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The Problem of Shariah Norms Functioning in the Legal System of a Modern Secular State

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***Abstract**:*

The urgency of the problem under study is conditioned by the strengthening of the Islamic factor in social relations at the beginning of the 21st century and the emergence of relatively large Muslim communities in the countries with a predominantly non-Islamic culture. The purpose of the article is to analyze the conflict moments arising from the coexistence of state legislation and Shariah norms in one territory.

The leading approach to the study of this problem is the method of comparative law and the method of case studies. The first method makes it possible to compare the existing differences between the laws of a state and religious norms, the second one makes it possible to reveal the strategies of participant behavior in public relations and to analyze specific conflict situations between a state law and religious rules of conduct.

The article deals with the issues of terminology, the problems of law and religion combination in the sphere of family, inheritance and criminal law, and the data on sociological research are given. The main results of the article include the identification of individual conflict situations, using the problem of polygamy, domestic violence, harm to health as an example. The materials of the article can be useful for lawyers, anthropologists, religious scholars, historians in the study of religious norms and

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1. Introduction

1.1. Relevance of the problem

After the collapse of the colonial system and the subsequent economic and political crisis in newly created states, the massive outflow of local indigenous populations from countries of Africa, the Middle East, and Asia takes place in the territory of the more developed countries (primarily to Europe and North America). Thus, the issue of the legal culture of migrants as the factor that influences integration into the host community arises among the countries with a legal system conventionally called by us "European" one (i.e. the countries that recognize the freedom of conscience, the equality of citizens regardless of gender and religion, the principle of religion separation from state). Meanwhile, the culture of immigrant behavior from the former colonies was largely formed under the influence of local customs and religious norms, and one of the most widespread religious normative systems in these regions is Sharia. Simultaneously with the influx of migrants, the "reproduction" of behavior patterns takes place in the communities consisting of migrant descendants of the "first wave" and newly converted Muslims. All this allows us to assert that the study of conflicts between the norms of the Sharia and the laws of "European" law countries will not lose its relevance in the coming decades.

1.2. Problem status

In recent decades, many publications of a scientific nature have appeared, in which the opinion is expressed about the possibility of certain sharia norms implementation in the legislation of a modern secular state. Similar ideas are present in both foreign and domestic literature. Among foreign researchers, the mentioned problem is dealt with by the representatives of the Muslim community: Al-Qaradawi (2003), Ramadan (2009), Yilmaz (2005), etc. Their studies are broad ones, touching upon the problems of such spheres as theology, family and property relations, Shariah punishments, etc. Within the framework of this group, the term "Fiqh of minorities" (i.e. the Sharia norms applicable in the community of Muslims living in non-Muslim surroundings) is proposed. The secular academic part is a minority and is represented by such scientists as Fournier (2010) and Menski (2008; 2011), mainly focusing on the study of Muslim family law. Among Russian researchers, the greatest contribution to this problem was made by Syukiyaynen (2009; 2012), a leading expert on the Sharia in the post-Soviet space. Mukhametzaripov's (2015) article is devoted to the conflicts in the field of inheritance law.

The scholars of the Sharia in a "non-Muslim" state often turn to the concept of legal pluralism developed in the framework of legal anthropology by Griffiths (1986). In this article we will try to look at the problem of the Sharia functioning in the system of law of the secular state from the point of view of possible negative consequences from the use of sharia norms in legal practice.

2. Methodological Framework

2.1. Objectives of the study

In the course of this study, the following tasks were accomplished: 1) the identification of the most acute conflicts between the norms of the Sharia and the norms of the legislation of individual European states; 2) the analysis of specific situations and judicial decisions in order to identify the ways of emerging conflict resolution; 3) a critical understanding of the solutions proposed by the researchers and the legislators of these conflicts, including those related to the legalization of certain Shariah norms in European countries.

2.2. Methods of research

In this study, both general and private-science methods are used, while the following are selected as the main ones:

- the comparative legal method (the comparison of Shariah norm content and the requirements of legislation);
- the formal legal method (the analysis of legislative acts and the interpretation of legal norms that come into conflict with religious prescriptions);
- the case-method (during the study of specific legal situations of hypothetical and real nature (court cases).

