

Separation of Powers and the Facade of Accountability

The single greatest weakness of man-made systems is that they are based on the fallible human intellect. It is this weakness that forces man to undergo an iterative process of development, such that experimentation with laws leads to new shortcomings, in an attempt to address existing shortcomings. This iterative process is an integral part of legal systems derived from the human intellect, as the human intellect is not all-encompassing and prone to bias, disparity and contradiction. Western laws necessitate continual revision and development in the hope of achieving better legislation, and so an endless cycle continues. Within the realm of constitutional and legal issues of the state, an important and fundamental principle is the principle of the division of state powers or separation of powers. Separation of powers is proposed for strengthening the accountability of the government in a democracy. According to this principle, neither a person nor an institution can become an absolute authority in any state. It is asserted that if this happens then all the states, subjects and society will be at the mercy of this one person or institution. If that person or institution conforms to the good, then all will be well, which is the concept of a benevolent totalitarian dictator. However, in the event of bad intentions, great oppression, injustice and corruption will arise, which are hard to prevent.

The Western notion of the separation of power has its roots in the Sixteenth Century of the Christian Era (CE). To minimize the misuse of political power by the elite, over the heads of ordinary folk, John Calvin proposed to divide power among several political institutions like the aristocracy, lower estates, or magistrates in a system of checks and balances- this is the separation of powers. Some ramification of this notion can be seen in Seventeenth Century North America CE, where state power in some states was divided into institutions. There was an elected legislature and an appointed judiciary who would then elect a governor as the head of an executive administration to run the affairs of government with his deputies. The concept was formally observed in democratic structures of European states where legislation was separated from executive powers. Turning its back on oppressive clerical rule in Europe, the Christian World separated God and the kingdom, resulting in a man-made system based on freedom from divine laws and new problems.

Over time, through experience, the Western man has learned that in the case of a system of law based on human intellect, where man makes laws according to his desires, it is problematic to grant all authority to one institution or man, so that he does as he pleases in a totalitarian fashion. The separation of powers is a proposal to address this underlying flaw within man-made Democracy. Under the separation of powers, the authority of the state is divided into branches, each with separate, independent powers and responsibilities so that the powers of one branch are not in conflict with those of the other branches. The typical division is into three branches: a legislature, an executive, and a judiciary, which is the *trias politica* model. Since this system is currently the system of the world's leading states, it is inevitably adopted by nations that do not have a comprehensive ideology. Pakistan itself is an example of the *trias politica* model. It has the Parliament as the legislature, the Prime Minister and the Cabinet as an Executive, whilst the Supreme Court and lower courts form the judiciary. The advocates of democracy claim that the leading Western powers have used separation of powers to their advantage, strengthening the accountability of the ruler and preventing abuse of power.

Separation of powers led to the current US presidential system, where the power to create laws is vested in the Congress, not the executive presidency. The power to impeach the president is shared between the two houses of the Congress, with the House of Representatives deciding whether the president needs to be impeached or not, whilst the Senate actually carries it out. The same Eighteenth Century US Constitution divides state

power to redress the inherent flaw. It was developed on the premise that an effective system of accountability should be made part of the state, where one part of the state could control the other, so that power and authority would not be abused. In contemporary democracies, the separation of power is a key element of state formation, without which the exercise of power in the state is almost impossible. In contrast, dictatorships and monarchies are assailed on the grounds that one person, having all the power and authority, oppresses the people because he places his personal ambitions and his family's interests over the interests of the people. Advocates of democracy are convinced that because of this absolute power in a dictatorship, it is not possible to hold the ruler accountable. Accordingly, for them, even the worst democracy is better than the best dictatorship.

