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The Epistemological Effect of Pragmatism on Implementing Sharia in the Sunnite Political Jurisprudence

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Research Article

Abstract

The principle of 'rule of law' in Muslim countries follows the epistemological foundation of theocracy and is classified under the model of legal rationalists. Implementing the plan of development from the eighteenth century in Muslim country has caused the pragmatism to affect the process of implementation of Sharia in Muslim countries gradually and changed the foundation of the principle of rule of law. In the present study, we have shown that the evolution based on the epistemological effect of pragmatism is founded on the epistemic basis of theocracy in implementing Sharia. The abovementioned effect has appeared first in the civil law and then in the public law and the theory of the state. Accordingly, implementing Sharia has faced a non-foundational attitude and its model has shifted from traditional natural law to modern natural law. The result of this change is giving principality to the human-like rationality in creating the legal rule. Supporting

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private ownership, human rights and civil rights are among the consequences of the effect of pragmatism in creating the legal rule. The epistemological effect of pragmatism is evaluable in the level of philosophy of law in the Muslims countries. Thus, the pragmatic approach considers the law as a type of perceptions of the practical intellect, and its epistemological foundation is on transition from Kant's transcendental intellect and making use of instrumental intellect.

Keywords

empiricism, epistemology, pragmatism, Sharia, political jurisprudence, the Sunnites.

Introduction

The Sunnite classical jurisprudence is classified in the category of religious natural law (Al-Azmeh, 1996, p. 12) and has a paradigm (Ibrahim, 2015, p. 63). In that paradigm, the basis for necessity of legal principles and rules is displayed in the epistemic system of theocracy (Alwazna, 2016, pp. 251-260). The legal methodology according to the science of 'principle of jurisprudence' (Kamali, 1996, p. 3), and the ultimate goal of legal rules is establishment of the Islamic utopia (Al-Azmeh, 1996, p. 128). The implementation of Sharia in the aforementioned model is structural and normative (Oktavinanda, 2018, p.15).

The problem is that with the acceleration in implementing the plan for development in the recent decades, the epistemic foundation of the modern pragmatism had meaningfully changed the basis of the incumbency of legal rules in the Muslim countries (Hallaq, 2005, p. 1). This change is explainable by a paradigmatic shift from the traditional natural law (Al-Azmeh, 1996, p. 96) to modern natural law. Though the pragmatic approach makes use of the theocracy thought as a beneficial component (Nasr, 2001, p. 90), it does not – indeed – consider the divine will as the basis of the principle of rule of law (ibid, p. 90). It uses the nature of law as the tool for creating the legal rule and thinks that the law is the crystallization of the state's will (Grey, 1989, p. 793). In the new approach, the origin of legal liability is the human-like rationality. The effect of pragmatism based on liability in Muslim countries, though it had much more echo in civil law up to the mid-twentieth century, has now overshadowed the basic rights and the citizen's rights and even has led to prescriptions in rights of the religious minorities and relations with the state's fighting with Islam, like Israel. Pragmatism has challenged the methodology of implementing Sharia and has altered the method of inferring from the Quran and Sunnah with its non-foundationalism.

Up to now, two major views have explored the effect of epistemic foundation of pragmatism on the laws of the Muslim countries. The first view has considered pragmatism as the product of the dominance of political liability over the legal liability, and considers it as the heritage of Islamic democratization (Nasr, 2001, p. 21). The second view considers pragmatism as the result of legal pluralism in the jurisprudence of Islamic denominations and searches for its root inside the methodology of jurisprudence (principles of jurisprudence) (Ibrahim, 2015, pp. 3-4).

This article maintains that the result of those two views is reducing pragmatism into political philosophy or a discussion inside the structure of jurisprudence, while the phenomenon of pragmatism, especially in the recent decades in the sphere of philosophy of implementing Sharia, has appeared in the form of a dichotomy of description/ prescription, and the idea of civil state is its most important achievement. The civil state, by considering the coefficient of the effect of development plan, has had much more echo in some Muslim countries, but its implications are also seen in underprivileged countries, an example of which is now seen in Taliban state.

