

Sharia and international human rights obligations – harmony or conflict in the eyes of “Western” observers?

When conducting the dialogue between “Western” lawyers and their counterparts in the sphere of Islamic law, it is important to explain how we compare and analyse the *substantive law* of the respective systems, but also how we *structurally* deal with this “foreign” structure which is Shariah. These challenges become quite apparent when analyzing the role of international rules on human rights in the respective systems.

1. The Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948, is probably the most generally known presentation of fundamental human rights. The General Assembly exhortation to member countries to “cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions” may have contributed to this. Additional conventions on citizens’ rights, on political rights, on economic, social and cultural rights and on children’s rights – as well as the conventions against torture, racial discrimination and discrimination against women may be seen as elaborations of these fundamental rights; although they are essential, knowledge of their content seems to be somewhat less widespread among the general public in UN member countries.

When dealing with the general perception of fundamental human rights, and their relationship to Shariah, we may therefore take some key prescriptions in the 1948 document as the point of departure.

The following elements of the Universal Declaration of Human Rights have been chosen to illustrate my subject

- Article 7 on equality before the law
 - Article 8 on the rights to remedy by the national tribunals
 - Article 16 on the right to marriage and on equal rights during marriage and at its dissolution, as well as on consent as a prerequisite to marriage
 - Article 18 on the freedom of thought, conscience and religions, including the right to change religion and the right to manifest religion in worship, and
 - Article 21 on democracy.
2. Countries, for which Shariah is the basis of the legal system, adhere to the UN principles and may state that there are no major difficulties to accommodate them with national law, while 'Western' observers who are not specialists in matters of Shariah law may see dichotomies.

This being said, the vitality of international research into 'Islamic Law and Society' - also the name of an important publication, to which Muslim and non-Muslim scholars contribute- deserves to be mentioned with respect (although some scholars, like Norman Calder, have meant that the contemporary study of Islamic Law "grew up too quickly"). But to most “Western” practitioners of law,

the sphere of the Shariah is unknown territory.

3. This may, to a considerable extent, stem from a difference of perceptions. "Western" legal experts may be struck by the fact that studies in Islamic Law so often deal with subjects that they might label 'Legal History', seemingly a closed book of limited interest to contemporary practitioners. We may talk about a 'vertical' approach, which goes deep back into the past in the case of Shariah, and a 'horizontal' approach, which is based almost only on what is contemporary in "Western" law systems. At least in countries of the Civil Law/Germanic Law tradition, positive law is what one finds in the annually re-issued Code of Laws edition; in the Swedish case only 10% of its laws and statutes are from before 1950.

The content of such Code of Laws derives its legitimacy solely from the fact that these norms emanate from constitutionally competent authorities (parliament etc.). There is no 'fundamental principle' according to which the contents of the laws *de lege lata* are the expression of specific national or regional traditions, religious beliefs or moral perceptions. Only in the use of the *ordre public* concept may such circumstances have an impact.

Historically, this situation has been different - in the 17th century, e.g., Swedish courts could pass judgments directly based on descriptions of crimes and their punishment in the Bible. But to-days understanding of legal norms' role in society is entirely secular. This, i.e., can also be seen reflected in the gradual elimination of heresy as a special crime, something which may hurt new groups of inhabitants (e.g. immigrants of a Muslim creed), when phenomena appear like the Muhammed caricatures incident in Sweden's neighbour country Denmark.

4. In most "Muslim" states (maybe with the exception of countries like Turkey, Bosnia-Herzegovina and Albania), the roots of law are in the religion. The laws' religious background supposedly strengthens their impact on human behavior (which may be an advantage), in addition to the wish to avoid sanctions, which analysts see as the driving force behind law-compatible behavior in non-Muslims societies (which may be a disadvantage). On the other hand, this hardly permits the own legal system's submission to other legal systems – Islamic law *supersedes but cannot be superseded*.

