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ARTICLES

FAMILY LAW, RELIGIOUS MARRIAGE AND SHARIA COURTS IN WESTERN SOCIETIES.

ONE COMPARATIVE INSIGHT ON THE ENGLISH MODEL

Alessandra Pera

1. FAMILY LAW AND PERSONAL STATUSES ACROSS ISLAMIC MIGRATION ROUTES FROM NON-WEST INTO WEST

Family is a fundamental social group, present in all historically known societies, whose structure and functions change over time and from one society to another. This proves the fact that family relationships are among the most sensitive and specific components of the various religious cultures, as well as the primary venue where each culture is practised and transmitted, thus becoming ineluctably part of the instances of recognition forwarded by each immigrant.

The new forms of family brought in Europe by migrant communities demand for recognition in the legal systems of the European host countries. This leads the States to pay attention to the new forms of family induced by social and immigration modern needs.

Among the various families that make up this archipelago[1], which seems to expand more and more, the most significant number of conflicts usually involves the Muslim ones, both because they constitute the majority of migrants, and because the institutions of the Islamic family law are the most discordant ones with the culture of the European rights.

In Western legal systems the "privatization" of family law, which recognizes wide margins of autonomy and privacy to the family, rests however on a system of legal and social values shared by the countries following the western legal tradition[2], which constitute as many barriers to the reception of conflicting ethnic and religious models.

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[1] Busnelli, F.D. "La famiglia e l'arcipelago familiare." *Riv. dir. civ.* I (2002): 514. The well known metaphor by Carlo Arturo Jemolo is conveniently re-proposed, by no longer comparing the family to an island that the sea of the law can only lick, but rather to an archipelago. Jemolo, C.A. "La famiglia e il diritto." *Annali Seminario Giuridico* III (1948): 57 et seq.

[2] On the concept of Western legal tradition, Merryman, J.M. *The civil law tradition. An introduction to the legal systems of western Europe and Latin America*. Standford: Standford University Press, 1969. 2, according to the Author, *«A legal tradition, as the term implies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective».* See also Glendon, M.A and Gordon, M.W. and Carrozza, P.G. *Comparative legal traditions*. St. Paul Minn: West Group, 1994. 6-8; Stein, P. and Shand, J. *Legal values in Western Society*. Edinburgh: Edinburgh University Press, 1974, translated in Italian by Maccioni, A. and Giuliani, A. and Moccia, L. *I valori giuridici della civiltà occidentale*. Milano:

The moral and legal equality between men and women[3] which is embodied, in this context, in equal freedom and dignity of the spouses[4] within the marriage must be mentioned first. Other aspects which deserve to be remembered are the development of the child's personality[5] and the affirmation of its right to participate personally in his own formation and in the choices concerning him, in order to pursue and recognise her/his best interest above all any other value and right.

Western legal systems exclude a parental responsibility, of both spouses, understood as absolute dominion over their children, placing on the contrary the best interests of the child[6], who has the right to be educated and trained according to his/her inclinations and aspirations, in a position of prominence.

Great importance is also attributed to the right to self-determination and freedom of action of each individual member of the family, in all their life choices (health, work, friendships), and in particular in the marriage decision.

The right to marry is precisely recognized as a fundamental right enshrined in art. 12, ECHR[7], which guarantees the freedom to marry, to both man and woman.

In addition, all Western legal systems show to join an exclusively monogamous model of union.

None of the European legal systems allow exceptions to the monogamous model of family, even where both heterosexual or homosexual de facto unions are admitted, or where marriages between same-sex spouses are authorized. Bigamy and polygamy, in many European countries, remain a crime.[8] Moreover, the unwillingness to accept

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Giuffrè, 1981; Stein, P. *Legal Insititution. The Development of Dispute Settlements*. London: Butterwords, 1984, translated in Italian by De Vita, A. and Panforti, M.D. and Varano, V. *I fondamenti del diritto europeo*. Milano: Giuffrè, 1995; Glenn, H.P. *Legal traditions of the world. Sustainable diversity in law*. Oxford: Oxford University Press, 2010. 127 ss.; Monateri, P.G. "Black Gaius. A quest for the multicultural origins of the western legal tradition." *Hastings Law Journal* 51 (2000): 479-555; Somma, A. "Giochi senza frontiere. Diritto comparato e tradizione giuridica." *Boletin Mexicano de derecho comparado* XXXVII (2004): 169-205.

[3] EHRC art. 23.

[4] EHRC Additional Protocol, VII art. 5.

[5] EHRC art. 24 UN Convention on Children Rights. New York. 1989. See in particular artt. 3 e 5.

[6] Miranda, A. "Scelte esistenziali ed educative dei minori in diritto inglese ed italiano." *Rass. Civ.* (1986): 1143.

[7] ECHR art. 12 *"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right".*

[8] As an example, in Italian law bigamy is forbidden by art. 556 c.p., in French law by art. 433-20 of the *Code Penal*, and it is the same in Germany and in Spain.

polygamous marriages in Europe was declared by the European Parliament in its 2006 Resolution, where it urges Member States to adopt measures that provide for effective and dissuasive sanctions so that all violence against women and children, particularly forced marriage, polygamy, the so-called honour killings and mutilations, are punished.[9]

The increasing circulation and diffusion of the heterogeneous legal models of family imported into Europe by immigrants, especially by those of Islamic faith, has started to create relevant issues, especially because of the differences between the peculiar Islamic schools and doctrines.

Most of such issues originate from the Islamic family law, the subordination of women it expresses and the close connection between legal, social and religious rules that characterizes Islams.

Since - especially as regards the personal status of Muslims - Islamic law does not accept the separation between law and religion, which on the contrary characterizes all Western legal systems, it is easy to guess that family relationships are the most affected by the influence of the religious requirements. In particular, since the Qur'an itself rules explicitly and in detail these relationships, Islamic family law has most resisted the secularization and the modernist trends.[10]

Although the family law of Islamic immigrants falls within international law and should be applied by the Courts of the European countries, the cases that occur are numerous and complex enough to not allow the automatic application of foreign law. This is due to the fact that the institutions of Islamic family law are those most at odds with the values of Western culture, mainly for the obvious difference of treatment between the sexes, for the strong discrimination against women and the patriarchal setting of the family. For example, the right of a man to have up to four wives, to be able to divorce his wife for no reason, the ban for a Muslim woman to marry a non-Muslim man, the non-existence of age limits for marriage.

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[9] Resolution of the European Parliament on *Female Immigration: Role and Condition of Women Immigrants in the European Union.* 2006/2010(INI) point 35, available at www.eur-lex.europa.eu.

[10] For an analysis of Islamic family law see Pearl, D. and Menski, W. *MuslimFamily Law*. London: Sweet & Maxwell, 1998; Anies, M.A. "Study of Muslim Woman and Family: A bibliography." *Journal of Comparative Family Studies* 20, 2 (1989): 263-274; Pahman, F. "The Controversy over the Muslim Family Law." *South Asian Politics and Religion.* Ed. Smith., D. E. Princeton: Princeton University Press, 1966. 414-427. In the Italian literature, Aluffi Beck Peccoz, R. *La modernizzazione del diritto di famiglia nei paesi arabi*. Milano: Giuffrè, 1990; Abagnara, V. *Il matrimonio nell'Islam*. Naples: Edizioni Scientifiche Italiane, 1996; Abu-Sahlieh, A.A. "*Il diritto di famiglia nel mondo arabo: tradizioni e sfide*". I musulmani nella società europea. Turin: Edizioni della Fondazione Agnelli, 1994.

It is evident that a uniform social model of family will never be found in a multicultural society, since the variation of culture, religion and traditions also varies the "families" and, with them, family relationships between men and women or parents and children, as well as educational and existential choices relating to children and the possible conditions for the breakup of a family.

Cultural specificities, particularly those of the Islamic community, are acquiring legal significance also in terms of personal status and family relationships. This is, in fact, the circle mostly exposed to ethnic-cultural incidence, for reasons as much anthropological-sociological as legal.[11]

Personal status and family law appear to be significantly related to issues concerning multi ethnicity.

The progressive increase in the number of immigrants in Europe has begun to generate significant impact on the structure and functioning of the legal systems of European countries, and in the medium term it will likely imply a change of both.

No more of that comfortable charm of the absoluteness[12], embodied in the image of a legal system based on a national society which is compact, homogeneous and internally undifferentiated, all to be replaced by a diversified society in which is felt a need to assess whether - and to what extent - Western legal systems can give space to the peculiarities of individuals belonging to minority cultures bearers of autonomous values; it is therefore crucial to understand whether the recognition of such cultures can, in some way, put national identity into crisis, undermining the principle of the validity of general rules applicable to all citizens.

Such a transformation requires consequently a change[13] in the approach to the theme in Western legal systems, that are called today not only to take into account these

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[11] Benigni, R. "Identità culturale e regolazione dei rapporti di famiglia tra applicazioni giurisprudenziali e dettami normativi." *Stato, Chiese e pluralismo confessionale* November (2008): 4, available at *www.statoechiese.it*. For a critical approach, see Scaglia, A. "Culture e famiglia: così profonde e così diverse." *Le famiglie senza frontiere.* Ed. Pascuzzi, G. Trento 2006. 149-150; Ioriatti, E. "È auspicabile l'armonizzazione del diritto di famiglia?" *Le famiglie senza frontiere.* Ed. Pascuzzi, G. Quoted. 177 ss.

[12] Bartoli, R. contradictor to Monceri, F. "Multiculturalismo: disincanto o disorientamento del diritto?." *Religione e religioni: prospettive di tutela, tutela delle libertà.* Ed. De Francesco, G.A. and Piemontese, C. and Venafro E. Turin: Giappichelli, 2007. 94.

[13] Miranda, A. "La privatizzazione del diritto di famiglia: il modello di Common Law." *Alambicco del Comparatista II: Matrimonio, Matrimonii.* Ed. Dagnino A. Milan: Giuffrè, 2000. 37.

new structures of personal relationships, but especially to give answers to the requests for recognition and protection coming from the individuals involved in such relationships.

It has been shown that after an initial phase of isolation aimed at finding a job, immigrants arriving in Europe tend to join to their own communities, by ensuring that immigration tends to turn from "individual" to "family and community".

This stabilization of immigrants, resulting in the formation of families and communities, feeds the tendency to re-create the institutions of the communities of origin in a foreign land, to apply both the traditional rules and practices, thus making the foreign community bearer of new and/or traditional legal models.

The legal framework in which the immigrants present in Europe move is, therefore, made of a dual track: one formed by the rules and regulations of the host country and the other formed by the rules and regulations of the country of origin, then an *official law* and an *unofficial law*.

The first dilemma the European judges have to face is reconciling cultural rights with the individual ones, because preserving the former could lead to ignore or even damage the latter.[14]

From these premises, it can be understood how extremely delicate is the task of both theoretical and practical jurists of Western legal systems.

Liberal versions of multiculturalism suggest the need to adopt legal solutions to the recognition and support of minority groups, thus the recognition of cultural or collective rights, which must meet though certain limitations and precautions to protect the freedom of individuals within groups.

On the judicial level, this may mean that the courts, in applying the law, take into account foreign standards, as well as principles and rules of its domestic law to assemble a third concrete norm, new with respect to the rules and principles of the systems considered.[15]

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[14] For this purpose, see feminist doctrine, which claims how the recognition of some typical institutions of Islamic family law within the European legal systems, placed at ensuring respect for the values and traditions of minorities, may on the contrary strengthen discrimination within cultural groups towards weak subjects such as women or children. As it was brilliantly illustrated it is not obvious that the protection and recognition of minority rights can resolve multicultural issues within the European legal systems. Okin, S.M. "Is Multiculturalism bad for women?" *Boston Review* 5 (1997): 22.

[15] Belvisi, F. "Società multiculturale, diritti delle donne e sensibilità per la cultura." *Ragion pratica* 22 (2004): 516.

In this study the issues outlined so far will be addressed by analysing, in short, the role and influence of the Sharia Courts and MATs in the process of circulation of the legal-religious models in the system of reference (paragraphs 2-3-4). It must be kept in mind that these Courts, in exercising the powers recognized by the legal system of the United Kingdom, respond to general questions and decide concrete cases in different fields. They deal with divorce, parent-child relationships, inheritance, duties of wife and husband; but also with torts, loans and contract law. The judges, who can only be male (with some exceptions which will be discussed below paragraph 5), interpret the sacred sources and the doctrine according to various schools of thought in which the Muslim legal science[16] is divided. By applying the Shari'a, Islamic law, they perpetuate the revelation, combining it according to the needs of the time.

As it will be shown, through the activity of the Sharia Courts and Muslim Arbitration Tribunals (MATs), the legal solutions adopted find full citizenship within the national legal system, albeit with certain limits and subject to certain formal and/or substantive conditions (paragraphs 3-4). These institutions, in fact, have had recognition within the legal system as alternative dispute resolution bodies under the Arbitration Act 1996, as it will be explained in paragraphs 2-3.

On the one hand, this approach has allowed the modelling – in large part – of the behaviours of the population after the religious or ethnic background thus following orders that do not respect national boundaries; but on the other hand, it has brought out with greater force and evidence that these behaviours are sometimes discordant or in manifest conflict with the law of the host State.

Immigration inevitably leads to a change in the character of the host society, since immigrants, though ready for the dialogue and the acceptance of the regulations of the country where they have decided to settle down, will never give up their form of cultural life, i.e. their rules.

