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The Separation of Powers in Islamic Political Jurisprudence and Its Manifestations in Contemporary Constitutional Systems

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Abstract:

This article examines the principle of separation of powers from the perspective of Islamic political jurisprudence, seeking to uncover its historical roots in the classical Islamic legal tradition and its intersection with contemporary Western constitutional theories. The study proceeds from the hypothesis that Islamic jurisprudence established a comprehensive framework for the distribution of sovereign functions among governing institutions, albeit under different terminology and mechanisms. The research adopts a comparative analytical methodology, drawing on classical Islamic jurisprudential sources and constitutional texts from several Muslim-majority states. The study concludes that there is a substantive convergence between the principle of Shura and constitutional oversight on the one hand, and the functional separation of powers on the other, while highlighting the Islamic specificity grounded in Shari'a as the supreme authority over all powers. The article recommends the development of a contemporary Islamic constitutional model that balances divine sovereignty with the requirements of the modern state and popular participation.

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Introduction

The principle of separation of powers stands among the most prominent pillars upon which the modern constitutional state is built, constituting a fundamental safeguard against tyranny and a protection of civil liberties. In Western intellectual memory, this principle has been associated with two eminent scholars: John Locke in his Two Treatises of Government, and Montesquieu in his seminal work The Spirit of the Laws, which framed this principle with clarity and profoundly influenced the drafting of modern liberal constitutions from the American Constitution of 1787 onward (Locke, 1988; Montesquieu, 1989).

However, the Western intellectual claim of exclusive authorship of this principle does not withstand rigorous scholarly scrutiny. Reflection on the Islamic jurisprudential heritage reveals a striking functional presence of the concept of distributing powers and distinguishing the competencies of governing bodies since the dawn of the Islamic state in the era of the Prophet and the Rightly-Guided Caliphate. This is what has prompted a number of contemporary scholars to investigate this issue from multiple angles, searching for points of convergence and divergence between the two models (Rabi', 1997; 'Ammarah, 1988).

This issue acquires heightened importance in light of the constitutional transformations experienced by Muslim-majority states in recent decades. Following the wave of independence in the mid-twentieth century, and the subsequent episodes of forced modernization, the Arab Spring revolutions once again raised the question of reconciling the reference framework of Islamic Shari'a with the requirements of the modern democratic state (Brown, 2002).

This study seeks to answer the following questions: Did Islamic jurisprudence establish a comprehensive theory of separation of powers? What are the jurisprudential foundations of such a theory? How does this theory manifest in contemporary Islamic constitutional systems? And what are the limits of convergence and divergence between the Islamic and Western models? To address these questions, the research is organized into seven principal themes, progressing from theoretical grounding to practical constitutional application.

1. Research Objectives

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This research seeks to achieve the following scholarly objectives:

First, to elucidate the Islamic jurisprudential conception of the distribution of sovereign functions by examining classical sources and their practical implications during the era of the Rightly-Guided Caliphate and major Islamic states.

Second, to analyze the philosophical and doctrinal foundations of the principle of separation of powers in both Islamic and Western thought, revealing points of convergence and divergence between the two models without overstating either commonality or difference.

Third, to undertake a systematic comparison between the Islamic model of power organization and its liberal counterpart, while respecting the civilizational specificity of each and avoiding the trap of epistemological projection.

Fourth, to trace the manifestations of the principle of separation of powers in contemporary Islamic constitutions, drawing on examples from Saudi Arabia, Iran, Pakistan, Morocco, and Tunisia.

Fifth, to present a critical reading of the tensions between divine sovereignty and constitutional review mechanisms in the contemporary Islamic state, and to propose grounded reconciliatory solutions.

Sixth, to contribute to the construction of a contemporary Islamic constitutional theory that upholds the requirements of justice, freedom, and the protection of rights in light of the objectives (maqasid) of Islamic Shari'a.

