



## Rule of Law 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. The first section of this article, introductory discourse, scrutinizes the fallacy of different theories on the notion of justice leading to the concept of "rule of law" in general. The second section focuses on the rule of law in Islam. Concluding ideas are presented in the final section, conclusion.

**Keywords:** *Democracy, Norms; Justice, Rule of Law; Shari'a Law; Social Values*

### **Introduction Discourse**

The evolution of social values during the enlightenment era toward the industrial revolution subdued the realm of the religious rules.

Consequently, the contemporary States began to form a strong penchant in favor of rule of law theories, whilst the traditional societies had a tendency toward religion and religious rules.<sup>1</sup>

The impact of modernism on the creativity of the human being during the early years of the twentieth century was undeniable. It reshaped a socially modern trend of thoughts reaffirming the power of human being to create its own life with the help of science and technology.<sup>2</sup>

Postmodernist school had a glorious and popular acclamation all over the world during the mid-twentieth century, regardless of many discrepancies in various interpretations of this school.

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<sup>1</sup> - Weber Max, Legitimacy, Politics and the State, in Legitimacy and the States, Ed. William Connolly New York University Press, 1984 P. 34

<sup>2</sup> - Berman Marshall, All That Is Solid Melts into Air: The Experience of Modernity, Penguin Books, 1984, P. 17

Postmodernism while recognizing the importance of the rule of law, was nevertheless reluctant to admit its decisive role in shaping the human beings lives. Postmodernism challenged the formalistic view that the human life is shaped by certain norms (legal norms, religious norms, or even biological norms) and paved the way to some school of thoughts believing in certain parameters which create historical developments within the society itself.

These schools claim that human identities are continually being formed and due to the many interactions between the existing pressure groups are challenged within their own social milieu.<sup>3</sup>

Postmodernism had the courage to put forward the question of “who controls the flow of ideas within the post-industrial societies?”

Jean Francois Lyotard argues in his book (The Postmodern Condition) that the status of knowledge is altered as societies enter what is known as postmodern age.<sup>4</sup>

For the modernity the rule of law during the Middle Ages couldn't be considered as a concrete notion. The rule of law according to this school of thought had a precarious fate depending on royal orders, palace decrees, church orders, canon laws and so on.

Thus according to the modernity the rule of law during the Middle Ages couldn't be a valid paradigm and the whole legal system was based on the authoritativeness of the rulers.<sup>5</sup>

Modernity brought by itself the enshrined theory that a law to be a law it must conform to justice.<sup>6</sup>

The notion of justice has been defined differently by different school of thoughts and philosophers. For some philosophers it is comparable to a kind of “moral virtue”<sup>7</sup>, for some other philosophers it is comparable to a

“feature of civilization”<sup>8</sup>. From a realistic point of view man are in search of justice because he fears to be himself a victim of injustice<sup>9</sup>.

For the eminent philosopher Immanuel Kant, justice is the aggregate of those conditions under which the will of one person can be conjoined with the will of another in accordance with the universal law of freedom.<sup>10</sup>

Albeit the fact that a seed of mundane interest and social comfort is discernable in the notion of justice, some philosophers have observed that all human beings are psychologically predisposed to the notion of justice, John Stuart Mill for instance argued that justice is somehow related to the psych of human being in that he is in search of the happiness.<sup>11</sup>

<sup>3</sup> - Thiele Leslie Paul, Thinking Politics: Perspective in Ancient, Modern and Postmodern Political Theory, New York Seven Bridges Press, 2002 pp. 79-80

<sup>4</sup> - Lyotard Jean Francois, The Postmodern Condition: A Report on Knowledge, Translation by Bannington G. et.al. Manchester University Press, 1984, pp. 3 & 36

<sup>5</sup> - Yasutomo Morigiw, Stollier Michael, Halperin Jean Louis, Interpretation of Law in the Age of Enlightenment, Springer Publication, 2011