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[16] The literature on the importance of schools and the various breakdowns is boundless, for an essential idea see Melchert, C. *The Formation of the Sunni Schools of Law.* Leiden: Brill, 1997; Kahn, M.H. *The Schools of Islamic Jurisprudence.* New Delhi: Kitab Bhavan, 1991; Ziadeh, F.J. "Law: Sunni Schools of Law" *The Oxford Encyclopedia of the Modern Islamic Law.* Ed. Esposito, J. New York: Oxford University Press, II, 1995. 456 et seq.; Bearman, P. et al. *The Islamic School of Law.* Cambridge MA: Harvard University Press, 2005; Arabi, O. *Studies in Modern Islamic Law and Jurisprudence.* The Hague: Kluwer, 2001. 18-25; Nurlaelawati, E. *Modernization, Tradition and Identity.* Amsterdam: Amsterdam University Press, 2010. 221-222.

In relation to possible conflicts between the rules of the indigenous community and those of the hosted one, situations may arise in which the conflict can be easily solved through spontaneous adaptation mechanisms on the part of migrant communities. There are cases, however, where the intervention of the state law is essential, both where the incompatibility is immediately identifiable, such as the one between the Islamic institution that allows the unilateral repudiation of women and the principle of equality between spouses and when this difference emerges only at the time of the application of foreign rules in specific contexts, such as in the case of the veil, Islamic ritual rule to be followed in public places.

This is even more true when considering personal rights and family law, especially with regard to profound institutions and characters of the personal status of the individuals, who are part of a certain community in which the rule of law coincides with the religious, traditional and/or philosophical one, so these instruments (religion, philosophy and tradition) become models of social control and organization of the group.[17]

Often the "fading" of dogmatic categories is followed by problems that arise from the discrepancy between law and reality, due to the development of unofficial rules, parallel to the official law. This demonstrates the fact that the immigrants live in what Menski calls the second phase of adaptation, in which operates a new hybrid law, a form of legal pluralism in action.[18]

Immigrants, at this stage, understand that the domestic system is the dominant one, but do not wish to abandon their traditions.

In this way, foreigners are becoming – once again in Menski's words – «*skilled legal navigators of pluralism, rather than assimilated monoculturalists*».[19]

So in the historic centre of Palermo, for example, live families made of a husband, many wives and children born from the union of that man with his various wives, one of whom is his wife for the Italian civil law (or even none of those women). Children often are recognized only by the father or by the father and that wife whose marriage has civil

[17] On the classification into legal families based on the distinction between *rule of law*, *rule of religion/tradition* and *rule of politics*, conceived as instruments of social control, see Mattei, U. and Monateri, P.G., *Introduzione breve al diritto comparato.* Padova: Cedam, 1997. 51-79.

[18] Menski, W. "Law, religion and culture in multicultural Britain." *Law and religion in multicultural societies.* Copenaghen: DJOF Publishing, 2008. 83 et seq.; Id. *Comparative law in a Global Context: The legal Systems of Asia and Africa.* Cambridge: Cambridge University Press, 2006. 301.

[19] Menski, W. Quoted. 302.

effects in Italy, to guarantee them access to family and social welfare services, but they are fully aware of the identity of the natural mother, and for them and for the rest of their family as well as the entire Islamic community is their mother "by fact and law".

The UK deal with Sharia Courts on family law since decades. Such institutions already exist in other European countries and in particular in Italy, but have not merged as a phenomenon of public relevance. Sharia Courts are organized in the mosques, in private flats and apartment, but their work, as dispute solvers, affects every day life of Muslim citizens in western societies. The way the Uk manage with recognition and integration of such realities since many years is interesting for other legal systems, who are going to afford the same critical issue, trying to find out institutional tools to take on this social and cultural challenges.

2. SHARIA COURTS AND MATS AS ARCHITECTURAL DESIGNERS OF THE *DESH PARDESH*

The Islamic legal system can be ascribed to the *rule of religion* model, where there is a substantial coincidence between the religious rules and the law norms, which are substantiated in both Sharia and its sources (Quran, Sunna, Umma, Igma, Qiyas…).[20]

Sharia is the way shown by God that believers are called to follow. It consists of all the precepts and rules of conduct, which the good Muslim must follow and on the basis of which the Muslims are judged both by the members of their community and by God. The Shariah system is based on the precepts revealed by God to men in order to discipline their behaviour.[21]

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[20] For a brief overview of the sources of Islamic law, Kamali, M.AA. "Source, Nature and Objectives of Sharia." *The Islamic Quarterly* 33 (1989): 223; Coulson, N.J. *A history of Islamic Law.* Edinburgh: Edinburgh University Press. 1964; Kusha, H.R. *The Sacred Law of Islam.* Aldershot: Dartmouth Ashgate, 2002. 13-50; Rehman, F. *Islam.* Chicago:University of Chicago Press, 1979. 30-42; Burtonm, J. *The Sources of Islamic Law. Islamic Theories of Abrogation.* Edinburgh: Edinburgh University Press, 1990. 1-14; Glenn H.P., *Legal Traditions of the World*. Oxford: Oxford University Press, 2010. 182-186. In the Italian literature, see Gambaro, A. and Sacco, R. *Sistemi Giuridici Comparati.* Turin: Utet, 1996. 464 et seq.; Sami, A. *Il diritto islamico: Fondamenti, Fonti, Istituzioni.* Rome: Carocci, 2010; Vercellin, G. *Istituzioni di diritto musulmano.* Turin: Utet, 2002.

[21] There is a vast literature on the concepts of religion and law revealed. For an historical analysis, see Coulson, N.J. *A history of Islamic law*. Edinburgh: Edinburgh University Press, 1964; Id., "Islamic Law." *An introduction to legal systems*. Ed. Derrett, J.D.M. London: Sweet & Maxwell, 1968; Rodison, M. *Muhammad*. New York: New Press, 2002. 73 et seq.; Rothven, M. *Islam in the world*. London: Penguin, 1984. 85-87; Roberts, J. *History of the world* London: Penguin, 1995. 317; Amstrong, K.

This inherent and profound feature, which constitutes the very essence of the Islamic legal tradition, along with many other elements[22], must be the starting point for the rest of this analysis, which aims at focusing its attention on the way religious law, through the Sharia Courts, competes with the State and secular law. It is a model of parallel and concurrent jurisdiction, based on the fusion between religious and legal rule, in which the judge, the arbitrator or mediator all use concepts, categories and precepts derived from the law of God, which is at the same time a guide for religious and social behaviours, for both the spiritual and temporal life. By following adjudicative or conciliatory models, such institutions implement a form of social control based on the rule of religion, which has therefore a place in the Western context that, for centuries, has known the separation between Church and State, between legal rule and religious rule, since it is based on the principle of laity, understood in two different accepted meanings[23], which will be described very briefly.

Islam. A short history. New York: Modern Library, 2000. 3-23; Hallaq, W.B. *Shari'a: theory, practice, transformation*. Cambridge: Cambridge University Press, 2005; Kamali, M.H., *Principles of Islamic jurisprudence.* Cambridge: Islamic Text Society, 2003. 20 refers to the gradual nature of revelation; Weiss, B.G. *The spirit of Islamic law.* Athens: University of Georgia Press, 1998. 25-30. In the French literature, Arnaldez, R., "La loi musulmane à la lumére des science coraniques." *Arch. Philos. Dr.* (1993): 80; Charles, R. *Le droit musulman*. Paris: Paris University Press, 1965. 7 et seq.. In the Italian literature, Gambaro, A. and Sacco, R. Quoted above. Turin: Utet 1996. 461 et seq. and the bibliography cited therein.

[22] On the complexity of the items, information, attitudes and concepts, produced by history and coming from the past and, therefore, present, that make a legal tradition, see the metaphor proposed by Glenn by recourse to the figure of the *bran-tub*, Glenn, H.P. *Legal Traditions of the World*. Quoted. 2010, 13 et seq.; on the historicity of the tradition and the importance of the past, see also Simpson, A.W.B. *Invitation to law*. Oxford: Blackwell, 1988. 23; on the idea of tradition as something passing almost physically from one person to another and from one generation to another, following the idea of the Latin *traditio brevi manu*, see Gadamer, H.G., *Truth and Method*. New York: Crossroard, 1988. 131; as set of ideas aware and transmitted in time, see Phillips, M.S. and Schochet, G. *Questions of tradition.* Toronto: University of Toronto Press, 2004. XI; see also the concept proposed by Merrymen as explained above.

[23] For a brilliant and exhaustive analysis of the different meanings of *rule of law* and laity in comparative Italian literature see Moccia, L. "Glossario per uno studio della common law." *I valori giuridici della civiltà occidentale.* Milan: Giuffrè, 1981. 458, in the Italian translation of Stein, P. and Shand, J. Quoted. Moccia refers, among others, to the studies of Dicey, A.V. *Introduction to the study of the Constitution*. Ed. Wade, E.C.S. London, IX th, 1956. 183 et seq. Dicey identifies three meanings properly attributable to the expression *rule of law*: firstly as «the guarantee of freedom of the single individual and its goods (…)», in this sense «*rule of law* is opposed to any system of government based on the exercise by the authority - whatever it is – of wide, arbitrary or discretionary restrictive powers»; the second meaning is based on the idea of «equal subjection of all, both private and public authorities, to the common law of the realm, applied by the ordinary courts of justice»; the third is based on the fact that in the English experience «the general principles of the Constitution (such as

The first is attributable to the concept of rule of law, as used in modern systemology, following which the systems governed by the rule of law have experienced two important divorces: the first between law and politics, so that the time for political decisions or government ones (macro-choices) is separated from that of the legal technical choices (micro-choices); the second between law and tradition or religion, so that the rule of law and the jurist need not a sacred or traditional legitimacy, the one to be considered binding and the other to have the authority needed to exercise its functions.[24]

In the second accepted meaning of the principle of laity[25], a "truly lay" State can not impose the dictates of a particular moral, albeit largely dominant, over any citizen.

The lay State does not own any of the possible conceptions of good or of "good life", but it creates the conditions and sets the rules on the basis of which all these ideas can grow and communicate with each other. The lay State, in short, builds the "neutral" field where individuals, agencies, associations, etc., can freely interact. In fact, to build this "empty space" is not itself a neutral choice, because it is an evaluatively connoted option in favour of the fundamental principles of freedom of conscience, autonomy and individual responsibility, which are embodied in both the formal and material Constitutions of many States[26]. This choice can therefore be characterized as "neutral" only under this specific profile, and because none of the ethical concepts or visions of the world that are available in that context is privileged; but it is not "intrinsically neutral", because it is founded on the values of freedom and autonomy of the person which are also guaranteed by the Constitutions of many States and represent a common heritage of the Western legal tradition.[27]

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the right to personal freedom, or the right to public assembly) are (…) the result of judicial decisions determining the rights of private individuals in the single particular cases brought before the courts; while in many foreign legal systems the protection (whatever it may be) given to individual rights results, or at least seems to result, from the general principles of the constitution».

[24] Mattei, U. and Monateri, P.G. Quoted. 66-70; Gambaro, A. "Il successo del giurista." *Foro it.* V (1983): 85-93.

[25] For such interpretation of the principle of laity, see Villa, V. "Alcune osservazioni sulla nozione di laicità." *Quaderni laici. Supplemento. Le due Italie* (2010): 183-193.

[26] See Marini, G. "La giuridificazione della persona. Ideologie e tecniche dei diritti della personalità." *Rivista di diritto civile* I (2006): 359 et seq.; Resta, G. *Autonomia privata e diritti della personalità*. Naples: Edizioni Scientifiche Italianei, 2005.

[27] On the point, see Mill Colorni, F. "Multiculturalismo contro laicità." *Supplemento a Micromega. Per una riscossa laica* (2007): 56-68.

Also in the field of family law it is not therefore admissible for a lay State to impose by law a certain moral-religious model of the family, even if it is followed by the large majority.[28]

In the UK, the opportunity to instruct an independent agency to keep watch on the work of the Sharia Councils, the British Islamic courts, has been variously discussed. In particular, the former Interior Minister and current Prime Minister, Theresa May, has repeatedly denounced cases of Muslim divorces that leave the woman on the streets and those of domestic violence encouraged by the judges of the Sharia, because the husband has the right to chastise his wife. The approach does not seem to question the freedom of Muslims to organize themselves according to their faith, but is intended to prevent religious justice from turning into a vehicle for radicalism, barricading itself in institutions alien to the "British values".

On the other hand the response of the Muslim Council of Britain, the most representative Islamic body, intended to remember that institutions such as the Sharia Councils are needed in a plural society, echoing the doctrine taught in a famous speech held in 2008 by the then Archbishop of Canterbury, Rowan Williams.

In particular the Muslim community, through the Muslim Council of Britain, recalled a debate, now not so recent, dating back to 1970, when the Islamic Organizations of the United Kingdom and Ireland (UMO) organized several meetings and presented a common project which aimed at the creation of family law rules specifically applicable to the British-Muslim citizens.[29]

In 1975 in Birmingham, during a conference organized by the UMO, scholars of various nationalities, religious and cultural backgrounds were confronted on the role the

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[28] Whatever the family models may be in a given social context, the task of a lay State is to ensure family pluralism. This often creates moments of social and political tension, ideological clashes between the components that are part of the social structure that the State has the function of governing, setting the stage for the coexistence of such various models within the same frame of reference: see Clément, C. "La place du modèle familial dans un systéme pluralist." *Réflecxions sur le pluralisme familial.* Ed. Roy, O. Paris: Presses Universitaires the Paris Ouest, 2010. 123 et seq.; and Robin, O. S. "Le regroupment familial confronté au pluralisme familial." *Réflecxions sur le pluralisme familial.* Ed. Roy, O. Quoted. 167-182; Coussirat Coustière, V., "La notion de famille dans les jurisprudences de la Commission et de la Cour européenne des droit de l'homme." *Internationalisation des droit de l'homme et évolution du droit de la famille*. AA. VV. Paris: Université de Lille II, 1996; Id., "Famille et Convention européenne des droit de l'homme." *Protection de droit de l'homme: la perspective européenne: Mélange á la mémoire de Rolv Ryssdal*. AA. VV. Köln-Berlin-Bonn-München, 2000. 281 et seq.; Bucher, A., "La famille en droit international privé." *Recueil des Cours*. t. 283 (2000) 9 et seq.

