COMMENTS

ISLAMIC LAW BETWEEN COMMON LAW AND CIVIL LAW SYSTEMS: WHITHER HUMAN RIGHTS?

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Beside the systems of Common Law and Civil Law, the presence of another distinguishable legal system of "Islamic law" is to be noted. Such latter system does not distinguish between the temporal and the spiritual and in this system the temporal derives its origin from the spiritual. This paper inquires into the existing relationship between the system of Islamic Law and human rights. The system of Islamic Law deserves, today more than ever, attention, not only because nearly 25% of the global population applies it but also because there is a renewed interest in its study as a result of the repeated, serious terrorist events that have aroused curiosity in it and, above all, the fear of islamization and its consequences on Europe. We have also seen that although various Muslim countries like Pakistan, Yemen, Malaysia and Nigeria had adopted legal codes based on Western ones in the past but that they are now gradually returning to the original Muslim laws they had although prior to colonialisation.

The two most widespread legal systems in the world are: the *Common Law* and the *Civil Law.* The legal systems of nation states can be classified in these same categories even though they have considerable differences. Alongside these two systems, we may notice, with persistency, another legal system known as *"the Islamic law"* that, as will be seen in the following paragraphs, does not distinguish between temporal power and spiritual power; on the contrary the first derives from the second. It is essential to understand the relationship between *Islamic Law* and human rights that still

remains an unsolved historical and conflictual relationship in many parts of the world.

It is important to understand some concepts. The *Civil Law* is not the "civil law" as a *corpus* that rules the relations among people and it is not the *ius civile* of the ancient Rome as well. It is the whole legal system of those states that find in Roman civil law the essential principles of their structure: reference here is made to Continental European countries, Latin America and Francophone Africa.

On the contrary, the *Common Law* is the legal system developed in England after the Norman conquest in 1066. In the modern law, the *Common Law* system is adopted in those countries where the law is based and developed upon the English model; though Scotland has conserved its own system with many influences of the *civil law*. Until now the Irish Republic and Northern Ireland have conserved their peculiar legal sub-system.

The countries which have the *Common Law* system are: the United States of America, Anglophone Canada, South Africa, New Zealand and all the countries taking part in the *Commonwealth*.

At present, the *Islamic Law* system deserves more attention because it is adopted by almost 25% of the world population and also because it is interesting to study it due to terrorist events - like that of September 11th 2001 - which have created interest and curiosity about a world that Europeans do not know well enough and that scares them. Clear examples of *"re-islamization"* are also observed which regard to different countries of Islamic cultural background such as *Pakistan, Yemen*, *Malaysia* and *Nigeria* that, after having adopted some Western codifications, have gradually re-adopted the Islamic law.

Moreover, the analysis we are treating has many practical implications: the birth of the "Islamic banks" for example - which have different kinds of investment and credit through the model of *profit/loss sharing* - ruled by a real Islamic law founded on the Koran that does not allow the practise of usury and the collection of interest just as the Catholic Church did in the past in Italy.

Before treating this *quaestio*, a question should be posed: can one really speak of a real *Islamic law*, and is it consistent with human rights? To answer these questions, it is imperative to compare the three different legal systems.

In the *Civil law* countries, like the case of Italy, the judge basis his decisions through interpreting the legal codes and using, if required,

some interpretative integrative criteria such as analogy or general principles of law. Consequently, in any case he has to decide the dispute, he has to find a solution to it because he cannot judge "*non liquet*" as the Roman judge did when the rule was not clear. Nowadays, this "lack of delivering judgment" might justify the "crime of omission" as a lawful act.

