

Democracy as a Political System of Governance: An Analysis in the Light of the Fundamental Qur'anic Principles of Governance

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Abstract

This article is based on the theme that modern Muslim polity should be grounded in the Qur'anic principle of "Shura" (consultation) which outlines a representative form of government. It discloses that although political system of Islam finds its chief source of legislation in the will of God as revealed to the Prophet Muhammad yet modern concepts of political system, ways of governance and techniques of administration of justice are not against or something strange for Islamic legal system rather Qur'an and Sunnah contain almost all modern concepts of governance and administration which are considered as prime concerns of the contemporary political systems of the world. The present Muslim world is backward only due to lack of analytical study of the Qur'anic principles in the context of the modern scientific knowledge. To provide a purposeful enterprise, this article gives a comparative analysis of both legal systems, i.e. Islamic and Western and presents some point of similarities and differences. This article suggests that the legal provisions of the Quran and the Sunnah must be re-interpreted in the light of the changed context and that the traditional interpretation of the Qur'an must not be taken as binding upon the modern Muslim societies. It was for their time and that the foreign procedural and governance laws should be re-evaluated in the light of the Qur'anic principles and should be adopted through legislation by the contemporary Muslim states and law courts if not against the objectives of Shari'ah.

1. Introduction

The prime concern of any legal system is the study of law as a legal and social phenomenon to maintain peace and justice in a society. Literally, a legal system is defined as a coherent and consistent system based on law (Cowie, 1997). The term legal means pertaining to and the word theory means a system of something (Fitzgerald, 1990). Technically, a legal system is defined as an integrated body of rules determined by an inner coherence of meaning and is of necessity a purposeful enterprise (Friedmann, 1967), (Layon, 1980). Fuller defines legal system as a body to enlighten rules which created purposefully and intended to guide human behavior (Fuller, 1969). In the light of these definitions a political system may be defined as a system of governance and power of a country (Black, 2012). Taking about the legal systems of the Western World, the English legal system is based on the common law traditions of conceptualization and formalization and has a complex nature while the legal systems of New Zealand and Australia are based on pure common law system. South Africa combines the civil and common law as well as local customary laws of the land. On the whole all legal systems of the western world are based on the same model (Morrison, Gearey & Malleson, 2004).

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Contrary to it, the legal system of Islam is based on the principle of oneness of God and His supreme authority over the universe. The political system of Islam does not accept any ruler, king, or institution having absolute power other than Almighty Allah. It is explicitly stated in the Qur'an: "Know you not that it is Allah to Whom belongs the dominion of the heavens and the earth?" (The Quran: 2:107). Roscoe Pound (1953) points out that "naturally a human being does not agree to submit himself to another man unless he is forced by a physically stronger person or by his mental superiority." (p. 51). God is the Creator of the human being and knows his nature, so He did not force human being to be submissive to other one like him rather He admired the self respect of human being and ask him to be submissive to His sovereignty alone. It is this reason that issues regarding sovereign power, its authority and limits that are burning issues of all the legal systems of the world do not arise. In this context, this article is divided into three sections. Section first describes some fundamental principles of governance existed in the Qur'an. Second section provides a comparison between Islamic and Western legal systems and last section consists of some conclusions and recommendations.

2. Fundamental Principles of Governance Existed in the Qur'an

Generally, the Qur'an and the Sunnah both give us an overall policy regarding governance and deal with both public and private relationships in a Muslim and a non-Muslim state. (Al-Khidri, 1960). Unlike barbarian government of primitive English governing system, Islam placed its political system on rich, up-dated and modern principles of governance since its beginning (Sherman, 1996). The fundamental principles of governance of the Qur'an can be discussed as:

2.1 Constitution of the Muslim Ummah

The term constitution is a new coin of the contemporary legal development and is defined as a code deals with the powers, functions and authorities of different organs of a state. In a parliamentary system, the constitution is designed to describe the principle of separation of power by announcing sovereignty of Parliament, rule of law and the principle of the constitution. (Dicy, 1920). Likewise, first three articles of the Constitution of America 1789 describe powers and authorities of three major organs of the federal government, i. e., legislature or Congress, President and Supreme Court of the country. The objectives of a constitution are to frame the principles, objectives of national institutions regarding their function, to enable its people to order their lives according to their customs and beliefs and lastly, to describe rights and duties of its subjects (Wright, 1954).