[29] See Pearl, D and Menski, W. *Muslim Family Law.* London: Sweet & Maxwell, 1998. 56.

Sharia should have had within this corpus of British family law rules. On three separate occasions, in 1977, in 1983 and 1996, the Islamic Community, through the UMO, had the opportunity of an institutional confrontation inside of the House of Lords to discuss the possible application of Islamic family law in Britain but never got the desired result.

In particular, the Islamic Sharia Councils (ISC) began to operate in the UK in the second half of the XX century, as advisory bodies, to which the Muslims could turn "in a foreign land" to obtain advices, opinions, to straighten out interpretative doubts on Sharia, on the correct way to behave for a good Muslim, on the exact scope of a Sharia precept. This becomes very important for a Muslim living in an "alien" context, such as that of the Western communities of those States based on the rule of law, to preserve identity and tradition as well as not to leave their home communities because of the fading of the rules and dogmatic categories due to the coexistence with and within the "alien" system.

Today the Islamic Courts surveyed in the UK are about 100.[30] The majority of them were established – *unofficially* – inside mosques or private dwelling-houses[31], set up by small, medium or large communities of migrants, who shared ethnicity, geographical origin or membership of one of the Islamic schools.

The ISC answered after hearing the opinion of the Imam[32] of the mosque of reference, i.e. the religious leader, the head of the Islamic community, which holds the mosque.[33]

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[30] See some of the statistical data incorporated in a legal research in Zee, M. "Five options for the relationship between the State and Sharia Councils." *Journal of religion and society* 16 (2014) 2-14; in the Italian literature, see Marotta, A. "Il diritto musulmano in Occidente: Corti islamiche nel confronto tra democrazia e shari'a." *Heliopolis, Culture, Civiltà Politica* 2 (2013): 193.

[31] A phenomenon that occurs at present in many European and Italian cities. There are, however, no reliable estimates, since there are no official data and it is a casual and hardly assessable phenomenon.

[32] On the different figures, of the Imam, the qadi and the mufti and the derivation of their respective powers and authorities, see Doi, A.R.I. *Shari'a: The Islamic law*. London: Ta Ha Publisher, 1984. 11-13; Schacht, J. *An introduction to Islamic law.* Oxford: Claredon Press, 1964. 188-198; Khadduri, M. *The Islamic conception of justice.* Baltimore: Johns Hopkins University Press, 1984. 145-146. In the Italian literature, on the role of the Imam and of the qadì, see Gambaro, A. and Sacco, R. Quoted. 468; David, R. and Jauffret Spinosi, C. *I grandi sistemi giuridici comparati*, Italian translation by Sacco, R., Padova: Cedam, 2004. 381 et seq.

[33] The functioning of ISC – before the adoption of the *Arbitration Act* 1996, which as we shall see shortly is an important watershed in the relations between the parallel systems (Islamic and English) – is described widely and in detail by Griffith –Jones, R. "The unavoidable adoption of Shari'a law –

In 2007 Shaykh Faizul Siqquidi, Son of the Sheik Faizul Aqtab Siddiqui, promoter of the "Sufi Network"[34] (a project aiming at establishing and maintaining close relationships within the British Muslim community) founded in London the first MAT, an arbitration body, which rules in accordance with the Islamic Shariah law.

Shaykh Faizul Siqquidi, admitted to the profession of barrister in England, a true *skilled navigator of pluralism* of second generation in Menski's vision, born, raised and educated in the UK, started offering within the MATs that gradually raising on British territory, several services: practical courses and practical legal professions in the field of Islamic family law, courses on ADR systems, but also pronunciations of true judicial nature itself, for example, in the ascertainment of the real will of the spouses, attesting that the manifestation of consent *ad nuptiam* was given without violence and in accordance with the rules of English law.

The reference is not accidental, given that an important speech of Lord Chief Justice Phillips, entitled "*Equality before the law*" and pronounced at the London Muslim Centre on July 3, 2008[35] had been focused on this matter. In this speech, the Lord Chief Justice expressly and warmly supported the hypothesis that the Shariah rules on family law could find space within the English legal system through the use of ADR systems for the settlement of disputes. This is in compliance with the principles of the rule of law and of laity, understood as the best guarantee of respect for cultural and religious diversity. By calling to adopt national and international sources of law which enshrine the prohibition of racial and religious discrimination, admitted the existence and legitimacy of parallel legal systems.

According to this setting, the eminently negotiating nature of the mediating agreement or the adjudicative function of the arbitration award maintain the dispute, its solution and the content of the agreement or of the award within the private sphere,

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the generation of a media storm." *Islam and English law, rights, responsibilities and the place of Shari'a*. Ed. Griffith-Jones, R. Cambridge: Cambridge University Press, 2013. 14 et seq.

[34] To better know the "Sufi Network" project and its creator, as well as His many initiatives and activities see *http://www.hijazcollege.com/the-principle.php.*

[35] See *Equality Before the Law*. Speech by Lord Phillips, Lord Chief Justice, East London Muslim Center, 3rd July, 2008, available at *www.judiciary.gov.uk/media/speeches/2008/speech-lord-phillips-lcj-03072008*; Phillips, N. "Equal before the law." *Islam and English Law*. Ed. Griffith-Jones, R. Quoted. 286-293.

with the possibility to ask for its *law enforcement*, through the involvement of States Courts[36] and in compliance with, however, some fundamental limitations, so

it is possible in this country for those who are entering into a contractual agreement to agree that the agreement shall be governed by a law other than English law. Those who, in this country, are in dispute as to their respective rights are free to subject that dispute to the mediation of a chosen person, or to agree that the dispute shall be resolved by a chosen arbitrator or arbitrators. There is no reason why principles of Sharia Law, or any other religious code should not be the basis for mediation or other forms of Alternative Dispute Resolution. It must be recognised, however, that any sanctions for a failure to comply with the agreed terms of the mediation would be drawn from the laws of England and Wales. So far as aspects of matrimonial law are concerned, there is a limited precedent for English law to recognise aspects of religious law, although when it comes to divorce this can only be effected in accordance with the civil law of this country.

The debate this speech has triggered is certainly peculiar: it specifically concerns Islam and the multi-religious United Kingdom. However, it reports an issue of global reach.[37]

The propagation of models between Islamic law and other rights is bidirectional, it often occurs within the "constitutional boundaries" of a host State and, at the same time, it can happen that the identification of the Umma becomes less accurate as and when the laws of the host State replace the Shariah rules in varying degrees.

In States where Sharia is not the law of the territory it is possible to identify two different ways to pose the relationship between State law and Islamic law: the first guarantees the Islamic law the formal status of Muslim law; the second, dominant in the Western States, is characterized by the exclusivity of the State sources of law and by the denial of personal statuses. The approach varies depending on the system of the sources of law and on how the legal formant[38] weights on the structure of the single system. The non State law can be recognized, but there is a certain resistance to acknowledge the religious right. In fact, though, compared to private law, it has been observed that this is

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[36] See Anello, G. "'Fratture culturali' e 'terapie giuridiche'. Giurisdizioni religiose e diritti umani in una prospettiva interculturale." *Diritti umani e diritto internazionale* 5 (2001): 149.

[37] Marotta, A. "Il diritto musulmano in occidente: Corti islamiche nel confronto tra democrazia e shari'a." *Heliopolis. Culture Civiltà Politica* 2 (2013): 193.

[38] On the concepts of formant, see the studies by Rodolfo Sacco. Here, above all, see Sacco, R. "Legal formants: A dynamic approach to comparative law." *The American Journal of Comparative Law* II 39 (1991): 343-401; Id., voce "Circolazione e mutazione dei modelli giuridici." *Digesto civ*. II, Turin:Utet. 365 et seq.; Id., voce "Formante." *Digesto civ*. IV, Turin: Utet. 438 et seq.

regarded as a device open to new models, even religious (Islamic) ones, through the tools of the contract and of private autonomy.[39]

The dialectic relationship emerges also in the position expressed by the Archbishop of Canterbury and Lord Chief Justice, Rowan Williams, on February 7, 2008 at Temple Church, when he inaugurated a season of public discussions entitled *Islam and English Law*, referring to concepts such as "*joint governance*" and "*transformative accommodation*", already expressed by a certain doctrine.[40]

In particular, according to this theory, each single individual would be free to choose the jurisdiction to which submit disputes and to adjudge its own rights, *«so that power holders are forced to compete for the loyalty of their shared constituents»*.[41] Therefore, in the face of tensions between the Islamic community and State legal system, the solution offered is freedom, left to individuals in terms of *choice of forum* and *choice of law*.[42] This seems perfectly consistent with the idea of *«equality before the law»*[43] expressed by Lord Chief Justice Phillips.

The theme is therefore the clash between the *law of the land (one for all)* and the rules of the Muslim personal status, applied through the channels of private autonomy, through contracts and obligations or through solutions offered by the Sharia Courts which act as mediators or arbitrators in relations between private individuals. This was "simpler" in the United Kingdom and in other common law systems where, through the principle of *reasonable accommodation*, religious organizations under the ADR systems were involved.

So the *reasonable accommodation* becomes the legal argument on which to base the system of arbitration-religious Courts and a form of legal pluralism[44] that enhances

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[39] See Glenn, H.P. *Legal Tradition of the World*. Quoted. 2010, 191 et seq.

[40] Schachar, V.A. "Privatizing diversity: a cautionary tale from religious arbitration in family law." *Theoretical Inquiries in Law* 9 (2008): 572-607.

[41] See Williams, R. *Archbishop's Lecture, Civil and Religious Law in England: a religious perspective*. February 7, 2008, available at *www.rowanwilliams.archbishopofcanterbury.org/articles.php/1137*.

[42] Marotta, A. "Il diritto musulmano in occidente: Corti islamiche nel confronto tra democrazia e shari'a." Quoted: 194-195.

[43] Reference is made to the concept of substantial equality, for which identical situations must be treated equally and different situations should be treated in a different way, exactly to guarantee equality, as a result corrective intervention of law.

[44] A *weak form of legal pluralism*, according to Reiss, M. "Note: The materialization of legal pluralism in Britain: Why Shari'a Council decision should be non-binding." *Arizona Journal of International and Comparative Law* 26 (2009): 761-762, who refers to new forms of justice and makes it clear that, in order to rule out the existence of a concurrent jurisdiction, the minimum guarantee should be the

respect for religious and cultural diversity, and enables individuals to fully practice their faith, even when the legal rule coincides with the religious precept, but respecting the constitutional framework and the founding principles of the State legal system.[45]

Therefore, as mentioned above, the Islamic communities within States in the western area try to maintain their culture and protect their tradition and identity, building a "home away from home" a "*desh pardesh*", through the application of Muslim law, seeking solutions for the resolution of conflicts within the Islamic community[46] or, however, *«overarching meta-norm approximating to the rule of law».*[47]

Yet, it should be noted that there have been criticism to an approach deemed too "accommodative", especially from a certain doctrine, according to which *Sharia* can not become a form of jurisdiction in England nor in Wales and any matter or dispute, especially in the field of family law, must be treated and judged by a judge who applies the *common law of England and Wales*.[48] An absolute triumph of the *lex loci* and of the State sovereignty, as well as of the idea of a single *law of the land*, through the exercise of judicial power. [49]

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non-binding nature of the arbitration, of the decision and/or of the mediating agreement for its parties. The Author neglects, however, a cryptotype: the authority-authoritativeness of those in power to decide, adjudicate or mediate the dispute, or other cultural factors can, in itself, determine the sentiment of obligation of conduct regardless of the choice of the State legal system to ensure the direct enforceability of the decisions of the *Councils*.

45 For the identification of the "restricted" matters in which these spaces would be permitted, in the light of the indications of the Archbishop of Canterbury and of certain Authors, see for all Hedge, I. "Islamic finance, alternative dispute resolution and family law: developments toward legal pluralism?." *Islamic and English Law*. Ed. Griffith-Jones R. Quoted. 117.

46 Rohe, M. "Reasons for the application of Shari'a in the West." *Applying Shari'a in the West: Facts. Fears and Future of Islamic rules on family relations in the west.* Ed. Berger, M.S. Leiden: Leiden University Press, 2013. 43-44.

47 So says McGoldrick, D. "Accommodating Muslims in Europe: From adopting sharia law to religiously based opt outs from generally applicable laws." *Human Rights Law Review* 9 (2009): 605. The author believes that this is because to live according to the Sharia is not simply a matter of adhering to its precepts, but also and above all it is a psychological and behavioral individual attitude.

