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Reinterpreting Constitutional Law through the Lens of Islamic Sufism: A Theosophical Approach to Governance and Legal Principles

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Abstract

The fundamental principles of constitutional law are outlined concisely, though they are reinterpreted in this work through the philosophical lens of Sufism. While these principles are traditionally embedded in constitutional texts, they are reconceptualised here based on Sufi thought. Key concepts such as popular sovereignty, limitations on power, accountability of the governing bodies, separation and independence of powers, power equilibrium, central authority supremacy, transparency in governance, adherence to legal norms, and the mechanisms of checks and balances are critically examined. This study investigates the theoretical underpinnings of constitutional law from the theosophical and mystical perspectives of Islamic Sufism. By introducing ten foundational principles, the research aims to establish a robust framework for formulating and enhancing constitutional systems. Comparative analyses with Gnostic traditions from other religions could provide further insights. These principles offer valuable perspectives for academic discourse and have practical implications for advancing constitutional law and its reinterpretation. The inherent subtlety, sincerity, and ethical depth of Islamic Sufism provide a compelling perspective that may intrigue legal scholars and researchers. Despite its richness, the Sufi viewpoint still needs to be explored within public law studies. This paper introduces a novel and intellectually stimulating domain, inviting further scholarly inquiry.

Keywords

Public law; Constitutional law; Theosophy; Mysticism; Sufism; Gnosticism; Islamic law

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1. INTRODUCTION

Defining the relationship between individuals and the state necessitates delineating the boundaries of their respective rights and responsibilities. Constitutional law serves as the framework for establishing these boundaries, acting as a foundational mechanism for the social contract between the government and the members of society.

This paper does not aim to explore the intricate details embedded within various constitutions. Instead, it examines constitutional law's overarching principles and essence, highlighting its indispensable and fundamental tenets. While the organisation and distribution of power and the

concept of sovereignty represent pivotal aspects of constitutional law, their manifestations differ across nations. This diversity, however, falls outside the scope of this discussion.

Ernest de Sarzec (1832-1901) discovered the world's oldest constitution during his archaeological excavations in ancient Sumerian places in south Iraq, dating back approximately 4,300 years. This artefact is attributed to Sumerian king Urukagina of Lagash and is among the earliest known texts on constitutional legislation. It delineates the rights and responsibilities of citizens and the government, the relationships between rulers and the governed, and the governance frameworks, administrative structures, and powers (Black, 2006).

Subsequently, prominent legal codes addressing state sovereignty emerged, such as the Code of Ur-Nammu of Ur (2050 BCE), the Code of Hammurabi of Babylonia, the Hittite Code, the Assyrian Codes, and the Mosaic Law. Cyrus the Great of Persia issued the Commandments of Cyrus (529 BCE). In 621 BCE, Draco introduced the austere laws of the city-state of Athens, which were later revised into the Solonian Constitution by Solon in 594 BCE. Aristotle formally distinguished between law and constitution in 350 BCE.

In Ancient Rome, constitutional law was termed "Constitution," later adapted by the Popes as Canon Law. The Codex Theodosianus (438 CE) by Emperor Theodosius II and Justinian's Codex (534 CE) laid the foundations of modern European law. Similarly, Japan's Prince Shōtoku issued a legal code inspired by Buddhist ethics in 604 CE. In the Islamic tradition, legal principles emerged in 622 CE during the first year of the Hijri calendar, with the Medinan Constitution forming a basis for societal governance.

The *Gayanashagowa Law*, known as the "Great Law of Peace," was established between 1090 and 1150 among the major tribes of Native Americans in North America. Similarly, the *Magna Carta Libertatum*—or the "Great Charter of Freedom"—was signed in 1215 by King Henry III of England. This pivotal document transitioned the English monarchy into a constitutional system, compelling the monarch to adhere to the rule of law over personal will. A significant provision of the Magna Carta prohibited the king or any authority from imprisoning, exiling, executing, or confiscating property without due legal process (Bijan, 2018).

In 1240, Egyptian scholar Abul-Faza'il Qebti synthesised Torah precepts and Byzantine legal principles to compile a legal code. This evolved into a constitutional framework in Ethiopia by 1450. Meanwhile, *Leges Statutae Republicae*—the constitution of San Marino—was written in Latin in 1600, making it one of the world's oldest active constitutions. Similarly, the *Fundamental Orders of Connecticut* (1639) marked one of Western history's earliest concrete constitutional documents.

