

A comparative study of judicial independence in Iran and United States of America

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Abstract:

Judicial system is a reference which should take an action for general public rights realization and eliminate legal abnormalities by issuing various decrees, and its judges can bring powerful rulers to justice because of having committed crimes; so if they won't have enough autonomy, they can't have a fair judgment. One of the conditions of judicial independence principle objectification, is independence of judicial system set from other organs of government, by means of powers separation principle. The first goal of powers separation, is assigning specialized tasks of government to separate organs and systems consists of experts. For this purpose, judicial system is responsible for resolving claims and disputes as well as criminal penalties and prosecuted. One of the intended principles is providing judicial independence and also general jurisdiction of judicial system in order to addressing disputes and committed crimes in the community level. The third principle of fundamental principles is judicial independence that has also been mentioned. But unfortunately this issue have been violated in laws of the Islamic Republic Iran and United States of America due to the existence of quasi-judicial tribunals within agencies. Moreover, existence of special court for the clergy in Iran is a clear violation of judicial independence.

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Principle of judicial branch separation from the other powers of government is the first step in organizational independence of the judicial system and can be found in multiple principles of the fundamental laws of both countries. However, despite the recognition of separation powers principle and respect independence for judicial system, again we see interference of powers and other institutions in functions of judicial system in both countries. In addition to that, in order to provide judicial independence in desirable and intended means of that, providing independence and impartiality of judge's also is required. This means that judges ruled out only with regard to the law, justice and equity, and do not pay any attention to the orders and wishes of others, and finally from this independently behavior, won't fear from dismissal, downgrading the status and change the place of employment and jeopardizing their positions. This independence must be holistic, which means that judges must be independent not only within the judicial branch, and no person or authority shall not intervene in their votes and their decisions, but also outside the judicial branch and from no authority and office or other governmental entity and even public interest and thought should not be the slightest effect on his normal and impartial judgment, but rather should always consider justice, equity, law and human rights. In addition to these two concepts, magistrate also should observed impartiality within their and has the internal autonomy.

Keywords: judicial independence, separation of powers, the Islamic Republic of Iran, the rule of law, judicial system, United States of America

**Introduction:**

Throughout political history, from beginning of ideas development regarding to identify special triple task government and necessity of separate them from each other and leaving them to each autonomous bodies, to their evolution and to achieving opinions about monitoring and balancing and the need for cooperation of three branches, theorists and lawyers have always considered a very important and critical place for the judiciary. This means that in addition to identification judicial branch as an independent branch along with other powers, this system must entitled from such respect and independence against any official and system, so avoid from any abuse and leveraging¹. Based on conducted recent studies all over the world, it can be generally expressed that the principle of judicial independence is one of the most important principles recognized by the constitution of the transition countries. But the issue that is raised here and cause lack of providing desirable judicial independence, is to discuss how to implement regulations that have been enacted in order to respect the independence of the judiciary; For example, how to select qualified and competent judges in first stage and in its later stages, how to promote appointment and dismissal of judges based on meritocracy principles or amount of providing financial independence of the judiciary and allocation of sufficient funds for this great and important system in public funds and issues like this². This paper attempts that, topics related to judicial independence have been discussed in three parts of organizational autonomy, independence and impartiality of judges:

Organizational independence of judiciary, it s consist of judiciary independence from the other branches and its financial independence. On the other hand independence and impartiality of judges that is related to lack of authorities involvement in proceedings to judicial cases from the judges and also lack of judge s heart desire towards one of the parties. Thus, initially, concept of judicial reviewed and then mentioned two cases will be discussed.

The concept of judicial independence

In order to properly understand the concept of judicial independence it is necessary that first we separately analyzed the concept of judicial independence then we examine these two concepts together. Independence means state or condition that is far and free from any dependency, subordination or control. Accordingly, political independence is precisely means autonomy and rejection of any obedience and controlled and even hypnosis of a foreign power³. The judicial system is also a branch of government that judgment and settlement of claims power granted to it, in other interpretations it is a series of courts in a country or a branch of government branch that is responsible for interpreting, inference and applying the rules⁴. When we use these two words together, we find new means, thus it can be said that judicial independence in its original sense is freedom and independence of judicial system from other governmental institutions, and especially the executive and legislative powers, that part of this concept is comparable to the concept of powers separation. In other words, judicial independence at first stage sought to recognize judicial branch as an independent judiciary and aligned with the executive and legislative branch and it has executive affairs office authority within organizational, without undue interference from the other's powers⁵. In fact judicial system must be far from any undue pressure that is affected on how making decisions⁶. On the other hand we can say that judicial independence is not a purpose itself, but is the most important means for achieving rule goal and justice and fairness and ultimately achievement of people to their rights and freedom⁷. Regardless of this important issue, perhaps in terms of some mentioned definitions of judicial independence above, induce a concept that may be judicial system and judges are free from any influence and fear, and issues vote based on their personal interests and desires. At this stage, the concept of monitoring and balancing between powers has been proposed, and its importance becomes manifest. Perhaps this is because many political scientists believe that the selection of judges by the executive and legislative powers with preserving the principle of judge s lifetime, also keep its independence and also cause its



