The Great Yasa and The Siyasah Shari'iyyah
Some Comparative Observations

Oleh Akh. Minhaji

Lanjutan Edisi yang lalu

***Akh. Minhaji**, lahir di Pamekasan-Madura, adalah dosen Fak. Syariah IAIN Sunan Kalijaga. Karya-karya tulisnya selalu membahas persoalan-persoalan seputar hukum Islam. Setelah selesai program Master pada Institute of Islamic Studies, McGill University, ia menempuh program S3 pada institute yang sama dan sedang menulis disertasi berjudul "Ahmad Hassan and Islamic Legal Reform in Indonesia."*

C. Some Aspects of Comparison.

In the two previous sections (See Unisia No. 28, 1995), we have discussed the issue of both the Great Yasa and the Siyasah Shar'iyyah, and the following section is an effort to compare some important points between the two. Inconcrete terms, this section tries to trace how far both the silmilarity and the difference between the concept of the Great Yasa and that of the Siyasah Shari'iyyah extends. It will also be tried to analyse as to why the term Siyasah Shari'iyyah is more well known in contemporary Muslim society compared to the Yasa.

Based on our discussion in the previous sections, it is clear that the term Yasa originated in the Mongol Empire (Mongolian language) which later was also used in the areas in which the influence of Mongol Empire was significant. Contrary to this, the origin of the term Siyasah is somewhat questionable. Some scholars such as al-Maqrizi and Ibn Taghribirdi have the opinion that the term Siyasah came from the term Yasa of the Mongols.[111] This view, however, is not conclusive in itself. Ayalon, though he tries to explain the origin of the term Siyasah based on al-Maqrizi and Ibn Taghribirdi works, does not come to a clear point on the issue. Bernard Lewis and Fauzi M. Najjar, on the other hand, have tried to make us believe that the origin of the terms Siyasah is Arabic; nonetheless, Lewis seems to feel doubtful about the issue and finalizes his explanation, saying that "the root of the term *siyasah* itself is probably of non-Semitic origin."[112] In short, it is likely to be true to infer that, unlike the origin of the term Yasa, the origin of the term Siyasah is still debatable.

Interestingly, it should be noteworthy to mention here that the term Siyasah was sometimes used to denote the term Yasa. It has been reported, for example, that in his biographical dictionary, *al-Durar al-Kaminah*, Ibn Hajar al-'Asqalani used the word Siyasah in the sense of Yasa. He says, for instance, "*kana 'arifan bil-siyasa*" which means "he is the Yasa expert."[113] Ibn Khaldun has also been reported to have written "*al-Siyasah al-Kabirah*" in an address to the Great Yasa of Genghis Khan.[114] Ayalon provides another example. In the biography of Amir Utamish (or Aytmish), Ibn Taghribirdi, says Ayalon, writes about the Amir : "*kana yahkumu...bilsiyasa wal-yasaq*". This statement, according to Ibn Taghribirdi's own admission, is copied from Kalil b. Aybak al-Safadi in which the original statement is "*kana yahkumu bil-yasa wal-yasaq.*"[115] On the contrary, there is no evidence whatsoever that term Yasa is used in an address to the term Siyasah.

The meaning of both the Great Yasa and the Siyasah Shar'yyah is quite interesting to discuss here. There is a strong indication that both have a similar meaning, that is: the right of the govermment (political authority) to issue rules (laws) aiming at organizing its people in order to make their social life possible. The

111). See pp. 4-6 above

112). Lewis, " Siyasa, " 3.

113). David Ayalon, " The Great Yasa of Chingiz Khan" (B), studio Islamica 34 (1971) : 178-9. See also his " The Great Yasa " (C2), 116

114).Ayalon, "The Great Yasa" (C2), 118

115). Ibid., 116

Great Yasa of Genghis Khan for example, has been reported as being the codification of certain rules laid down bya Genghis Khan which should be followed by his people and also by his successors. [116] In the case of the Siyasah Shari'iyyah, it is also clear that the term was, and is, used to give right to the political authority to issue any rules for its people. Coulson points out, for example, that even though "the political authority has no legislative power to modify or supersede the Shari'ah. it nevertheles has the power, ad indeed the duty, to make supplementary administrative regulations to effect the smooth administration of law in general."[117] According to Ibn Qayyim, the Siyasah Shar'iyyah gives an opportunity to the ruler to issue law which "comprises all measures that bring the people close to wellbeing (salah) and move them further away from corruption (fasad), even if no authority is found for them in divine revelation and the Sunnah of the Prophet."[118] In short, both the Great Yasa and the Siyasah Shar'iyyah seem to be addressed to the political aouthority of a government in relation to, among others, the enactment of law.

A significant point should be addressed here. Having looked at the date when the Siyasah was understood as criminal law or punishment (since the fourteeth century), one may infer that the date was closely linked to the period of the promulgation of the Great Yasa and also the period of the spreading out of the term Yasa as a legal code in the areas in which the influence of the Mongol Empire was very significant. Thus, it could be easy to understand that the term Siyasah was begun to be understood as a legal code, or criminal law. And, it was in this period that the Yasa seemed to be intertwined with the term Siyasah.[119]

George Vernadsky provides an interisting point about the concept of the Great Yasa which is, as we shall see, similar to that of the Siayasah shar'iyyah. Vernadsky asserts that the Great Yasa is not " a mere codification of the customary laws of the Mongol tribes," but rather the law promulgated by the great Genghis Khan, aimed at supplementing the Mongol traditional laws.[120] Vernsky emphasizes this point, suggesting that the principles of the Great Yasa "were intended to fill the gaps in customary law or, as in the case of criminal law, to replace traditional customs with new ordinances."[121] No one will be surprising therefore if a large number of the ordinances in the Great Yasa "are original based on Chingiz's conception of what was good and right for his state and his people,"[122] and he he modified or abolished certain customary laws of the Mongols which, in his opinion, were not in accordance with the new demand.[123] It is on this point that the concept of the Great Yasa is, as will be shown later, similar to that of the Siyasah Shar'iyyah, in the sense that : (1) the Siyasah Shar'iyyah is considered a supplement to the Shari'ah rules, and (2) the provision of law based on the doctrine of the Siyasah Shar'iyyah sometimes apparently contradicted the provision of the Shari'ah.

