



A Comparative Study of Shi'a Public Shari'a Law and Sunni Public Shari'a Law (Administrative Law and Governance in Islam)

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Abstract

Public law notions seen from shari'a law perspective have not been duly discussed in Islamic countries. In the discourse of rule of law in Islam we are confronted with a dilemma, moral values of a religion are not compatible with the coercive legislative measures. Thus the authentic application of shari'a rules is feasible only if a scientific hermeneutic of shari'a law is adapted to the exigencies of today's modern life, while the outlook on the boundaries of hermeneutic remains obscure. Regarding the public finance in Islam and State owned banking system, in many Islamic countries both Shi'a concept banks and Sunni concept banks, while prohibiting usury have worked out a well established shari'a law compliant loan system in favor of the customers. Also economic democracy from shari'a law point of view finds its way through other means provided in shari'a rules (Shi'a or Sunni). The notion of an Islamic administrative law is rather misperceived. The actual polemic on governance and administrative law in Islam is considered as being an outcome of the conflict between shari'a based concepts and notions asserted by faqihs and jurists and the legal practices and usages of Islamic States since the expansion of Islamic territories (700 AD).

Keywords: *Administrative Law; Shari'a Law; Democracy; Economic Democracy*

Introduction

Human history despite all its didactic aspects carries with itself certain weird and unspoken elements and parts of these unspoken elements as they remain obscure, subliminally haunt the sub-conscious of the human reflection.

For instance, regarding the history of the Industrial Revolution, the cause of some European nations success in the advancement of technology and betterment of their own life compared to the failure of some other nations in this field while being from the same continent and the same locality has remained in the obscurity and even with today's standards is considered as enigmatic.

Assessment of much distant historical events compared to the assessment of recent or contemporary historical events seem more uncertain. The history of far past events carry with them more unspoken elements, consequently the unclear aspects of the human history become more noticeable and enigmatic.

For instance, the cause of the Roman Empire fall, a giant super power in the history of human being with all its meritorious characteristics is still unclear and is haunting the human thoughts. To precise the written history has not yet given us a reasonable and logical answer as to the causes of the Roman Empire fall.

The historical events become much noticeably uncertain and unyielding to any interpretation as we go further into the distant past to observe the events of the antiquity. The story of Noah's Ark for instance, has been interpreted differently from various perspectives by many historians and theologians with very meager success in shedding lights on certain unanswered questions and concealed points, for example from chronological point of view the exact historical era of the occurrence, the cause of inundation and the real cause of the wrath of God toward Noah's populace have remained in the obscurity.

Codification process of shari'a law too in the legislative history of Muslim countries has been confronted with so many snags upon which a plethora of affidavits, jurisprudences and interpretations have been asserted by many jurists and scholars.

A contextual approach to these unresolved issues could clarify the circumstances in which the codification of shari'a law on certain issues has been formed. The pre-Islamic legal rules governing the Arabian societies (in Arabian Peninsula) for instance, were one of the challenges of the codification of shari'a law.

The customary rules on the question of slavery for example, in the pre-Islamic societies of the Arabian Peninsula could be posited as a theme of argument for our discourse analysis.

Slavery, particularly female slavery, was a deep rooted practice in this part of the world during the pre-Islamic era. Islam began to encourage the Muslim populace to adopt a scheme on the emancipation of the slaves. This was not an easy task, the slave traders resisting their vow, would require a heavy price to free a single slave. To advance this philanthropic goal, shari'a law laid down an especial rule providing that any Muslim willing to emancipate a slave could use his annual income residue (Zakat) to pay the price of a slave to the slave holder.

One thousand and four hundred years later, in our time, certain pro and con extremists on both sides try to assert a one sided interpretation on the attitude of shari'a law toward the slavery by posing questions like this: all these Byzantine discussions don't prove that shari'a law tolerates the slavery? This can not be considered as a contextual approach to the subject matter of a scientific research but solely a biased and wicked interpretation.

