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For A minimal Vocabulary of Interculturality: a Legal Comparative Perspective

THE MUSLIM ARBITRATION TRIBUNAL (MAT)

Emanuele Odorisio

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The purpose of this article is to illustrate the main characteristics and issues of the Muslim Arbitration Tribunal (MAT). In the first paragraphs I recalled the growing need, especially for Muslims, to see some aspects of their lives regulated directly by the precepts of religious origin and the most important legal mechanisms that can allow the application of the shari'a in a Western system. Subsequently, I focused on one of these mechanisms, the religious-based arbitration, more specifically, on the MAT of the United Kingdom, which is an arbitral tribunal that applies shari'a with legal relevance in the English legal system. On the basis of this relevance I compared the MAT from the Shari'a Councils; the latter offer the Islamic community a series of services with exclusively religious and internal relevance to the community itself. In the following paragraphs I dealt with the main criticality's of the MAT phenomenon, namely the problem of the effective voluntariness of arbitration by the weakest subjects belonging to these communities, such as women, as well as that of the possible risks, with respect to the protection of fundamental rights, the application of shari'a through arbitration, despite the existence of various controls by the judicial authority, in the executive and appeal, on compliance with the limit of public order.

I. INTRODUCTION

In this short article, I will try to illustrate the main characteristics and problems of what is, without a doubt, one of the most significant experiences of applying the shari'a in the Western system. This is the phenomenon of religious arbitration tribunals in England, the so-called MAT[1].

Before analysing this institute more closely, however, it is essential to offer the general framework of the main techniques that can lead to the application of religious norms within a legal system. It is also necessary to clarify the reasons that make this application particularly important for Islamic communities and the reasons for the success behind the MAT model.

[1] This work served me as the basis for the intervention carried out on May 19, 2021 on the occasion of the Conference «Costruendo un vocabolario minimo dell'interculturalità con approccio interdisciplinare» organised on the zoom platform within the PRIN (2017) «From Legal Pluralism to the Intercultural State. Personal Law, Exceptions to General Rules and Imperative Limits in the European Legal Space».

II. THE MAIN POSITIVE LAW TECHNIQUES FOR THE APPLICATION OF RELIGIOUS RULES WITHIN THE LEGAL SYSTEM

Since belonging to a religious belief constitutes a fundamental element of human experience, it is quite natural that religious denominations and their members aspire to see some aspects of their life regulated by precepts of religious origin[2].

This need is particularly felt for Muslims. The research that has been carried out on the intensity of religious identity shows that Muslims suffer less than those of other religious faiths the inevitable phenomenon of assimilation to the new social and cultural contexts in which they live, and that the link with their own religion continues to be particularly significant even in the passage from one generation of immigrants to another [3].

When we refer to the aspiration to apply, even in the new Western context in which one is an immigrant, one's own religious rules, in this case the shari'a[4], it is necessary to consider that these precepts are fundamentally aimed at disciplining two very different areas[5].

First of all, it is undeniable that many religious norms concern religious precepts in the strict sense, that is, the norms concerning the practices and the exercise of worship. In such cases, these are precepts that normally don't need the recognition of a particular effect in the legal system as they operate in society without the need for any official validation. It is simply a matter of allowing and not prohibiting the practices and the exercise of worship

[2] M. Abbamonte, *L'esperienza dei faith-based arbitrations in Ontario, Stati Uniti e Inghilterra*, in A. Briguglio, R. Martino, A. Panzarola, B. Sassani (a cura di), *Scritti in onore di Nicola Picardi*, 1 ff., spec. 4 ff (I, 2016); F. Alicino, *Stato costituzionale, pluralismo giudiziario e società policulturale*, in F. Alicino, N. Colaianni (a cura di), *Il costituzionalismo di fronte all'Islam. Giurisdizioni alternative nelle società multiculturali*, 19 ff. (2016); J. R. Bowen, *On British Islam. Religion, Law, and Everyday Practice in Shari'a Councils*, 4 ff. (2016); J. Brechin, *A Study of the Use of Sharia Law in Religious Arbitration in the United Kingdom and the Concerns That This Raises for Human Rights*, in Ecclesiastical Law Society, 293 ff. (2013); M. J. Broyde, *Sharia Tribunals, Rabbinical Courts, and Christian Panels. Religious Arbitration in America and the West*, 3 ff. (2017); A. M. Felicetti, *The Phenomenon of Religious Arbitration in Family Law: Perceptions, Reality and Perspectives for the Future in England and Wales*, in Trento Student Law Review, 45 ff. (2019); R. E. Maret, *Mind the Gap: The Equality Bill and Sharia Arbitration in the United Kingdom*, in Boston College International & Comparative Law Review, 255 ff. (2013); P. Parolari, *Diritto policentrico e interlegalità nei paesi europei di immigrazione. Il caso degli shari'ah councils in Inghilterra*, 5 ff. (2020); Y. Prief, *Muslim Legal Practice in the United Kingdom: the Muslim Arbitration Tribunal*, in *Legal Pluralism in Muslim Contexts*, 12 ff. (2019); M. Reiss, *The materialization of legal pluralism in Britain: why shari'a council decisions should be non-binding*, in Arizona Journal of International & Comparative Law, 26, 739 ff. (2009); A. Rinella, *La* shari'a *in Occidente*, Bologna, 82 ff. (2020).

[3] C. De Angelo, *Tribunali religiosi e tribunale arbitrale: l'offerta «giudiziaria» islamica in Inghilterra*, in Diritto e religioni, 2(1), 387 ff. (2014).

[4] It is obviously not possible in this context to mention the problem relating to the notion of shari'a. On this problem and for the first essential references, see P. Parolari, *Diritto policentrico e interlegalità nei paesi europei di immigrazione. Il caso degli shari'ah councils in Inghilterra*, cit., 35 ff.; A. Rinella in A. Rinella, M.F. Cavalcanti, *I Tribunali islamici in Occidente: Gran Bretagna e Grecia, profili di diritto comparato*, cit., 63 ff.; Id., *La* shari'a *in Occidente*, cit., 127 ff.; M. Reiss, *The materialization of legal pluralism in Britain: why shari'a council decisions should be non-binding*, cit., 742 ff.

[5] A. Rinella, *La* shari'a *in Occidente*, cit., 107 ff., 155.

governed by these precepts of religious origin. Generally speaking, the Western world allows freedom of religion, hence there are no particular problems for this to happen, always keeping in mind the limits of public order.

For our purpose what is more interesting is that part of the religious law that aspires to regulate interpersonal relationships with real legal effects, a clear example is all the legislation relating to family relationships or the one that pertains to mandatory contractual or non-contractual relationships.

The application of these rules within the legal system can take place through different channels.

First of all – and obviously apart from the very limited situations in which Islamic law is directly in force for some categories of citizens [6] – this is possible through private international law[7]. This law allows the application of 'rules' of other legal systems, in a given state, when the relationship presents extraneous elements (for example one of the parties is foreign or has his/her residence and domicile abroad, the relationship has arisen abroad, the unlawful act occurred abroad, etc.). It may thus happen that if in a foreign state the applicable law is the shari'a, as it is based on that legal system, the latter can also be applied in another legal system.

