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IRAINIAN SUPREME COURT PROCEDURES AND THE VIOLATION OF DOCTRINE OF DIVISION OF POWERS

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Today, in many countries, exercise of authority by governments through distinct powers separated from each other and in most cases, states apparatus is divided in to three legislative, executive and judicial powers[1].

Such a division has a relatively long history and as a so called theory of separation 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[3].

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 interpellate, call to account, appoint, dismiss or dissolve another power. Such independence in a country's governmental powers is called separation of powers. It is obvious that the judicial power and law courts are not exception to this rule and 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 judicial power by creating uniform judicial practices called Decisions of Unity of Judicial Practices 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.

Position and necessity of judicial practice establishment. Amongst the legal sources[4], judicial practice 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 practice, it can be said that judicial practice 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"[5]. In other words, judicial precedent 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 precedent is nothing but judicial and legal decisions 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 decision which is issued by president of a law court[6].

In principle, the need for judicial practice 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 practice 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 power is extensively and in advanced form in use. For example, the Common Law to which the term "judge-made-law" is given.

Types of judicial practice 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 practices in Iranian legal system can be divided in to two groups:

1/ Binding judicial precedent. According to Law of Unity of Practice Unity enacted in 1950: "whenever in the National Supreme Court, to similar cases different practices are applied, at request of Minister of Justice or Chief of the National High Court of Cassation or the attorney general, Full Bench of the Supreme Court which in these cases is held with presence of at least Ь 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 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 practice 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

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no influence in cases which in the past were investigated and were closed, but non-compliance with decisions of judicial precedent 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 practices 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 precedents 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[7]. And whenever like the law of Common Law countries, court decision due to its strength and evidence convince other courts' presidents to comply with it, then one can claim that judicial precedent is an efficient source in law, but if like what in Iran is the case, lower courts are compelled to obey and comply with decisions of higher courts, it seems that judicial precedent has not been accomplished and courts have issued a verdict by simply relying on the Supreme Court's decision for unity of practice which has become as the law like other instances where there is statutory and codified law, while they may sometimes not be satisfied and convinced with arguments and grounds of the National Supreme Courts and may disagree with it. A manifest example thereof is the precedent unity decision no.676 of 2005 by the National Supreme Court the issuance of which is against explicit content of article 3 of the Amendment Law of Holding Public and Revolutionary Courts. According to this law, proceeding for goods smuggling naturally falls within jurisdiction of the revolutionary courts located in crime place. Unfortunately, according to this decision of unity of practice, in regions where no revolutionary court is formed and existed, proceeding of goods smuggling cases is delegated to public and criminal courts, while in such instances, it was better the nearest revolutionary court to crime pace to be recognized as the competent authority in order to prevent any impairment and violence to inherent jurisdiction of courts and the parliament's statutory law. In this decision of unity of practice, it is clearly seen that a case investigation which falls within inherent jurisdiction of revolutionary courts, by decision of the National Supreme Court in the form of unity of practice has fallen within jurisdiction of another authority, i.e. public courts, and it seems to be beyond judges' interpretation of the law and is the same as the law enactment.

2/ Non-mandatory judicial precedent. But, there is another type of judicial precedents 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 practice or the very decisions of the Full Bench of the National Supreme Court.

Perhaps, the reason for creation of this type of judicial practice 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 precedent.

One might assume this type of judicial precedent as a non-compulsory custom which is common and customary in law court and among judges. This type of judicial precedents 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.

In non-mandatory precedent, judges make themselves bound to courts' previous best judgments and decisions. A manifest example of it is a petition which has not been signed by the petitioner and is submitted to the court, because the law is silent in this regard and no relevant precedent unity decision by the National Supreme Court has been issued. Most judges, given the prevailing custom in courts, reject this type of petition and this is as the non-mandatory judicial precedent. However, if president of a court contrary to this precedent, in court session, asks the petitioner to sign the petition or for correction and signature of the petition ha sends a written notification for him, legally, there is no problem with his decision, because he has acted against the non-mandatory precedent and there is no obligation for him. 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[8].