The *Age of Enlightenment* in the 17th and 18th centuries brought significant advancements in legal philosophy. Thinkers such as Denis Diderot, François-Marie Arouet (Voltaire), Jean-Jacques Rousseau,

Montesquieu, and Immanuel Kant influenced political thought and constitutional development. Their ideas shaped foundational legal frameworks, notably the United States Constitution (1788), heavily influenced by the writings of Polybius, John Locke, and Montesquieu. This era witnessed the compilation of modern, impactful constitutions that embodied rationalism and the principles of justice and governance.

The consolidation of a constitution is contingent upon its stabilising principles. Montesquieu's conceptualisation of the Constitution and similar perspectives excluded the tasks of amending, interpreting, and revising constitutional principles from parliamentary responsibilities. This exclusion ensured that constitutional amendments could not be altered through ordinary legislation or government arrangements but only through the ratification of a constituent assembly or a referendum (Pangle, 1973).

During the Medieval period, ecclesiastical rule and religious fanaticism led to the imposition of societal religion as a divine mandate. This provoked an antithetical response within the church, advocating limitations on ecclesiastical authority. Though supportive of the church's promotion, John of Salisbury criticised its misuse of power and called for reform (Coleman, 2000). He advanced the sovereignty of law, asserting that rulers acting against principles of justice and law should be restrained. While opposing rebellion against kings, he emphasised adherence to social discipline, marking a step toward constitutionalism.

In the 13th century, Saint Thomas Aquinas further separated politics from religion, harmonising logic and faith to ensure Christianity's endurance and a thriving European political landscape (Coleman, 2000). He tried to conciliate logic and religion and coordinate religious and social principles in a way that both Christianity endures and a more brilliant political world for Europe came into existence. Drawing from Aristotle (384–322 CE), Marcus Tullius Cicero (106-43 BCE) and Saint Augustine, Aquinas argued for the coexistence of reason and faith, asserting that natural law integrates both without conflict (Brown, 1967). He classified laws hierarchically: **divine law** as supreme and eternal, grounded in divine rationality; **natural law**, encompassing creation and its inherent principles; prophetic teachings; and, lastly, traditions derived from human experience. Practically, these philosophical underpinnings constrained sovereign power, defined the scope of individual rights, and culminated in the development of constitutional frameworks.

The philosophy underlying constitutional frameworks is encapsulated in principles that effectively delineate the boundaries of governmental sovereignty (Bijan, 2018). Proponents of *étatism*—the doctrine emphasising the supremacy of state authority—frequently diverge from these principles. In contrast, the *dirigisme* approach advocates for constraining government powers and providing strategic guidance for governance.

This study seeks to elucidate the fundamental principles of constitutional law concisely. While these principles are embedded in constitutional documents, this paper reinterprets them through the lens of Islamic Sufism, offering a unique philosophical perspective. Key concepts, including popular sovereignty, limitations on power, accountability of governing bodies, the separation and independence of powers, the balance of authority, central government supremacy, legal transparency, adherence to legal norms, and the mechanisms of checks and balances, are critically examined. The reinterpretation challenges traditional understandings, inviting readers to reconsider these principles through the ethical and spiritual framework provided by Sufi thought.

2. METHOD

This study adopts a conceptual framework to examine the foundational principles of constitutional law through the lens of Islamic Sufism, precisely its theosophical and mystical dimensions. Rather than employing experimental methodologies or hypothesis testing, this approach emphasises interpretative analysis and reflection on existing legal doctrines, exploring their spiritual and philosophical underpinnings within the Sufi tradition. This qualitative inquiry seeks to analyse legal constructs through a theoretical lens rooted in Islamic mysticism.

The primary data sources for this research consist of classical Sufi texts and teachings, including seminal works by figures such as al-Ghazali, Ibn Arabi, and other influential Sufi scholars. These texts provide insight into the core tenets of Sufism and Islamic mysticism. Additionally, modern constitutional texts are utilised to contextualise the discussion within contemporary frameworks of constitutional law, encompassing the constitutions of relevant nations.

Secondary sources include academic literature, such as books, peer-reviewed journal articles, and interdisciplinary studies that examine the interplay between constitutional law, spirituality, and Islamic governance. The research methodology predominantly involves desk-based research or a comprehensive literature review. Data is analysed using qualitative methods to uncover the symbolic meanings and ethical values embedded within constitutional principles. Key analytical techniques include:

1. Conceptual Analysis: Investigating core legal concepts such as popular sovereignty, separation of powers, and checks and balances from a Sufi philosophical perspective, offering more profound and metaphorical interpretations.
2. Theoretical Comparison: While the study focuses on Sufism, comparative analyses with other mystical traditions, such as Gnosticism, are proposed to identify parallels and divergences in spiritual and legal philosophies. Through these methods, the study seeks to establish a synergistic relationship between constitutional law and spirituality, integrating moral and ethical

considerations envisioned by Sufi teachings. This innovative approach aims to enrich the academic discourse on constitutional law by embedding it within a broader spiritual and justice-oriented paradigm.