48 See Griffith-Jones, R. "The unavoidable adoption of Shari'a law – the generation of a media storm." Quoted. 35, which reports the position expressed by Bridget Prentice, Undersecretary of the Ministry of Justice in 2008: *«Shari'a law has no jurisdiction in England and Wales and there's no intention to change this position. Similarly, we do not accommodate any other religious legal system in this country's laws».*

49 On the (ir)remediable dichotomy of the parallel systems that never meet, see MacEoin, D.G. and Green, D. *Sharia law or "On law for all"* and Addison, N. *Sharia Tribunals in Britain – Mediators or Arbitrators?* London: Civitas: Institute for the Study of Civil Society 2009; both available on line *www.civitas.org.uk/pdf/SHariaLawOrOneForAll.pdf.*

To tell the truth these most intransigent and conservative positions are partly justified by the need to safeguard human rights to the extent that the *reasonable accommodation* is likely to endanger the rights of individuals, especially when the choice of resorting to religious justice or, in upstream, the choice to profess a certain religion is not an expression of free consent.

According to the interpretation of some of the Sharia schools, recourse to secular justice is not recommended if not even prohibited. The rejection of the Sharia jurisdiction by a Muslim is an act of dissent from his community, a criticism to a shared system, which would lead to the marginalization and to be labeled as *"western"* or "*kafir*".[50] The hypothesis of an appeal against the arbitration award before the competent common law court would be even more unlikely and, in any case, rare because not all immigrants belonging to the Muslim community are (as Menski described them) *skilled navigators of pluralism*, indeed sometimes they have language difficulties and do not know English law and the forms of protection it provides in relation to certain rights. [51]

This applies to both men and women.[52] Therefore, the voluntary nature of the use of these alternative forms of jurisdiction would be mere declamation, which leads to

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[50] Kafir is an Arabic word that indicates, through a wide variety of shades, the person who does not believe in the God of Islam, usually translated as "unbeliever", "non-religious" or "infidel." The word comes from the root <K-F-R> which has 482 branches in the Qur'an, starting with the term *kufr* that indicates anything that is unacceptable or offensive to Allāh. From *Kafir* stem also the term *Kaffir*, used by European settlers in South Africa to address generically black people, and the ancient name (Kafiristan) of the Afghanistan region of Nurestan. See *http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100044658*; and *http://www.treccani.it/enciclopedia/cafri_(Enciclopedia-Italiana)/*.

[51] In particular, this applies more to women than to men according to Ali, S.S. "Authority and Authenticity: Sharia Councils, Muslim woman's rights, and the English Courts." *Child and Family Law Quarterly* 25 (2013): 113. The Author identifies a number of elements that "*pressurizes women to use such forums to obtain 'acceptance' from their families and communities".*

[52] Although, as mentioned in the previous note, the gender issue is strong, since in the light of the rights and the position that Sharia recognizes the woman, the interest in appealing to the secular justice in the first instance and on appeal is certainly "more feminine". See some cases, that here, for reasons of space, can not be analysed, treated by Namazie, N. "Sharia Law in Britain: A treat to one law for all and equal rights." *One law for all*. June 2010, on line at *www.onelawforall.org.uk/new-report-sharia-law-in-britain-a threat-to-one-law.for.all-and-equal-rights*. The report covers cases dealt by the *Sharia Council* in London, where the judge (man), in a case of domestic violence, stated that for the wife not to denounce her husband and, above all, not to take refuge in an English institute ("it's a poor choice ... you must not go against Islam") was the appropriate conduct for the applicant. In other cases of domestic violence, where women denounced serious abuse, the Sharia courts have held to condemn the husbands to take classes for anger management and obtained that women withdraw their

violations of the rights of access to justice, to *due process of law* and to the *right to day in court* and other fundamental rights in the legal tradition of *common law*.

These themes rose once again in both the public debate and at the institutional level through *"The Equality Bill"* of 2011 and the *"Arbitration and Mediation Service Equality Bill"* of 2012[53], which aimed at regulating religious arbitration tribunals with the objectives of ensuring the principle of equality and to limit the powers of these Courts, expressly excluding the field of criminal law.[54] At this predicament, Baroness Caroline Cox, a member of the House of Lords, showed in a parliamentary report that the growing influence of Shariah law puts at risk both the principle of equality and the prohibition of discrimination between British citizens before the State law, introducing rules and principles that are not only foreign to the common law, but in sharp contrast with it: the imposition of husbands in child marriage, the right of the husband to divorce and automatically get custody of the children, the right of sons to succeed *jure hereditatis* in a larger share than daughters.

The legal system would also abdicate the jurisdiction or at least accept a concurrent jurisdiction, as the Sharia Courts do not operate only *officially* in matters that may be subject to arbitration (civil and commercial issues), but also *unofficially* on the subject of domestic violence, abuse, negligently caused serious personal injury and other types of criminal law cases.

3. PROCEDURAL AND SUBSTANTIAL GUARANTEES IN THE RELIGIOUS ADJUDICATIVE AND CONCILIATORY MODEL.

As mentioned above, it was the Arbitration Act of 1996 at the legislative level, on the one hand, and the activity of Shaykh Faizul Siqquidi's MAT, secondly, to kick off the transformation of the Sharia Courts in Arbitral Tribunals, institutionally framed within the English legal order, on the model of the first MAT that was established in Birmingham in 1982. More precisely, after the statements of Lord Chief Justice Phillips and Lord Chief Justice Williams of 2008, many Sharia Courts have formed within them proper arbitration tribunals, competent to issue "orthodox" decisions (awards)

accusation. This doctrine holds that the Shariah courts, far from representing social cohesion factors, foster social fragmentation instead.

[53] Both texts are available on line at *www.publications.parliament.uk/pa/bills/lbill/2013-2014/0020/14020.pdf*.

[54] See Rebecca, E.M. "The Equality bill and sharia arbitration in the UK." *Boston College International and Comparative Law Review* 36 (2006): 255.

concerning family law and inheritance, divorce, custody of children, civil and commercial law in general, with the limit of the inalienable rights and certain intangible statuses.

In particular, *section* 46 of the *Arbitration Act* entrusts arbitral Tribunals with the power to decide disputes devolved to them by the parties *«a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal»*[55]. This, however, respecting the typical procedural rules of English law (right to a hearing of the parties, rules of evidence, fact and enforceability of the award in respect of public order and law, appellability of the award before the competent common law court)[56] and some crucial standards[57] – now codified –, namely the respect for the principles enshrined in the Human Rights Act 1998 (HRA), among which the ban on sex discrimination and the protection of women, as well as the right to access to justice as a right to appeal to a judicial court are particularly relevant because of the *legal irritants*[58] stemming from the encounter-clash between the different cultural models (Islamic and common law).

From a technical legal point of view, the HRA 1998, section 6 (3) provides that all public authorities, including courts and tribunals, must act in accordance with the European Convention on Human Rights. The relevant interpretive node is whether the expression '*public authorities*' also includes "*court or tribunal*" or at least "e*very person exercising functions of a public nature*", even arbitrators. Part of the doctrine believes it can conclude in the affirmative sense, since, according to the same HRA, *section* 21 (1), the term "*tribunal*" shall mean an authority in front of which legal process can take place, so

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[55] The text is available on line at *www.legislation.gov.uk/ukpga/1996/23/contents*.

[56] See the *Procedural rules of Muslim Arbitration Tribunal*, available at *www.matribunal.com/proceduralrules*.

[57] Marotta, A. "Il diritto musulmano in occidente: Corti islamiche nel confronto tra democrazia e shari'a." Quoted: 198, defines them as essential elements. These are, moreover, expressly provided for within the *Procedural rules of Muslim Arbitration Tribunal*, sections 1-2-22-23, available at *www.matribunal.com/proceduralrules*.

[58] On the concept of *legal irritant*, coined when dealing with the circulation of models in contract law, but later used in various areas of law, see Teubner, G. "Legal irritants: good faith in British law or how unifying law in ends up." *Modern Law Review* 16 I (1998): 11 et seq., where it is shown how, as a result of a legal transplantation of a model from one system to another, an active reaction, both direct or indirect, of "irritation" is possible, which may be more or less deep and affect the outcome of the legal transplant in auspicious or inauspicious manner or with the emergence of a model, so much deviated from the original, to the point of becoming original.

despite the temporary nature of their authority, the arbitrator or the board are responsible for the legal proceeding.[59]

Sharia Courts and MATs have by now competencies of various nature: the first more conciliatory-mediating of transformative-performative type concerning family law, reconciliation after divorce, recognition of divorce certificates; the seconds with adjudicative-arbitration functions in commercial transactions, Islamic finance; both of advisory nature, when providing *pro-veritate* advice to public entities (public administrations and *common law* Courts) and to individuals on issues of interpretation of Islamic law.

In fact, it is not always easy to distinguish functions and competencies, as the role of mediator or arbitrator shall be done by the same persons.

Within the Sharia Courts mediation often results in an act by which the parties adhere to the proposal of the mediator, whose suggestion/decision they accept, depending on how the intervention of the mediator (often the *imam* or his representative or the *qadì*) appears performative, given its authority and authoritativeness over the community. There is, in fact, no form of control over the appointment of judges-mediators, nor a mechanism of selection and monitoring of their work, as they are chosen by co-optation.[60] No legal representation (advisors) is required for the parties, in fact it is often specifically not recommended. There is no system of registration of the mediation agreements-decisions.

According to some scholars, these and other factors indicate that also the Sharia Courts - like the MATs, which exercise the functions of arbitration "under the umbrella" of the Arbitration Act and in compliance with the procedural rules, referred to below - have adjudicative functions, escaping to the lawfulness provided during the enforcement of the award phase (approval and enforceability), but also and above all by exerting a power similar to the jurisdictional one. It is a speedy trial, which enters into the merits of the conflict, in which the judge decides in accordance with the Sharia rules. The decision is binding upon the parties and immediately enforceable. The Imam or his

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[59] On this matter, see Passanante, L. "Il problema della natura del lodo alla luce dell'esperienza inglese." *Rivista di diritto e procedura civile* 4 (2004): 1409 et seq.

[60] For the distinction between the role of Imam, qadì and muftì, see Glenn, H.P. *Legal Traditions of the World.* Quoted. 2010. 186-190. On the importance of roles and professions in singling out the deep and identitarian characteristics of a legal tradition see again Glenn, H.P. "Professional structures and professional ethics" *McGill Law Journal* 35 (1990): 424.

delegates, in fact, decide the dispute between the parties and perform a function of social pacification in the community, and this increases their authority-authoritativeness. They, however, almost always maintain contact with the Countries of origin and with the leaders of Sharia schools they belong to ensure a certain degree of uniformity in the interpretation and application of the rules.[61]

In Islamic culture these authorities are entrusted with activities of public interest, because they act to preserve, protect and safeguard the faithful who live on a "non-Muslim territory" and represent a moment of intersection between the Muslim community and the State legal system. This emerges with reference to their work carried out in terms of offering advice to Muslim British citizens or residence permit holders, who intend to apply to the British institutions to have access to certain services, such as welfare, or for the request of registration of religious marriages.[62]

Furthermore, these organizations are engaged in acts, which have legal effect within the reference community, that in certain matters *superiores non recognoscens*. In the sense that for the parties and for the authority issuing the measure the recognition of civil effects according to the State legal system is absolutely indifferent.

This applies, for example, for the cognizance to release *tafriq*, i.e. divorce certificates for the sole Islamic marriage (*nikha*); or with reference to the outcome of the long and complex conciliation procedure in case of *talaq* (repudiation).[63]

The authority and cognizance of the members of the Sharia Courts, in the form of MATs or not, are both directly derived by the Imam and thus, as mentioned, are first of all of religious nature. Therefore, in the settlement of disputes concerning the dissolution of marriage, divorce or repudiation, the Judges-Arbitrators-Mediators take account of Sharia and traditional rules applicable for the parties, but also of the legal implications that the decision could have in the world of English law, in accordance with the

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[61] On the overlapping of the conciliatory-mediating and adjudicative functions of Sharia Courts and on the negative consequences of such setting, see Addison, N. *Sharia Tribunal in Britain. Mediators or Arbitrators?*. Quoted. In the Italian literature, Marotta, A. "Il diritto musulmano in occidente: Corti islamiche nel confronto tra democrazia e shari'a." Quoted: 199.

[62] See Edge, I. *Developments toward legal pluralism*. Quoted. 127.

[63] The rules of procedure concerning *talaq* (and not only) are contained in the statute of the *Muslim Arbitration Tribunal "The gateway to Islamic and English legal services"*, available at *www.matribunal.com*; and more in *sections* 1-2 of the *Procedural rules of Muslim Arbitration Tribunal*, available also at *www.matribunal.com/proceduralrules*.

Arbitration Act, in particular the enforceability of the arbitration award, that is the decision taken within the MAT.

Therefore, MATs, on the one hand, replace the State jurisdiction with regard to the way in which they are perceived by the members of its related community of reference and, secondly, compete in the market with other organizations providing ADR services and technical-legal consultancy.[64]

Yet part of the doctrine, in denouncing the arbitrary, discriminatory and coercive nature of Sharia Councils, notes that these institutions are not performing the functions of mediators nor those of arbitrators, but their core business consists of the requests for divorce by Islamic women. In particular, 95% of the cases (100 per year for single Council) concerns "divorce agreements." Given that mediation and arbitration are forms of ADR for disputes between two or more parties, a petition for divorce by a single spouse may happen occasionally, but not systematically. The truth is that this is not an alternative form of dispute resolution, but, quite often, the only culturally and religiously acceptable way for a Muslim woman who wants to divorce.[65]

It is also true, however, that for the Islamic community as a whole, it is impossible to think of resolving issues related to marriage and divorce out of the Sharia. Not for nothing, the family law is the area most affected by the debate concerning the *accommodation of religious law*, and also the one that conflicts the most with secular law and with the idea of gender equality.