In Islamic legal system, Quran and Sunnah Mutawatirah (authentic and proved through continues chain of narration) of the prophet both are considered as a Divine Constitution of the whole Muslim Ummah (Al-Suyuti, 1978). From the Sunnah, the Constitution of Medīnah was promulgated by the Holy Prophet (PBUH) as a head of the state in 622 A.D. (Hussainy, 1968). Article first of the Constitution states: "This writing is from Muḥammad the prophet of Allah (pbuh) to Quraysh and Yathrabi believers and those who follow them and fight alongside with them. They will form one Ummah to the exclusion of others." (Ibn Ishaq, 1968).

2.2 Concept of Sovereignty in the light of the Qur'ānic Provisions

The development of the concept of sovereignty in Western World has its origin in the process of mutual recognition whereby states granted each other rights of jurisdiction in their respective territories and communities during the 17th century. (Finely, 1983). Bodin's was the first who contended that the conflicts between religion and civil state could be solved only by the existence of supreme power competent to overrule all religious and customary authorities, a central power which could wield decisive power within a specified community (Machiavelli, 1983).

In political system of Islam, all supreme powers and sovereignty is vested in Allah Almighty alone. This principle of sovereignty has been established and declared by Allah Himself: "And to Allah belong the east and the west, so wherever you turn (your faces), there is the face of Allah." (Qur'an). His believers however, exercise it as delegated authority as political sovereigns. The constitution of Pakistan (1973) states explicitly that the sovereignty over the entire universe belongs to Almighty Allah alone. Similarly, Article 2-A of the constitution of Pakistan defines that the authority means a delegated authority given by the Allah Almighty to the people of Pakistan, who are bound to exercise it within the limits prescribed by Him. Thus in a case, Asma Jilani, The Government of Punjab, it was held by the Supreme Court of Pakistan that the legal sovereignty over the entire Universe belongs to Almighty Allah alone. . . and the people as delegates of the Sovereignty of Almighty Allah can make laws in conformity with the Quran and Sunnah."(PLD,1972).

2.3 Concept of Independent State

A state can be defined as an association of human beings established for the attainment of certain ends by certain means.(Cotterrell,1989). An independent state must possess certain qualities, such as the possession of a particular territory to control, existence of organized community of people occupying that territory, and lastly, to be acknowledged by other independent states of the world. Muslim state of Medīnah founded by the Holy Prophet (pbuh) was acquainted with the above mentioned qualities (Ibn Hashshām).

2.4 Islam should be the State-Religion of a Muslim State

The divine provision of the Qur'an declares clearly that Islam should be the state-religion of a Muslim state. For example, the text: "O ye believe! Obey God, His Apostle, and those set in command among you." (Qur'an). This text establishes some basic rules of governance such as principle of loyalty to the rulers, concept of hierarchy of the governance like supreme authority and delegated authority and lastly, that Islam should be the state religion. This spirit is seemed in the Constitution of Pakistan 1973 and Article, 2 of the Constitution describes that Islam shall be the state religion of Pakistan.

2.5 Democratic form of Government is most Favorable

In contemporary legal language, the term democracy literally means rule by the people (Cowie). Technically, it is defined as a representative democracy in which every adult person of a state has right to participate in government to run the affairs of the state. (Steven & Robin, 2012). The concept of democratic form of government has its origin in the struggle to establish a system based on the principles of equality, justice, and to clarify the extent of the powers of the state. According to this system law, rules and policies appear justified when they are democratic (David, 1997).

In Islamic legal system, the Qur'ānic principles guide an Islamic government to decide the matters and issues of the national interest with counseling and mutual understanding. For instance, the text: "And those who answer the call of their Lord and establish worship and whose affairs are decided by counseling among themselves."(The Qur'an). The principle of counseling and consultation was adopted by the Prophet himself and it is narrated that nobody could excel the prophet (pbuh) in counseling with his companions.(Ibn Hajar, 1375 A.H.). The Muslim state of Medīnah can be presented as an example of this type of government which was based on the principle of consultation and consensus of opinions. Hence, the most suitable form of the government of an Islamic state is democratic form of government.