3. FINDINGS AND DISCUSSION

3.1. People Sovereignty Principle

The social contract, conceptualised as a covenant between society and government, establishes the ruler as the representative and advocate of the people. In this arrangement, individuals relinquish certain rights to the government in exchange for governance and societal order. Noor Ali, the Master of the Gonabadi Sufi Order, elaborates on the concept in his article *Covenant with the Government* (2002), stating:

"The term 'covenant,' appropriately chosen, warrants a precise definition." He references Article 183 of the Civil Law, which defines a contract as: *"A mutual agreement in which one or more individuals commit to acting for another, based on mutual consent."* While ordinary agreements between individuals are referred to as "contracts," a "covenant" applies to commitments of a higher order, such as agreements involving nations or governments or those with profound significance—akin to international conventions, including human rights treaties (Bijan, 2011).

The agreements signed by the Holy Prophet (PBUH) with the idolaters of Mecca were not mere individual contracts. Still, they represented pacts between two distinct communities: the Muslim ummah and the Meccan idolaters. The term "covenant" is employed in the Quran to describe such agreements, as seen in verses like: *"Except to reach a people between you and them is a covenant"* (An-Nisa, 90) and *"If he belonged to a people with whom you have a covenant"* (An-Nisa, 92).

In instances where the subject of an agreement or promise holds profound significance, the Quran again employs the term "covenant," as in: *"Because they broke their covenant, We cursed them and hardened their hearts"* (Al-Maidah, 13) and *"Those who break Allah's Covenant after ratifying it"* (Al-Baqara, 27). Moreover, when an agreement involves a binding commitment on one party or an obligation on the other, it is also called a "covenant." For example, *"And [recall] when We took from them [the Prophets] a solemn covenant"* (Al-Ahzab, 7) and *"And We commanded them, 'Transgress not on the Sabbath,' and We took from them a solemn covenant"* (An-Nisa, 154). From these examples, it is evident that the term "covenant" signifies an agreement of substantial importance within the Quranic lexicon and Persian literary tradition. This importance derives either from the parties' status or the unique and serious nature of the commitments specified within the agreement.

The fulfilment of ordinary promises is a fundamental criterion of piety and a condition of faith, as highlighted in the Quran: *"Successful indeed are the believers… and those who keep their trusts and covenants"*

(Al-Mu'minun, 1-8). However, the priority given to fulfilling major covenants underscores their broader significance. Beyond the two immediate parties to a covenant, its fulfilment often benefits other stakeholders indirectly affected by it.

In Islamic ethics, the importance of honouring commitments is emphasised to such an extent that even covenants made with idolaters are deemed binding: *"Except those of the idolaters with whom you have a covenant and have not subsequently failed you in anything… so fulfil their covenant to them for the end of their term. Surely Allah loves the pious"* (At-Taubah, 4). Here, fulfilling covenants—even with idolaters—is presented as a hallmark of piety, while the Quran strongly condemns the breaking of agreements in multiple instances.

Given this context, applying the term "covenant" in the title of the discussed report is appropriate and precise. Ultimately, the sovereign body—understood in its general sense rather than limited to governmental institutions—is positioned as the entity bound by such covenants with the people.

As a fundamental pillar and integral component of the sovereign body, the government is responsible for fulfilling the obligations outlined in this covenant. This covenant holds a significant and exalted status, primarily due to its grounding in the people's central role as one of its key parties. Article 56 of the Iranian Constitution states: *"Absolute sovereignty over the universe and humanity belongs to God, who has entrusted humanity with the ability to govern their destiny. No one can usurp this Divine right from an individual or transfer it for the benefit of another person or group. The nation exercises this Divine right through mechanisms outlined in subsequent principles."*

Grounded in the doctrine of national sovereignty and the belief that individuals act as God's representatives on earth, the people form a covenant, with God on one side and the sovereign body on the other. Through this agreement, the people delegate the execution of their sovereign rights to designated authorities, who act as their representatives. Under this framework, all authorities, from the highest-ranking officials to subsidiary organisations, must act within their defined mandates and uphold the covenant with the people.

No authority has the right to exceed its prescribed duties, engage in actions beyond its jurisdiction, or neglect its responsibilities. Any deviation or misconduct by individuals or institutions must be addressed by appropriate oversight bodies to mitigate any detrimental consequences. However, should the governing body collectively violate the covenant, they would fall under the condemnation of the Quranic verse: *"Those who break Allah's Covenant after ratifying it"* (Al-Baqara, 27). Repeated transgressions may even justify the people's right to act in defence of their covenant, including measures against the ruling body's authority.