<sup>6</sup> - Costa Pietro, Zolo Danilo, The Rule of Law, History and Criticism, Springer Publication, 2007 p.326

<sup>7</sup> - Aristotle, Nicomachen Ethics, Book V, pp. 67-76, Translation Terence Irvin, Second Ed. (called Nicomachen), Indianapolis, Hackett, 1999, pp. 67- 76

<sup>8</sup> - Cicero Marcus Tullie's, On Duties, Edited by Griffin M.T. & Atkins E.M., Cambridge University Press, 2003, Book II p. 79

<sup>9</sup> - La Rochefoucauld Francois de, Reflexions ou Sentences et Maximes Morales, 1664, Maxime no. 78 Mozambook 2001, p. 19

<sup>10</sup> - Kant Immanuel, Metaphysical Elements of Justice, Translation by John Ladd, Second Ed. (called Justice), Indianapolis, Hackett, 1999, p. 30

<sup>11</sup> - Mill John Stuart, Utilitarianism, Crisp Roger Ed. Oxford University Press, 1998 p. 83

Leslie Paul Thiele in his colossal and excellent book (Thinking Politics) argues that “justice is commonly assumed to thrive under the rule of law “.

In this book Leslie Paul Thiele presents a well adorned classification to the notion of justice: retributive justice, distributive justice and commutative justice, an adaptation of Aristotle and Thomas Aquinas theory. Yet in his discussions he follows the path of those who subtly promotes the ideal of Euro-communism or American-leftism.

When he defends the principle of “giving to each what is due “he falls –knowingly? – for dialectic materialism, a theory that thrived in the European liberalism but ended up in negating the same liberalism.

Thiele argues that “giving to each his or her due pertains not only to the meting out punishment (known as retributive justice) but also to the allotment of social goods (distributive justice) as well as the allotment of compensation (commutative justice).<sup>12</sup>

But who is to mete out this justice?

Postmodernism believes that man himself must participate in the social life of the society. Man must work out his way through the social life to a position which will enable him to take his share from the society.

There is no external force to give him what is due, just the other way round, in his struggles he will face certain forces within the society to rob him out of what he legitimately has right to own.

In his day to day life, in his endeavors to work out his way through the society, man is tributary of his capacities, his genetic heritages, his ancestral achievements be they to his benefit or be they to his detriment.

In this light, the notion of equality loses its foundation, we cannot talk of equality in the society when each individual has a different IQ (intelligent Quotient) . It is true that we could cultivate the human IQ, to make it stronger by changing the ambiance of the individual or/and by focusing on his nutrition, still we wouldn't be able to change the basic parameters of the

human IQ. The hereditary IQ is always a preemptory factor, this is a matter of ancestral chromosomes, DNA and genes.

The well-known example of two boys from two different families who began their apprenticeship in a wholesale market simultaneously is very typical, where they ended up with two different fates, one of them became a wholesale trade owner, while the other one remained a simple employee.

They were from different families while they enjoyed similar career opportunities, but they had different abilities, different skills because they possessed two different level of intelligent quotients.

John E. Hunter , a well-known psychology professor, asserts in his scientific findings that there is an irrefutable correlation between the career success and higher IQ test scores , both in superior jobs ( jobs requiring a higher performance with a higher personality ) and in ordinary jobs .<sup>13</sup>

<sup>12</sup> - Thiele Leslie Paul, Thinking Politics, Perspective in Ancient, Modern and Postmodern Political Theories, Second Ed. Chatham House Publication, 2002 pp. 201-209

<sup>13</sup> - Hunter J.E., Cognitive Ability, Cognitive Aptitudes, Job Knowledge and Job Performance, Journal of Vocational Behaviour, Vol.29, Issue 3, 1986, pp. 340-362

David C. Rowe, an American psychology professor, known for his works studying genetic and environmental influences on human behaviors, in his excellent book “The Limits of Family Influence: Genes, Experiences and Behaviors “, focuses on whether different rearing factors shape differences in children’s intellectual characteristics. He shares with the other behavior geneticists the stance that parents and rearing experiences may have little influences on what intellectual characteristics their children will eventually may develop.