In the case of the Ottoman Empire, for example, Suleyman the Magnificent has been reported to have said that this his qanun-names (the law based on the concept of the Siyasah Shar'iyyah) was not aimed at abrogating nor contradicting the Shari'ah but "supplemented it by religiously indifferent regulations."[124] On another occasion, Shaykh al-Islam Abul Su'ud was also reported to have said : "there can be no decree of the Sultan ordering something that is illegal in the view of the *shari'a (na mesru' olan nesneye emr-i sultani olmaz)*."[125]

Moreover, because of public interest (*maslahah*), the doctrine of Siyasah Shar'iyyah gives an opportunity to the administrative power to promulgate certain rules

---

116). See p. 5 above

117). Noel J. Coulson, "The Concept of Progress and Islamic Law ", *in Religion and Progress in Modern Asia*, ed. Robert N. Bellah (New York : The Free Press, 1965), 85 See also his A History of Islamic Law (Edinburgh : Edinburgh University Press, 1990), 172 : J.N.D. Anderson and N.J. Coulson, "Modernization : Islamic Law in Northerm Africa : *Islam and Modernization*, ed M. Brett (London : Frank Cass, 1973), 74; J.N.D. anderson, " Modern Trend in Islam : Legal Reform and Modernization inthe Midle East," *International and comparitive Law Quartely* 20 (1971):4, 13 : his "Law as a Social Force in Islamic Culture and History," *Bulletin of the school of Oriental and African Studies* 20 (1957): 26; his "The Significance of Islamic Law in the World Today," *The American Journal of Comparative Law* 9 (1960): 192.

118). Mohammad Hashim Kamali, *Priciple of Islamic Jurisprudence* (Cambridge : Islamic Texts Society, 1991), 271.

119). According to Turkish-English dictionary, the meaning of Yasa or Yasak is : law, regulation,rule, prohibition, punishment, interdict, forbiddeen, prohibilited (see Abbas Aryanpur-Kashani & Manoocheha Aryanur Kashani, *The Concise Persian-English Dictionary*, Tehran : Amir Kabir Publication, 1986, 1428; A.D. Alderson and Fahir Iz, *The Oxford Turkish-English Dictionary*, third edition, Oxford : Clarendon Press, 1985, 503 : *New Redhouse Turkish-English Dictionary*, Istanbul : Redhouse Press, 1968, 1244-5; F. Steingass, A *Comprehensive Persian-English Dictionary*, London Routledge & Kegal Paul, 1984, 1526, 1531).

120). Vernadsky, "The Scope and Contents, " 359-60

121). Ibid., 360

122). Haider, " Mongol Tradition, " 65-6.

123). Juvaini, *The World-Conqueror*,25.

124). Schaht, *Introduction*, 90. See also his "Problems ofModern Islamic Legislation, "*Studia Islamica* 12 (1960) : 102; J.N.D. Anderson, "The Adaptation of Muslim Law in sub Saharan Africa," in *African Law : Adaptation and Development*, ed H. Kuper and L. Kuper (Berkeley: University of California Press, 1968), 151.

125). Heyd, *Kanun and Shari'a*, 9 For the same view thar the Qanun was supplemented to and not contradictid with the provision of Shari'ah, see Halil Inalcik, *The Ottoman Empire*, trans, Norman Itzkowitz and Colin Imber (London : Weidenfeld and Nicoson 1975), 71; H.A.R. Gibb and Harold Bowen, *Islamic Society and the West*, vol. one part one (Oxford : Oxford University Press, 1951), 23.

which apparently contradicted the Shari'ah.[126] The following case of the Ottoman Empire is a clear example in point.

According to the Ottoman authorities, the enactment of the Qanun was not aimed at replacing the Shari'ah as the main source of law for the Ottoman Empire. With the passage of time however the situation changed considerably. The Qanun, which at first had been limited to areas outside the Shari'ah, began to penetrate those areas which, according to some religious groups, belong to the Shari'ah. It would be useful here to cite some significant examples of the issue, as fellows.