The Preamble of the Universal Declaration of Human Rights, which Iran's government has endorsed, emphasises that protecting human rights through a legal framework is essential to prevent

individuals from resorting to rebellion as a final remedy against oppression and tyranny. This foundational principle cautions governments against violating the agreements established with their citizens and against tyranny, oppression, and lawlessness. Conversely, it recognises the people's right to resist when such agreements are broken.

Early Islamic history formalised this covenant between the ruler and the people as *Bay'ah* (an oath of allegiance). Through this process, the Caliph publicly committed to fulfilling specific duties toward the people, while the people pledged obedience in return. The Quranic injunction reflects this mutual obligation: *"Obey Allah, obey the Messenger, and those in authority among you"* (An-Nisa, 4:59). This oath was taken seriously, binding both parties to their respective commitments.

For example, after the assassination of the second Caliph and the establishment of a council, *Bay'ah* was proposed to Ali (AS). However, he declined the oath under the condition of adhering to the precedents set by his predecessors (the two Sheikhs). Ali (AS), despite his divinely ordained guardianship, believed he was obligated to honour the commitments of the *Bay'ah*. His refusal to compromise on this principle led to his not being appointed ruler.

In contrast, Othman accepted the *Bay'ah* with similar conditions but later violated them after assuming power, leading to widespread dissatisfaction and eventual rebellion. The rebellion against the third Caliph arose from the belief that he had deviated from the terms of the *Bay'ah*, thus justifying the people's withdrawal of their allegiance. While his assassination stirred controversy, the initial reasoning for the uprising was based on the perceived breach of covenant.

In modern liberal democracies, this concept of a covenant between the ruler and the governed finds its parallel in the constitution. The constitution represents a formalised agreement wherein the people, through their approval, collectively agree to adhere to its principles. Any individual or official appointed to a position of power is expected to fulfil their duties within the bounds of the Constitution.

3.2. Power Restraint Principle

This principle originates from the foundational concept of public sovereignty. Governmental authority is established through constitutionally defined parameters, emphasising the necessity for governance to align with the people's will as enshrined in the Constitution. The government operates within these constraints to uphold this framework.

In the article *"Separation and Independence of Powers Derived from National Sovereignty"* (Tabandeh, 2002), the author notes an intriguing synthesis of two historically contrasting theories:

1. The *Theory of Divine Sovereignty*, dominant during the pre-Renaissance period under ecclesiastical influence, asserted that rulers derived their authority from divine providence.
2. The *Theory of National Sovereignty* views popular consent as the basis for governmental legitimacy,

wherein the electorate directly or indirectly delegates authority to representatives.

Article 56 of Iran's Constitution encapsulates this integration, proclaiming that "absolute sovereignty over humanity and the universe belongs to God" while affirming the people's God-bestowed right to self-governance. The text emphasises that any individual or group cannot usurp this right and must be exercised according to constitutional principles.

The principle also counters modern juristic theories that dismiss the will of the people as independent from divine authority, instead framing individuals as stewards of divine rights. Moreover, the Constitution strengthens this framework by labelling any encroachment upon this sovereignty as an infringement of divine law, elevating the principle beyond mere legal protection to a moral imperative.

Though universally acknowledged across legal systems, the practical application of this principle varies, often leading to meaningful debates over what constitutes a violation of sovereignty. These discussions underscore the necessity for clarity in defining governmental actions aligning with or contradicting the principle, ensuring effective implementation across diverse legal traditions.

The power restraint principle is established within the constitutional framework to systematically regulate and limit the formation of organisations, powers, and their respective authorities. This principle ensures governance operates within predefined legal boundaries. As Tabandeh (2002) states:

"The people should be informed about the affairs of any circumstances. They should know different beliefs to reject the false, follow the truth, and strengthen it. According to the command in verse 9 of Surah Al-Hujurat, it is stated: 'And if two parties or groups among the believers fall to fighting, then make peace between them both. But if one of them transgresses against the other, then fight against the one that transgresses until it complies with the Command of Allah' (Al-Hujurat, 9)."

This perspective emphasises that individuals must actively engage with ideological debates and contradictions, evaluate political leaders' actions (not merely words), and advocate for the just cause. Active participation by the people is presented as not only necessary but obligatory. This civic engagement is regarded as a precursor to influencing collective destiny and is framed as a moral imperative that cannot be dismissed. People's intervention in political discourse and decision-making is integral to sustaining justice and ensuring alignment with constitutional and divine principles.

