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The Incompatibility of the Sharia Law and the Cairo Declaration on Human Rights in Islam with the European Convention on Human Rights

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ABSTRACT: The Resolution 2253 (2019) of the Parliamentary Assembly of the Council of Europe deals with the question if the Sharia law ("Islamic law") and the 1990 Cairo Declaration on Human Rights in Islam are compatible with the European Convention on Human Rights. This question was raised within the context of the endorsement of the Cairo Declaration by three member states of the Council of Europe, states that also ratified the European Convention upon their accession to the Council of Europe (Albania, Azerbaijan, Turkey). The same question is relevant also for Russia and Bosnia and Herzegovina, but also for Jordan, Kyrgyzstan, Morocco and Palestine, whose parliaments enjoy partner for democracy status with the Parliamentary Assembly of the Council of Europe. The European Court of Human Rights (the Grand Chamber) had already in 2003 the opportunity to give an answer to the above mentioned question: it "concurs in the Chamber's view that Sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention." Based on its own assessment and a comprehensive report adopted by the Committee on Legal Affairs and Human Rights, the Strasbourg Parliamentary Assembly concludes on the topic that "the various Islamic declarations on human rights..., while being more religious than legal, fail to reconcile Islam with universal human rights, especially insofar as they maintain the Sharia law as their unique source of reference. That includes the 1990 Cairo Declaration on Human Rights in Islam…" This study focuses on the analysis of the Assembly's report and resolution and also on country specific recommendations.

KEYWORDS: European Convention, Human Rights, Sharia, Cairo Declaration, incompatibility

Introduction

For many years, the issue of incompatibility between the Islamic Sharia Law and the international protection system for fundamental human rights, in the way it was consecrated by the United Nations or at a regional level – for example the European human rights protection system – became a heated debating subject both for international organizations and for the doctrine of specialized literature in the field of international law.

In this context, on a European level, in the last years we have seen for multiple times thorough examinations on the problem of incompatibility between the Islamic Sharia Law, the human rights protection system consecrated by the European Convention on Human Rights and the European Court of Human Rights, in the framework of the Council of Europe.

On January 27, 2016, several members of the Parliamentary Assembly of the Council of Europe initiated a Motion of Resolution which was meant to show their concern in regard with three aspects:

- The incompatibility of Sharia with the fundamental principles of democracy and the norms provided by the European Convention on Human Rights, observed by the European Court of Human Rights in the Refah Partisi v. Turkey decision.
- Three of the signatory states of the European Convention on Human Rights also signed the Cairo Declaration of Human Rights in Islam, adopted by the Islamic Conference Organization in 1990, this way enforcing, officially or unofficially, the Sharia Law – including those provisions which are in clear contradiction with the Convention, considering that the European Convention on Human Rights is a compulsory international instrument for all the part-taking states.

- Even though no member state of the Council of Europe officially adopted Sharia, the Islamic courts unofficially apply these rules, especially in the field of private law, at the request of the members of the Muslim communities from many member states. (Motion for a resolution, Doc. 13965, 2016)

Taking into account everything from above, the Assembly decided to investigate the compatibility of Sharia, including its unofficial application, with the European Convention on Human Rights and the implications of its signatory states in the case of adherence to the
This is the content of the analysis we propose in the following.

Short considerations regarding the international mechanisms of human rights protection

70 years after the adoption of the Universal Declaration of Human Rights by the General Assembly of the UN on December 10th, 1948, it is still a long way to go until we will reach a guarantee of the real, universal and efficient protection of fundamental human rights and liberties, in spite of the fact that the international organizations continuously adopted clear positions on the specific problem of human rights.

The fundamental human rights and liberties are „the folding of a democratic society", a paramount condition for the society's evolution. These fundamental rights and liberties apply to all human beings as intrinsic rights, regardless of nationality, race, gender, faith or social status. In fact, they represent the „common judicial patrimony of the humanity, because they refer to universal values in international relations" (Corlățean 2015, 7). Among these rights and liberties, the most important one to stand out is the right to life.

It is a world accepted truth, at least in a declaratory way, that human rights describe a fundamental dimension of all human beings which also apply to all human beings as intrinsic rights, regardless of their nationality, race, gender, beliefs or social statute.

The right to life is a supreme right, which notifies the prerogative of any human being to exist as such, compelling all individuals to respect it and abstain from any actions which could damage or harm this supreme social value. (Predescu 2006, 77)

If, historically speaking, the judicial philosophy provides that the right to life is a natural, inalienable right, in normative and political terms every democratic society regulates it for itself.