Consequently, in *Civil law* systems, the judge makes his verdict exclusively on the law code. To interpret the rule to apply to a specific case the judge is free to choose among other judgments which have been previously delivered. The "judicial precedent" can become binding when issued by superior jurisdictions. The judge can motivate his verdict mentioning the Supreme Court's jurisprudence especially if this Court has already ruled upon the *quaestio* in an unequivocal manner (e.g. by reference to n. *3275/1983* Supreme Court verdict). On the contrary, as highlighted in 1983 in n. 7248 Supreme Court verdict, the judge who wants to deliver a different verdict from past ones, has to justify his verdict by reference to suitable and convincing reasons in order to motivate his different judgement.

On the contrary, the *Common law* rules are not found in a code that collects the rules but derive from the jurisprudential principle of *stare decisis*, the "judicial precedent" - which represents an inductive procedure developed by the judge. It consists in a comparison between a particular juridical problem with other similar cases already ruled upon, especially if they happen to have been decided by the *Superior Courts* whose judgments are considered to be more authoritative.

However, in *Common Law* systems, there are also written laws like *Acts of Parliaments* or *Statutes* - on the one hand, they are different from the jurisprudential law and, on the other hand, they are strictly interpreted. They are very different from *Civil Law* rules and are based on the literal meaning and not on extra-textual criteria.

It is very important in *Civil Law* systems to consider the so-called drafting history, in order to comprehend the lawmaker's will, but this approach cannot be used in the *Common Law*. In the latter legal system, in fact, it is the opposite principle that applies: the judges are not required to understand what the lawmaker's intention was but to understand the real meaning of what the lawmaker has said: *legislator qui voluit dixit, qui noluit tacuit.* Consequently, if a law does not contain a rule to solve a specific case, this gap cannot be solved through the application of different interpretative criteria such as,

for instance, the *l'analogia legis*. In the case of "jurisprudential precedent" that is, in the Anglo-Saxon system, we use a real *source of law*. However, the strict principle of the literal interpretation of the law is linked to the principle of "reasonableness" that does not accept the enforcement of a law that is different from the so-called "*diritto vivente*".

This *modus operandi* of the *civil law* systems is the opposite to the Common Law as civil law systems have a deductive reasoning. The judges research the justice in every single case using written laws and other integrative tools to interpret possible legal gaps.

Following this introduction, I examine the *Islamic law* legal system.

In the Italian legal system it is essential to take into consideration the choice of a state independently from the choice adopted by confessional codes: "*Date a Cesare quel che è di Cesare e a Dio quel che è di Dio*" explains the separation in the Western world between the temporal and the spiritual spheres. In Western countries the Enlightenment heritage posits the human being at the centre of the legal system and this applies both to *civil law* and to *common law*. The legal rule is considered as the product of man's reason and because of this rational element the law is considered to be binding. In the Muslim world the source of law is God - the only lawmaker - and there is no separation between confessional and spiritual powers.

It is interesting to illustrate the analogy between the Islamic and Eastern traditions where there has never been a separation between the moral and the juridical spheres. In Eastern countries, in fact, apart from their written laws there are also unwritten laws based on ethics and custom that were so important that they have complemented the written law. In China, for example, since the end of 70s, there has been a "Western transformation process" concerning its law that has adopted some European codes as their model such as the German and Italian codes. For a long time, the main view was the *Confucian* as opposed to laws and courts. In the Maoist period anyone who wanted to rule his life following the law was prosecuted. In Islamic countries faith and education are more important than codification because they are essential to progress in civil life and in social stability. A right education of everyone with the help of families, mosques, schools and Universities allows them to interiorize such values and to understand how to behave.

In the Muslim and Asian countries it can be evidenced how impor-

tant is the system of custom and social relations, for example, in the case of an agreement. In these legal systems, stability and mutual confidence are essential (where they are seen as a "relational" function) because durable economic exchanges are based on mutual confidence and moral obligation. On the contrary, in Western countries, the rule of law has the primacy in comparison to other rules such as ethical, moral, religious etc., rules. In the Muslim world, where the source of the law is God, the religious rule has also a juridical content but it is not only juridical. It comes directly from Allah and it is not modifiable by men. Consequently, the Muslim legal system is much more than a simple legal system that rules human actions. This system rules, in fact, every aspect of human life. This can be seen in those countries like Saudi Arabia where Islamism is the only official religion in the country. Contrariwise, in the countries where the Islamic religion is not the only religion followed like, for example, in Kenya or Nigeria, the Islamic law cohabits with other laws, producing legal *pluralism.*

