Kaygı 30/2018: 1-9
Research Article | **Araştırma Makalesi**

Makale Geliş | Received: 06.02.2018
Makale Kabul | Accepted: 20.02.2017
DOI: 10.20981/kaygi.410544

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With a Representative Example the Roles of Reason and Emotion in Western and Islamic Legal Systems

Abstract

The core of this study is to show the role of emotion and reason in two major legal systems, namely the Western and Islamic legal systems. Firstly, I will portray the two systems without any detail, in order to show emotion and reason balances in each of them. After that, I will choose a *representative example* to explain and state how they follow different roads of approach to reach an understanding of the balance between reason and emotion. As an assumption, it would be safe to say Western law is more widely known. Therefore, I will focus primarily on an illustration from Islamic Law using as my example a facet of Family law, a special kind of separation "lian or mulahana" which, I think, clearly represents the outlook of Islamic law on emotion.

Keywords

Modern Law, Rationalism, Fiqh, Islamic Family Law, Lian, Emotion and Law.

Batı ve İslam Hukuk Sisteminde Temsil Edici Bir Örnekle Akıl ve Duygunun Rolü

Öz

Bu çalışmanın özü iki büyük hukuk sisteminde, Batı ve İslam hukuk sisteminde, duygu ve aklın rolünü göstermektir. Öncelikle her birinde duygu ve akıl dengesini göstermek için, her iki hukuk sisteminin ayrıntıya girmeden ana hatları çizilmiştir. Bundan sonra her iki sistemin makul bir akıl ve duygu dengesi için, nasıl farklı yollar izlediklerini gösterecek bir temsil edici bir örnek sunulmuştur. Bir varsayım olarak Batı hukuk sistemi daha yaygın olarak bilinen ve uygulanan bir sistem olduğundan temelde İslam hukukundan bir örnek tercih edilmiştir. Bu örnek, İslam hukukunun duyguya bakışını net olarak ifade ettiği düşünülen İslam aile hukukunda özel bir ayrılık yöntemi olan "lian ya da mulahana"dir. Lian, evlilik içi duygusal ilişki biçimin, aklın rolünü ve sistem içindeki dengeyi anlama olanağını vermektedir.

Anahtar Kelimeler

Modern Hukuk, Rasyonalizm, Fıkıh, İslam Aile Hukuku, Lian, Duygu ve Hukuk.

A Short Historical Development of Reason and Emotions in Life and in Law

Emotions generally seem to be, in our daily life, a deficit; a lack of logical, purposeful thinking. Whenever we make a mistake –quarrel in traffic or pay too much for a useless thing- we think that the reason and the source of our mistake is our emotion (emotions are scapegoats). We make mistakes because of behaving emotionally, or not rationally. According to Weberian (Weber 2002) classification emotional thinking or behavior is a lack of instrumental rationality. Rationality characterizes Western civilization. The Eastern style, in a broad sense, is just the opposite(!). The Eastern civilization has always been primarily based on emotionality. Even Orientalists comment on the lack of "Instrumental rationality" in the Eastern world. Therefore, it can be said that the *Archimedean point* is the role of rationality in Western and Eastern worlds in the everyday aspects of life.

This sharp distinction sources from unique historical developments of the West. The 17th Century has a special name, "the Age of Reason", and its specialty is not limited with the name. New Philosophy emerged from Scholastic Philosophy but, at the same time, fiercely rejected its own past's ties. An enormous scientific revolution followed this philosophical change and was followed by another revolution (Industrial Revolution) which put in practice and transformed into inventions all theoretical developments of the Enlightenment, which was the next age just after the "Age of Reason". All these developments created Western Civilization and a new way of life, which dominates the rest of the world that did not share the historical process.