Gabrial Baer indicates that there had been important regulations which "had been largely outside the *shari'ah* and the jurisdiction of the *qadis*."[127] Criminal law, according to him, was the main example of such regulations.[128] Its most important contribution, Heyd points out, was "the imposition of a fine ... upon criminals liable to the fixed penelties (*hudud*)" such as for fornication, homicide, and for certain cases of theft.[129] The taking of interest (*riba*) up to a certain rate was another example of Qanun which was considered contradictory to the provision of Shari'ah.[130] It also happened that in case of a murder which occurred in the Palace, the Sultan was authorized to excute the murderer at once without strictly following the procedure fixed by Shari'ah.[131] It is not an exaggeration therefore that Anderson asserts : the doctrine of Siyasah Shari'iyyah "allowed the ruler to go well beyond the strict dictates of the prescribed doctrine in what he regarded as the public interest."[132] Consequently, the provision of Islamic law is far removed from the rigid regulations contained in the classical texts of all the well known schools of Islamic law.[133] More than this, it has often been said that "commands and prohibitions applicable to Arabia of the first century of *hijra* need not always be regarded as literally binding today."[134] Interestingly enough is the statement of Al-Nowaihi, as follows :

> all the injuctions on the secular affairs which are made in the Qur'an and the Sunnah were no more than temporary provision meant for the Arabs of the time of the Prophet alone and not intended to be everlasting and unalterable. All the findings of the ancient 'imams were the opinions of human beings who did their best in their limiting circumstances and who neither were infallible nor claimed infallibility. Consequently, all the decisions of the classical shari'a must be amenable to change.[135]

We turn our discussion now to the issue of the difference between the Great Yasa and the Siyasah Shari'iyyah. The most clear difference between the two is concerned with their sources. The Great Yasa of Genghis Khan was generally based on the tradition of Mongolian society enacted through the order of Genghis Khan. It should be born in mind however that what was considered good and bad for the Mongol Empire mostly depended on Genghis Khan's considerations. This is clearly different from that of the Siyasah Shar'iyyah is claimed to be based on the divine ordinance laid down in the Qur'an and the *hadith* (the tradition of the Prophet Muhammad), and quite significantly the *ijtihad* of the Muslim scholars. In addition to this, it would not be an exaggeration to point out here that, unlike the Great Yasa, the Siyasah Shar'iyyah is continously used in any Muslim society, and regarded as an important subject in the study of Islamic law.

The last part of this section will discuss the issue of why the term Siyasah Syar'iyyah is more well known instead of the Great Yasa in contemporary Muslim society. To answer this problem, Saunders' viewpoint is quite significant to be mentioned here. Having compared the achievements of the Muslim (Arab) Empire and the Mongol Empire, Saunders is of the opinion that, compared to the Mongol, the Arab Muslim is more successful in establishing a great empire. Certain factors, says Saunders, have supported this fact, and he has produced a long discussion on the issue, some of which are the following :

> The historian who is struck by the comparison between the Arab conquests of the seventh century and the Mongol conquests of the thirteenth, may be surprised at the failure of the latter to issue in the creation of a new civilization. If the Arabs, like the Mongols, were illiterate barbarians when they embarked on the

126). J.N.D. anderson and N.J. Coulson, "The Moslem Ruler and Contractual Obligations," *New York University Law Review* 33 (1958) : 929.

127). Cabrial Baer, "The Transition from the Traditional to Western Criminal Law in Turkey and Egypt," *Studia Islamica* 45 (1977) : 149. see also Heyd, *Criminal Justice*, 1.

128). Baer, "Transition," 149. see also Herbert J. Liesbesny, "Impact of Western Law in the Countries of the Near East," *The George Washingthon Law Review* 22 (1953) : 127-8.

129). Heyd, Studies, 181

130). Ibid., 182

131). Heyd, Kanun and shari'a, 12-3

132). J.N.D. Anderson, *Law Reform in the Modern World* (London : The Athlone Press, 1976), 12 See also Noel J. Coulson, "The State and the Individual in Islamic Law," International and Comparative Law Quarterly 6 (1957), 51. Coulson also points out that, according to Farhum, the doctrine of Siyasah has six purposes: "the protection of life, lineage, mind character and propherty, and the elimination of any ' corruption'".

133). Anderson, *Law Reform*, 187.

134). J.N.D. Aderson, "Shari'a Today," *journal of Comparative Legislation and International Law* 31 (1949) : 25

135). Mohammed Al-Nowaihi, "Religion and Modernization : The General Problem and Islamic Responses, " in *Modernization : The Humanist Response to its Promise and Problems*, ed Richard L. Rubenstein (Washington : Paragon House, 1982), 337

building of an empire that eventually stretched from Spain to India, they speedily educated themselves in the schools of the Greeks and Syrians, and later the Persians, and the philosophical and scientific treatises that were composed in the Arabic language in Baghdad and Samarkand, Cairo and Cordova, carried the human mind to new heights, while the graceful domes and minarets of mosques and colleges transformed the skyline of eastern cities. The Mongols totally failed to match this achievemnet. Their original barbarism was indeed softened by example of their better-educated neighbours and subjects; their leaders acquired a tincture of letters; the culture of China and Persia in partcular left its impress upon them, but the Mongol language never became the vehicle of sophisticated literature, nor was it widely propagated beyond its first homeland and it was easily defeated in cimpetition with Persian and Uighur Turkish. The failure of Mongol to rise to the level of Arabic may be attributed to the fact that the Mongol Empire was created by a soldier and legislator whereas the Arab Empire was created by a prophet ..... Whenever Islam was established, Arabic inevitably followed and grew into a universal tongue, understood if not spoken by Turks and Berbers, Persian and Indians.[136] If Arabic represented the Law and the Prophet, Mongol represented the Law only, and though the *Yasa* was venerated as the bequest of Chingis to his people, no Bible or Koran was composed in his language, which thus could claim no special status as the speech of heaven.[137]