The rules of private international law, however, provide for another channel through which the shari'a can be applied in a Western system, to the extent that they allow the recognition of legal effects to judgments and measures coming from another country. It may thus happen that the recognition and effectiveness of a foreign judgement or any other provision in which the judge has applied the shari'a is requested and obtained.

It is precisely through this channel of application that problems of compatibility between religious norms and the principles of public order of Western systems are most frequently recorded. See, for example, in relation to the Italian legal system, the case examined by Cass. 7 August 2020, n. 16804. The judgement of the Court of Appeal of Rome was challenged in the Court of Cassation, which had ordered the Civil status officer to proceed with the cancellation of the transcription in the margin of the marriage certificate of the judgement issued by a Palestinian Sharia court for the dissolution of the marriage for her repudiation by the husband. The Court of Cassation rejected the appeal, substantially

[6] This is, for example, what happens in Greece for Muslims of Turkish and Bulgarian origin who reside in Thrace. (A. Rinella, *La* shari'a *in Occidente*, cit., 107 ff., 155). On this phenomenon, see M.F. Cavalcanti, in A. Rinella, M.F. Cavalcanti, *I Tribunali islamici in Occidente: Gran Bretagna e Grecia, profili di diritto comparato*, in Diritto pubbl. comp. ed eur., 69 ff., spec. 91 ff (2017).

[7] In a critical sense with respect to the suitability of the system of private international law to satisfy the religious aspirations of Muslims, see P. Parolari, *Diritto policentrico e interlegalità nei paesi europei di immigrazione. Il caso degli shari'ah councils in Inghilterra*, cit., 7, 48 ff.

confirming the ruling of the Court of Appeal and affirming the principle of law under which a "repudiation decision issued abroad by a religious authority (in this case Sharia court, [...]), although comparable, according to foreign law, to a judgment of the state judge, cannot be recognised within the Italian legal system due to the violation of the legal principles applicable in the forum, under the double profile of substantial public order (violation of the principle of non-discrimination between men and women; gender discrimination) and procedural public order (lack of defensive equality and lack of an effective procedure carried out in the real cross-examination)"[8]. Nonetheless, the Court of Cassation in relation to a similar case (relating to the cancellation of the transcription from the registers of the divorce judgement between two Iranian spouses, pronounced by Tehran's Supreme Court, in contrast with the fundamental principles of the Italian legal system, given that in Iran the husband can divorce unilaterally and arbitrarily) came to a different conclusion, arguing, however, not on the issue of compatibility or otherwise with the Italian legal system of Islamic divorce based on the so-called repudiation, as regards the area of knowledge of the judge of recognition: "In the judgment of deliberation the judge cannot proceed with the recognition of the foreign sentence if this produces effects contrary to public order. However, in deciding whether the foreign decision is contrary to public order, the judge cannot submit it to a review of a content or merit nature or of the correctness of the solution adopted in the light of the foreign or Italian legal system (case in point)"[9].

It is also possible that Islamic law will be applied as the legal system recognises the possibility for the parties to invoke foreign legislation. For example, EU regulation no. 1259 of 2010 on divorce and separation provides that when the spouses are of different nationalities they can choose which national legislation to apply as long as it is the national legislation of one of the two spouses or the effective residence of the couple. A similar situation occurs in matters of succession[10].

There is also no lack of other techniques through which it is possible to implement the requests for the application of religious precepts. Where the generality and abstractness of the legislative provisions, while ensuring compliance with the principle of equality, risks prejudicing the religious requests of members of specific communities, the legal system can intervene with affirmative actions that introduce active legal situations for these subjects in

[8] In doctrine on this pronunciation, see M. E. Ruggiano, *Il ripudio della moglie voluto dalla* Sharia *e la contrarietà al diritto italiano*, available at www.rivistafamilia.it/2021/02/22, as well as P. Virgadamo, *Il ripudio islamico pronunciato da un Tribunale religioso è ancora contrario all'ordine pubblico: una sentenza tanto decisa nelle (giuste) conclusioni, quanto perplessa nelle (a tratti nebulose) argomentazioni*, in Diritto di famiglia e delle persone, II, 1406 ff. (2020).

[9] Cass. 14 August 2020, n. 17170; in doctrine, see D. Scolart, *La Cassazione e il ripudio (talāq) palestinese. Considerazioni a partire dal diritto islamico*, available at www.questionegiustiziaonline, 2020 (4/12/2020).

[10] A. Rinella, *La* shari'a *in Occidente*, cit., 155 ff.

derogation from the general discipline[11]. In common law countries, sometimes the task of derogating from the general discipline is carried out by the judges themselves who may use hermeneutical techniques that allow them, for constitutionally protected subjective legal situations, such as those concerning religious freedom that are limited by provisions addressed to the generalities of the associates, to introduce, exceptions to the general rule (reasonable accommodation)[12].

The application of the shari'a, finally, can be the result of a double choice of the parties: the choice of arbitration for the resolution of one's disputes; the choice of shari'a as the applicable law by the arbitrators[13]. It is in fact one of the peculiarities of the arbitration institute, generally present in the various national legislations, that of allowing the parties to choose the law applicable to the merits of the dispute[14].

And it is precisely the use of arbitration that has given rise to one of the most significant experiences of the application of shari'a in the West, particularly in England[15]. It is, as I have already mentioned, the phenomenon of the MAT, the Muslim Arbitration Tribunal, a religious arbitration tribunal that could constitute a model that can also be exported to other legal systems[16].

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[11] A. Rinella, *La* shari'a *in Occidente*, cit., 84 ff.

[12] On this hermeneutic technique, see A. Rinella, *La* shari'a *in Occidente*, cit., 84 ff.; A. Rinella in A. Rinella, M.F. Cavalcanti, *I Tribunali islamici in Occidente: Gran Bretagna e Grecia, profili di diritto comparato*, cit., 69 ff., spec. 72 ff.

[13] A. Rinella, *La* shari'a *in Occidente*, cit., 97 ff., 173 ff.

[14] Section 46 (1) Arbitration Act, provides that «the arbitral tribunal shall decide the dispute – (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 determinated by the tribunal». Cf. N. Andrews, *On civil processes. Court Proceedings, Arbitration & Mediation*, 937 ff. (2nd ed., 2019); S. Blake, J. Browne, S. Sim, *A practical approach to alternative dispute resolution*, 485 ff. (5th ed., 2018); *Blackstone's civil practice 2020, The Commentary*, 1367 ff. (2020); J. Brechin, *A Study of the Use of Sharia Law in Religious Arbitration in the United Kingdom and the Concerns That This Raises for Human Rights*, cit., 295; A. M. Felicetti, *The Phenomenon of Religious Arbitration in Family Law: Perceptions, Reality and Perspectives for the Future in England and Wales*, cit., 75 ff.; B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996*, 244 ff. (5th ed., 2014); A. Negri, *Le Sharia Court in Gran Bretagna. Storia ed evoluzione dei tribunali islamici nel Regno Unito*, cit., 12; R. Pillitteri, *L'Arbitration Act 1996: l'attesa riforma della legge inglese sull'arbitrato*, in Dir. Comm. Int., 803 ff., spec. 834 s. (1997); M. Reiss, *The materialization of legal pluralism in Britain: why shari'a council decisions should be non-binding*, cit., 741; A. Rinella, *La* shari'a *in Occidente*, cit., 245.