This article uses an analytical method to firstly present a clear explanation of the term 'pragmatism' and, in the second step, explore the coefficient of the effect of epistemic foundation on implementing Sharia. This study is of great importance because it attempts to present an analysis and theory on a challenging issue in the thought of the contemporary Sunnism. Since the principle of rule of law forms the most important and the most basic pillar of any legal system, this article is seeking to present an analysis and a theory for the most basic part of the contemporary law in Muslim countries. Investigating the effect of the epistemic foundations of pragmatism along with consideration of coefficient of development plan is an issue in which

most Islamic countries – in the Horn of Africa, Middle East and even Far East, including Malaysia and Indonesia – are involved; and on the other hand, the Shiite jurisprudence – with its entrance into the government sphere, is no exception. Thus, the subject of this article is firstly an exploration of a fundamental challenge in the system of jurisprudence and law in the Islamic world. Secondly, it is a bridge of discourse relationship among the Islamic countries in the sphere of jurisprudence and public law.

1. Explanation of the origin of the subject of the study

Exploring the level of effect of pragmatism on the Sunnite jurisprudence firstly requires a distinction between a variety of terms based on the term 'pragmatism'. To explain it more, pragmatism as an influential movement in America's contemporary laws is understood in a way that is different from pragmatism in the pure philosophy and political sciences. Although all these terms enjoy a common theme, the application specified to each of them will be different in specialized sub-categories (Legg & Hookway, 2021, pp. 3-4). And this difference has caused the contemporary researchers of jurisprudence such as Coulson and Fekri Ibrahim to intend a different meaning of the term pragmatism (Ibrahim, 2015, pp. 3-4). Accordingly, even Nasr, when he proposes the term pragmatism in the sphere of contemporary political philosophy of the Muslim countries, naming it 'democratization' (Nasr, 2001, p. 21), concentrates his discussions on jurisprudence, Sharia, and normative aspects of Islam. Besides, his perception of the term 'pragmatism' is quite different from Fekri Ibrahim's perception. This difference in interpretation of the term 'pragmatism' causes a misunderstanding in the problem. Thus, it is essential to explore that term and its semantic aspects separately.

1-1. Terminology of pragmatism

Pragmatism is the title of a tradition[1] in philosophy that considers principality for consequences of an action. The philosophical foundation of pragmatism is rooted in Hume's skepticism. On the other hand, under the influence of Hegel, it does not tolerate the dichotomy of mind and object. Accordingly, the pragmatists do not deal with knowing the essence and quiddity of things (Shaun, 2017, pp. 50-51).

1-1-1. The term pragmatism in the modern law

The legal pragmatism is a very attractive approach in the modern and postmodern law, especially in America (Grey, 1989, pp. 409-410). Many researchers of law have evaluate 'pragmatism' as influential on their legal views (Lipkin, 1989, pp. 701-806). Pragmatism is an approach in law and, accordingly, it must be explained based on its variables. That term, unlike what legal rationalists say (Schlag, 1989, p. 1223), refers to the non-foundationalism in law. The legal foundation of pragmatism, like its philosophical foundation, is based on using the empirical method in law (James, 1907, p. 151).[2]

1-1-2. The term pragmatism in the Sunnite contemporary law

Since the foundation of jurisprudence and implementation of Sharia in the historical experience of Sunnism has always been seen in a model, it is necessary to state a short introduction for it.

The governmental jurisprudence and the implementation of Sharia

1. In Pierce's thought, pragmatism has logical principles, a scientific system and philosophy of science, but the scholars after Pierce have reduced pragmatism into an attitude in philosophy (Hookway, 2013, part 9; idem, 2003).
2. Pragmatism is a form of experience (Hookway, 2013, part 3-4). Wilson has explained the relationship between experience and pragmatism in comparing pragmatism and transcendental idealism. It has even been claimed that the empirical foundation of pragmatism is closer to absolute idealism and, accordingly, pragmatism has made absolute idealism 'empirical' (Wilson, 2018).