3.3. Ruling Body's Non-Exculpation Principle

According to this principle, all authorities within the ruling class are subject to the law without exception. They are both accountable to the law and must act in a manner that reflects responsiveness to it (Tabandeh, 2002). Tabandeh (2002) argues that the power of a dictator must not be confused with the legal authority of a ruler. Legal authority stands in direct opposition to the arbitrary power of

dictatorship. While dictatorship undermines individual freedoms, the rule of law safeguards the legal rights of individuals and represents the ultimate expression of a nation's sovereignty.

The law must govern all individuals equally, without favouritism or discrimination. Historical accounts from the early years of Islam demonstrate this principle in practice. After the canonisation of legal matters, the Prophet Muhammad (PBUH) adhered strictly to the law and ensured its equal application to all, including himself. This unwavering commitment to equality before the law is reflected in the design of the Iranian Constitution. Article 112, inspired by this foundational principle, explicitly states: "The Leader or members of the Leadership Council, like all other individuals, are equal before the law."

Furthermore, no negligence or superficiality is permissible in law enforcement. To ensure decisive implementation, relevant authorities must have adequate legal power. However, such power is circumscribed by significant responsibility and must be exercised strictly within constitutional and statutory law limits. No single individual or group should monopolise power or exceed constitutional boundaries. Instead, all authorities must act within their designated scope of competence, impartially enforcing the law without fear of external influence or intimidation.

The historical development of the theory of the separation of powers and its role in structuring and distributing the primary responsibilities of governance can be traced back to Aristotle and Plato. In his seminal work *Politics* (Aristotle, 1970), Aristotle was the first to define the three branches of power. However, Aristotle's conceptualisation of these powers differs significantly from the framework formalised in contemporary constitutions. The functions of these powers were discussed within the context of the Greek theosophists' prevailing philosophical and political methodologies. Notably, the most compelling aspect for modern jurists and political theorists is that the principle of the separation of powers is rooted in the intellectual advancements of the 17th and 18th centuries. The natural law tradition, exemplified by jurists such as Hugo Grotius (1583–1645), played a pivotal role in delineating the responsibilities and authority of political entities (Campbell, 2001).

Samuel von Pufendorf (1632–1694), another prominent figure, identified a set of fundamental functions or powers for the government (Took, 1719), including:

1. Legislative authority
2. Establishment of enforcement mechanisms to ensure compliance with the law
3. Judicial power
4. Management of war and peace, including the negotiation of international treaties
5. Taxation and revenue collection
6. Appointment of ministers and their subordinates
7. Regulation of public education.

The division of such duties was perceived as conflicting with established rulings because, according to this perspective, a central authority or apparatus is deemed essential to maintain a necessary connection between various responsibilities and affairs. This ensures that the coordination vital for sustaining sovereignty is maintained. Jean Bodin (1530–1596) identifies five or six manifestations of sovereignty (Franklin, 2006), yet he firmly asserts that freedom is indivisible. He views legislative power as the paramount authority, with other expressions of governance derived from and subordinate to it, consolidating under the overarching influence and supervision of the legislative branch.

On the other hand, John Locke advocates for the separation of powers into three distinct branches: legislative, judiciary, and federative. According to Locke, the federative power is responsible for declaring war, negotiating peace agreements, and handling international treaties—functions contemporarily attributed to the executive branch. Notably, Locke excludes judicial power from his discussion, as he considers adjudication to lie outside political processes and power dynamics.

In *The Spirit of Laws*, Montesquieu elaborates on the principle of separating legislative, judiciary, and executive powers. Influenced by his study of England's political institutions, particularly the ideas of John Locke, Montesquieu's theory significantly shaped the development of the U.S. Constitution in 1787, the French Constitution in 1791, and the Norwegian Constitution in 1814. Montesquieu posits that all forms of authority inherently require limitations because power, by its nature, tends to overreach. To prevent abuses of power, he advocates for a system in which power counterbalances power, achieved through a rigorous separation of functions and authorities.

Conversely, achieving unified sovereignty necessitates centralisation and coordination. This perspective underscores the importance of structuring governance to ensure harmony between various apparatuses while safeguarding against fragmentation. Montesquieu distinguishes between moral, religious, and political piety in his book *The Spirit of Laws*. By political piety, he refers to patriotism and egalitarianism. He underscores the importance of laws that safeguard and ensure freedom while preventing the abuse of power against citizens. According to Montesquieu, these laws serve as the fundamental guarantees for the sustainability of political systems and embody the principles of patriotism and equality. Consequently, the institutionalisation of freedom within the legal framework becomes essential. In other words, establishing freedom in law and drafting a constitution grounded in liberty contribute to achieving a stable political system, fostering patriotic unity, and ensuring equality among citizens.

