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For A minimal Vocabulary of Interculturality: a Legal Comparative Perspective

MUSLIM RELIGIOUS JURISDICTION:
*NEO MILLET SYSTEM IN ISRAEL AND GREECE**

Maria Francesca Cavalcanti

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In contemporary secular systems, characterised by a strong cultural and religious pluralism, it is difficult to deny that the religious factor plays a fundamental role in shaping the identity of the different communities that participate in the societies they govern. After all, one of the most complex and articulated expressions of cultural pluralism relates to the religious dimension and the widespread presence of a plurality of religious communities with traditions and norms that demand a place in the public space. In these circumstances, it is necessary to determine whether the primary legal order, which governs the conduct of all persons present within the territory of the State, recognises, admits or tolerates that some of those persons, individually or collectively, observe rules of non-State origin. In this case, in fact, the presence of normative systems, parallel to the state system, means that the legal phenomenon is not limited to the official sources of law that are under State control, but also includes all those legal and non-legal norms that actually govern the behaviour of individuals, or of some of them. In this context the neo millet system, as designed in the Greek and in the Israeli legal system, and characterized by the presence of an islami jurisdiction which is part of the State judicial system, represent an interesting example of legal pluralism and reasonable accommodation between the reasons of minorities legal order and those of the State legal system.

I. INTRODUCTORY REMARKS: LEGAL PLURALISM AND PERSONAL FEDERALISM

In contemporary secular systems, characterised by a strong cultural and religious pluralism, it is difficult to deny that the religious factor plays a fundamental role in shaping the identity of the different communities that participate in the societies they govern. After all, one of the most complex and articulated expressions of cultural pluralism relates to the religious dimension and the widespread presence of a plurality of religious communities with traditions and norms that demand a place in the public space.

This circumstance recalls the notion of legal pluralism that characterises those constitutional orders open to the plurality of cultures and religions and, therefore, crossed by norms that cannot be directly ascribed to the state legal system. The reference is, in

particular, to the coexistence of rules, sanctions and bodies of justice that are not formally part of the state legal system and that are, nevertheless, able to act in the public sphere[1].
The concept of legal pluralism finds application in those scenarios in which old and new minorities demand equal dignity with the majority component but also the affirmation of rules belonging to their own tradition or religion to regulate, at least in part, their existence. Therefore, the state legal system sees its legal production supplemented by rules that are beyond its control but which, at the same time, apply to relations between citizens.
In these circumstances, it is necessary to determine whether the primary legal order, which governs the conduct of all persons present within the territory of the State, recognises, admits or tolerates that some of those persons, individually or collectively, observe rules of non-State origin. In this case, in fact, the presence of normative systems, parallel to the state system, means that the legal phenomenon is not limited to the official sources of law that are under State control, but also includes all those legal and non-legal norms that actually govern the behaviour of individuals, or of some of them.
Among the declinations of legal pluralism that best relate to the phenomenon of cultural and religious pluralism is the one proposed by Griffiths, who suggests a distinction based on the degree of openness of the state legal system to other normative systems present and operating within its territory. In this sense, he defines as weak that legal pluralism dominated by the State system, through mechanisms of connection and recognition that bring the normative system, placed under the hegemony of the State, back to unity.
On the other hand, the legal pluralism that does not suffer from the domination of the state system is strong. As a result, within the same territory different regulatory systems operate and state institutions do not have a monopoly on functions related to the production and application of rules[2].
Equally relevant is the distinction proposed by Vanderlinden and Touraine between subjective legal pluralism and objective legal pluralism. Objective legal pluralism focuses

