

The Principle of Separation of Powers between Sharia and the Positive Law:

a Case Study on the Constitutional System of Saudi Arabia

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Abstract—*The aim of this study is to clarify the extent of the influence of the separation principle of powers in the constitutional system of Saudi Arabia, as it is one of the main principles of democratic systems. Sharia law is the supreme system in Saudi Arabia which necessitates determining the stand of Sharia among this principle. The principle of separation of powers has not been defined in the governance system of the First Islamic State. Therefore, this study seeks to define it. The study on the Saudi constitutional system, the constitutional articles of the Basic System of Governance, the Saudi Cabinet system, and Shura Council system led to the conclusion that the Saudi constitutional system did not take the principle of separation of powers, but merely mentioned that the powers of the country are three and the judiciary is independent. This study showed the overlap between the executive and legislative powers, which means that the Shura Council cannot be considered an independent legislative power. The Islamic political system defines the principle of separation of powers in a different meaning as compared to its definition by contemporary political systems; this is due to the special nature of the Islamic political system. What is worth mentioning is that the Islamic system does not prevent applying the principle of separation of powers in their contemporary application; however, there are certain restrictions in Sharia when applying this principle. In light of the developments in the international community and the claims of rights, freedoms and democracy, Islamic societies and countries that take the Islamic law as a basis for their constitutional system cannot ignore these claims for much longer. Democracy is a western concept, which means it does not necessarily comply with the provisions of Sharia, and so, the importance to develop a concept which is consistent with the Sharia provisions of the Islamic states is increasing. However, what should also be taken into consideration is the social, economic and political developments and the demands of individuals.*

Keywords— *Constitution; Saudi Arabia; Separation of Powers; Sharia Law*

I. INTRODUCTION

The Kingdom of Saudi Arabia was established in 1932 and remained without a written constitution until 1992 when the Basic Law of Government was passed. The Basic Law of Government is considered the most important constitutional document in the Kingdom, along with the system of the Council of Ministers and the Shura Council. By reviewing the

legal texts contained in each of these three systems, I noted that the principle of separation of powers has not been expressly or implicitly stated, the regime merely refers to the existence of three powers. Article 44 of the Basic Law of Government in Saudi Arabia states that "the authorities in the State shall be composed of the judiciary, the executive and the regulatory authority, and shall cooperate in performing their functions in accordance with this and other regulations, and the King is a reference of these authorities."

While article 46 of the same system affirms the independence of the judiciary through the text "the judiciary is an independent authority, and the judges have no authority over their jurisdiction other than the authority of Islamic law." Thus, it is clear from this text that the regime expressly provides for the independence of the judiciary, but the nature of the executive branch's interference with the legislature remains problematic.

This paper aims to highlight the concept of separation of powers between sharia and the statutory law in the Kingdom of Saudi Arabia. We find through the text of Article 1 of the Basic Law of Governance of Saudi Arabia, the question of contradiction as the fundamental system of government considers the Qur'an and Sunnah the Constitution of the State. In light of developments in the international community and claims of rights, freedoms and democracy, the need to study the extent of the principle of separation of powers in the statutory law with Islamic Sharia is becoming more and more essential. What should be noted is that the number of research papers written on Saudi constitution is insignificant.

1. Azizah Y. al-Hibri [1] discusses the question that arose after the Gulf War between those who demanded the introduction of democratic changes to the system of the government, and those who were concerned about the correct Islamic point of view on the subject. Al-Hibri's article analyzes the Islamic constitutionalism's position on democratic governance. Although the author spends most of the article explaining the sources of Islamic law and different related processes, and also comparing and contrasting sharia with American democratic system, she moves on to explain the concept of separation of powers briefly. Al-Hibri points out that

the concept of separation of powers did not exist in the days of the prophet and some argue that the concept already exists in the theoretical framework, as Islamic law rests on the consent of the Muslim people.