monitoring and balancing; because if selection of judges would be within judicial branch, likelihood of abusing and even being ideological of selection procedure goes also higher. If this will happens, means (judicial independence), from is surpassed target (rule of law)⁸. **After clarification of judicial independence concept should address to this issue that how feasible is to providing and guarantee judicial independence.**

Organizational independence of judicial branch

Judicial organizational independence, prior to each other matter, is based on powers separation. In fact, powers separation means the separation of the main and specialized tasks of government and assigning each branch as separating and independent. One of the most important functions of government is to resolve disputes in accordance with the laws that for this purpose, judicial branch was established as a separate branch. In past they believe that three branches must completely and absolutely be separated from each other in order to do their specialized duties in an appropriate manner, however, gradually and based on gained experience, it was concluded that the absolute separation of powers is neither practical nor prudent. Thus, they adopted terms of inflexible separation of powers rather than the absolute separation of powers. In this explanation that sometimes the duties and functions entrusted to each of the branches of government which not of them is from type of function; for example, entrusted addressing to disputes duty in board of detection and resolution of labor dispute which have judicial nature, sub authorities is abundant in constitution. Granting such authorities should be done in a balanced manner to prevent the accumulation of vast authorities in a government section.

1.1- General competence of judicial system to address lawsuits and crimes

As previously noted, the main and most important goal from powers separation, is assigning governmental and specialized tasks to special and specialized organs. Judicial branch is also specially as one of the systems and major governmental agencies that has

task to handle and resolve disputes and also prosecute and punish offenders. We could consider this issue as one of the fundamental conditions of institutional independence. The third principle purposes from basic principles of judicial independence which is competence with the Judiciary with respect to all issues of a judicial nature and monopoly power to make decisions about their competence as defined by law stipulates, is also the same organizational autonomy respected of judicial branch to its basic concept. Under Islamic Republic of Iran rules pursuant to Article 156, judicial branch is the branch which is independent and responsible for tasks such as: Investigation and issue judgment about grievances, violations, complaints, settling disputes, and resolving discounts, discovery and prosecution crimes and punishment, criminal punishment, appropriate action to prevent crime and reform criminals.

Independence of judicial system against the legislature power

Regarding to independence of judicial branch from the parliament of Islamic Republic of Iran, an important point that must be addressed is related to Article 90 of the constitution⁹. In mentioned principle, parliament as the nation extract is responsible to being represent of them, addressing to complaints at the macro level and activities of three branches and provide adequately respond to the people and nation¹⁰. It is evident that this principle of constitution is applied in order to some sort of public scrutiny but mediated on behalf of the people by the Parliament¹¹. For this purpose, in Parliament, the commission has been established under Article 90 Commission to addressed people complaint about the workings of three branches. In first stage, we can say that the workings of parliament and two other branches are vague terms which requires further explanation¹², about this expression we can offer two types of interpret. Firstly the purpose of workings three branches expression, is about the whole branches not only individuals and authorities within the powers, for example, if a person had complaints from workings of judicial branch headed or trial judges, for this purpose can be detected by justice authority

and for this must refer to laws, otherwise, he may lose his existential philosophy source and instead, Islamic Consultative Assembly would take this matter.

1-2 - the independence of judicial system against the executive branches

The most important issue regarding to influence of the executive branches on judicial system independence is related to discussion about rulings implementation and prepare required budget for this system. Legal ordinances of courts are issues in three forms of civil, criminal and administrative and how to execute these three categories are different from each other. In law courts, issued judgment are timely enforced by implementation part of court that has issued it. The executive directors under managers and court responsible have laws execution responsibilities and have it in extent of necessity and under the supervision of enforcement officers. And also if the court haven't enforcement officer or enforcement officer is not enough, sentences can be enforced by the office manager or other court staff¹³. About criminal sentences in year 81 and after that courthouse was restored, section relating to criminal enforcement was handed over to prosecutors¹⁴. In criminal implementation of sentences unit each magistrate, several people are working as assistant prosecutor in implementation of sentences.