The current democratic European society cannot be conceived without a judicial system which protects the human rights in general. We highlight the guarantees which provide for the exercising of the right to life in Article 3 of the UDHR (1948) and in Article 6 of the International Covenant on Civil and Political Rights (1966), this right being, in a European perspective, the first substantial right regulated in Article 2 of the European Convention on Human Rights (1950). The provisions of Article 2 are completed by those stipulated in the 13th Protocol of the Convention which talks about the abolition of the capital punishment in any given situation. The importance of this right in the ensemble of all human rights and liberties is also shown by the position it holds in the composition of Title I – *Rights and Liberties*. This framework mentions „the sacralization of the right to life", followed by an interdiction of torture and inhuman or degrading treatments (Art. 3), the interdiction of slavery and forced labour (Art. 4) and a non-retroactivity of the criminal law (Art. 7) (Lazăr 2009, 89) .

The European Court of Human Rights affirmed that the right to life is „one of the fundamental values of the democratic societies which compose the Council of Europe", consecrating the preeminence of the right to life in the dispositions of the Convention and highlighting the „principle of the sacred character of life, protected by the Convention" (Sudre 2006, 213).

The contemporary European doctrine recognizes that not only the right to life but all rights and fundamental liberties belong to the common judicial patrimony of humanity. In fact it mentions that the individual, as a human being, is entitled to immanent, intrinsic rights (Corlățean 2015, 7).

The realities of the current globalized world, though, show that even these guarantees, as solid as they may seem, are challenged by some international political or religious contexts. Sensitive

topics such as non-discrimination, freedom of thought and religion, could create changes in the judicial sphere or in the system of values of our European democratic society.

The right to life is just one of the many rights that are challenged or which encounter changes making their way less predictable. Therefore, the situation requires a democratic control of the judicial, political and religious developments which protect the life and the other human rights, and, above all, to find a midway between the defense of the fundamental right to life and the exercise of other fundamental rights, such as freedom of thought, religion and the right to non-discrimination. When it comes to the external manifestations of the religious beliefs or ideas of a person, these become social acts, and the state along with the European organizations are obligated to regulate these social behaviours in a positive sense, in order to limit and sanction all the deviations and abuses (Corlățean 2018, 40).

As an answer to the appearance of regional systems of protecting human rights, the islamic states adopted a few political and/or legal instruments on this matter as well. One of these instruments is the Cairo Declaration of Human Rights in Islam, adopted by the Islamic Conference Organization in 1990, which „wants to contribute to the humanity's efforts to promote human rights, to protect the exploited and persecuted human being and to affirm his liberty and his right to a respectable life in accordance with the Islamic Sharia". The Declaration, on one hand, recognizes the right to life in Article 2: „a) The life is a gift from God and the right to life guaranteed for all human beings. It is the duty of the individuals, societies and states to protect this right from any abuses; it is prohibited to kill anyone, except for the situation when there exists a reason mentioned by Sharia. c) The protection of life during the time given by God is a duty set by Sharia"; however, on the other hand, Sharia allows cruel, inhuman punishments and even the capital punishment by stoning or other degrading ways.

The Cairo Declaration on Human Rights in Islam is way more restrictive than the Universal Declaration of Human Rights. The freedom of expression is restricted by the case of a blasphemy when the capital punishment is allowed, and muslims cannot deliberately change their religion. The Jihadists do not mention this Islamic Declaration, but they usually justify their crimes with Sharia – an imperative judicial system which involves political and social structures, which promotes exclusivity and aims to apply to everyone.

The Declaration mentions that „Islam is the religion of the pure human nature" (Art. 10) and that „all rights and liberties stipulated in this Declaration are subordinated to the Islamic Sharia" (Art. 24), which is „the only source of references for the explanation or clarification of any article of this declaration" (Art. 25) (OIC 1990).

In the book *Human Rights in Islam,* Sayyid Maudodi (1976), an Islamist doctrinaire, claimed that Sharia guarantees the fundamental human rights in the best way possible, these rights arising exactly from its text (archive.org).

Even though some provisions of Sharia are compatible with the human rights or they offer even more rights (e.g. Article 7 of the Cairo Declaration which calls for a special protection for the human fetus, in comparison with the European Convention which does not), there still are many provisions which are not compatible with the European Convention on Human Rights (e.g. apostasy from Islam comes along with the capital punishment) (PACE, Resolution 2253, 2019).