1. Mohamed Abdelaal [2] starts his article by explaining the concept of separation of powers and how the western democracy underlies it. It is a way to ensure that the power is not in the hands of one authority that tyrannize the citizens. The author points out that there was no need to separate powers during the era of the prophet since he was infallible., The concept of separation of powers, therefore, emerged after his death during the era of his companions. The companions or Khalifas held the executive power, they sent judges to settle disputes between people and hold the judicial authority, and the legislative authority was vested in the hands of a committee called "Ahl al-Haq wal-aqed". Up until now, the legislative authority is independent from the state and its political authorities, the Islamic ruler is never the one to issue laws. Abdelaal points out that the establishment of the concept under the American legal system is attributed to the states themselves. However, in Islam, this principle is attributed to several experiments and radical changes in the Islamic society.

2. Matthew J. Nelson [6] writes an article on the role of the parliament in an Islamic Republic for the Foundation of Law, Justice and Society. The author mentions the example of Pakistan in his article that Pakistan has struggled with the constitutional relationship between its parliament and sharia since the beginning. One of the most important debates regarding sharia involves the concept of separation of powers. In Pakistan, it was the judiciary authority that stepped in to define Islam, not the legislative nor the executive authority. In the end, it was Pakistan's parliament that emerged as constitutionally supreme. Pakistan's first Constituent Assembly reasserted the power of parliament. Nelson continues explaining in his article the historical events that shaped Pakistan's relationship with parliament and the sharia. The author poits out that other Muslim countries would revisit many of Pakistan's debates in this matter to shed a light on the relationship between Islam and democracy.

3. Asifa Quraishi-Landes's [7] article discusses Islamic constitutionalism. She explains the nature and history of Islamic law and states that the core principle of Islamic jurisprudence is that God's law, sharia, cannot be known with certainty, which brought the importance of fiqh law making, to understand God's laws but not speak for God. The fiqh applied in courtrooms was created by fiqh scholars and not the executive authority. The ruler however, had his own independent form of law making called siyasa to maintain public order. The idea of the author's paper is to describe what a sharia based government could look like if sharia is understood as an Islamic rule of law compromising of both fiqh and siyasa, which would open up new ways of thinking about the allocation of legal and political power and how to create a system of checks and balances.

4. Mohammad Hashim Kamali [5] mentions in an article that representative assemblies in Muslim countries have limited legislative powers. Moreover, consultative assemblies and

parliaments have functioned in a constrained environment due to the prevalence and power of the executive organs. The centralist model seems to have prevailed in Islamic history and much of the post-colonial period and have dominated the legislative and executive branches. According to the author, in the history of Islamic government, the state has neither initiated not articulated separation of powers. Kamali however, admits in his paper that a lot has been changed in the course of time.

II. PRINCIPLE OF SEPARATION OF POWERS BETWEEN SHARI'AH AND THE LAW

The separation of powers is at the forefront of the basic constitutional principles on which modern democracies are based. It is also one of the most important principles of democracy, which explains that the democratic system was created to eliminate the tyrannies and the dictatorship of the rulers. The principle of separation of powers is usually attributed to the French philosopher "Montesquieu;" however, it was also mentioned other times in history by Aristotle and John Lock. The purpose of the principle of separation of powers has always been mainly to prevent tyranny, guarantee the principle of legality, and avoid gathering the power in one hand. It also contributes to highlighting the benefits of the division of state functions. The principle of separation of powers has also been criticized by scholars who pointed out that it would be impracticable because the authorities of the State are like the parts of one body that are naturally connected, and the separation of its parts disrupts its work and jeopardizes the State. [3]

The Islamic political system did not know the application of the principle of separation of powers according to the concept and perception of the philosopher "Montesquieu the Islamic system adopted principles from God. The correct application of these Islamic principles prevents the tyranny of power by the ruler. The Holy Qur'an and the Sunnah explicitly include the text on a set of general constitutional rules on which the Islamic system is based, the most important of which are: governance of God, Shura, justice and equality, and obedience to the ruler. Therefore, the legislation in Islam is done by God starting by what is reveled in the holy book "Qur'an", and what was stated by His Messenger, the Prophet. The executive authority in the Islamic political system is the authority that is competent to implement Islamic law, and it does not have the authority to violate it. It is the authority that works to administer and regularize public facilities to ensure the needs of Muslims. [4]

