Separation of Powers in Shariah

Mohammad Hashim Kamali

I. Introduction

European colonialism dominated the Muslim world through much of the 19th and 20th centuries, during which time the Shari'a was aggressively suppressed, and supplanted by western legal codes and its nation-state model. This latter model, with it concomittant constitutional blueprint, became widespread in the emerging Muslim states that were also ruled by western educated elites more familiar with western law doctrines than their own Islamic heritage. Yet the latter part of 20th century witnessed a move in the opposite direction. The Islamic revivalism and resurgence of the closing decades of 20th century espoused a mass protest over the failure of good governance and democracy in much of the post-colonial Muslim world. Muslim masses protested against western subjugation of their history and culture. The emerging voice thus conveyed the demand that law and governance in the Muslim lands must resonate its own heritage and values- hence the increasing tendency and demand in recent decades for an Islamic system of government and constitution.

What is our bearings now with the more particular yet evidently important principle of separation of powers and its proper constitutional role in regulating relations among the various organs of state in an Islamic polity? To answer this question, one would need to bear in mind the shifting paradigms the Muslim polity has experienced – from the Righteous Caliphate of the early decades of the advent of Islam, to the ensuing hereditary/dynastic caliphate, to western nation state, and now a fresh demand for an Islamic state (*dawla IslÉmiyya*) as I explain in the following paragraphs. With the spread, under European influence, of the western nation state in much of the post-colonial Muslim world, both the Shari'a and ulama lost their preeminence. Massive dislocations in their legal and political orders brought the Muslims face to face with a host of uncertainties as to what role, if any, could their own legacy play under the new constitutional arrangement of western origin. The early decades of the post-colonial period saw the introduction of a spate of new constitutions and other laws and the talk was of democracy, constitutionalism and the rule of law. Actual practice turned out, however, to be less than satisfactory and generally unsuccessful. Instead of the promised democracy and rule of law, a great number of the newly-independent Muslim states experienced a succession of military *coup d'etats*, internal dislocation, dictatorship, and turmoil. Then the expected backlash and the rapidly spreading call for an Islamic state, revolution and the Shari'a.

Western educated elites that occupied the echelons of power in much of the post-colonial Muslim world found themselves ill at ease to activate the traditional channels of communication with their ulama and scholars. Muslim countries thus underwent sustained

political turmoil that entailed failure of good governance almost everywhere. It is still too early to say, for many Muslim countries, as to whether they have regained equilibrium and found their bearings with their respective constitutional orders. Are they in a position to develop their own methods and a congenial system of rule that strikes harmony with their hallowed values, and the modern law principles of constitution and separation of powers?

Without wishing to delve into details, it is unfortunate to note that the late 20th, and the first decade of 21st, century witnessed a different, and in many ways, a more horrendous course of events under the so-called 'war on terror' that became more and more violent and costly over the years. The devastating consequences of confrontation and violence are too self-evident to need elaboration for both the Muslim world and the West. The 9/11 terror attacks came at a time when radical Muslim fundamentalists and jihadists were losing grounds, as of mid-1990s as they too had failed to provide credible alternatives to make their much-repeated promises of bringing accountability and good governance to their respective countries. The aftermath of 9/11 is still taking its toll on the vitality and resources of the world, and those of the Muslim world in particular.

II. Summary

This essay advances two opposing theories/models about the recognition or otherwise of separation of powers in an Islamic polity. One is the centralist theory that visualises a holistic and unitarian approach to government hierarchy. This model has no room for separation of powers simply because of its advocacy of a powerful executive whereby the head of state, in his capacity as representative of the community, is seen as the repository of all political power. This evidently entails a strong executive organ that dominates all other branches of government and leaves little room for a meaningful system of checks and balances by the various organs among themselves.

The second theory discussed in this paper maintains that separation of powers is not only valid in principle but that in a real sense the Islamic polity has consistently applied it. Thus it is held that a functional separation of powers had always existed and must therefore be recognised, especially in light of prevailing conditions in much of the present-day Muslim world, which has accepted the western nation state model, a democratic constitution and its blueprint on separation of powers. The remainder of this essay devotes a section each to a discussion of the three organs of state with a view to ascertain, in some detail, the status of the constitutional separation of powers and their supportive Islamic doctrines.

III. The Executive-Centralist Model

If the historical caliphate is taken as a basis of assessment, then it would appear that the head of state is the repository of all political power and that separation of powers, which is a requirement of political democracy, does not have a basis in an Islamic polity. The advocates of this view have gone on record to say that separation of powers is alien to the Islamic system. There is a basis for this opinion as I shall explain, although I believe that this conclusion is less than accurate and calls for a fresh interpretation and review.

A unitarian or centralist approach to governance is predicated on a certain reading of the doctrine of Divine Oneness (*tawhÊd*) and its far-reaching ramifications in Islamic political thought. Thus it is understood that Islam takes a holistic approach to governance both from within and from without. The internal manifestation of this unitarian approach is seen in political and administrative centralism that unifies all parts of the Islamic polity into a central command structure that stands at the opposite pole of separation of powers. This

unitarian approach is also manifested in the absence of any clear lines of division between religion and state, which are not separated from one another. This vision of religion-and-state unity evidently differs from that of the western nation state model that has been fashioned under the influence of the Enlightenment philosophy. Religion is thus separated from politics and regarded as a concern only of personal choice and conscience of the individual. The Islamic caliphal model, on the other hand, holds the state as the patron and protector of religion, which is also under a mandate to implement the Shari'a. Hence the conclusion that visualizes a theoretical unity between religion and state on one hand, and a structural unity rather than separation of powers in the organizational pattern of government power on the other.