In a quiet another field, we could identify the same one sided interpretation or look at the shari'a law issues, this time not emanating from the outsiders or the outsider's influence but rather from the Muslim themselves. Regarding the prohibition of the alcoholic beverage in Islam for instance, is it admissible to conclude that this prohibition comes out of fantasy or it is based on a scientific foundation? It would be a childish and superficial perception of shari'a law if we limit ourselves merely to the form of the rules, instead of the substance and scientific bases of the regulations.

What about the narcotic drugs? Opium and narcotic drugs addictions, as there were no sign of their addictions during the pre-Islamic era in the Arabian Peninsula societies, are not discussed in the history of shari'a law, but does this mean that shari'a law allows opium and drug addictions?

Shari'a law (Sunni and Shi'a) not only prohibits any noxious and harmful substance consumptions (save medical uses) but also it prohibits any act which would intentionally and purposefully

injure any part of the one's own body, be it the internal parts of the body or external membranes of the body, be it the brain or the nervous system.

Therefore, any interpretation of shari'a rules which is based on the façade of the shari'a law, in a comprehensive legal system established fourteen centuries ago in respect of certain particular circumstances, would lead to a shallow comprehension and superficial perception of the shari'a law.

Today in our modern world, certainly all legal systems are confronted with legal lacuna phenomena, while legal lacuna per se can not be an obstacle to the development and expansion of the legal system if the remedy is provided promptly.

The proponents of hermeneutic in shari'a law (Sunni or Shi'a) maintain that in order to eschew any wayward exegesis we ought to draw on concrete evidences in a contextual approach rather than philosophic perception of shari'a rules, bearing in mind that formalistic exegesis of shari'a law could be misleading and pernicious for the Muslim nations in a world moving so rapidly toward complexity.

In determining the field of hermeneutic, we must differentiate the field of objectivity from that of the subjectivity. A subjective interpretation of shari'a rules could lead the Muslim nations to the perdition.

Thus by determining borders and limits of the field of hermeneutic, we must point up the parameters of an objective interpretation, otherwise a devilish terrorist gang such as Al-Qaeda or Taliban would declare itself a shari'a compliant group.

Focusing on more technical aspects of the shari'a law interpretation, we notice that the presumption of the objectivity of the traditional exegesis loses grounds as the polemic of hermeneutic encounters some impromptu impediments.

For instance, in the history of codification process of shari'a law we can not find any sign of rules or principles pertaining to the insurance issues. This is the instance where the normative concepts on the codification process of the shari'a rules, in search of a remedy for the legal lacuna, faces a dilemma. Much is discussed on the prohibition of "Gharar" in shari'a law, a notion comparable to the betting on a venture. Some of the Sunni school of thoughts are of the view that the insurance undertakings could have to some extent similarities with the notion of "Gharar".

While the basic principles pertaining to the prohibition of "Gharar" can not in any way be used to the notion of insurance policies. Insurance policy is comparable to a kind of contract upon which the underwriter binds himself to pay a sum of money to the other party, the beneficiary, in case of occurrence of a pre-determined accident (e.g. fire or car accident), whilst in the notion of "Gharar" there is no talk of accident, nor any precision as to the kind of occurrence in any venture.

Vis a` vis the obligation undertaken by the underwriter the client binds himself by his own consent to be assistant to the viability of the insurance incorporation by paying a sum of money annually. While in the notion of "Gharar" only one of the parties binds himself to pay a sum of money to the other party.

The proponents of Takaful insurance grounding their legal concept either on "Waqf" or "Mudharabah" contracts in shari'a law have construed a different perception on the methodology of hermeneutic for shari'a rules. This could be cumbersome particularly in respect of certain vital commercial activities -vital to any Islamic State economy- such as shipping insurance industries. Whereas any portfolio by State owned conventional insurance incorporation could eschew these ambiguous arguments leading to different perceptions of shari'a rules. Yet the polemic on the delimitation of the field of hermeneutic in shari'a law remains unresolved.