The Cairo Declaration created many controversies, such as the concept of equality between genders, the right of marrying non-Muslims or the notable failure on freedom of thought and religion. The Cairo Declaration on Human Rights in Islam is the „product of the cultural Islamic matrix", and Sharia is a judicial system established on the base of exclusively religious revelations, deducted from the Qur'an and Sunna, but which apply to all human beings (Cîteia 2019).

Even though it has a strong societal dimension, the Islamic ideology remained dominated by confesionalism and ethnicism. The fact that in Sharia the main source of right is the absolute supremacy of the Qur'an and, therefore, the absolute authority of the holy law derives directly from the Qur'an, is incompatible with the European Convention on Human Rights (Rus 1994, 14).

Is there any compatibility between Sharia and the European Convention of Human Rights?

Until December 18th, 2018, the European Court of Human Rights (ECHR) adopted a constant position, considering that Sharia is not compatible with democracy or the human rights. In 2003, the ECHR validated the dissolution of a Turkish Islamist party because it militated for the establishment of Sharia in Turkey (Refah Partisi v. Turkey). The Strasbourg Court ruled that Sharia is incompatible with the provisions given in the European Convention on Human Rights.

The European Court of Human Rights had the opportunity of ruling over the incompatibility of Sharia with the human rights provided by the Convention of 2003 in the case of Refah Partisi v. Turkey, saying that Turkey, as a signatory country, could legitimately stop the application of some religious rules which could alterate their democratic values. In this particular case, the decision of the Constitutional Court to dissolve the Socialist Party (Refah Partisi) because it promoted the introduction of Sharia was considered compatible with the Convention. The Court ruled that the Sharia Law is incompatible with the European Convention on Human Rights, but most obviously, this did not mean that there was an absolute incompatibility between the Convention and Islam, because the Court recognized that the „religion is one of the most important elements that compile the identity of the people and their view on life" (Meritxell Mateu, Introductory Memorandum).

By its decision of December 19th, 2018, the European Court of Human Rights highlighted its position in the sense that it did not *de plano* condemned Sharia anymore, but just some of its elements which were incompatible with the Court. The Court did not reiterate the principle conviction of Sharia, but especially its abusive application in the case Molla Sari v. Greece, and accepted the Islamic sacred law in the context of the *de jure* application of the common Greek law.

Based on the Sevres Treaty (1920) and Lausanne Treaty (1923), which regulated after the war that minorities in Greece and Turkey could live after their own rules, the Greek jurisdiction accepted Sharia to be enforced in cases of marriage, divorce and inheritance, to the whole Muslim community of Western Thrace, a Greek region.

This decision was appealed at the ECHR by a woman who was deprived, through the enforcement of Sharia, of the inheritance left by her husband in accordance with the common law.

The Greek justice voided the bequest, saying that it has to enforce the Sharia Law, which provided that the inheritance should belong to the sisters of the departed. The Court condemned the abusive enforcement of Sharia, but not the law itself, creating this way the conditions for the applicability of Sharia in Europe, without coming against the European Convention on Human Rights (PACE, Resolution 2253, 2019).

The European Court agreed that the state should respect the religious minorities without obligating their members to be part of them. When a state agrees to enforce Sharia on its territory, this has to be optional. The Court chose a liberal communitarian approach to reconcile the coexistence of diverse communities benefiting from judicial privileges in the same state.

However, ruling that Sharia is applicable in Europe, even in a limited way, the decision of the ECHR allows the political structures that want to apply it to pretend that they act in the name of the „protection of human rights."

Even more than that, knowing the extent to which Islam could set up a closed society, questions raise in regard with the possibility of leaving this society, asking whether or not a simple consent is enough to guarantee freedom and life, taking into account that Sharia punishes apostasy with the death penalty.

The position of the Parliamentary Assembly of the Council of Europe in regard with Sharia

The change within the ECHR's jurisprudence is a problem that generated critics and worries even inside of the Parliamentary Assembly of the Council of Europe (PACE), becoming a heated debating subject in Strasbourg, in spite of the fact that usually ECHR has a tolerant position towards the multitude of religious options including Islam.

On January 22nd, 2019, ECHR debated the resolution project which claimed that Sharia is not compatible with the European Convention on Human Rights. This resolution especially targets West Thracia, in Greece, which officially applies Sharia for its Muslim community, decision which

was condemned by PACE in 2010. This project also targets the existence and the functioning of the Muslim Sharia Councils in the UK, the fact that three member states of the Council of Europe (Turkey, Azerbaijan and Albania) signed the Cairo Declaration of Human Rights in Islam, and that other member states of the Council do enforce, officially or not, the Sharia Law (Greece, UK and Turkey). It should be added that, even though the Russian Federation and Bosnia and Herzegovina did not sign the Cairo Declaration, they are observing members of the Islamic Conference Organization and they also ratified the European Convention on Human Rights.