To say that caliphate had no place for separation of powers is predicated in the analysis that the caliph is designated into office by the people according to the principles of *wakÉla* (representation) and *walÉya* (delegated authority that originally belongs to the *umma*). The head of state, being the *wakÊl* or representative of the community by virtue of a contract of agency/representation thus becomes the repository of all political power. He is authorized, in turn, to delegate his powers to other government office holders, ministers, governors and judges etc. These are, then, entrusted with delegated authority (*wilÉyat*) which they exercise on behalf of the head of state each in their respective capacities. *WalÉya* is of two types, namely general (*walÉya 'Émma*)- such as that of ministers and governors, and specific (*walÉya khÉssa*), which is task-specific and consists mainly of implementation rather than exercise of political power and policy initiative. One who discharges general *walÉya* must have comprehensive knowledge of the subject matter that falls under his jurisdiction, but one who exercises specific *walÉya* need not have that level of knowledge.[1]

One of the principal assignments of the head of state is to implement the Shar'ia and in doing so to solicit assistance of all his employees and subordinates. The position of the head of state vis-à-vis the Shari'a in this regard is seen as primarily administrative that consist of an orderly execution of Shari'a. The head of state is also authorized to take discretionary measures, under the rubric of *siyÉsa shar'iyya*, or Shari'a-oriented policy, to ensure good management of public affairs. The measures so taken may or may not have been stipulated by the Shari'a, nor in the more elaborate corpus juris of *fiqh*, but founded in judicious policy, experience and insight (*firÉsa*) of the leader. With the exception of judges whose position in respect of enforcing the Shari'a is parallel to that of the caliph himself, all other officials act, in effect, as delegates and assistants to the head of state.[2] Appointment of officials to government positions, another important task of the head of state, must strictly be on merit, which is predicated in two main principles: trustworthiness and strength.[3] The latter refers to the relevant qualification and knowledge of the employee in relationship to the work he is assigned to do. The best qualified candidate for the post must be given priority over others.

Under the executive-centralist model, government officials exercise delegated authority in the capacity either of leading officers of state who are vested with political authority, or *Íukm*, or in the capacity of assistants (*mu'ÉwinËn*) who do not exercise political authority and merely assist those who do. The leading officers are in turn assisted by deputies and assistants who act as administrators and managers but do not exercise political power or

[1] Cf., 'Abd al-Ghani Busyuni 'Abd Allah, *Nazariyyat al-Dawla fi'l-IslÉm*, Beirut: al-Dar al-Jami'iyya, 1986, 260.
[2] Cf., Mohammad Hashim Kamali, "Characteristics of the Islamic State," *Islamic Studies* 32(1993), 17-40, at 31.
[3] Cf., Qur'an: 28:26. See for details Basyuni 'Abd Allah, *Nazariyyat al-Dawla*, 224.

Íukm. The prerogative of unrestricted political and executive authority of the first order thus belong to the head of state, who is vested with it by virtue of the community's representation and pledge of allegiance (*bay'a*). In sum the centralist model did not recognize autonomous individuals and organs in government hierarchy who did not refer for authorization to the head of state.[4] The one exception to this, although somewhat half-heartedly made in earlier writings, is that of the judge whose position, in respect of the administration of Shari'a, is in par with that of the head of state himself.[5]

Administration of the Shari'a is a major duty, although evidently not the only one, of the head of state. This much is obvious, even in the typical outline of the ten duties of the head of state/caliph as listed in the renowned works of al-Mawardi, al-Farra'[6] and others. These may be summarized as follows: protection of the religion; settlement of disputes among people; internal security; defence of the borders; enforcement of the *hudud* penalties; waging jihad against the enemies of Islam; collection of taxes; distribution of the assets of the public treasury to deserving parties; recruitment of officials; and personal supervision of state affairs.

Much of the subject matter of constitutional law, and its more specific theme, separation of powers, can properly be said to be of concern to *siyÉsah shar'iyyah* (Shari'a-oriented policy) consisting of policy measures, administrative regulations, and procedural measures taken in the interest establishing justice and good governance. As a principle of Islamic public law, *siyÉsa shar'iyya* (or simply *siyÉsa*) entrusts the head of state with discretionary powers to introduce such measures and take policy decisions that ensure orderly implementation of the Shari'a, as well as extra-Shari'a initiatives on matters of concern to the good management of public affairs. This may include economic development, military affairs, emergency situations and the like. The urgency of situational development that demand attention may sometimes be such as to necessitate a certain departure from some of the normal rules of *fiqh* and the *ijtihÉd*-based elaborations of Shari'a.[7]

Executive power in the state hierarchy is delegated to ministers, governors, army commanders and others. Text book writers have in this connection distinguished between two types of Ministers, namely those with full authority, or *wazÊr al-tafwÊÌ*, who is also vested with the exercise of political power, or *Íukm*, taking initiative and making decisions in all areas of government. This is equivalent to what is now known as *prime minister* . One who is appointed to this position must fulfill the same qualifications as the head of state himself, and these may be summarized into three, namely knowledge, a just character, and wisdom (*'ilm, 'adÉla, Íikma*)- although many text books have enumerated several other conditions. The second ministerial portfolio is known as that of 'executive minister', or *wazÊr al-tanfÊdh*, and extends mainly to implementation of specified range of duties on behalf of the head of

[4] Cf., Sa'di Abu Habib, *DirÉsah fi MinhÉj al-IslÉm al-SiyÉsÊ*, Beirut: Mu'assasa al-Risala, 1985, 72; Taqi al-Din al-Nabhani, *Muqaddimat al-Dustur*, Kuwait: ? Dar al-Qalam, 1964, 89-90.

