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VALUE PARADIGMS AND LEGAL PRINCIPLES TO THE PROOF OF THE "ISLAMIC NORMATIVE FACTS"*

Angelo Rinella

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The application of Sharia law within the legal systems of democratic tradition poses several problems. First, the problem of the legal value of rules of a religious nature in a secular legal order. Secondly, the concrete application of religious rules among members of the faith community makes those norms "normative facts": the state system does not recognize them as valid norms, but takes note of their effectiveness. Thirdly, experience shows that the laws in force of a secular state can be interpreted and applied in such a way as to accommodate, even if only partially, the legal solutions offered by religious law. The arena where this experience is mainly manifested is offered by the jurisdictional seat: the courts and the arbitration tribunals that practice "reasonable accommodation" as an interpretative tool. These phenomena are based mainly on the will to dialogue. This essay briefly explores these issues.

I. THE SHARI'A LAW AS A NORMATIVE FACT IN THE FACE OF THE STATE LEGAL SYSTEM

The modalities according to which the shari'a law can be applied in the territory of a democratic and secular state are substantially five: the first three are official and formalized, the remaining two both lacking their own form; of the latter two, the first one is official, the other one is also devoid of official status.

A first way, which we could say founded on the incorporation of shari'a law into the legal system of the State, is offered by the experience of Greece where the application of Islamic law is envisaged for Thracian citizens of Muslim faith, before a Mufti which is framed in the judicial order of the Hellenic Republic. However, the application of the shari'a law is

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left to the choice of the parties to the dispute; in fact, they have the right to alternatively invoke the application of ordinary civil law, even if only to obtain greater advantages.

A second way is given by the rules of private international law.

A third way is offered by religious-based arbitration.

A fourth is based on the prudent appreciation of the judge who, when resolving disputes between Muslims, has the faculty to formulate interpretative solutions aimed at a reasonable settlement between current law and Islamic law (reasonable accommodation).

Finally, there is a way without any form and officiality with respect to the legal system; this is the para-jurisdictional practice of the so-called Sharia courts.

The following considerations intend to frame the phenomenon of the application of shari'a law in democratic systems of Western origin with reference to the system of sources of law.

The approach uses the categories of the western legal tradition; the aim is to measure in formal terms the position and role of shari'a law in the West legal systems. The assumption of this analysis is the effectiveness of Islamic law within the territory of the state of Western legal tradition: the different ways through which the shari'a law enters the arena of legal norms observed by civil society have the common denominator of the effective application.

Within the framework of the system of sources of law, Sharia norms are classified as normative facts; the application of these rules - depending on the modalities and the context - is the result of a recognition or a mobile reference by the dominant legal system which ascertains their existence and admits their applicability. The state legal system therefore gives them ex post legitimacy; that is, subsequent to their formation.

The work of judges through the interpretation of current law and the practice of the Sharia Council do not determine the configuration of factual rules.

In the case of Greece, which is inspired by the Ottoman millet model, the shari'a rules could be considered as extra-ordinem sources of law: that is, rules that arise from an origin other than the State and procedurally extraneous to what is established by the state regulation on production of the rules. However, they are recognized as capable of producing legal effects when resolving disputes before a judicial authority; albeit with a special type of effectiveness, being limited to a fraction of the State's territory, to a specific component of the population and to certain subjects.Resta nella facoltà delle parti invocare o meno l'applicazione della *shari'a* e, quindi, adire il *Mufti* o il tribunale civile.

With reference to the discipline of private international law that involves the application of Islamic law or in the case of religious-based arbitration, in both these cases it seems once again possible to refer to the category of extra-ordinem sources of law.

Normative sources that escape the norms on the norms of the state legal system and yet admitted to produce effects in its own space by virtue of the laws of the State itself which authorize their application (based on the discipline on private international law and the discipline on arbitration).