2.6 Principle of Separation of Powers

The principle of separation of powers lies at the core of the constitutions of the modern world. The parliamentary system of government in English legal system is a development of the theory of separation of power. The concept of separation of power among different organs

i. e., the legislative, executive and judicial etc was presented and advocated by the English legal philosopher Lock and others (Crawford, 1998). The objective of this concept was that these organs and their functions should be kept apart in order to prevent the centralization of too much power and certain limitations may be imposed on the unlimited powers of the government (Slapper and Kelly, 2004).

In Islamic legal system, the theory of separation of power has its origin in the Qur'an. For instance, the verse: "O you who believe! Obey Allah and obey the messenger (Muhammad, pbuh) and those of you (Muslims) who are in authority. And if you differ in anything amongst yourselves, refer it to Allah and His messenger, if you believe in Allah and in the last Day." (The Qur'an). This text establishes principle of separation of power as first portion of the verse directs to be loyal to Allah and His messenger and to the ruler in authority who exercise delegated power while the second portion of the verse directs the believers that if a dispute arise amongst themselves then refer the matter to Allah and His prophet and here the words "those in authority are omitted" which leads that the dispute should be brought before a person or an institution other than the ruler in authority who decide the issue in the light of the provisions of the Qur'an and the Sunnah. As the dispute could be either between the individuals or between an individual and government, so the issue must be refer to a third party who may be a judge or court of law. In this way, this verse is the source of the theory of separation of power. Thus, in a case, Tika Iqbal Muhammad Khan. Pervez Musharaf, it was held by the court that Pakistan has a parliamentary system and the Constitution is based on the principle of trichotomy of powers where under all the three organs of the state, namely the legislative, executive, and the judiciary are required to perform their functions and exercise their powers within their allotted sphere." (PLD, 2008).

2.7 Qualification and Authority of the Head of the State

In an Islamic state the head of the state must be a Muslim for it is recognized and accepted principle of Shari'ah that authority to make law belongs to Almighty Allah alone. For example, the text of the Qur'an (4:59) as mentioned above, the words "those set in command among you" indicate that the head of the state must be a believer or a Muslim. This provision has been inserted in article 41 (2) of Constitution of Pakistan 1973 which states that the president of Pakistan must be a Muslim and article 90 (1) states that he shall exercise his executive authority in accordance with the constitution.

2.8 Legislation or Enactment Procedure in a Muslim State

Almost every legal system has its certain fundamental principles to enact and to legislate to solve the contemporary issues of the people. In contemporary legal language, the law-giver is defined as legislature. It is an executive body consists of specific individuals to whom a specialized function has been temporarily assigned. The task of these individuals is not to impose their will even within limits on their fellow-citizens but to pass statutes which are fairly precise operation. (Charles & Reed, 1978). It has power to make, to alter, to amend and to repeal laws and is limited by the constitutional provisions (Crawford).

Legislation in Islamic legal system is normally initiated in the form of an opinion by a *mujtahid* who is to endeavor hard to comprehend the object and the intent of the Law-Giver. (Al-Shatibi, 1341 A.H). The criterion of Islamic legislation is that every believer is not capable to legislate. This right belongs to expertise of the sciences of the Qur'an and Sunnah and Islamic jurisprudence known as *mujtahid*. There is no hard and fast rule regarding legislative process, the best way however, is that each Muslim state should have its own legislative body consisted of expertise as the earlier rulers of the Muslim state established (Numani, 1988). The laws so made must be in accordance with the provisions of the Quran and the Sunnah. Article 227 of the constitution of Pakistan 1973, states clearly that all existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Quran and Sunnah.

2.9 Concept of Independent Judiciary

The principle of judicial independence is based on the presumption that the judges must be free from all types of state pressure in their decision making in order to ensure their impartiality.

Until the 17th century, English legal system had no concept of independent judiciary. The judges hold position as viceroys of King. There was no concept of separation of powers. The task of the judges was just to help the central state and its legal forms and institutions. (Cownie & Bradeny, 2003). The idea of independence of judiciary and the legal system from the direct control or interference of the state was presented by English philosopher John Locke who saw it as one of the essential reasons for and justifications of the social contract on which the social structure was assumed to be based (Pollock & Maitland).