[5] 'Uthman Bin Ju'a Damiyiya, "al-SulÏat al-'Ómma fi'l_IslÉm: al-MafhËm wa'l-'IlÉqa," *Majall JamÊ'a al-SharÊqa li'l-'UlËm al-Shar'iya wa'l-InsÉniyya*, (Sharjah University journal for Shari'a and human sciences), vol.3, no.3(1427/2006), 14.

[6] Both Abu'l Hassan al-Mawardi (d. 1058 CE), and Abu Ya'la al-Farra' (d.1066) wrote books bearing the identical title: *KitÉb al-AÍkÉm al-SulÏÉniya* (book on sultanic ordinances) which are recognized reference works on the subject.

[7] For more details on *siyÉsa shar'iya* see Mohammad Hashim Kamali, *Shari'ah Law: An Introduction, Oxford*: One World Publications, 2008, Ch. 11 entitled "Beyond the Shari'ah: an Analysis of Shari'ah-oriented Policy (*siyÉsah shari'iyyah*), 225-246.

state, also not involving exercise of political power or *Íukm*. The head of state may appoint any number of executive ministers, but only one prime minister.[8] It may be noted in passing that this line of division between two types of ministers originate in juristic opinion of a circumstantial type as explained below - there being no substantive Shari'a position on this and it is, as Mutawalli and Busyuni 'Abd Allah have both viewed, reflective of the exigencies of the Abbasid caliphate.[9]

A similar line of division has been noted, however, between two types of governorates, one based on competence (*imÉrat al-istikfa'*), and the other based on occupation (*imÉrat al-istilÉ'*). The former is appointed by the head of state and exercises power much along the same lines as the leader himself, whereas the latter occupies the post through military power with which the head of state concurs - often for lack of a better option. This latter is indicative of "exceptional circumstances at a time when the Abbasid caliphate of Baghdad had lost much of its effective power and control over the territorial domains of the state."[10] I shall not delve into the various conditions text book writers have expounded pertaining to each of these two types of ministers and governors. Al-Mawardi wrote, however, that the powers of governors are "confined to management of the army, policy initiatives for people's benefit, internal security and defence but do not extend to adjudication and issuance of judicial orders, nor to the levying of (new)taxation."[11]

Delegation of power, or *walÉya* - in whatever form, does not, however, derogate from the substance of personal accountability. Everyone is accountable for that which has been placed under his or her charge. This is the purport of the following Qur'anic directives:

"Every soul is in pledge/accountable for its deeds"(74"38);

"devour not one another's properties by false means, nor proffer them to the authorities so that you may sinfully usurp a portion of another's possessions"(2:188);

"take not take a stand over that of which you have no knowledge. Surely, the hearing, the sight, the mind- each of these shall be called to account."(17:36).

The principle of personal accountability in these passages subsume all members of the Muslim community- from the head of state, to the head of the family unit, to all government employees, to men and women, indeed to everyone, as is known from the text of a renowned hadith (quoted below). Space does not permit a detailed review of the principle of accountability (*muÍÉsaba*). Suffice it to note that bribery, self-enrichment, and abuse of power in public office receives detailed attention in the in the Qur'an and hadith, as well as the precedent of the second caliph, 'Umar al-Khattab, who took to task many leading figures, powerful governors and dignitaries for wealth they had accumulated during tenure of office- leading on occasions to punitive measures and confiscation of the whole, or a portion of wealth they failed to account for.[12]

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[8] Abu'l Hassan al-Mawardi, *KitÉb al-AÍkÉm al-SulÏÉniyya*, Cairo: Matba'a al-Sa'ada, 1959, 30.
[9] 'Abd al-Hamid Mutawalli, *MabÉdi NiÐÉm al-×ukm fi'l IslÉm*, Alexandria: Mansha't alMa'arif, 1974, 229. Busyuni 'Abd Allah, *Nazariyyat al-Dawla fi'l-IslÉm*, 254f.
[10] Basyuni 'Abd Allah, *Nazariyyat al-Dawla*, 260.
[11] Al-Mawardi, *al-AÍkÉm al-SulÏÉniyya*, 33.
[12] See for details on accountability (*muÍÉsaba*), Mohammad Hashim Kamali's, *Freedom of Movement, Citizenship and Accountability: an Islamic Perspective* (forthcoming – due to be published by the Islamic Texts Society, Cambridge, U.K); see also Busyuni 'Abd Allah, *Nazariyyat al-Dawla fi'l-IslÉm*, 261f.

IV. Separation of Powers – an Affirmative View

Theoretical concerns over the implications of *tawhÊd* and structural unity of government notwithstanding, functional lines of division of powers existed even under the historical caliphate. This is partly due to the role of the Shari'a and influence of the ulama who acted as the interpreters of Shari'a and had considerable presence also in the education and judicial sectors of government. Whereas management of public affairs, *siyÉsa* and public policy were the concern mainly of political leaders, the ulama and *mujtahids* occupied themselves with *fiqh* and *ijtihÉd* that consisted of juridical eleborations of the Shari'a. The manner in which the rulers implemented the corpus juris of *fiqh* and Shari'a was also of concern to judicious policy and *siyÉsa*.