2. Significance of the Research

The significance of this research is manifested in several respects. At the theoretical level, it contributes to bridging the gap between classical Islamic jurisprudential studies and contemporary constitutional research — a field of knowledge that continues to witness lively and evolving debates in both Arab and Western academic circles (Faruq 'Abd al-Salam, 2000).

At the applied level, the research provides rich analytical material for legislators and constitutional jurists concerned with designing governance systems in societies with an Islamic background, particularly during the

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democratic transition that many Arab states are undergoing, as they require firm intellectual references that combine the authenticity of heritage with contemporary engagement (An-Na'im, 2008).

Furthermore, the research derives its topicality from addressing the challenge of combining religious legitimacy with democratic legitimacy — the central axis of contemporary political and jurisprudential debate in many Muslim-majority states. The heated constitutional discussions in Egypt, Tunisia, Morocco, and Libya are sufficient testimony to the pressing need for studies of this kind.

Additionally, the research contributes to presenting Islamic jurisprudence as a living civilizational heritage capable of engaging with global constitutional thought, free from isolationist closure on the one hand and uncritical assimilation of external frameworks on the other.

3. Research Methodology

The research relies on two complementary principal methodologies: the analytical-inductive method and the comparative method. The first method involved examining texts of the Holy Quran, the Prophetic Sunnah, and the opinions of classical jurists on questions of the Imamate, Shura, Hisba, and the judiciary, and extrapolating the governing principles for the distribution of sovereign functions in the Islamic state, with careful analysis of the content and historical contexts of these texts (Montesquieu, 1989).

The comparative method was employed through a systematic comparison between the Islamic approach and its Western counterpart, according to a rigorous scholarly methodology that accounts for contextual and historical differences, followed by tracing the reflection of this comparison in the constitutional texts of a number of contemporary Islamic states, accompanied by a critical reading.

The historical method also assisted the research in mapping the jurisprudential evolution of the concept of authority in Islam, from the moment of Prophetic foundation through the era of the Rightly-Guided Caliphate and on to major jurisprudential codifications such as al-Mawardi's al-Ahkam al-Sultaniyya and the writings of Ibn Taymiyya and Ibn Khaldun. The research additionally employed the method of constitutional discourse analysis in studying the texts of

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contemporary Islamic constitutions and their provisions relating to the distribution of powers.

4. Theoretical Foundations of Separation of Powers in Islamic Political Jurisprudence

4.1 The Concept of Authority in Islam: Sovereignty (Hakimiyya) and the Caliphate

Islamic political jurisprudence conceives of authority beginning from the principle of divine sovereignty (hakimiyya), embodied in the Quranic verse: 'Judgment belongs to God alone' (Quran 6:57). This sovereignty means that absolute supremacy belongs to God alone, and that human beings are vicegerents on earth who exercise authority in accordance with the requirements of Shari'a, not by virtue of an autonomous self-determined will. Consequently, all political authority in Islam is authority constrained by the boundaries and objectives of divine law (Ibn Taymiyya, 2005).

Jurists distinguished between two types of authority: the foundational legislative authority, which is the exclusive right of God, and the interpretive legislative authority (ijtihad), exercised by the community through scholars and the ruler in domains where no definitive text exists. This fundamental distinction establishes a system of mutual constraints among governing bodies that does not differ in essence from the core idea of separation of powers (al-Ghazali, n.d.).

As for the concept of the Caliphate, al-Mawardi defined it as established 'to protect the religion and to manage the affairs of this world,' and this definition carries within it the seed of functional distinction: the protective religious function, which represents a form of constitutional oversight, and the administrative political function, which corresponds to executive authority in the modern conception (al-Mawardi, 1990).

4.2 Shura: The Pillar of Deliberative Authority in Islam

Islamic law established, from the dawn of the Prophetic state, the principle of consultation in political decision-making, responding to the explicit Quranic directive: 'Consult them in the matter' (Quran 3:159), and 'Their affairs are

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[conducted] through consultation among themselves' (Quran 42:38). Jurists derived from these texts the obligation to constrain the ruler's powers through a consultative council representing the People of Binding and Loosing (Ahl al-Hall wa al-'Aqd), thus sowing clear seeds of the concept of functional separation of powers (al-Qaradawi, 1997).