in the pre-modern era belong to one single epistemic sphere. In other words, the foundation was that anything is inferred according to jurisprudential foundations must be implemented. The mystery lies in the fact that basically the concept of governmental jurisprudence in the pre-modern era is focused on the theories of caliphate and its legal determination has emerged in the form of the 'royal rules' or *Aḥkām al-Sulṭānī* (Mawardi, 1989) (Fadel 2018, p. 65). And the concept of *Aḥkām al-Sulṭānī* pertains to that aspect of implementing Sharia. In the modern era, however, that concept is known through terms such as *niẓām al-ḥukm fil-Islām,*[1] *al-niẓām al-siyāsī fil-Islām,*[2] *uṣūl al-ḥukm fil-Islām,*[3] and *al-siyāsat al-sharʿiyya.*[4] Although there is a narrow border between implementation of Sharia and political jurisprudence, here, by implementing Sharia, we mean correspondence with 'governmental jurisprudence', which is a description for all discussions of jurisprudence. From this perspective, the abovementioned term is in contrast to individual jurisprudence (Mehrizi, 1376, pp. 141-142).

Unlike the term pragmatism in the modern law, which is based on the philosophical paradigm, pragmatism in the Muslim countries has no consistent relationship with the philosophical foundation (Ibrahim, 2015, p. 3). This has caused a different perception of the term (Coulson, 1978, p. 37).

1. That term was proposed by thinkers such as Muhammad Yusuf Musa, Ahmad al-Huraydi, Taqi al-Din al-Nahbani, Muhammad Asad, and Mahmoud Abd al-Majid al-Khaledi. They understand the concept of Implementing Sharia in the framework of the institute of state (Kamali, 2016, pp. 399-400).
2. That term refers to the political jurisprudence or the theories of governance in Islam. It has been accepted by Muhammad Ziya□ al-Din al-Raʿis, Muhammad Abd al-Qader Abu Fares, Muhammad Salim al-ʿAwwa□, Muhammad al-Mubarak, and Suleiman Muhammad al-Tamawi (ibid).
3. It refers to the theory of 'the state in Islam' accepted by Fu□ad Abdu al-Munʿim Ahmad, Abd al-Hamid Mutawalli, Mustafa Kamal Wasfi, and Muhammad Salam Madkur (ibid).
4. It refers to the classic concept of theological politics accepted by Ibn Taymiya Harrani, and later in the modern era, reread by Abd al-Wahab Khalaf, Ali al-Khafif, Abd al-Rahman Taj, and Yusuf al-Qarzawi (ibid).

The major views presented in this regard are as follows:

A. Pragmatism is equivalent to the concept of legal pluralism in the jurisprudence of the four denominations. Accordingly, pragmatism is an eclectic approach in the jurisprudential denominations and refers to the emergence of a concept that, for achieving the legal goals in practice, negates the exclusion of a jurisprudential method in one jurisprudential denomination and, on the contrary, supports pluralism in the jurisprudential denominations (Ibrahim, 2015, pp. 3-4). The inclusion of that term is far-reaching and it is claimed that even the jurists such as Sabki and Zarkashi were pragmatists according to that explanation (ibid). It is also said that according to that explanation, pragmatism does not overlap with its modern concept.

B. Pragmatism is the product of a different perception of the concept of modern law in the Muslim countries (Coulson, 1978, p. 218). Legal modernism has caused the concept of law to become bipolar between the practical necessity and the religious principles (ibid). Accordingly, the concept of law has adopted practical necessity for efficiency and efficacy, and it pays serious attention to religious principles. As a result, pragmatism means understanding law according to practical necessity (ibid, pp. 218-219).

To criticize the first view, this article does not evaluate pragmatism as an inquiry inside the paradigm of classical jurisprudence. Rather, it believes that pragmatism is among the essentials of implementing the development plan. It is an empirical approach, and it has influenced the structure of the Sunnite implementation of Sharia. The type of pragmatism emerged in the laws of the Muslim countries is, from epistemic perspective, like the pragmatism in the modern law, and follows the same model. We will explain it more in the third section.