Muslim scholars are also reluctant to extend the implications of a centralist organization of state to anything more than an administrative approach that need not interfere with the essence of accountability, and acceptance also of functional lines of division of powers in the various organs of state. The head of state, although the supreme political ruler of the land, could not be an absolute ruler. For he is not only subject to the overriding authority of the umma and Shari'a but also depended on support of the ulama and *mujtahids* (those qualified to carry out independent reasoning or *ijtihÉd*) as well as under duty to conduct the affairs of state through consultation and consensus with the community. The contract of representation (*wakÉla*) also endorses the republican substance of the Islamic system, and many of the necessary ingredients of a democratic approach to governance. [13]

The executive/centralist model seems to have originated in a presumptive logic, which was in turn, taken at face value in the juristic works of the ulama, presumably because it was deemed to bear greater harmony with the integrationist outlook of *tawhid* and the territorial unity of caliphate. This was how the Prophet, pbuh, in his capacity as the head of state, and the Rightly-Guided caliphs after him were seen to have conducted the business of government during the early decades of the emergence of the state of Madina. Yet it may be said that the Madinan state was small in size and was involved in recurrent warfare that might have dictated a central command structure. It was due probably to the force of circumstance, rather than any doctrinal mandate that could be quoted in support of administrative centralism. It is also somewhat of a discrepant analogy to extend the ramifications of *tawhÊd* , which is essentially a theological concept, to state administration. To this effect, al-Sanhuri wrote that unity (*waÍda*) of government in the territorial domain of the historical caliphate was reflected in a unified central authority (*sulÏa markaziya IslÉmiyya*), which was personified by the caliph.[14] Having said this, al-Sanhuri also observed that a centralized state was not an inflexible rule and the historical pattern may be changed in the light of prevailing conditions. There is nothing in the sources of Shari'a to impose a mandate in regards to the administrative structure of government.[15] The matter thus remains open to considerations of public interest, consultation (*maÎlaÍa* and *shËrÉ*) and *siyÉsa*. It is through these methods that necessary adaptation and adjustment in the organisational structure of the state could be devised and implemented.

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[13] Cf., 'Uthman Damiriya, "al-SulÏat al-'Ómma fi'l-IslÉm," p.11.

[14] 'Abd al-Razzaq al-Sanhuri, *Fiqh al-KhilÉfa wa TaÏawwruha*. Arabic translation and commentary by Nadia al-Sanhuri and Tawfiq al-Shawi, Cairo: al-Ha'a al-Misriyya al-'Amma li-l-Kitab, 1989, 174-75.

[15] Ibid, 179.

On an historical note, it will be noted further that the executive-centralist caliphate also changed over time and underwent divergent phases of development that brought it in many ways closer to a decentralized system. The fall of Baghdad in the hands of the Mongols in mid-thirteen century CE led to the emergence of sultanates and principalities under local princes and commanders that gave rise to powerful dynasties, such as the Ghaznavids, Saljuqs, the Almohads, and Fatimids (Afghanistan, Persia, north Africa and Egypt respectively) that marked the emergence of decentralized units under the nominal authority of the caliphate of Baghdad. Politics of power and military domination in the remote geographical reaches of the caliphate thus drastically reduced the effectiveness of the hitherto prevailing centralized model. Many of the local rulers, Sultans and Amirs were not only autonomous but effectively more powerful in their own territories than the caliph of Baghdad. Yet they paid homage to Baghdad only as a semblance of political unity that also served the purpose of their continued legitimacy in office. But weaknesses in the centre and difficulties of transport and communication, cultural and linguistic differences tended to endorse the spread of the decentralized pattern over the greater part of the vast geographical domains of the caliphate. Yet the sentiment of Muslim unity under the concepts of *umma* and *khilÉfa* remained strong enough to give the caliphate a new lease of life under the Ottomans, which was, however, a military power for the most part, and this too was met with eventual decline and demise when Ottoman Turkey succumbed to western pressure to declare its termination in 1924.

V. Legislation and the Legislative Organ

The requirement of the Islamic constitutional theory that mandates the state to implement the Shari'a has led some commentators to the conclusion that there is no place for independent legislation in Islam, and no separate legislative organ is therefore needed to fulfill that role. All that the state has to do, in other words, is to enforce the Shari'a. That the state has no authority to originate new legislation. This manner of theoretical articulation of the state's position vis-à-vis legislation may be somewhat sweeping, as I elaborate below, but whichever way one looks at it, the Shari'a does present a major limitation on the legislative powers of the state so much so that the state throughout the Islamic history has shied away from claiming legislative authority unto itself- lest it create a rival system of law to that of the Shari'a. To be sure, the state never ceased to issue administrative ordinances, decrees and by-laws, under such alternative names as *niÐÉm, ferman, nizamnama, usulnama and qÉnËn*, mostly under the rubric of *siyÉsa*. The state had no legislative organ with a specific assignment to promulgate law, simply because this role was mainly played by the ulama as the interpreters of Shari'a and carriers of ijtihad and ijma'. Many commentators, including Mahmood Ahmad Ghazi, author of a book, *State and Legislation in Islam*, are of the view that the state in Islam is not vested with independent legislative authority beyond interpreting and implementing the Shari'a.[16] And what it means is that legislative power in an Islamic polity consists essentially of interpretation and *ijtihÉd*, and it is the ulama, not the state, who are entrusted with it. Wahba al-Zuhaily, has made a similar observation and gone a step further to say that separation of powers is upheld in an Islamic polity, not only in functional terms, but as a matter of principle. Zuhaily thus wrote on a comparative note:

> Islam validates the principle of separation of powers. This is because legislation in Islam ensues from the Qur'an and Sunna, consensus (*ijmÉ'*) of the *umma*, and *ijtihÉd*. All of these are independent of the head of state- nay but he is bound by

[16] Cf. Mahmood Ahmad Ghazi, *State and Legislation*, Islamabad: Shariah Academy, 2006, 110.