Although the desire to strengthen accountability gave rise to the notion of the separation of power, it also obstructed the efficient performance of the ruler, who was to be held accountable. Separation of power weakened the institutions by stripping them of power successively. Although procedures were then developed to run the affairs, these procedures were cumbersome and slow, whilst bringing all the institutions together on the same page was an exhausting labour, such that the pace of managing affairs became relatively slower. In other words, due to this concept of separation of powers, since each institution has to get approval from another institution to exercise its powers, that reliance on another institution slows down its own performance. Now, unless approval comes from the other institution in a timely fashion, the institution will be in a state of paralysis. For example, the US administration is responsible for running the country's affairs. Spending money on these matters is part of the responsibility, but it is Congress, not the administration, that has the power to authorize the budgetary expenditure needed for the next fiscal year. There have been many cases when the US administration was paralyzed by the Congress for several days, striking the economy hard. The reason was that the budget presented by the administration was not passed within the stipulated time frame through Congress, due to a deadlock. The US state ran out of money to pay its expenses, including salaries, which led to the suspension of several governmental affairs. The US administration has been shut down ten times in modern US history due to separation of powers. The last shutdown occurred during President Trump's administration, from December 22, 2018 to January 25, 2019, the longest one in US history to date, causing 5 billion dollars' worth in losses, the worst in US history.

Another consequence of the division of power is that accountability is weakened, rather than being strengthened. If the powers required to address an issue are divided, the matter of ultimate responsibility is lost or obscured. A single institution can be held responsible for abuse of its designated powers but with the distribution of power, responsibility will also be divided. One would not be able to hold any single person or institution responsible for the failure to solve a problem, because the responsibility is a collective responsibility as no single institution has all required powers invested within it to completely address the problem. This process does not allow any one institution to be accounted for failure, allowing institutions to be tolerated for their failure without effective accountability. As a local example in Pakistan, neither the federal government nor the provincial government nor the city administration accepted full responsibility for the devastation caused by the 2020 monsoon rains in Karachi. Due to the separation of power, no single tier or division of government had all the required invested power to address the problem on its own. Thus, the distribution of power to establish a balance of power, with checks and balances, actually weakens accountability rather than strengthening it. There is continual passing the buck, blame shifting and finger pointing.

Islam centralizes power within the Khaleefah, instead of separating it within in the state. Although it is true that in the Khilafah (Caliphate), the Khaleefah (Caliph) does not have the power to legislate as he pleases, confined to the implementation of divine laws, the authority to adopt and enforce laws rests solely with the Caliph. Although the Khaleefah may appoint

assistants (mu'awineen) and governors (wulaa') to assist him in state affairs as he deems necessary, the responsibility for their performance rests with the Khaleefah alone, for he makes these appointments at his discretion. Those appointed by the Khaleefah do not exercise power on their own, but upon the authority assigned to them by the Khaleefah. In other words, the appointed governors and assistants are entrusted with the responsibility by the Caliph, who appoints them and removes them. As far as the judiciary is concerned, its powers are also in origin with the Khaleefah. The Ummah is the source of authority and transfers that authority through the Pledge of Allegiance to the Khaleefah for the implementation of complete Islam, taking care of all the affairs of the people according to the Islamic system, including the arms of the executive and judiciary. The judiciary, as well as the implementation of the rules related to it, are included in the Pledge, which is given to the Caliph personally. Just like it is upon the Khaleefah to issue orders regarding the rules of Islam, similarly it is upon the Khaleefah to issue orders related to the judiciary. Therefore, in the Islamic state of the Khilafah, the Khaleefah is the origin of all powers, which includes both executive and judicial powers i.e. all state powers are invested in the Khaleefah.

With the Khaleefah having all the executive powers in the Khilafah state, he has the authority to take all the necessary decisions himself. This does not allow any state institution to become an obstacle in running the system, because the Khaleefah himself has authority over all state institutions. Decisions on a matter do not require the approval of any other person or institutions making both the arrival at decisions and implementation of decisions faster. Therefore, in making decisions on revenue and expenditure, the balance in the expenditure between foreign military operations and domestic affairs are determined by the Khaleefah. The Khaleefah does not have to wait for any approval or permission, when setting priorities, making timely decisions regarding the needs of society and enforcing these decisions. This is because the Khaleefah has complete authority in these matters. Regarding accountability, the notion of centralization of power focuses accountability on a single person, the Khaleefah himself. Since all the powers are centred at Khaleefah, the responsibility and accountability also falls upon him. He cannot escape from his responsibility by sharing it with someone else. Therefore, all fingers are pointed towards the Khaleefah and the buck stops with him. As he becomes the focal point of all the political pressure from public, the Majlis of the Ummah and the political parties, it compels him to strictly adhere to Islam and look after the affairs without negligence. Where dispute arises, the matter is referred to the judiciary.