On the other hand, in Islamic legal system, the judiciary has been considered as an independent institution since its beginning and government has no authority to intervene with the power of the judiciary. It is stated in the Qur'ān (4:58): "Verily, Allah commands... and that when you judge between men, you judge with justice." The first Caliph of Muslim Ummah Abu Bakr separated judiciary from executive and made it completely independent. He appointed 'Umar as chief justice of the Muslim state (Muhib Allah, 1384 A.H.). Article 175 of the constitution of Pakistan 1973, describes the jurisdiction of the courts and their hierarchy and 175 (3) explains that the judiciary shall be separated from the executive.

2.10 Concept of Legislation through Judicial Interpretation

The concept of legislation through judicial interpretation is well recognized by Islam political system. The judgment given by judges is binding on the parties. It is stated in Qur'ān (4:65): "But no, by the Lord, they can have no faith until they make three judges in all disputes among them. Then find in their soul no resistance against your decision and accept it with full conviction." In Islamic legal system, the judges are not bound to follow precedents rather they are free to make new laws by way of judicial interpretation and to decide a contemporary issue differently in the light of the changed context. In a case, Bilqees Fatima vs. Najm-ul-Ara, The Lahore High Court of Pakistan held that if courts are clear as to the meaning of the verses, effect to that interpretation will be given irrespective of what has been said by the jurists (PLD).

2.11 Functions of a Government in a Muslim State

The government of any state must be able to perform certain primary and secondary functions. The primary functions are administration of justice and war to defend its subjects from all types of internal and external aggressions. Among the secondary functions of a state are to legislate, taxation and other tasks which are necessary to be taken into consideration for administration of justice and to maintain law and order in a society. As far as concerned the functions of a Muslim state, the Qur'an and Sunnah guide in detail regarding the internal and external policies of a Muslim state. For instance Qur'an states regarding the foreign policy of a Muslim state that a Muslim state not only responsible to maintain law and order in the society but also in the whole world. It is stated in the Qur'an: "But if they incline to peace, you also inclining to it, and put your trust in Allah. Verily, He is the all-Hearer, the All-Knower." (8:61). Not only is this but Qur'ān guides its followers to be ready to face against external aggression. For instance, the verse: "And be ready against them all you can of power, including steeds of war to threaten the enemy of Allah and your enemy, and others beside whom you may not know but whom Allah does know." (Qur'an). Likewise, the Holy Prophet being head of the state entered into peace agreements with the non-Muslims against internal disturbance and managed a system of defense through wars against external threat. (Ibn Hashshūm). A state running under the umbrella of Islam is under heavy duties and not only responsible to educate and administer its believers regarding their worldly affairs but also responsible to prepare them to face the Day resurrection. Article 31 of the constitution of

Pakistan provides that step shall be taken to enable the Muslims of Pakistan individually or collectively to order their lives in accordance with the fundamental principles of Islam.

3. Differences & Similarities between Western and Islamic System of Governance

The above discussion reveals that theoretically Western system of governance is in clear contrast with the Islamic system particularly regarding the concept of Supreme sovereignty and Law-Giver. The difference between Islamic concept of sovereignty and Western concept is that the former has its roots in the divine revelation while the later come into being to resolve the issue of superiority between religion and political authority which leads ultimately to the superiority of a political sovereign over religion. Contrary to it, under Islamic political system the issue of conflict did not arise because it has been solved by Allah Almighty Himself. This prime difference causes for further differences between the two. There are however, some similar elements in both systems which may be adopted by each other.

3.1 Differences between Both Systems

Islamic system of governance is different from other systems of the nations of the world in many aspects and some of them are as under:

- (i) The foundational principles of the Muslim's Constitution (Qur'an and Sunnah) are irrevocable and cannot be altered or amended by any means of legislation while the constitutions of the contemporary states are subject to change and amendment. For example, the fundamental principle of Islamic constitution is that Supreme authority of this universe belongs to Almighty Allah alone and that His believers can exercise only delegated authority and hence, no law can be made repugnant to the spirit of divine revelation.
- (ii) Unlike modern constitutions which contain principles to govern and to determine powers and authority of different organs of the state and deal just with the conduct of their subjects regarding worldly affairs, the constitution of the Muslim Ummah communicates to the spiritual, moral, ethical, and psychological aspects of the life of its believers and places equal value to the sensational issues and the issues of transcendent nature and controls beliefs, ideas and actions of human being regarding this world and the world hereafter.
- (iii) Unlike Western legal system where the existing sovereign authority has immunity before law, the head of the Muslim state has no Royal prerogative or immunity before law. He is just an administrator to administer law and justice in the light of the objectives of the legal system of Islam/Shari'ah.
- (v) The issue of limited or unlimited authority of the parliament, judiciary and executive does not arise in Islamic legal system and each organ of a Muslim state has a complete code of conduct in form of the Qur'an and the Sunnah to decide the matters and thus, a serious conflict does not arise.
- (vi) The Islamic legislative authority cannot supersede the limitations prescribed by the Qur'an and Sunnah while in Western legal system the legislative body has unlimited authority to legislate and to promulgate laws what it considers appropriate or necessary in the light of the public demands and needs of the people and has no concern with their religious impact.
- (vii) The scope of the earlier code of Roman law was limited and dealt only with the personal matters of the subjects and their properties and had no concern with the public and ritual aspects of their lives. On the other hand, Islamic law/ Fiqh has deep concern with the three major fields of a contemporary pure legal system since its beginning such as all types of civil transactions including political affairs, criminal affairs and liabilities of people that are based on the principle of retaliation and compensation and lastly, with the rituals of the people (Hamidullah, 1993).

(viii) The term “law” in Western legal system has been derived from the Latin term of Roman law “jus” which means right while Islamic law termed as “Fiqh” means to know and to understand something.

(ix) Unlike common law, Islamic law is written law. The common-law and civil law under English-European legal system has its source in the Roman law and Catholic Canon law. On the other hand, Islamic law has its origin in the divine revelation of Qur’an and Sunnah.

(x) Islamic law is defined as the command of the God sanctioned by revealed Book and Sunnah of the prophet by way of interpretation while law in Western legal system is defined as a command of a supreme political sovereign enforceable by political force has its origin in the custom and precedent.

(xi) The other difference is that any additional legislation or modification of any existing Islamic law must be recognized by the provisions of the Qur’an and the Sunnah. Any piece of legislation contrary to these sources is not acceptable although against the so called welfare of the people. On the other hand, the Western concept of legislation is based on the welfare of the majority of the people, any piece of legislation enacted by the parliament can be modified and amended through legislative process and question of divine base does not arise.

(xii) In Western legal system, the issue regarding the discretionary powers of the judges is a hot issue to debate and to solve. Here, reason plays a vital role and the judge has a wide discretion to decide the case according to his own judgment. As the discretion of a judge is the law of tyrants. Thus, the problem of interpretation and its application remains intact (Pound, 1953). Islamic legal system by contrast does not face this problem. No doubt reason plays an important role during the process of interpretation but the discretion of the judge is controlled by the limits and bounds of Shari’ah. It is duty of the judge to refer his opinion to the legislative intent of the Qur’an and the Sunnah. Thus, he cannot decide any issue with his own personal whim.

(xiii) In case of law of England precedents are of great importance and are strictly followed in legal decisions and it is considered that apart from judicial decision there is no law in England at all. Judicial precedents on the other hand form a considerable part of Islamic law but have no binding force and do not form the whole structure of law.

(xiv) The common law and the civil law both are extreme in nature. Under common law a judge can impose his discretion without any extent in exercising judicial discretion while the later underestimate the extent to which continental judges have discretionary power. It is this reason that the European Court of Justice (ECJ) is in practice increasingly recognizing the benefits of establishing a body of case law. Unlike this conflict, in Islamic legal system, there is no such tension to establish a code law to limit and to control the discretionary power of judges rather they are bound to abide by the general principles of Quran and Sunnah and cannot exceed them.

(xv) Unlike western concept of democracy where government and policy makers are bound to legislate according to the majority will though not in accordance with religious bond a Muslim government in an Islamic state cannot make any law based on the desire or want of the people just only to please them if such want is against the objectives of Shari’ah or legal system of Islam.