Independence of judges:

Judge independence means that judges in their decision making must be free from adherence to everyone except law and their conscience and fairness, and applied the law fairly without fear of any agent, including pressure of public opinion, pressure of political authorities and partisan interests, and make a decision based on facts of the case¹⁵. However, the judge's independence like institutional and financial independence is not absolute and without any oversight, rather the purpose from it is independence against undue influence or interference, and criticism and apply destructive influence; because judicial decisions are not immune from appeals and also, eventually judge must decide based on the issues raised at

the trial¹⁶. We can say that one of the issues that greatly affect the independence of individual judges, is judge s relationship with superiors or in other words judicial employees¹⁷ (including chief justice of service location, the higher court, or other judicial superiors). These relations are very sensitive and considered as a serious threat to the independence of judges. Therefore, it is necessary to enact legislation in this regard to judges be immune from any interference or influence by other judicial officials¹⁸. If discussion continue, we address to cases relating to the independence of judges, which includes how to select judges, autonomy in decision making and judgment, independence against public opinion and financial assets of judges.

1-3– Judge’s Selection

Islamic Republic of Iran law, pursuant to the third paragraph of Article 158 of the constitution, considered recruitment of righteous and worthy judges and dismissals of them as head of the judiciary duties and regarding two high-ranking officials of the judiciary (chief justice and general prosecutor), in particular, Article 162 stipulates that they appointed by head of the judiciary in consultation with the judges of the supreme court. Constitution of the Islamic Republic of Iran, is stipulates in Article 163: The conditions and qualifications of judges determined in accordance with juridical norms by law¹⁹. According to condition of judge s appointment law adopted in 1361, the following requirements are considered necessary for the judge: 1) being male. 2) Having faith and justice and practical commitment towards Islamic criteria and loyalty to the Islamic Republic of Iran. 3) Productive cleanliness. 4) Iranian citizenship and having performed military service or having the exemption. 5) Temperament health and the ability to work and lack of drug addiction. 6) Having Ejtehad or legal permission to those who have justice BS or BA in theology, jurisprudence and law degree or a Bachelor of judicial and administrative sciences faculty affiliated with Justice or Judicial degree from supreme judicial school of Qom, or being students who complete level and passed two years of Fiqh and judicial by examination and verification of teachers society²⁰.

In United States of America, also, how the select judges is stipulated in Article II of its constitution; in such a manner that president has authority to propose Federal judges and thereafter, Federal court judges are appointed with the consent of the Senate. Under Article III, Federal judges are appointed for a Lifetime and they can't be removed unless through charged ritual against public officials by Congress²¹.

Independence against the authorities and political institutions

In legal system of Islamic Republic of Iran pursuant to Article 164 of the constitution, can't change judge's service location without his consent, unless due to the community sinterest with head of the judiciary's decision after consultation with the chief justice and the general prosecutor. In fact, this exception is compromised initial independence of judges. So it is possible that judges couldn't have complete independence against wishes and mentioned authorities' comments. So it would not be impossible if the judge acts contrary to head of the judiciary's comment in authority to address a case, and this will cause that by using latter part of Article 164, transmission provided and therefore inability to handle desired case with respect to sentencing will offer²² or minimum punishment will be in order to not obeying from comments and judicial authorities wishes.

1-4 - Independence against public opinion and media

Here it is necessary that refer to some impact that public opinion may have on judicial proceedings. One of the most important of them is presence of a jury²³ in some trials. Jury is a set of individuals that by having ethical requirements and specific abilities, invited as a representative of public opinion in some specific criminal cases and collaborate with professional judges in judgment²⁴. In constitution of Islamic Republic of Iran, presence of a jury in political and press offenses stipulated like: addressing to political and press offenses is clear and it's done by presence of a jury in justice court

Financial enabling of judges

In Iran, the judges considered as state employees and they are in government recruitment; but government treated them differently in terms of salary, as well as faculty members from universities, compared with other public servants. So that the right of these individuals are at higher levels than other government employees and employees of judicial branch. This difference of incoming was much less than the past, of course, in recent years attempts have been made to increase substantially the amount of judge s salaries. In retirement regulation law adopted in 1374, decreed that regarding to salaries and retirement of judges, unlike other employees, that the average salary is computed based on their last two years salary, regarding to judges, their last salary will be criterion; finally, in 1384 judges salary have increased significantly, and has found significant gap with salary of other employees, that of course is far from ideal salary²⁵.