1-2. Delineating the society under the influence of pragmatism on implementing Sharia.

By the Muslim countries, we mean those countries that enjoy the jurisprudence of the Sunnite denominations. This is because the jurisprudence of the four denominations has a broad inclusion in Muslim countries and in the historical experience, it has been the criterion for liability to law (Jackson, 1996, p. 53). Thus, the target society of this article is focused on the Sunnite countries. Although there are diverse theories regarding the relationship between the state and the religion in the aforementioned countries, and some speak of secular state (An-Naim, 2010, p. 45) while others speak of religious state, we cannot deny that the commitment to the rules of government and state in all those countries is somehow in favor of the traditional theories of implementing Sharia (Fadel, 2018, p. 60). The jurists, in their historical experience, have always spoken of a government wherein the religious law is implemented (Alikhani, 1400 SH, p. 44). From another angle, the Islamic legal principles are always related to the general discourse of the Muslim countries, and the normative system of the Islamic law along with the normative system of the state enjoy their special source of authority and legitimacy, interacting with the state's norm (An-Nacim, 2010, p. 1).

Therefore, the effect of pragmatism has not had a uniform coefficient in Muslim countries. Thus, the target society in this article is focused on the extensibility of the Muslim countries, and pursues the experience of this pragmatism in Islamic countries, the subject of the target society and the main target society of the study.

1-3. Genealogy of the development in the philosophy of law

The concept of development, by making use of evolutional

rationality[1] influences the social sciences (Muwaththaqi, 1383 SH, p. 224), and has a normative process accepted by the UN and is considered as one of the most important tools for global life. The UN has defined 'development' as 'quality of life', and believes that development must be a consistent and well-adjusted collection of cultural, economic, and social dimensions as well as qualitative and quantitative development (United Nations, 1971).

Since the era of cold war, the concept of development has been closely linked with ideology (Roxborough, 1979, pp. 52-53), taking on a powerful prescriptive approach (Muwaththaqi, 1383 SH, p. 233). In early years of the second decade of development, the UN has emphasized that development requires a monolithic approach in the global level (Sachs, 2009, p. 8). Thus, development in the contemporary thought is considered akin to the prescriptive strategy. Accordingly, in the Muslim countries, there is a logical relationship between development and the state of being affected by prescriptive strategy of development. Meanwhile, the coefficient of effectiveness will be focused on the principle of rule of law.

2. The epistemological foundation of incumbency of the legal rule in the approaches of pragmatism and religious laws

The analysis of foundation of incumbency is rooted in knowing the legal rule. The legislator produces the legal rule in the statute laws and specifies a guarantee of implementation for it (Hayati, 1397 SH, p. 24). However, the system of legal rules is based on the legal principles, and the legal principles are, indeed, the main ideas based on which the laws are enacted (Boulanger, 1979, pp. 73-74). The legal principles are, on the

1. According to the theory of evolutional rationality, the institutes – in the process of development – are constructed on the basis of human's will (Hayek, 1967, pp. 43-65).

one hand, positive ones as the foundation of statute laws and pertain to the position of reality and fact-itself (Hayati, 1379, p. 22) and, one the other hand, have a extra-legal position and organize the foundation of a legal system (ibid). It must be noted that speaking of the foundation for incumbency, here, is inclusive and includes both the common legal rules and legal principles. Thus, the legal principle is considered as *a priori* principle and is focused on the legal rule.

1-3. The epistemic foundation of incumbency in the religious natural law

In the religious natural law, the foundation of the legal rule is affected by its source (Kelly, 1992, pp. 92-100). The Book and the Sunnah are the first sources of stating the divine will (Al-Wazna, 2016, pp. 251-252). The legal fundamental rules are extracted, inferred and interpreted by relying on the sacred texts (Al-Azmeh, 1996, p. 12). The intellect is identified as a source in longitudinal relation to the Book and the Sunnah and is called inferential intellect. The process of legal reasoning is objectifying the inferential intellect in interaction with sacred texts (Al-Wazna, 2016, pp. 251-252).