> them and by the conclusions drawn from them. The principle of *ijmÉ'* in Islam manifests the will of the people….Both the Islamic and western democracies reject despotism and consider the people as the locus of authority in political and government affairs.[17]

Representative assemblies have the authority, both under the present-day constitutions of Muslim countries, and western doctrines, to pass laws and regulations, but unlike the western democratic state model, which exercises sovereign legislative authority, its Islamic counterpart is primarily consultative and has limited legislative powers.[18] Moreover, consultative assemblies and parliaments have a relatively short history in Muslim countries and have functioned in a constrained environment due mainly to the overarching Shari'a and the prevalence also of an all-powerful executive organ. The executive-centralist model has thus prevailed, not only through the longer stretch of Islamic history, but also during much of the post-colonial period, and persistently dominated the legislative and judicial branches. Historically, the learned ulama and *mujtahids* monopolized the *fatwa*-making role, *ijtihad* and *ijmÉ'*, and left little room for consultative assemblies and parliaments in the interpretation of Shari'a. They also dominated the judiciary, and religious education in the mosque and *madrasa* almost everywhere in the Muslim lands. The ulama dominance in the education sector further strengthened their position. In this way the powerful ulama constrained the role and scope not only of the consultative assemblies but of the executive branch and that of the head of state himself.

As earlier noted, minor exceptions apart, the state in the Muslim lands had no separate legislative organ to pass laws. Except for the Ottoman state, the Andalus and the Maghreb where historical records indicate existence, on a limited scale, of consultative councils of the learned for deliberation over juridical and state matters (often of the type that had political consequences), Muslim states had no recognized legislative organs. It was well into the early 20th century, and during the post-colonial period for the most part, that Muslim countries began to create consultative councils (*majlis shËrÉ*) with limited powers that were also constrained by the presence usually of a strong executive organ and powerful ulama. The head of state, even though the repository of all political power, depended on the ulama class and the important *fatwa*-making role they continued to monopolise. This picture presented the existence of a functional separation of legislative power, almost independently of the executive branch and the head of state himself. In the history of Islamic government, the state has neither initiated nor articulated separation of powers as such, just as it did not issue a formal constitution either. All that can be said of the existence of separation of powers in an Islamic polity ensues from the inherent limitations concerning the powers of the rulers and judges, the role of the ulama, the substantive principles of justice and duty of state to implement the Shari'a. The jurists and *mujtahids* were not state functionaries and acted in their capacities as pious individuals that served and interpreted the Shari'a independently of the state. These religious leaders were civil society figures that gained prominence through their knowledge and community service and their standing in the mosque and madrasa. They served voluntarily as teachers and imams, as free-lance legal advisors, attended birth and burial ceremonies and thus became influential in their communities. Their intellectual contribution and leadership could even be seen at a glance in the nomenclature of the leading schools of Islamic jurisprudence that bear to this day the names of their individual eponyms, the Imams Abu Hanifa, Shafie, Malik, Ibn Hanbal,

[17] Wahba al-Zuhaily, *QaÌÉya al-Fiqh wa'l-Fikr al-IslÉmÊ*, Damascus: Dar al-Fikr, 2006, 466ff.
[18] Ibid.

Ja'far al-Sadiq and so forth, founders of the *madhhabs* (legal schools) and scholastic centres that flourished in their names.

Notwithstanding such obvious limitations on the legislative role of the state vis-à-vis the Shari'a and the influential ulama, a great deal of what has been said, has changed in course of time. The prevalence of the nation state model with its constitutionalist underpinnings and the fact that the legal theory of Islamic jurisprudence over *ijtihÉd* and *ijmÉ'* etc., we have envisaged in our discussion above is no longer operative under the nation state model. The nation state model disrupted continuity of much that was Islamic in the realm of law and governance, the Shari'a itself, and ideas and institutions of an Islamic constitutional order. Most of the post-colonial Muslim states were modeled on divergent legal theories and constitutions that barely refer to *ijtihÉd*, *ijmÉ'*, the *umma*, *khilÉfa*, even the Shari'a.

But even under the old executive-centralist model as discussed above, and the admitted continuity of some of the basic Islamic positions over the continued validity of the Qur'an and hadith, and that of the substantive Shari'a, there still remains considerable scope for extra-Shari'a legislation. The unprecedented disruptions and changes the Muslim world has experienced brings us face to face with new challenges to provide fresh interpretation of the source evidence in conjunction with newly arising issues of concern to law and governance. Furthermore, since the scope of clear textual injunctions in the Qur'an and Sunna is limited, many aspects of governance remain open to legislation based on consultation and consensus and *siyÉsa*-based policy initiatives. This may be elaborated as follows:

1) That which has not been regulated by the existing Shari'a, and which is known, in the *fiqh* jargon, as the unoccupied sphere (*manÏiqat al-firÉgh*, also as *manÏiqat al-'afw*) and remains open to human legislation and *ijtihÉd*. This is the purport of a renowned hadith: "whatever that God has made permissible in His Book, it is *ÍalÉl*, and what He has prohibited is *ÍarÉm*, but that over which He remained silent is forgiven (*fa-huw 'afwun*.)" Qaradawi quotes this hadith side by side with the Qur'anic verse: "and your Lord is never forgetful."( )."[19] Hence the conclusion that the Muslim community is free to regulate its own affairs in all areas that are not legislated textual injunctions, such as science and technology, industrial relations and commerce, international relations, traffic regulations, administration and policy relevant matters etc., all of this and more may be open to siyasa-based initiative and legislation. Further support for this position is found in the Qur'anic proclamation that "God has expounded in detail all what He has forbidden to you" (6:11)- thus implying that nothing is forbidden beyond what is clearly declared in God's messages. Note also the legal maxim that "permissibility is the basic norm (of Shari'a) in all matters-*al-aÎlu fi'l-ashyÉ' al-ibÉÍa*," and the hadith text that "Muslim are bound by their stipulations."[20] Muslims are free to conclude contracts, enact