The set of rules that govern the procedure followed by MATs in the exercise of arbitration functions has as its main sources the Arbitration Act (and its subsequent amendments and additions) and the MATs internal Rules, provided for within the Statute "*The gateway to Islamic and English Legal Services*". These sources govern the ways in which it is possible to resolve disputes in accordance with both the English legal system and Islamic law.

The arbitration board consists of an Islamic law expert, the *qadi*, and a lawyer, a *barrister* or a *solicitor*, admitted to the legal profession in England and Wales. The arbitrators have the duty to work and decide in accordance with the Quran, the Practices of the Prophet and Islamic schools of law, in other words in accordance with

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[64] On this second aspect, see Anello G., "Fratture culturali e terapie giuridiche. Giurisdizioni religiose e diritti umani in una prospettiva interculturale." Quoted: 489 et seq.

[65] Zee, M. "Five options for the relationship between the State and Sharia Councils." *Journal of religion and society* 16 (2014): 14.

the main sources of Sharia (Quran, Sunna, Umma...), but not specifically with all of the others.[66]

As mentioned above, the different schools have very different positions from each other: some are more conservative and traditionalist, because they are extremely related to the letter of the sacred texts and reluctant to use the *qiyas* (analogy) and *ijtihad* (individual reasoning)[67]; other are more open to evolutionary interpretations of the sources and flow of change, albeit remaining respectful of tradition. Of course, the membership of the *qadi* in one school or another can make a difference with respect to the merits of the decision, the solution adopted by the MAT in the individual case.[68]

The arbitrators are responsible and guarantors also of the proper following of the procedure and respect of English law, the rights and interests of the parties in the proceedings. The award must be respectful of both Islamic law and English law.

The procedure is activated by parties, even just one of them, but both must have agreed in advance (in some form: arbitration agreement, arbitration submission or arbitration clause) on the choice to resolve the dispute which arose between them through the territorially competent MAT. The request must be in writing and addressed to the MAT; it should specify the name of the actor and his lawyer or his delegate; the request must set out the terms of the dispute and the right which is assumed damaged, and indicate the name and address of the other party and any witnesses or evidence that the parties intend to use.

The Arbitration Court can also proceed in the absence of the party if: a. the party is abroad; b. the party might risk to suffer serious hardship specifically assessable by its family, because of the ruling; c. the party is not capable of discernment; d. it was impossible to notify the party to convene; e. the party has expressed the Board's her/his

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[66] See again *www.matribunal.com/proceduralrules*.

[67] On the relevance of the analogical reasoning and on the autonomy of the individual thought as factors of change and evolution in law, however sometimes perceived as dangerous and destabilizing for legal tradition to the point of being considered as heresy, see Glenn H.P., *Legal Traditions of the World.* Quoted: 190, 201-203, 211-212.

[68] On the essentially casuistry nature of Islamic law in the past and today, according to a model different from that of common law and without the idea of the binding precedent or of the *stare decisis*, see Imber, C. *Ebu's-su'd: The Islamic Legal Tradition*. Edinburgh: Edinburgh University Press, 1997. 52-53; Masud, M.K. and Peters, R. and Powers, D.S., *Dispensing justice in Islam: Qadis and their judgements.* Leiden London: Brill, 2006; Milliot, L. and Blanc, F.P. *Introdution à l'étude du droit musulman*. Paris: Sirey, 1987. 256.

will not to be constituted in the procedure. In any case, the part can be present by means of a representative.[69]

The single Arbitration Board has the power to indicate specific rules of procedure to be adopted with regard to the treatment of the individual case. Such specific guidance can be given orally or in writing and must be followed by the parties.

The parties bear the burden of proof of the facts in support of their claim. On the issue of burden of proof, the procedural rules distinguish written or documentary evidence from witnesses. The latter are permissible only if necessary and essential for the proof of a relevant fact and crucial to the decision and, in any case, in accordance with the Islamic law.[70]

Each party has the right and the duty to provide evidence in the full knowledge that they are true and relevant to the case treated.

The Arbitration Board will take into account only evidence taken in respect of the principle of cross-examination, so they must have been inspected by the counterparty.

The Board has the power to decide the expulsion of one or all parts from the courtroom in the presence of some critical circumstances: for reasons of public order and/or national security; in case of danger for a child; in cases of serious breaches of English law or of criminal offences.[71]

The decision will be taken by applying the principle, typical of the of the common law, of the "more likely than not", according to the scheme of the so-called balance of probabilities, appropriately called specifically by the *Arbitration Act*.

Decisions are to be issued in accordance with the canons of speed and efficiency of the procedure.[72]

The MAT, unlike the judicial Courts, is not bound to the rule of *stare decisis* and neither to its precedents nor to those of common law, although it should decide in compliance with both the Sharia and common law rules.[73]

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[69] See *sub-section* 5 of the *Arbitration Act*. On the role of the lawyer in Islamic law in contemporary times and on representation in court, see Mallat, C. "From Islamic to middle eastern law: A restatement of the field." *American Journal of Comparrative Law* 4 (2003): 51-52.

[70] On the problematic nature of the evidence of witnesses in Islamic law, its relevance or irrelevance, depending on religion, sex, age of the witness and other critical aspects see Pearl, W. and Menski R. *Muslim family law.* Quoted. 18; Heneef, S. "Modern means of proof: legal basis for its accommodation in Islamic law." *Arab. Law Quarterly* 20 (2006): 334.

[71] The opinion of Griffith-Jones on the effective exercise of such power is quite critical: Griffith-Jones, R. Quoted. Griffith-Jones R. *Islam and English Law*. Quoted. 155-156.

[72] According to *subsection* 2 of the *Procedural Rules, "as quickly and efficiently as possible".*

As mentioned above, the decision (award) may be appealed before the competent Court of *common law* and may even be enforceable if subjected to the judgement of approval or of *judicial supervision*.

4. COMMON LAW COURTS JUDGING ON SHARIA FAMILY LAW CASES

In many Western States, Islamic Tribunals function as "private tribunals"[74] and the law they interpret and apply, be it acknowledged by the state or not, plays an important role, not only in the life of the Muslims, who live in the West, but also in the balance between State and non-State law.

In particular, such delicate equilibrium is based on a series of variables depending from macro-choices of legislative policy[75] and from micro-choices made in concrete cases, both by Sharia Courts and by State Courts.

This is primarily in common law systems, in which the judicial formant plays a crucial role, not only with respect to the lawfulness of the decisions of the first - if required for the purpose of the enforceability of the religious decision under the state law- but also, and above all, in terms of law making, precisely concerning the way how such relation poses itself.[76]

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[73] Griffith-Jones, R. Quoted. *Islam and English Law.* Ed. Griffith-Jones R. Quoted. 15.

[74] See Glenn, H.P. *Legal Traditions of the World*. Quoted. 376 ss.

[75] In the opposite direction to the choices made by the United Kingdom with the *Arbitration Act* and the official positions of the *Lords Justice*, referred to in paragraph 2 of this work, is the choice of the legislature in Ontario, who in 2006 excluded any effects of the formal arbitration in family matters when the law applied is not that of Canada. In doctrine, for an examination of the various views expressed in relation to this legislative intervention, both during gestation and after its enactment, see Boyd, M. *Dispute Resolution in Family Law.* Toronto: Queen's Printer, 2004, available at *www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd*; Bakht, N. "Were Muslim barbarians really knocking on the gates of Ontario?." *Ottawa Law Review* 40 (2008): 67 et seq.; Razack, S. *Casting Out.* Toronto: University of Toronto Press, 2008. 148.

[76] See Von Bar, C. *Islamic Law and its reception by the Courts in the West.* Cologne: Karl Heymmans, 1999; for the UK, Pearl, R. and Menski, W. *Muslim family law*. Quoted. 77-80; Poulter, S. *English law and ethnic minority customs*. London: Butterworths, 1986; Shan-Kazemi, S.N. *Untying the Knot*. London: Nuffield Foundation, 2001. 9-11; Bano, S. "Muslim Family Justice and Human Rights: The Experience of British Muslim Woman." *Journal of Comaparative Law* 2 (2007): 38 et seq. For the USA, see Quraishi, A. and Syeed Miller, N. "No Altars: A survey of Islamic Family Law in the United States." *Women's Rights and Islamic Family Law. Perspective on reforms*. Ed. Welchman, L. London-New York: Zed Books, 2004. 177 et seq.; Grossman, M. "Is this Arbitration? Religious Tribunals, Judicial Review, and Due Process." *Colorado Law Rev*iew 107 (2007): 169.

To have an idea of the role that the common law Courts have in determining the crucial points of this balance, it seems appropriate to refer to some leading cases highly paradigmatic of some attitudes and diffused approaches.

As previously said, the Sharia Courts and MATs mainly deal with disputes pertaining to personal status of Muslims and, therefore, to matters falling into the fields of personal rights and family law. In this area, among Islamic institutions that pose greater problems in terms of compatibility with English law and determine real *legal irritants*, it is useful to analyse a case in matters of inheritance, and three others concerning the validity, effect of religious marriage and its dissolution.

The first case[77] is a dispute between testamentary heirs, the Al-Midani brothers, two British citizens resident in London and successors of their father Mouaffak Bin Jamil Al-Midani, who was a Saudi citizen. The *de cuius* had disposed of its assets with two subsequent wills, indicating different single individuals as heirs. The brothers, beneficiaries of the various testamentary provisions, decided to appeal to the Islamic Sharia Council in London to identify the criteria for the division of the huge heritage among the four heirs. The Islamic Judicial Body, indicated inside the Islamic Sharia Council, issued a decision (award) that ruled on the distribution of the estate, stating that under Islamic law also some persons other than the four brothers who had commenced arbitration proceedings were to be accounted as beneficiaries of the succession. Two of the brothers, then, contested the award before the Court of Appeal.

The Court recognized the applicability of Islamic law, since the *de cuius* was a citizen of Saudi Arabia, therefore, foreign law was the applicable law as personal law of the testator; yet the Court did not go into the merits of the case, holding that the Arbitration came to a decision that went beyond what was required by the parties and invested the legal position of subjects who were not parties of the arbitration proceeding. This because the will to refer the dispute to an arbitrator had been manifested in the special agreement only by the four Al-Midani brothers. Therefore, the award was deemed invalid, since it was pronounced also against or in favour of third parties.[78]

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[77] *AlMidani and Another v. AlMidani and Others* [1999] 1 Lloyd's Re. 923.

[78] See Anello G., *Fratture culturali e terapie giuridiche*. Quoted. 491.

The second case concerns the effects of an Islamic marriage that was not registered following the rules provided in the 1949 Marriage Act and by the subsequent reforms of 1990 and 1994.[79]

The conditions for divorce are: the irreparable marriage breakdown (failure of the attempt of reconciliation) and the de facto separation for at least a year. In the event that the marriage was formerly celebrated in an *ad hoc* building surveyed by a minister authorized to do so, and the act was then recorded and has, therefore, civil effects, it will be necessary to validate the decision-agreement either or to initiate a trial before the competent common law Court, in order to make the divorce effective even in the English legal system.[80]

In the Islamic community marriages are celebrated in mosques, but more often at home or inside Sharia Courts. This excludes these marriages from having civil effects and automatically determines the unique jurisdiction of the Sharia Courts for the disputes regarding the validity or dissolution of marriage. This is even more significant considering the multifunctional role of not only the Shari'a Courts, but also the Imam, minister of religion as well as head of the community and the subject from which come both the legitimacy and power of the qadi.

The case *El Gamal v. Al Maktoum*[81], concerned the nullity petition of the marriage between Nivin El Gamal (the woman) and her husband Ahmed Bin Saeed Al-Maktum, 53 years old Sheik of Emirati, member of the Dubai Royal Family. The woman, the plaintiff, was a 35 years old Egyptian citizen, who was living in the UK as a 'tier one migrant' until 2013, after failing in her attempt to claim asylum. From this union was born a child in April 2008.

According to the plaintiff thesis, the parties met in Dubai and they dated for 18 months before parting ways in January 2005. The man contested such circumstances and facts and assumed the relationship as mere "intermittent sexual relations (…) casual, uncommitted and non exclusive".[82]

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[79] Reference is made to the *Marriage Registration of Buildings Act* 1990 and to the 1994 *Marriage Act*. See Thomson, E.L. and Yunus, F.S. "Note and Comment: Choice of Laws or Choice of Culture: How Western Nations Treat the Islamic Marriage Contract in Domestic Courts." *Wisconsin International Law Journal* 25 (2007): 389-390.

[80] More in general, on marriage in English law, see the Italian scholar Giaimo, G. *Il matrimonio nel diritto inglese*. Padova: Cedam, 2007 and the quite wide bibliography cited therein.

[81] *El Gamal v. Al Maktoum* [2012] 2 FLR, 387.

[82] Ibid. paras 9-10.

The woman affirmed that they re-met in New York in April 2006. In December 2006, the Sheik had proposed to her by phone, so that on 11 January 2007 an Islamic wedding ceremony was celebrated in a Knightsbridge London flat.

She maintained that an Imam conducted the ceremony at the presence of two Muslim witnesses. She accepted, however, that no wedding rings were exchanged.

The child was conceived after the marriage, but the parents much time apart, as the mother visited the USA in 2008 and worked in Qatar between the end of 2008 and the beginning of 2009.