Administrative Law and Governance in Islam

The European modern States ¹brought with themselves the glory of urbanism and the expansion of public institutions. Monarchy administrations began to develop in Western Europe and by mid seventeenth century the public institutions of most European countries (Occidental Europe) were wielding an effective executive power to the detriment of nobility, feudality and the local autonomous powers. The phenomenal expansion of the State administrations in these countries was accompanied by an accretion of parliament influence.

Thus it would be plausible to conclude that the well-known struggle between the monarchy administrations, parliament and local authorities lasting for centuries was an all-inclusive consequence of the advent of modern States in this part of the world.

By the eighteenth century the judiciary elites too joined the conflicting powers. The impact of arbitrary use of power by the monarchy public institutions and administrations on the public opinion of European nations of Seventeenth century paved the way to the regional and national protests against the exercise of discretionary power by the State. These protests had various outcomes in different parts of the Occidental Europe.

In the United Kingdom for instance, the courts confronted the discretionary power of the king and monarchy institutions. Therefore, king's interferences with the judicial power were marginalized and his role in the formation of common law were curtailed. Eventually the Crown's public institutions and administrations were brought under the law control². Public administrations, office of commissioners, boards and committees at local and national level were barred to use any discretionary executive power in the exercise of their daily duties by the English courts and this was the inception of a legal trend purporting to judge the Government administrations acts.

The influence of the Parliament too, on the extension and development of administrative rights and democracy in this country was undeniable. During the last centuries public institutions were created to deal more attentively with the social and economic affairs of the British nation. These public bodies were accountable to the ministers, while the ministers in turn were accountable to the Parliament³. With a closer look at the legal history of the United Kingdom we could notice that the conflict resulting from the exercise of power and duty by the Government administrations and public institutions, House of Commons and the judiciary led to the formation of a legal concept known as 'natural justice'.

Two important principles were the basic components of this legal concept which eventually became legal norms, the principle of "nemo iudex in causa sua" the rule against bias and the principle of "audi alteram partem" the right to a fair hearing. Actually the rule against bias and the right to a fair hearing are the constituent parts of natural justice which are considered as the legal benchmarks of Britain's administrative law.

Historically the judicial review of the administrations and public institutions acts and decisions was of the King's (or Queen's) Bench jurisdiction. By the Supreme Court of Judicature Act of 1873 and 1875 the King's Bench (or Queen's Bench) became one of the High Court of Justice divisions. Since then the King's (or Queen's) Bench Division of the High Court of Justice has been the competent judicial authority to review the public authorities' acts and decisions. Today any claimant against an

¹ - French, l'Etat contemporain

² - Stott David, Felix Alexandra, Principles of Administrative Law, Cavendish Publishing Ltd., 1997, Page 34

³ - Bradley A.W., Ewing K.D., Knight C., Constitutional and Administrative Law, 16th Edition, Pearson Education Ltd. Pub., 2015, Page 302

administrative decision, on ultra vires ground for instance, must follow the judicial review procedure of the High Court of Justice.

Whereas the French administrations and public institutions acts and decisions are subject to the judicial scrutiny of the French Administrative Tribunals. These Tribunals possess an extensive jurisdiction and legal power to quash and annul the French administrations and public institutions acts and decisions on the “exces de pouvoir”, ultra vires ground for instance.

The Law of 28 Pluiose an VIII of the Sovereign Napoleon Bonaparte established an especial council within the capitol of each French province (prefecture) to deal with the petitions against the arbitrary exercise of power by the public authorities. These councils presided by the province governor (le prefet) had a limited jurisdiction.

A new Act of French legislator in 1889 laid down the code of procedure conceived for the contentious administrative claims. Another legislation in 1926 while increasing the competence and jurisdiction of these councils changed their status.

A presidential decree of 30 September 1953 based on the Act of July 11 1953 , replaced the provinces councils with the actual French Administrative Tribunal with an extended sphere of competence and jurisdiction and complete independence⁴.