The epithet foundationalism is the most important epistemic index for the legal rule in the classic jurisprudence (Makdisi, 1985, pp. 97-98) on which the process of implementing Sharia is also based. Foundationalism means existence of basic beliefs and non-inferential beliefs. The self-founded basic beliefs are self-justified and are a reference for confirming other beliefs. The foundational legal rule is the fundamental rule that is never questioned from the essential aspect and its justification is presupposed (Oktavinanda, 2018, p. vii). For instance, the tradition "Whatever its large amount intoxicates, its little amount is also unlawful"[1] (Zakariya, 2015, p. 25). Accordingly, the legal rule is constructed to the effect that any intoxicating drink is unlawful

1. Ibn Qudama, n.d., vol. 10, p. 327.

(Al-Mazani, n.d., p. 265) and the agent deserves to be punished (ibid). The process of creating a legal liability in the laws of transactions and public law is in the same vein and is also applicable in the contemporary era (Zakariya, 2015, p. 25). As a result, the proposition of 'the unlawfulness of any intoxicating drink' expresses God's legislating will and is considered a basic proposition that will be a source for confirming other legal rules.

1-4. The epistemic foundation of incumbency in pragmatic approach

The epistemic foundation of the pragmatic approach is formed in the sphere of cognition (Schlag, 1989, p. 1223) and is a rival to the rational thought. Rationalism is not a form of thinking; rather, it is a form of existence. And pragmatism is in contrast with the existential rational aspect (ibid, p. 1224). The most important epistemic product of pragmatism in law is using the empirical method for achieving the truth (ibid, p. 1223).

The adherents of the pragmatic approach have different, and even sometimes opposing, views (Smith, 1990, p. 410), but the origin of all their theories returns to practical intellect, for they consider the law as a type of practical intellect (ibid, p. 409). The concept of practical intellect sometimes means Kant's transcendental intellect (Maddy, 2007, p. 50), and sometimes it means instrumental intellect. The difference lies in the fact that the perception of Kant's transcendental intellect, though independent from the perception of transcendent intellect and perceives the foundation of incumbency of legal rules independently with no need to be assessed by the external rules and theoretical intellect (Friedman, 2013, p. 22), it is still in the paradigm of natural law (Kelly, 1992, pp. 258, 261). Besides, adopting the instrumental approach to intellect, by the legal rationalists, has focused the perception of the practical intellect just on the practice, and it is no longer faithful to the paradigm of the natural law. Turning the rational perception to

instrument means that the rational perception can be useful in methodological perception, but cannot attribute right and wrong values to the legal propositions independently (Drahos, 1996, p. 472). Accordingly, the legal pragmatists pay special attention to the goals and ends of the legal rules and, thus, oppose the natural lawyers and legal formalists. As a result, pragmatism presents a different perception of rights (Warner, 2010, p. 406).

To explain more, it must be noted that pragmatists consider 'justification' without a foundation (ibid). Non-foundationalism in justification means that in making decision as to what one should defend and how one should act, we consider numerous norms called 'norms of justification' (ibid).

The norm of justification as the standard norm is used for identification and specifying other norms. With it, one can evaluate other norms. The norm of justification has no foundation outside it and has no need for such a foundation; and this is the privileged feature of pragmatism regarding justification. That norm is used continuously in practice (Rorty, 1982, p. xxv).

The pragmatists do not accept the theory of verity in the sense of correspondence to reality. Thus, the main issue in pragmatist attitude is not correspondence with reality; rather, it is justification. Always, the norms that are used in practice are the criteria. Accordingly, in that approach, there is no possibility for defining the truth (Rorty, 1991, p. 23). The strategy of pragmatism is that the concept of verity be equivalent to justification as demanded by the practical and common norms (Rorty, p. 52).