[19] Yusuf al-Qaradawi, *al-SiyÉsa al-Shar'iyya fi Öaw' NuÎuÎ al-SharÊ'a wa MaqÉÎidiha*, 2nd ed., Cairo: Maktaba Wahba, 2005/1426, 70. According to another similar hadith text "God has made certain things obligatory, so be sure not to neglect them; He has also laid down certain limits, which you must not exceed, and He prohibited certain things which you must observe; and He has, out of mercy but not forgetfulness, remained silent over other matters, so try not to be (too) inquisitive about them." Hadith recorded by Al-Nawawi in his *Arba'Ên Hadith* (forty select hadith).

[20] Abu Dawud, *Sunan Abu DÉwËd* (Ahmad Hasan's tr,), Vol.III, 1020, hadith no. 3587.

laws and regulations that incur commitment provided always that do not conflict with the clear injunctions of Shari'a.[21]

The foregoing also subsumes unregulated public interest (*maÎlaÍa mursala*), which refers to matters of public interest that have not been regulated by the existing Shar'ia. All that which appear to be of benefit for the people, be it in the present or future, whether in temporal matters or in reference to the Hereafter, the authorities are empowered to take measures to secure the benefit in question whenever the opportunity arises. Such measures may consist of substantive law or *siyÉsa*-based rules and procedures that may be introduced from time to time. *MaÎlaÍa mursala* is circumstantial and cannot therefore be either generalized nor predicted in advance. Something that is deemed to be a *maÎlaÍa* in one country may not be the same in another, nor even in the same country, for change of time and circumstance may alter the situation such that a *maÎlaÍa* of the past is no longer the same under a different set of circumstances. Hence the wisdom and insight of capable leaders play a role in the identification of *maÎlaÍa* and also determination of measures through which it can be realized. The Companions took measures, for instance, to establish new government departments, build prisons, issue coins, introduce market regulations etc., on which the text was totally silent. *MaÎlaÍa* is also an evolving concept that grows abreast with new changes in the life of the community and the legislative organ would be authorized to legislate over what they deem to be of benefit.[22] In recent times, Muslim countries introduced laws on compulsory registration of marriage and divorce as well as the sale and purchase of real property, introduced municipal laws, guidelines and restrictions on urban planning, imports and exports, and more recently restrictions on smoking and so forth, all of which partake in *maÎlaÍa*-based legislation and the scope remains open for legislative initiative.[23]

2) Matters over which the Shari'a grants a choice to the head of state, such as in respect of treatment of the prisoners of war, where the text (Q., 47 :4) records several methods, one of which may be selected for purposes of enforcement. Also with regard to the perpetrators of highway robbery (*ÍirÉba*) the text (5:33) records four types of punishment from the most severe to the least and the choice rests with the leader to select one he deems to be most appropriate. Differences of opinion also exist on whether death by retaliation (*qiÎaÎ*) is applicable to one who commits murder under duress: some say only one of the two parties is subject to retaliation but differ as to which, others say both are, and still others maintain that neither is subject to retaliation.[24]

3) With regard to matters over which the jurists are in disagreement, be in the interpretation of text, or *ijtihÉd*-based conclusions, the head of state may determine and select that which is deemed to be most appropriate. This is in accordance with the renowned legal maxim: "the command of the Imam puts an end to disagreement- *amr al-*

[21] See for a discussion, Mohammad Hashim Kamali, *Islamic Commercial Law: An Analysis of Futures and Options*, Cambridge (and Kuala Lumpur): Islamic Texts Society, 2000, 66-82.
[22] See for details on *maÎlaÍa mursala* M H Kamali, *Principles of Islamic Jurisprudence*, Cambridge: Islamic Texts Society, 2003, ch.13(351-369). See also Qaradawi, *al-SiyÉsa al-Shar'iyya*, 82f.
[23] Cf., 'Abd al-Ghani Busyuni 'Abd Allah, *Nazariyya al-Dawla fi'l-IslÉm*, Beirut: al-Dar al-Jami'iyya, 1986, 215f.
[24] Cf., al-Qaradawi, *al-Siyasah al-Shar'iyya*, 80.

imÉm yarfa' al-khilÉf." In a similar maxim it is provided "the command of the Imam is enforceable- *amr al-imÉm nafÊdh.*"[25] Qur'an commentaries and *fiqh* manuals record many instances where the range of disagreement may be such that seven or eight different views are given by various schools and jurists. The head of state, the courts and the legislature, for that matter, would be in a position to select only one that serves the best interest of the community for purposes of judgment and legislation. Disagreement is also found not only among the leading schools, but often within them and among their leading figures and followers. Note, for example, the extensive fiqh works, such as that of Ibn Maflah al-Hanbali's *KitÉb a-l-FurË'* in six volumes, and al-Mardawi, *al-InÎÉf fi MasÉ'Êl al-KhilÉf* in twelve volumes, on the impressive range of scholastic diversity of schools and scholars over juristic issues.[26] The authority of the head of state in such cases may be specified by a legislative instrument that takes from these resources a ruling that is deemed to be in the people's best interest.