The authorization to produce effects implies the recognition of those religious norms, but the primacy of state norms and of the principles and values established by the constitutional charter remains firm. Therefore, state legislation authorizes its application with a sort of mobile reference to the right chosen by the parties, without renouncing to exercise their dominion according to the conception of the state monopoly on the production of legal norms. But with reference to arbitration, it must be remembered that the mechanism through which the primacy of the state system can be asserted is not automatic; rather it is left to the initiative of the parties who wish to report any conflict between the arbitration decision and the supreme principles of the legal system, which cannot be derogated from by the will of the parties. For the rest, the parties invoking an alternative right to that of the State aspire to settle the question on the basis of a discipline other than the one in force; aspire to a treatment in derogation.

The rules applied in arbitration are therefore an alternative to legal sources and if they conflict with them, they will prevail at least as long as one of the parties does not denounce their irremediable illegality before a state court. The prevalence of the regulatory provisions chosen by the parties over the law in force has its source of legitimacy in the will of the parties, which produces effects according to what is established by the law of the State[1]. It authorizes its application on the basis of a sort of "mobile deferral" by which the state system makes applicable normative facts in its territory, which are outside the framework of legal sources, in a stable and automatic manner.

With regard to the function performed by the arbitral tribunals, Salvatore Satta's statement appears today more relevant than ever: «It is a gross error to think that the parties, through arbitration, would usurp a function that is proper and exclusive to the State, which is

[1] See N. Picardi, *La crisi del monopolio statuale della giurisdizione e la proliferazione delle Corti*, in Rivista Italiana per le Scienze Giuridiche, nuova serie, 2, 43-78 (2011); F. Carpi, *La metamorfosi del monopolio statale sulla giurisdizione*, in Rivista trimestrale di diritto e procedura civile, 811 ff. (2016).

jurisdiction, and to deduce that arbitration is legitimate only to the extent that the State itself recognizes it. It is not exclusive to the State to decide disputes but to enforce rights protection»[2].

The legitimacy of the arbitration is based on the will of the parties; the legislation applied is in competition with and alternatively with the legislation of the state system; the protection of rights which are beyond the availability of individuals remains firmly in the hands of the state.

Therefore, these normative facts (legal norms produced outside the legal system and lacking the formal requirements that would make them recognizable as legal sources within the same legal system) enter the current regulatory system and contribute to forming the same legal system in force by virtue of a mobile deferral or an authorization that makes them applicable to the case in question also by way of derogation from the ordinary rules.

The mobile deferral does not lead to an incorporation of extraneous rules within the legal system. In reality, a legally relevant fact is determined which is destined to end with the same act of application to the case in question.

The case of the resolution of disputes between Muslims before the Sharia courts appears quite different. It can be defined, from the point of view of the host state, as a completely unofficial practice. On the formal level, the procedure that is established before these courts responds to internal provisions, naturally inspired by the principles of the shari'a. Therefore, it presents a formality extraneous to the legal system of the state, although a "form" does exist.

It does not seem that Islamic law applied in these contexts can be placed in the category of extra-ordinem sources since the factual and a posteriori recognition of its norms is also completely absent.

Numerous extra-juridical factors affect the effectiveness of these religious norms and the effects they produce on individuals. The social context, the primacy of the personality of the law, the moral and religious pressure, the threat of social sanctions makes those norms imperative for the members of the community; the conviction of the obligatory nature of those norms and of their pre-eminence over the norms of the State is widespread among them.

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[2] S. Satta, *Diritto processuale civile*, 847 (9th ed., 1981); see also *Id*., *Contributo alla dottrina dell'arbitrato* (1970).

In the context of the activities carried out by the Shari'a Council for the benefit of Muslims, therefore, the provisions of Islamic law applied to disputes constitute legal norms by virtue of the principle of effectiveness and their " justiciability", in the sense of suitability to be used in a jurisdictional seat for the resolution of disputes.

Those rules are invalid for the state legal system. From the perspective of the state legal system, in fact, the legal rules take on validity not so much because they are effective, but because they are produced in the forms provided for by the law itself. On the other hand, when the creation of a rule complies with the legal production of rules dictated by the legal system, the validity of that is recognized and its effectiveness is assumed.

In general, the fact that the legal system establishes the rules on the production of law does not exclude that other rules may be applied in that same context even if produced in discrepancy with respect to the formal conditions. Such norms lack the elements of recognizability as norms and therefore formally invalid.