A group of contemporary jurists holds that Shura, in light of the objectives of Islamic law and the principles of Islamic political jurisprudence, represents more than mere consultative obligation — it is an institutional constraint on the authority of governance that parallels the role of the legislative power in modern constitutional systems. However, this view is not the subject of complete jurisprudential consensus, as another group maintains that Shura is advisory rather than binding (al-Ghannushi, 1993).

Among the most prominent features of Shura as an institution for distributing power are: the determination of who may legitimately exercise it (the People of Binding and Loosing), the limitation of its scope to interpretive matters excluding definitive constants, and the requirement of specific competencies in those who exercise it. All of this renders it a specialized and constrained institution, rather than an absolute right for all, bringing it closer to the concept of parliament in its modern constitutional form (al-Ansari, 1980).

4.3 Al-Ahkam al-Sultaniyya: The Most Complete Jurisprudential Foundation

Al-Mawardi (d. 450 AH) crowned the jurisprudential founding of the theory of authority in his enduring encyclopedia Al-Ahkam al-Sultaniyya wa al-Wilayat al-Diniyya, in which he presented a comprehensive system for distributing governmental functions that reveals a clear distinction among types of authority, even without employing this modern term. Al-Mawardi distinguished between: the function of the Supreme Imamate (executive authority), the function of the judiciary (independent judicial authority), the function of the ministry and its types, and the function of Hisba (regulatory oversight) — each possessing independent competencies and specific conditions (al-Mawardi, 1990).

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In the same vein, Abu Ya'la al-Farra' (d. 458 AH) contributed, in his book of the same title Al-Ahkam al-Sultaniyya, a parallel jurisprudential foundation with some doctrinal differences, indicating that this concern with distributing governmental competencies was not confined to any one legal school but was a shared feature of Islamic jurisprudence (Abu Ya'la al-Farra', 1966).

Ibn Taymiyya (d. 728 AH) then deepened this foundation in his two works Al-Siyasa al-Shar'iyya fi Islah al-Ra'i wa al-Ra'iyya and Minhaj al-Sunna al-Nabawiyya, adding an explicit critical and supervisory dimension that renders commanding the good and forbidding the evil (al-amr bi al-ma'ruf wa al-nahy 'an al-munkar) a legitimate mechanism for holding the ruler accountable — a function paralleling, in some respects, that performed by constitutional courts and independent oversight bodies in modern systems (Ibn Taymiyya, 2005).

5. A Comparative Study Between the Islamic and Western Models

5.1 Philosophical Foundations: Divine Sovereignty versus Popular Sovereignty

The principle of separation of powers in Western thought rests on a social contract philosophy that holds sovereignty to emanate from an absolute popular will, and that the three powers are merely expressions of this will which delegates and monitors them. By contrast, the Islamic model is grounded in divine sovereignty and the delegation of governance by the community within the bounds of Shari'a, rendering authority constrained by a higher standard than the popular will itself (Rousseau, 2003).

This difference in foundational reference does not mean the two models are entirely contradictory. Indeed, a number of contemporary jurists and thinkers — including Sheikh Rashid al-Ghannushi, Dr. Tariq Ramadan, and Abdullahi An-Na'im — argue that Islam's requirement of Shari'a constraints prevents democracy from sliding toward an absolute majoritarianism that may oppress minorities. This makes it close to the idea of fundamental rights that contemporary constitutional democracies place beyond the reach of legislatures (Ramadan, 2012; An-Na'im, 2008).

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Tensions nonetheless remain, particularly regarding who holds the authority to interpret Shari'a and determine its requirements: specialized jurists, the popular majority through referenda, or the independent judiciary. Answers to this pivotal question have varied markedly across contemporary Islamic constitutions according to the nature of the political system in each state (Lombardi, 2006).