The result of the pragmatist attitude is negation of any sublime norm in the hierarchy of the legal norms. The pragmatic legal norm defends pluralism. In other words, any legal norm is changed and evolved in the light of other norms and enjoys no independent essence (Warner, 2010, pp. 407-408). In this attitude, variety and diversity are of

great importance, and various views and different religious and cultural styles as well as social classes, sex or race generate literature of 'convergence' and are considered as the final theory of 'justification' (ibid). Accordingly, any denial of convergence in line with the contrast emerged from rational study and achievement of one single theory will be inconsistent with the essence of legal pragmatism (ibid).

Considering the aforementioned facts, in the pragmatic approach, the principle of rule of law is determined on the basis of its end and, unlike the school of religious natural law, the foundation of liability will not be subject to the source of legal rule (i.e. the Quran and the Sunnah).

3. The effect of epistemic pragmatic foundation on implementation of Sharia

Considering the aforementioned discussions, the most important effect of the epistemic pragmatic foundation on the classic jurisprudence is that the mode of implementing Sharia in the sphere of governance shifts from traditional natural rights to modern natural rights. This means that the principle of rule of law is not based on discovering the divine will; rather, it owes to the humanistic rationality. As a result, the principle of rule of law, as before, is not subject to its source and is determined according to methodology. Methodology means the way we recognize the compelling rules governing the social relation as a bridge connecting epistemology and justified beliefs that speak of knowledge (Hekmatnia, 1393 SH, p. 8). The empirical methodology of the pragmatic approach is so willing to make use of the data from sociology, economics and the like, and is not committed to knowing and discovering the legal nature of issues. In the methodology of pragmatic approach, Sharia by itself is not a criterion for the foundation of liability. Besides, in view of the utility of Sharia in social norms and legal order, it can be beneficial and even necessary

(Coulson, 1978, pp. 149-150; Nasr, 2001, p. 90). By the application of pragmatism in Muslim countries, the legal methodology and the principle of rule of law were defined according to Sharia. Sharia, the hard core of legal liability, and its methodological foundation were formed in the theoretical philosophy (or theoretical intellect) (Coulson, 1978, pp. 149-150). The position of practice, without giving principality to benefit and expediency, was subordinate to the approach of theoretical intellect. Thus, the disruption between the perceptions of theoretical intellect and practical intellect are among the most important effects of pragmatism on implementation of Sharia.

3-1. The effect of pragmatism on the law of the Muslim countries

The pragmatic approach did not appear systematically and uniformly in the laws of the Muslim countries. Thus, it is neither analyzable uniformly, nor is it assessable in specified legal branches. Even the result of the effect of pragmatism is not the same. Thus, first, several legal events will be referred to, and then, an analysis of the effect of pragmatism will be presented.

3-1-1. Pragmatism and civil law

The first and the most important effect of pragmatism echoed in the sphere of civil law and the personal states. The first generation of the pragmatic approaches in the law of the Islamic countries was formed according to the practical necessities in the sphere of economics, not jurisprudential reasoning. Considering the economic development with a capitalist look (Abu-Rabi', 2005, p. 524) and its legal implications such as supporting private ownership are among the most important factors of the effect of pragmatism on civil law. In the 18th century, in the famous case of Rida, the people were allowed for the first time to depart from the rules of the denominations and, accordingly, a woman called Rida could sell her endowed estates (Ibrahim, 2015, p. 235). This law

was effective in the economics of Egypt and caused many of the endowed estates to come in the economic cycle and become tradeable.

The second generation of pragmatic approaches were evident in the twentieth century. First, in 1945, in Sudan, the person's will was decided to be done on one-third of the person's heritage (Nasir, 2009, pp. 234-236). And the reason was not a jurisprudential reasoning; rather, it was the economic need of the testators to fulfill their economic needs (Coulson, 1978, p. 205). This law, though right in accordance with Imamiya jurisprudence, was inconsistent with the jurisprudence of the four denominations and, therefore, when the same law was enforced in Egypt in 1946 as an amendment for the law of testamentary obligations, it was documented by the Shiite jurisprudence (Egyptian Act no. 71/1946). In 1959, the law of inheritance changed in Tunes, and in 1961, the same law changed in Pakistan, while in that time, the law of inheritance in Pakistan was under the influence of Egypt (Faruki, 1965, p. 253). In 1949, first in Syria and three years later in Egypt, the law of transference of family endowments was cancelled and, accordingly, it was no longer possible to transfer their ownership through inheritance. The reason for that law was economic justification, because a large part of lands in Syria had no possibility for performing major economic activities due to endowment ownership, and it was necessary to remove their ownership (Coulson, 1978, p. 219). In 1953, in the civil law of Iraq, the insurance and aleatory contracts became lawful with reference to the law of western states (ibid, p. 218).

