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Shariah in Secular Legal System: The Problem of Parallel Justice

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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 by 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 study. The first method makes it possible to compare existing differences between the laws of a state and religious norms, the second one allows to reveal the strategies of public relation participant behavior and to analyze specific conflict situations between the law of a state and religious rules of conduct.

The main results of the article include the study of "Shariah courts" phenomenon on the territory of non-Muslim secular states, the reasons of their occurrence, the current practices and possible consequences of their activities. Attention is paid to the Shariah Councils in the Islamic banking system and the issue of official Sharia courts existence in Greece. The materials of the article can be useful for lawyers, anthropologists, religious scholars, historians in the study of a "parallel justice" problem in modern countries.

***Keywords:** Shariah, Secular Law, Shariah Courts, Islamic Finance, Parallel Justice.*

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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 the newly created states, there is a massive outflow of local indigenous populations from countries of Africa, the Middle East, and Asia to the territory of the more developed countries (primarily to Europe and North America). Thus, the countries with a legal system conventionally called by us "European" (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 a state), face the issue of the legal culture of migrants as the factor that influences the integration into the host community. The adherence to the customs and religious norms of certain population layers, their relative isolation from the majority on a cultural level, becomes the factor of own "courts" emergence that enjoy prestige in these groups and compete with state organs in the administration of justice. Therefore, the study of the problem concerning the activities of Shariah "courts" is of relevance at the moment.

1.2. Problem status

In recent decades, many publications of a scientific nature 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 foreign and domestic literature. Among foreign researchers, the mentioned problem is dealt with by representatives of the Muslim community most frequently: Al-Qaradawi (2003), Ramadan (2009), Yilmaz (2005), etc. Their research is a broad one, touching on the problems of such spheres as theology, family and property relations, Shariah punishments, etc. Within the framework of this group, it is proposed to create consultative Sharia councils giving explanations (fatwas) to Muslims wishing to live according to the Sharia. Secular scholars are represented by 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) (the study of the problem concerning the combination of Muslim and European models of legal culture), as well as by Bekkin (2009) (the study of Islamic finance and economics, Islamic banking). The problems of the conflict between religious and secular norms in the resolution of Muslim disputes were described by Mukhametzaripov (2014). Many scholars of sharia in a "non-Muslim" state often refer to the concept of legal pluralism developed in the framework of legal anthropology by Griffiths (1986) argue about the need to maximize the freedom of conscience and religion towards Muslims. In this article we will try to look at the problem of Sharia courts in a secular state system from the point of view of possible negative consequences of their activities.

2. Methodological Framework

2.1. Objectives of the study

During this study, the following tasks were accomplished: 1) the identification of conflicts related to the activities of Sharia courts in Europe and North America; 2) the analysis of specific situations and legislative decisions related to Sharia courts; 3) critical understanding of Sharia court activities in Europe and North America.

2.2. Methods of research

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

- the comparative legal method (the comparison of Shariah norms contents 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).

3. Results

3.1. Shariah courts in Europe and North America

There is no direct prohibition on the activities of religious arbitration courts in European countries. However, researchers express concern about the existence of a parallel system of unofficial justice in the form of a system of Shariah councils and mediators. In Germany there are the facts of criminal case consideration by such informal courts (Popp, 2011). In the UK, the public is also concerned about the reports of crime concealment (especially in respect of domestic violence, the harm to health) by some leaders of local Muslim communities (Waters, 2013). Discrimination against women remains a significant problem in religious arbitration courts in Europe. Let us consider the British example in more detail. Since the 1980s, Shari'ah courts began to appear in the system of religious courts in the United Kingdom, originally composed of rabbinical tribunals Beit Deen, Catholic and Anglican courts. Shari'ah courts provided services to the members of immigrant families. Thus, there are at least 100 Muslim councils now. In addition to Shariah councils, the system of arbitration courts has been established since 2007 within the framework of the Muslim Arbitration Tribunal, functioning under the Arbitration Act of 1996 (Arbitration Act, 1996). Shariah councils and arbitrations deal mainly with family and hereditary issues, but according to news reports, they easily become a tool for coercion of women by Muslim communities, concealing the facts of violent crimes (The Clarion Project, 2013). Besides, the proceedings in these institutions may be far from the principles of party equality, especially based on gender (Setyawati *et al.,* 2017; Suryanto and Thalassinos, 2017; Suryanto, 2016).