Regarding the appellate jurisdiction of administrative claims, historically the King’s Council acting as an advisory body of the French Kings since sixteen century was replaced by Council of State (Conseil d’Etat) in 1799 to deal with legislative issues and administrative conflicts. Following a French Parliament Act on May 24, 1872 Conseil d’Etat formally became a judicial authority to judge claims against State administrations acts and decisions.

The State Council (Conseil d’Etat) keeping its scientific advisory role, since 1953 had been an appellate court for the judgments of the Administrative Tribunals. By the establishment of new Administrative Appellate Courts in 1987, Conseil d’Etat became a supreme court of last resort for the administrative contentious cases.

The notion of an Islamic administrative law in today’s intellectual milieus is rather misperceived. During the reign of the first Islamic Governors, the administrators and executive agents in the exercise of their duties and responsibilities were subjected to a strict code of conduct, arbitrary use of power for instance, by Muslim executives were prohibited.

As time passed and the Islamic territories expanded (700-800 AD), certain anti-Islam elements infiltrated into the Islamic States and began to concoct anecdotes and deceptive themes conceived purposefully to deviate the Muslim nations from the basic principles of Islam.

Eventually these movements and some other historical events created a state of confusion among Muslims and their rulers, so the Muslim rulers gradually were drifted away from the original principles of shari’a law.

⁴ -For a more detailed study of French administrative law and French administrative justice see for

Example:

Rousset Michel, Rousset Olivier, *Droit Administratif II , Le Contentieux Administratif* ,
Deuxieme edition, Press Universitaires de Grenoble, 2004

Ricci Jean-Claude, *Droit Administratif* , 4e Edition , Hachette Pub. , 2004

A fundamental and precise study of administrative rules of Al-Ma'mun Government for instance (of Abbasid dynasty, 800 AD), shows us how during his reign under the guise of shari'a law he developed many anti-Islamic policies which their malignant effects on the other nation's judgment on Islam and Islamic administrative law have endured through the time.

Al-Mamun's administration had a tyrant's authority over the Muslim nations of Mesopotamia. During his reign people was oppressed under the rule of his cruel governors. Scholars, faqihs , government officials and social elites had to go under an inquisition ordeal upon which they were subjected to a series of investigative questionings . The object of these inquisitions was to put these distinguished personalities to a kind of religious trial to test their loyalty to Al-Mamun's government and the way he administered the religious affairs.

This inquisition (in Arabic is called "mihna") could lead to the imprisonment and torture of the subject⁵. While on the doctrine side we find many jurists and State legal councils who solicitously asserted a plethora of legal principles on Islamic administrative law.

An eminent jurist of the Abbasid dynasty era for instance, Ya'koub Abou Youssef (731-798 AD) has discussed on taxing law and the rights of tax payers in Islam. More over in his book on taxation⁶he has emphasized on the modality of tax collecting which must be compatible with shari'a law . The assertion of this eminent jurist of Abbasid era is of immense importance even for today's Islamic States practice on taxation, where there are some controversial arguments concerning the compatibility of taxing rules with shari'a law apart the Zakah (Sunni) or Khoms (Shi'a) practice .

Y'akoub Abou Youssef also has been one of the protagonists of the consumer protection rules in Islam. In his book concerning the pricing issue, he has asserted the compliance of market economy pricing rule with shari'a law , while at the same time he was of the view that the Islamic State administration should adopt price control regulations when it deems appropriate⁷ .

The actual polemic on governance and administrative law in Islam is considered as being an outcome of the conflict between shari'a based concepts and notions asserted by faqihs and jurists and the legal usages and practices of Islamic States since the expansion of Islamic territories(700AD).

It is argued that the Islamic jurists and scholars by asserting myriads of shari'a based notions and theories concerning the legal issues of governance in Islam have paved the way to the development of the shari'a based administrative law, whereas on the executives side the issue was confronted with many hindrances, hence the poor achievements in the administrative law domain.