The separation of power also leads to power struggles between state institutions, causing instability in the state. In Pakistan, for example, the judiciary, the executive and the opposition in the legislature are often trying to assert their power over others, with the added complication of the military's influence in the branches of state. So, the Seventeenth Amendment of the era of President General Musharraf granted important powers to the President over the legislature and the judiciary. It was repealed in the Eighteenth Amendment, swinging powers back. Various amendments made to the Constitution of Pakistan reflect the divisive nature of the separation of power. This does not happen in the Khilafah because all powers are already vested in the authority of the Khaleefah. The paralytic competition for power is eradicated, so the Khaleefah's entire attention is focused entirely on implementing laws from Islam to look after the affairs of the citizens.

The Western separation of power implicitly concedes that when man makes law, the system is characterized by selfishness, corruption and vested interests. It is not possible for the system to serve the masses justly. Therefore, whenever a person is given powers to make laws, he inevitably misuses them. As John Dalberg-Acton said, "Power tends to corrupt, and absolute power corrupts absolutely." According to Western thinking, powers must be separated so that the selfish ruler does not possess all powers, whilst being controlled by a system of checks and balances through the separation of powers. Inefficiency in governance is the price of separation of power, but its intent is to prevent corruption. Such a ruler must be subject to strong accountability to keep him upright and if necessary, he can

be legally deposed. That is why the constitutions of democracies have laws regarding the vote of no-confidence and dissolution of parliament. They are intended as legal provisions to ensure accountability of the ruler through political or public pressure. Therefore, in Democracy, there is a trade-off between efficiency and accountability, with the scales tilted in the favour of accountability, according to Western thinking.

In contrast, the concept of centralization of power in the Islamic State of the Khilafah reflects the notion that the Khaleefah as a ruler is ruling by Islam, which he cannot manipulate for his own interests, whilst being just and pious. Although we find ahadith which mention the dislike of the ruler, depriving the people of their rights; these are related to the extraordinary situation and not the norm. Moreover, according to the Shari'ah, in order to be an elected Khaleefah, it is legally necessary to be just (aadil), not a sinner (faasiq). This provision in the constitution of the Khilafah state legally closes the door to the position of Khilafah for a wicked person who does not care for the laws of Islam, either in his personal life or in his post. In the exceptional case, the ruler can be removed if he implements other than Islam and does not desist on judicial redress. He will not be removed for difference of opinion within Islam, though he remains accountable through political and public pressure. Bound to ruling by Islam and fearing Allah (swt) alone, the Khaleefah immediately implements decisions based on his authority, strengthening the rule and speeding up the handling of matters, through highly efficient and effective execution. Thus, on the scale of speed of execution and accountability, in Islam, there is a perfect balance of efficiency and accountability, which no man-made system can match.

With regard to accountability, it is essential to understand that the source of law is closely related to the accountability of the ruler. In Democracy, the source of the constitution and the law is the human mind. The scale of right and wrong is determined by human reasoning for the constitution and the law. In Democracy, man has the power to formulate the constitution and the law, which gives the power to the ruling elite as means to make self-serving laws. The power to make laws enables the ruling elite to make accountability legally difficult for both the people and state institutions. By way of example, under Article 248 of the Constitution of Pakistan, the president, the governors, the prime minister, the provincial ministers, the federal ministers and the state ministers are not answerable to any court of Pakistan for discharging their responsibilities. Due to such immunity, practically the people are witnesses to the oppression, whilst being tied by legal binds. They have to face devastation at the hands of the incumbent rulers, without any recourse for effective legal redress. They have to wait till the government completes its due tenure to hold the rulers accountable, as is occurring now with Musharraf and others, many years after their rule. Moreover, the harshness of cases against many former rulers reflects the weakness of accountability during their tenures.