The resolution project was drafted after a complete report of the Committee on Legal Affairs and Human Rights, report which was named „The Compatibility of the Sharia Law with the European Convention on Human Rights: Could the member states of the Convention also be signatory states of the Cairo Declaration?".

The European Center for Law and Justice asked the European parliamentarians to modify the resolution project in order to include the problem of the interdiction of blasphemy against Allah and Muhammad.

Through a series of resolutions – Resolution 1846 (2011) and its Recommendation 1987 (2011) regarding the fight against all forms of religious discrimination, along with Resolution 2076 (2015) regarding religious freedom and the cohabitation in a democratic society, and its Recommendation 1962 (2011) regarding the religious dimension of the intercultural dialogue – PACE already explicitly opposed to some provisions of Sharia. It especially stated that the state and the religion should remain separated and that „the states should ask the religious leaders to adopt a clear position favouring the priority of human rights, as provided by the European Convention on Human Rights". Even more, a special resolution for the specific case of West Thracia was adopted. This resolution advised the Greeks to „eliminate the enforcement of Sharia which raises serious compatibility problems with the European Convention on Human Rights." PACE reaffirmed its commitment towards the principles opposed by the Sharia Law many times. (eclj.org)

The project of Resolution 2253, discussed on January 22nd, 2019, completed and brought clarifications to PACE's recommendations to the member states. The project's text especially denounced the fact that Sharia – including dispositions which are in a clear contradiction with the Convention – is applied, officially or unofficially, in many member states of the Council of Europe. The project addresses these states „to take into consideration the withdrawal from the Cairo Declaration" and reiterates the necessity of abolishing Sharia in Greece and of the women in the UK Sharia Councils. In a more general manner, PACE reminds through this resolution that the freedom of religion does not imply the right of having a religious legal framework which would function at the same time with the common law and in contrast with the human rights. (PACE, AS/Jur (2018) 46, 3 January 2019, § 4.)

PACE reiterated the obligation of its member states to protect the freedom of thought, conscience and religion and considers that some provisions of the Cairo Declaration of Human Rights in Islam, being more religious than obligatory in judicial terms, fail in reconciling Islam with the universal human rights, considering that Sharia is the main source of law.

The project of Resolution 2253 also targeted the fact that Sharia comes against other provisions of the Conventions and of its additional protocols, including Article 2 (right to life), Article 3 (the ban on torture, and inhuman and degrading treatments), Article 6 (right to a fair trial), Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscicence and religion), Article 10 (freedom of expression), Article 12 (right to marriage), Article 1 from the 9th Convention Protocol (protection of property) and Protocols 6 (ETS no. 114) and 13 (ETS no. 187) regarding the abolition of the death penalty. It works the same way for the divorce and inheritance procedures, which are clearly incompatible with the Convention (PACE, Resolution 2253, 2019).

The Committee on Legal Affairs and Human Rights considers that, even though the Cairo Declaration on Human Rights in Islam has no obligatory character judicially-wise, it has a symbolic value and a political meaning. Nevertheless, it fails in reconciling Islam with the universal human

rights, especially to the extent that it considers the Sharia Law as its only reference source and it does not recognize some specific rights.

The Committee considers that, in the case of human rights, there is no room for religious or cultural exceptions. The member states and the partners for democracy should promote religious pluralism, tolerance and equal rights to everyone. The Committee underlines that the European Convention on Human Rights is a compulsory international instrument for all states taking part in the process. This report also refers to the effective application of the Sharia principles in some member states and gives specific recommendations to each of these countries (Antonio Gutiérrez, Doc. 14787, 03 January 2019).

Conclusions

It is supposed that the process of rewriting the human rights judicial norms will continue, in a European perspective, tackling these changes and challenges. This might generate new and even bigger tensions between the European normative system and other cultural-religious models.

Europe is compelled to defend the European Convention on Human Rights in front of the Islamic human rights competition, which also pretend to be universally applicable. This position is affected by the political symbolism generated by the fact that the Cairo Declaration was adopted by a bigger number of states than those who ratified the European Convention of Human Rights.

Only a return to the European identity and its objective understanding of human rights, based on natural law, would also allow the liberation from universalism, this common life with vague features, as well as from Sharia. It is only then when the human rights will regain their universality.

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