[15] More generally on the spread of faith-based arbitrations also outside the United Kingdom, see M. Abbamonte, *L'esperienza dei faith-based arbitrations in Ontario, Stati Uniti e Inghilterra*, cit., 7 ff.

[16] In doctrine there are some who have observed that in the case of religious arbitration tribunals there would be a joint administration (State-Confessions) of the jurisdiction (F. Alicino, *Stato costituzionale, pluralismo giudiziario e società policulturale*, cit., 52 ff.; in the same sense, see also M. Abbamonte, *L'esperienza dei faith-based arbitrations in Ontario, Stati Uniti e Inghilterra*, cit., 8 note 24). The observation can also be shared, provided, however, that it moves from a non-technical notion of jurisdiction, at least to the extent that this expression is to be used in the context of the Italian legal system. In our positive law, in fact, and above all in our Constitutional Charter, the expression jurisdiction is reserved for state judges who grant protection of rights that is independent of the consent of both parties.

III. DEFINITION OF THE MAT AND REASONS FOR ITS SUCCESS

Finally *in medias res*, in the light of what has been clarified above, it does not take many words to offer the notion of MAT, which is a religious arbitral tribunal and therefore presupposes on the one hand an arbitration, that is, the existence of a dispute where the parties decide to have private subjects (the arbitrators) other than the state judge, and, on the other hand, the choice of the parties to fix the shari'a as the criterion for judging the arbitrators.

It also deserves to be emphasised that this is a particular type of arbitration. In terms of arbitration, as is known, it is customary to distinguish ad hoc arbitration from institutional or administered arbitration[17]. The latter differs from the first in that it provides for the existence of an institution appointed to administer the arbitration procedure, offering a series of services to the parties, such as a list of arbitrators to contact, support them in the organisation and management, administrative procedure, the accounting management of the same, with the preparation of specific tariffs for the remuneration of the arbitrators, etc. One of the peculiarities of these administered arbitration procedures is that of having their own arbitration procedure regulations which therefore become applicable to individual arbitrations when the parties decide to rely on that arbitration institution.

Well, it is clear that in the case of the MAT we are in the presence of the latter, a more sophisticated and advanced type of arbitration procedure[18], since the MAT has in fact prepared a specific regulation [19] – that the parties make their own when they enter into an arbitration agreement to have their arbitration administered by the MAT – and the institution that organises and promotes the arbitration is a different entity from the individual arbitration panels that are called from time to time to decide individual disputes[20].

As far as the refereeing rules are concerned, I will limit myself to mention two aspects that seem of particular interest.

The first is that it is precisely in the arbitration regulations that it is specified that the court must decide according to the rules of the shari'a. In fact, pursuant to art. 1 of the "Procedure Rules of Muslim Arbitration Tribunal", "the overiding objective of these Rules

[17] For this distinction in English law, see S. Blake, J. Browne, S. Sim, *A practical approach to alternative dispute resolution*, cit., 439 ff.; *Blackstone's civil practice 2020, The Commentary*, cit., 1367 ff.

[18] The phenomenon of faith-based arbitrations is also generally characterized by the use of the figure of administered arbitration (M. Abbamonte, *L'esperienza dei faith-based arbitrations in Ontario, Stati Uniti e Inghilterra*, cit., 8, 55).

[19] These are the «Procedure Rules of Muslim Arbitration Tribunal» available at www.matribunal.com.

[20] For the sake of simplicity, in the continuation of the work I will continue to discuss the arbitrations of the MAT and the decisions of the MAT, but these expressions must be understood in the sense that they are the arbitrations carried out at (and administered by) the MAT and the decisions made by the arbitration boards established, according to the regulation of the MAT.

is to secure that proceedings before the Tribunal are settled in so far as possible – 1. in accordance with Qur'anic Injunctions and Prophetic Practice as determined by the recognised Schools of Islamic Sacred Law"[21].

The second is that the court is to be composed of at least one Islamic law expert and a lawyer qualified to practice in England: "the tribunal shall consist of as minimum a: 1. Scholar of Islamic Sacred Law 2. Solicitor or Barrister of England and Wales" (Article 10 (1) of the regulation)[22].

Referring for a more in-depth description of the origins and history of the institute to the now extensive literature on the subject[23], it is important to note that while other attempts to incorporate Muslims' requests for the application of the shari'a in the United Kingdom, in particular through the creation of a special court that was supposed to judge disputes between Muslims, have failed[24], the MAT, since its establishment, which took place on the initiative of Sheikh Faiz Siddiqi in 2007 in Nuneaton in Warwickshire, has been a great success.

This success basically stems from the convergence of two elements.

First of all, through arbitration the parties can give effective legal relevance to the rules of religious origin, since the arbitration award pronounced by the MAT aspires to be an arbitration award governed by the 1996 Arbitration Act and is therefore destined to have full binding effect, as well as executive; what, on the other hand, is not possible if one acts

[21] On this aspect of the procedure, see M. Abbamonte, *L'esperienza dei faith-based arbitrations in Ontario, Stati Uniti e Inghilterra*, cit., 52; P. Parolari, *Shari'a a corti islamiche in Inghilterra tra mito e realtà. Pluralità di ordinamenti giuridici e interlegalità nelle società multireligiose e multiculturali*, in Materiali per una storia della cultura giuridica, 157 ff., spec. 169 ff. (2017); Y. Prief, *Muslim Legal Practice in the United Kingdom: the Muslim Arbitration Tribunal*, cit., 23 ff.

[22] See on this matter M. Abbamonte, *L'esperienza dei faith-based arbitrations in Ontario, Stati Uniti e Inghilterra*, cit., 52; M. J. Broyde, *Sharia Tribunals, Rabbinical Courts, and Christian Panels. Religious Arbitration in America and the West*, cit., 180; Y. Prief, *Muslim Legal Practice in the United Kingdom: the Muslim Arbitration Tribunal*, cit., 22; A. Rinella, *La* shari'a *in Occidente*, cit., 249.

[23] M. Abbamonte, *L'esperienza dei faith-based arbitrations in Ontario, Stati Uniti e Inghilterra*, cit., 40 ff.; J. R. Bowen, *On British Islam. Religion, Law, and Everyday Practice in Shari'a Councils*, cit., 142 ff.; M. J. Broyde, *Sharia Tribunals, Rabbinical Courts, and Christian Panels. Religious Arbitration in America and the West*, cit., 177 ff.; C. De Angelo, *Tribunali religiosi e tribunale arbitrale: l'offerta «giudiziaria» islamica in Inghilterra*, cit., 399 ff.; F. Gandini, *I tribunali arbitrali islamici*, in Foro it., V, 433 ff. (2009); R. E. Maret, *Mind the Gap: The Equality Bill and Sharia Arbitration in the United Kingdom*, cit., 263 ff.; A. Marotta, *Il diritto musulmano in Occidente: Corti islamiche nel confronto tra democrazia e shari'a*, in Heliopolis. Culture Civiltà Politica, 193 ff. (2013); A. Negri, *Le Sharia Court in Gran Bretagna. Storia ed evoluzione dei tribunali islamici nel Regno Unito*, in www.statoechiese.it, 4, 1 ff., spec. 11 ff. (2018); P. Parolari, *Shari'a a corti islamiche in Inghilterra tra mito e realtà. Pluralità di ordinamenti giuridici e interlegalità nelle società multireligiose e multiculturali*, cit., 169 ff.; Y. Prief, *Muslim Legal Practice in the United Kingdom: the Muslim Arbitration Tribunal*, cit., 12 ff.; M. Reiss, *The materialization of legal pluralism in Britain: why shari'a council decisions should be non-binding*, cit., 739 ff.; A. Rinella in A. Rinella, M.F. Cavalcanti, *I Tribunali islamici in Occidente: Gran Bretagna e Grecia, profili di diritto comparato*, cit., 83 ff.; Id., *La* shari'a *in Occidente*, cit., 224 ff., 242 ff.