(xvi) The Western concept of “Theocracy” is in clear contrast with the Islamic concept of “Delegated power”. The word “Theocracy” is a Greek word has two parts “Theo” means God and “Cracy” indicates to a particular form of government. Technically, it can be defined as a state or a nation where all political powers are exercised by clergy and where religious law is dominant over civil law (The American Heritage, 2005). In Islamic legal system however, no particular class of human being has direct approach to God. God has revealed his directions through revelation to his last prophet Muhammad (pbuh) who was the explainer and the interpreter of these divine instructions. The Prophet being a human was a messenger

to convey the message of God to the people. Majority of these messages and instructions are general in nature and provide guidelines to govern a state by the people in the light of these instructions and a state is not governed directly by God. Hence, it is belief of Muslims that no man or institution has a privilege to have a private relationship with God or a special right to speak to him. God only spoke to the Prophets and all other men stand on equal status. It is necessary for legislature to enact such laws which must not against the objectives of Shari'ah or have their origin in the Qur'ān and Sunnah.

(xvii) Unlike Western legal system where religion is considered as a private affair between man and God, Islamic law itself is based on the religion and hence, not entirely a private affair.

(xiii) In early common law system women were considered as private property of men and had no right of inheritance or to own any type of property. By defining domestic matters as private, the state and its functionaries have denied women access to its power to protect them from abuse. Islamic law on the other hand, declares women equal in status to that of men and there is no family matter subject to be declared as domestic rather Islamic law has made a systematic arrangement to protect and to secure the interest of the women by way of inheritance and made her free to own, to sale and to purchase any type of property and her parents or husband have no right to intervene with her rights.

(xix) The law in Western legal system is based on the temporal objectives of the government having a particular political agenda. The priorities of one government may differ from another one while Islamic law is based on the eternal objectives of Shari'ah and changing in the government can not disturb it. A Muslim government rather under obligation to establish good moral and ethical values in the society as guided by the Holy Qur'an (22:41): "Those who if we give them authority in the land, (they) enjoin five compulsory prayers, to pay Zakat and enjoin al-Ma'ruf and forbid from al-munkar (in the light of the teaching of Shari'ah)."

(xx) Islamic law is different from the natural law in the sense that natural law born in the mind of human being to decide what is wrong and what is right while the former has its origin in the divine instructions and the validity of right and wrong can be examined only in the light of divine instructions not from the human mind or heart.

(xxi) Unlike common law system, under Islamic legal system, the head of the state or king has no complete sovereign powers or any Royal prerogative. He simply performs his function of legislation and administration of justice as vicegerent of Allah. He is bound to establish rule of law revealed by Allah.

3.2 Similarities between Both Systems

However, like other legal systems of the world, Islamic legal system aims to administer law and justice in a society and to resolve the contemporary issues of the people in the light of the principles of justice, equality and fair policy. Thus, techniques, methods and measures of any legal system can be analyzed and modified in the light of the objectives of Shari'ah as the operation and the scope of the law in is dependent upon the existence of a legal system and its certain attributes. There are some common elements between both legal systems. Some of them are asunder:

(i) Like all modern constitutions of other nations of the world, Islamic constitution contains both general, universal and immutable principles regarding fundamental rights and as well as detailed specific principles which are constituted to apply the general principles.

(ii) In an Islamic state, the head of the state may be a nominal head as in a parliamentary form of the government or he may be an active and powerful head as in a presidential system. For instance, president of America enjoys many powers and authorities. The President is not only the head of state but he is also head of the government. At the same time, he possesses the

authority of the military commander-in-chief and chief diplomat. Along with these powers, the President has broad constitutional powers to manage national affairs and the workings of the federal government and he may issue executive orders to affect internal policies. The President may sign or veto legislation passed by Congress and has the power to recommend measures to Congress. The Congress may override a presidential veto but only by a two-thirds majority in each house. (Krause,1953). Talking about the head of the earlier Muslim state, he possessed unlimited powers like the president of America and the Caliphs had to enjoy the authority of the head of the state and commander in-chief at the same time.

(iii) The legislative power of a Muslim government is similar to any other government of the modern world as both are bound by the constitutional provisions and both are free to make and to enact new laws according to the needs of people to accommodate changes of a society and both are bound to legislate and to enact new laws within the limits prescribed by the constitution of the state. The legislative power of a Muslim state is bound only with a condition is that such legislation must not against the spirit and the objectives of Shari'ah (Qur'ān and Sunnah). For example, the criminal law of Islam is based on the protection of certain objectives of Shari'ah which are based on public interest and it is this reason that only a few crimes have their prescribed punishment such as murder, theft, false accusation of adultery, apostasy, and adultery etc, and all other crimes and offences are left at the discretion of the Muslim government to decide their punishments according to the nature and the circumstances of the crime.