5.2 Points of Convergence Between the Two Models

Despite fundamental philosophical differences, notable points of convergence emerge between the Islamic and Western models on the question of separation of powers. Most prominent among these are: the principle of functional specialization and the avoidance of concentrating power in a single hand; the principle of checks and balances; and the principle of judicial independence as an indispensable pillar of the just state (Ibn 'Ashur, 2004).

Islamic jurisprudence has never accepted that the Imam hold all governmental functions in his hands. Judicial independence was a well-established principle from the time of the Prophet, who stated: 'Judges are of three types' — distinguishing among them with precision. The judge in Islamic jurisprudence does not receive directives from the executive power in his rulings, which parallels judicial independence in the modern conception (Ibn Qudama al-Maqdisi, 1994).

There is likewise a convergence in the principle of responsibility and accountability. Islamic jurisprudence admits no absolute immunity for the ruler; he is answerable first before God and then before the community, and may be removed if he deviates from the requirements of the trust placed in him. Islamic history has indeed witnessed numerous instances of caliphs and princes being held accountable before bodies of jurists and judges and in consultative assemblies ('Awda, 1981).

5.3 Fundamental Points of Divergence

Conversely, there are fundamental differences that cannot be overlooked. Most important among them is that the Islamic model does not recognize the rigid organic separation of powers as found, for example, in the American model;

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rather, functional separation prevails alongside cooperation and complementarity. The idea that the Muslim ruler may simultaneously be commander of the army and holder of executive powers while remaining subject to the provisions of Shari'a and the oversight of scholars reflects a structurally different conception of authority from that of Montesquieu (Hallaq, 2013).

The two models also diverge in the origin of legislative authority. In the Western model, the legislative power holds the competence to enact law from the ground up based on popular will; in the Islamic model, this competence is constrained with respect to definitive constants, while remaining free in the domain of interpretive variables. This constraint is not a deficiency in the Islamic view, but rather a safeguard preventing the majority from turning into tyranny ('Uthman, 1979).

6. Manifestations of Separation of Powers in Contemporary Islamic Constitutional Systems

6.1 The Iranian Model: Compound Guardianship

The constitution of the Islamic Republic of Iran, promulgated in 1979 and amended in 1989, represents the most procedurally elaborate model in its attempt to graft the principle of separation of powers onto the system of Islamic jurisprudential governance. Article 57 of the Iranian Constitution explicitly stipulates the separation of the legislative, executive, and judicial powers, while all three remain subject to the oversight of the institution of the Guardianship of the Jurist (Wilayat al-Faqih), which constitutes the supreme authority in the system (Arjomand, 2009).

Critics argue that this model empties the separation of powers of its true content, since the authority of the Guardian Jurist remains above all three branches, creating a hierarchy that renders mutual oversight incomplete. Defenders of this model, in contrast, argue that it institutionally achieves the principle of Shari'a sovereignty without undermining the functional specialization of the three powers in their day-to-day exercise (Arjomand, 2009).

The Iranian system also added the mechanism of the Guardian Council, comprising six jurists and six legal scholars, charged with monitoring the

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conformity of laws with Islamic Shari'a — thereby exercising a dual function resembling simultaneously a constitutional court and a jurisprudential reference body. This compound model reveals a serious attempt to reconcile the requirements of the modern state with the demands of Islamic jurisprudence, even as practical implementation challenges persist (Arjomand, 2009).

6.2 The Saudi Model: Functional Separation under Absolute Monarchy

The Basic Law of Governance of Saudi Arabia, promulgated in 1992, stipulates that the Holy Quran and the Prophetic Sunnah are the country's constitution and that governance is based on justice and Shura. This law established a functional separation among governing bodies without reaching full organic separation; the King is the supreme head of executive authority and holds broad legislative powers through royal decrees (al-Ghamidi, 2008).

Nevertheless, specialized bodies exercising quasi-independent competencies are observable, most notably: the Council of Senior Scholars as the supreme religious reference, the Council of Ministers with its executive and legislative powers, the Shura Council whose powers have gradually developed, and the judiciary grounded in the provisions of Islamic Shari'a. This functional distribution, though incomplete from a classical constitutional standpoint, represents a step toward functional separation (al-Ghamidi, 2008).