For professor Rowe it is doubtful that a good-child rearing practices could greatly reduce an undesirable characteristic such as a low level IQ in a child .<sup>14</sup>

Finally, in a sample of US siblings, Rowe et. al. report that the inequality in education and income was predominantly due to genes , with shared environmental factors playing a subordinate role .<sup>15</sup>

John Rawls a well-known and acclaimed professor of democracy and politics in his famous book “A Theory of Justice “argues that, John Lock’s theory of social contract leads us to some principles of justice which can be considered as the fundamental terms of a social cooperation that the hypothetical free and rational individuals would accept to develop their own interests. These terms would determine the basic rights and duties of each individual in the society and would prescribe how to litigate the claims of the members of the society against each other, terms forming foundation of the charter of the society.

John Rawls calls this conception of justice “justice as fairness “, which convey the idea that its fundamental principles are agreed to in advance by the members of the society as being fair.

Furthermore, he observes that in this fair agreement no one knows in advance his social status in the society and no one knows about his fortune in the distribution of social assets, nor does about the outcome of his abilities, his intelligence or special psychological propensities. Therefore no one would be advantaged or disadvantaged in the choice of his interests , as a result of a voluntary scheme , which free and equal persons have assented and agreed upon as being fair and self-imposed .<sup>16</sup>

In Rawls theory of justice, we have before us an adaptation of Lock’s theory of social contract, which as the author himself has emphasized is purely hypothetical.

From postmodernist point of view, the utopian notions of justice are mere idealistic theories without any empirical or pragmatic sense.

For Jean F. Lyotard, the quest for justice is a quest for un-known. Thus the idea of justice would be a paradigm of plurality, transcending toward divergence instead of convergence. Consequently the notion of justice for professor Lyotard remains open to debate , avoiding any compulsory prescription , for instance, on the issue of social justice if we try to choose an established set of criteria this could lead us to a dilemma on the encroachment of discourse of reality upon the discourse of justice .<sup>17</sup>

What postmodernism misreads is the fallacy of these conflicting ideas on the theories of justice.

<sup>14</sup> - Rowe David C., *The Limits of Family Influence: Genes, Experience and Behavior*, The Guilford Press New York, 1994, p. 7

<sup>15</sup> - Rowe David C., Vesterdal W.J. and Rodgers J.L., *The Bell Curve Revisited: How Genes and Shared Environment Mediate IQ*, SEE Associations, University of Arizona, 1997

<sup>16</sup> - Rawls John, *A Theory of Justice*, Belknap Harvard University Press, 2005 (First Ed. 1971), pp. 5-13

<sup>17</sup> - Lyotard J. F. & Thebaud J.L., *Au Juste, Conversations*, Christian Bourgois Editeur, Paris 1979, Pages 50, 186

Actually there is no end to the theorizing of justice , a myriad of school of thoughts have emerged during two millennia on this issue , egalitarianism , utilitarianism , universalism , relativism , constructivism , libertinism , contextualism , pluralism .<sup>18</sup>

While the common feature of these quixotic theories on the notion of justice is that they all are mute about the actual man's failure in making a non-criminal, non-violent life for himself in our modern society.

The nexus of discussion turns around this question: why we haven't searched the real cause of this failure? Are we knowingly camouflaging it?

The day human being began to learn to kill his or her partner, his or her colleagues, his or her clients and to steal their belongings and valuables they killed the social justice, they killed man's civilization.

But who taught this way of life to the human being? Certainly not Christianity or Islam.

The discourse of demonology teaches us that this is the devil worshippers who taught this Satanic way of life to the human generations. Devil worshippers by infiltrating into the Nations administrations, into their mass media (TV channels and Radio stations), into the Nation's trade systems, they sowed the grains of Satanic thought to the society.