(iv) Like the developed systems of the world, Islamic legal system makes its states bound to maintain law and order in the society and to provide justice to every member of the society (Muslim and non-Muslim) as stated in the Qur'an (4:135): O you believe! Stand out firmly for justice, as witness to Allah; even though it be against yourselves, or your parents, or your kin, be rich or poor, Allah is a better Protector to both (than you). So follow not the lust (of your hearts), lest you avoid justice; and if you distort your witness or refuse to give it, verily, Allah is ever Well- Acquainted with what you do." It is also duty of an Islamic state to protect its subjects from all types of internal and external aggression and to work for the welfare of the people as provided by the Law-Giver: "O Ye Believe! Spend out (in the way of Allah) of pure things which you earned lawfully and from which We brought forth for you from the earth." (The Qur'an).

(v) Law either Islamic or English-European is a product of long historical development, based on the juristic opinion or fabricated by well-educated and people of well-known fame. For example, Roman law was promulgated and codified by the Roman jurists and similarly, Islamic law was developed by the people who had deep understanding of the precepts of the Qur'an and the Sunnah and who had deep concern to provide solutions of the problems in the light of the public interest.

(vi) Law in both systems aims to regulate and to govern the conduct of the people in the light of the interests of the society to establish a welfare state and to provide justice to all and to secure its citizen from all internal and external aggression.

(vii) Like European-common law, Islamic law is derived and designed from legislative and judicial work through logical reasoning in the light of the public interest and is enforced by the element of sanction moral and physical. Growth and development of law in both systems is dependent upon juristic interpretation and judicial decisions.

(viii) Both systems do differentiate between law and ethics and if a person breaks moral or ethical values is not subject to punish. For example, in Western legal system if a person engaged in void transaction does not commit any offence and furthermore, is not regarded as object of punishment. When a transaction involving illicit gain comes to a court the only thing that actually happens is that the transaction is made void and has no legal consequence. The same practice is found in Islamic legal system as Gerber pointed out for instance, that " if

husbands who leave their wives without maintenance are not punishable by law for the act itself, heirs who usurp the rights of other heirs likewise are not punished for their behavior even if they lose their case in the court. People who can afford to repay their debts are not punished for claiming the opposite, even if their ability to pay is established.” (p. 130). The only difference between morality in positive law and morality under Islamic law is that the break of moral values has been declared by Shari’ah as punishable in the world hereafter as well as parliament is authorized to restrict it by way of *ta’zīr* punishment.

(ix) Islamic law some time creates artificial logic behind an enactment like English-European and Western legal system. For example, the fatwa given by Abu Hanifah and Abu Yusuf reveal that the sever prohibition of usury is not treated as total and absolute prohibition, but merely as a legal injunctions, so be it (that there is no harm in using a sale as a cover for interest). Commenting on this Gerber describes that “this is perhaps the highest expression of the artificial logic in Islamic law, which had as much of it as Western legal system. It is also arguably, the highest expression of expediency to be found in the structure of Islamic law. But it is in no way an open license to violate all moral and legal injunctions.” (p.104).

(x) Although Islamic law has its origin in the divine instructions of Quran and Sunnah yet does not oppose the formal concept of modern law in any other legal system of the world as Gibb states that “the canon law in Arabic should not be taken as to mean the exact opposite of the canon law in European language. (p.72). Like any piece of positive law, Islamic law can be modified and amended by way of secondary legislation to meet the challenges of the time and needs of the people and hence, possesses all that qualities and characteristics which can be part of any up-dated and modern concept of law in any legal system of the developed world today.

4. Conclusions and Recommendations

On the basis of this study it is concluded that the necessity of the state necessitates a code of conduct or structure of law and Allah Almighty has bestowed Muslims by way of revelation. The supremacy of law demands its presence before the existence of a political authority and Islamic law is prior to and independent of the existence of political authority. A thorough study of the constitution of Muslim Ummah in the light of the characteristics and objectives of the modern constitutions, it leads that it contains clear instructions regarding rights and duties of the citizens of a Muslim state, the inter-relations between Muslims and non-Muslims, the concept of joint responsibility of all citizens for defense and war, equality before law, and others fundamental principles which provide a strong base for up to-date and modern system of governance. These and similar principles are progressive by nature and beneficial for all types of political systems, religious or secular and presidential or parliamentary etc.

