The relationship between islamic law and international law

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1 INTRODUCTION

To understand the relationship between Islamic law and international law, it is necessary to understand what Islamic law is, that is, what is its place of speech. Only in this way will it be possible to study the relationship with other legal systems, as well as their sphere of application.

2 OBJECTIVE

Analyze aspects of Islamic law, that is, the nature, structure, and scope, as well as present the possible convergence, of its content, with public international law.

3 METHODOLOGY

The research was carried out taking into account the literature review, in addition to the application of the deductive-hypothetical method.

4 DEVELOPMENT

Islamic law, or sharia, is the set of rules and commandments that apply to all aspects of the private and public life of the Muslim, that is, it comprises the spaces of private relationships between individuals and the community of believers. Furthermore, it is a system that is defined as having a sacred origin and nature (BADR, 1978).

In this way, Islamic law regulates man's relationship with God (the cult or ibada), establishing the Muslim's duties through the pillars of faith: shahada: the profession of faith; salat: prayer five times a day; hajj: a pilgrimage to Mecca; siam: fasting - Ramadan; zakat: payment for the benefit of the poor (HALLAQ, 1999).

It so happens that sharia not only regulates ibada, but also other social interactions (muamalat). Shariah rules apply to individuals in family, political and economic relationships, therefore, it establishes the list of criminal offenses and the respective sanctions. Likewise, sharia organizes the political system within the state and the international relations of the Muslim community. Finally, it has an ethical dimension, as it dictates generosity and tolerance among people (HALLAQ, 1999).

The sources from which the rules of Islamic law arise are the Qur'an (holy book) and the Sunna (sayings of the Prophet). Such sources are dogmas of Islamic doctrine - divinely inspired teachings that indicate, for Muslims, the behaviors to which they are obliged and prohibited. Soon, it is clear that the

legislator is not man, but God himself. In practice, therefore, Islamic law at its core is a religion, expressed in Islam, which submits all things to the will of God. In summary, the foundation of the legal order and the binding character of Islamic law is the deity (KHADDURI, 1954).

Another term that draws attention in Islamic law is Ijtihad, that is, the human effort to try to know God's will and discover legal norms. Likewise, the usul al fiqh is the understanding of the Theory of Islamic Law, that is, a set of techniques used to identify and apply the norms of Islamic law, namely: the consensus (Ijma) among jurists and other scholars on the existence, the content and scope of the rules; and, the analogy (Qiayas) that allows applying rules to new situations, but similar to existing ones. In this way, the usul al fiqh is an instrument used to verify the possibility of the norms of Islamic law being applied to new times and new social situations (BADR, 1978).

The possible solution to the gaps in Islamic law is the acceptance of the existence of parallel regulation. The Muslim community recognizes other forms of non-Sharia-inspired social regulation. However, this does not prevent the discussion that prevails until the present day: Islamic law, in addition to intending to be a comprehensive system (ibada, mouamalat, and ethics), sees itself as a single and exclusive system. In other words, does Islamic law see the possibility that some non-Sharia norms and rules can be applied in parallel? The answer depends on understanding the primacy of Islamic law (HALLAQ, 1999).

According to scholars of the Muslim world, Islamic law precedes the State itself and must survive after it, since it is destined for each Muslim and, therefore, for each human being since all are called to recognize the revelation and to submit to the will of God. In this sense, Islamic law has no spatial or temporal limitations, which is why it must be applied to the community of believers, wherever they may be found (KHADDURI, 1954).

Therefore, every Muslim must observe the precepts of sharia about his worship and relationship with God and others. In other words, a government that wishes to be guided by Islam must observe and apply the rules of Islamic law in its relations with other states, just as it must ensure that those who live under its rule observe the norms of sharia. In the absence of such a government, each believer must apply any sharia rules. Therefore, sharia is a legal order that cannot be seen apart from the profession of faith, so people owe it a loyalty that surpasses any other political or social bond (BADR, 1978).

Since the State has become the universal form of political and social organization, the law is seen as something produced and controlled by it, as well as a territorially located phenomenon. Thus, Law is the system of rules and institutions that the State creates and must be applied within its territory. In this way, the legislator is the State itself, being responsible for the application of legal norms (KHADDURI, 1954). Therefore, the question is: how to combine a legal system that arises from divine sources (Islamic law) with the centralized authority of the State (Westphalian model) over its territory?

Considering that Islamic law is not the product of human legislators or judges, to discover the place that States and contemporary legal systems reserve for sharia, it is necessary to understand its extent, with two possibilities (WESTBROOK, 1993):

(i) Islamic law is considered by the legal order of the State as a whole – its primacy guaranteed; or,

(ii) Islamic law plays some role in it, whether of greater or lesser influence.

It is noted that the present analysis raises the discussion about legal pluralism, that is, the possible convergence between the different legal systems. Consequently, nothing prevents Islamic law from functioning as an example of legal pluralism, except when it claims for itself the exclusivity of the legal order (BADR, 1978).

Because of this, the central problem with the notion of sharia as a source of state law is to articulate the possibility of a legal system being the source for another system when both are constituted and see themselves as a totality. In this case, Islamic law may be (WESTBROOK, 1993):

(i) The sole source of a national legal system when it is in itself all valid and directly enforceable law in that State;

(ii) One of the sources when the State proposes to legislate, creating norms whose content coincides with the precepts of sharia;

(iii) A source of inspiration for the State's legal system so that the rules conform to the "spirit" of sharia rules.

Therefore, if the State considers Islamic law as one of the sources of applicable law, Sharia loses the primacy - which, in its perspective, it should have -, allowing it to be applicable in the light of principles that are not it's own (KHADDURI, 1954).

The reasons that lead to the combination of two legal systems that are so different are the needs, which will depend on the distribution of power in the social space. Here is the answer to the question of why sharia still lingers in the core legal systems of many states – it is a power game (WESTBROOK, 1993).

5 FINAL CONSIDERATIONS

It is observed that Islamic law contains rules that relate to all aspects of life, including provisions relating to international relations, treaties, diplomacy, humanitarian law, and human rights, among others. Therefore, it cannot be ignored by the Academy of International Law (WESTBROOK, 1993).

Public International Law is seen as the set of rules and institutions that regulate behavior between States. Its norms and institutions result from the treaties concluded by the States and from the constituted customs. Therefore, it differs from Islamic law, as public international law is built around institutions and recognizes the State as the basic unit of the system (BADR, 1978). In addition, international law, of Western and liberal making, works with the idea of a coherent system of rules arising from the sovereign will of States. In turn, Islamic law is founded on the only possible sovereignty – that of God.

Although international law is different in terms of its structure when compared to Islamic law, in terms of its content nothing prevents the similarities. Islamic law converges with the sources of international law in several ways (BADR, 1978). As an example, Islamic law contains provisions relating to treaty law - which resemble the 1969 Vienna Convention on the Law of Treaties - or operates as customary rules that may be valid between certain States. Furthermore, principles of Islamic law, i.e. principles contained in national law, where Sharia occupies some place of importance, can be seen as general principles of law under Article 38 of the Statute of the International Court of Justice, therefore, liable to be applied by international courts (HALLAQ, 1999).

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