

Iranian Supreme Court procedures and the Violation of Doctrine of division of Powers

* Abolfazl AmeriShahrabi

Theory of State and Law at Yerevan State University Judge of criminal law in Iran

Abstract. Doctrine of division of power as a general rule has formed and expanded by Montesquien and Aristotle's idea. This rule has been accepted in article 9th of the constitutional law in Iran. According of that, Iran has three Powers: parliament, executive and juridical powers and none is allowed to interfere with the duties and authorities of another power, but according of article 11th in Iran's constitutional law, Supreme's judges in juridical procedure unity can make rule by the create the procedures. These procedures are binding for all court and juridical office in the similar causes. However, this method is a manner to act the rule and the lawyer believe it's a interfered of juridical power in parliament's duty and against the doctrine of division of powers, so the government should avoid to act rule by this way, but this article power that approval the rule and law by juridical power is necessary because when the parliament' codes are imperfect, antonym and obscurity and if we want to retort the rules to parliament again is a exclusive way and needs a long time. Also creating the binding juridical power has prospected by Iran's constitutional law and its one of judges' duty for interpretation the law.

Keyword: division of the power, act, Supreme Court, procedure.

1. Introduction

Now days, in many countries, exercise of authority by governments through distinct powers separated from each other and in most cases, states apparatus is divided to three legislative, executive and judicature.(1)Such a separation has a relatively long history and as a so called theory of division of powers, it has been the issue of discussion from the time of Plato and Aristotle up to the present time and philosophers like Montesquieu, Jean Jack Rousseau, John Lock and others each one somehow has endorsed this division and has considered it necessary for reformation of governments and establishment of individual freedom. From among these thinkers, influences of Montesquieu, French legal expert in 18th century detailed in his famous book, *The Spirit of the Laws*, have been more than others and in most countries have been positively received.(2) One of the important consequences of this theory is that if the legislative, executive and judicial powers are concentrated on one of the governmental powers or one person, no individual freedom will remain and the ground is prepared for dictatorship.*

Iranian legal system as well complies with this theory and in article 57 of the Constitutional Law, doctrine of separation of powers has been explicitly accepted and based on this each one of the country's three powers are prohibited from interference with other powers' affairs and none is allowed to interfere with the duties and authorities of another power and each power is obligated without encroachment and interference in other powers' domain of activities to do the duties to it is charged with according to the Constitutional Law. Thus, it is obvious that the powers will have no right to interpolate, call to account, appoint, dismiss or dissolve another power. Such independence in a country's governmental powers is called division of powers. It is obvious that the judicature power and law courts are not exception to this rule and

* Abolfazl Ameri shahrabi. Tell: 00989122941250 (Ameri); fax: 00986636235000

* With regard to relationship between freedom and doctrine of division of powers, in article 16 of Human Rights Declaration it has come: "Every society in which individuals' rights are not secured and division of powers has not been established has not a constitutional law."

they are only the executer of legal rules and regulations and cannot directly enact a new law or regulation. However, sometimes it is seen that the judicature by creating uniform judicial procedures called Decisions of Unity of Judicial Procedures establish an act which is as the law and this act seems to be interference of this power with other powers' affairs and in a sense it leads to unity of powers or at least the powers mixture. In this article, it is tried to address this issue from different aspects.

2. Position and description of judicial procedure

Amongst the legal sources **, judicial procedures in order to keep pace with developments and events in the society has a special position and today, in most legal systems of the world including Iranian legal system, it is referred to as one of the principal sources of the law, so as the extent of its effect and legitimacy may be even a crucial distinction point between Common Law legal system from other legal systems such as Roman and German laws. In definition of judicial procedure, it can be said that is "uniform legal and judicial method of law courts with regard to the legal issues repeated so many times that it can be said each time the courts of justice are faced with such issues, they again take the

Same decision.(3) In other words, judicial procedure is a custom and usage which prevails in courts of justice and its origin is the authority and power which is delegated to judges by the legislator for interpretation of the law. Judicial procedure is not a judgment that generated by judges' mind and as a result, their interpretations of law are expressed as judgment and verdict. In other words, judicial precedent includes a group of judges' decisions issued in legal issues and in all of them one solution is followed and they should not be confounded with the court's judgment which is issued by a judge at the court.(4)

In principle, the need for judicial procedure arises when the legislator in enactment of laws uses polysemous terms and words or members of parliament due to lack of care or proficiency regarding legal concepts enact the laws which unintentionally some ambiguities, flaws, shortcomings and contradictions have been caused in them and for this reason, they disable judges in taking the right course of action and in issuing the verdict. On the other hand, it is necessary that the courts' decisions to be based on articles and principles of the law, ** while modification of the law given the time distress and the need of society for new law, seems impossible, therefore the best way in such instances is that the judges to be bound according to laws and general legal principles to interpret the laws until the new law according to society's new requirements is enacted and since members of parliament are familiar with problems of people in the society, the solutions and approaches specified by them which emerge as judicial procedure can be closer to justice and more practical.