6.3 The Moroccan Model: The Most Mature Conciliatory Experience

The Constitution of the Kingdom of Morocco, promulgated on July 1, 2011, merits special analytical attention. It represents a genuinely balanced constitutional model that combined the monarchical framework, Islamic reference, and representative democratic principles in a manner unprecedented in previous Moroccan constitutions. Article 1 explicitly states that Morocco's governance is 'a constitutional, democratic, parliamentary, and social monarchy' and that the constitution rests on the principles of 'separation, balance, and cooperation of powers' (Daadaoui, 2011).

Perhaps the most notable features of the 2011 constitution in this regard are: the clear distinction between the King's function as Commander of the Faithful (religious guardian authority) and his function as head of state

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(coordinative authority among the powers); the strengthening of parliamentary and governmental powers; and the independence of the judiciary through the establishment of the Supreme Council of Judicial Power (al-Aslimi, 2012).

Critical studies indicate that actual practice has not always matched constitutional aspirations, particularly regarding the genuine balance between royal and governmental authority. Nevertheless, this model remains among the most prominent Arab constitutional experiments in grounding separation of powers on a foundation that unites Islamic identity with representative democracy (Daadaoui, 2011).

6.4 The Pakistani Model: The Islamic State and Constitutional Separation

Pakistan is among the countries that have undergone a remarkable constitutional experiment in combining the Islamic state with the democratic parliamentary system. The 1973 constitution, as amended in 1985, declares Islam the state religion and the Quran and Sunnah a supreme source of legislation, while explicitly adopting the principle of separation of the three powers and the parliamentary system. The Pakistani constitution established the Federal Shariat Court as a supervisory body to ensure the conformity of laws with the provisions of Islam — a model for combining religious and constitutional oversight (Jalal, 1990).

Pakistan has witnessed acute tensions among the three branches and between them and the military, revealing that constitutional text alone is insufficient to consolidate separation of powers; it requires a well-established democratic political culture, strong civil institutions, and genuine political will. This lesson is not unique to Pakistan but applies to all contemporary Islamic constitutional experiments (Jalal, 1990).

6.5 The Tunisian Model: From the Arab Spring to Constitutional Reversal

Tunisia deserves special attention as it underwent an exceptional constitutional experience of its kind in the Arab-Islamic world. The 2014 constitution, drafted by an elected constituent assembly through broad national

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consensus, combined recognition of Islam as the state religion with constitutional guarantees of rights and freedoms, and an explicit adoption of the principle of separation of powers and the reinforced parliamentary system (Tunisian Constitution, 2014).

However, the developments of 2021 and the subsequent constitutional amendments of 2022 noticeably redrew the distribution of powers in favor of the presidency, opening wide debate about the extent of adherence to the principle of separation of powers under these transformations. The Tunisian experience offers a valuable lesson: that constitutional achievements are not irreversible and that safeguarding the principle of separation of powers requires permanent societal vigilance.

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7 Challenges and Proposals

7.1 Principal Challenges

Entrenching separation of powers in Muslim-majority states faces intertwined structural and cultural challenges. First, the absence of a culture of accountability in societies that lived for extended periods under authoritarian regimes that concentrated powers in a single hand, sometimes exploiting religious texts to justify such concentration. Second, the weakness of independent civil institutions, trade unions, and civil society — the actual guarantors of separation of powers in lived reality rather than merely in constitutional text.

Third, the chronic jurisprudential dilemma concerning who holds the competence of ijtihad and interpretation. If the class of scholars constitutes the supreme jurisprudential reference, it may become a parallel authority added to the three branches rather than functioning as a neutral oversight mechanism. Fourth, the tension between the requirements of pluralistic democracy — which accepts the rotation of power among parties of differing orientations — and the requirements of Islamic identity, which may resist some of the outcomes of such rotation.