Montesquieu also highlights other factors, such as a nation's culture, traditions, customs, climatic conditions, religion, history, and cultural heritage—collectively called the "national spirit." He asserts that legislation must consider this national spirit, as ignoring it would result in an unstable and

inefficient political and legal system. Furthermore, Montesquieu argues that a people's identity and national spirit cannot be rapidly or comprehensively transformed through laws and politics alone.

He also maintains that societal improvement depends on respecting individual freedom and behaviour, provided such behaviour does not harm others. In contrast to Hobbes' perspective, Montesquieu views the head of government as an executor of laws rather than their creator. He emphasises that the right to national sovereignty, represented by a parliament elected by the people, takes precedence over the government and judiciary powers (Tabandeh, 2012).

In this context, His Holiness states (Tabandeh, 2012): "The principle of Separation of Powers has been enshrined in the Constitution of the Islamic Republic of Iran. For the first time, this framework introduces an additional authority to the traditional triad of powers, namely, the Guardian Council, which functions as a safeguard against the unrestrained sovereignty of the legislative power (as understood in classical law). Although some argue that the principle of Separation of Powers is a modern concept, Islamic traditions, particularly within the Shiite school of thought, clearly incorporate this idea—especially regarding the independence of the judiciary and its detachment from government and politics.

Islam, particularly the Shiite school, is so comprehensive and adaptive that it can address human challenges in every era within its high moral and spiritual objectives. Even orientalists and jurists, despite their frequent critiques of Islam, are compelled to acknowledge the validity of this theory. Recognising and validating cultural practices and traditions—provided they do not conflict with the core principles of Islamic monotheism—and the ongoing openness of *ijtihad* (independent juristic reasoning) are two vital avenues for progress. These factors ensure the dynamism and richness of Islamic law, extending to its social, political, and economic dimensions.

This dynamism enables the consistent satisfaction of societal needs and represents the continuation of the revolution's noble movement. In practical terms, this continuity can be interpreted as "government policy," which, by its nature, seeks innovation and drives the progressive elements of society. Governments must avoid complacency and the maintenance of existing conditions; instead, they should strive to achieve higher ideals for humanity. They must continuously advance the development of society toward an ideal future, meeting its social and economic needs more effectively each day. Governments should avoid fostering unnecessary or excessive demands and, conversely, should encourage beneficial spiritual and material aspirations that promote societal progress. This approach prevents stagnation and passivity, ensuring that society remains dynamic and oriented toward growth and evolution.

3.4. Independence of Powers Principle

From the theory of Separation of Powers, two distinct approaches—absolute and relative separation—are conceptualised. The absolute separation of powers refers to the complete non-intervention of the three branches (executive, legislative, and judicial) in each other's domains. Proponents of this view argue that such a division ensures a balance of power. However, critics contend that absolute separation is neither practical nor realistic because it is impossible to establish precise and clear boundaries between the actions of the executive and legislative branches. Additionally, all three branches share a common foundation: national sovereignty. Thus, each branch can only progress with the others' development. Furthermore, practical considerations do not necessitate severing the natural connections between institutions. This perspective supports a power cooperation model, often called relative separation of powers.

In the framework of relative separation, the three branches are viewed as distinct manifestations of a unified political sovereignty, with separation as a means to allocate responsibilities. However, this division must be implemented to prevent the concentration of power in a single entity while also ensuring it does not hinder the effective exercise of sovereignty.

In systems characterised by absolute separation of powers, the president is directly elected by the people and assumes responsibility for executive authority. At the same time, the legislature is composed of representatives similarly chosen by the electorate. These two branches operate at an equivalent level of authority and mutual independence, with neither empowered to terminate the tenure of the other. Maurice Duverger describes such regimes with the following principles:

1. Each branch functions professionally within its jurisdiction, without interference from the others.
2. Legislative authority exclusively enacts laws, while the executive implements them and may issue supplementary regulations (e.g., ratifications, decrees, or circulars).
3. Governmental entities operate autonomously without hierarchical relationships or mutual subordination.

In contrast, regimes with relative separation of powers emphasise interaction and collaboration between branches. Legal and political mechanisms enable these branches to remain distinct yet interconnected, ensuring collective sovereignty. In such systems, governmental duties are not entirely segregated but shared across institutions, fostering interdependence. Three core principles underpin this framework:

1) Governmental duties must be categorised, with each distinct function assigned to a specialised entity.
2) Unlike absolute separation, these entities may share overlapping responsibilities.
3) Each branch must possess mechanisms to influence and check the others.

A cornerstone of the separation of powers doctrine is the judiciary's independence, which safeguards the impartial application of law. Judicial autonomy is paramount, ensuring alignment between legal frameworks and their execution.