3-1-2. Pragmatism in the sphere of public law and the theory of state

The effect of pragmatism on implementation of Sharia in the public law and criminal law was not so strong as in civil law (Zakariyah, 2015, p. 192). This is because the social-political sphere and the studies in the public sphere of the society is among the most underdeveloped sections in the Sunnite implementation of Sharia (Kamali, 2016, p. 385).

Nevertheless, pragmatism in the level of basic law in non-political attitudes of Islam has had considerable effect and its recent sample was quite evident in rewriting the constitutional law of Egypt in 2014 (Steuer & Blouet, 2015, p. 256), but this effect was just in the level of individual jurisprudence, hence out of the scope of this article. Anyway, the effect of pragmatism on implementation of Sharia, though not as much in public statute law as in civil statute law, is analyzable in the level of doctrine.

On the one hand, with the occurrence of Arabic Spring from 2010 and with the coming to power of *Akhawan al-Muslemin* movement in Egypt and, on the other hand, with the doubt in possibility of realization of Islamic state – which is the product of fundamentalists such as al-Qaeda and ISIS (Rahman, 2020, pp. 8-9) – the discussions of public law and the theory of state was seriously affected by pragmatic attitude and it was extended to discussions of philosophy of implementing Sharia, in a way that its product can be seen in the theory of civil state (Levie, 2017, p. 23) and giving principality to variables such as acceptability and legitimacy (An-Nacim, 2010, p. 19). To explain it more, the doctrines affected by the pragmatic approach are classified in two major formats:

The first was proposed by the first and second generations of the thinkers in *Akhawan al-Muslemin* movement (Alikhani, 1400 SH, p. 38), though the thinkers of the second generation were more deeply affected by pragmatism (Halverson, 2010, pp. 56, 74). This format considers the objectification of the legal rule in its formal aspect in the institute of state.

The second format does not link the foundation of public law in implementing Sharia directly with the institute of the state, and tends more to infer a new foundation for legal rules by identifying and defining legal principles (Kamali, 2016, p. 402). Accordingly, the Islamic Sharia is a collection of records, procedures and general principles

along with a series of hermeneutic and paralogic techniques (inconsistent reasoning) (Al-Azmeh, 1996, p. 12). Explaining each of those two aforementioned approaches is as follows:

A) The effect of pragmatism in the theory of state

The idea of civil state was objectified in the sphere of public law in Egypt – wherein it was proposed bout one century before that – in 2011, with coming to power of *Akhawan al-Muslemin* (Steuer & Blouet, 2015, p. 237). But the military coup in 2013 did not allow various aspects of that phenomenon to emerge. The civil state means the non-military state (ibid). Qaradawi, as a member of the second generation of the thinkers of *Akhawan al-Muslemin*, introduced the civil state with parameters such as democracy, plurality, supporting the rights of religious minorities, and protecting the women's social participation (Qaradawi, 2005, p. 171). Qaradawi's main concern, and that of other thinkers in the same line as his, was firstly to defend the possibility of realization of the state in Islam (ibid, p. 8). They try to introduce, unlike the traditions of fundamentalists, the concept of the state in Islam as distinct from the caliph's command (ibid, p. 31), and make use of modern variables such as the principles of civility and citizenship (Steuer & Blouet, 2015, p. 3). The foundation of this fact returns to the philosophy of the governmental jurisprudence and the way Sharia is implemented, and it is quite similar to the Umawid's challenge with legal order of Medina's state in early Islam (Zakariyah, 2015, pp. 11-12).