Saljuq administration (1037-1194 AD) in Islamic Persia for instance , had very poor achievements in applying shari'a based rules for the urban and market law and order system ⁸. Obviously the development of statehood in the Islamic territories was accompanied by a gradual formation of a primitive administrative system in these countries , where the head of State was no longer occupied with the executive issues in all fields and specialties , instead his subalterns appointed by himself were responsible for specific issues of governance , treasury and financial issues , military matters , commercial issues etc., thus we could detect the inception of formation of State departments within the Islamic States .

⁵ - Cooperson Michael, Al- Ma'mun, Makers of the Muslim World, Oxford UK, 2005, Page 126

⁶ - In Arabic: Kitab al-Kharaj

⁷ - Abou Youssef Ya'koub , Le Livre de l'impot foncier (Kitab al-Kharaj), Trans. E. Fagnan , Paris ,

⁸ - Al-Mawardi, Abu al-Hassan Ali ibn Muhammad ibn Habib (972-1058), Al- Ahkam al Sultaniyya w'al Wilayat at-Diniya

See also: Amedroz Henry F., The Hisba Jurisdiction in the Ahkam Sultaniyya of Mawardi, Journal of The Royal Asiatic Society, Volume 48, Issue 2, April 1916, pp77-101

The formation of the same administrative structure at a small scale was also discernible at the provinces (wilayat), while the governors of the provinces were appointed by the head of State.

No doubt that the Muslim scholars during a long historical span of time, from 700 AD to 1900 AD were not familiar with the basic legal principles of Roman law (of Western Roman Empire). Therefore, Muslim jurists could not take the initiative and draft a code of administrative law similar to the actual code of positive administrative law in France or Germany. Surprisingly the actual codes of positive administrative law in these countries (France and Germany) too are not based on ancient works or on the historical legal doctrines on the subject matter but rather they are related to the contemporary concepts and notions of nineteenth and twentieth centuries.

Seen from this perspective, the administrative rules of the Islamic countries during this period (i.e. from 700 to 1900) could be judged as being unique and independent of European scientific influence. The administrative duties and responsibilities of the office of Muhtasib for instance, regarding the public shari'a law of the ancient Islamic States administration are unique and could be considered as a typical concept of Islamic public law.

Still what could be construed from the historical evidences concerning the Islamic public law is that we could not find neither on the Muslim scholars side nor on the Muslim governments side any trace of an effective attempt to draft an elaborated code of Islamic administrative rules applicable to the whole territories of the Muslim (Sunni or Shi'a) nations, for instance concerning the administrative rules on the government expenditures, we can not find any sign of positive law being drafted by the Islamic scholars of that era or by the government jurist-consul.

What we find in the Islamic masterpieces and outstanding Islamic literature works are rather collections of advises to the administrators⁹ or collections of advises to the rulers and head of States¹⁰, while a collection of advises like "administrators and rulers should fear God and behave honestly" could not be considered as an authoritative code of conduct for the administrators, nor a tangible legal criterion in a trial¹¹.

A more fundamental principle of public shari'a law historically consigned to the oblivion by the ancient Islamic States is the mandatory consultation in every affairs of social concern. Establishing a council with the other savvy elites in every issues and affairs of the society is an obligation upon the rulers and governors provided authoritatively by the Quran.

Elite in Islamic sense means an individual with a righteous soul and just and honest behavior in the society who has got a scientific expertise in issues important for the Muslim nations or the Muslim States.

Thus albeit the fact that the establishment of first parliament in the history of human civilization is one of the honors of the Roman Empire (Roman Senate of before Christ epoch), a council similar to today's house of representatives should have been established according to the shari'a law standards within each of the Islamic States in the world, since the expansion of the Islamic territories (i.e. 700 AD).