In the direction of this very discussion as the condition for endurance and stability of the country, it is said that (Tabandeh, 2012): "Independence should not be meant as autonomy, because every individual and authority has a responsibility to the society even if having perfect independence, and no one can shrink his responsibility with the excuse of independence, or counts himself as an exception from monitoring and controlling. The second point is that independence comes when no authority or ruler, even within the judiciary power and even its head, can change a judge or discontinue his job without proving his delinquency or fault.

If the judge's credential is to be related to an individual decision of a person, and without a court judgment, he will never be safe. There is no difference if we call this individual a minister, the head of a high judiciary council, or the head of judiciary power; anyhow, the judge is not safe in such a system. The danger of secession and replacement is above his head like the sword of Damocles, and the way of penetration is completely open …" (Tabandeh, 2012)

3.5. The Balance of Powers Principle

Montesquieu articulated the principle of the *Balance of Powers* alongside the *Separation of Powers* in *The Spirit of Laws*. The primary objective of separating powers is to establish equilibrium among them by allowing one branch to check and limit the influence of another. This balance ensures that no single branch becomes dominant or overly independent, ultimately contributing to societal stability.

The legislative power must remain distinct from the executive power. If the executive dominates, it could exploit its authority to manipulate the legislative process, legalising its actions and potentially fostering systemic corruption. To prevent such overreach, the judiciary plays a crucial role in overseeing the executive's implementation of legislative mandates. In some constitutional systems, specific mechanisms are instituted to balance these powers. However, these measures may inadvertently disrupt the equilibrium they aim to maintain by introducing complexities in power regulation and adjustment (Tabandeh, 2012).

In this context, the judiciary's role in democracies is particularly significant. As noted by Tabandeh (1976):

"Although the separation and division of ruling authority into the three branches—judiciary, executive, and legislative—are, to some extent, inherent to the nature of governance, all three branches originate from a singular source in dictatorial regimes. Montesquieu was among the first to define the necessity of their separation explicitly. According to democratic theorists, legislative power must be independent to safeguard societal security." The

duties of legislative power and its role in a democratic system can be extracted from this division, and the conclusion derived from it is as follows:

Preserving Existing System

A modern society should be in a state of gradual transformation, addressing deficiencies or failures as they arise to eradicate them. Consequently, the executive and legislative branches are empowered to address these shortcomings and, when necessary, amend laws, including the Constitution, in response to evolving societal needs. However, in contrast to this transformative and progressive role, the judiciary maintains stability by preserving the existing legal and institutional framework.

The judiciary's responsibility is to uphold the constitution and enforce established laws with impartiality, neutrality, and unwavering commitment to its oath, refraining from political advocacy or external influences. While politics, embodied by the legislative and executive branches, represents change and innovation, justice, represented by the judiciary, symbolises stability and security.

Historically, the judiciary has not initiated coups d'état but has consistently resisted attempts to undermine constitutional order. In contrast, such disruptions typically originate from the executive or legislative branches. This dynamic was evident during the French Revolution, which sought to dismantle the ancien régime. One of its initial actions was the dissolution of the old parliament, including courts that had issued general verdicts with binding authority for future cases.

The judiciary's reputation for loyalty to the existing system and its perceived resistance to revolutionary change initially rendered it suspect. However, this adherence to principle later earned the judges renewed trust, leading to their reinstatement and subsequent role in safeguarding the newly established system, which had become the prevailing order.

The responsibility of ensuring the judicial system's integrity has been a central function across various governance models worldwide. This holds regardless of whether the government operates under democratic, dictatorial, monarchical, or republican systems. In this context, Maurice Duverger, a renowned constitutional law professor, offers a compelling observation. He notes: "For the French, it is surprising when he hears that there is a monarchy regime in Belgium and the prime minister of that country (Van Aker, the prime minister after the 2nd World War) says: this regime is as necessary as bread and the monarch is as respectful as the family for the people, or that, in England the king is reigning over the people that the responsibility for his actions is on the shoulders of his ministers. He adds that this regime is rooted in the belief that it is necessary and interdependent and that "it is not probable that the king does a bad action. He is sacred and not removable. All the goods come from him." And then, following the responsibilities of the ministers, he adds to the above discussion that: "…. at the time of anger and rage of people, ministers with their responsibilities are acting in fact as a veil against, and protect this holy authority from the aim of people's rage and anger, and vice versa, they are removed at

necessary times so that the people can show the signs of gratitude and dignity to him, and oh if they act against it." This protective function of judicial power has historically played a pivotal role. Two historical examples underscore its significance. During the German occupation of Belgium in World War II, the Belgian Council of Ministers and most of the parliamentary representatives fled abroad, illustrating the judiciary's resilience and adaptability in safeguarding national stability.