* The paper has been selected and reviewed by the Scientific Committee of the Conference "Costruendo un vocabolario minimo dell'interculturalità con approccio interdisciplinare", held on May 19, 2021 via Zoom platform, within the research activities of the PRIN 2017 "From Legal Pluralism to theIntercultural State. Personal Law, Exceptions to General Rules and Imperative Limits in the EuropeanLegalSpace" (PI–prof. Lucio Pegoraro–CUP J34I19004200001).
[1] A. Facchi, *Customary and Religious Law: Current perspectives in Legal Pluralism,* in Jura Gentium (2007); R. Motta, *Approccio classico e approccio critico al pluralismo giuridico,* in Materiali per una storia della cultura giuridica, 2, 141 (2004); R. Scarciglia, W. Menski (eds.), *Normative Pluralism and religious diversity,: Challenges and methodological approaches* (2018); F. Puppo, *Il problema del pluralismo giuridico,* in Società e diritti, II(4), 105-130 (2017), S. E. Merry, *Legal Pluralism,* in Law and Society Review, 22, 869-901 (1988); M. C. Locchi, *pluralismo giuridico e diritto comparato nelle società occidentali di immigrazione,* in S. Bagni (ed), *Lo Stato interculturale: una nuova utopia?* (2017).
[2] J. Griffiths, *What is Legal Pluralism?*in Journal of Legal Pluralism, 24, 1-55 (1986).

on the role of the social group to which it belongs: what functions it performs institutionally, procedurally and normatively; what is the relationship between the rules produced by the groups and the state legal system; whether there is scope for recognising the existence, in the same area, of as many legal systems as there are social groups.

Subjective pluralism considers the fact that each individual belongs, with a variable degree of interaction, to a plurality of groups and communities. This kind of pluralism reflects the choice that each individual can make about the forum, or normative system, that he or she considers most suitable to regulate a certain segment of his or her life. In this perspective, the individual subject to different sources of regulation faces the dilemma of choice and mediation between the norms, procedures and institutions of the different legal systems to which he or she refers[3].

The question that arises is how this puzzle can be put together, considering the different nature and origin of the norms to which the individual refers, as well as the need to ensure a balance between the collective rights of minority groups, the individual rights of their members and the fundamental principles of the legal system.

The perspective taken into consideration here, referring to Islamic communities, concerns, in particular, the problem of mediation and accommodation between the state legal system norms and those of reference of these communities. In the case of Islam, this is a complex and articulated legal system that goes beyond the spiritual dimension of the faithful and calls for full legitimacy and effectiveness in the public space dominated by the state system. The issue is twofold: the compatibility of the minority legal system with the state legal system, and the legal means to ensure coexistence between these two normative systems[4].

The idea that culturally, traditionally and religiously diverse peoples can live together in a virtuous way is often traced back to the Western political and religious tradition, starting with the Latin tradition of *ius gentium* and the medieval tradition of the Holy Roman Empire. But there is another particularly significant experience that have to be considered in this context: that of the Ottoman Empire and its Millet system, designed precisely to ensure peaceful coexistence between the different religious communities under the control of the State.

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[3] J. Vanderlinden, *Le Pluralisme juridique-Essay de synthése,* in J. Glissen (ed), *Le pluralisme Juridique*, 19 (1972); J. Vanderlinden, *Le Pluralism Juridique* (2013); A. Touraine, *Libertà, uguaglianza, diversità* (1998).

[4] A. Rinella, *La Sharia in Occidente. Giurisdizioni e diritto islamico: Regno Unito, Canada e Stati Uniti d'America* (2020).

The case of the Ottoman Millet is indicated as the prototype of the so-called personal federalism: a form of political organisation in which the personalist principle prevails over the territorial one, in which the communities of individuals are defined on the basis of ethnicity, religion or language, and are recognised by the State as holders of rights and powers of self-government. These powers include, in particular, the power to apply a norm of a traditional and religious nature to certain issues, such as those relating to family law, which are generally considered central to the collective identity of a minority community[5].

Personal federalism, although it can coexist with territorial federalism, disregards the community's link with the territory and allows for the recognition by the State of rights and status to all members of the cultural or religious minority, regardless of where they are located. The exercise of these powers of self-government requires the recognition by the State of community institutions that have sufficient autonomy to exercise them. An autonomy that implies the broadest possible protection from State interference, especially on issues of decisive importance for the collective identity of the community[6].

Personal federalism would seem to be typical of those systems that address the needs and criticalities of particularly culturally, religiously and linguistically fragmented societies. These societies are generally characterised by cultural and political cleavages, as well as the need to ensure that all communities participate in the public sphere[7]. Experiences with these characteristics aim to overcome the criticalities brought about by cultural and religious pluralism, not by assimilating minorities into the majority, but by attributing a certain margin of autonomy and powers of self-government to individual communities, attempting to stem competition between them and with the majority.