B) Giving principality to the variables such as legitimacy and acceptability

This approach is typically presented by those who have not directly theorized about the public law and have not spoken about instances such as state. Instead of instance idealization, that group have discussed about variables that can directly affect the principle of governance (Al-Najjar, 2013, p. 38). The doctrine of that group has

objectified in the form of the concepts of acceptability and legitimacy. The view of that group contains a critical-prescriptive approach (Al-Azmeh, 1996, p. 12). The critique of this group focused generally on Mawardi's theories in implementing Sharia. By criticizing the system of caliph-centered implementation of Sharia, they – indeed – criticized the historical attitude towards implementation of Sharia. Accordingly, some have considered the rules of classic implementation of Sharia as merely justification of the governments' behaviors (Fadel, 2018, p. 60). Some consider the implementation of Sharia, up to the end of Ottoman empire, as lacking informed normative system (Abdul-Na'im Ahmad, 1991, pp. 15-16). Some others believe that in implementing Sharia, no normative existence has been defined for the state (Kamali, 2016, pp. 384-385). Meanwhile, in the evaluation of the relationship between the religion and the state, we can consider Sultan Baybars' decree, in 13th century, for appointing four judges from the four denominations in Cairo to organize the judicial system of Egypt as an important turning point (Jackson, 1996, p. 49). This is because that decree institutionalized the system of religious imitation, separated the jurisprudence of denominations from the social realities, and removed the openness of jurisprudence from the evolutional effect of empirical observations (Kamali, 1996, p. 32). As a result, according to the aforementioned view, we cannot present a specified model of Islamic principles for the public law.

The prescriptive aspect presented from that group is focused, instead of institutionalism and discussing the essentials of the state, on defining the fundamental variables in legal principles. The product of that view is introducing the elements of acceptability and legitimacy as the foundations of liability. Accordingly, any legal rule without social legitimacy is not justified. Thus, the legal rule must be based on collective reason and is originated from a participatory system based on the authentic Islamic sources. The criterion for legitimacy is

allegiance and explaining allegiance in the contemporary era necessitates considering the ballot box. In this process, allegiance must be without discrimination and must belong to all citizens and limited to a certain time (Warren & Gilmore, 2013, p. 219). In short, the nature of implementation of Sharia and the legal principles governing it will be participation, public will and public interests. Finally, there is neither the model of Sultan's decrees nor any other special model or archetype of an Islamic regime; and it is possible for the legal principles and rules to have various forms such as preserving human's dignity, allegiance, consultation, justice, equality, freedom, public welfare, and trusteeship. Any governmental system that supports the aforementioned principles and repulses anarchy and disorder has the Islamic qualifications (Kamali, 2016, p. 403).

Conclusion

The pragmatic attitude in modern law creates a different perception. Giving principality to findings of the practical intellect and making use of empiricism in law are among the most important approaches of this attitude. This study is seeking to prove the point that the modern pragmatic approach has affected the implementation of Sharia in Muslim countries. Although the coefficient of that effect is not the same in all Muslim countries, it depends on confirmed variables in implementing the development plan, including plurality, religious toleration, interaction with fighting infidels, accepting religious tolerance in women's rights and the like. Thus, the more developed Muslim countries such as Turkey, Indonesia, Malaysia, and – recently – the countries in the margins of Persian Gulf have accepted the most influence from the aforementioned variables compared to underdeveloped countries. The type of getting effect from pragmatism, whether informed or uninformed, has caused the epistemic source of implementing Sharia to shift from transcendental intellect to

instrumental intellect. Although the new approach of new-thinking jurists in implementing Sharia is seeking to base its new inference on Sharia, their method does not fit into the rationalist legal logic, and on the contrary, it follows the norm of justification in modern pragmatism.

Accordingly, rereading the implementation of Sharia in passing from the classic model of Sultan's decrees to modern thought contains the following features: consequentialism, instrumental methodology, and paying attention to the ends of legal rules. Thus, from this perspective, it follows the epistemic logic of pragmatism.

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