To eliminate possible abuses in the Sharia arbitration system, a draft bill on arbitration and mediation was proposed in the UK in December 2010 complementing many laws, including the Arbitration Act of 1996. It mentions the duty of religious arbitration court judges to inform the parties of their rights under applicable law and the need to register a formal marriage for a proper legal protection. Otherwise, it is proposed to recognize the decision of the arbitration court as null and void. It is also planned to give the English court the right not to recognize the decision of an arbitration court in case of doubts about the voluntary consent of the participants in the arbitration. Besides, the Bill prohibits any arbitration proceedings based on the inequality of the testimony of a man and a woman, their hereditary and property rights, other discrimination, and provides a criminal punishment for the persons who mislead the parties about their judicial powers, in the form of imprisonment up to five years (Arbitration and Mediation, 2012). The draft of this normative act is still pending in the Parliament of Great Britain, which indicates that some lobbying groups may oppose this bill.

In North America, the example of Canada is noteworthy. Here, the law initially assumed only the functioning of secular arbitration courts, but over time, religious arbitrations began to appear. A sharply negative attitude of some local authorities towards religious arbitration courts appeared in 2003 when Said Mumtaz Ali, the lawyer from Toronto, Ontario, announced the creation of the Islamic Institute of Civil Justice and called on Muslims to resolve disputes in this institution exclusively. In response, the authorities of the province of Ontario (and later Quebec) completely banned the creation and the functioning of religious courts (including Jewish and Catholic ones) in 2005, and toughened the requirements for the qualification of arbitrators and documentation. However, these measures did not stop some Canadian Muslims from the resolution of family disputes by the Shariah and this practice continues unofficially. The researcher H. Simmons writes: "Due to the fact that religious arbitration is now predominantly out of sight of Ontario courts, there is no way to assess the observance of women's rights in informal religious arbitration courts" (The Economist, 2010). Let's note that there is no prohibition on the functioning of religious arbitration in other provinces of Canada.

3.2. Shariah courts and Islamic banking

Sharia arbitration can arise in the framework of Islamic financial institutions. There are several significant points that I would like to draw attention to. First of all, the creation of Islamic banks can lead to the increased influence of foreign Islamic financial institutions and individuals, often promoting the ideology of political Islam. Thus, the first Islamic bank of Germany "KT Bank AG", opened in July 2015 in Frankfurt am Main, belongs to the Turkish financial group "Kuveyt Turk", 62% shares of which are owned by the Kuwait Finance House (Reuters, 2015). According to some Western researchers, the Kuwaiti Financial House (the only Islamic bank in Kuwait) was established and controlled by the international Islamist organization "Muslim Brotherhood" (Smith, 2004). Thus, Islamic banks with foreign participation can become an instrument of direct financing of Islamist groups, including those

interested in the creation of their own jurisdictions within the framework of a non-Muslim state. For example, the representatives of some radical circles speak about the need for "financial autonomy" and "economic separatism" of jamaats, the practice of "traditional and uncontrolled schemes of financial transactions (hawala)", the propaganda of "alternative (Islamic) financial instruments" and their promotion "by any available ways" (Sever). Such ideas are expressed by the former head of the St. Petersburg branch of the National Organization of Russian Muslims (NORM) Salman Sever (Maxim Baidak), now living in Turkey.

Secondly, Islamic banks are not only financial institutions, but also religious organizations. The media sometimes states that Islamic banks are not a "religious structure" (Zaripova & Yurieva, 2015). However, this is not entirely correct. An Islamic Bank must coordinate its activities (financial products, transactions, local acts, etc.) with Muslim theologians (ulemas). This follows from the essence of the Islamic economy - the conduct of entrepreneurial activity in accordance with the Sharia.

For a constant contact with theologians, "Shariah councils" are established at Islamic banks that serve as advisory bodies whose decisions are binding on Muslim financial organizations. The participation of theologians in such councils leads to the increase of their social status (recognition and influence among Muslims, in society) and financial well-being (services are usually paid for). However, only some of these theologians will be local, since Islamic banks will have to hire foreign citizens from Arab countries (also from the Persian Gulf region), Turkey, South and South-East Asia (Pakistan, Malaysia, Indonesia). Thus, there may be conflicts between the ulema of the "Shariah Councils" at banks and local clergy. The expansion of Islamic bank activities in the future may lead to the attempts to introduce Shariah norms into the legislation of a state. Sharia arbitration arising at banks will gradually move from purely financial issues to the consideration of other cases (hereditary, family ones), turning into the system of unofficial justice, competing with state courts.