The principle of separation of powers in Islamic Sharia was not clearly existent during the era of the Prophet, as he held all three powers. The principle became more apparent during the era of the Caliphate, after the death of the Prophet, especially in the era of Caliph Omar ibn al-Khattab, who separated the judicial authority from the rest of the authorities of the state. In the current age and era, Islamic scholars and writers have divided opinions regarding the permissibility of the principle of separation of powers. There are those who support the idea of the existence of this principle in the Islamic political system, one of the incidents they refer to in order to prove their point is that the actions of the prophet of consulting with others before making a decision. Consultation, and not taking the full

authority and power of decision making, is an important constitutional principle. There are also those Islamic writers and scholars who reject this principle as non-Islamic, and that it addresses problems that do not exist in the application of the Islamic system, they stated that the Islamic system is based on the unity of the nation and the unity of interests and thought, and the division of powers does not fit with this unity. [3]

III. THE SAUDI CONSTITUTIONAL SYSTEM

The Basic Law of Governance was issued by a Royal Decree by King Fahd bin Abdulaziz in 1992. The Basic Law of the Government is the supreme constitutional document in the State, in addition to the system of the Council of Ministers, the Shura Council and the Allegiance Council. These regulations were issued by royal orders, which means by King's sole will. The characteristics of the Saudi Constitution include that it was issued through grant and it is composed of several constitutional documents and not one single document.

A. *The Principal Of Separation Of Powers In The Saudi Constitutional System.*

Article 44 of the Basic Law of Government in Saudi Arabia states that "the authorities in the State shall be composed of: the judiciary, the executive and the regulatory authority, and shall cooperate in the performance of their functions in accordance with this and other regulations, and the King is reference of these authorities." The text of this article shows that the Saudi constitutional system did not clarify its stance on the principle of separation of powers, as it only referred to the existence of the three authorities and the cooperation between them and that the King is the reference to these authorities. Article 46 of the same law states, "The judiciary is an independent authority, and the judges have no power over their rulings other than the authority of Islamic law." In examining the provisions of the Basic Law of Governance, it is clear that it did not clarify the separation between the executive branch and the legislative authority. In order to clarify this, the texts of the Council of Ministers and the Shura Council must be studied and analyzed with regard to legislative competence.

B. *Legislative Jurisdiction In The Kingdom Of Saudi Arabia*

The Council of Minister's law was issued in 1414H by a royal decree, consisting of 32 articles. Articles (19-28) dealt with the functions of the Council of Ministers in executive affairs, organizational affairs and financial affairs. What concerns us in this regard is the specialization of the Council of Ministers as the executive authority in regulatory matters.

Article (20) of the Council of Minister's law provides that "Subject to the provisions of the Shura Council law, laws, treaties, international agreements and concessions shall be issued and amended by Royal Decrees after being reviewed by the Council of Ministers." Article (21) of the same law stipulates that "The Council of Ministers shall review the draft laws and regulations before it, vote on them article by article and then as a whole in accordance with the procedures set forth in the rules of the Internal Regulations of the Council." Article (22) stipulates that "Each Minister shall have the right

to propose a draft law or regulation related to the affairs of his ministry. Each member of the Council of Ministers shall have the right to propose whatever he deems to be worthy of discussion in the Council after the approval of the President of the Council of Ministers."

The Shura Council's law was issued in 1412H by royal order and it stipulates that "The Shura Council shall express its opinion on State's general policies referred by the president of the Council of Ministers. The Shura Council shall specifically have the right to exercise the following:

- 1) *Discuss the general plan for economic and social development and give view;*
- 2) *Study laws and regulations, international treaties and agreements, concessions, and propose what it deems appropriate;*
- 3) *Analyze laws;*
- 4) *Discuss government agencies annual reports and attach new proposals when it deems appropriate.*

Article (17) of the Shura Council's law states, "The Shura Council's resolutions shall be submitted to the King who decides what resolutions to be referred to Cabinet (Council of Ministers). If views of both the Shura Council and the Cabinet agree, the resolutions are issued after the approval of the King. If the views of both Council's vary the issue shall be returned back to the Shura Council to decide whatever it deems appropriate, and send the new resolution to the King who takes the final decisions." Article (18) states, "Laws, treaties, international treaties and agreements and concessions shall be issued and amended by Royal Decrees after being reviewed by the Shura Council."