However, by virtue of the principle of effectiveness, they are observed in place of the legally approved norms with which they conflict. In reality, therefore, they innovate the legal system. The capacity of these normative facts to create juridical norms, therefore, cannot be detected ex ante due to their formal invalidity; on the other hand, it is detectable ex post, as a consequence of the "effectiveness" deriving from their application[3]. This is the moment in which the legal system recognizes them as extra-ordinary sources: the obedience given to those rules or the application by a public authority.

Obviously, the case of Islamic law applied before the Shari'a Council is quite different.

II. THE SEARCH FOR THE COMPOSITION OF VALUE PARADIGMS. DIALOGUE AND JOINT GOVERNANCE

Dialogue - an expression of Greek origin - indicates the intertwining of different thoughts and conceptions; it presupposes a relationship; the relationship can only be based on mutual knowledge.

[3] V. Crisafulli, *Lezioni di diritto costituzionale. L'ordinamento costituzionale italiano. (Le fonti)*, 147 ff. (1971).

The need to seek forms of dialogue, including on an institutional and legal level, becomes urgent due to the signals coming from the Muslim communities of Europe[4].

Putting aside sociological and anthropological reflections, it is worthwhile here to dwell on some issues that the investigation of comparative law has allowed to emerge.

The first question concerns the keeping of some of the legal categories of the Western tradition. The plurality of religions and cultures that characterizes today's democratic societies does not represent a novelty on the social level. However, it poses new problems on the constitutional and jurisdictional level.

Safeguarding the unity, uniformity and systematic coherence of the legal system is put under pressure due to the presence of a plurality of rules in the legal system that are extraneous to the legal forms of production of sources. It is a living legal order that arises from the different cultural and religious traditions present in the national territory and which seem to have different value references from those transposed and consolidated in the current constitutional system. These are generally non-formalized normative bodies which nevertheless receive application: think of natural law, religious law, cultural law.

The constitutional systems of modern democracies and, more generally, the legal systems express the values of the society they govern; when society gradually assumes an increasingly multi-ethnic and multi-religious composition, the question to be asked is whether the legal system should weaken the degree of unity, uniformity and coherence in favor of a heterogeneity of reference values.

The doctrine of natural rights that was affirmed in Europe between the seventeenth and eighteenth centuries expressed a substantial indifference to the cultural and religious conditions of man. The universalistic value of human rights proclaimed with the Universal Declaration of 1948 recalled the need to establish which values are the object of unanimous interpretation and application and which, conversely, are affected by the different legal and religious traditions and cultural specificities. In other words, what are the values and rights that can be said to be universal and as such non-derogable and inviolable?[5]

[4] See AA.VV., *Musulmani d'Europa. Tra locale e globale*, in Oasis, XIV, 28 (2018). In particular, Salafism and its vision of a hegemonic and universal Islam is attracting great attention. Supported by the Saudi regime, Salafism distances itself from jihadism, favors a very rigorous regulatory and cultural dimension, promotes the establishment of new universities and reforms the cycle of Islamic higher studies. See F. Messner, M. A. Ramadan, *L'enseignement universitaire de la Théologie musulmane. Perspectives comparatives* (2018); J. Wagemakers, *Il Salafismo o la ricerca della purezza*, in Oasis (2019), https://www.oasiscenter.eu/it/salafismo-ricerca-islam-puro (last visited November 30, 2021).

[5] Reference to the observations of F. Viola, *La controversa universalità dei diritti umani*, in Studia Patavina, 64(2), 235-251 (2017). «To the question "Are human rights universal?" the correct answer is

This is not the place to develop a reflection on this issue. Here it is interesting to note that in modern Western democracies the protection of the life and aspirations of individuals must necessarily find correspondence in a subjective legal situation recognized by the legal system as a right, therefore also protectable in the courts.

This approach does not always coincide with models typical of other cultures where the position of the individual is, for example, subordinated to that of the family or clan to which they belong; the value of social harmony prevails over the affirmation of individual rights; recourse to legal regulations for the resolution of disputes does not appear to be favored over other forms of conciliation and mediation. The reference, as is evident, is to the Asian theory of values.

Now, when minority communities with strong cultural and religious traditions are grafted onto Western societies, the problem arises of adapting the former to the dominant model, without the traits of their own identity being lost.