3.3. Shariah courts in Europe: The example of Greece

In terms of Shariah justice in the system of "European" legislation and its consequences for ordinary Muslims, the example of Greece is indicative. Now, Greece is the only EU country in which the application of shariah norms in the resolution of family and hereditary cases is officially permitted. In the north-east of the country, Thrace has about 100,000 Muslims (mostly Turks and Bulgarians), who have a relative autonomy in the regulation of some issues concerning a personal status. The provision of such legal autonomy was the result of the Lausanne Peace Treaty of 1923 between Greece and Turkey. Muftis are responsible for the application of Shariah law in this region. There are three Muftis (one in each major city of the region) and they are appointed by the Greek authorities. The Muftis have the right to review the cases of marriages and divorces between Muslims; the cases of material provision; the cases of parent responsibility; the emancipation of minors (except for the issues of adoption and the recognition of paternity); wills, inheritance

of Muslims in accordance with the "Holy Muslim Law" (i.e. Sharia). At the same time, the application of Shariah in Greece has a purely territorial character. Shariah norms can be applied only if both sides of the dispute are Muslims and live in Western Thrace. If at least one of the parties does not profess Islam or resides outside the region, then the case is subject to review by the state court (Vrellis, 2011). Formally, each decision of a mufti is to be considered in a Greek court of first instance, which verifies the mufti's authority to resolve a dispute without changing the contents of the decision. The court is also required to verify a mufti's decision for the compliance with the Greek Constitution. In case of constitutional norm violation, the decision has no legal force (Vrellis, 2011).

In practice, it happens differently. A resident of Thrace Hatiice (Khadija), Molla Sali (Chatitze Molla Sali) appealed to the European Court of Human Rights (ECHR) in February 2014 with the request to abolish the norms of Shariah and Muslim courts in the legislation of Greece. Before her death in March 2008, her husband Muslim left H. Malla Sali all his property under the will certified by a Greek notary. The deceased husband's sister immediately appealed the will from the local mufti, on the grounds that according to the Shariah Muslims cannot bequeath their property (Guillot, 2015). H. Molla Sali appealed to the civil courts, which confirmed her right to inherit. However, in October of 2013 the Supreme Court of Greece ruled that the cases of the inheritance of local Muslims should be resolved in the courts of muftis and only in accordance with the Sharia. The decision of the Supreme Court deprives the Muslim minority in Thrace of the right to make wills under Greek civil law, which was granted to it since 1946 (National Secular Society, 2013). Consequently, there is no way of any voluntary application of the Shariah norms. Moreover, the Greek courts, which the legislator instructed to check the decisions of muftis for compliance with the Constitution, often limited themselves to the registration of a document without studying its content. Thus, the violations of the rights of Greece citizens of the Muslim faith, especially women, who demanded a divorce, were numerous. The appeal by H. Mola Sali to ECHR has not been considered yet.

4. Discussions

The examples given by us concerning the activities of Sharia courts show that this issue is extremely ambiguous. When it is considered, it is inappropriate to talk about "divine laws" supposedly capable of transforming society for the better, and the references to "the demands of believers" are also dubious, as these requirements are often only the desire of individual religious leaders and scientists and are not supported by most ordinary Muslims. We believe that the introduction of Sharia norms into the legal space of a secular state will inevitably lead to negative results. In the long term, such a policy will lead to the isolation of ethnic and religious groups from most of the population, their gradual development into "ghetto", the strengthening of informal group leader positions and the emergence of "parallel justice", a drastic reduction in legal culture among ordinary members of these communities, and the "balkanization" of the legal space. Such measures can lead not

to the establishment of an interfaith and interethnic world, but to the increased enmity and acts of violence. Thus, the authority of a state is reduced, its sovereignty is undermined, and the rights and the freedoms of citizens are violated, especially among the most vulnerable part of religious communities - women and children.

5. Conclusion

The study made it possible to identify certain conflicts related to the activities of the Sharia courts, to demonstrate ways of this problem solution undertaken by some states. The desire to create own consultation councils by Muslims is quite natural, since there is a desire of Muslim scholars to unite in single institutions, but the desire of certain groups to create Sharia courts and the establishment of Shariah justice with respect to the part of the population and even with respect to a separate territory raises serious concerns. In such a situation, a constant monitoring of the situation in religious communities is required from a state, while satisfying the religious needs of believers and preventing the emergence of informal "judicial" institutions that claim to be exclusive in their activities and directly competing with state authorities.

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 to familiarize students with the current processes at Muslim communities in Europe and North America.

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