Now that we have become briefly acquainted with the way different judicial practices have been formed in Iran, this question crosses the mind: "Is the issuance of judicial precedent unity decisions (of binding type) by Full Branch of the National Supreme Court as violation of doctrine of separation of powers in Iranian legal system and interference of the judicial 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[9].

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 precedent 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 judicial power and judges of the National Supreme Court[10]. 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 judicial 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 prece-

dent. 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 precedent decision and has no objection to it, he gives his consent to it and implicitly agrees with it.

In the end, it can be concluded that in Iran, as is mentioned in previous sections, judges are charged with the duty that first, by reliance on articles and principles of the law to issue their verdicts and according to Iranian civil and criminal laws, a judge is not allowed for any excuse even for the law ambiguity to refrain from proceeding and administering of justice6. On the other hand, due to great extent, complexity and volume of people's relationships in society, prediction and specification of due actions for all relationships, actions and behaviors of people by the legislative power is impossible. It is here that the only legal solution for judgment based on article 73 of the Constitutional Law is law interpretation and a new judicial precedent in line with the codified laws should be generated and in this direction, the judges in Full Bench of the National Supreme Court in Iran by producing decisions of unity of judicial practices, apply their law interpretation authority which like the law is binding for everyone. Although this practice to some extent is in conflict with the doctrine of separation of powers and as far as possible, law formation through decisions of unity of practice and judges of the judicial power should be prevented, but it is the best way to follow in instances where the law has ambiguity, shortcoming and defect or is silent and brief. Because readjustment of the law by parliament is a very long process and in addition to this, due to lack of expertise with most of MPs it is still possible that they may again fail to compose and modify the right law according to society's requirements. However, the solution suggesting judicial practices made by judges through law interpretation which according to the Constitutional Law is permitted can be the best solution.

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[1] Marie Gremona, Legal Method, 4th Edition, J.W. Arrowsmith Ltd, London: 2006, p. 62.

[2] Montesquieu, "The Spirit of the Laws", translation by Akbar Mohtadi, 6th edtion, Amir Kabir Publication, 1971, p. 261.

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

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

[5] Katouzian, Naser, Philosophy of Law, vol.2, 1st Edition, Mizan Publication, 2005,p317.

[6] Report & Boulanger, Traite de Droit Civil d'apres le Traite de M. Planiol, T.I., Paris: 1957,p224.

[7] Katouzian, Naser, "Introduction to Law", 1st edition, Enteshar Publication, 2000,p485.

[8] Journal of the Capital Bar Association, no.13, Tehran, 2003,p11.

[9] Hashemi, Seiyed Mohammad, "Constitutional Law",vol.2, Tehran: Qom Higher Education Compound, 1999,p15.

[10] Article 214 of the Law of Criminal Procedure "… the court is bound to find the right judgment of each case in the law and in case there is no specific law about the case, by reliance on canonical sources or valid religious injunctions, to issue the case verdict and courts are not allowed on excuse of silence, defection, brevity, conflict or ambiguity of the codified laws to refrain from investigation of petitions, claims and issuance of verdict.

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Աբոլֆազլ Ամերի Շահրաբի
ԵՊՀ պետության և իրավունքի տեսության ու պատմության ամբիոնի ասպիրանտ

Իրանի իրավական համակարգը ուսումնասիրելիս կարող ենք գալ այն եզրակացության, որ դատական գործընթացներում որոշումների հաստատումը գերագույն դատարանի դատավորների կողմից համարվում է դատական իշխանության և դատավորների կողմից միջամտություն օրենսդիր իշխանության գործերին, ինչի հետևանքով առաջանում է իշխանության թևերի տարանջատման սկզբունքի խախտում: Սակայն այս փաստը պետք է դիտարկել դատավորների լիազորությունների և պարտականությունների տեսանկյունից, ինչի մասին մանրամասն ներկայացված է ԻԻՀ Սահմանադրության մեջ: Մեջլիսի պատգամավորները անուշադրության, իրավաբանական տերմիններին անտեղյակ լինելու պատճառով հաճախ այնպիսի օրենքներ են հաստատում, որ շփոթմունքի ու թյուրիմացությունների տեղիք են տալիս: Հետևաբար, կարելի է առկա խնդիրը լուծել դատավորների՝ տվյալ օրենքի մեկնաբանությունների հիման վրա: