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The relationship between the Islamic legal system Sharia and European continental law

Abstract

The study examines the essential differences between European legal systems and the Islamic legal system, the Sharia. It points out the differences between secular and religious legal systems, the differences of evaluating and judging crimes and punishments, the judicial system of Islamic law and the sanctions it offers.

Keywords: Islamic legal system, sharia, European legal systems, continental law, Quran, religious, secular

Introduction

The Arabic word sharia means a path, a path to a source - a collection of divine laws, religious regulations that completely determine and govern the lives of Muslims (Salamon – Munif, 2003). There are basically two major differences between Islamic legal system, that is sharia law, and the European continental legal system. On the one hand, Sharia is based on religion, on the annunciation of the Qur'an, Sunni (prophetic traditions), and Ajman (consensus), while, on the other hand, the continental European legal system is entirely secular, in which the branches of law are completely separate from canon law. The other essential difference is that, unlike the continental legal system, sharia is not a written law. Although the Qur'an mentions many specific laws and regulations that Muslims are required to observe, and also countless prophetic traditions have been recorded, the sharia alone does not have a single collected printed form, like the constitution of a European country or a Code. Muslim countries use sharia to varying degrees in their legislation. There are countries, such as Saudi Arabia, where the whole legal system is based on sharia, where written law is not applied. In other Muslim countries, like for example Turkey, the Islamic legal

order has been completely replaced by secular law. The most common, however, are countries such as Egypt or Libya, where sharia is only partially used, so Islamic law and secular law, mainly taken from the French Code Civil and the Swiss Civil Code, are mixed. However, besides the written law, especially in the underdeveloped regions, customary law based on Sharia and also local tribal customs play a major role in legislation in countries of Muslim majority.

Religious Law - Secular Law

Sharia is based entirely on the Islamic religion. Believers consider it to be a source of law from God, and therefore its legitimacy is unquestionable. Precisely for this reason, if a written law of a non-Muslim country conflicts with Islamic law, there is no question for the faithful Muslim, which path to follow. In many of the cases Sharia is not contrary to continental law, and imposes penalty to crimes such as murder, robbery and theft. At the same time certain acts or crimes are not judged identically by the different legal systems. A good example of this is the issue of homosexuality (Kovács, 2019a) (further typical examples of this are socially marginalized groups), (Kovács, 2019b) which is regarded as a criminal act and punished by the Sharia in a qualified case (when four credible witnesses have seen the act), or adultery, which is morally condemned by European societies but not punished by the Criminal Code.

Legal status of persons in Sharia

One of the biggest differences between the European and Islamic legal systems is the question of equality and being equal under the law, legal equality. Islamic law distinguishes subjects according to religion, gender, and in a certain sense, materially.

Non-Muslims

Sharia distinguishes ummahs from dhimmis. Ummahs are the members of the Islamic community of believers, where common ground is the religion, it is one single group that shares common religious beliefs and not a nation with common ancestry or geography, while dhimmis are those non-Muslim monotheist believers who live in the neighbourhood of the Muslim community, or

in an Islamic state, with legal protection. The countries with Christian majority in Europe are populated by dhimmis. The laws and rights of the dhimmi communities are in many cases the same as those of the Muslims, but there are some pivotal points where the sharia differentiates between the two communities. One such difference that I would emphasize is that under Islamic law, a dhimmi cannot take care of Muslim children. This creates a particularly worrying situation regarding the integration of the children of Muslim immigrants into European societies. Although in most cases school-bound Muslim children are enrolled, the legitimacy and acceptance of non-Muslim teachers in Islamic communities is highly questioned. The other major difference is that according to Islam, a dhimmi cannot judge or give a verdict over a Muslim. This rule questions the whole European legal system. After all, even if a dhimmi judge gives a verdict on a Muslim, it is virtually unenforceable – that is illegal - in the sense of Sharia.

There is also a third group in the religious sense, the so-called kafirs. The Arabic word kafir means unbeliever, nonbeliever. The term refers to a person who rejects or disbelieves in God (Allah) or the tenets of Islam, denying the authority of God, and is thus often translated as infidel. Unbelievers include atheists, non-believers, non-monotheist believers like Hindus or Buddhists, and are considered apostates with whom Muslims are at war. Only Muslims who have denied Islam are ranked below the kafirs, and they are not regarded as a community, but as criminals who are sentenced to death. In case of war however, the sharia is no more forgiving to the kafirs. Extreme Islamist groups legitimize their actions on the basis of what has been revealed in the Qur'an.