The structure of the Western civilization can be seen at three levels. The deepest level is human reason, which is unique to human beings and deserves respect because of having the capability of free choice, as Kant put it clearly. The second level is a rational understanding of the whole world and of life. It includes control of physical and social realms in rational and logical ways, as the utilitarian wished it to make life more effective and predicable. Therefore it is a logical conclusion that the Industrial Revolution enabled human beings to manage all physical and social processes in order to reach the possible determined targets: From draining swamp areas to building skyscrapers or putting a policy into effect to reduce the crime rate. The third level in the structure of Western civilization is the rationalization of everyday life, which helped change social institutions into their rational counterparts (Weber 2002: as cited Kalberg's Intruduction: xviii). To illustrate this, imagine a father –a skilled craftsmen, say a carpenter for example. Passing his knowledge and skill along to his son, would be an example of traditional social institution. The development of vocational schools and training workshops would be an example of what I mean by a 'rational counterpart'. Rationalization is important for productivity and maximizing profit. *Profit is so important that cannot be left to chance.*

It can also be seen in Comte's Rational Religion: he believed that religion is an important factor for harmonious social life and by giving a commonly shared aim it supports and keeps social unity. But he thought that historical religious systems were not able to fulfil their function because of their irrational nature.

Western-Origin Modern Law

Law and legal matters were not an exception in these developments. The old conception of law and legal systems had to be changed in order to comply with the new understanding, namely they must be rational. The old legal systems were based on customary law and were mostly not only traditional, local and good for agricultural life but also unwritten and unclear. Therefore, old law was not effective for the daily life which the Industrial Revolution created. Rationalization of law emerged as a form of "The Codification Movements" which were, first all over Europe and spread to the rest of the world, the transformation of legal rules from unwritten customary rules to written-designed rules. The change was not limited only to the form of the rules as seen at first sight; it was more a change not in form but in content, structure and mentality of legal rules. By these *movements*, modern law and legal systems emerged. Modern law is dramatically different from *old law*. Old law, as said above, was mostly customary, traditional, local, spontaneous and unwritten (so unclear, at least not as clear as written law). Just opposite these features modern law is scientifically-logically designed, written, certain and culture-free (it means, modern law is not dependent strictly on a local culture). This features even virtues of law embodied in the ideal of Legal Positivism.

This kind of law –modern law- as Weber said, is highly rational and can serve capitalist societies' needs. This kind of modern Western law can fulfil the requirements of Weber's Formal-Rational (instrumental rationality) legal system and is the most developed system of law. Therefore, the virtue of Western law is its rationality or accepting rationality as its base. As a well-known fact, Weber typified another kind of rationality: "substantive rationality" and depending upon this there can be a "value-rationality". Additional concepts of reason exist, albeit these discussions should be set aside for the sake of putting forth the argument of this study.

One of the most important social institutions is law, or the legal system, and not only Weber but also most of the pioneers of sociology gave it a key role in their theories. As stated, rationalized law is modern law and it developed under all kinds of the positivist theories of law. Legal Positivism dreamed a fully scientific or logical law completely free from subjectivity, especially free from human beings' occasional character of human emotions (!).

Legal Positivistic virtues of law are important and they partly are the basis of a legal system, which is generally respectful of human rights and freedoms. These virtues are as follows (inspired partly from H. L A. Hart, Davies-Holdcroft 1995:3):

1. Certainty.
2. Uniformity of law.
3. Predictability of law.
4. Law as a closed logical system. External reference is not needed.
5. Separability of law and morality.

6. Law should give guaranty of fulfilling contracts or keeping promises. And if they are breached or broken, law would give remedies to get the rights from contracts or recover the loss.

Nobody can say that modern law was able to completely implement these ideals but theoretically they have been kept and defended by almost all jurists in the European realm of law.

This historico-theoretical background of modern law, with some minor differences sourced from local culture, regulates family law (actually all areas or branches of law) according to the principal of *the* reason. The attitude reserves a little room for emotions which, according to this understanding, are distortions so they hardly ever and only with limitation should be taken into account in law to keep these positivistic virtues intact.

The Main Sources of the Islamic Law (Fiqh)[1]

In order to find out the approach of Islam to the balance of reason and emotions, it is needed to go back to the foundational period or the formative years as almost every matter is related to Islam (Ekinci:2006). For the sake of clarity, the main sources of Islamic Law should be followed in their hierarchical sequence. The main sources of Islamic Law (Fiqh) are as follows (Üçok & Mumcu 1993: 41-46 and Cin & Akgündüz 1995: 152-174):

1. The Book: it means the Holy Quran (as officially agreed it includes at least a % 75 overlap of precepts with The Holy Bible).
2. Sunna: it is everything related to or associated with The Prophet Muhammed. His preachings, recommendations, rejections, behaviors and even gestures.
3. Ijma (Consensus): it is a doctrinal consensus about problematic matters that determines and shows the Islamic view (about ijma see Farooq 2006). An Islamic jurist (faqih) finds a solution to a problem; more clearly, he determines the place of the matter in Islam. If the other jurists accepted this solution and a consensus came out, it would become an Ijma and a binding source of Islamic Law.
4. Rey (Qiyas): a judgement about a problem. If it is given not for a concrete case but a fictitious situation, it will be a "fetwa" (Inanir 2011:15-33); if it is given for a concrete case, it will be a "hüküm-judgement". Fetwa is not a binding source of Islamic Law but a kadi (Islamic judge) generally reaches a decision (huqm) to comply with the fetwa. It should be stated that there is a fierce debate in Islamic Law on that point because of two important reasons. Firstly, fetwa is a secondary or derivative source of fiqh and because it is an

[1] The well-known name of Islamic Law is Sharia (Literal meaning: way, method, custom) and although it mostly includes divine precepts, correspondingly Fiqh is a product of human understanding as well. If we talk about the legal matters, which belong to everyday life, not Sharia but Fiqh will be the true word to use. Generally they are interchangeable.

outcome of reasoning, you can infer it from four main sources listed above. Secondly a fetwa mostly does not include the way of the argumentation. [2]

The Method of Islamic Law (Fiqh)

The method of Islamic Law (Usul al-Fiqh) and Islamic Jurisprudence (Fiqh) (Hallaq 2009a:16-28) mainly is a case law, it looks like common law and it works similar to Common Law.[3] The key difference between them is "stare decisis doctrine" which in Western Law relies completely on legal precedents, whereas every qadi (qazi, qadhi-Islamic judge, see Hallaq 2005:34-40) has the freedom to decide every case without referring to old decisions in similar cases. There are some ways to unify the decisions, which is given by different Qazis for similar issues. The first of these ways is ijma (consensus) but in practice ijma cannot completely be sufficient to the aim. The second way is to appeal to the courts of Ottoman Empire (for different courts see Akgunduz 2009:42-44): The **Divan of Cuma** and The **Divan of Carsamba**. The Divan of Cuma was the highest court of appeal, including the grand vizier and quziaskers (the highest two judges of the empire, one responsible for Anatolia and the other one responsible for Rumelia). Friday (Turkish Cuma) is the meeting day of the court and sometimes the sultan joined The Divan of Cuma to see how Islamic principles of justice were implemented. The Divan of Carsamba (it took it's name the same way as The Divan of Cuma, the regular meeting day was Wednesday, Turkish Carsamba) was a court of review (the first-degree of appellate court) and the grand vizier and four major qazis were regular members of the court. One of the duties of the two appeal courts was to unify the qazis' different decisions of similar legal issues. When the Ottoman Empire lived its golden days, the appeal courts fulfilled their duties, but by the corruption of the empire the appeal courts in the course of time failed.

Therefore Islamic law and Usul al-Fiqh together embody a kind of law which is not rationally designed and well thought out by a legislator or a legislative body. It was patterned during the first century of Islam and family law was not an exception to this development.

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[2] A *rey* (Qiyas) and a *fetwa* are close but different concepts from each other. A *rey* is an inference from the main three sources of Islamic law. It includes *fikhi* (canonic) grounds and shows logical steps of itself. On the other hand, a *fetwa* is an abstract statement about a problem. It importantly does not include reasons or grounds and logical steps of itself. It should include them but in the course of history *fetwa*-collection-books neglect the reasons and only show the outcome for the sake of clarity and practicality, and anybody who needs a solution to his or her problem generally is not interested in detailed reasons and argumentation of the solution.