The Muslim law is not a simple legal system linked to codes but it is independent from a *corpus* of law. It is similar to the *common law* system with the difference that it is not the product of the "*stare decisis* rule" and "judicial precedent", but it is the result of a "doctrinal production". The written sources of the Islamic law - the *Koran and the Sunna* - have a limited number of juridical prescriptions. They are included in *fatwa* opinions by "law doctors" and they become juridically binding upon believers when there is a community "*consent*", and when the most part of the outstanding doctors share them. Besides these three sources, a fourth has to be added, the "analogical reasoning". This source is the most controversial because the analogy is the result of a human process based on the interpretation of a divine rule in order to extend its meaning to other similar cases. The analogy has always been, since the past, a cause of debate between jurists and theologians because it is considered to be irreligious to fill a divine gap by the human reason.

It is evident that there is no uniform Muslim law for all Islamic countries; it is even clear how next to the official sources of Islamic law there are other principles, probably not so broadly diffused which integrate the previous sources in different ways from one country to another. Some examples are: the *common good* criteria, the *customs* and the *royal decrees*. These differences in most of the Islamic codes are further accentuated by the adoption of other Western codes intro-

duced by colonization. This forms the phenomenon called *acculturation* of the Islamic law. An example is: the Libyan situation where the severity of the *shari'a* is mitigated by the hybrid Gheddafi doctrine in his famous book *The Green Book* where he lists Libya's essential principles that are alternatives to capitalist and communist principles.

The attempt to introduce in the *Civil Law* a typical *Common Law* institute can be very difficult and *a fortiori* the same can be said if it were to be introduced in the *Islamic Law* system. If we examine the *trust* institute, that many *civil law* countries have tried to introduce in their codes, they have not obtained the result they longed for because of their modifications to this institute in order to insert their own connotations. There are many examples especially in so far as contract law is concerned such as in the case of *factoring, franchising, forfeiting,* and location contract, family code, inheritances, and, in general, the juridical laws and court warranties.

It is wrong to believe that the Muslim law is a coherent and uniform *corpus iuris* valid for all Muslims because it is not the only legal reference in Arabic-Muslim countries. Those countries where the Muslim law is the main legal source have also created some hybrid juridical systems that take on board rules of classic Muslim law mixed with rules of Western law. This can create some conflict, often a very violent one, among different countries, like in Tunisia where the *Personal statute code* has innovated the family code giving women a series of rights that no Islamic country recognizes.

It can be observed how the three juridical systems can be reconciled. On the contrary, in Anglo-Saxon countries there is still a use of law based on unwritten principles and on creative jurisprudence - called *case law*. In continental countries, the court verdicts, especially those of Supreme Courts, are important in the solution of controversies. Islamic law countries receive both *civil law* and *common law* model rules. Examples exist of different juridical systems that "coexistence" in the same state - this is called a *'mixed-jurisprudence'*: for example in Louisiana, in the United States of America, there is a *civil law* system integrated in the *common law*.

The *Islamic law* in comparison to *Civil and Common Law* systems is replete with religious meaning, and Allah is at the centre of the universe. It can represent a critical challenge for democracy because when a "religious state" imposes itself upon the population, there is the possible danger of suppressing the religious freedom of minorities. What should be asked is whether *Islamic law* will place the

human being at the centre of the universe as Western constitutional tradition does. Consequently, it could further be asked, whether *Islamic law* wants to introduce limitations to the exercise of power in order to defend human rights. In other terms, what is being asked again to debate is the relationship between the religious dimension and the political and regional dimension, starting from the imperative principle of separation of powers in order to defend the individual rights.

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