Thus, it is not surprising therefore that the Siyasah Shar'iyyah claimed as originating in the Muslim Empire is very dominat in contemporary Muslim society. As a consequence of what Saunders has discussed, the original concept of Shari'ah laid down in both the Qur'an and the Sunnah of Prophet Muhammad and also quite a number of the *kitab al-fiqh* written by the famous scholars in the circle of the four orthodox schools, are well preserved until the present time. This is however not the case for the Great Yasa. Though most modern scholars agree that the Great Yasa was positively enacted by Genghis Khan, non of them has ever been fortunate enough to look at a complete written document as an original text of the Great Yasa. The analysis of the Great Yasa in the present time is based mostly on secondary sources only.[138]

Barthold shares a similar view to that of Saunders in terms of the weakness of the Mongols. The Mongols, says Barthold, "were undoubtedly on a very low cultural plane even compared to their fellow-tribes, the Keraits and Naimans."[139] As a result, "immediately after the unification of Mongolia, and before the subjugation of the cultured provinces, the necessity of borrowing from the subject people became manifest."[140] Some evidences of these borrowings have been recorded by Barthold, one of which was the use of the Uighur script as an important language of the official necessity of the Mongol Empire.[141]

There is another reason as to why the Siyasah Shar'iyyah is more well known than the Yasa in contemporary Muslim society. It has often been said that the Shari'ah seen as religious law based on the divine will of God. The Yasa (or, in the case of Ottoman Empire, Qanun), on the other hand, is claimed as merely the manmade law. Consequently, it was considered "secular." It was also a fact that the rule of the Yasa or Qanun (as secular law) was often confronted with the rule of the so-called religious law, Shari'ah. In this situation, it seems to be reasonable if some people absorbed the religious law instead of the secular law due to the reason that the religious law is better than the secular one. For this reason, it is understandable that the term Siyasah based on the religious ordinance is preferred instead of the Yasa (Qanun) as secular law. Consequently, the term Siyasah is, in the long run, preferred over the Yasa.

Nontheless, it is important to underline here that the problem is not so simple. The term Shari'ah, which was contradicted with the Yasa or Qanun, was limited to the understanding of certain scholars and not Shari'ah in its general meaning. In order to have a more clear understanding about the issue, it seems to be worth while to observe the historical fact during, for example, the Ottoman Empire.

During the period of the Ottoman Empire, there were at least two sources of law : Shari'ah and Qanun (which is, in principle, the same as the Yasa). While Shari'ah was claimed as the religious law, Qanun was claimed as the secular law based on, among other important things, the will of the Sultan and his custom. The difference and the contradiction between the two are always emphasized in the historical record. Some examples of this contradiction have been pointed out in the previous section.[142]

It is not much understood however that the term Shari'ah in the eyes of the Ottoman authorities likely referred to the viewpoints of the four famous orthodox

---

136). Saunders also emphasize his view elsewhere, saying that "Arabic acted as the *lingua franca* of scholarship and letters over a wide segment of the globe from Spain to Transoxiana" (see his *Mongol Conquests*, 186).

137). Ibid., 189-90

138). See Poliak, "Cingiz-Khann's Yasa," 863-4; Vernadsky, "Scope and Contents," 337; David Morgan, *The Mongols*, 98

139). Barthold, *Turkestan*, 386.

140). Ibid.

141). Ibid., 387. See also Haider, "Mongol Tradition," 75-6.

142). See pp. 35-6 above.

madhahib, and more specifically to the Hanafi *madhhab*. For example, it was written in the introduction to the *qanunname* for Candia that "the land of the island to be registered according to the rules of the seriat as set out in the books of *fiqh*."[143] This statement clearly shows us that the meaning of the term seriat (Shari'ah) was addressed to the certain interpretation of a certain school concerning the provision of Islamic law which was written in the legal book, *fiqh*. For this reason, it would be safe to pindown that if there is a contradiciton between the provision of Shari'ah and the provision of Qanun, it should be rightfully understood that the conflict was truely between Qanun on the one hand and Shari'ah which was limited to the understanding of the orthodox (Hanafi) *madhhab*, and not Shari'ah in its general meaning. Or it could also be understood that the conflict was between the Shari'ah as understood by the Ottoman authorities based on the doctrine of the Siyasah Shar'iyyah and the Shari'ah as understood by the '*ulama*' of the Hanafi *madhhab* written down in the books of *fiqh*.

Moreover, the process of secularization which took place over time in the Ottoman Empire has made the issue more complex. Based on the Christian experience, the process of secularization has traditionally been seen as a conflict "between the religion (Shari'ah) and the world (Qanun)"[144] This was not the case in Turkey or in other Muslim countries. The problem faced by those Muslim countries was (and still is) not the conflict between religious teaching (Shari'ah) and world affairs (Qanun), but rather "between the whole value system of traditional Islamic society on the one hand and the encroaching process of modernization on the other."[145]

One of the crucial problems of the above issue concerns the position of local tradition relating to the promulgation of Islamic law, Shari'ah. It seems to be fair to say that the policy to make the local custom a source of law for Muslim ruler, even since Muhammad's period. One historical fact his indicated, for instance, that pre-Islamic Arab tradition formed a large part of both the source and the subject-matter of Islamic law, the Shari'ah. The concept of *sunnah*,[146] the important position of the *hakam*,[147] the law inheritance,[148] and *zihar*,[149] to some extent, are clearly derived from pre-Islamic Arab tradition.