These systems emphasise power-sharing between minority communities and the State, but pose the problem of establishing a clear separation between intra-community and extra-community issues through a set of conflict rules applicable in cases of overlap between competing legal systems[8].

Although this system has often been considered particularly efficient in considering and resolving multicultural issues, especially, as will be seen, in its earliest expressions, criticism of personality-based models has been numerous.

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[5] J. F. Gaudreault-Des Biens, *Religious Courts, Personal Federalism and Legal Transplant,* in R. Ahdar, N. Aroney (eds.) *Shari'a* in the West, 159-181 (2010).

[6] A. N. Messara, *Theorie General du Systeme politique libanais* (1994).

[7] Ibid. 11.

[8] P. Gannagé, *Le pluralisme des statuts personnels dans les Etats multicommunitaires: Droit libanaise et Droit proche-orientaux,* 239 (2001).

Firstly, it was pointed out that such models carry with them the risk of isolating communities, eliminating inter-community interactions and minimising those with the State and the majority[9]. Added to this is the danger of excessive isolation of the individuals making up the minority community.

According to Messara, in a democratic context, where personal federalism is used to solve problems related to the marginalisation of minorities with no territorial connection, it can take the form of what the author calls statutory federalism. In this sense, individuals declare their belonging to a community that enjoys a certain degree of autonomy specified by a statute[10]. As a consequence of this declaration, the provisions of the statute become applicable to these individuals, who must abide by the decisions taken by the community within its areas of competence, without being able to turn to the general discipline established by the state legal system.

In principle, it is the individual who decides to self-identify with a given community. In reality, however, this choice does not appear to be truly free, since it appears to be influenced by the family, place and social context of birth. This identification, which often occurs automatically, is also automatically registered by the State, which thus makes it enforceable in relations with others, other communities and the State itself.

The main problem with this process is its exclusivity: once this membership has been defined, whether or not it is truly free, the individual cannot identify with any other group[11]. It is evident that, in a democratic context, the idea that an individual belonging to a particular minority is, in any case, bound to that cultural, ethnic or religious identification, appears problematic. Each individual, in fact, is characterised by multiple overlapping identities. Consequently, it should be noted that each individual can belong to different social groups, all of which influence his or her identity[12]. These are circumstances that risk being underestimated by personal federalism.

In addition, the relationship between the individual rights of group members and the collective rights pertaining to the group itself may produce, instead of a concrete protection of cultural identity, a risk of underestimation, if not violation, of the individual rights of the most vulnerable. This is the paradox of multicultural vulnerability[13] related to minorities within minorities: those minority components within the group that might

[9] G. Nootens, *Désenclaver la democratie: Des hunguentos à la paix des Braves,* 254 (2004).
[10] A. N. Messara, *Theorie General du Systeme politique libanais,* 62.
[11] J. F. Gaudreault-Des Biens, *Religious Courts, Personal Federalism and Legal Transplant,* 162.
[12] A. Shachar, *Multicultural Jurisdiction: cultural differences and women's rights* (2001).
[13] Ibid., 3.

see their rights oppressed by the community leadership and their vulnerability realised precisely because of those multicultural policies aimed at valuing and protecting differences[14].

The most relevant experiences of personal federalism come from the Middle East and Asia, born out of the need to resolve the demographic, cultural and religious complexity typical of the societies of these geographical areas, combined with the absence of a significant territorial concentration of the groups that make up these societies. These experiences have also been facilitated by the spread of Islam in these areas and the conception of the legal management of minorities and inter-community relations typical of Islamic systems[15].

The most emblematic and oldest example of personal federalism is the Millet system adopted by the Ottoman Empire and maintained, in different forms, in some contemporary States.

II. FROM OTTOMAN MILLET SYSTEM TO NEO MILLETISM SYSTEM: RELIGIOUS COURTS AND PERSONAL FEDERALISM

The Ottoman Empire was a multi-ethnic, multi-religious empire that ruled over an immense area with a population of Turks, Slavs, Albanians, Greeks, Muslims and Christians, giving it a particularly composite nature.