Devil worshippers brought with them extremism (religious or non-religious), fascism, Marxism, totalitarianism, proletarianism , racism , and terrorist ideologies into man's civilization .They forged new terrorist gangs (such as Al Qaeda , Taliban , Osama Bin Laden gang , ISIS or Daesh Militias , Islamic Extremist Terrorists) to brain wash innocent people in Western countries , while they – the devil worshippers – were planning to attack American or European cities from within . They used the military technology of these countries to conduct terrorist attacks against their own cities or installations on the name these forged gangs.

Paradoxically nobody doubted and nobody asked how on earth these militarily weak countries such as Saudi Arabia or Iran could even get a measure of courage or audacity to plan such a simpleton's plot to attack the New York's Twin Towers. Nobody questioned how these Muslim countries (almost all of them militarily weak and dependant to the American or European countries technology) could manage to enter American Airspace without being noticed by Pentagon's almighty radar system and intelligence agencies or how they – these forged terrorist gangs – could get such technology to conduct such an enormous plot (September 11<sup>th</sup> plot).

They addicted the public opinion to their falsifications through the gigantic mass media they infiltrated into.

Douglas Kellner , in his book entitled " From 9/11 to Terror War " talks about blow back theory ( borrowed from one of his writer colleagues , Chalmers Johnson ) which accordingly the cause of all malignant events in the US would be the consequences of covert activities of the US government back lashing against American nation .

Kellner in his book tries to adapt this theory to his concept of September 11<sup>th</sup> events, which according to his theorizing Osama Bin Laden and other radical Islamic terrorist gangs associated with the Al Qaeda network would have been supported, funded, trained, and armed by the CIA and several US administrations.

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<sup>18</sup> - Cambell Tom and Mancilla Alejandra, (Editors) , Theories of Justice , Ashgate Pub. 2012 ,Pages XI-XXII

Kellner's oversimplifying theory lacks stamina in that instead of searching the real culprit of these terrorist attacks, he attributes the foundation of these terrorist gangs to certain US administrations, an unbelievable hostile theory to American nation's insight and prestige, while in other section of his book he writes – contradicting himself – “it is well known that the Al Qadea network had its strongest financial and personnel support network in Saudi Arabia “. Blaming a weak country for acts which technically she can't even have dream about doing it.

In other paragraphs Kellner is of view that “ US is a rogue nation in terms of developing weapons of mass destructions and blocking treaties that could lead to their elimination”<sup>19</sup> .

Whilst almost all of the weapons of mass destruction used in Middle East countries are products of China, North Korea, Russia and Israel.

Therefore, contrary to professor Jean F. Lyotard's above mentioned postulation, quest for the reality comes first. Without reality we can't theorize on justice. Thus extrinsically and intrinsically we ought to apprehend the reality in the society then debate on the social justice.

With quixotic theories on the reality of social events, social justice will not be achievable, while without justice the rule of law loses its foundation.

The rule of law has been defined in various ways by many authors, scholars and international authorities.

The European Commission's Report on the rule of law states that in the European Union the concept of rule of law is enshrined not only in the Preamble to the Treaty on European Union (TEU), but also in its Article 2, according to which “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. This Report in quest of a definition for the rule of law and the identification of its core elements presents a set of eight elements as the

principal cornerstones of the rule of law in the world:

- 1- Accessibility of the law (that it be intelligible, clear and predictable);
- 2- Questions of legal right should be normally decided by law and not discretion;
- 3- Equality before the law;
- 4- Power must be exercised lawfully, fairly and reasonably;
- 5- Human rights must be protected;
- 6- Means must be provided to resolve disputes without undue cost or delay;
- 7- Trials must be fair; and
- 8- Compliance by the State with its obligations in international law as well as in national law <sup>20</sup>.

Unfortunately, this classification of the core elements of the rule of law lacks scientific bases as it mixes up different disciplines on different legal issues, transcending the real concept of the rule of law.

