The Rule of Law in the Islamic Legal System

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Overview

Essential elements of ‘the Rule of Law’

The Rule of Law and the Islamic Legal System

Selected Problems
Essential elements of ‘the Rule of Law’

See

UN World Summit 2005
Friendly Relations Declaration 1970
UN Millenium Declaration 2000

Two approaches:
Formal aspects (institutions, procedures)
Substantive goals (rights and justice)
Essential elements of ‘the Rule of Law’ (cont’d)

Historical origins

Ancient Greek philosophers (Platon, Aristoteles)
Regularise and limit powers of sovereign
Distinction from ‘rule of man’
  to avoid influence by particular factors (self-interest, animosity, friendship,...)
Law is embodiment of ‘reason’ and, thus, superior to the ‘rule of man’
Distinction from ‘rule by law’
  Power exercised by absolute ruler
  The ruler is not bound by law
‘What combination of powers in society, or what forms of government, will compel the formation of good and equal laws, an impartial execution, and faithful interpretation of them, so that the citizens may constantly enjoy the benefit of them, and be sure of their continuance?’

John Adams (1787)
UN ‘Rule of Law Unit’ (2006)

‘...a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.’

Kofi Annan (2004)
Three basic elements

The powers of the sovereign may not be exercised arbitrarily; rejection of ‘rule of man’

The law must apply also to the sovereign and instruments of the State; rejection of ‘rule by law’

The law must apply to all subjects of the law equally, be of general application and consistent implementation;
Three basic elements (in short)

(i) Government of laws

(ii) Supremacy of the law

(iii) Equality before the law
Rule of Law and the Islamic Legal System

Problematic characteristics:
Sources of Islamic law
Sacredness of the law
Position of certain individuals

Rule of law in an Islamic State?
Preservation of individual liberty?
Imposing duties on the State?

See ILA Committee Report 2010, p. 126 et seq.
Selected Problems

Humanitarian law
Constitutional law
Criminal law
Family law
Economic law
Humanitarian law
- Limitations to the right to warfare
- Imperative of mercy
- Prophetic practice of tolerance

Constitutional law
- Status of Islamic law in Muslim States
- Different types of relationship between Islam and the State
- Organization and work of judicial and administrative system
Criminal law

Huddud crimes with hard punishment, frequently not applied
Taaz’ir crimes, regulated under discretionary power of sovereign
Procedural rules:
rules of evidence, prohibition of torture, uniform compensatory amounts
Family law

Talaq divorces
Polygamous marriages

Economic law

Necessity of legal security
National laws and regulations
International obligations (WTO, investment treaties)
Respect of international awards
Conclusion

Many questions remain open
Possible subjects of future research of ILA Committee
Choice of methods important
  Comparative analysis of legal texts
  Analyses of court and administration practice
  Historical, political, social studies
  Interdisciplinary approach
Thank you for your attention!

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