Decisions were made by the Free Belgian government as if they were the legitimate governing body of Belgium and were broadcast over radio stations in London and Paris. Within Belgium, King Leopold and a council of ministers imposed by the Germans also made decisions under considerable pressure from German military forces. The Belgian judiciary recognised the Free Belgian government as the legitimate authority and deemed King Leopold's decisions illegal. It is said that akin to the way the army and civilian support, driven by national patriotism, secured victory in the war, the judiciary preserved the stability of the country's regime and safeguarded the monarchy. If Belgium had allocated its entire budget to military expenditures, it would not have been able to withstand the Nazi forces, given the limited size of its official army. The judiciary empowered the populace by fostering a sense of stability and security. In Belgium, the judiciary and official and unofficial military forces ensured victory and the preservation of the regime—not simply armaments. By promoting a collective belief in stability, the nation became an informal army, and homes were transformed into defensive strongholds.

Swiss lawyer Professor Miliand also authored an article criticising Hitler during World War II. This provoked a strong reaction from the German government, which accused Switzerland of violating its neutrality. However, the judiciary responded by condemning Professor Miliand's work, asserting that "legalistic arguments that undermine the vital interests of the nation and its neutral status, which is the foundation of the existing regime, are not accepted." This judgment ultimately helped prevent the German occupation of Switzerland.

People Security

Influenced by the ideas of liberal philosophers in the 18th century, particularly Montesquieu, the principle of separating a country's powers into legislative, executive, and judicial branches, along with their independence, became a cornerstone of democratic governance. In line with this principle, legislative responsibilities were assigned to the legislative branch. George Ripert asserts that the parliament is a surrogate of absolute power, but this surrogate exacerbated tyranny and consolidated power even more than previous autocrats.

Although Louis XIV famously proclaimed, 'I am the state,' he never overstepped into personal matters such as intimate relationships or regulating family size. However, his surrogate institution, the Parliament, perceived itself as inherently entitled and unrestricted in its ability to enforce detailed regulations governing all facets of individuals' lives. Ripert further comments, 'It is absurd to equate the

proliferation of regulations with progress. Yet, we have taken a path that runs counter to the objectives of the Great Revolution of 1789. Our predecessors believed that a few fundamental principles in the law were sufficient to guide society. At the same time, we are under the misconception that an abundance of detailed laws can foster genuine freedom.'

Ripert's analysis highlights that the power and independence of the judiciary are essential for safeguarding individual rights and represent a foundation of freedom. In this regard, all regimes contain a judiciary; when it possesses power and independence, it can protect the populace and check against potential overreach by the legislative branch—within reasonable limits. In some systems, such as the United States and India, the judiciary can nullify laws that contravene the Constitution. However, such judicial oversight does not extend to laws in France and comparable nations.

Alarm Duty

An impartial judiciary effectively enforces the law and upholds the established system. When public dissatisfaction arises with the functioning of the judiciary, it indicates that the populace may no longer endorse the current legal framework. This is because judges serve as representations of the law in the eyes of the public. At such times, governmental bodies and political authorities must take notice and reform the system to ensure justice. Just as pain in the human body is an alert prompting an individual to seek medical attention, the judiciary has a similar role in signalling the need for reform and oversight.

Diminishing the competence and authority of the judiciary and redistributing these powers to other branches of government is akin to prescribing painkillers and sedatives to mask symptoms without addressing the underlying issue. Such an approach is unsustainable and will ultimately fail when a serious ailment arises, or the underlying problems are exposed. Proper treatment is essential; while pain relief may be necessary during the process, it should not be a substitute for addressing the issue's root causes.

4. CONCLUSION

The judiciary serves as a crucial laboratory for the development of legal science, offering practical insights that should inform the formulation of legislation. The law-making process must incorporate the expertise and experiences of a broad spectrum of professionals rather than being monopolised by a select few. Such exclusivity risks creating laws that generate unforeseen challenges in practical application. Three essential conditions must be met for the judiciary to function effectively: independence, authority, and effective governance. Judicial independence requires freedom from interference by the executive and legislative branches, ensuring that the judiciary can fulfil its responsibilities without undue influence. Its autonomy must be safeguarded, free from external control

that could compromise its precision and impartiality.

Additionally, the judiciary must possess sufficient authority to oversee and enforce laws nationwide, ensuring no legal matter falls beyond its jurisdiction. It must act as a robust guardian of justice, not a tool subservient to executive interests that could misuse its power. Effective management is equally vital to the judiciary's administration. Judicial appointments and promotions must be based on merit and adherence to regulations rather than favouritism or personal connections. This ensures the advancement of competent, impartial judges who can perform their duties with integrity and neutrality, even in challenging circumstances.

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