The most deplorable part of the Islamic countries legal history particularly seen from the public law side, is the fact that the Muslim nations together with the Islamic States had been rested in inertia

⁹ - See for example: Nizam al Mulk's *Siyasat – Namah*, 1090 AD

¹⁰ - See for example: Al Ghazali's *Kitab Nasihat al Muluk*, 1111 AD

¹¹ - For a more detailed study of these collections of advices see for example:

Khan Arif Ali, Khan Tauqir Mohammad et. al, *Law of Governance in Islam*, in *Encyclopaedia of Islamic Law*, Vol.10, 2006, pp. 135-160

until the American and European nations uprising against the tyranny and despotic kings. Furthermore, the adoption of the United States Constitution in 1789 and the French Declaration of the Human Rights and the Citizen Rights in 1789 (Declaration des droits de l'homme et du citoyen) set a new benchmark for the Islamic countries scholars and jurists. Eventually the Muslim nations by adopting the social and legal concepts of American and French theories about the modern States , began to copy the epitome of American parliamentary¹²system or the French parliamentary¹³system .

For instance, with a realistic analyze of the history of Egyptian parliament establishment in 1922 (of Sunni concept) and the history of Islamic Persian parliament foundation in 1900 (of Shi'a concept) we notice how the Muslim nations have been dubbed as followers and imitators of the Western legal principles particularly on the public law concepts.

Whilst since the expansion of the Islamic territories(700AD) , the Islamic States could have been able to found a sophisticated assembly or council appropriate to the Islamic countries and compatible with public shari'a law , if the Muslim nations together with the Muslim scholars and jurists had done enough effort to put aside the sectarianism and to develop public shari'a law by drafting an elaborated code of Islamic public law including the rules on the establishment of an Islamic house of representatives .

Moreover, the European and American legislations on the parliamentary elections and their rules governing the constituencies and the eligibility of the candidates are not thoroughly compatible with the public shari'a rules. Therefore, any attempt to imitate or any initiative to copy the American or European electoral prototypes in Islamic countries could be considered as discordant and jarring with the public shari'a law (Sunni or Shi'a). For example, the rules governing the eligibility of candidates for the parliamentary elections in the United States or European countries are not compliant with the rules on the criteria of selecting the nominees according the Islamic standards, nor with the definition of an elite in Islam.

Throughout the history many public law scholars and jurists have supported vehemently the idea of a devolved administrative system, while some others have asserted the meritorious benefits of a centralized administrative system particularly for the developing countries. A conceptual outcome of these controversial arguments pose the question whether shari'a law prescribes any particular and pre-determined administrative system for the Islamic States? In other words, on the dilemma of centralized or devolved administration system is there any obligation upon the Islamic States to opt for a particular administrative system and structure?

It is argued that Imamate (in Shi'a concept) and Khalifate (in Sunni concept) could be considered as a centralized leadership of an Islamic State. This is an ancient notion based on the historical circumstances of the ancient States. Proponents of this theory will be baffled by the fact that, with a profound research in the Islamic documents and historical evidences they will realize that, they are unable to find even a single rule in shari'a law on this subject, or any advice from principal leaders of Shi'a nations or Sunni nations.

What we find in shari'a law as a centralized structure is absolutely on the ideological side of the concept of an Islamic State. The leader in Sunni or Shi'a concept is rather a legislative and an executive guide to show the right path to the executives and officials of an Islamic Government. The burden of the executive responsibilities rests on the shoulder of the directors of the administration system of an Islamic Government, be it a centralized system or a devolved administrative system.

¹² - United States House of Representatives, 1789 AD

¹³ - French National Assembly, 1789 AD

The whole structure of an Islamic State administration could be founded on a devolved based system , where the local rulers and directors are to do their jobs at the provinces or even states according to the shari'a law and will be responsible before the local population and the central Islamic State or even Federal Islamic State as well , or on a centralized administrative system where the rulers and the administrative directors are to undertake their responsibilities under direct control of the centralized Islamic State authorities and act according to the shari'a law . The choice between a devolved system of administration or a centralized administrative structure will depend on the demographical peculiarities and the territorial characteristics of an Islamic country.

Today in our high tech world, civic intellectual groups attention is more and more focused on the justice administration issues of the developing countries comprising both private law litigations and the contentious administrative claims. An essential part of the public law system in every country in the world deals with the administrative tribunals institutions and proceedings. Actually the functioning of the administrative tribunals in developing countries and developed countries as well is considered as a pivotal criterion for the evaluation of judiciary and legal democracy in these societies.