[24] This is the proposal formulated in 1985 by the Churches' Committeee on Migrant Workers in Europe. On the matter see A. Rinella, *La* shari'a *in Occidente*, cit., 224 ff.

before the state judge, who, in fact, except for the limited cases mentioned above in which he could apply the shari'a as a criterion of judgment, must apply the state law and not that of religious origin. The possibility on the one hand of asking the MAT for the application of the shari'a and on the other, however, of obtaining also the civil juridical recognition of its decisions is therefore certainly one of the main reasons for the success of the institute, as is also demonstrated by the fact that MAT itself, in promoting arbitration procedures on its institutional website, highlights exactly this aspect: «MAT operates within the legal framework of England and Wales thereby ensuring that any decision reached by MAT can be enforced through existing means of enforcement. Operating within the legal framework of England and Wales does not prevent MAT from ensuring that all decisions reached are in accordance with one of the recognised Schools of Islamic Sacred Law. MAT will therefore, like never before, offer the Muslim community a real and true opportunity to settle disputes in accordance with Islamic Sacred Law with the knowledge that the outcome as determined by MAT will be binding and enforceable»[25].

Secondly, it should not be forgotten that favour for the resolution of disputes through extra-judicial mechanisms such as arbitration (tahkim) belongs to the Islamic culture[26].

IV. THE DISTINCTION BETWEEN SHARI'A COUNCILS AND THE MUSLIM ARBITRATION TRIBUNAL

To better understand the MAT institution it is very important to clarify the difference between this institution and the Shari'a Councils.

In fact, these are two phenomena that are often confused and that instead have profoundly different characteristics [27].

The Shari'a Councils are private institutions of a religious nature that have sprung up in England since 1982 and offer a variety of services to Muslim communities[28].

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[25] See www.matribunal.com.

[26] A. Rinella, *La* shari'a *in Occidente*, cit., 121, 207, 243. Moreover, it should not be forgotten that the arbitrations administered by the MAT have reduced costs, thanks to the fact that the arbitrators are all volunteers for whom a mere reimbursement of expenses is provided (Y. Prief, *Muslim Legal Practice in the United Kingdom: the Muslim Arbitration Tribunal*, cit., 17).

[27] J. R. Bowen, *On British Islam. Religion, Law, and Everyday Practice in Shari'a Councils*, cit., 155 ff.; P. Parolari, *Diritto policentrico e interlegalità nei paesi europei di immigrazione. Il caso degli shari'ah councils in Inghilterra*, cit., 148 ff.

[28] M. Abbamonte, *L'esperienza dei faith-based arbitrations in Ontario, Stati Uniti e Inghilterra*, cit., 41 ff.; J. R. Bowen, *On British Islam. Religion, Law, and Everyday Practice in Shari'a Councils*, cit., *passim*; J. Brechin, *A Study of the Use of Sharia Law in Religious Arbitration in the United Kingdom and the Concerns That This Raises for Human Rights*, cit., 295; C. De Angelo, *Tribunali religiosi e tribunale arbitrale: l'offerta «giudiziaria» islamica in Inghilterra*, cit., 391 ff.; A. Negri, *Le Sharia Court in Gran Bretagna.*

One of the most frequent activities is that of religious counselling. Muslims turn to these institutions for advice on how they should behave in order to act in compliance with the shari'a.

The Shari'a Councils also deal with mediation and conciliation.

However, the service that is offered in most cases – according to some statistics this happens even in 90% of cases – is that of issuing a divorce certificate at the request of the wife[29].

As is known, according to Islamic law only the husband has the power to divorce his wife. If the latter wants to divorce, she must necessarily turn to the Islamic judge, who, however, obviously not being present in the English territory, is replaced by these Shari'a Councils. It is therefore the only tool a woman has to obtain a divorce that is effective from a religious point of view at least. It must in fact be remembered that the certification issued by these institutions has no value from the point of view of the English legal system and has only a religious value[30].

However, it should be noted that not only the divorce certificate issuing service but all the activities carried out by the Shari'a Councils, although relevant from a religious point of view within the Islamic community, have no legal relevance for the English system[31].

The relevance of the activities carried out by the MAT is quite different.

Storia ed evoluzione dei tribunali islamici nel Regno Unito, cit., 10 ff.; P. Parolari, *Shari'a a corti islamiche in Inghilterra tra mito e realtà. Pluralità di ordinamenti giuridici e interlegalità nelle società multireligiose e multiculturali*, cit., 161 ff.; Ead., *Diritto policentrico e interlegalità nei paesi europei di immigrazione. Il caso degli shari'ah councils in Inghilterra*, cit., 89 ff.; Y. Prief, *Muslim Legal Practice in the United Kingdom: the Muslim Arbitration Tribunal*, cit., 13, 19 ff.; F. Sona, *Giustizia religiosa e islam. Il caso degli Shari'ah Councils nel Regno Unito*, in www.statoechiese.it, 34, 1 ff., spec. 10 ff. (2016).

[29] J. R. Bowen, *On British Islam. Religion, Law, and Everyday Practice in Shari'a Councils*, cit., 47 ff.; C. De Angelo, *Tribunali religiosi e tribunale arbitrale: l'offerta «giudiziaria» islamica in Inghilterra*, cit., 395; A. Negri, *Le Sharia Court in Gran Bretagna. Storia ed evoluzione dei tribunali islamici nel Regno Unito*, cit., 4; P. Parolari, *Shari'a a corti islamiche in Inghilterra tra mito e realtà. Pluralità di ordinamenti giuridici e interlegalità nelle società multireligiose e multiculturali*, cit., 161; Y. Prief, *Muslim Legal Practice in the United Kingdom: the Muslim Arbitration Tribunal*, cit., 13; F. Sona, *Giustizia religiosa e islam. Il caso degli Shari'ah Councils nel Regno Unito*, cit., 10 ff.

[30] C. De Angelo, *Tribunali religiosi e tribunale arbitrale: l'offerta «giudiziaria» islamica in Inghilterra*, cit., 395; A. Marotta, *Il diritto musulmano in Occidente: Corti islamiche nel confronto tra democrazia e shari'a*, cit., 197; A. Negri, *Le Sharia Court in Gran Bretagna. Storia ed evoluzione dei tribunali islamici nel Regno Unito*, cit., 5; P. Parolari, *Shari'a a corti islamiche in Inghilterra tra mito e realtà. Pluralità di ordinamenti giuridici e interlegalità nelle società multireligiose e multiculturali*, cit., 168; A. Rinella in A. Rinella, M.F. Cavalcanti, *I Tribunali islamici in Occidente: Gran Bretagna e Grecia, profili di diritto comparato*, cit., 78, 83.

[31] M. Abbamonte, *L'esperienza dei faith-based arbitrations in Ontario, Stati Uniti e Inghilterra*, cit., 41; C. De Angelo, *Tribunali religiosi e tribunale arbitrale: l'offerta «giudiziaria» islamica in Inghilterra*, cit., 392 ff.; M. Reiss, *The materialization of legal pluralism in Britain: why shari'a council decisions should be non-binding*, cit., 768 ff.

In this case, the parties turn to the arbitrators to ensure that they comply with the general rules on arbitration of English law, namely the Arbitration Act of 1996[32], decide their disputes with a ruling having binding legal effect and also suitable for any subsequent forced execution, if the party obliged to comply with the award does not spontaneously comply with what was decided by the arbitrators, as well as subject to appeal before the state judge[33].
And it is important to note that, as already noted above, unlike what happens before the state judge, which normally to resolve the dispute must apply state law, these courts, like any other arbitration panel, must apply the set of substantive rules requested by the parties, which in the present case have identified it in the shari'a.
As a result of these arbitration proceedings we therefore have decisions having a binding and executive legal effect comparable to the decisions issued by the judicial authority, in which the rules of conduct imposed on the parties are those established by the shari'a.
If it is therefore true that both the MAT and the Shari'a Councils apply the shari'a, it is also true that while the decisions of the Shari'a Councils have no relevance for the English state legal system, the arbitral awards of the arbitral tribunals religious have the same legal effects as any other English arbitration award and are largely comparable to those of a judgement by the same state judge. Although the two institutes are different, both evidently constitute two moments of the same more general phenomenon of the aspiration of those belonging to the same religious creed to see individual aspects of their life regulated by precepts of a religious nature. And in fact, in the various legal systems, we usually see at first the rise of the Shari'a Councils and then at a later time the birth of real religious arbitrations[34].

[32] On this discipline see M. Abbamonte, *L'esperienza dei faith-based arbitrations in Ontario, Stati Uniti e Inghilterra*, cit., 43 ff.; N. Andrews, *On civil processes. Court Proceedings, Arbitration & Mediation*, cit., 835 ff.; S. Blake, J. Browne, S. Sim, *A practical approach to alternative dispute resolution*, cit., 423 ff.; *Blackstone's civil practice 2020, The Commentary*, cit., 1367 ff.; B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996*, cit., 1 ff.; L. Passanante, *Il problema della natura del lodo alla luce dell'esperienza inglese*, in Riv. trim. dir. proc. civ., 1405 ff. (2004); R. Pillitteri, *L'Arbitration Act 1996: l'attesa riforma della legge inglese sull'arbitrato*, cit., 803 ff.; A. Rinella, *La* shari'a *in Occidente*, cit., 244 ff.; B. Zuffi, *L'arbitrato nel diritto inglese. Studio comparatistico sulla natura dell'arbitrato e sull'imparzialità dell'arbitro in Inghilterra*, 1 ff. (2008).
[33] J. R. Bowen, *On British Islam. Religion, Law, and Everyday Practice in Shari'a Councils*, cit., 163 ff.; M. J. Broyde, *Sharia Tribunals, Rabbinical Courts, and Christian Panels. Religious Arbitration in America and the West*, cit., 181 ff.; C. De Angelo, *Tribunali religiosi e tribunale arbitrale: l'offerta «giudiziaria» islamica in Inghilterra*, cit., 400; A.M. Felicetti, *The Phenomenon of Religious Arbitration in Family Law: Perceptions, Reality and Perspectives for the Future in England and Wales*, cit., 75 ff.; P. Parolari, *Shari'a a corti islamiche in Inghilterra tra mito e realtà. Pluralità di ordinamenti giuridici e interlegalità nelle società multireligiose e multiculturali*, cit., 169 ff.; Ead., *Diritto policentrico e interlegalità nei paesi europei di immigrazione. Il caso degli shari'ah councils in Inghilterra*, cit., 148 ff.; Y. Prief, *Muslim Legal Practice in the United Kingdom: the Muslim Arbitration Tribunal*, cit., 23 ff.; M. Reiss, *The materialization of legal pluralism in Britain: why shari'a council decisions should be non-binding*, cit., 760 ff.; A. Rinella in A. Rinella, M.F. Cavalcanti, *I Tribunali islamici in Occidente: Gran Bretagna e Grecia, profili di diritto comparato*, cit., 84 ff.; Id., *La* shari'a *in Occidente*, cit., 243.
[34] F. Gandini, *I tribunali arbitrali islamici*, cit., 433 ff.

Moreover, it is clear that, given the different importance of the two institutes, the relative scope of application is also necessarily different. And in fact, while, as we have seen, we turn to the Shari'a Councils above all to obtain the divorce certificate, since divorce disputes cannot be subject to arbitration[35], such disputes cannot be submitted to the arbitrations that take place at the MAT. The latter, therefore, mostly deal with family property disputes, inheritance disputes, commercial disputes, disputes relating to property rights or credits or, more generally, contractual[36].

To further clarify the relationship between Shari'a Councils and MAT, it should be noted that the latter, despite its name which would seem to assume that its activities are always exclusively arbitrary, also offers the typical services of the Shari'a Councils, such as for example the issue of the divorce certificate, and that in such cases the effects of its acts remain confined within the religious sphere not unlike what happens with respect to the real Shari'a Councils[37].

For this reason, the report "The independent review into the application of sharia law in England and Wales" presented to Parliament by the Secretary of State for the Home Department in February 2018[38], which concerned the Shari'a Councils, has only marginally

[35] As is known, despite the Arbitration Act does not expressly specify what the «matters which are not capable of settlement by arbitration» (v. B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996*, cit., 417 ff.; A. Negri, *Le Sharia Court in Gran Bretagna. Storia ed evoluzione dei tribunali islamici nel Regno Unito*, cit., 13; A. Rinella, *La* shari'a *in Occidente*, cit., 247; B. Zuffi, *L'arbitrato nel diritto inglese*, 51 (2008)), it is undisputed that those relating to the dissolution of the marriage cannot be arbitrable (M. Abbamonte, *L'esperienza dei faith-based arbitrations in Ontario, Stati Uniti e Inghilterra*, cit., 49 ff.; N. Andrews, *On civil processes. Court Proceedings, Arbitration & Mediation*, cit., 949 ff.; L. Baccaglini, *Arbitration on family matters and religious law: a Civil Procedural Law Perspective*, available at www.civilprocedurereview.com, 13; S. Blake, J. Browne, S. Sim, *A practical approach to alternative dispute resolution*, cit., 428 ff.; C. De Angelo, *Tribunali religiosi e tribunale arbitrale: l'offerta «giudiziaria» islamica in Inghilterra*, cit., 400; P. Parolari, *Shari'a a corti islamiche in Inghilterra tra mito e realtà. Pluralità di ordinamenti giuridici e interlegalità nelle società multireligiose e multiculturali*, cit., 168; Ead., *Diritto policentrico e interlegalità nei paesi europei di immigrazione. Il caso degli shari'ah councils in Inghilterra*, cit., 147; B. Zuffi, *L'arbitrato nel diritto inglese*, cit., 54).

[36] J. R. Bowen, *On British Islam. Religion, Law, and Everyday Practice in Shari'a Councils*, cit., 163; M. J. Broyde, *Sharia Tribunals, Rabbinical Courts, and Christian Panels. Religious Arbitration in America and the West*, cit., 182; Y. Prief, *Muslim Legal Practice in the United Kingdom: the Muslim Arbitration Tribunal*, cit., 23.

[37] M. Abbamonte, *L'esperienza dei faith-based arbitrations in Ontario, Stati Uniti e Inghilterra*, cit., 51; J.R. Bowen, *On British Islam. Religion, Law, and Everyday Practice in Shari'a Councils*, cit., 155 ff.; C. De Angelo, *Tribunali religiosi e tribunale arbitrale: l'offerta «giudiziaria» islamica in Inghilterra*, cit., 400; A. Negri, *Le Sharia Court in Gran Bretagna. Storia ed evoluzione dei tribunali islamici nel Regno Unito*, cit., 14; P. Parolari, *Shari'a a corti islamiche in Inghilterra tra mito e realtà. Pluralità di ordinamenti giuridici e interlegalità nelle società multireligiose e multiculturali*, cit., 170; Ead., *Diritto policentrico e interlegalità nei paesi europei di immigrazione. Il caso degli shari'ah councils in Inghilterra*, cit., 148 ff.; Y. Prief, *Muslim Legal Practice in the United Kingdom: the Muslim Arbitration Tribunal*, cit., 19 ff.

[38] Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/678478/6.4152_HO_CPFG_Report_into_Sharia_Law_in_the_UK_WEB.pdf

dealt with the MAT and precisely only to the extent that it carries out the activities of the Shari'a Council [39].

V. ON THE APPLICATION OF SHARI'A IN CASE OF ARBITRATION

Before going on to mention the main problems of these arbitration procedures, it is important to underline an aspect that is often not highlighted with due relevance.

It is a question of the fact that if it is true that through the arbitration of the MAT there is the application of the shari'a by a subject other than the state judge, the procedural dynamics deriving from the submission of the arbitration awards of the MAT to the Arbitration Act, in some cases, may also lead to the application of the shari'a by the same state judge.

This can happen for example in the execution of the award.

The Arbitration Act provides for various paths that can be followed to give executive effect to the arbitrators' award, so as to be able to proceed with a forced execution in the event of further default by the losing party.

Apart from the possibility of taking an "action on the award", that is the promotion of an action before the High Court to assert the non-fulfilment of the provisions of the award, therefore in the same way as an ordinary action for breach of contract[40], the typical way is to apply to the judge to obtain from him the "leave of the court", pursuant to section 66 (1) of the Arbitration Act: "An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect"[41].

Basically, once the "leave" has been obtained, the arbitration award can be enforced as if it were a decision of the state judge, not much differently from what also happens in the

[39] On the report, see A. M. Felicetti, *The Phenomenon of Religious Arbitration in Family Law: Perceptions, Reality and Perspectives for the Future in England and Wales*, cit., 57 ff.; P. Parolari, *Diritto policentrico e interlegalità nei paesi europei di immigrazione. Il caso degli shari'ah councils in Inghilterra*, cit., 123 ff.; A. Rinella, *La* shari'a *in Occidente*, cit., 255 ff.

[40] L. Passanante, *Il problema della natura del lodo alla luce dell'esperienza inglese*, cit., 1422; R. Pillitteri, *L'Arbitration Act 1996: l'attesa riforma della legge inglese sull'arbitrato*, cit., 838.

[41] S. Blake, J. Browne, S. Sim, *A practical approach to alternative dispute resolution*, cit., 538; *Blackstone's civil practice 2020, The Commentary*, cit., 1359 ff.; B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996*, cit., 317 ff.; L. Passanante, *Il problema della natura del lodo alla luce dell'esperienza inglese*, cit., 1422; R. Pillitteri, *L'Arbitration Act 1996: l'attesa riforma della legge inglese sull'arbitrato*, cit., 837 ff.; B. Zuffi, *L'arbitrato nel diritto inglese. Studio comparatistico sulla natura dell'arbitrato e sull'imparzialità dell'arbitro in Inghilterra*, cit., 151 ff.

Italian legal system, in which, as is well known, the arbitration award it becomes enforceable only following the judicial approval pursuant to art. 825 c.p.c.

However, the Arbitration Act provides for another possibility. Pursuant to section 66 (2) "where leave is so given, judgment may be entered in terms of the award". This means that the party, once the "leave" has been obtained, can ask the judge to pronounce a sentence that has the same content as the award[42]. As a result of this unique mechanism – which is mostly used to initiate forced execution abroad – it is therefore possible to have a complete judgement issued by the English judge in which the shari'a is applied.

VI. The problem of the effective voluntariness of arbitration

As regards the main problems relating to the MAT[43], I will limit myself in recalling the three issues on which the doctrine has fundamentally concentrated [44].

[42] B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996*, cit., 318; R. Pillitteri, *L'Arbitration Act 1996: l'attesa riforma della legge inglese sull'arbitrato*, cit., 838; B. Zuffi, *L'arbitrato nel diritto inglese. Studio comparatistico sulla natura dell'arbitrato e sull'imparzialità dell'arbitro in Inghilterra*, cit., 153.

[43] On the wide debate raised by the spread of the MAT, especially for the risk that the application of the shari'a could compromise the protection of some fundamental rights of the person, and more generally the phenomenon of the Shari'a Councils, see M. Abbamonte, *L'esperienza dei faith-based arbitrations in Ontario, Stati Uniti e Inghilterra*, cit., 42 ff.; F. Sona, *Giustizia religiosa e islam. Il caso degli Shari'ah Councils nel Regno Unito*, cit., 1 ff. In legal literature it has also been noted that a significant obstacle for the full understanding of the reality of the MAT comes from the difficulty of having direct access to the documentation relating to the individual arbitration procedures. (J. R. Bowen, *On British Islam. Religion, Law, and Everyday Practice in Shari'a Councils*, cit., 166 ff.; Y. Prief, *Muslim Legal Practice in the United Kingdom: the Muslim Arbitration Tribunal*, cit., 37 ff.; M. Reiss, *The materialization of legal pluralism in Britain: why shari'a council decisions should be non-binding*, cit., 775).

[44] The need to solve the various problems deriving from the application of the shari'a through the use of the MAT, especially as regards any discrimination against women, has led to the proposal of a bill (called "Arbitration and Mediation Services (Equality) Bill"), presented in 2011 (but never approved) to the House of Lord by Baroness Carolina Cox, which included, among other things, various amendments to the Arbitration Act. In particular, it was envisaged the introduction of a new section 6 A, called "Discriminatory terms of arbitration" pursuant to which "No part of an arbitration agreement or process shall provide — (a) that the evidence of a man is worth more than the evidence of a woman, or vice versa, (b) that the division of an estate between male and female children on intestacy must be unequal, (c) that women should have fewer property rights than men, or vice versa, or (d) for any other term that constitutes discrimination on the grounds of sex". On this legislative initiative, see M. Abbamonte, *L'esperienza dei faith-based arbitrations in Ontario, Stati Uniti e Inghilterra*, cit., 53 ff.; J. R. Bowen, *On British Islam. Religion, Law, and Everyday Practice in Shari'a Councils*, cit., 205 ff., 253 nota 35; C. De Angelo, *Tribunali religiosi e tribunale arbitrale: l'offerta «giudiziaria» islamica in Inghilterra*, cit., 406 ff.; R. E. Maret, *Mind the Gap: The Equality Bill and Sharia Arbitration in the United Kingdom*, cit., 256 ff., 268 ff.; A. Negri, *Le Sharia Court in Gran Bretagna. Storia ed evoluzione dei tribunali islamici nel Regno Unito*, cit., 21 ff.; P. Parolari, *Shari'a a corti islamiche in Inghilterra tra mito e realtà. Pluralità di ordinamenti giuridici e interlegalità nelle società multireligiose e multiculturali*, cit., 173 ff.; Ead., *Diritto policentrico e interlegalità nei paesi europei di immigrazione. Il caso degli shari'ah councils in Inghilterra*, cit., 122 ff.; Y. Prief, *Muslim Legal Practice in the United Kingdom: the Muslim Arbitration Tribunal*, cit., 28 ff.; A. Rinella in A. Rinella, M.F. Cavalcanti, *I Tribunali islamici in Occidente: Gran Bretagna e Grecia, profili di diritto comparato*, cit., 89 ff.; Id., *La* shari'a *in Occidente*, cit., 251 ff.