VI. The Judiciary

Justice is a major preoccupation of Islam and its Shari'a, and those who administer justice merit great spiritual distinction and reward. Qur'anic guidelines on justice maintain commitment to impartial justice and objectivity in its implementation. There are more that 50 verses in the Qur'an on justice*('adl, qisË*), and more than 300 on injustice and oppression (*Đulm*). The scope of Qur'anic Justice subsume three varieties, namely corrective or retributive justice, distributive justice, and political justice as in the sphere of appointments of officials, international relations, war and peace etc.[27]

Historically, the ulama and religious leaders dominated the judicial branch, but in the capacity mainly of government employees - as judges were traditionally selected from among those learned in the Shari'a. However, since the Shari'a was not enacted by the state, and the state had in effect an administrative role with regard to its enforcement, the ulama and judges regarded themselves as the custodians of Shari'a and bearer of direct mandate to enforce it almost independently of the state hierarchy.

Muslim commentators have held that no one is in principle authorized to influence the judge nor to compromise his independence as the effective administrator of Shari'a, a task they have been mandated by the Qur'an(Cf.,4:59). In Zaydan's assessment, "no one whatsoever is permitted to interfere in the work of the Qadi with a view to influencing him away from the course of justice. Anyone who violates this guideline is violating the Shari'a."[28] This is because the duty to administer justice, although primarily borne by the head of state, and the judge acts as his deputy, the latter shares that function with him by virtue of a direct Shari'a mandate. Judgment (*qaÌÉ'*) is by definition a declaratory task that is vested in the judge; the latter ascertains the ruling of Shari'a ad declares its application to a dispute before him. The judge does not, in other words, create a ruling (*Íukm*) in the absence of any evidence in Shari'a. This is a declaratory and interpretative role, and no one can effectively share it with the judge, who must issue judgment based on his own understanding and conviction. Since

[25] See for details on the subject of *ikhtilÉf* and the two legal maxims cited M. H. Kamali, *Shari'ah Law: An Introduction,* Oxford: Oneworld, 2008, ch.5 entitled "Disagreement (*ikhtilÉf*) an Pluralism in Shari'ah,"pp.99-123 at 119.

[26] Se for a discussion, al-Qaradawi, *al-SiyÉsa al-Shar'iyya,* 74-79.

[27] For more details on justice see Mohammad Hashim Kamali, *Freedom, Equality and Justice in Islam,* Cambridge: Islamic Texts society, 2002, 103-155.

[28] 'Abdal-Karim Zaydan, *NiĐÉm al-QaÌÉ' fi'l-SharÊ'a al-IslÉmiyya,* 3rd revised ed., Beirut: Mu'assasah al-Risalah, 2002, 59.

the judge is personally accountable for error or miscarriage of justice, he must act independently of extraneous influences in the conduct of duty. He is within his rights also to reject all interference, even from the head of state himself, in the conduct of his judicial functions. [29]

Since almost every case before the court exhibits significant variation in respect of detailed circumstances surrounding it, judges are often called upon to carry out original interpretation (*ijtihÉd*) of the basic evidence of Shari'a to arrive at appropriate judgments. This is endorsed by the theory of *ijtihÉd*, which demands total freedom for the judge and *mujtahid* to discharge their duty in accordance with their true conviction free of all interference. The judge is not even allowed to follow other judges in the deliverance of his own judgment and *ijtihÉd*, nor to deputise that task to anyone else. Should there be interference from the head of state or his leading officials, the judge is not under duty to comply. For according to the ruling of a renowned hadith "There is no obedience in transgression; obedience is due only in righteousness."[30] It would be wrong for the head of state and other office holders of influence to interfere in the works of a judge that may undermine his independence. Yet historical records exhibit a wide gap between theory and practice, which show that judges were often denied their independence.

Commentators have gone on records to say that judges enjoyed considerable independence during the Rightly Guided Caliphs, and also during the Umayyad rule(665-750CE) so much so that they issued judgments in disputes involving the caliph himself and have issued judgment against the caliph.[31] Reports thus indicate that the caliphs 'Umar b. al-Khattab, and 'Ali b. Abi Talib appeared before the Qadi as parties to litigation, and both expressed the desire that they should not be given any preferential treatment in the court. This precedent sustains the conclusion, as one commentator points out, that the judge can accept a suit against the very person of the head of state and try him in an open court and that " this feature of the Islamic judiciary is an index of its independent status."[32] Under the Umayyad rule, judges were free in the exercise of *ijtihÉd*. The founder of this dynasty, the caliph Mu'awiya, was also the first to relinquish his judicial functions to appointed judges.[33] Another observer qualified this conclusion so as to say that "the judiciary was fully independent from the executive … but this independence was confined to civil cases and private wrongs."[34]

The emergence and gradual crystallization of the four schools of jurisprudence during the early Abbasid period around the eleventh century CE led to new restrictions on the independence of judges. The establishment of the leading schools was taken to imply that the Shari'a had already been expounded and elaborated to an advanced level and that from then on everyone, including the judges, should follow the existing expositions of the schools and restrain from innovative interpretation and *ijtihÉd*. A factor that prompted this development was the exceeding diversity of schools, interpretations and doctrines that were viewed with apprehension and thus a cause for concern that they could lead to confusion and