The adoption of the local tradition as a significant element of law in Islam was also a common practice on the part of the second Caliph, 'Umar Ibn Khattab. According to hamidullah, 'Umar "had ordered his lieutenents to conserve almost the entire legal system of the conquered countries with regard at least to land revenue, in Iraq for instance."[150] Margoliouth presents a critical study of 'Umar's letter to Abu Musa al-'Ash'ari (a *Qadi* of Basrah) which contains an instruction to use the prevailing tradition (*al-sunnah al-muttaba'ah*) dealing with the local legal problem.[151] The system of taxation, the treatment of tolerated religions, and the institution of *waqf* are some examples of institution and/or legal practice which originated from the conquered areas, praticularly those formerly in the Christian Roman Empire.[152] If the local custom is considered as one important parts of the promulgation of law in Islam since early times, one may question as to why Yasa, Qanun and the like were not considered a part of the Shari'ah, or why they were intentionally contradicted to the Shari'ah. One of the answers of this problem seems as follows. The Qanun, as has been generally known, originated in the culture of the Ottoman people, in an area outside Arab culture. The term Arab has often been wrongly understood as equal with the term Islam. To put it differently, there was a tendency to put the Arab as the "owner" of Islam. The discussion of Islam, consequently, was mostly addressed to the Arab countries. Non-Arab countries, on the other hand, seemed to be considered peripheral. It is in this context that Hourani's statement, as follows, could be understood properly :

> In writing about the 19th and 20th centuries, we should never forget the Ottoman impact : the lasting influence of those countries when most Arab countries, and many others, were incorporated into the last

143). Richard C. Repp, "Qanun and Shari'a in Ottoman Context," in *Islamic Law : Social and Historical Contexts*, ed. Aziz al-Azmeh (London : Routledge, 1988), 132-3.

144). Niyazi Berkes, *The Development of Secularization in Turkey* (Montreal : McGill University Press, 1964), 6.

145). Halil Inalcik, "On the Secularization in Turkey," review of *The Development of Secularization in Turkey*, by Niyazi Berkes, in *Orientalistische Literaturzeitung* 9/10 (September/October, 1969), 433. See also al-Nowaihi, "Islamic Responses," 309.

146). See H.A.R. Gibb, *Muhammedanism*, second edition (Oxford : Oxford University Press, 1962), 73-4.

147). James Hawting, *Encyclopedia of Religion and Ethics* (New York : Charles Scribner's Sons, 1955), s.v. "Arabs (Ancient)," by TH. Noldeke.

148). Mircea Eliade, ed. *The Encyclopedia of Religion* (London : Macmillan Publishing Company, 1987), s.v. "walayah," by Hermann Landolt.

149). See Asaf A. A. Fyzee, *Outlines of Muhammadan Law*, second edition (Oxford : Oxford University Press, 1955), 137-8.

150). Muhammad Hamidullah, "Sources of Islamic Law-A New Approach," *The Islamic Quarterly* 1 (1954) : 207.

151). D.S. Margoliouth, "Omar's Instruction to the Kadi," *Journal of the Royal Asiatic Society* (1910) : 307-26. For a discussion on the same issue, see R.B. Serjeant, "The Caliph 'Umar's Letters to Abu Musa al-Ash'ari amd Mu'awiya," *Journal of Semitic Studies* 29 (1984) : 65-79.

152). Schacht, *An Introduciton*, 19. See also F.E. Peters, *Children of Abraham : Judaism, Christianity, Islam* (Princeton : Princeton University Press, 1984), 92 ; Al-Nowaihi, "Islamic Responses," 334-5.

> great empire of Islam. In the past it was easy to forget it ... We are all aware now of the importance of the Ottoman centuries. The Ottoman created and maintained not only a lasting and effective structure of government and administration, but an area of free trade within which commercial exchanges were comparatively easy; within this area there flourished a distinctive urban society, not only in Istanbul but in the great provincial centers, and a system of taxation and control of land under which agricultural production could be carried on.[153]

Back to the point, it is reasonable that the Yasa or Qanun, the non-Arab culture, was not included as a part of Shari'ah; thus, it was considered "strange."

Nontheless, there is a growing consciousness among some contemporary Muslims to return to the example of the early concept of the law in Islam in which local custom, regardless of area and culture, should play a decisive role in the promulgation of the Islamic law. The following thesis of Fazlur Rahman, which has been widely discussed among Muslims (e.g. in Indonesia), is of much importance in elucidating the issue.

To solve any problem faced by Muslim society, Rahman introduces a thesis which he calls "a couble movement." This thesis, according to him, is a process of interpretation concerning the Islamic teaching in relation to the social problem of Muslim society. The thesis consists of two movements, "from the present situation to Qur'anic times, then bac to the present."[154] Ther firts movement is divided into two steps. First, one must understand the exact meaning of the specific given text in the Qur'an. In doing so, he must examine any social circumstances in which the text was given. The second step is to generalize the specific answer of the Qur'anic text, combined together with other specific answers of the Qur'anic texts, and formulate them "as statements of general moral-sicial objectives."[155] In other words, the first movement of the proces of interpretation is a movement "from the specifics of the Qur'an to the eliciting and systematizing of its general principles, values, and long-range objectives."[156] The second movement is the opposite of the first one. While the first movement is an inductive process, the second one is a deductive process, that is: one must articulate the general principle, as the result of the first movement, into a specific view in order to answer the real problem faced by the Muslim society.[157]

The rule of marriage in Islam is one of the popular examples by Rahman. Rahman clearly states that the ideal form of marriage in Islam is monogamous. By referring to the Qur'an surat al-Nisa 3–4,[158] Rahman links the practice of polygamy with the reatment of orphans. The permission of polygamy, says Rahman, "has to do only with orphan women, and not women in general."[159]