However, such practice is not specific to Iranian legal system and law enactment by judges and the judicial procedure is extensively and in advanced form in use. For example, the Common Law to which the term "judge-made-law" is given.*

3. Types of judicial procedure in Iranian law

Judicial precedents sometimes are created only as the voluntary judicial custom and in other cases as the binding law. Consequently, in terms of being binding, judicial procedures in Iranian legal system can be divided in to two groups:

3.1. Binding judicial procedure

According to Law of Unity of Practice Unity enacted in 1950: "whenever in the National Supreme Court, to similar cases different procedures are applied, at request of Minister of Justice or Chief of the National High Court of Cassation or the prosecutor general, Full Bench of the Supreme Court which in these cases is held with presence of at least $\frac{3}{4}$ of chiefs and counselors of the Supreme Court, the disputed subject is investigated and gives its opinion on the issue in question. In this case, the vote of the majority in the mentioned bench is binding for divisions of the National Supreme Court and for the law courts in similar

**Iran's law sources are : Islamic Jurisprudence, the law, custom, judicial precedent, and doctrine

**Article 166 of Iran's constitutional law

*judge-made-law

cases and will not change except as a result of new decision made by Full Bench of the National Supreme Court or enactment of new laws.” It is seen that if a judicial decision on a subject becomes a judicial procedure unity decision, from then on, like an act passed by the national assembly, it becomes binding and a law and all inhabitants of the country including domestic and foreign nationals, governmental and non-governmental offices, courts of justice, legal authorities both judicial and non-judicial should comply with it. Although contents of these decisions exert no influence in cases which in the past were investigated and were closed, but non-compliance with decisions of judicial procedure unity after announcement of Full Bench of the Supreme Court and its ratification is considered non-compliance with the law and its breaking and the excuse for its non-performance on the part of judge by arguing that he was not aware of it or did not consider it suitable and consistent with his view or saw it in contrast with the law will not be accepted and courts in study of claims should act according to precedent unity decisions. However, compliance of courts with opinion of the Full Bench of the National Supreme Court is not for the reason that they have been convinced of the Supreme Court’s argument, but for the obligation which is ordained by the law for the issue.

Thus, binding judicial procedures in Iranian legal system is the very decision of the Full Bench of the National Supreme Court which is produced and formed by holding a meeting. In most European countries, judicial procedures are result of years-long dialogue between jurists and experts in this field and this indicates weakness and defect of judicial organization and system in Iranian legal system.(5)

3.2. Non-mandatory judicial procedure

But, there is another type of judicial procedures the compliance with which is not compulsory and obligatory and has no definite boundary and does not involve the obligation in the binding decisions of unity of the Full Bench of the National Supreme Court.

Perhaps, the reason for creation of this type of judicial procedure is that judges always are inclined in addition to mastering the law and precedent unity decisions of the National Supreme Court to be aware of opinion and decisions of other judges and colleagues of theirs in the form of ordinary and normal practices in similar and parallel courts as well as opinions of high courts and if interested, to comply with them. Hence, in each court case, they compare their judicial issue and conclusion with practice and working way of other courts and often if they don’t have confidence in their view and opinion, they seek their colleagues’ fashion of working in other courts and this is known as non- mandatory judicial procedure.

One might assume this type of judicial procedure as a non-compulsory custom which is common and customary in law court and among judges. This type of judicial procedures is not equivalent to the law and their authority depends on judges’ opinion and society’s circumstances and laws’ situation and in a judicial complex or division of a district or town’s court or even throughout the country a particular practice for an issue may be in use without a legal obligation.(6) however, in Iranian law, judicial interpretation has been foreseen in the Iran’s Constitutional Law as a tool for discernment and administration of justice by resorting to which the judge brings legal actions and events to law laboratory and analyzes each legal event and phenomenon.

Now that we have become briefly acquainted with the way different judicial procedures have been formed in Iran, this question crosses the mind: “Is the issuance of judicial procedure unity decisions (of binding type) by Full Branch of the National Supreme Court as violation of doctrine of division of powers in Iranian legal system and interference of the judicature power with affairs of the legislative power?”

However, enactment of judicial precedent unity decision by the National Supreme Court from a thorough and meticulous view point is a kind of legislation and interference in the legislative power’s affairs.(7)

But in answering this question, it can be said that first, although enactment and passing the laws and regulations according to article 85 of the Constitutional Law is an authority specific to members of the parliament which cannot be transferred to others, according to article 11 of the Constitutional Law, setting rules in the form of judicial procedure unity decisions by Full Bench of the National Supreme Court has been officially recognized and is considered a legal action, because the Constitutional Law has given this right to the judicature power and judges of the National Supreme Court. Secondly, the Constitutional Law has provided for the executive power, which is charged with the duty to execute the laws passed by the parliament, the authority to ratify by-laws, circulations, and resolutions and delegation of such authority to

the judicaturel power would not cause a problem. Thirdly, between judicial interpretation on the part of judges and enactment of law, a distinction should be made and existence of judicial interpretation next to the law is a rational exigency, because the written law always involves some shortcomings and has to be resolved through judicial procedure. In fact, law interpretation should be part of the law itself and its complementary but on a distinct and independent stand. Fourthly, since the legislator is silent about enactment of judicial procedure and has no objection to it, he gives his consent to it and implicitly agrees with it.

4. Acknowledgement

First, Atfirst, I want to acknowledge ProfessorArturVagharshyan, Head of Chair of Theory of State and Law, Yerevan State University

Then, I want to acknowledge DrH. S. Stepanyan, guide instructor.

5. Reference

- [1] M. Cremona. Legal Method.4th Edition, London, 2006, p.62.
- [2] A. Mohtadi. The Spirit of the Laws. 6th edition, Amir Kabir Publication, Tehran, 1971, p.261.
- [3] N. katouzian. Naser. Philosophy of Law, vol.2, 1st Edition, Mizan Publication, Tehran, 2005, p.317.
- [4] G. Ripert, and J. Boulanger. Traite de Droit Civil d'apres le Traite de Planiol, T.I, Paris, 1957, p.224
- [5] N. katouzian. "Introduction to Law", 1st edition, Enteshar Publication, Tehran, 2000, p.485.
- [6] J. Madani. Judicial Practic, 10th edition, Paidar Publication, Tehran, 2008, p.33.
- [7] M. hashemi. Constitutional Law, vol.2, Mezan publication, Tehran, 1999, p.15.