The Sheik claimed that any marriage ceremony was celebrated as described by the woman in January 2007 or in any other occasion.

The Court had regarded to the woman's history of psychiatric episodes and medical professionals' view, which had ascertained symptoms of depressive episodes, panic attacks, inability to sleep, loss of appetite and suicidal ideation, for which she had been prescribed antidepressant medicines.[83] She had described being fearful for herself and her child safety because of the Sheik position and had called the police reporting that she had been followed and that the Sheik intention was to kill both the mother and the child. [84]

The man strongly contested such charges and depicted the woman as devious and untrustworthy.

Focusing on what is relevant for this study, the case involved two fundamental issues: 1) whether as a matter of fact, an Islamic wedding ceremony was celebrated on 11 January 2007; 2) if so, whether the ceremony was able to produce any legal effects in English law.

As mentioned above, the plaintiff woman argued that the parties were jointed by an Islamic wedding ceremony, which created a marriage, albeit a void one for want of compliance with the Marriage Act 1949, section 49. The woman sought a decree of nullity in order to claim consequential financial orders.[85] This point was crucial for her, because, in case of denial, the mother would be restricted to the more limited claims for financial relief for the child under schedule 1 of the Children Act 1989.

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[83] Ibid. paras 9-13.

[84] Ibid. para 44.

[85] Ibid. para 2.

The Sheik's case was that no ceremony had took place and even if the court did find differently, he contested that it was "so far removed from anything resembling a marriage at English law to amount even to a void marriage, and so was in shorthand what has become known as a non marriage or non-existent marriage".[86]

The Court held that the religious marriage, celebrated outside the rules of the *Marriage Act* and not registered, can not have civil effects. It is a fact that has no relevance in the world of state law and, therefore, it is ontologically impossible to rule on the validity or invalidity of such act and on the underlying relationship.

The judge seemed to consider the parties intentions as relevant in order to qualify the status of the questionable ceremony, but in the case there were no minimal pre-requisites to comply with the Marriage Acts or with any other legislations, that permit to recognise legal effect to the ceremony, as intention or belief could itself create a compliant marriage only in strict hypothesis. In particular, the parties had done nothing to show any attempt to conduct a ceremony respectful of the formal requirements of the English laws. So there was no nullity to declare, as there was no act. The case was a non-marriage one.[87]

The woman petition was dismissed, with the possibility to claim for financial relief under schedule 1 of the Children Act 1989.

However, in other cases in which the party has requested it, the common law courts have stated that the factual situations can produce legal effects, by using the principle of "presumption of marriage" or else the concept of "*common law marriage*", that consider both a *«long cohabitation and reputation»* as constituent elements.[88] That is, they recognize the long cohabitation and the existence of a relationship socially perceived as marriage as sufficient elements to establish some civil effects typical of the marriage relationship.[89] This case law was not applicable to *El Gamal v. Al Maktoum* because the Judge excluded the long cohabitation between the spouses.

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[86] Ibid.

[87] Ibid. para 87.

[88] Short, H.S. and Miles, J. *Family Law: Text, Cases and Materials.* Oxford: Oxford University Press, 2012. 74; Probert, R."When are we married? Void, non existent and presumed marriages." *Legal Studies* 22 (2002): 398.

[89] On the institute of the so-called *common law marriage*, on the relevance of the consent beyond and above a form and a *vestimentum*, see Probert, R. "Hyde v Hyde: defining or defending marriage?." *Child and Family Law Quarterly* 4 (2007): 322-336; Miranda, A. "La privatizzazione del diritto di famiglia: il modello di common law."*Alambicco del comparatista*. Quoted, 2000. 369 et seq.

In *Dukali v. Lamrani*[90] the parties were both Muslims and Moroccan citizens. The plaintiff, the woman, was born in England, while the respondent, the man, was born in Morocco and moved to England with his family, when he was 7 years old. On 8 January 2002 they celebrated a Moroccan civil marriage ceremony at the Moroccan Consulate in London, at the presence of a notary, a Moroccon Udul. The wedding was celebrated by the officiant and a formal marriage certificated was issued, than followed the religious celebration and the honey moon.

In January 2006 from the union was born a girl, but the relationship between the spouses broke down between the 2009 and the 2010, as on 6 May 2010 the wife petitioned for divorce in the English court.[91]

The respondent accepted that a valid Moroccan marriage ceremony had taken place but contested that it was capable to produce any effects under English law.[92] In the meanwhile of the wife's English petition for divorce, the husband had himself petitioned for divorce to a Sharia court, so that the Islamic divorce was pronounced by the Larache court on the 2 June 2011.

The woman petitioned, under sections 12-13 of Matrimonial and Family Proceeding Act 1984, for financial relief.[93]

The case, again, involve two relevant issues: 1) whether there was a marriage as required by section 12 (1)(a) of the 1984 Act; 2) if so, whether UK law would recognise the Moroccan divorce under section 12(1)(b) of the 1984 Act.

The woman affirmed that there was a marriage and that the divorce triggered her right to financial relief under Part III of the 1984 Act. The husband contested the status of the marriage under English law, arguing that Part III was not applicable at the case, as there was no (civil) marriage and, in any case, the Moroccan divorce should not be recognise in the English legal system.

According to the wife, herself and the husband, together with their parents and relatives, were intended and believed that they were celebrating a wedding at any effects

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[90] *Dukali v. Lamrani* [2012] EWHC 1748 (Fam), [2012] 2 FLR 1099.

[91] Ibid. paras 8-9.

[92] Ibid. para 10.

[93] In particular, section 12 of the 1984 Act provides for financial relief where: 'a) a marriage has been dissolved or annulled (…) by means of judicial or other proceedings in an oversees country, and b) the divorce (…) is entitled to be recognised as valid in England and Wales, either party to the marriage may apply to the court in the manner prescribed by rules of court for an order for financial relied under this Part of the Act'.

under English law and not only a religious ceremony. The Moroccan Consulate, the notary presence, the certificate and other elements demonstrate the parties intention to a fully recognised marriage by English law and to avoid the subsequent English civil ceremony.

On the celebration in the Moroccan Consulate, despite the thesis argued by the Consul General relying on Vienna Convention on Diplomatic and Consular Relations[94], the court has clarified that such Institution was not registered or approved by the General Registar or local authority as a venue for marriage according to the Marriage Acts 1949 to 1994. Moreover, the court made reference to the principle that a consulate is considered part of the territory of the receiving state and not of the sending one[95]. By this way, the formal validity of the marriage must be scrutinized having regard to English law.

The relevant case law was, therefore, that one formed on non-existent and non-marriage. Not by chance, Holman J, made reference to *El Gamal v. Al Maktoum*[96], confirming that where a marriage in no way comply with the requisites requested by the Marriage Acts, the solely parties intentions cannot create a compliant marriage.[97] In his case, in particular, he ascertained the lack of registered premises for the venue, of the authorization of the officiant, of subsequent registration and concluded the marriage was neither valid or void, but non-existent.

The next step in the judge the legal reasoning is that a non-existing marriage can not be considered for the purposes of section 12 of the 1984 Act. There were no previous binding precedents on such issue, but Holman J agreed with the Attorney General (intervener in the action) thesis, according to which the word marriage used by the Parliament in section 12 must mean a marriage recognised under English law as valid or, at least void.[98] In the silence of the Parliament, it is impossible to interpret the word marriage construing a meaning which includes also non marriage (far from the language used).

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[94] Ibid. para 19.
[95] *Radwan v. Radwan* [1973] Fam 24.
[96] *El Gamal v. Al Maktoum* [2012] 2 FLR. 387
[97] *Dukali v. Lamrani* [2012] EWHC 1748 (Fam); [2012] 2 FLR 1099, at paras 24-36.
[98] Ibid. para 44.

Finally, the court excluded also the relevance of the presumption of marriage, argued by the wife, deciding that such presumption can be invoked and applied after a period longer than 7 1/2 years, as the contested marriage had lasted.

The forth case *Uddin v. Choudry* 2009[99] concerns two spouses who originally came from Bangladesh and moved to Britain. They had celebrated their marriage according to Islamic rites, the traditions and customs of Bangladesh and had not proceeded to registration under the Marriage Act.

The dispute between the spouses concerned the effects of the dissolution of religious marriage and the failure of the marriage contract.

In particular, the marriage contract stipulated that the bride received a sum of £ 15,000 from her husband or his family (*mahr*). This sum, however, had not been paid at the time of the marriage. The spouses did not consummate the marriage and, a few months after the celebration, the bride asked the competent Sharia Council the dissolution of the marriage. The Islamic Court ruled positively on the dissolution of marriage without deciding anything about the other claims of the woman, concerning the payment of the *mahr.*

In this case, in search of the applicable foreign law rule, the Court of Appeal has resorted to the appointment of an Islamic law expert, *mufti,* making recourse to the MAT. In the technical report, the expert clarified that:

– if not stated otherwise in the marriage contract, the gifts are considered pure and simple and should not be returned in case of divorce;

– if the marriage is not consummated for reasons not attributable to the bride, she is entitled to payment of the entire previously agreed *mahr*.

In line with that indicated by the expert of Islamic law, the Court of Appeal held that the gifts received during the period of engagement were not to be returned and that the marriage contract was valid. Therefore, the bride was entitled to payment of the benefit provided for in the contract and, therefore, to payment of the *mahr.*

Therefore, the opinion provided by the expert of the MAT allowed, on the one hand, the application of Islamic law in the exercise of jurisdiction of common law and, secondly, to proceed on the merits of the master agreement in the part relating to asset issues in the strict sense, without questioning the effectiveness and validity of the divorce decision issued by the Islamic Sharia Council.

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[99] *Uddin v Choudhury & Ors* [2009] EWCA Civ 1205.

The analysis by paradigmatic cases and, therefore, the use of the inductive method show that the dialogue between the two parallel legal systems can take place, in practice, through different paths.

As we have seen, in the hereditary dispute the Court of common law does not intervene in the Islamic law of succession and does not criticise its rules in finding the persons entitles to succeed, but notes the invalidity/nullity of the arbitration award, as issued in violation of the rules of law provided by the Arbitration Act and, specifically, in violation of the principle of relativity of the effects of the agreement between the parties prodromal to the start of the arbitration proceedings.

This points out that MATs can only move within the mesh of the Arbitration Act and the rules of procedural fairness and substantive fairness both provided by it.

In the second case, the court of common law denied legal effect to the Islamic marriage celebrated outside the Marriage Act. Departing from some precedents, by resorting to a traditional dogmatic category such as the common law marriage (through which, as early as 1593, the validity of the marriage *«by habite and repute»* was recognized), the Court has managed to ensure the state jurisdiction and the respect of the *law of the land*, equal for all (*one for all!*), at least with reference to some effects of the marriage (the most significant ones: parent-child relationships, conditions for the reliance of children, right to maintenance for the weaker spouse...).

In the third case, there are two decisions on the divorce: the Islamic court and the English court one and they determine very different effects.

Both the second and the third cases analysed, give rise to some insights, that for the moment I want only to underline, without giving any explanation: Muslim husbands prefer the religious marriage and divorce effects and contest the existence of a marriage under English law. For the moment, I want to stop the reasoning saying that in such cases it seems that the dialogue between the two legal orders is inconsistent.

In the fourth case, the dialogue between the parallel legal systems is carried out through a technical and procedural law instrument, that is the appointment of an expert in the subject matter of the dispute. Indeed, the recourse to the appointment of the *mufti* resembles a typical praxis of the colonial era which is still much followed by common law Courts that were to judge disputes by applying Islamic law, for example in India.[100]

[100] On such praxis followed in the colonial era, see Gambaro, A. and Sacco, R. Quoted. 495 et seq. and, in particular, 498.

But there are hard cases also, where this dialogue and the identification of technical solutions that guarantee the minority legal orders (see next paragraph) with a life and co-existence within the "major" legal system are more complex and not always possible.

Always with reference to marriage, the concept of *limping marriage* comes into consideration. This term refers to those marriages that, as said above, are valid for the religious order and incapable of producing civil law effects in the State legal system. In this context it is particularly difficult to integrate the belonging religious culture and the protection of fundamental rights, since certain situations occur that English law has effectively described with the expression *split status position*. In this situation the Muslim believer is the holder of a "split" legal status , whereby, on the one hand, she/he is obliged to respect the religious prescriptions and on the other, is subject to state law applicable in relation to her/his status.

The above analysed cases dealt with the civil effects of Islamic religious marriage and on the dissolution of the religious bond, but cases also occur where one or both spouses (most often one) get a divorce before a state Court, but not the dissolution of the religious bond. Therefore, the couple will be divorced for the State legal system, but not for the religious community and the Islamic legal system to which they belong.[101]

In many cases, moreover, the refusal to pronounce the *talaq* by the husband translates into a coercive instrument to ensure that the woman accepts, also in the civil trial, detrimental conditions arising out of divorce as far as income and property are concerned, or in matter of custody of children. In such cases, the fact that the State does not recognize the validity of Islamic law clearly does not prevent, however, harmful consequences for the woman, who is the weak part of the marital relationship and, indeed, it weighs heavily on her subjective legal situation.[102]

These cases become real *legal irritants*, however it should be clarified that they are sometimes accidental and unintended, and sometimes strategic and intentional, in order to protect the belonging legal tradition. In other words, some incidents of lack of communication serve to ensure supremacy and spaces to a certain religious or legal culture, either that of the minority legal order or that of the majority one, because each

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[101] See Anello, G. "Fratture culturali e terapie giuridiche." Quoted: 497-498.