To support his idea that the objective goal of the marriage in Islam is monogamous, Rahman looks at the socio-historical background during the early period of Islam. Rahman contends, for example, that polygamy was a common practice in Arab society. Also, it is well known that the early politico-military development in Islam, and the rapid conquest of territory during this period had created certain problems, including a disproportionate number of slaves and widows among Muslim society. Under these circumstances, says Rahman, it is not surprising that the Qur'an permits polygamy as one of the ways to solve the problem.[160] He concludes that the permission for polygamy should be regarded as being temporary and yet "the long-range overall objective of the Qur'an thus remained monogamy."[161] According to Rahman, "the problem of polygamy looks to be parallel to the problem of slavery."[162] Although the Qur'an speaks about slavery, this does not mean that Muslims are encouraged to have slaves. The Qur'anic injunction of slavery was one of the ways to solve the problems surrounding the issue of slavery, which was a common practice in Arab society.[163]

Having understood Rahman's viewpoint, one may conclude that the local custom of any Muslim country should be considered as one of the important sources dealing with the legal problem in Islam, and should play

---

153). Albert Hourani, "How Should We Write the History of the Middle East," *International Journal of Middle East Studies* 23 (1991) : 129.

154). Fazlur Rahman, *Islam and Modernity* (Chicago : The University of Chicago Press, 1984), 5.

155). Ibid., 6.

156). Ibid., 7.

157). Ibid.

158). "Give unto orphans their wealth. Exchange not the good for the bad (in your management thereof) nor absorb their wealth into your own wealth. Lo! that would be a great sin. And if you fear that you will not deal fairly by the orphans, marry of the women, who seem good to you, two or three of four; and if you fear that you can not do justice (to so many) then one (only) or (the captives) that your right hands possess. Thus it is more likely that you will not do injustice" (Mohammed Marmaduke Pickthall, *The Meaning of the Glorious Koran*, Ontario : Penguin Books, n.d.).

159). Fazlur Rahman, "The Status of Women in Islam : A Modernist Interpreation," in Separate World : *Studies of Purdah in South Asia*, eds, Hanna Papanek & Gail Minault (Delhi : Kay Kay Printers, 1982), 301. See also his "A Survey of Modernization of Muslim Family Law," *International Journal of Middle East Studies* 2 (1980) : 452.

160). Ibid. See also his *Islam*, 29.

161). Rahman, "Status of Women," 301. See also Majid Khadduri, "Marriage in Islamic Law : The Modernist Viewpoints," *The American Journal of Comparative Law* 26 (1978) : 217.

162). Rahman, "Status of Women," 302. See also his "Modernization," 452.

163). Ibid.

a decisive role in the promulgation of Islamic law. Consequently, the common view that Yasa, Qanun and the like are regarded "secular" and are different from the Shari'ah should be reconsidered.

D. Concluding Remarks

In conclusion, some important points should be underlined.

There is a strong indication that the term Yasa originated in Mongol customary law, though it has been claimed that the Mongols had no alphabet. The Mongol customary law had served as the foundation of the provision of the so-called Great Yasa, *al-Yasa al-Kabirah*, promulgated by the founder of the great Mongol Empire, Genghis Khan.

The origin of the term Siyasah, on the other hand, seems to be controversial. While some scholars hold that the term Siyasah came from the term Yasa, others tend to assert that the term Siyasah was Arabic in origin. It is likely true to observe here that this issue is not conclusive in itself, and further researh is still badly needed. Moreover, the term Siyasah, according to the latter view, has been used since the early period of the Muslim (Arab) Empire with its various meanings. And since the fourteenth century, the terms Yasa and Siyasah seemed to be used interchangeably. In addition, due to the social fact during the medieval period, the doctrine of the Siyasah Shar'iyyah had been created which was understood as any policy of certain Muslim government based on the religious law, Shari'ah.

The central position of the Great Yasa or Siyasah Shar'iyyah in the promulgation of law in any Muslim society is another point which should be emphasized here. It is very probable that there is a growing tendency in contemporary Muslim society that political authority (government) has a central position more than any other institution relating to both the formulation and enactment of the law, and put the local custom as one important source to issue the subject-matter of Islamic law. This does not mean, however, that the position of the '*ulama*', as an important agent of the law in Islamic history, is not significant. But their position seems to be subordinate to the political authority. Consequently, no one should be surprised by the fact that the provision of Islamic law determinded by the '*ulama*' would be applied if it has received the approval from the political authority.

Bibliograpy

Amedroz, H.F. "The Hisbah Jurisdiction in the Ahkam Sultaniyyah of Mawardi." *Journal of the Royal Asiatic Society* (1916) : 289–314.

_____, "The Office of Kadi in the Ahkam Sultaniya of Mawardi." *Journal of the Royal Asiatic Society* (1910) : 761–96.

_____, "The Mazalim Jurisdiction in the Ahkam Sultaniya of Mawardi." *Journal of the Royal Asiatic Society* (1911) : 633–74.

Anderson, J.N.D. "Law as Social Force in Islamic Culture and History." *Bulletin of the School of Oriental and African Studies 20* (1957) : 13–40.

_____, *Law Reform in the Muslim World.* London : The Athlone Press, 1976.

_____, "Modern Trends In Islam : Legal Reform and Modernization in the middle East." *International and Comparative Law Quarterly* 20 (1971) : 1–21.