Historical evidences show that a similar court to that of the European monarch's "curia regis" and the "King's Bench" had been established by the ancient Islamic States, namely court of petitions against rulers (in Arabic: Divan Madalem or Mahkamat al Madalem) to deal with the people's claims against the eventual oppressions of the local rulers and administrators.

Regarding the institution of an administrative judicial system, appropriate for Islamic countries, three different approaches have been advocated by Muslim scholars and jurists. Some scholars and jurists have supported the idea of an Islamic madalem court or tribunal which would be competent to judge the complaints of folks against the rulers and administrative directors in Muslim countries in mere imitation of the ancient Islamic States , whereas the achievements of these States since 700 AD in establishing an equitable and impartial jurisdiction in favor of the oppressed plaintiffs in itself have been questionable , for instance historical records of the Seljug Government's Madalem courts jurisprudences could be one of the striking examples .

Some others have defended the advantages of a common judicial system with tribunals or chambers competent to litigate both private law issues and public law claims. In this kind of juridical system, an imitation or adaptation of English legal system , apart from the specialized quasi-judicial committees which are competent to sentence the contentious claims concerning particular professional activities such as labor issues or activities dealing with the environmental pollution issues , a common judicial authority of civil law judiciary similar to that of England King's Bench or Queen's Bench is competent to judge the abuse of power of the executives or ultra vire claims against the administrators .

While other Muslim scholars and jurists have been for an adaptation of French legal system in Muslim countries, where the litigation of civil matters is totally separated from the administrative contentious jurisdiction. In this kind of juridical system, a specialized judiciary and a hierarchy of administrative courts and tribunals are established to judge all claims against government public institutions and administrations, including claims against all specialized agencies dealing with particular issues, such as State aviation matters or environmental issues or conflicts emanating from the activities of the State owned enterprises.

It is also argued that for an evaluation of judicial democracy in a country, particularly for the evaluation of an unbiased and impartial judgment of the contentious administrative cases, technicality always defeats the formalism and the formalism in turn is an attendant of the institutionalism, while in

today's intellectual civic groups view focusing on the institutionalism in judicial matters is considered as a naïve trend.

Therefore, today, in dealing with the judicial matters any attempt to enshrine the form to the detriment of the substance will be considered as barren and vain. Accordingly, the debate on the modality of administrative judicial system is misleading in itself and has caused many confusions among Muslim nations.

For instance, regarding the establishment of administrative courts or tribunals why Muslim nations should give priority to the formality and the appearance of the courts or tribunals. The option between a court of Madalem or a Bench or an Administrative Tribunal can not be considered as a decisive issue, nor we can find any affidavit or jurisprudence since the outset of Islam emphasizing on the importance of the formality rather than the functioning of the justice system and the foundation of the justice itself.

What matters according to the shari'a law (Sunni or Shi'a) is the establishment of the justice among the Muslim nations and not the form or the appearance of the institutions. Thus any conceptual notion using certain methods to instill in Muslim nations a way of sloganeering on the ostensible formalism should be judged as an anathema leading to mere sectarianism. More importantly shari'a law is praised for its severe disciplines and measures for the appointment of the judges.

Contrary to the European and American countries legal norms and practices, shari'a law is very strict on the observance of the mandated rules and criteria for the appointment of the judges, particularly the judges who are to deal with legal actions against the Islamic State rulers and administrators (in today's jargon, members of the judiciary for the Administrative Tribunals or King's Bench or Madalem Courts or whatever name is given).

According to the shari'a law an applicant for a position in the judiciary not only must acquire the requisite scientific level and certificate but also possess a solid faith in divine justice. Therefore, the applicant's ethical and moral character should be scrutinized in conformity with the shari'a law standards, while a clearance on the ancestral side of the nominee too, is a sine qua non condition for the appointment.