A more optimistic view of the rule of law defines it in terms of “ supremacy of law “<sup>21</sup> ,which could be admissible , at least in its conceptual form if it was not exaggeratedly adorned with unrealistic eulogies , where in some countries the mere existence of the Constitution itself has been and continues to

<sup>19</sup> - Kellner Douglas, From 9/11 to Terror War, Rowman & Littlefield Pub., 2003, pages 30, 212-213

<sup>20</sup> - European Commission for Democracy through Law, Report on the Rule of Law adopted by the Venice Commission at its 86<sup>th</sup> Plenary Session, 25-26 March 2011, pages 7-9

<sup>21</sup> - Dicey A.V., Lectures Introductory to the Study of the Law of the Constitution (1<sup>st</sup> ed. London, 1885, Page 97), reprinted in Allison J.W.F. (ed.), Dicey A.V., The Law of the Constitution, Oxford University Press, 2013

be in jeopardy . In a country where a layman cannot even file a complaint to acquire his right because of the high expenses of the judicial system talking about the rule of law in this exaggeratedly manner would be equal to make a mockery of the nation's grievances, as professor Fairgrieve D. in his article exaggeratedly remarks: the rule of law is inherent to the common law system as it developed slowly through the case law method, as part of the home-grown constitutional approach. He continues quoting from Dicey's writings : as Dicey remarked the general principles of the constitution are with us as the result of judicial decisions determining the rights of private persons in particular cases brought before the courts<sup>22</sup>, underlining the role of the judiciary whereby , unlike their continental brethren, possesses not only a formally independent power but also an independent normative power meant to protect citizen's rights <sup>23</sup> .

Professor Martin Krygier criticizes Dicey's point of view on the rule of law from another angle. He argues that to have scientific approach to the rule of law we ought not to limit our discourse to an enumeration of the characteristics of laws and legal institutions in a given society, rather we must begin with the teleology of the matter and end up with the sociology of the legal issues discussed on the rule of law definition.

The nexus of professor Krygier's discussion on the rule of law turns around this question: how a society could possibly restrain the arbitrary exercise of power. He postulates that on the rule of law we must consider four essential criteria , the scope of the ability of the institutions empowered to restraint , the character of the norms that are considered to be as the mediums of restraint ,the real liaisons between the norms and the ways they are applied , and how the norms count in the society <sup>24</sup>.

In a more realistic approach professor Brian Z. Tamanaha explains in his book, how in actual modern society where law and the judicial system are considered as a powerful instrument, powerful men or groups could grab every possible occasion to interpret or use the law in their own interests, while centuries ago law was perceived as the right ordering and common good of the whole society.

Professor Tamanaha in his book , asserts that an instrumental view of law is that law is a mean to an end and could be considered as an empty vessel that can consist of any content whatsoever to serve any end desired <sup>25</sup> . In an assertion of a prima facie definition of the rule of law certainly we could agree upon a literal meaning of the rule of law: "the respect of the law and regulations ". While the nature of human being obviously is prone to the greedy attraction of corruption, he cannot help himself being attracted to the arbitrary use of power and coercion when he gets the power.

This is other than being influenced by the satanic groups in the society and this is a part of how he has attained the position where he is, it is in his nature to be crooked.

Therefore, we cannot deny that in every society there is and will always be a degree of arbitrary use of power, embezzlement and administrative financial corruption camouflaged by certain demagogical policies.