First of all, it is necessary to make a few brief observations on the subject of the voluntary nature of the arbitration.

In the Italian legal system, the voluntary nature of the use of arbitration is a requirement of the institution's constitutional legitimacy. The Constitutional Court has stated several times that arbitration is constitutionally legitimate only if it is attributable to the will of the parties[45].

Indeed, the Council observed that "following the combined provisions of Articles 24, paragraph 1, of the Constitution (right of action in court and correlative exercise, constitutionally guaranteed) and 102, paragraph 1, of the Constitution (reservation of the jurisdictional function to ordinary judges, subject to the exceptions referred to in the following article), the basis of any arbitration is to be found in the free choice of the parties: because only the choice of the subjects (understood as one of the possible ways of disposing, even in a negative sense, of the right referred to in Article 24, paragraph 1, of the Constitution) can derogate from the precept contained in art. 102, paragraph 1, of the Constitution". On the basis of this principle, the Council declared numerous rules illegitimate which provided for forms of mandatory arbitration and therefore cases in which the source of the arbitration was not the will of the parties but the law.

In the United Kingdom, on the other hand, there is no similar principle and in fact there are numerous cases of mandatory arbitration[46].

This does not mean, however, that, beyond the cases in which arbitration is required by law, even in that legal system, arbitration requires the voluntary agreement of the parties.

And it is precisely on this aspect that some of the harshest criticisms of the institution of the MAT have been pinned, since, especially with reference to women, but not only, it is feared that social pressure and the fear of being judged negatively in one's own communities can push the weakest subjects to accept the jurisdiction of the arbitral tribunals[47].

The problem is therefore that of the effectiveness and fullness of the voluntary nature of the arbitration choice.

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[45] This is a more than consolidated jurisprudence. The first pronunciation was Corte cost. 14 July 1977, n. 127.

[46] B. Zuffi, *L'arbitrato nel diritto inglese. Studio comparatistico sulla natura dell'arbitrato e sull'imparzialità dell'arbitro in Inghilterra*, cit., 28, note 70.

[47] M. Abbamonte, *L'esperienza dei faith-based arbitrations in Ontario, Stati Uniti e Inghilterra*, cit., 10 ff., 56; L. Baccaglini, *Arbitration on family matters and religious law: a Civil Procedural Law Perspective*, cit., 17; J. Brechin, *A Study of the Use of Sharia Law in Religious Arbitration in the United Kingdom and the Concerns That This Raises for Human Rights*, cit., 300; A. M. Felicetti, *The Phenomenon of Religious Arbitration in Family Law: Perceptions, Reality and Perspectives for the Future in England and Wales*, cit., 84 ff.; M. Lupano, *Il metodo e l'uso degli strumenti religiosi di ADR negli ordinamenti statali*, in Quaderni di diritto e politica ecclesiastica, 159 ff., spec. 174 (2020); R.E. Maret, *Mind the Gap: The Equality Bill and Sharia Arbitration in the United Kingdom*, cit., 267; M. Reiss, *The materialization of legal pluralism in Britain: why shari'a council decisions should be non-binding*, cit., 764.

In this regard, I will limit myself to observing that the problem is actually a problem that has been felt for some time also in our legal system. In fact, there has been a widespread concern for some time that the weak contractor may be induced far beyond his real will to enter into an arbitration agreement. In our system, however, it is difficult to find a remedy to the problem in the general regulation of the contract as simple awe is not sufficient for the cancellation of the contract. So much so that in cases in which this need has been more strongly felt, the legislator has had to intervene with special disciplines (see for example, Articles 1341 and 1342 of the Civil Code). Therefore, beyond the cases in which there is an express legislative provision, there is no room for the interpreter to prevent the arbitration agreement stipulated by a weak contractor from producing its typical binding effects, first of all that preventing access to jurisdiction. ordinary.

Compared to the English system, the situation is not very different, so much so that precisely to solve this problem the Arbitration and Mediation Services (Equality) Bill provided for an amendment to the Family Law Act 1996, aimed at ensuring the genuineness and full awareness of the choice of parties, in favour of arbitration[48].

VII. The problem of the actual autonomy of the parties in determining the rules of the arbitration procedure

A second problem, closely related to the first, is that relating to the ability of both parties to actually freely self-determine, not only in the genetic moment of the arbitration, or in the moment of the completion of the arbitration agreement, but also during the course of the procedure.

The guiding principle of all the laws on arbitration is that of the maximum freedom of the parties and therefore all the laws leave ample room for the will of the parties throughout the arbitration process.

Limiting myself to the most important aspects, it is sufficient to remember that in general it is up to the parties to establish which are the procedural rules that the arbitration panel must follow, the choice of the members of the arbitration panel is left to the parties, the appeal before the judicial authority of the award requires either the authorisation of the

[48] See A. M. Felicetti, *The Phenomenon of Religious Arbitration in Family Law: Perceptions, Reality and Perspectives for the Future in England and Wales*, cit., 87 ff.

judge or the agreement of the parties, an agreement is then possible before the conclusion of the procedure by which the parties waive the appeal[49].

Well, it is clear that if there is a problem of protection of the weak party in relation to the formation of the arbitration agreement, a similar problem occurs every time the legal system attributes, in relation to the arbitration procedure, relevance to the agreement of the set off[50].

The question was raised with particular reference to the discipline of the appeal of the award.

The Arbitration Act provides for two different types of appeal against the award: the challenge, to assert the lack of jurisdiction of the arbitral tribunal (section 67) or a serious irregularity (section 68), and the appeal (section 69), to challenge instead an error of law of the arbitral tribunal[51].

With reference to section 69 of the Arbitration Act, it was noted that this section on the one hand admits the possibility of challenging the award for the violation of a rule of law, establishing that "a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings", on the other hand it precedes this provision by the clause" unless otherwise agreed by the parties"[52]. And the attribution to the parties of the possibility of renouncing the appeal of the award risks once again damaging the weakest subjects, such as women, who could in fact feel compelled to stipulate this type[53].

In this regard, however, it should be noted that, at least according to the prevailing interpretation, in the present case the problem of the possible pressures that the weak party can undergo does not come into play, as the appeal on point of law can be contested only

[49] Cf. with particular reference to English law, M. Abbamonte, *L'esperienza dei faith-based arbitrations in Ontario, Stati Uniti e Inghilterra*, cit., 87 ff.