7.2 Proposals for a Contemporary Islamic Constitutional Model

Based on the findings of this research, a set of foundations for a contemporary Islamic constitutional model — one that unites authenticity with modernity — may be proposed. First, the adoption of a functional and cooperative separation of powers rather than a rigid organic separation, such that the competencies of each branch are distinct while mechanisms for balance and mutual oversight remain in place.

Second, the establishment of a supreme constitutional court that combines jurisprudential Shari'a competence with constitutional legal competence, charged with monitoring the conformity of legislation with both the provisions of Shari'a and constitutional principles simultaneously — drawing on partially successful experiences such as Iran's Guardian Council and Pakistan's Federal Shariat Court, while correcting their structural deficiencies. Third, consolidating judicial

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independence through strict constitutional guarantees, insulating it from executive interference in the appointment and promotion of judges.

Fourth, developing the Shura Council into a genuinely representative body that reflects social diversity and exercises actual legislative powers within the limits of Shari'a constants and guarantees of rights and freedoms. Fifth, explicitly stipulating in the constitution the principle of the political accountability of rulers before the community and mechanisms for holding them to account and prosecuting them should they deviate from the requirements of trust and justice.

8. Research Findings

1. Classical Islamic political jurisprudence contained well-established functional principles for distributing competencies among governing bodies, even without adopting the Western terminological formulation of separation of powers. The jurisprudential distinction among the Imamate, the judiciary, the ministry, and the Hisba constitutes a functional framework for authority specialization.

2. The principle of Shura and the system of the People of Binding and Loosing constitute the foundational pillar of deliberative authority in Islam, which intersects substantially with the function of the legislative power in modern constitutional models, despite differences in the philosophical foundations underpinning each model.

3. Contemporary Islamic constitutions have varied in their accommodation of the principle of separation of powers. Some have explicitly adopted it with the addition of a supreme Shari'a reference (Morocco, Pakistan, Tunisia 2014); others have settled for functional separation while retaining centralized power (Iran, Saudi Arabia).

4. The core challenge in contemporary Islamic constitutional jurisprudence is not whether separation of powers exists, but rather the mechanisms for ensuring its independence and the effectiveness of mutual oversight under a Shari'a reference that transcends all the powers.

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5. Judicial independence was among the most firmly established principles in classical Islamic jurisprudence, providing a stable common foundation where the Islamic and Western visions of separation of powers converge.

6. The Tunisian experience and its Pakistani antecedent reveal that constitutional text alone is insufficient to consolidate separation of powers; it requires an entrenched democratic political culture, strong civil institutions, and genuine political will.

7. There is a common ground between the Islamic and Western systems that enables a productive and fruitful constitutional dialogue, provided that civilizational specificity is respected and that both uncritical Westernization on the one hand and isolationist closure that obstructs ijtihad on the other are avoided.

8. Islamic constitutional jurisprudence is in need of an epistemological renewal that keeps pace with the requirements of the age without surrendering constants, drawing on the jurisprudence of objectives (fiqh al-maqasid) and the universal rules of Shari'a in order to ground a comprehensive contemporary Islamic constitutional theory.

Conclusion

This comparative analytical study demonstrates that Islamic political jurisprudence was by no means devoid of concern for the question of distributing power and limiting tyranny. Rather, it offered mature conceptions that — though varying in their level of theoretical elaboration and practical application — constitute a living intellectual heritage worthy of investment in the construction of constitutions for the contemporary Islamic state.

The reflective observer may conclude that the need for separation of powers is not a Western import at odds with Islamic identity, but rather a human requirement and a legal objective attested by the texts of revelation and the opinions of jurists across the ages. The existing disagreement concerns mechanisms and details, not the principle itself.

It is hoped that this research will give rise to further in-depth comparative studies that bridge the gap between Islamic jurisprudence and the science of

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constitutional law, and contribute to building a contemporary Islamic constitutional model that fulfills the community's aspirations for freedom, justice, and the protection of human dignity in light of the guidance of the final Islamic Shari'a.

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