3. Results

3.1. The problem of terminology

It is necessary to relate the concepts of "law" and "shariah". Recognizing the importance of customs and religion as social regulators, we believe that the law has a number of significant differences. One of the inalienable characteristics of law, in our opinion, is its territorial and written nature. Thus, the functioning of law is closely related to the sovereignty of a state, distributed to its entire territory, limited by recognized political boundaries. The recognition and the implementation of legal regulations are possible only within the specified limits. Customs and religious norms do not have such a characteristic, as they depend on a specific ethnic or a religious group that can change the place of its stay (for example, by moving to a neighboring country or a region) or these norms may arise in a certain territory among the local population (for example, through missionary activity). Despite the debatable nature of this approach (for example, is it possible to call international law a "right" in the literal sense of the word, or is it rather a system of international treaties whose execution depends on the will of a state?), it allows to separate the law from customs and religious norms clearly (Hapsoro and Suryanto, 2017; Suryanto and Ridwansyah, 2016).

Therefore, it is not entirely correct to call the Shariah law as "Muslim law". Rather, it is the "system (the set of) religious norms". Interestingly, that from the point of view

of ideology, the phrase "Muslim law" can be used to undermine the authority of state law. The term itself already presupposes the existence on the territory of a state some kind of "parallel law" qualitatively equal to the existing legislation. At that it relies on divine laws, and not on "human" lawmaking, and this makes it more important, especially in the eyes of believers. The concept of legal pluralism has a number of positive aspects from the scientific point of view (for example, scientists who adhere to this trend help to disclose the role of customs and religious norms in modern society, protect the rights of indigenous small peoples), nevertheless, it belittles the role of state law, refusing it from the most important - the supremacy on the territory of the whole country (Yazid and Suryanto, 2016; Hadi *et al.*, 2016).

3.2. Muslim marriage

When it comes to Shariah in the field of civil relations, the institution of polygamy is often mentioned. Polygamy, practiced by some Muslims in non-Muslim countries, is rather ambiguous. Firstly, such marriages are not official, since only monogamous marriage is recognized as legal practically in all countries of "European" law. Consequently, from the point of view of the law, the second and subsequent "wives" cannot acquire the rights of a legal spouse (for example, the right to jointly acquired property, a share in the inheritance under the law, etc.). The property issue is the most significant problem for polygamous marriages. Secondly, the conclusion of polygamous "marriages" does not exclude the risk of coercion of women by parents or the members of a religious community, including through psychological or physical violence.

Do not forget that the right carries out the educational function apart from the regulatory function. The law sets the framework for possible behavior, demonstrating the model of the most correct and socially promoted behavior to the members of society. Despite the fact that the legal consolidation of monogamous marriage does not always guarantee a strong family, nevertheless, it is to a certain extent called upon to discipline spouses, to make them more responsible towards each other and to their children. Practice shows that human societies, as a rule, tend precisely to paired relations as the most optimal ones, both from the point of view of interpersonal relations, psychology, and from the point of view of conflict reduction in society. The tradition shared by the majority of the population became the rule of law in the end. For example, in Russian Federation, 87% of respondents consider polygamy to be inadmissible (VTsIOM, 2015). Many Russian political leaders, in particular, the President of the Republic of Tatarstan, R.N. Minnikhanov, also did not approve the legalization of polygamy, although most of the Tatars belong to ethnic Muslims (KazanFirst.Ru, 2015).

To date, the overwhelming majority of 197 countries in the world officially recognize only a monogamous marriage. At that, even in the case of legislative consolidation of polygamy, most of the population lives as a married couple. Consequently, twin marriages are deeply rooted in the characteristics of human relations and folk traditions. Even in Western countries, which took a very controversial decision to

move away from classical monogamy as a union of a man and a woman and replace it with the union of "spouses № 1 and № 2" with the goal to legalize same-sex marriages, a legislator could not depart from the tradition of "pair union", although the logic of change suggested the complete abolition from the traditional marriage institution.