_____, "Shari'a Today." *Journal of Comparative Legislation and International Law* 31 (1949) : 18–25.

_____, "The Adaptation of Muslim Law in Sub-Sahara Africa." In *African Law : Adaptation and Development*, eds. H. Kuper and L. Kuper, 149-64. Berkeley : University of California Press, 1965.

_____, "The Significance of Islamic Law in the World Today." *The American Journal of Comparative Law* 9 (1960) : 187-98.

Anderson, J.N.D. and N.J. Coulson, "Modernization : Islamic Law." In *Northern Africa : Islam and Modernization*, ed. M. Brett, 73-83. London : Frank Cass, 1973.

_____, "The Moslem Ruler and Contractual Obligations." *New York University Law Review* 33 (1958) : 917-33.

Ayalon, David. "The Great Yasa of Chingiz Khan : A Re-examination." *Studia Islamica* 33 (1971) : 97-140, 34 (1971) : 151-80, 36 (1972) : 113-58, and 38 (1973) : 107-56.

Baer, Gabrial. "The Transition from the Traditional to Western Criminal Law in Turkey and Egypt." *Studia Islamica* 45 (1977) : 139-58.

Barret, T.H. "The Secret History of the Mongols : Some Fresh Revelations." *Bulletin of the School of Oriental and African Studies* 55 (1992) : 115-9.

Barthold, W. *Turkistan Down to the Mongol Invasion.* Second edition. London : Messrs. Luzac and Co., 1928.

Berkes, Niyazi. *The Development of Secularization in Turkey.* Montreal : McGill University Press, 1964.

Cleaves, Francis Woodman, tran. "The Fifteen 'Palace Poems'." *Harvard Journal of Asiatic Studies* 20 (1957) : 429-33.

_____, *The Secret History of the Mongols.* London : Harvard University Press, 1982.

Coulson, New James. *A History of Islamic Law.* Edinburgh : Edinburgh University Press, 1990.

_____, "The Concept of Progress and Islamic Law." In *Religion and Progress in Modern Asia*, ed. Robert N. Bellah, 75-92. New York : The Free Press, 1965.

_____, "The State and Individual in Islamic Law." International and Comparative Law Quarterly 6 (1957) : 49-60.

Crone, Patricia and Martin Hinds. *God's Caliph : Religious Authority in the First Centuries of Islam.* Cambridge : Cambridge University Press, 1966.

Eliade, Mircea, ed. *The Encyclopedia of Religion.* London : Macmillan Publishing Company, 1987. S.v. "*walayah*,"

by Hermann Landolt.

Fyzee, Asaf A.A. *Outlines of Muhammadan Law*. Second edition. Oxford : Oxford University Press, 1955.

Gibb, H.A.R. *Mohammedanism*. Second edition. Oxford : Oxford University Press, 1962.

_____, "The Social Sifnificance of the Shuubiya." In *Studies on the Civilization of Islam*, eds. J. Shaw and William R. Polk, 63-64. Princeton University Press, 1964.

Gibb, H.A.R. and Harold Bowen. *Islamic Society and the West*. Vol. I. Oxford : Oxford University Press, 1951.

Haider, Mansura. "The Mongol Traditions and Their Survival in Central Asia (XIV-XV Centuries)," *Central Asia Journal* 28 (1984) : 57-79.

Hamidullah, Muhammad. "Sources of Islamic Law-a New Approach." *The Islamic Quarterly* 1 (1954) : 205-11.

Hawting, James, ed. *Encyclopaedia of Religion and Ethics*. New York : Charles Scribner's Sons, 1955. S.v. "Arabs (Anvcient)," by TH. Noldeke.

Heyd, Uriel. *Kanun and Shari'ah in Old Ottoman Criminal Justice*. Jerusalem : The Israel Academy of Science and Humanities, 1967.

_____, *Studies in Old Ottoman Criminal Law*, ed. V.L. Menage. Oxford : Clarendon Press, 1973.

Hitti, Philip K. *History of the Arabs*. Ninth edition. London : Macmillan, 1967.

Hodgson, Marshall G.S. *The Venture of Islam*. Vol. I. Chicago : The University of Chicago Press, 1977.

Hourani, Albert, "How Should We Write the History of the Middle East." *International Journal of Middle East* 23 (1991) : 125-36.

Hung, William. "The Transmission of the Book Known as *The Secret History of the Mongols*," *Harvard Journal of Asiatic Studies* 14 (1951) : 433-492.

Ibn Qutaybah, 'Abd Allah ibn Muslim. *al-Imamah wa al-Siyasah : al-Ma'ruf bitarikhi al-Khulafa'*. 2 volumes. Beirut : Dar al-Adwa', 1990.

Inalcik, Halil. "On the Secularization in Turkey." Review of *The Development of Secularization in Turkey*, by Niyazi Berkes. In *Orientalistische Literaturezeitung* 9/10 (September/October 1969) : 437-46.

_____, *The Ottoman Empire*, trans. Norman Itzkowitz and Colin Imber. London : Weidenfeld and Nicolson, 1975.

Juvaini, 'Ala-ad-Din 'Ata-Malik. *The History of the World-Conqueror*, tran. John Andrew Boyle. Massachusetts : Harvard University Press, 1958.

Kamali, Mohammad Hashim. *Principles of Islamic Jurisprudence*. Cambridge : The Islamic Texts Society, 1991.

Kennedy, Hugh. *The Prophet and the Age of the Caliphates*. London : Longman, 1986.

Khadduri, Majid. "Marriage in Islamic Law : The Modernist Viewpoints." *The American Journal of Comparative Law* 26 (1978) : 213-8.