In constitution of United States, as long as judges have an appropriate behavior, they will remain lifetime in their jobs, and congress has no right to reduce their salaries. Actually, this issue throughout the history of America, protected judges strongly against deviation of the true and fair decisions. The main reason for bringing this sentences to constitution of America - in fact, according to the Madison s opinion ° is that this article gives the court power to cancel any action and movement to pass legislation by congress that cause judge's salary reduction in their lifetime; because it is so contrary to the constitution. But there is one important issue that if congress reduce income benefits to judges or reduce salaries periods based on inflation; can we considered these as violation of constitution and won t perform them? It seems that, we can t considered this matter from those matters that will declared invalid due to violation of constitution by the courts based on principle of judicial appeals^{26,27}. We can considered this matter as strategies to influence judges' salaries that severely affected on its independence.

2- Impartiality of judges

Impartiality of judges, is not entirely consistent with his independence. In fact, impartiality means lack of desire in the heart and mind of magistrate towards one of the dispute parties or the subject of dispute²⁸. Issue of judge s impartiality have been identified in laws of many countries. This is why each of judges sworn at first and before starting their work that judging about claims with complete honesty and impartiality. Furthermore, from fair trial clause in fourteenth amendments of constitution in America, we can inferred having access to impartial and independent judge²⁹.

In Islamic Republic of Iran s laws, pursuant to Article 163 of the constitution; "The conditions and qualifications of judges is determines comply with jurisprudence criteria by the law." So principles and rules of Islamic jurisprudence have been observing regarding to judge s characteristics and requirements in order to provide his impartiality in all laws. For example, Article 39 of trial laws in public and revolutionary courts in criminal affairs stated that:

"Investigation trial and judges must ultimately done impartiality of the investigation ..."³⁰. In following we addressed to mentioned four issues affecting on impartiality of judges and include lack of previous statements regarding to the case, and lack of getting influence of judges from dispute parties, and ultimately non-involvement of judges in politics and independence of trial from the court.

2-1 - The lack of previous statement regarding to the case

Actually, hence that judge's vote in case has already commented regarding it, or even similar cases, can lead to prejudice towards current proceedings, and this is for this reason in order to preserve the impartiality of judge s in proceedings that lack of judge's previous statement is one condition about addressed case³¹. Article 91 of the civil procedure code of the Islamic Republic of Iran concerning to magistrate dismissal due to his previous statement have brought in the case as: magistrate could decline to

proceedings in the following cases and lawsuit parties also can reject him. d- magistrate previously made statement as magistrate or witness or expert in subject of alleged lawsuit. But the rules for magistrate disqualification to proceedings due to lack of his impartiality in America, throughout time getting so long and it is formed by a complex procedure; In 1911, congress enacted legislation whereby the judges should declare their incompetence to addressing the cases in which is in initial stage, made comments regarding to them and now is in appeal stage of judgment about the same case has been assigned to them or be a witness of that case³².

2.2 - The lack of penetration and influence from the parties

Participation in process of addressing to claims that it is obtained result is related to judge or his close relatives or friends, strongly influenced on the judge's impartiality and place him in subject of accusation. That is why this issue is considered as one of the disqualification factors of judge in discussed case in both International documents and either in domestic laws of countries.

Judge's non-interference in politics

Constitution of the Islamic Republic of Iran is silent about non-interference of judges in the politics; but because the highest authority of judicial branch have task to specifying and selecting independent judges, according to Article 158 he has certain and specified tasks that this duties is incompatible with politics, and judges also attempt to merely resolving disputes and trials apart from the executive branch and government policies. Also according to Article 141 of the constitution and its interpretation, means prohibiting judges from taking judging and representatives in Islamic Council at the same time (That is a political job), based on the constitution and existence history of Judge's non-interference in politics, we can conclude that the fundamental rights of Islamic Republic of Iran has also endorsed this matter³³.