[29] Ibid. 59-60.
[30] Ibid., p.60.
[31] Ibid., p.61. See also Subhi Mahmassani, *ArkÉn HuqËq al-InsÉn fi'l-IslÉm*, Beirut: Dar al-'Ilm li'l-Malayin, 1979, 98.
[32] Farooq Hassan, *The Concept of State and Law in Islam*, New York: University of America Press, 1981, 43.
[33] Sulayman Muhammad al-Tamawi, *al-SulÏat al-Thalath fÊ DasÉtÊr al-'Arabiyya wa fi'l-Fikr al-SiyÉsi al-IslÉmÊ*, Cairo: Dar al-Fikr al-'Arabi, 401.
[34] Ghulam Murtaza Azad, *Judicial System of Islam*, Islamabad: Islamic Research Institute, 1987, 100.

unacceptable disparity in court decisions. Sometimes persons of lesser qualifications also attempted *ijtihÉd*, which exacerbated the situation and many began to call for restrictions to be imposed on the free exercise of original interpretation and *ijtihÉd*. Added to this was also the unprecedented expansion of the territorial domains of Islam which brought the Shari'a into contact with other more entrenched cultures and traditions thus prompting the ulama to pronounce the so-called 'closure of the gate of *ijtihÉd – sad bÉb al-ijtihÉd'*. This was partly why it became official policy of Islamic governments to adopt one or the other of the leading schools as their official *madhhab*.[35]

The new restrictions which limited the scope of ijtihad to a particular school clearly marked a departure from th precedent of the early caliphs and an unwelcome imposition on the freedom of judges. Al-Mawardi (d.450/1058), himself a judge and follower of the Shafi'i school, found this unacceptable when he expounded the doctrine and wrote that the judge must exercise his own *ijtihÉd* and, in so doing, he is not bound to adhere to the ruling of the school to which he subscribes. Should he be the follower of the Shafi'i school, he is not bound by the ruling of that school unless his own *ijtihÉd* leads him to it; should his *ijtihÉd* favour the opinion of Abu Hanifa, then he should act on it without hesitation.[36] The prominent Hanbali Jurist Ibn Qudama al-Maqdisi (d.1223/620) held it to be impermissible to appoint a judge on condition that he should adjudicate according to a particular school. "God the Most High has decreed righteousness as the criterion of justice and righteousness cannot be confined to a particular school. Hence when a judge is appointed with such a condition, that condition is null and void"[37]

A careful reading of the Qur'an also point to need for an independent judiciary to adjudicate disputes between the ruler and ruled with total impartiality. This may entail the sensitive task of disqualifying the head of state when found to be in violation of his terms of office. This is envisaged in the Qur'an where the text anticipates the possibility of disputes arising between the ruler and ruled, which can only logically be adjudicated by a judicial authority that is not influenced by either of the disputing parties. This is our understanding of the Qur'anic verse, known as the *ayat al-umarÉ'* (the rulers') to which a reference has already been made:

> O you who believe! Obey God and obey the Messenger and those invested with authority among you. Should you dispute over a matter among yourselves, then refer it to God and to the Messenger…That is better, indeed commendable in the end (4:59).

This text is clear on the point that both the ruler and ruled are subject to the ordinances of Shari'a. It is also implied that people are entitled to disagree with their leaders. It is also clear from the context that the verse addresses the ruler and ruled. In the event of a dispute arising between them, then it is only logical that neither of the two parties would be authorized to adjudicate over it, which is why it should be objectively determined, as the text specifies, by reference to the Shari'a. To facilitate the implementation of this text, there must be an independent judiciary with full powers to adjudicate disputes arising between the

[35] See for detail Mohammad Hashim Kamali, "Appellate Review and Judicial Independence in Islamic Law," in ed. Chibli Mallat, *Islam and Public Law*., London: Graham & Trotman, 1993, pp.49-85.
[36] Abu'l Hassan 'Ali al-Mawardi, *KitÉb al-AÍkÉm al-SulÏÉniyya*, Cairo: Matba'a al-Sa'ada, 1090/1327, 64.
[37] Abu Muhammad 'Abd Allah Ibn Qudama al-Maqdisi, *Al-MughnÊ*, Riyad: Maktaba al-Riyad al-Haditha, 1981/1401, vol.9, p.106.

citizen and state.[38] This may take the form of the historical *MaÐÉlim* (courts of grievances), which had jurisdiction over disputes involving state officials and judges themselves, or it may take the form, as we may have today, of an independent judiciary with clear constitutional mandate that grant it immunity against interference. It is essential in any case, that the head of state should have no powers to dismiss or replace the leading judges in the land, and that means a free and independent judiciary.[39]

Furthermore, the Islamic constitutional theory is explicit on the point that the community may depose the head of state in the event of a manifest aberration, when he commits a crime, or in the event of loss of mental and physical faculties. This begs the question as to who should make that momentous decision to disqualify a reigning head of state. The constitutional theory has not answered this question, but it may be said in response, that the judiciary is called upon to discharge the sensitive task of impeaching the errant head of state and eventually to declare him disqualified. This would be almost impossible unless the judiciary is fully independent and the judges enjoy total security of office.[40]

Conclusion (pending).

[38] Muhammad Asad, *The Principles of State and Government in Islam*, Los Angeles: California University Press, 1961, 66.
[39] Cf., Mahmud ‘Abd al-Majid al-Khalidi, *QawÉ’id NiÐÉm al-×ukm fi’l-IslÉm*, Kuwait: Dar al-Buhuth, 1980/1400, 211.
[40] Cf., Mohammad Hashim Kamali, “Appellate review and Judicial Independence in Islamic Law,” in ed. Chibli Mallat , *Islam and Public Law*, 51-52.