It is also concluded that the constitution of the Muslim Ummah provides fundamental principles of governance which do not oppose modern techniques and ways of the governance if not against the spirit of Shari’ah.

It is also concluded that the logic behind gradual revelation of the Qur’an (twenty three years) was to establish a legal system and to make it able to fulfill the needs of the changed scenario with the changes of time and changed needs of the people.

To sum up the author draws a conclusion that the concept of law in current phenomenon has been changed in the sense that it needs open-texture to face the challenges of every-day life. The instrument of law being a social phenomenon must have some attributes to achieve its goal of administration of justice. The law should have capacity to meet the challenges of changed circumstances and to deal with social and economic issues and the issues of inter-relationship between state and its subjects on equal basis. It should have flexible nature for modification of existing law to be implanted to new issues of society.

In this context, it is suggested that the contemporary Muslim philosophers and the jurists must understand the changed circumstances and changed needs of the Muslims and must have deep understanding of the Qur'anic sciences in the light of the Sunnah of the prophet, his companion and changed context. They should be expert regarding perfect and imperfect wording of the Qur'anic language. The general principles of the Quran are consisted of perfect wording and are universally acceptable by all the nations of the world such as principle of equality, justice, public interest and principle to establish a welfare state. The imperfect wording of the Qur'an can be interpreted differently in the light of the changed context.

They should not only be expertise of Islamic jurisprudence but should be acquainted with the philosophy of law of other nations to utilize modern political techniques and to resolve the contemporary issues of the Muslim by re-interpretation through logical reasoning from direct and indirect provisions of the Muslim's constitution.

It is necessary for a modern Muslim jurist to have awareness that the majority of the legal systems of the world are based on some common elements which constituent a necessary part of it. For example, every legal system holds laws to achieve certain purposes such as to implement moral rights and duties of the people, to ensure equality before law, to maintain rule of law in a state, to legislate to fulfill the common desires and interests of the people and lastly, to defend its subjects from all types of internal and external aggression. This similarity leads that the validity of all positive laws made by the parliament of the contemporary Muslim and non-Muslim governments may be examined and tested in the light of the objectives of Shari'ah to declare them Islamic to keep harmony with the state legislation and Shari'ah for *al-asl fi al-ashya' al-ibahah* which means that originally everything is permissible unless prohibited by law.

It is also suggested that the contemporary Muslim jurists must not ignore the fact that the sphere of legislation in Islam is quit vast and that they should study and evaluate legal provisions of the Qur'an and the Sunnah in the light of liberal and flexible approaches of *ijtihad* such as purposive approach, contextual approach and public interest etc. For example, the earlier ruling was that a debtor who does not pay debt despite his ability to pay, was not punishable by law. With the passage of time, this ruling caused hardship and inconveniency for creditors, then on the basis of public utility a *fatwa* given by the later Hanafi jurist that such person should be thrown into jail and his property should be confiscated and sold. (Ramli, 1938). This and similar cases can be taken by the contemporary Muslim jurists as examples to solve the contemporary issues of Muslim Ummah.

The legislative function in a Muslim state should be performed by the legislative council or by the Parliament. It must consist of well-acquainted people with the Islamic legal theories and the requisites of *ijtihad*. They should be well-informed with the contemporary social, economic and psychological needs of the Muslims. They must be open-minded to accept the changed conditions and willing to reconstruct the legal texts of the Quran and the Sunnah in the light of their objectives and public interest.

It is also necessary that the traditional interpretation of the Qur'an must not be taken as binding upon the modern Muslim societies. It was for their time. The fresh interpretation should be done in the light of the modern approaches such as purposive interpretation (*ijtihad al-maqāṣidī*), contextual rule and rationale rule of interpretation etc. Foreign procedural laws if not against the objectives of Shari'ah may be re-evaluated in the light of the Islamic interpretive techniques and may be adopted through legislation in Muslim states and law courts. It is important to note that Muslim jurists and scholars ever demanded by Shari'ah to provide ease to people and to remove harm from them.

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