2-3 - Independence of trials from the court

In Islamic Republic of Iran, pursuant to current laws, judicial has been formed from two parts of trials and court and judges include

assistant prosecutor and prosecutors that investigate and prosecute crimes in courts and magistrate that pay judging in court, according to issued indictment by the trial. In final evaluation parliament of Islamic Republic of Iran's constitution, considered judges as sitting judge and investigating judge. Ayatollah Yazdi has said in this parliament: "... In Islam there is no differences between judges are seated and standing..." So our constitution does not discriminate between trial prosecutors and the court's judge,³⁵ and impartiality issue is important at both positions. According to Iranian Penal Code Procedures, regarding to trial and its duties, we could say it is an independent organization, that have duty to prosecute offenders with occurrence of crime reported and is responsible for investigation regarding to crimes committed. In addition, representative court is attend as public prosecutor in proceedings sessions to crimes at courts and after proceedings by courts and issued judgment, records return again to court for executing sentences³⁶. In America, as in most countries of the world, crime pursuer official play a major role and in same amount it has special place.

Conclusion and Suggestion:

Judicial independence in Islamic Republic of Iran and United States of America's rule, also in constitution and somehow in other laws have been identified that of course, we can't considered all of them as ideal. Although these regulations are useful and suitable from some aspects but shortcomings is observed in some cases. On the other hand in act stage or in other means enforced approved law, also some mentioned aspects have been ignored in law and purpose of legislator will not come true. In Islamic Republic of Iran's regulation in organizational independence dimension is somewhat acceptable (except for violation cases that were referred in the text), But in discussion of judge's independence and impartiality, unfortunately comprehensive legislation does not enact and lack of action on these regulations have been increased on problems. The first matter that we can named regarding to deficiencies in both studied systems, is discussion of temporary or permanent expulsion

from judging place. In Islamic Republic of Iran, mentioned fault regarding to transfer referred judges, is placed at the end of Article 164 of the constitution. Transfers and dismissals of judges should be done based on comments of judges themselves, as well as certain regulations pursuant to law approved in a democratic process. So to solve this problem, some reviews should be conducted in constitution and remove the last part of Article 164 of constitution in the Islamic Republic of Iran. Actually in terms of spirituality, social status, position and time of the judges, especially seated judges (means judges of court) and interrogators (Which in so far past called them researches judges, means judges who are depends on court but change in their place of employment and his position, such as sitting judges is not simply possible.) will be so strong and invincible that can't change his job place in any way except in case of committing huge offenses or crimes that after the judicial authorities proceedings suspension of judges. In vicinity of these cases should be treated harshly with distracting judges - whether their corruption is financial or moral or factional and parties. So that if a judge took bribes or in other ways he done mistake, he must be sure that his judicial life whether as judge or as a lawyer or any job related to judicial affairs has been ended and he has nowhere to go. That is probably only deviate individual changes or transferred to another place or in terms of amnesty with judges disciplinary court's ruling, he should get licenses to practice law. In United States of America, the case in this respect which is damaged and destroys the independence of the judiciary, is applying method of making accusations and trial of judges done by the senate and house of representatives. Of course judges should be moderated to when they are in violation of the law or haven't conducted their duties right and in justice, or committed crimes, they could be pursued. But it is better that in order to do this, specialist and impartiality individuals present in the trial that not lead to an abuse of this authority. In addition, some committee states have been established to monitor judges in order to supervising disciplinary affairs and misconduct of judges. Something like this objection also is stated regarding to last part of Article 164 of the constitution in Islamic Republic of Iran.

The next weak point is how to select judges also in Islamic Republic of Iran and either in United States of America. In Iran selection of judges is more like a conscious choice rather than specialist. So amending the implemented regulations of employing judges and training requirements approved 01/10/1376 should immediately revised and corrected. Method of selecting federal judges In America by president that is often associated with political considerations, and on the other hand getting a vote of confidence from Senate, in case of parties will agree with president, will cause to happened, and if they be oppose to president party s conflict of interest will occur. It seems that if about selecting judges, certain conditions mentioned and among them complete political impartiality of judges is exists and also consider clear rules that qualified and dedicated judges will select and therefore, it is also be clarified, judges will be more independent.

Another disadvantage of the judicial system in Islamic Republic of Iran is how to manage and leadership its branch. Although judicial branch headed is not depends by authorities to any of the powers and it might be useful on top of them. But it is necessary to choose a person that will be competent at managing and in fact have enough information and authority besides having legal expertise (Not just the knowledge of judicial affairs but also what is mentioned in constitution). In order to this purpose it is necessary that situation of judicial branch headed will express by constitution and other laws as more objective and more tangible. Next case to discuss is independence of court from the trials. Under the current regulations, judge in that unit will play the role of magistrate and prosecutor together, that this issue will compromise his impartiality. Therefore it is necessary that in this case required action will takes place based on mentioned content in final chapter.