The fundamentalist conclusion (Al-Qaradawi et al.) seems to be a rejection of "solutions imported from the West" - i.e. from an alien legal perception in favour of an "Islamic solution". If Political Islam makes no distinction between Islam as a religious belief and Islam as an overriding societal norm, the incorporation of such alien norms into the own legal system for them quite naturally may seem to be a contradiction. Among concepts which - according to these analysts - can be difficult to accommodate in a Shariah-based society, may be the right to democracy. The fact that the human rights according to the 1948 UN declaration is part of an almost universal legal culture may not be a sufficiently strong

arguments against a hermetic view on law and society.

5. Although a fundamentalist negative attitude to the application of non-Islamic legal perceptions in Islamic countries can attract “Western” media attention, it is not seen as representative of mainstream attitudes and Islamic jurisprudence. Qur'an's and the Prophet's openness towards other religions and cultures are often quoted as the imperative behind more equilibrated views. Thus, there are various elements in which the “Western” legal analyst can recognize phenomena with which he feels familiar. Let me mention – at random – three such phenomena:
 - Islamic law is not monolithic. The largest Muslim nation (and its equally Muslim neighbours) has since long incorporated important elements of local customary rules (*adat*) into their positive law, even in central areas to Shariah such as inheritance.
 - The early authorisation of interpretative reasoning - to a degree varying among the four Qur'anic schools - has made Islamic societies open i.a. to the normative changes necessitated by technological and societal development and by the advent of "globalisation" with its impact on behaviour and consumption patterns. Competence in what we may call "legal history" is linked with the ability of modern Muslim jurisprudence to find anchorage for those adaptations in the fundamental texts.
 - In the later decades of the twentieth century, Swedish legal doctrine has paid particular attention to the utilisation of a *teleological method* in the interpretation of normative texts and as applied to concrete cases. The explanatory research on the inter-related perceptions of *hiyal* and *makharij* in the Hanafi (and, to a certain extent, the Maliki) school is an example of how parallel methodological approaches can be found in a Civil Law and an Islamic Law context, respectively.
6. When a "Western" observer without knowledge of Muslim legal culture looks at some of the fundamental human rights initially listed as they appear in their contemporary legal environment in "Muslim" states (outside Europe), he will probable presume to have found dichotomies.

Some have to do with the actual situation in these countries - in many states a lack of democracy, practical difficulties for disfavored people (often women) to have recourse to existing legal remedies (obtaining divorce, equal treatment in courts) etc., but this is not necessarily related to Shariah, rather to the prevailing political situation in these countries.

More problematic may, however, seem questions like the equality of men and women in marriage and the dissolution of marriage (e.g. weaker rights to divorce for the woman, according to Shariah-based positive law of a number of countries), the inequalities of citizens/inhabitants of different creeds as far as applicable law in family matters is concerned, and, above all, the freedom of religion and the right to change religion. E.g., *hudud* punishment of *apostacy*, used in certain states, may seem quite dramatic in the in the light of the importance of freedom in this respect that the UN rules propose.

7. How can we explain these, as it seems, notable dichotomies?

- A somewhat simple explanation would be that we have to do with “two spheres”, one ‘internal’ and one ‘external’, where norms and commitment in reality don’t meet. This separation can take the form of non-incorporation of the agreed international norms into the national law.
- Quite apart from the more drastic fundamentalist variant mentioned under point 4 above, some of the mismatch may have to do with the application of an *ordre public*- type of reasoning, e.g. in the case of apostasy, an utterly condemnable act according to Muslim perceptions (and a rather trivial behaviour in a "Western" legal environment). At the same time, it should be noted that *ordre public* has been invoked in "Western" legal systems against Muslim phenomena such as polygamy.
- Another type of explanation might focus on the role of Islamic law in the process of norm interpretation. The core element of Muslim *qanun* is, as everybody knows, family law and succession; even if the relevant dispositions are incorporated into 'secular' legislative texts, they seem to derive their strength from the original formulations in the Qur'an or Hadith. As for other fields of law - contracts, fiscal law, penal law etc, - direct rules are more scanty, and an interpretative and evolutive reasoning has given rise to the existing so-to-say secular normative material. However, *interpretation* of these texts, and particularly of "alien" legal material, may still be guided by Shariah *interpretative methods*, giving such texts another meaning in an Islamic context than when they are interpreted in a different environment of “Western” legal culture.

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