Conclusion

Public opinion in developing countries has not been always well disposed toward modern legal concepts. Prejudice against the expansion of modern legal trends never ends in developing countries. The cultural settings of these countries have a strong tendency toward conservatism.

Against this backdrop and in a world moving so rapidly toward a high-tech oriented life, Muslim nations can not and should not be prisoner of their own socio-legal concepts.

With a closer look at the Islamic countries legal system we can notice that public law issues have not been duly discussed in these countries. Hitherto the private law issues have had an obvious priority of consideration over public law issues in Islamic countries. Legislators in these countries have had an underlying penchant toward certain legal schools of thoughts who defend the supremacy of private law over public law. Consequently, not only the important themes of public law which are given expanded consideration in the European and American countries positive law are non-existent in Islamic countries legislations but also public law issues seen from the shari'a law perspective too have been left to the oblivion in these societies.

The absence of an effective code of law on natural resources for instance, in Islamic countries positive public law system, compared to the colossal regulations regarding the preservation of natural resources in European countries legislations shows the obvious inactivity of Islamic countries legislators in these fields. Today in our world of legal globalization, the expansion of public law themes are confronted with many hurdles in the Islamic societies.

Technically a persistent narrow-mindedness toward the public law syllabus comes from the prevailing private law school of thoughts in the shari'a law curriculum. After the elapse of so many years, these nations ought not to end the traditionalistic pedagogical legal methodology in the Muslim countries law schools in favor of a modern discipline of legal discourses?

In our discussion on the attitudes of different school of thoughts vis a` vis the development of public law in Islamic countries, bigotry too should be considered as one of the pernicious impediments to the legal development in these societies. Any scientific research on the bigotry as a subject of discourse analysis should take into account certain parameters which are deeply –entrenched with the historical roots of outsiders evil influences in Islamic societies.

Historically since the expansion of Islamic States in the Mesopotamia region many conspiracies have been plotted to destroy the Muslim nations from within, hence the fundamental principles of the Islamic governance and public administration were the best targets. The actual Muslim generations are the hairs to these conspiracies.

In our war-torn, strife-torn world the bigotry has been flourished into the devilish extremism. Extremism in its political construction is not compliant with any religious credos, be it Islam or be it Christian. Religion as a faith can not be a medium for certain obsequious opportunists to use it as a mundane tool of profiteering. Extremism in its theological construction runs contrary to the basic principles of Islam, where it prohibits any excessive demeanor whatsoever (e.g. prohibition of hermitage life in Islam).

Focusing on more globally debated issues, for instance any excessive expending on army or militarism is prohibited in Islam, where Muslims are not allowed to cause or to begin any war, they are only allowed to proceed to any defense if they are attacked (the authentic meaning of "Jihad"). Extremism in its legal construction could lead to the misperception of shari'a rules, particularly in views of the non-Muslim nations. For example, concerning polemics on certain Islamic penal law issues, we can not find any anecdote of the prophetic era about flagging a wrongdoer, nor any Quranic verses providing strictly this penal law practice. Consequently, the flagging usage could be easily replaced by any conventional punishment, more convenient for today's circumstances.

The intellectual scholars in these countries have got the heavy burden of responsibility to help Muslim nations to get rid of the formalistic view on shari'a rules, shadow of which (i.e. shadow of the formalistic view) has been malevolently on their lives and souls for ages. Today if the Islamic countries legal systems can not catch up with the modern legal trends globally posited as such, the failure can not be attributed to the outsider's pernicious influences or activities, but rather to the inattentive behavior of the Muslim academic scholars.

Actually these countries are struggling with many legal lacuna, while the antidote being of a legal technical nature calls for an enormous endeavor, the shortcomings seem to be not on the people's side but rather on the Muslim jurists and scholars side.

Finally, it seems totally plausible to conclude that Muslim academia's shortcomings could be established by the fact that the Muslim law schools for ages have not carried out any R&D programs in

legal issues, particularly on what pertains to the public shari'a law concepts. Practically we don't find any serious R&D programs being conducted at the law schools of these countries on public shari'a law subjects.

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