The plurality of ethnic groups, cultures, religions of today's Western societies raises questions of coexistence that cannot be resolved with integration policies or with the spirit of tolerance; a democratic society that does not question the "absolute" value of political and cultural unity with its own tools of democracy can hardly govern a plural society. The search for ways of dialogue, on several levels, can offer a way out.

What does "dialogue" mean at the level of the legal system? Basically it means drawing on the tools that law can provide to unite deeply different communities. It should not be forgotten that the primary function of law is to unite human beings: ubi societas ibi ius.

Dialogue on a legal level, therefore, must mainly make use of the techniques of balancing the different rights; the interpretation of the provisions - whether of jurisdictional, political or doctrinal origin - must seek normative meanings oriented to the reasonable composition of the antinomies.

The case of shari'a in the West is emblematic in this regard. The application of Islamic law in fact, or in some recognized form (reasonable accommodation) or recognizable (arbitration), sometimes reveals contradictions with current law.

In these cases, the interpreter is called upon to balance through the reasonable accommodation between current law and religious law. Obviously, the search for the path

"It depends". Depends on what? Obviously it depends on the point of view taken into consideration», *ivi*, 235.

of composition presupposes the choice of dialogue; otherwise, it would be elementary to detect the collision, register it and confirm the primacy of the law in force.

Reasonable accommodation meets the limit of fundamental rights and non-negotiable principles; no court has the power to let them be violated.

However, in a multicultural society that expresses the variety of its values even in the legal system, it is necessary to go beyond the legislative formulas and allow the hard core of values and fundamental rights to emerge.

Consequently, concepts such as "human rights" or "universal rights" necessarily tend to compress themselves around those values that are really proper to the human race as such and that overcome cultural and religious differences: in particular those relating to the sacredness and dignity of human life.

Ayelet Shachar proposes a shared governance model between state and cultural groups[6]. The so-called transformative accommodations, according to the A., is based on an articulated system of division of powers between the State and minor groups so that - on certain matters - neither one nor the other has exclusive and exhaustive jurisdiction; for example, family relationships, the education system, succession, etc. Where jurisdictional attributions intersect, individuals have the power to choose the jurisdiction they deem best suited to guaranteeing their rights.

Therefore, it is Shachar's opinion that the transformative accommodation model values well the plurality of affiliations of individuals who exercise rights and observe obligations deriving from the State and from the group or groups to which they belong. For the A. in particular, it notes the right of the individual to escape the discipline of the group to which he belongs when he believes that his fundamental rights are not protected. The so-called right of exit is aimed at defending the most vulnerable subjects of the group who are subject to illiberal practices.

The fact remains that the exercise of this "right of exit" by an individual belonging to a group, albeit legally recognized, must also overcome obstacles of a social, psychological nature and economic dependence[7].

III. SPACES AND RULES OF DIALOGUE: OFFICIAL AND EXTRA-ORDINARY JURISDICTIONS. THE PROCESS OF INSTITUTIONALIZATION OF ISLAM

[6] A. Shachar, *Multicultural Jurisdictions. Cultural Differences and Women's Rights*, 88 ff. (2001)

[7] See G. Pino, *Identità personale, identità religiosa e libertà individuali*, in Quad. di diritto e politica ecclesiastica, XVI, 1, 119-151, particularly 133 ff. (2008).

The search for places and rules arises at different levels. In these pages we have looked at the level of institutions and constitutional functions; in particular, to the seats of the judicial institutions and their rules.

The assumption is that the communities, major and minor, have matured the political choice of dialogue and that the dialogue is conducted with the intent of seeking common, shared and shareable values. No claim of assimilation of the other could be adduced to the content of the dialogue itself.

With reference to the functions of the State, the judicial function is the one that most offers the chance for dialogue in a society in which political choices in this regard are not yet defined. Indeed, jurisdiction has the advantage of looking at the concrete case, at living law. The need to develop general and abstract rules is not faced with it; but to offer an answer to the juridical question raised by the concrete becoming of human relations. It is therefore a question of judging a human affair, taking into account the context in which it is placed, and - according to the prudent judgment of the judge - seeking a reasonable composition between the conflicting provisions, between state law and religious law.