[3] It is a debatable matter but Islamic Law could be one of the sources of Common Law. It is thought there are two possible historical ways of connection: Sicily Kingdom and Early Crusaders, who were confronted with Islamic culture and city life. They lay sieges to cities and conquered them but, the same time, were influenced by them (See Makdisi as cited Songur & Aydın, 2012:3; C.F. Hallaq, 1985-1986)

The Characteristics of Islamic Family Law

Islamic family law (Hallaq 2009b:271-294) in general has interesting regulations about marital separation –rules, conventions and practices- which were shaped both in the age of the Prophet (originally Asr-ı Saadet – the Age of Happiness) and in the time of the big jurists (mujtehit imams). These regulations were derived partly from Quranic principles, partly from Sunnah and also from jurisprudence which was patterned on these two sources, with a few differences according to sects. These regulations depended on either the outcome of the practices of Islamic principles on the Islamic society or reactions against old habits or customs which dominated family law and life before Islam. In the former, family law regulations were **gradually** formed according to the outcomes of the practices and the experiences of Islamic principles. In the latter, as a well-known fact Islam named the time before it's revelation as Jahiliyya –the Age of Ignorance- and certainly rejects everything related to that time. It therefore tried to remove all social rules, customs, traditions and even habits; indeed the life style of whole civilization. This attitude, especially in family life, brought about a struggle between old the life style with the new life style. During this struggle the Islamic regulations about family law slowly and gradually changed the society's habits and along with them were changed by the outcomes of the processes. These mutual effects led to the regulations which were harmonious with the problems of the legal practices.

The Reason Why is Chosen: Why Islamic Family Law?

Ultimately, family relations are based on many kinds of emotion because of its nature family law is more suitable than the other branches of law to reflect the balance between reason and emotions or to show the legal system's attitude to this balance. Additionally in family law, the group of norms related to separation are chosen because any kind of separation, even when both parties want it eagerly, is **a touchy** period. Therefore, the balance of reason and emotions will be the highest priority in the course of any kind of separation. It would be a good strategy to trace the separation procedures of any other legal system in order to find out how it deals with this touchy period. Islamic separation law has interesting and unique institutions in this branch of law (see Cin & Akgunduz 1989: 87-104).

The Kinds of Separations in Islamic Family Law:

1- A –Talak (divorce). Talak is the default right of a man without giving any reason to divorce. A woman can get this right under the same conditions as a man, but dependent upon the groom's assent during either the solemn wedding ritual itself or any time in married life. Talak is a verbal statement or declaration of intent, which is targeted from one in the married couple to the other one, the most usual form being "you are vacant". When a husband or, if she has the right, a wife says "you are vacant" or something like this, everything is not over but a period of divorce starts. Different from modern law's divorce procedures, this period seems like the separation period in modern legal systems because it gives the couple enough time to review their relationship and their decision, and also serves to find out whether the wife is

pregnant or not and to solve other problems (parental rights, family properties) to separate their lives. There are several kinds of talaq and from the beginning to the end a talaq process is comprised of the stages: Talaq ar-Raji (revocable divorce), Talaq al-Ba'in (irrevocable divorce and/or Triple Talaq). The triple talaq is an interesting regulation and it aims to hinder the abuse of the right of talaq. In the triple talaq the divorced couple cannot remarry unless the woman gets married to another man and then divorces him.

B- Muhâlaa (Hul-Kula): A wife's right to divorce by quitting her rights –which originated from the marriage agreement- namely Mehir and Nafaka.

2- Tefrik (Annulment of Marriage): A wife can go to court to render and void the marriage based on certain reasons. The reasons are (1) a sickness and a deficit that affect sexual life, (2) when a husband does not to fulfil the obligation to provide basic financial security, needs (3) Absentia and Forlorn, when a husband is lost, missing or absent, (4) Mistreatment and lack of harmony (see Aydın 2014:217-228).

