



Chapter 4 "The Rule of law in Islamic thought and practice" by Timur Kuran

Outline:

The author examines whether and how extent Islamic law satisfy the principles of the rule of law (government accountability, equal access to justice and the political process, efficient judicial and political systems, clear laws, generally stable laws and protection of human rights). The author concludes that "Islamic law, as it is now understood, does not offer an efficient variant of the rule of law." (p.87) The author also says "the imposition of Islamic law on a society in any one of its pre-modern formulation would result in massive failures, at least as measured by the extent to which the rule of law principles are satisfied." (p.87). This chapter implies, however, necessity of drastic innovation of Islamic law in order to adjust complexity of contemporary world (see, for example, p.75, p.77-78, p.87.)

In this lecture, we will review structure and source of Islamic law, as well as contemporary facets of Islamic law (nationalization of Islamic law, and Islamic finance).

1. What is the Islamic Law?

(1) Islamic Law is the Qur'an?

Islamic law is a set of legal norms around Islamic teaching, and all Muslims owe religious obligation to submit themselves to commandments of the Qur'an. Well-known commandments of the Qur'an, among others, are prohibition of drinking alcohols and eating pork, as well as polygamy. Other than these, one can find various norms controlling Muslims daily life in the Qur'an:

a. taxation

zakat (obligatory donation),

b. commercial transaction

prohibition of interest, distribution of risk of loss in transaction,

c. family issues (inheritance and marriage)

daughter has inheritance right equivalent to a half of son's inheritance right,

husband's right to divorce (*talak*)

husband's obligation to support former wife during a period of prohibition of re-marriage

d. civil compensation

compensation by money for life damage (blood compensation)

compensation by talio

However, those norms are not enough for comprehensive legal system. Therefore, Islamic law means the system of legal norms that are derived from various sources of law.

(2) Religious law?

Islamic law has two aspects, namely a religious law and a scholar law.

As a religious law, Islamic law has characteristics of:

a. perfectness (law created by the Allah of omnipotence)

b. comprehensiveness (law covering all aspects of human life)

c. universality (supranational law)

Therefore, human kind can not change or reject this universally applied divine law.

In reality, however, Islamic law is not rigid legal system but enough flexible to adjust development.

It is possible because of another aspect of Islamic law as scholar law. Islam law is a system of norms derived from various source of laws, including the Qur'an, through scholarly efforts in order to respond problems arising in society.



(3) Sources of law

a. the Qur'an --> absolute truth

Compilation of revelation (610AD-632AD). --> editing started after 632AD and the authentic edition was established in 8th century.

Norms in the Qur'an

ibadat: way of worship

mu'amalat: relation between persons*

b. *sunna* (*hadith*)

Compilation of behavior and practices of Muhammad, as well as traditional practices that were not prohibited by Muhammad.

There are many kind of *hadith* --> Islamic philology

c. *ijma'*

Opinion agreed by Islamic scholars on certain question.

d. *qiyahs*

Analogy from superior sources.

(4) Islamic scholars

4 biggest Islamic schools

al-Hanafiyya, *al-Malikiyya*, *al-Shafi'iyya*, *al-Hanbaliyya*

Islamic scholars as state judges or legal servants (*ulama*, *penghulu*, *qadi*, *hakim* etc.) -->

Each Islamic school became authentic schools in Islam countries and dominated official posts.

Then, they issue authentic legal opinions (fatwa), and develop system of Islamic law under the state sponsorship.

2. Islam law in contemporary world

(1) Islamic law in nation states

Hooker, Indonesian Syariah: Defining a National School of Islamic Law, ISEAS, 2008, p.1

"In the contemporary world of Islam we have by now become accustomed to the fact that the formal expression of syariah differs from region to region. In practice this means that we have to be specific as to place and time when answering the question, 'What is syariah and how is it known? At the level of nations - Egypt, Tunisia, Saudi Arabia, India, Malaysia and so on - we can give specific reply to this question. for the Islamic world as a whole there is no answer except at some almost meaningless level of generality. It is also possible to answer the question in terms of Western forms of law, that is, civil and common law reformulations which show, for example, that Malaysia and India have quite a lot in common whereas Malaysia and Indonesia do not, despite their similar languages and culture. In short, syariah in practices is various, not homogenous."