In contrast to Democracy, the Khaleefah does not have the power to legislate as he pleases. The constitution and laws are derived from the divine evidences. Unlike limited human intellect, the divine sources are not bound by circumstances, time and place, defective through human limitations and bias. The revelation becomes the sole basis for all institutions of the state, including the judiciary, the Majlis of the Ummah and the media. Divine revelation provides a definitive basis for accountability of governance in the Khilafah state, settling all disputes. The Khaleefah is bound to the laws of Islam which are acceptable to all Muslims, with unanimous agreement. Accountability laws are also formulated from Islam, independent of the personal will of the Khaleefah. Thus, the Khaleefah cannot create legal obstacles in the way of his accountability by making arbitrary laws, such as immunity provisions. This ensures effective and unimpeded accountability of the ruler, according to the standard of divine evidences. There is a strong system of checks and balances, without the need for separation of power. Islam obliges upholding the word of truth before the ruler on the basis of enjoining the good and forbidding the evil. In the case of the implementation of Kufr Buwah (Open Kufr), the judiciary can remove the Khaleefah from the office unless he

retracts from his stance. If a case of Kufr Buwah is pending in the Court of Unjust Acts, the Caliph does not have the authority to dismiss the presiding judge. The Khaleefah cannot change this legal provision through coercion of the Majlis or the people in general, as they are not the source of law. If he still persists despite judicial decision, Islam obliges the use of force to remove him.

As for the concern that even though the constitution and the laws are based on revelation, the Khaleefah may protect his personal interests through corruption in executive orders related to Islam, it is a product of a mind that is comparing the Caliph to today's democratic rulers. In Democracy, rulers are corrupt since Democracy grants man the power to legislate. In order to attain the power of legislation, the corrupt make huge investments in elections, knowing that they can manipulate law to secure huge financial returns. Moreover, legislators are bought by capitalists, through funding of election campaigns and party contributions, allowing the capitalists to exert control over laws, policies, rulers and governments. In Pakistan, aspiring legislators willingly change their political affiliations based on their interests in every election, taking advantage of the changing political environments to ensure their entry into the assemblies. It is utter folly to compare the justice of the Khilafah with the ruling elite in Democracy. Since the source of law is not human reasoning, but divine revelation, the Khaleefah can never manipulate laws for his interests or interests of others. Those who present themselves for the responsibility of the Khaleefah know beforehand that they have to enforce the rules of Islam, on which they are pledged allegiance. The Islamic state makes fear of Allah (swt) rather than the legal force as the basis for following Islam, through the grooming of people moulded into Islamic personalities. Although there are state laws and punishments for exceptional cases, the rulers and the ruled follow the Shariah orders based on the fear of punishment in the hereafter by Allah (swt). This is the basis that distinguishes the Islamic State from other non-Islamic states and societies, whilst harmonizing the Islamic thinking of the ruler with that of the ruled.

Of course, in today's world of agent rulers who sacrifice the interests of Muslims for the sake of the West, it is difficult to imagine a system as witnessed in the era of the Khulafa'a Rashideen, where the judge Shuraih (ra) judged in favour of a Jew, rather than the plaintiff Khaleefah Ali (ra) or the Khaleefah Umar retracted from his legal position upon being accounted by a single woman regarding the limiting the mahr. Yet, for Muslims in our era, glad tidings of RasulAllah (saw) gives us hope within despair. RasulAllah (saw) gave glad tidings of the Khilafah that would come immediately after the Prophethood, saying, «ثُمَّ تَكُونُ خِلَافَةً عَلَىٰ مِنْهَاجِ النَّبُوءَةِ» **“Then there will be Khilafah on the Method of Prophethood.”** (Musnad Ahmad) However, in the same hadith, RasulAllah (saw) also spoke of the Khilafah that will come after a period of oppressive rule, using the same words, «ثُمَّ تَكُونُ خِلَافَةً عَلَىٰ مِنْهَاجِ النَّبُوءَةِ» **“Then there will be Khilafah on the Method of Prophethood.”** (Musnad Ahmad). InshaaAllah, the coming Khilafah Rashidah will be like the Khilafah that was established after the Prophethood, adhering to Islam strictly. InshaaAllah coming Righteous Caliphate will be led by a Righteous Khaleefah, ruling by all that Allah (swt) has revealed. The Ummah will be blessed by a pious Khaleefah who will create an atmosphere of Iman, removing the fear of death and love of this world from the hearts of Muslims, smashing the idol of Western democracy for good, inshaaAllah.

**Written for the Central Media Office of Hizb ut Tahrir by
Mun'im Ahmed – Pakistan**