So, when you meet those who disbelieve [in battle], strike [their] necks until, when you have inflicted slaughter upon them, then secure their bonds, and either confer favour afterwards or ransom them until the war lays down its burdens. (47:4) (URL1)

Women

Islamic law also makes a legal distinction between men and women: women have less rights than men. Although in some respects the sharia actually protects women's rights, this protection is primarily limited to property and contract law. This can be called the lack of the principle of equality (Kovács, 2015a). In Islamic society, women are subordinated to men. The husband's right is to educate the woman, which can be exercised within the "regulated limits" by corporal punishment.

The Qur'an declares: Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth. So righteous women are devoutly obedient, guarding in [the husband's] absence what Allah would have them guard. But those [wives] from whom you fear arrogance - [first] advise them; [then if they persist], forsake them in bed; and [finally], strike them. But if they obey you [once more], seek no means against them. Indeed, Allah is ever Exalted and Grand (URL2).

The subordinate relationship detailed above also extends to sexuality. In Islam, it is the woman's duty to please her husband, and this duty can only be denied in special cases, such as during the menstrual cycle. As a general rule, a woman may not deny sexual contact with her husband, but if she nevertheless escapes the request, the husband shall wait no more than three days.

Women are also discriminated against men in other areas of law, such as inheritance law or testimony. When it comes to testimony, a woman's word is half that of a man, and the same proportion is true to inheritance: a daughter and a sister get half the man's share unless there is a male relative in the same line. The husband receives half of the estate after the wife (if they have children), while the woman receives only a quarter of the man's estate. It is thus clear that the legal position of women in Islam is far below the requirement for gender equality in Western societies. Beyond the fact that women's rights are by definition restricted to men's rights, Islam distinguishes between Muslim and non-Muslim women, as well as moral and immoral women under Islamic rules. It follows that, although fornication and rape (Kovács, 2017) are both condemned and severely sanctioned by Sharia, the extent of the crime is not the same in the case of the above-mentioned violent crimes. Violence against a religious, respected Muslim wife is subject to completely different legal, social and moral judgments than violence against a dressed "whore", an "infidel" woman who does not live in accordance with Islamic rules.

Judicial institution in Islamic law

In Islamic litigation, the conduct of trial and judgment is concentrated in the hands of a judge, the "bath". In the case of classical Islamic law, it is for the litigants to prove, the judge will make a judgment on the basis of the information available and will not take part in the procedure of proof. It is a general feature of Islamic procedural law that there is no strict separation between civil and criminal matters and their rules of procedure (Jany, 2011). In civil lawsuits, criminal proceedings are automatically triggered if there is a suspicion

of a crime. Proceedings may be opened *ex officio* if initiated by an authority, but in this case the criminal and civil proceedings may be mixed, as the court may order the person who has been convicted in the criminal proceedings to pay compensation for the damage and if found to have committed a crime, you can sanction it.

In classical Islamic law, there is no court of appeal, only if the judge renders a ruling contrary to Islamic rules or if the judge makes a procedural mistake. For example, in the case of a Muslim, it bases its judgment on the testimony of a non-Muslim witness, or the accused may not properly express his position. The system of courts is similar to modern legal systems, but the legal system of Muslim countries with constitutional and written law is familiar with the institution of appeal. In Kuwait, for example, the judiciary is structured in three levels: the Courts of First Instance, the three-judge The Courts of Appeal and the supreme council (URL3). In the classical Islamic legal system, judges were appointed directly by the ruler. Max Weber described it as “bathtub judging” being judged by subordinate clerks to which the ruler can intervene at any time (Jany, 2006). The reality is more sophisticated in the modern age for Muslim countries with a written legal system, but the fact is that the judiciary is under the control of the executive branch, which may, to varying degrees, undermine independent judgment.

Some of the key crimes in Sharia and in continental law systems (Hungarian Criminal Code)

Homicide

The Hungarian Criminal Code orders the punishment of all forms of homicide, except for the legitimate protection of life. Under the Criminal Code Article 21 (2) states that an unlawful assault shall be deemed to have been aimed at extinguishing the life of the defender. The Sharia, on the other hand, has several exceptions in which it does not sanction homicide at all, but instead regards it as a legitimate act. The 14th hadith on the actions of the Prophet Mohammed (collection of oral communication) states: “*It is not legal [to spill] the blood of a Muslim except in one of three cases: the fornicator who has previously experienced legal sexual intercourse, a life for a life and one who forsakes his religion and separates from the community*”. (al-Bukhari, Muslim) (URL4) This means that in the above mentioned three cases - adultery, murder and apostasy - sharia law legitimizes homicide.

Assault

Sharia does not make legal distinction between minor and grievous bodily injury, the penalty in each case is in proportion to the extent of the injury. In punishment the eye for an eye principle prevails, which can cause injury to the offender commensurate with the damage inflicted unlawfully. For example, if the offender breaks the hand of the victim, the offender's hand is also broken. Corporal punishment, or in extreme cases mutilation – long forbidden in European legislation -, can be converted into financial redemption if the victim, or the victim's family permits it, in which case the offender pays in instalments for the offended up to three years. Although the judge of all criminal cases is the qadi, that is the judge, but the qualifications a qadi must possess is not uniform. There is a minimal requirement, that is a qadi must have the same qualification as a witness in court, meaning he should be free, sane, adult, trustworthy and a Muslim. Thus, it often happens that from the point of view of European law system, the verdict may seem vigilante justice.

Sexual offences

Sexual offenses are punishable both by Hungarian Criminal Code and by Islamic law, however, the judgments of certain acts are very different, while in certain cases one legal system regards an act or behaviour as a crime, the other system does not (Kovács, 2015b).

One of the most striking differences are in regard of sexual exploitation and sexual abuse (Kovács, 2015c) (Criminal Code § 196 and § 198) 10. Sharia basically is stricter in case of sexual crimes than the European legal systems, the punishment is very rigorous (for example in Saudi Arabia rape is punished by capital punishment), but in some cases, such as the situation of a wife or slaves, offers virtually no protection to the victim. As it has already mentioned above, it is the inalienable right of a husband to have sexual intercourse with his wife, which may be physically enforced. The same is true for slaves, and although Muslim law prohibits slavery almost without exception, in extremist organizations such as the Islamic State or Al-Qaeda, and in some lesser developed areas such as Pakistan or parts of Afghanistan, slavery (primarily the debtor's slavery) is an institution that still exists today. In addition to sexual exploitation, sexual abuse of a young or a child also has a largely different interpretation. It should be noted here that Islamic law imposes stricter sanctions (even death penalty) for committing the above offense, but again has different set of laws on who

the subject of the offense may be and on the determination of the motive for the offense. Islam considers child marriage as fundamentally legitimate, women have inherently more limited rights than men, and there is no clear, valid directive for everyone from which age a girl can marry or can be taken as a wife.

Although in most Islamic countries there is an age limit, it is often lower than in Europe, and in some cases, such as Yemen (URL5), there is no such regulation at all.

Terrorism - jihad and territorial conquest of the land of unbelievers

The Arabic term “jihad” literally means striving or struggling, to express the utmost effort in order to achieve a purpose.¹⁴ In religious terms it means all efforts to make personal and social life meet God’s will, such as struggle against one’s evil inclinations, proselytizing (da’wah), or efforts toward the moral improvement of the ummah, though it is most frequently associated with war. The spiritual form of this is the so-called “great jihad”, that is to overcome one’s own ego and desires by voluntarily submitting oneself to the will of God. The “little jihad” is the armed struggle prescribed by Allah. The latter may be a defensive, patriotic war, but it may also be an offensive or a preventive one, or a struggle to spread the Islamic faith (da’wah).

The Qur’an writes of the essentially conquering “holy war”: Fight in the way of Allah those who fight you but do not transgress. Indeed. Allah does not like transgressors. And kill them wherever you overtake them and expel them from wherever they have expelled you, and fitnah (disbelief and worshipping of others along with Allah) is worse than killing. And do not fight them at al-Masjid al-Haram (the sanctuary at Makkah) until they fight you there. But if they fight you, then kill them. Such is the recompense of the disbelievers.