Islam in nation state

After the World War II, many states achieved their independence as a secular nation state in Islamic region. Therefore, Islamic law has to co-exist with or subordinate to secular state law. This situation is contradicted with the concept of supranational universality of Islamic law as divine law. Relationship between Islamic law and nations states varies state to state. In Turkey, Islam has been contained to sphere of worship and Islamic law has been strictly excluded from public space. In Iran, since the revolution in 1979, Islamic law scholars have governed the country according to Islamic law. In general, however, it might be right to say that Islamic law keeps its role as family law for Muslims.

Relation with non-Islam religion (especially, inter-religion marriage), criticism against women's inferior status, coordination between state law system and Islamic law, those issues are different in each country. Thus, contemporary Islamic law is very different from traditional understanding of Islamic law.



(2) Case of Indonesia

a. Marriage law reform (see 小林寧子(Yasuko Kobayashi)「インドネシア」(柳橋博之編著『現代ムスリム家族法』日本加除出版, 2005, pp.98-109)

1974 Marriage law

rules from classic Islamic law:

- Polygamy;
- Prohibition of marriage between persons who share a nursing mother;
- Right of guardian to cancel marriage
- Physical handicap as a reason for divorce
- Husband's obligation to pay support for divorced wife...

rules protecting women's interest (correction of classic Islamic law):

- Obligatory registration of marriage to government office;
- It is necessary to have permission of court to have second wife (polygamy);
- Marriage is based on consent between both parties;
- Minimum age of marriage (male 19 years old, female 16 years old);
- Properties formed under marriage are shared property of husband and wife;
- It is necessary to have permission of court to invoke *talak* divorce.
- Discord between husband and wife is recognized as a reason of divorce.

Islamic Law Compilation and its setback from marriage law:

Status:

Guideline for dispute resolution according to Islamic law authorized by Presidential Instruction 1991.

Modern law style composed of volumes, chapters, articles and sections (no explicit relation with certain schools)

Setback:

- Prohibition of inter-religion marriage (even classical Islamic law tolerates marriage with muslim man and Christian or Jewish woman);
- Woman can not be a marriage guardian or witness;
- Disobedience to husband is a reason of divorce;
- If wife initiates a divorce claim, husband does not owe obligation of support

(3) Islamic finance (*Syariah* Finance)

Along with economic development in Islamic countries and rising of Islamic movement, Islamic banking or Islamic finance form new facet of Islamic law. Islamic finance means financial business activities compatible with Islamic law. Ordinary financial business is called "conventional finance" in comparison with Islamic finance.

One of the most prominent characteristics of Islamic finance is a prohibition of interest (*riba*). One can find several phrases that prohibiting interest, such as "the God allows commercial activities, but prohibit taking *riba*." Therefore, in Islamic finance, there are no previously promised interest, but contract of benefit sharing and commission for agency-ship for goods transaction as a alternative of fixed interest. Size of Islamic financing reaches to 450 -700 billions USD.

Jurisdiction of Islamic finance

Law on religious jurisdiction in Indonesia (amended in 2006):

Jurisdiction of religious court (*pengadilan agama*)

Family issue: marriage, divorce, and guardianship

Property issue: inheritance (*waris*), will (*wasiat*), gift (*hibah*), donation for social purpose (*wakaf*), charity (*shadaqah*),

Financial issue: not only Islamic banking, but insurance, re-insurance, trust fund, bond, mortgage, settlement, pawn, financial pension, business, micro-finance.

Law on advocates in Indonesia (amended in 2003)

Graduate of faculty of Islamic law (*syariah*) to be qualified as a licensed lawyer.