[102] Yilmaz, I. "Muslim alternative dispute resolution and neo-ijtihad in England." *Alternatives. Turkish Journal of International Relations* 2 (2003): 117-139; Id., "Law as a chameleon: the question of incorporation of Muslim personal law into the English law." *Journal of Muslim minority affairs* 21 (2001): 297 et seq.

legal system in some matters considers some values or legal interests as essential to its legal tradition, identifies. So, in order to protect and promote such values, it identifies and applies instruments for *superiores* (or concurrent) *non recognoscere,* especially if its legal tradition is characterized by a high rate of normativity.[103]

In the Western legal tradition these values are protected through the concept of unavailability of rights or statuses and the concept of public order, as well as though the limits of mandatory rules and morality, the principles of secularism, equality and rule of law, expression of those core values discussed above.

However, the content of the basic values, of the inalienable and non-negotiable rights within the different legal traditions varies, and each tradition recognizes some that others do not recognize, or it excludes some that others instead protect. On this land take place both the "contrapuntal exchanges" and the circulation of legal models.

5. MINORITY LEGAL ORDERS AND THE RULE OF LAW

The investigation conducted so far leads us to address the issue of parallel legal systems: the first is the expression of a cultural and religious minority, who poses and manifests itself as a true *legal order*, albeit being a minority, with its strong component of identity, of normativity, and its need for conservation of the legal tradition, of the dogmatic categories and its own rules; the second is the state system, organized according to the principle of territoriality of the law, which hosts the minority.

The historical analysis shows that this is no new phenomenon, not for the western legal systems nor for Islamic ones. For the first, just think of the competition between *ius civile* and *ius gentium* in Roman times[104], the barbaric concept of *waregang*[105] or the legal

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[103] On the concept of normativity see Glenn H.P., *Legal Traditions of the World.* Quoted. 365 et seq.

[104] See Schiavone, A. *Ius. L'invenzione del diritto in Occidente.* Turin: Giulio Einaudi Editore, 123 et seq.; and also Lombardi, G. *Ricerche in tema di ius gentium.* Milano: Giuffrè, 1946; Id., *Sul concetto di ius gentium*. Rome: Istituto di diritto romano, 1947; Talamanca, M. "Ius gentium da Adriano ai Severi." *La codificazione del diritto dall'antico al moderno.* Ed. Dovere, E. Naples: Edizioni Scientifiche, 1998. 191 et seq..

[105] In the Edict of Rotari the *waregang* is the stranger who is protected by the sovereign (*sub scuto potestatis nostrae*). Against interpretations that consider the rule relating to a particular category of foreigners, identified as 'refugees', it is argued that it should apply to any foreigner who enjoys a regular statute within the realm: therefore it should relate to the legal condition that any foreigner acquires the moment it arrives in the kingdom of the Lombards, regardless of the reasons. The right for protection, which the foreigner is granted, is not so different from what the king has to grant to its weakest and most vulnerable subjects, such as children and women when they have no other person

pluralism in medieval Europe[106]; for the second, reference can be made to the system of the *millet*[107], during the Ottoman Empire.

The examples could be many, but for the sake of brevity those mentioned above are enough to show that the historical perspective allows us to better understand how *minority legal orders* are a constant element in the civil and legal life of a given community.

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who assumes their *mundio*. These persons saw applied the law of their country of origin or the Longobard law, depending on the matters and on the legal relations that were taken into account. The edict, in this regard, contains very specific and detailed provisions. Among the scholars who have proposed such reconstruction, see Princi Braccini, G. "Waregang (Rotari 367): straniero sotto il mundio regio?." *Filologia Mediolatina. Studies in Medieval Latin Texts and Transmission Rivista della Fondazione Ezio Franceschini* 18 (2011) 109-124.

[106] On the theme of legal pluralism at the time of *ius commune*, see Giaro, T. "Occidente e oriente nella storia del diritto privato europeo." *Diritto privato europeo: fonti ed effetti*. AA. VV. Milan: Giuffrè, 2003; Merryman, J.M. *The civil law tradition.* Quoted. 2; Monateri, P.G. "Black Gaius." *Hastings Law Journal*, 2000, p. 490 et seq.; Mattei, U. and Monateri, P.G., *Introduzione breve al diritto comparato.* Quoted. 47 et seq.; Glenn, H.P. "La tradition juridique nationale." *Revue Internationale de droit comparé* 55 2 (2003): 263 et seq.; Markesinis, B. *The gradual convergence. Foreign ideas, foreign influences, and the English law on the eve of the 21st century*. Oxford: Claredon Press, 1994; Gorla, G. *"La "communis opinio totius orbis." New Perspectives for a common law of Europe*. Ed. Cappelletti, M. Leyden: Sijthoff, 1978, p. 45 et seq.; Gorla, G. and Moccia, L. "A revisiting of the comparison between continental law and English law (16th to 19th century)." *Journal of legal History* 2 (1981): 143 et seq., who observed that the continental law between the XVI and XVII centuries was peculiar in being a judicial law. This opinion was shared also by Lupoi, M. *Alle radici del mondo giuridico europeo.* Rome: Laterza, 1994, who agrees that the two systems have developed from a common strain of the High Middle Ages; Zimmerman, R. "Diritto romano ed unità giuridica europea." *Studi di storia del diritto.* AA.VV. Milan: Giuffrè, 1996. 16 et seq.; Watson, A. *Roman law and comparative law*. Athens-London: University of Georgia Press, 1991.

[107] The term *millet* means religious denomination. The reference is to the legal status recognized to some non-Muslim religious communities residing in the territory of the Ottoman Empire and to the system of administrative government of these communities. This is an evolution of the *dhimma*. On the territory of the Empire resided many non-Muslim communities: Christians, Jews, Yazidis, Zoroastrians. They all were under the Islamic law, for which the unbelievers had a less favourable legal treatment. The Christian and Jewish communities (People of the Book), unlike the other, were not persecuted. Their status was, in fact, of *dhimmi* (protected), they did not participate in the city government and could be exempted from military service by paying a tax (*jizya*); they also paid a land tax (*kharaj*). Notwithstanding these distinctions directly deriving from Shari'a, the Ottoman Empire recognized non-Muslim religious communities as a "nation" (*millet*); the head of each community coincided with the religious leader, who exercised both religious and secular functions (Patriarch for Christians; Chief Rabbi of Constantinople for the Jews). Once the religious leader had received confirmation of his investiture by the Sultan, he could exercise its functions and, within certain limits, the *millet* was politically and legally autonomous. In fact, he collected taxes, dispensed justice in matters of family and civil law in general; he represented his community before the Sultan and his administration. See Hourani, A. *A history of the Arab Peoples*. Cambridge (Mass.): Harvard University Press, 1991. 21; Italian translation, *Storia dei popoli arabi*. Milan: Mondadori, 1998; Glenn H.P., *Legal Traditions od the World.* Quoted. 54 et seq., 225 et seq.

Today, however, the context in which the dialogue, the contrapuntal exchange, takes shape is significantly different. Certainly even migration flows are not historically a novelty[108], but there is a significant change in the attitudes of social management of diversity. The scale and intensity of the global movement of people have both become more intense. The flows follow, more than in the past, a movement from non-western into western, so the Western legal systems have to deal with the issues that arise from the diversity of these minority legal orders.

Having to contextualize here the reality of the United Kingdom, the elective field of this survey, it should be noted that the three prevailing religious communities are the Christian, Jewish and Muslim ones. These are the three religious groups now most commonly considered as terms of the debate on the parallel legal systems.

We have seen, in particular with reference to the Islamic legal tradition in the UK, how the introduction and recognition of alternative forms of dispute resolution and, perhaps, of jurisdiction, once again raise the issue of the relationship between territoriality and personality of law.

The question is understanding to what extent the state system can tolerate the principle of personality of law and the Muslim minority legal order[109] and to what extent can Islamic law authorize the adhesion of Muslims to a non Islamic law.

It has been pointed out how they adhere to local state law while continuing to maintain an Islamic identity[110]. However, in these contexts, those who hold power within the minority legal order often manage to impose models and solutions, which, when selected by an authority (such as the Sharia Courts) considered legitimate by the great majority of the community to which it belongs, gain the dignity of regulatory discipline, of legal (and religious) rules able to bound behaviours. Therefore, the concern

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[108] Many scholars speak of new diaspora and of cyclical transhumance, Glenn, H.P. Last quoted. 107 et seq.; and specifically of Islamic diaspora ibid. 366 et seq.

[109] The debate on the possibility, opportunity, legitimacy of giving formal recognition to Islamic law with reference to the English legal system is testified by the use of expressions such as "English shari'a" and "*agrenzi shariat*". See, in particular, Pearl, D. "Islamic Family Law and Anglo-American Public Policy." *Clevel. St. L. Rev.* 36 (1985): 113-126.

[110] On the obligation to obey the local law, as enshrined in the Sharia, see Ramadan, T. *Western Muslims and the future of Islam*, Oxford University Press: Oxford, 2004. 95-96. Such obligation is declined differently by the various Sharia schools according to Pearl, D. and Menski, W. *Muslim Family Law*. Quoted. 2-65. About it, see also Glenn, H.P. *On Common Laws*, Oxford: Oxford University Press, 2005, p. 134; Aluffi Beck-Peccoz, R. "Cittadinanza ed appartenenza religiosa nel diritto internazionale privato. Il caso dei paesi arabi." *Teoria Politica* 9 (1993): 97.

is that the protection of personal autonomy and of legal pluralism, which pushes a liberal State to recognize spaces to a minority legal order, will result in a boomerang and in a sacrifice of that pluralism it aims to grant.[111]

Certainly, forms of legal pluralism in the strong sense, which contemplate the recognition of exclusive jurisdiction for religious Courts would result in the transfer of a significant portion of state sovereignty to a specific community of believers, giving the latter the collective right to live according to its own rules.

This, on the one hand, would open the way for the transformation of a social minority into a political minority and, on the other hand, would result in serious discriminations against some members of the community, especially the most vulnerable ones, since it would produce a jurisdictional segmentation of the people on an ethnic and cultural base.[112]

It should be noted that this issue affects many other European legal systems, such as, for example, Germany, Italy, France and Holland.

In Germany, in particular, the mediation carried out within Muslim communities involved also criminal law, according to the tendency of Middle East family clans to decide the conflicts in accordance with their cultural traditions, but in an *unofficial* way.[113] At an official level instead, Germany recognizes spaces of enforcement of Islamic law through two lines, both oriented and limited by the concept of public order: 1) private international law, by virtue of which the applicable law (in matter of personal rights and family law) is that of the parties[114]; 2) the so-called "*optional civil law*", by means of which margins of private autonomy are recognized in particular, as far as we are concerned here, in the area of marriage contracts.

Very few of these contracts have been brought to the attention of the state Courts, which still show the general tendency to recognize its legitimacy and effectiveness. In particular, the Federal Court, on several occasions, ruled that the agreement including the provision of the *mahr* is not invalid in itself because contrary to public order or

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[111] See Malik, M. *Minority legal order in the UK. Minorities, Pluralism and the law.* London: The British Academy Policy Center, 2012 available at *www.britac.ac.uk*.

[112] Colom Gonzales, F. "Entre el credo y la ley. Procesos de integralidad en el pluralismo jurìdico de base religiosa." *Revista de Estudios Politicos (nueva época)* 157 (2012): 83-103.

[113] Rohe, M. "Reasons for the application of Shari'a in the west." *Applying Shari'a in the west: facts. Fears and the future of Islamic rules on family relations in the west*, Ed. Berger, M.S. Leiden: Leiden University Press, 2013. 38.

[114] Rohe, M. "Islamic law in Germany." *Hawwa* 1 (2003): 46-59.

because the institute is alien to German law. The agreements were deemed valid, as expression of the principle of private autonomy and freedom to conclude contracts related to family.[115] The attitude of German judiciary has been criticized many times by some scholars[116] and by public opinion, but the General Muslim Council and the Islamic Charter show a certain appreciation for the German constitutional system characterized by laity and religious freedom.[117]

In Italy, as well as in France, spaces for the application of Islamic law are drawn from international private law or specific bilateral agreements[118] and however – especially in France, where maybe the sentiment of national identity is stronger than in Italy – within the limits of public order and of the *lois de police*.[119]

In addition, the mandatory provisions prevent, at least in theory, the entrance of those provisions and institutions of Islamic law in contrast with the internal principles.[120]

The phenomenon of Islamic Courts and parallel jurisdictions, however, especially in Italy remains concealed, undercurrent, since such form of jurisdiction is exercised inside mosques and private homes, but has not yet "formally" met or clashed with the state authority. The theme is not at the attention of the public and political debate. It remains underground.

In Holland, Sharia is applied officially by the authorities and within the national legal system by means of: a. international private law; b. the foreign diplomatic authorities, who can be consulted by Muslims on various issues; c. substantial law, that offers different options on this point. Islamic law is enforced also unofficially, whenever

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[115] BGH, decision of January 28, 1987; BGH, decision of October 14, 1988; BGH, decision of December 9, 2009, all of these commented by Yassari, N. "Understanding and use of Islamic family law rules in Germany: The example of mahr." *Applying Shari'a in the west*. Quoted. Ed. Berger, M.S. 171-174.

[116] See Wagner, J. "Islamic Justice in Europe: It's often a diktat of Power." *Spiegel Online International*. 9.11.2009, available at *www.spiegel.de/international/germany/islam-justice-in-europe-it-s-often-a-dictat-of-power-a-783843.html*.