Therefore, the primary centers of dialogue are the judicial institutions, both formal and informal.

The UK experience seems to offer an exemplary model from this point of view.

Religious-based arbitration in matters of family law seems to be the most effective formalized instrument: the arbitration panel in applying Islamic law must adapt it - without denying its proper meaning - to current law. The award is binding on the parties; however, in the event of default by one of the parties, its execution can be requested or it can be challenged before a civil court. At that time, the judicial authority exercises control over the legitimacy of the decision and, if necessary, can annul it.

The transformative accommodation model proposed by Ayelet Shachar, which well represents the reality of legal systems coexisting in the same space and relating to the same individuals, in areas where there is an overlap of rules leaves individuals the freedom to choose the most guaranteed system of rules. or more advantageous. On the other hand, it does not offer any indication as to whether or not a hierarchical relationship exists between the regulatory systems involved in the discipline of the case in question; indeed, the hierarchical criterion would give way to a system of shared competences (joint governance) in which the arbiter on which regulatory system should prevail would be the recipient of the regulations themselves.

Compared to the transformative accommodation model, religious-based arbitration seems to be preferred. It ensures - in certain matters - that the parties to the dispute can choose the law on the basis of which to seek the resolution of the dispute and, of course, also the norms of the religion to which they belong. The law of the current legal system, however, retains the primacy and represents the parameter of adaptation of religious law in this case. Eventually, if the conditions are met, it can become the parameter of evaluation of the legitimacy of the arbitration decision in the execution or appeal before a state court.

Completely informal, at least with respect to the state system, is the para-jurisdictional activity of the Shari'a Council. Consultancy bodies on disputes between Muslims, express opinions with no juridical value, but with a religious and social authority that produces a coercive constraint on the recipients. Compared to the micro regulatory system, the constraint presents all the canons of legality. In these places religious marriages are dissolved according to the forms and rules dictated by Islamic law; the activity of these bodies is not governed by state legislation; no control by the public authority is exercised over the rulings, nor could it be otherwise.

Recognizing in the judicial arena a suitable place for dialogue between the state and Islam allows us to recall a final piece of the mosaic that is being composed: the institutionalization of Islam.

Participation in the public space is an essential condition of dialogue: it requires the development of suitable communication mechanisms and tools to make the requests of Muslim communities persuasive and understandable. The interlocutors are, at the same time, the institutions - starting from the local ones, up to the governing bodies of the state - and civil society as a whole.

The forms of participation in the public space are changeable and respond to the conditions of the context in which they occur: traditionally, the community of Muslims in Europe organizes itself, establishes associations and organizations, establishes schools dedicated to the young people of the community, builds mosques and minarets; bodies and structures that make the presence of the Islamic community visible and organized and that respond to the specific needs of the faithful. In other words, the Islamic community constitutes its own bodies and institutions and participates in the public space. In certain circumstances, it sets up its own party which represents its political interests and religious instances, but which nevertheless adopts the statute of democratic parties and does not position itself among the anti-system parties. In other words, it does not set out to

overthrow the constitutional order in order to establish an Islamic theocracy subject to shari'a[8].

The development of the institutionalization processes of Islamic communities contributes to strengthening the citizenship of the Muslims of Europe; it allows them a more significant participation in the political life of the country and a contribution to the democratic decision-making processes of political and legislative acts.

The law of political society and the law of religious communities' present different areas of overlap; every society - even if of religious inspiration - needs a secular legal system because religious norms do not cover the entire sphere of human life.

The absolute monopoly of secular law and its consequent hegemony over other sources today still represents a "bulwark" of Western civilization. The production, application and interpretation of laws are in the hands of secular institutions and respond to secular reasons and criteria. For religious communities, especially minority ones and traditionally extraneous to the social context in which they are based, there are two ways: to seek participation in the public space to contribute to the determination of political choices and the normative contents of the laws; or invoke exceptions to state law and derogation to current rules.

The first way defines the places of dialogue and creates the favorable conditions; the second explores the cleavages of today's plural societies.

[8] On the subject of religious-based parties, see the interesting pages of M. C. Locchi, *La disciplina giuridica dei partiti a orientamento religioso* (2018).