3- Lian or Mulaana (mutual damnation): is a unique form of separation including the rejection of paternity of a child or an embryo.

The Lian (Mutual Damnation as a Way to Separation and to Rejection of Affiliation)

Lian deserves a detailed explanation because of its importance in the reason-emotion-balance. In order to put lian clearly, two logically connected subjects with it should be known: The first one is the Islamic crime of perjury (qazf), as only a husband who has never been previously convicted of perjury (qazf) applies to Lian. The second one is the Islamic crime of adultery (zina) as adultery can only be proven by four male witnesses a husband that suspects his wife and does not have any witness can only apply the institution of lian. Therefore by lian he can both test his wife's loyalty and also break the bloodline between a child or an embryo who, he believes, is not his own. Lian is a formal oath. In order to understand lian consider the following scenario: a married couple fiercely quarreled and the husband accused his wife four times of extramarital intercourse (committing adultery) swore so verbally. The wife completely rejected the accusation four times and swore verbally against it. If the husband verbally blamed his wife one more time (the fifth) and swore that his wife committed adultery and his wife continuously rejected and swore against the accusation (the fifth), lian would prompt the legal results as mentioned above: the couple separated and husband broke the bloodline with the child or embryo. Today with developments in genetics, it is not needed to appeal to lian as a some kind of oath about the affiliation but it still stands as a unique way of separation.

Lian as a Balance between Reason and Emotions in Islamic Law

Lian not only can be a symbol to understand the place of emotions in Islamic Law but also a way to find the balance between reason and emotions. A marriage is a

legally accepted social institution and as said above, also has an emotional dimension. Whether it is a "love match" or not marriage has this dimension and even a key function about emotions. An important part of family relations consists of emotional ties and relations between the couple, between the children and between the parents and children. These ties and relations have a regulative function about emotions. Apart from the times of turbulence, a family fulfils this regulative function somehow.

The basis of this function is the shared respect and love between a couple. The other motivations, for example sexual attraction, money or admiration etc. can be the reasons of, more or less, respect or of some kind of love. It is indeed, an ideal for a marriage to be based on mutual respect and love. However, in real life we cannot expect to see these kinds of ideal marriages very often there should be a limit in negative emotions contrary to respect and love in a relationship in order to deserve the name marriage and to fulfil its functions. Islamic Law with regulation of lian determines the limits (the borders) which a couple should never trespass beyond if they want to keep their marriage relation intact. When they trespass beyond the limits, lian or this kind of mutual damnation means that Fiqh accepts that the basis of the marriage –mutual respect and love- was demolished as an irrefutable presumption. The couple should know that the marriage puts some responsibilities on their shoulders. Therefore, this kind of mutual damnation demolishes the emotional fundaments of the relationship. Additionally lian (with the all procedures about separation) aims to provide the couple with a useful habit: when of one them with anger or sorrow shouts at the other one, he or she should wait for the emotional intensity to decrease before reacting.

The Contingent Outcomes of Fiqh's Procedures

In conclusion, emotions are more important and find a bigger place in Islamic law than modern law. Usul al Fiqh aims to establish a balance between reason and emotions. It recognises the emotional nature of marital relations and an individual's will. Marriage procedures of Fiqh are simpler and easier than modern law. It recognises the capricious characteristic of human nature and regulates many ways of separation. The couples can divorce easier and simpler than modern law. Nevertheless, Fiqh accepts the seriousness and importance of marriage in individual life and in society. Therefore, it continuously reminds the couples that marriage should be taken seriously. For example, you cannot make a joke about divorce (talaq), if you say "I divorce you", whether you are serious or not you will be divorced and you must have to get remarried!

Fiqh institutes a balance between reason and emotions by making these regulations. All regulation have two sides: one side opens a way to emotions and the other side controls its uses and especially, protects against misuses. This kind of family life might lead to a more unstable social life than what modern law aims at but is more in line with human nature and social reality.[4]

[4] ACKNOWLEDGEMENT: The author gratefully acknowledges the support of Galatasaray University through the research funding under grant no: 15.200.002.

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