[50] See from the many authors, J. Brechin, *A Study of the Use of Sharia Law in Religious Arbitration in the United Kingdom and the Concerns That This Raises for Human Rights*, cit., 301, that observes that "*the rules of arbitration are extremely flexible; where vulnerable individuals are in effect coerced (if not legally coerced) into choosing religious arbitration, it is quite possible that these individuals will not be in a position to negotiate the terms of the arbitration in a way that would be fair to their interests*".

[51] N. Andrews, *On civil processes. Court Proceedings, Arbitration & Mediation*, cit., 1055 ff.; B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996*, cit., 325 ff.; L. Passanante, *Il problema della natura del lodo alla luce dell'esperienza inglese*, cit., 1418 ff.; R. Pillitteri, *L'Arbitration Act 1996: l'attesa riforma della legge inglese sull'arbitrato*, cit., 837 ff.; B. Zuffi, *L'arbitrato nel diritto inglese. Studio comparatistico sulla natura dell'arbitrato e sull'imparzialità dell'arbitro in Inghilterra*, cit., 162.

[52] M. Reiss, *The materialization of legal pluralism in Britain: why shari'a council decisions should be non-binding*, cit., 775.

[53] A. Negri, *Le Sharia Court in Gran Bretagna. Storia ed evoluzione dei tribunali islamici nel Regno Unito*, cit., 33; M. Reiss, *The materialization of legal pluralism in Britain: why shari'a council decisions should be non-binding*, cit., 775.

and exclusively errors of law in the application of English law[54]. Therefore, since in the case of the MAT it is based on the assumption that the applicable law is the shari'a, this means of appeal must be considered precluded regardless of any determination of the parties.

VIII. THE LIMIT OF PUBLIC ORDER

Finally, a third problem is the one which characterises all the experiences of application of the shari'a in a Western system, and in fact, even in the event that the application of the shari'a is conveyed by an arbitration award, there is the risk of rulings in conflict with public order, which undoubtedly can happen, for example, every time in which the shari'a causes discrimination between the parties, mostly prejudicing the woman[55]. From this point of view, by way of example only, one of the issues that raised the most doubts is that deriving from the application of art. 14 (3) of the MAT regulation, which provides that "all witnesses must testify in the form and manner prescribed by Islamic Sacred Law". According to the shari'a, in fact, the testimony of the woman would have a lower value than that of the man[56]. The English legal system obviously provides mechanisms to counter any arbitration decisions in conflict with public order[57].

[54] N. Andrews, *On civil processes. Court Proceedings, Arbitration & Mediation*, cit., 1055 ff.; B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996*, cit., 358, 420 ff.; B. Zuffi, *L'arbitrato nel diritto inglese. Studio comparatistico sulla natura dell'arbitrato e sull'imparzialità dell'arbitro in Inghilterra*, cit., 165 ff., text and note 185.

[55] M. Abbamonte, *L'esperienza dei faith-based arbitrations in Ontario, Stati Uniti e Inghilterra*, cit., 10 ff., 45, 56; A. M. Felicetti, *The Phenomenon of Religious Arbitration in Family Law: Perceptions, Reality and Perspectives for the Future in England and Wales*, cit., 90 ff.

[56] On the problems arising from this provision of the MAT regulation, see Y. Prief, *Muslim Legal Practice in the United Kingdom: the Muslim Arbitration Tribunal*, cit., 27 ff., 37 who notes that on the one hand the fact that the parties have voluntarily accepted the arbitration and the rules of the procedure «*thus, it may be argued that the parties involved submit to discriminatory rules of evidence by their own choice*», on the other hand «*it is disputable, however, whether this provision meets the abovementioned requirement of a fair and impartial arbitration procedure as well as the principle of equality declared by MAT itself on its website: "all matters will also be considered without any prejudice to […] gender […]"*». Cf. on the argument also L. Baccaglini, *Arbitration on family matters and religious law: a Civil Procedural Law Perspective*, cit., 17, as well as A.M. Felicetti, *The Phenomenon of Religious Arbitration in Family Law: Perceptions, Reality and Perspectives for the Future in England and Wales*, cit., 90 ff., and P. Parolari, *Diritto policentrico e interlegalità nei paesi europei di immigrazione. Il caso degli shari'ah councils in Inghilterra*, cit., 122 ff., also for the analysis of the proposals in this regard formulated in the Arbitration and Mediation Services (Equality) Bill.

[57] However, it is important to note that up to now it appears that no arbitration decision of the MAT has ever been subjected to the evaluation of the state judge, neither in the execution nor in the appeal (Y. Prief, *Muslim Legal Practice in the United Kingdom: the Muslim Arbitration Tribunal*, cit., 38).

First of all, if the award contains provisions in conflict with public order, both from a procedural and substantive point of view, in the English system, as well as in ours, this prevents the possibility of attributing executive effectiveness to the same[58].

As already mentioned, pursuant to section 66 (1) of the Arbitration Act, the executive effectiveness is granted to the arbitration award only after a review by the judge at the time of granting the "leave".

Secondly, the award contrary to public policy can be challenged and annulled by the state judge pursuant to section 68 of the Arbitration Act, which provides that «(1) a party to arbitral proceedings may [...] apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award "and indicates among the" serious irregularities "the case in which" the award or the way in which it was procured being contrary to public policy"[59].

However, the possibility of challenging the arbitration award for being against public order is not an absolute guarantee with respect to the violations of fundamental rights that could derive from the application of the shari'a through an arbitration award.

In fact, it has been observed in legal literature that it is very difficult, in practice, to be able to obtain the annulment of an arbitration award based on the conditions required by the Arbitration act and the burdens imposed on the contesting party[60], hence "British Muslim women cannot easily appeal a decision handed down by a Shari'a Council"[61].

[58] A. Negri, *Le Sharia Court in Gran Bretagna. Storia ed evoluzione dei tribunali islamici nel Regno Unito*, cit., 13; J. Brechin, *A Study of the Use of Sharia Law in Religious Arbitration in the United Kingdom and the Concerns That This Raises for Human Rights*, cit., 302; A. Rinella, *La* shari'a *in Occidente*, cit., 246.

[59] M. Abbamonte, *L'esperienza dei faith-based arbitrations in Ontario, Stati Uniti e Inghilterra*, cit., 53; A. M. Felicetti, *The Phenomenon of Religious Arbitration in Family Law: Perceptions, Reality and Perspectives for the Future in England and Wales*, cit., 90 ff.; B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996*, cit., 334 ff.

[60] A. Negri, *Le Sharia Court in Gran Bretagna. Storia ed evoluzione dei tribunali islamici nel Regno Unito*, cit., 33 ff.; J. Brechin, *A Study of the Use of Sharia Law in Religious Arbitration in the United Kingdom and the Concerns That This Raises for Human Rights*, cit., 307 ff.; M. Reiss, *The materialization of legal pluralism in Britain: why shari'a council decisions should be non-binding*, cit., 764, text and note 252; A. Rinella, *La* shari'a *in Occidente*, cit., 253.

[61] M. Reiss, *The materialization of legal pluralism in Britain: why shari'a council decisions should be non-binding*, cit., 764.