Although these demagogical policies in Asian, African and South American countries are presented in more simplistic ways contrary to the European (Western) and American (Northern) countries

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<sup>22</sup> - Fairgrieve Duncan, *Etat de Droit and Rule of Law: Comparing Concepts*, in Antoine Aurelien (ed.) *Le Droit Britannique: Etat des Lieux et Perspectives*, Societe de Legislation Comparee, 2014, Pages 187-211

<sup>23</sup> - Santoro Emilio, *Rule of Law and Liberties of the English*, in Costa P. and Zolo D. (eds.), *The Rule of Law: History, Theory and Criticism*, Springer, 2007, page 188

<sup>24</sup> - Krygier Martin, *The Rule of Law: Legality, Teleology, Sociology*, in Gianluigi Palombella and Neil Walker (Eds.), *Relocating the Rule of Law*, Hart Pub., 2009, pages 45-69

<sup>25</sup> - Tamanaha Brian Z., *Law as a Means to an End, Threat to the Rule of Law*, Cambridge University Press, 2006, pages 1, 227-228

where these demagogical policies are camouflaged by more stylistic adornments such as democracy, human rights, free election system, pluralism etc., they are all in pursuit of the same evil intentions.

Therefore, in our discussion on the rule of law we are confronted with certain degree of arbitrary use of power as well as abuse of power in every society, certain degree of embezzlement and administrative financial corruption, a degree of nepotism, a degree of irregularity and non-observance of the rules and regulations in every society, be it an American society, be it an Asian society.

Thus the more the measure of perversity and corruption is high the more the rule of law is faded in a given society and the respect of the law and regulations is more non-existent.

### ***Rule of Law in Islam***

In the discourse of rule of law in Islam, we are facing a dilemma, moral values of a religion (or moral codes decreed by a religion) are not comparable to the legal rules enacted in a legal system.

Believers and faithful followers of a religion get their credos subjectively, faith is placed at their heart, whilst their behavior in the world might not be as they would have desired according to their faith.

A man's vow, for instance before his lover to love her forever, may be replaced someday by infidelity.

Faithfulness is not measurable by mundane standards in today's world, we cannot expect by today's standards, for instance, an accused of criminal charges to swear honestly before an Islamic judge (Shari'a Cadi).

If we take as an example one of the fundamental rules of conduct for a faithful Muslim "be just in your life", in our modern and at the same time corrupt world we cannot expect of a faithful Muslim to live his or her life according to this rule unless he or she admits to be duped or beguiled into many treacherous traps.

By the same token neither subjectively nor objectively, we cannot base a legal system on a purism school of thought.

Professor Arif Ali Khan and professor Tauqir Mohammad Khan in their book argue that Islamic democracy takes into account not only the materialist needs of human life but also man's belief in God.

Our savvy scholars emphasizing on Ibn Khaldun's writings are of the opinion that the belief in God and accountability to Him enhance the efficiency of Islamic democracy, since Islamic political man according to his faith is inner-directed and is subjected to external restraint of the Shari'a law, therefore he is also outer-directed<sup>26</sup>.

Albeit the pertinent ideals of professor Arif Ali Khan and professor Tauqir Mohammad Khan, the loophole in their notions of the rule of law and justice is that there is a presupposition in their ideals that the human being is as innocent as an angel and he will abide all the shari'a rules, particularly when he gets a top notch executive career in the society.

<sup>26</sup> - Arif Ali Khan & Tauqir Mohammad Khan, Law of Governance in Islam, Encyclopaedia of Islamic Law, Vol. 10, Pentagon Press, 2006, page 347



Mohamad Hashim Kamali postulates that in a legal system based on religious principles—in our discourse on Islamic legal principles—we

will certainly face certain lacuna because of ever changing circumstances in our modern world. To remedy this, Islamic legal scientists<sup>27</sup> have asserted a system of policy making technique named shari'a policy<sup>28</sup>, literally meaning shari'a oriented policy, applicable to all legal and governmental matters. While according to the Islamic rule making authorities – fugaha – shari'a policy, implies legal measures decreed by Imam or the Ruler of Islamic society<sup>29</sup> on matters which he considers there is a legal lacuna, be it on the civil matters, penal issues, constitutional controversies, judicial rules or be it on the foreign relations issues. Imam or faqih decrees certain rules in the interest of Muslim communities.