Kozlowski, Gregory C. *The Concise History of Islam and the Origin of Its Empires*. Massachusetts : Copley Publishing Group, 1991.

Lamb, Harold. *Genghis Khan : The Emperor of All Men*. New York : Doubleday & Company, n.d.

Lambton, Ann K.S. *State and Government in Medieval Islam*. Oxford : Oxford University Press, 1991.

Lapidus, Ira M. "The Separation of State and Religion in the Development of Early Islamic Society." *International Journal of Middle East Studies* 6 (1975) : 363-85.

Lewis, Bernard. "Siyasa." In *In Quest of an Islamic Humanism*, ed. A.H. Green, 3-24. Cairo : The American University Press, 1968.

_____, "The Mongols, the Turks and the Muslim Polity." *Transaction of the Royal Historical Society* 18 (1968) : 49-68.

_____, *The Political Language of Islam*. Chicago : The University of Chicago Press, 1991.

_____, "Translation form Arabic." *Proceeding of the American Philosophical Society* 124 (1980) : 41-7.

Liebesny, Herbert J. "Impact of Western Law in the Countries of the Near East." *The George Washington Law Review* 22 (1953) : 127-41.

Lister, R.P. *The Secret History of Genghis Khan*. London : Peter Davies, 1969.

Margoliouth, D.S. "Omar's Instruciton to the Kadi." *Journal of the Royal Asiatic Society* (1910) : 307-26.

Martin, H. Desmond. *The Rise of Chingis Khan and His Conquest of North China*. Baltimore : The Johns Hopkins Press, 1950.

Morgan, David. *The Mongols*. Cambridge : Basil Blackwell, 1986.

Morgan, D.O. "The 'Great Yasa of Chingiz Khan, and Mongol Law in the Ilkhanate," *Bulletin of the School of the Oriental and African Studies* 49 (1986) : 163-76.

Najjar, Fauzi M. "*Siyasa in Islamic Political Philosophy*." In *Islamic Theology and Philosophy : Studies in Honor of George F. Hourani*, 92-110. Albany : State University of New York Press, 1984.

Al-Nowaihi, Mohamed. "Religion and Modernization : The General Problem and Islamic Responses." In *Modernization : The Humanist Response to Its Promise and Problems*, ed. Richard L. Rubenstein, 309-40. Washington : Paragon House, 1982.

O'Leary, De Lacy. *How Greek Science Passe to Arabs*. London : Routledge & Kegan paul. 1964.

Peters, F.E. *Children of Abraham : Judaism, Christianity, Islam*. Princeton : Princeton University Press, 1984.

Picthall, Mohammed Marmaduke. *The Meaning of the Glorious Koran*. Ontario : Penguin Books, n.d.

Poliak, A.N. "The Influence of Chingiz Khan's Yasa upon the General Organization of the Mamluk State." *Bulletin of the School of Oriental and African Studies* 10 (1939-42) : 862-76.

Prawdin, Michael. *The Mongol Empire : Its Rise and Legacy*, trans. Eden and Cedar Paul. Londod : George Allen and Unwin, 1961.

Rahman, Fazlur. "A Survey of Modernization of Muslim Family Law." *International Journal of Middle East Studies* 2 (1980) : 451-65.

_____, *Islam*. Chicago : University of Chicago Press, 1979.

_____, *Islam and Modernity*. Chicago : The University of Chicago Press, 1984.

_____, "The Status of Women in Islam : A Modernist Inter-

pretation." In *Separate World : Studies of Purdah in South Asia*, ed. Hanna Papanek & Gail Minault, 285-311. Delhi : Kay Kay Printers, 1982.

Repp, Richard C. "Qanun and Shari'a in Ottoman Context." In *Islamic Law : Social and Historical Contexts*, ed. Aziz al-Azmeh, 285-311. London : Routledge, 1988.

Rossabi, Morris. *Khubilai Khan : His Life and Times*. Los Angeles : University of California Press, 1988.

Saunders, J.J. *The History of the Mongol Conquests*. London : Routledge & Kegan Paul, 1971.

Schacht, Joseph. *An Introduction to Islamic Law*. Oxford : Clarendon Press, 1986.

_____, "Problems of Modern Islamic Legislation." *Studia Islamic* 12 (1960) : 99-129.

Serjeant, R.B. "The Caliph 'Umar's Letters to Abu Musa al-Ash'ari and Mu'awiya." *Journal of Semitic Studies* 29 (1984) : 65-79.

Sinnah, Ahmad Abu and others. *Madkhal al-Fiqh al-Islami*. Matba'ah Lijannah al-Bayan al-Arabi, 1965.

Spuler, Bertold. *The Mongols is History*, tran. Geoffrey Wheeler. Washington : Praeger Publishers, 1971.

Vernadsky, George. "The Scope and Contents of Chingis Khan's Yasa." *Harvard Journal of Asiatic Studies* 3 (1938) : 337-60.

Waley, Arthur. *The Secret History of the Mongols*. London : George Allen & Unwin, 1963.

Watt, W. Montgomery. *Islamic Political Thought*. Edinburgh : Edinburgh University Press, 1987.

_____, "The Political Attitude of the Mu'tazilah." *Journal of the Royal Asiatic Society* (1963) : 38-57.

Webb, Robert N. *Genghis Khan : Conqueror of the Medieval World*. New York : Franklin Watts, 1967.

Wehr, Hans. *A Dictionary of Modern Written Arabic*, ed. J. Milton Cowan. Third edition. New York : Spoken Language Services, 1976.