Starting from the treatment of minorities typical of Islam, the religion of the majority of the imperial population as well as of the Sultan, the Ottoman Empire had adopted a particular system of diversity management: the Millet system, which represents the archetype of the models of personal federalism still used today in several Middle Eastern countries. A system that enabled the Empire to organise and manage a multicultural and multireligious society from the conquest of Constantinople in 1453 until the 19th century[16].

Historically, the attitude of Muslim regimes, even before the Ottoman ascendancy, had been to subject individuals belonging to other religious denominations to regimes that, while confirming the superiority of Islam, never reached the persecution. In Islamic law,

[14] A. Eisenberg, J. Spinner-Halev (eds.), *Minorities within minorities. Equality Rights and Diversity* (2005).
[15] J. F. Gaudreault-Des Biens, *Religious Courts, Personal Federalism and Legal Transplant,* 162.
[16] L. Barkey, G. Gaurilis, *The Ottoman Millet System: Non Territorial Autonomy and its contemporary Legacy,* in Ethnopolitics, 15(1), 24-42 (2016).

as well as in the practice of Muslim kingdoms, relations between the central authorities and the non-Muslim communities within them were determined by a pact of protection, *dhimma*, granted solely to the People of the Book, *Ahl al-Kitāb*, i.e. the members of the Abrahamic confessions, called *dhimmi*, the protected[17].

The *Dhimma* guaranteed not only freedom of faith and worship, but also a wide range of rights and guarantees. These included a personal status outlined on the basis of religious, as well as the establishment of autonomous religious courts competent to resolve disputes in application of the community's religious law[18].

In fact, in the Islamic conception of coexistence between religious communities, what was important in principle was the unequivocal recognition of the supremacy of Islam and Muslims. This recognition was linked to the idea of justice, *adalet*, understood as the maintenance of social and political order, according to which each group is obliged to respect its own role in society[19]. This conception of relations with minorities was taken up by the Ottoman sultans when, in the 1400s, the extension of imperial domains brought with it the need to relate to non-Muslim communities that were increasingly large and heterogeneous in their ethnic and social composition.

These changes led Sultan Mehmed II to promote a defined management structure for the three major non-Muslim communities - Christian, Jewish and Armenian[20] - according to a mechanism of administrative and legal autonomy[21].

This system outlined a precise way of dealing with diversity[22], characterised by a clear division of society according to the religious identity of its members regardless of their

[17] F. Donelli, *Islam e Pluralismo. La coabitazione religiosa nell'Impero Ottomano* (2017).
[18] E. Öktem, *Le Comunità religiose nell'Impero Ottomano e nella Repubblica Turca,* in M. Tedeschi (ed.), *Comunità e soggettività* (2006).
[19] B. Braude, B. Lewis, *Christian and Jewes in Ottoman Empire: The Functioning of Plural Society* (II, 1982).
[20] F. Donelli, *Islam e Pluralismo. La coabitazione religiosa nell'Impero Ottomano* (2017).
[21] From a historiographical point of view, the doctrine appears to be divided on the structure of the Millet community management system. Alexander Gibb and Harold Bowen (A. Gibb and H. Bowen, *Islamic Society and the West. Islamic Society in the Eighteenth Century* (I, 1950)) present the Millet system as an organic hierarchical structure created by Mehmed II in 1454 by which the Sultan entrusted the leaders of the three main religious minorities not only with the spiritual leadership but also with the temporal management of their respective communities. In return, the three ecclesiastical authorities were to act as guarantors of compliance with sultan regulations, loyalty to the Empire, internal community order and tax collection. According to I. Ortayli, Ottoman studies, Istanbul, Istanbul Bilgi University, 2004, the Sultan's choice was mainly dictated by the need to secure the support and loyalty of the conquered populations. On the contrary, according to Benjamin Braude, one cannot speak of the Millet as a standard institution with a defined, stable and uniform structure at least until the 19th century (B. Braude, *Foundation Myths of the Millet System* (1982)). According to the author, in previous centuries, the status of minorities varied according to the status of the group, according to a flexible and versatile approach.
[22] S. J. Shaw, *History of the Ottoman Empire and Modern Turkey: Vol I, Empire of the Gazis. The Rise and decline of the Ottoman Empire 1280-1808* (2010).

ethnic or linguistic identity[23]. By co-opting and linking up with local community intermediaries, the Ottoman government safeguarded the stability of a system of vertical integration and indirect rule over minorities[24].

Non-Muslims, who were in any case relegated to a condition of inferiority compared to Muslims, were granted rights and freedoms, but above all protection and autonomy, in a regime that was particularly respectful of internal minorities, even though they were identified only in religious terms[25].

The core of the Ottoman administration was composed of a distinct set of agreements between central power and particular groups. This multiplicity of understandings gave rise to a legal, social and administrative system composed of regulatory practices, declined according to the specific characteristics of each community, which was never fully codified until the 19th-century process of westernisation of Ottoman law[26].

The Ottoman Golden Age (1453-1600) was marked by the presence of three Millets each with its own peculiarities, degrees of autonomy and recognition[27]. In order to guarantee the stability of the system, the management of diversity took on a flexible character, through the acceptance of internal organisational forms and the identification of intermediaries with the task of managing relations between the community and the State. Leaders who were both a spiritual and political guide as well as the representative of the community before the imperial authority[28].

The state renounced its control over the internal dynamics of communities in exchange for regular tax payments and a cohesive administration[29]. Among the powers of self-government granted to minority communities was the subjection of their members to the Ottoman courts only in matters deemed of primary interest to the imperial system: criminal law, financial management and the army. The communities maintained under their jurisdiction most legal disputes, which included matters such as family law and

[23] D. Ilkbahr, *L'identità nazionale e religiosa in Albania nel contesto tardo ottomano,* in S. Trinchese, F. Caccamo (eds.), *Rotte Adriatiche tra Italia, Balcani e Mediterraneo* (2011).
[24] F. Donelli, *Islam e Pluralismo. La coabitazione religiosa nell'Impero Ottomano* (2017).
[25] B. Aral, *The idea of Human Right sas perceived in the Ottoman Empire,* in Human Rights Quarterly, 2, 454-482 (2004). Formally, the freedoms and rights granted from the 15th century onwards by the Sultan became perpetual for several centuries without being revised, abrogated or restricted.
[26] I. Ortayli, *Les non-musulmans et le principe juridique du millets dans l'Empire Ottoman,* in F. Castro, P. Catalano, *La Condition des autres dans les systemes juridiques de la Méditerranée* (2004).
[27] D. Ilkbahr, *L'identità nazionale e religiosa in Albania nel contesto tardo ottomano,* in S. Trinchese, F. Caccamo (eds.), *Rotte Adriatiche tra Italia, Balcani e Mediterraneo* (2011).
[28] K. Karpat, *Studies on Ottoman Social and Political History: Selected article and essay,* 612 (2002).
[29] However, the discretionary power of the Sultans involved alternating periods in which the figure of the leader of the Millet acquired greater importance, to other periods during which it was drastically reduced. D.G. Bates, A Rassam, *Peoples and Cultures of the Middle East* (1983).

personal status, areas of essential importance for preserving the cultural and religious identity of the community[30].

The possibility of granting legal value judgments on internal community disputes, through courts separate and autonomous from the imperial court system, has been described as the most significant right and responsibility accorded to minority communities[31]. The sentences of religious courts were enforced by state authorities in the same way as those of imperial Islamic courts. However, non-Muslims had the right to choose between the courts of their own community or the imperial Sharia Courts. Unless one of the parties to the dispute was of the Islamic faith, in which case the imperial Islamic courts had exclusive jurisdiction[32].

The system of legal pluralism outlined by the Ottoman Empire granted millets a high degree of autonomy in resolving disputes, while at the same time assuring individuals a certain degree of freedom of choice, which, however, can be presumed to be influenced by the social pressure exerted within each community.

Kymlicka identified the Ottoman structure as a hyper-communal model of tolerance based not on individual rights but on group rights. The Millet institution would therefore represent an archetype that demonstrates how it is possible to balance the principle of equality with that of respect for differences in a plural society.

The Ottoman system was characterised by a form of tolerance that was unusual for that historical period. A tolerance based on the recognition and respect of the other understood as a collectivity structured in a community, whose barriers were anything but impermeable[33], resulting in mutual contamination between minorities and between minorities and the majority[34].