Dr. Mohamad Hashim Kamali quotes from writings of one of the famous Islamic jurists Ibn Qayyim: any measure which actually brings the Muslim community closest to the beneficence<sup>30</sup> and furthest away from corruption<sup>31</sup> partakes in just policy making even if it has not expressly ruled by shari'a itself.<sup>32</sup> Mohamad Hashim Kamali continues his argument that, shari'a policy<sup>33</sup> is thus an instrument in the hands of the Islamic ruler with which he decrees certain rules despite the fact that a specific reference to these rules can be found neither in the Qur'an nor in the Sunnah<sup>34</sup>.

Dr. Mohamad Hashim Kamali's argument gains more ground when the Islamic communities are confronted with the formation of some new legal norms in the world.

In 1981-1982 when the Abolition of Capital Punishment Act was adopted by French National Assembly and capital punishment was replaced by life imprisonment other countries began to follow the same path (actually we find a similar legislation in many European countries legal system).

Similarly UN General Assembly has adopted numerous resolutions<sup>35</sup> calling for general suspension of the death penalty. Accordingly, the member States are to give a moratorium on the capital punishment with a view to abolish it in the near future.

The increasing normative trends in the legislation of developed countries reminds us of certain lapse of dynamics in the Islamic countries legislations.

The requisite role of the "faqih" (Islamic rule making authority) in this issue is more decisive, otherwise the Islamic countries legal system will certainly remain archaic.

Whilst in some other issues the vital role of "faqih" is hindered by certain anthropologic factors.

For decades the abhorrent and despicable tradition of genital mutilation of girls practiced in some African countries (some of them Islamic countries) was discussed vehemently by scholars and religious authorities in order to eliminate it.

<sup>27</sup> - In Arabic: ulama

<sup>28</sup> - In Arabic: siyasah shari'a

<sup>29</sup> - In Arabic: ulu al amr

<sup>30</sup> - In Arabic: salah

<sup>31</sup> - In Arabic: fasad

<sup>32</sup> - Muammad b. Abu Backr Ibn Qayyim al jawziyah, I'lam al Muwaqqin 'an Rabb al A'lamin (Cairo: al Kulliyah al Azhariyah, 1968 / 1388), IV page 309

<sup>33</sup> - In Arabic: siyasah shari'a

<sup>34</sup> - Hashim Kamali, Mohamad, Siyasah Shar'yah or the Policies of Islamic Government, in Saeed Abdullah (Ed.), Islamic Political thought and Governance, Routledge Pub. 2011, pages 35 - 54

<sup>35</sup> - GA Res. 62/149 (2007), GA Res. 63/168 (2008), GA Res. 65/206 (2008), GA Res. 67/176 (2012), GA Res. 69/186 (2014) and GA Res. 71/187 (2016)

This was also discussed at many UN General Assembly sessions , followed by numerous resolutions condemning this barbaric practice<sup>36</sup> .

Obviously such a practice is deeply intertwined with anthropological elements and could be considered as a cultural issue but more importantly it runs contrary to the basic Islamic principles and fundamental shari'a rules. It is argued that the vital role of "faquih "in this instance is compromised because practically his decree prohibiting this practice will be bypassed by the local folks.

Taking these anthropological elements into account, isn't it true that social culture is the principal constant of the rule of law notion?

The success of a legislation in a given society depends largely on the cultural context of the ambience, where a set of social values or certain traditional practices are deeply rooted in the public culture, the legislator or a religious rule making authority will certainly be confronted with these hostile cultural elements.

In these societies - mostly traditional – the anthropological factors form a shared conception of justice and rule of law in matters considered as daily life concerns<sup>37</sup>.

A more pessimistic view on the rule of law in Islamic countries has been presented by professor Hossein Esmaili, arguing that in Muslim societies jurists and ordinary Muslims are in an unsettled status vis a' vis the entanglement of the traditional Islamic law and the legal problems of the modern world.

