ISLAMIC LAW AND INTERNATIONAL LAW: THE TERMS OF A RELATIONSHIP

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The relationship between Islamic Law and other legal systems (basically western type domestic legal orders and international law) is often thought of in terms of compatibility or incompatibility.

Concerning certain subject matters of choice, the compatibility of Islamic (legal) principles with the values embedded in legal systems that are regarded as characteristic of the Modern Age is tested by sets of questions: is democracy possible in Islam? Does Islam recognize human rights and are those rights equivalent to a more universal conception? Does Islam recognize or condone more extreme acts of violence and does it justify violence differently? Etc.

Such questions and many more presuppose the existence of an ensemble of rules or principles which, as any other set of rules and principles, purport to regulate social behavior. This ensemble is generically referred to as Islamic Law.

However, one set of questions is usually left unanswered: is Islamic Law a legal system? If it is a legal system, what are its specific characteristics? How does it work? Where does it apply?

It is this paper`s argument that the relationship between Islamic Law and domestic and international law can only be understood if looked upon as a relationship between distinct legal systems or legal orders.
Islamic law as a legal system

Islamic law, or Sharia, is usually thought of as the ensemble of rules and commandments that apply to all aspects of life both of the individual Muslim and of the community of the faithful.

It regulates, firstly, the relationship between the faithful and God [the worship or *ibada*] by establishing the duties of the Muslim person towards God and religion. These duties are known as the pillars of the faith: the *shahada* - the spoken formula by which Muslims profess their belief in the existence of one unique deity and in the designation by God of Mohammad as his prophet; the *salat*, or prayer, five times a day; the *hajj*, a mandatory pilgrimage to Mecca; the fasting during the month of Ramadan; the *zakat*, a payment to be made for the benefit of the poor.

Not only Sharia regulates the *ibada*, but it also organizes the social interactions or the *mouamalat*. In this context, the rules of Sharia apply to the personal status of individuals, to family relations, to business, to the economy. They also establish the criminal acts and corresponding punishments. It is commonly though that they organize the political system within the state and purport to regulate the international relations of the Muslim community.

A third dimension of Sharia relates to what could be called Islamic morals or ethics, although restrictive views of Sharia may consider that such considerations do not really constitute a part of Islamic law.

The most striking and counter-intuitive feature of Sharia for lawyers trained in a western tradition is its divine origin and nature.

Indeed, the sources from which the rules of Islamic law spring and in which they are to be found are the Koran, the holy book containing the collection of revelations made by the archangel Gabriel to Mohammad, and the *sunna*, the ensemble of the prophet’s behaviors and sayings, being the prophet, as it is believed, immune from mistake and divinely inspired.

In these two sources the law must be identified. One must either consider that all rules of Islamic law are given by God-legislator and that the work of the human being is only to discover what they are, or believe that human endeavor is to make the laws in accordance with these two sources. In any case, the issue of the fundament of the legal order and of the binding character of its rules seems resolved.

The effort of human beings as they try to know the will of God and to discover or conceive the legal norms is known as *ijtihad*. From this effort have sprung the legal theories, *usul al fiqh*, pertaining to Sharia, and the ensemble of norms of which the content and reach are fairly agreed upon.

*Usul al fiqh* deal with the procedures, techniques and mechanisms to be used in the processes of identifying and applying the norms in and to concrete situations. Some of these are *ijma* or consensus (either in the community or among legal scholars) concerning the existence, the content and the reach of the norms; *qiyas* or analogical reasoning which allows for rules to be applied to new but like situations; *akl* or human reason, to the extent that it makes the interpretation of the sources possible in order to identify the rules.
Usul al fiqh and the mechanisms to determine the norms of Islamic law are at the center of the modern debate concerning the possibility or lack thereof of adapting Sharia to new times and new social situations.

It is common place to say that the doors of ijtihad have been closed at around the third century after the birth of Islam. Accordingly, both legal theory or usul al fiqh and the rules of Islamic law would be forever consolidated in the four main legal schools, madahib, known to Sunni Islam.

For many, the prerequisite for the mise à jour of Islamic law and its adaptation to modern times would be the reopening of the doors of ijtihad. For others, such doors were never really closed and debate persisted within and outside the legal schools. In any case, the question remains, it seems, concerning the possibility, or the need, of adapting Sharia, considering the hermeneutical limitations imposed by the timeless and divine nature of its main sources.

Even if one was to consider that all possible norms are contained in the Koran and the sunna and that all situations possible are regulated by these norms, it remains a fact that human capacities are limited and, therefore, lacunae and blind spots will always abound.