And if they cease, then indeed, Allah is Forgiving and Merciful.

Fight them until there is no [more] fitnah and [until] worship is (acknowledged to be) for Allah but if they cease, then there is to be no aggression except against the oppressors. Fighting in the sacred month is for (aggression committed in) the sacred month, and for (all) violations are legal retribution. So, whoever has assaulted you, then assault him in the same way that he has assaulted you. And fear Allah and know that Allah is with those who fear Him (URL6).

This quotation from the Quran illustrates one of the most fundamental moral differences between Western, European legal systems and the Islamic legal system. In the latter “disbelief and worshipping of others along with Allah” is

more serious a crime than murder. It is clear to what extent religion and the legal system is intertwined within the framework sharia, the Islamic law, in which religion basically precedes everything and, in the name of defending religion, legitimizes even a territorial campaign. Adding to the above mentioned differentiation between Muslims and non-Muslims, and keeping in mind that sharia uses this differentiation not only in case of criminal law but also in case of land and property law it can be quite understandable why many religious Muslims morally do not regard illegal crossing of the border or illegal residence in EU territory as criminal offenses.

Sanctions in Islamic law

In terms of Islamic and Hungarian law there are two very important differences between the penalties that can be imposed. On the one hand, the type of penalties that can be imposed and, on the other, the principle of imposing sanctions. The most important difference between the types of crimes is that, unlike Sharia, the Hungarian legal system does not apply death penalty and corporal punishment. In Islam law these are not only applied, but very often combined, therefore torture as such is part of the punishment, like stoning. Less serious penalties that may be imposed include flogging or mutilation. As for the principle of sanctions, sharia divides crimes into two main categories, one is crime against God, the other is crime against people. Crime against God are the “hudud” crimes, that is they violate God’s boundaries (hudud), the punishment for these crimes are specified in the Quran. In the case of these crimes, the extent of the punishment is at the disposal of God, so that no consideration can be given to them when the penalty is imposed. An example of such a crime is theft, which the Quran writes as follows: “*Cut off the hands of thieves, whether they are man or woman, as punishment*” (URL7). In this case, however brutal it sounds, the legal dispute is only about how to punish recidivists. According to Shafi Law School, in the second offense, the thief’s left leg should be cut off, followed by his left hand, and his right foot a fourth time. Paradoxically, the fifth offense is not ordered to be punished because the penalty cannot be enforced on the offender. For other, non-hudud crimes, the court has discretion. When imposing sanctions, the judge relies primarily on prophetic traditions and, in many cases, the law of retaliation principle also appears. The concept of ‘blood money’ is also unknown in the European legal system. According to the Sharia, the relatives of the murdered victim may renounce their vengeance and, instead, charge the offender a blood money, in which case the offender is not subject to any

further penalty by the court. “Kaffara”, meaning penance or penitence, is also unknown in the European legal system. Kaffara can be fasting, helping the poor, donating, or slaughter a sacrificial animal (Almohideb, 1996). In extreme cases Islamic law imposes death penalty on magic, apostasy or adultery. In Saudi Arabia, the penalty even nowadays for adultery by one who is married or has been married is stoning (Peiffer, 2015). In sum, the Sharia judges crimes differently to the European legal systems, distinguishes between crimes committed against God and man, the severity of the punishments that can be imposed are different from those imposed in the western legal systems, and in some cases the severity of the punishment is extremely brutal and cruel.

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Online links in this article

URL1: Quran 47:4. <https://quran.com/47/4>

URL2: Quran 4:34. <https://quran.com/4/34>

URL3: *Kuwait's Legal System and Legal Research*. <https://www.nyulawglobal.org/globalex/Kuwait.html#thejudicialstructureandcourtsystem>

URL4: *Hadith 14. Prohibition of a blood of a Muslim*. <https://hadithcommentary.com/nawawi/hadith14/8>

URL5: Lukács A. (2013). *Gyerekházasság Jemenben*. https://hvg.hu/vilag/20130916_Gyerekhazassag_Jemenben

URL6: Quran 2:190-194. <https://quran.com/2/190-194>

URL7: Quran 5:38. <https://quran.com/5/38>