Quoting from Dr. Seyyed Hossein Nasr, "Divine Law is to be implemented to regulate society and the actions of its members rather than society dictating what laws should be ", he postulates that as the nature of an Islamic rule of law is not clear therefore it is hard to believe that a rule of law system comparable to what is established in European and American countries be applicable in Muslim countries.

Professor Esmaili is of the opinion that a flexible pluralistic shari'a system is not able to co-exist with a modern rule of law system<sup>38</sup> .

A more sophisticated view has been discussed by professor Muhammad Sa'id Ashmawi (an eminent scholar and jurist at the University of Cairo), debated in Dr. Wael B. Hallaq's book "A History of Islamic Legal Theories, An Introduction to Sunni Usul Al-fiqh).

Professor Ashmawi argues that no doubt Shari'a must be considered as a medium to serve the nations but it ought not be viewed as a composition of rules and penalties. The general principles of Shari'a are mostly justified by the Quran or by the circumstances under which it was revealed, therefore it is comparable to a state of mind in the society without which the rule of law would not be sustainable.

Thus we must distinguish the general principles of Shari'a from idealistic religious features (compared to religion and religious thoughts).

The general principles of Shari'a must be applied through a proper technique while a proper application of Shari'a necessitates a scientific and correct interpretation of Shari'a, which was revealed for a particular reason to deal with the necessities of the society.

<sup>36</sup> - On 20 December 2012 the UN General Assembly adopted a Resolution to Ban Female Genital Mutilation. The Resolution A/Res/67/146, (2012) was adopted by consensus by all UN members.

<sup>37</sup> - Almqvist Jessica, *Human Rights, Culture, and the Rule of Law*, Hart Publishing, 2005, pages 167- 169

<sup>38</sup> - Esmaili Hossein, *The Nature and Development of Law in Islam and the Rule of Law Challenge in the Middle East and the Muslim World*, Connecticut Journal of International Law, 2011, Vol.26, Pages 329 – 366

Professor Ashmawi maintains that there is a link between the Quran and Shari'a on one hand and the realities of the pre-Islamic world on the other hand, we cannot deny that Islam has been emerged out of a particular nomadic society.

Therefore the true application of Shari'a can be achieved only if we bring it to bear, consistently the social exigencies, to the extent that it could be completely compatible with the development and ever-changing conditions and requirements of today's modern life<sup>39</sup>.

Professor Ashmawi's sophisticated vista of theories on Shari'a law could be impeccable if it had not a paucity on the role of faquih.

Generally speaking, people fail to take into consideration the immensity of the burden of responsibility which weighs on the shoulders of faquih. In our modern and at the same time corrupt world where even powerful developed countries are unable to defeat the terrorist and Satanic gangs (like ISIS or Daesh and Taliban terrorists) or evil pressure groups like different clandestine sects which infiltrate and corrupt the whole system of an advanced society, one cannot expect the Islamic countries to be free of these evil taints.

The whole history of the Islamic countries has been and will continue to be cursed by these Satanic influences.

More importantly, we must remember that unfortunately the terrorist gang's leaders (like Osama Bin Laden or other Al Qaeda leaders) too, fraudulently claim to be faquih.

Therefore, it is not difficult to understand how much the real faquih in Islamic societies are under multiple pressures.

Yet Muslim generations shun the idea that rule of law notion in the Islamic countries would be prisoner of the peculiarities of cultural setting of their social ambiance.

Thus from this perspective the importance of the role of faquih remains to be seen, the role of veracious and highly educated faquih who could assert the dynamics of public shari'a law in Islamic countries.

## **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 cannot 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

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<sup>39</sup> - Hallaq Wael B., A History of Islamic Legal Theories, An Introduction to Sunni Usul Al-fiqh, Cambridge University Press, 1997, pages 231 – 237

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 cannot 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 cannot 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 cannot catch up with the modern legal trends globally posited as such, the failure cannot 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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