One possible remedy to this is the admission or production of parallel regulation. Throughout history Muslim societies and, where it has existed, the Muslim state, have recognized other forms of social regulation and produced non-Sharia inspired regulation. However, from an internal point of view, it could be inquired whether Islamic law, besides being a comprehensive legal system (ibada, mouamalat and ethics), sees itself as an exclusive one as well.

This is an internal investigation in the sense that it discusses the admittance or lack thereof of rules that do not belong to the corpus of legal norms of Sharia and either run in parallel or are considered to be submitted to it, by Islamic law itself. It is not a debate on the relationship between Islamic law and other legal systems.

When the conditions of this relationship - between Islamic law and other legal systems - are to be established, however, there will be no escaping from considering how Islamic law views itself.
Islamic law and domestic, state, law

Modern age is, among other things, characterized by a particular view of law. Since the state became “the” form of political and social organization, law is viewed as a state produced, state controlled, territorially localized phenomenon. Law is the system of rules and institutions that the state creates or recognizes and that are to be applied within the territory of the state.

We are used to look at law, according to the main types of legal systems, as either the ensemble of norms contained in statutes produced by the legislator or those contained in precedents taken from judicial decisions. But we always look at the state as the ultimate responsible for producing and applying the law.

A first issue, therefore, concerning the relationship between Sharia and domestic law, is how to combine a legal system that springs ultimately from divine sources with the centralized authority of the state over its territory.

Islamic law is not the product of legislators nor of judges, but that of the legal/religious scholars. It is not circumscribed to any limited territory. It is directed both at the faithful, wherever they are, and to the community as a whole. Nevertheless, Muslims, individuals and societies are today all living in territorially defined states.

As a consequence, the relationship is basically modulated by the degree of penetration of Islamic law in the state legal system. This will, today, be defined by the state itself. Some will claim Sharia as the main source of their law, some will have it as an inspiration, some will restrict it to certain aspects of personal or family life.

It is however possible to think of the relationship in terms of alternative regulation, in the sense that Islamic law may be applied by individuals or communities in states where no place at all is reserved to it in the legal system. In this sense, Islamic law may be one among several regulatory systems that are either recognized or tolerated by the state system, or that run parallel or even contrary to the state system.

One can say that Islamic law is a facet in the overall debate on legal pluralism, whether we have a sociological/anthropologic view of pluralism or a legal, state centered pluralism.
International law

International law is usually seen as the legal system, the set of rules and institutions, that regulates behavior among states. Its rules and institutions are to be found in the treaties concluded by states and customs that result from a combination of state practice and state belief in the legal nature of certain rules.

International law is a system organized around the principle of sovereign equality of states. It operates, therefore, in a horizontal society of states in which there is no central authority responsible for creating or implementing the law.

International law contains norms and institutions that deal with a plurality of issues: peace and security, human rights, environment, law of the sea, diplomacy, etc.

Islamic law has developed a concept of state that is different from that of umma – community or nation – and a notion of sovereignty. The state is, however, understood as the public space in which the government of human affairs will take place and where there will be debate, dissention and changes in leadership. It may not correspond exactly to the western, modern, and today universal, model of territorially circumscribed state

From the standpoint of Islamic law, therefore, the notion of international relations may not coincide with the today prevailing view of a system of states. It is usually said that Islamic law has developed the notions of three different spaces in which the world would be organized: one where Islam rules; one where it does not and with which conflict is actual or potential; one with which the Islamic world had entered a relationship regulated by agreements.

Islamic law is also said to contain rules pertaining to the law of war and peace, to the law of the sea, to the law of treaties, etc.
The terms of the relationship

Usually, the critics of Islamic law will point to the non-conformity of its principles with modern, state or international, legal systems, in the fields of human rights, in the regulation of violence, etc.

On the other hand, in its defense, many will point to the – maybe surprising – compatibilities.

I believe the exercise to be futile unless we try to establish the relationship between existing – as long as they do exist – and diverse legal systems.

International law entertains a close relationship with domestic legal systems and tends to influence them more and more. To the extent that Islamic law may be recognized as part of a domestic legal order or may, in some cases, constitute itself the legal system, a first modality of relations, and maybe a first set of frictions, will be thus established between Islamic law – as part of the domestic law – and international law – which tends to penetrate all aspects of domestic life.

The second modality of relations will take place in the field of international relations and this in two possible manners: in the way Islamic states view their relations with other states and the extent to which they believe that their behavior in international affairs is to conform with Islamic principles; in the way the international legal system has been directly influenced by or suffers the competition of Islamic international law.