It is appropriate to cite the decision of the Supreme Court of British Columbia (Canada) on November 23, 2011, which specifically studied the issue of polygamy with the involvement of leading psychologists, medics, political scholars and lawyers. The court provides the reasons by J. Henrich, the professor of psychology at the University of British Columbia. The scholar convincingly proves that polygamy entails 1) the increase in the number of violent crimes and the intensification of antisocial behavior by a significant group of young men who are limited in their search for a spouse because of free female partner number decrease (the creation of a family reduces the likelihood of a man committing such crimes, as murder, robbery, theft, rape by 35%); 2) a significant decrease of the marriageable age for girls; 3) an unavoidable gender inequality; 4) the decrease of the material costs for children and the attention to their education by men living in polygamous marriage, largely because they have more children and constantly search for new wives (British Columbia Supreme Court, 2011).

The only country in Europe where polygamy is formally legalized is the Netherlands. In order to ensure the property rights and the interests of children in this country, the institution of cohabitation (samenwonen) is legally recognized, along with the official marriage (trouwen) and registered partnership (geregistreerd partnerschap). Parties have the right to conclude a special official contract on cohabitation (samenlevings contract), which can stipulate the share of the parties in common expense coverage, the acquisition of property; the division of property upon the termination of cohabitation; the recognition of a child's paternity before his birth, etc. (Bertelli, 2012). The cohabitation agreement, unlike a marriage contract or a partnership agreement, can be concluded with several persons (Information Sheet, 2012). Thus, the rights of women entering into an informal polygamous marriage are partially protected by the said treaty. The situation is different in other European countries. The UK has a civil partnership agreement, the conclusion of which is governed by the provisions of the Civil Partnership Law of 2004, but this law applies only to same-sex marriages between two partners (Civil Partnership, 2004). In France, the agreement on civil partnership, stipulated by Art. 515-1 CC, does not provide the restrictions like the English ones, but according to paragraph 2 of Art. 515-2 CC, it is impossible to conclude such a contract if one of the parties is already married. It is interesting that the attempt of the Dutch authorities to give a legal status to "non-standard" families through notarized cohabitation agreements does not find support in other countries of the European Union. On the contrary, the position of the Netherlands is criticized (Belien, 2005).

The legalization of polygamy violates a number of fundamental principles of the modern legislation in developed countries. First, the principle of sex equality is violated. Meanwhile, the equality of rights and the duties of men and women are one of the main advantages of "European" law, a natural result of society development. Secondly, the principle of citizen equality against the state is violated regardless of their religious affiliation, since the recognition of polygamy entails the inevitable legalization of the sharia norms regulating this institution (the conditions for a marrige conclusion and dissolution with Muslims and the representatives of other religions, the division of property, the status of children etc.). Thirdly, the state departs from the principles of secularism and the equidistance of religious organizations from a state.

3.3. Conflicts with criminal law: blood feud, "honor killings", domestic violence

Some supporters of certain Shariah norms implementation confirm the benefits that a non-Muslim state achieves due to the interaction with the Sharia. Russian Islamic scholar Syukiyaynen (2012) believes that Islamic law in its modern moderate understanding can be not only an opponent an adversary of universal legal standards and principles (including human rights), but also an ally in the overcoming of archaic traditions and customs (for example, the so-called murder of honor or blood feud).

The norms of the sharia can be built into the system of "European" law indeed (for example, instead of a percentage penalty, a fixed fine is determined in a contract between Muslim entrepreneurs - the result of negative attitude of the parties to any form of "riba", the marriage contract prescribes a marriage gift (mahr) to a spouse, paid in case of divorce on the initiative of a husband), but they can hardly become an effective ally in the overcoming of archaic traditions and customs. Firstly, with the help of Sharia, violence against women can be justified, who often become victims of the so-called "honor killings" since in the eyes of an orthodox believer a woman who has entered into premarital relations or meets with a non-Muslim, is perceived as a sinner and an apostate. Such an attitude can lead to the use of violence towards her up to the murder. An important role is played by the patriarchal model of the family, the subordinate position of a woman from the point of view of Islamic theologians. Secondly, sharia does not directly prohibit blood feud. The Qur'an states: "O you who believe! You are prescribed retribution for the dead: a free for a free one, and a slave for a slave, and a woman for a woman. And to whom anything will be forgiven by a brother, then following the custom the reimbursement to the one who forgave is necessary" (Surah 2, verse 178); "And do not kill a soul that Allah has forbidden, otherwise, as by right. And if someone was killed unjustly, then we gave power to his close one, but let him not excess in killing ..." (Surah 17, verse 35) (Quran, 1991). As we see, Islam allows a killer to compensate a victim for the loss of a loved one by paying "blood money". However, a murder in the legal systems of our time refers to socially dangerous acts, the punishment for which is inevitable. Reconciliation with a victim does not save a culprit from responsibility. An affected party is the entire society, and not a separate clan, a family or a tribe.