In the previous texts, we note that there are common authorities in proposing and issuing legislation between the Council of Ministers and the Shura Council. However, when reviewing the texts of the two Council's laws, we find that the Saudi regulator explicitly stated in the Council of Minister's law the competence of the Council of Ministers in organizational affairs but did not mention that in the Shura Council's law. In article (21) of the Council of Minister's law, the regulator also mentioned how to vote on regulations. This was not mentioned in the Shura Council's law. This is an indication that the regulator wanted the Council of Ministers to have the inherent jurisdiction in regulatory matters (legislative).

Through analyzing the articles in the Shura council's law regarding regulatory matters, article (15) mentions, "the Shura Council shall express its opinion..." It is clear that the role of the Shura Council is limited only to expressing its opinion, and the decisions it makes in these matters referred to it by the President of the Council of Ministers are not binding because it is only to express an opinion, there is nothing in the text that shows that these opinions are binding for the Council of Ministers.

The article added that the Shura Council "shall specifically have the right to exercise the following ... study laws and regulations, international treaties and agreements, concessions and propose whatever suggestions it deems appropriate." Here

lies the importance of the role of the Shura Council in this regard, in terms of regulatory competence. The article mentioned the word "study" and the end of the article mentioned the word "proposal," the Shura Council's law did not indicate the legal value of these decisions or proposals. When we return to the law of the Council of Ministers we find that the regulator clearly indicated the competence of the Council of Ministers in organizational affairs and indicated how to vote on the regulations, this is not found in the law of the Shura Council, the regulator also indicates that the decisions of the Shura Council are only proposals and opinions and have no binding legal value.

Article (17) of the Shura Council's law also affirms that the decisions of the Shura Council are not binding when it stated that "if the views of both Councils vary, the issue shall be returned back to the Shura Council to decide whatever it deems appropriate and send the new resolution to the King who takes the final decisions." Therefore, even if the two Council's differ, the King is the final reference and he is the one who makes a decision.

From the foregoing we conclude that what the provisions of the Basic Law of Governance mentioned that the powers of the State consist of judicial authority, executive authority and regulatory authority are in fact judicial and executive authorities. The regulatory authority is shared between the Council of Ministers and the Shura Council. By analyzing the texts of the Council of Ministers and the Shura Council, we find that the Shura Council cannot be considered an independent regulatory authority. It is also clear that the Shura Council does not have the ability to issue regulations, but that is rather for the Council of Ministers. The decisions of the Shura Council in this regard are merely opinions and proposals that lack binding legal value.

IV. CONCLUSION

In theory, the Islamic political system did not adopt the principle of separation of powers as a basis for regulating the work of the authorities in the state and the relations between them because the Islamic political system made use of principles from God Almighty. The application of these

principles prevents the tyranny of power by the ruler and dispenses with the idea and purpose of applying the principle of separation of powers that is applied in other legal systems. Given the prevailing view that there is nothing to prevent this principle from being taken in accordance with certain regulations that comply with the provisions of Islamic law, this study recommends that the principle of separation of powers be taken so that there is no kind of tyranny by the executive authority.

By looking at the Saudi constitutional system, this study concludes that the Saudi system did not take the principle of separation of powers, and that there is overlap between the executive and legislative branches. The Shura Council cannot be considered a legislative authority and its supervisory powers are limited. Therefore, the researcher believes that the Saudi constitutional system should be restructured, so that the Shura Council has powers close to the powers of the parliamentary councils in other countries, in terms of legislation of laws and on the other hand, in terms of monitoring the work of the executive authority. So that the Shura Council is the third authority of the State with sufficient independence in its work.

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