[117] See Rohe, M. *Alternative dispute resolution in Europe under the auspices of religious norms*. RELIGARE working paper n. 6/Gennaio 2011, *www.religareproject.eu*.

[118] As shown by the study carried out by Fournier, P. *Dossier 27: Reception of Muslim family law in western liberal states*, December 2005, available on line at *www.wluml.org/node/504*.

[119] See the analysis carried out in the next paragraph and the insights offered by Hocart, C. *La reconnaissance du statut personnel des musulmans en France. Question sensible, question de sensibilité*. CURAPP Question sensibles. Paris: PUF, 1998. 279.

[120] Campiglio, C. "Il diritto di famiglia islamico nella prassi italiana." *Rivista di diritto internazionale privato e processuale* 1 (2008): 43-46.

it is possible to consult the religious authorities, provided that Dutch law is not infringed. These forms of openness are conveyed through the "principle of favour", religious freedom, the autonomy of the parties in the field of private law, *ad hoc* provisions and open standards.[121]

The Dutch model is of particular interest because it has brought a solution to the afore mentioned problem of *limping marriages*, so in case of refusal of the husband to cooperate for the divorce, the power of the civil court is provided to order the husband to cooperate. Such power has also been applied to cases in which the parties were Muslim citizens, so the husband was ordered to cooperate for the religious or consular divorce. [122]

Exactly because of its vitality, the world of religious justice is undergoing a profound transformation that does not spare any Country and any creed. The religious rights, in fact, must not be seen as legacies of a and remote dimension faraway from our everyday life, but rather as cultural products, sources of values, shared meanings and practices that characterize the current modern societies. The perspective that must be used to analyse the different phenomena that revolve around religious minorities should dwell on the anthropological connotations of judicial facts and of social negotiations.

6. CONCLUSIVE REMARKS

Within the multicultural society, which therefore have complex characters, multiple standards coexist belonging to different legal systems that can ignore, neutralize or clash each other. In the West and in the global world, the religious law challenges the state and secular monopoly of law and the justice systems of religious communities compete with the justice of the State.

Several approaches can be found to decline the relationship between the two systems, by differently grading or excluding the idea of *accommodation*[123] seen above:

1) full recognition, where the State delegates part of its sovereignty and of the related powers to the religious tribunals, both at a legislative and at a jurisdictional level;

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[121] Rutten, S. "Applying Shari'a to family law issues in the Netherlands." *Applying Shari'a in the west.* Ed. Berger, M.S. Leiden: Leiden University Press, 2013. 97.

[122] For the first applications of such institute by the Court of First instance in Rotterdam, see Rutten, S. Last quoted. *Applying Shari'a in the west*. Quoted. 102.

[123] For a partly different and more articulate classification, see Zee, M. "Five options for the relationship between the State and Sharia Councils." *Journal of Religion and Society* 16 (2014): 9-10.

2) partial recognition, according to which religious tribunals can diverge from state law, applying rules that are proper to the religion-based system and to the personal status, but the effectiveness of the judgements is subject to the scrutiny of legality (conformity to general and fundamental values, public order, mandatory rules, morals, the *lois de police*, etc., depending on the state legal system of reference);

3) no recognition, so the political choice is that of no intervention, no mediation and allow the decisions of religious Tribunals to have relevance only for those belonging to the community of reference, denying them any juridical effect and, therefore, their ability to regulate, create, modify or extinguish legal relationships of various nature;

4) (more or less) absolute ban, characterized by limitations to the jurisdiction of religious courts, in order to prohibit or minimize the competition of the parallel legal system in the exercise of the legislative and/or judicial power.

The options are clearly different from each other and can be combined and graded, but whatever the political choice, it seems more than ever appropriate to avoid the risk of a rift between the minority community (religious law) and the native one, also because the choice of one of the last two models does not rule out that minorities apply at an informal, more or less cryptic-typical level, those rules to which the state legal system intends to give little or no space. This does not imply the claim that any behaviour, use or widespread rule in a minority should be necessarily encouraged or simply considered neutral by the state legal system, which should obviously not abdicate from its function.

The idea to consent them to exercise their jurisdiction under the umbrella of the Arbitration Act and inside the boundaries of the English legal systems, of its fundamental values and laws, give the chance to exercise a certain degree of control on their decisions, awards and provisions of various nature. But it has been demonstrated also that there are many cases in which it is impossible to enter inside the terms and conditions of the relationship, as it is non-existent under English law.

Religious courts may seem arbitrary, opaque, partial, but they have a great competitive advantage: their authority-authoritativeness stems from the immediate relationship with the parties, from the charisma of the priest, rabbi or imam, from community dynamics, from the margin of negotiation and private autonomy.

Moreover, as it has been highlighted, the West immigrant groups see their culture of origin in the religious judgement; and on a global scale religious courts benefit, from time to time, from their universality and their local rooting.

In a multicultural society conflicts should be resolved through dialogue and mutual recognition of cultures.

However, the position of those who believe that to attribute to all cultures equal value is equivalent to adopt an absolute relativism, which destroys the very notion of value is agreeable: if everything values, nothing values; the value loses its worth.[124]

A concrete example, which shows clearly the critical nature of the issue, comes from the Danish experience. As far as it is concerned, Denmark has the first mosque where the Imam is a woman and a Sharia Council is composed only by women. Therefore, the "absolute recognition" determines some distorting and pathological effects, so the Islamic feminist movement in Denmark finds space for the creation of such an institution, as a symbol of change in the status of women. Laity and liberal values become fertile ground for the feminist revolution of the Islamic community in Denmark, but determine the creation of an institution that would not exist in none of the legal systems of a Western country: a gender court.

Kymplicka has clarified that liberal democracies can welcome and embrace many forms of cultural diversity, but not all forms.[125]

As far as this survey is concerned, these ideas would lead to the conclusion of the existence of a secular law for all and no religious tribunal of parallel legal systems[126] or, more appropriately, to argue that a limit to the recognition could be identified where human rights are understood as a shared set of landmarks that can help the dialogue between the conflicting parties.[127] If a common ground is not found on human rights, it appears, in fact, difficult to deal with the discussion related to multiculturalism.

Clearly these phenomena imply far-reaching social changes, are reflected in the legal world and give rise to inter-sectorial processes[128]. In fact, globalization has led to the thinning of boundaries and de-territorialization in various fields of social life including law. In spite of this and because of its nature, law can not cease to be the instrument to

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[124] Sartori, G. *Pluralismo, multiculturalismo e estranei. Saggio sulla società multietnica*. Milan: Rizzoli, 2002. 69.

[125] Kymplicka, W. *Multicultural citizenship*. Oxford: Oxford University Press, 1995. 205.

[126] Namazie, M., "What is wrong with Sharia law." Available at *www.theguardian.com/law/2010/jul/05/sharia-law-religious-courts*.

[127] Ignatieff, M. *Human Right as Politics and Idolatry*. Princeton: Priceton University Press, 2003. 30.

[128] As observed by Marini, G. "Diritto e Politica. La costruzione delle tradizioni giuridiche nell'epoca della globalizzazione." 1 *Polemos* (2010): 31 et seq.

find answers to the needs of a community, albeit changing, multi-faceted, multi-faceted and ever changing.

The British model, defined "multicultural", instead relies on the principle of substantial equality of the associates. Again the foundations of today's policies are to be found in the choices made during the colonial period, where it appears that the British government did not deal, in principle, with the relations within the indigenous peoples.

The colonial administrations have implemented a policy of non-interference in the local law and customs, by imposing their own rules generally only in trade or otherwise in those situations directly relevant to the interests of the Commonwealth.

The British government has followed this setting with the ethnic minorities established in England, addressing the public policy towards the maintenance of both the traditions of the community and the ethnic and cultural specificities.

This model accepts a certain degree of cultural and religious diversity, which can be expressed in the public space, provided the compliance with common law and the rules established by the democratic method.

State intervention towards immigrants is not directed to assimilation, but rather to the respect for ethnic specificity and to the recognition of ethnic and religious groups and their institutionalization.

Individuals and groups, within the law, are free to organize themselves to keep their culture and their identity alive. In order to ensure the principle of substantive equality, an ethnic group is also recognized a differentiated legal treatment. For example, at the legislative level this model has resulted in the adoption of certain rules, which provide for exceptions, exemptions or special legal regimes when belonging to a particular ethnic group.

Among the many, the following can be cited: the *Race Relations Act* of 1976, which prohibits any kind of discrimination for reasons of race, religion or ethnic origin and which provides the legislative exemptions for an effective realization of substantial equality among the subsidiaries; the *Road Traffic Act* of 1998 that allows Indian Sikhs to wear turbans instead of helmets when they are driving motorcycles or even the *Shops Act* of 1950, which provides for the opening of Jewish stores on Sundays; The *Divorce and Religious Marriages Act* of 2002, which - encouraging the celebration of religious marriage with civil effects (through the registration of the marriage certificate) - allows to apply the discipline of the dissolution of the civil effects of marriage (divorce), also in order to

correct any imbalances of power between husband and wife, which could be a result of the application of the religious rules.[129]

Administrative measures and many British laws recognize political legitimacy to collective subjects, give special representation rights and provide for the recognition of special treatment based on ethnicity, but, even the British multicultural model seems to falter, as to be disparagingly defined in recent years as the *Londistan* model.

The London terrorist attacks of July 7, 2005, claimed by Islamic fundamentalists, according to those scholars who are against the multicultural model were the expression of a betrayal, while for others they were only the isolated demonstration of some fundamentalists, who represent a minority in the country.

It is true, however, that this model is in crisis, mainly because of the non-regulated migration flows, of the employment crisis and of the fear induced by Islamic extremism. In addition, the proliferation of parallel communities, both ethnic or religious, devoid of a common sense of belonging, makes sure that, as with all parallel figures, they are destined to never meet.

The British model would tend therefore to create separate communities, within which, in general terms, effects of social exclusion and ghettoization can also be generated.

However, it is clear that the European debate on the integration of immigrants and on the conflict between the rules of the host country and those imported from ethnic minorities has developed different models.

In particular, in the context of these models, it is worth recalling the role of great importance taken by judge-made-law, which in many cases has decided on the possibility or not to give dignity, and therefore legal significance, to the rules observed by a given ethnic community. Most of the legal changes related to multiculturalism are produced, in fact, through the free interpretation of the judges and result in the gradual formation of particular case law precedents or procedures, in the creation of extenuating

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[129] The *Act* explicitly mentions the "*usages of the Jews*" and it refers to the *get* (the Jewish divorce), but also to "*any other prescribed religious usages*", so it could be used also for those belonging to the Islamic community, who however don't show any interest or propensity towards it. For a more in-depth analysis see Hunt, P. *House of Lords (Written Answers): Justice: Sharia Law – Hansard* (March 3): Column WA154; Zee, M. "Five options for the relationship between the State and Sharia Councils." *Journal of religion and society* 16 (2014): 12; on the reasons of the choice made by the Islamic community see also Lester, S. "The State and the operation of Sharia Councils in the United Kingdom." *Journal of religion and society* 15 (2015): 3.

circumstances or in the provision of special measures aimed at resolving disputes at the base of which there is a cultural conflict.

Courts are entrusted with the difficult task to identify the applicable rules through assessments that are not purely legal. In reconstructing the reference standards of a community, the judges should not limit to analyse the national legislation of its countries of origin, but much more often have to add the specificities resulting from the customs or from the religion of such ethnic affiliations.

In short they must operate a balance between the protection of individuals from the point of view of a theory of Western rights, the regulation of private international law and the interest of individuals in the specific case.

The processes of sedimentation of power, which were determined also by separate jurisdictions, have often favoured the disengagement from power and state authority, transferring it within the religious community and its leaders.[130]

In other cases, it was assumed that the position of minorities could simply be kept in a state of political and legal subordination by the majority, for example, through the use of those limits mentioned in the present survey, public order, mandatory rules, morality, status and inalienable rights, but the discrepancy between the written rule and the practices, has shown us that religious legal systems can not be treated only in the light of the principles of the *law of the land*, since these are cultural phenomena which have a quite peculiar legal significance, harbingers of requests for recognition and of creation of new personal legal statuses.

Integration is however certainly not a univocal concept, nor is there only one way to go to accomplish it. For example, it may be understood either as cultural integration, that is, as adoption of a way of life, values and practices that are typical of the native population, or as a simple social and economic integration, compatible with the preservation of the original cultural identity.

The latter notion is referred to by the European Union Commission, which defines the social and economic integration as that process that prevents and counteracts the social marginalization of immigrants, aimed at reaching a level of social and economic life similar to that of the native population.[131] The achievement of such integration

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[130] See Ricca, M. *Oltre Babele, Codici per una democrazia interculturale*. Bari: Edizioni Dedalo 2008. 504.

[131] Commission of the European Communities. *A Common Immigration Policy for Europe: Principles, Actions and Tools,* COM(2008) 359 available at www.eur-lex.europa.eu.

requires a strategy that takes into account not only the benefits for the host society, but also the interests of immigrants. In this regard, the Commission invites Member States to provide measures for the participation of immigrants in the economic and social life and, in the long term, even politics. Only an adequate economic improvement can, in fact, clear conflicts from a cultural standpoint.

Surely the solution proposed by the EU, aimed at ensuring an improvement in the living standards of immigrants functionally to the establishment of those bases necessary for the reinforcement of their autonomy and freedom of individual choices, seems the most appropriate, but perhaps also the most utopian and not necessary capable to solve all the critical issue coming from the contrast of values and rules arising from the application of the personal law of such citizens.