The fact that the causing of harm to the health of the sharia leads to the payment of "blood money" to an injured party, may lead to the fact that the Muslim community in some cases will try not to provide publicity to this case and hide the fact of causing harm to health or murder. Such cases have already been recorded, for example, in the UK. British police of Woolwich detained a group of immigrants from Somalia, accused of inflicting stab wounds to the Somali teenager. Instead of bringing the case to court, the police succumbed to the persuasion of the victim's family and the local Somali community, allowing the proceedings in the Sharia "court". Community leaders confined themselves to the award of monetary compensation to the victim (Bentham, 2008).

Thirdly, the custom of blood feud mentioned by Syukiyaynen (2012) is sufficiently stable, which is confirmed by the example of the North Caucasus. Despite the long-standing adoption of Islam by local people, the Shariah could not eradicate this practice. Close blood ties and traditions sometimes turn out to be stronger than religious orders. Moreover, the difference in confessions or religious beliefs can aggravate the discord between births.

Let's consider another example. Sodomy is the gravest sin in Islam and according to the sharia it is punishable by the death penalty. But the criminal codes of many countries of "European" law have no punishment for homosexuality. The law does not make exceptions for those who kill homosexuals. A murder of a person, even if he adheres to another sexual orientation, is always a murder, a socially dangerous act. Now let's imagine a hypothetical situation. A murder of a man accused by the members of the community in homosexuality was committed in the Muslim community. The members of the community, including the relatives of the murdered, may not testify against the killers, since customs and sharia do not consider this act a crime.

The last example. Sharia has such a thing as "the education of a wife", including the use of physical strength: "The education of a wife (ta'dib) is a husband's right to the upbringing of his wife, which is carried out by good instruction, then by boycotting, and then by intimidation with hits not causing mutilations. ..." (Nurgaleev, 2011). It turns out that these sharia norms may well be regarded by some believers as a religious justification for violent acts against their wives and cohabitants, at least in the form of beatings and a deliberate infliction of minor harm to health, because there will be no mutilation with these encroachments. The religious norm comes into conflict with the rule of law and does not contribute to the realization of the latter. On the contrary, it can cause domestic violence.

4. Discussions

The study shows that the problem of the Sharia functioning on the territory of a secular state is quite acute one. In the course of the analysis of norms arising during the application of conflicts, a number of rather complicated moments are revealed. There

are three possible solutions: 1) the rejection of the rule of state law and the granting of broad powers to religious communities, which entails negative consequences for ordinary citizens; 2) the establishment of complete supremacy of state requirements in a private sphere, which inevitably leads to the violation of religious rights and freedoms; 3) the search for a compromise in the form of possible regulation of individual family and property relations within the framework of religious norms (through treaties), but on condition that a) the parties are willing to volunteer; b) the observance of human and citizen rights and freedoms; c) the primacy of state law requirements. The latter option seems to be the most optimal one.

5. Conclusion

The study made it possible to identify certain "painful" points of the Sharia in the framework of the "European" legal model. Being the product of the early Middle Ages, in the modern era sharia norms do not always meet the requirements of human and citizen right concept, often do not fit into the principle of equality of citizens regardless of gender and religion. Nevertheless, the problem persists, and conflict situations will arise periodically, requiring a comprehensive analysis and a reflection for the adoption of relevant legislative decisions. We believe that finding a "middle way" in this issue will meet the interests of both a state and ordinary Muslim believers.

6. Recommendations

This article is of value to lawyers, anthropologists, ethnologists, religious scholars, sociologists, historians, the representatives of other scientific trends in the study of the problem of religious norms and the law of a state coexistence. The materials can be used in the preparation of textbooks on the courses in comparative law, legal anthropology, ethnology, religious studies in order to familiarize students with the current processes at Muslim communities in Europe and North America.

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