The Millet system, understood as a structural framework of religious groups endowed with broad autonomy, began to change gradually from the 19th century onwards when, with the start of the *Tanzimat* reform projects, the Ottoman authorities adopted a policy of systematically managing non-Muslim communities. Until the early decades of the 1700s, the Ottoman Empire presented itself as a strong, fully legitimate, Islamic,

[30] D. Ilkbahr, *L'identità nazionale e religiosa in Albania nel contesto tardo ottomano,* in S. Trinchese, F. Caccamo (eds.), *Rotte Adriatiche tra Italia, Balcani e Mediterraneo* (2011).
[31] F. M. Göçek, *The Transformation of the Turkey: redefyining State and Society from the Ottoman Empire to the modern Era* (2011).
[32] K. Cicek, *Interpreters of the Court in the Ottoma Empire as seen from the Sharia Corts Records of Cyprus,* in Islamic Law and Society, 9(1),1-15 (2002).
[33] W. Kymlicka, *The Politics in the Vernacular. Nationalism, Multiculturalism, Citizenship* (2001).
[34] E. R. Durstler, *Venetians in Constantinople: Nation, Identity and Coexistences in the Early Modern Mediterranean* (2006).

cosmopolitan State, in which the peaceful acceptance of State control over the various minority communities continued to prevail[35]. However, in the second half of the century, the rise of secular elites within the Millets and the unstable international context made the borders of the Empire and the non-Muslim communities more difficult to control. Subsequently, the advent of the concept of the nation State and the progressive identification of the Millets with the new idea of the territorial State, triggered the disintegration of community cohabitation[36].

The need to modernise the Empire according to the European model, combat international decline and counter the independence goals of non-Muslim communities, led to a set of reforms that took the name of Tanzimat, initiated in 1839 with the enactment of an organic law for the government of the Empire, *Hatt-ı Şerif of Gülhane*, or *Tanzimani Fermani*, known as the *Edict of Gülhane* or *of the House of Roses.*

With the Edict of Gülhane, the Sultan expressed his desire to promote a different conception of the State through a secular approach. Among the main innovations introduced was the equality of all subjects before the law, irrespective of their religious identity, in a typically Western conception. With the affirmation of equality among subjects, the principles that had traditionally defined the condition of the *dhimmi* were modified for the first time[37]. The reforms after 1856 and, in particular, the introduction of European-style codes, also significantly affected the autonomy of the Millets: given its secular nature, the new discipline applied indiscriminately to all subjects, to all disputes, with the sole exception of family law[38]. In this area of law, the *Tanzimat* reforms reversed the pattern of jurisdiction under the traditional Millet system: until 1856, family law and succession matters had been one of the areas of law in which the Muslim communities were truly autonomous, such disputes falling under the jurisdiction of the communities unless the parties decided to turn to the Ottoman authorities. After that date, family and succession law in principle fell under the jurisdiction of the State, unless the parties concerned requested that the case be dealt with by the community Courts[39].

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[35] F. Donelli, *Islam e Pluralismo. La coabitazione religiosa nell'Impero Ottomano* (2017).
[36] Ibid.
[37] G. Del Zanna, *I Cristiani e il Medio Oriente (1798-1924)* (2011).
[38] E. Benassa, A. Rodrigue, *Shepardi Jewry. A History of the Judeo-Spanish Community, 14th-20th Centuries* (2000). However, the introduction of policies aimed at granting full legal equality to all subjects of the Empire led to greater fragmentation no longer on a confessional but on an ethnic basis, accelerating the process of disintegration of the Ottoman structure.
[39] M. H. van Den Boogert, *Millets: Past and Present,* in A. N. Longva, A.S. Roald, *Religious Minorities in the Middle East. Domination, Self-Empowerment, Accommodation,* 27-47 (2012).

The *Tanzimat* reformers never attempted to abrogate religious law, but rather to limit its scope through the introduction of secular laws and the gradual erosion of the powers of the religious courts[40].

After the First World War and the fall of the Empire, the traditional Millet structure, although deprived of the possibility of choosing the jurisdiction of minority members and identifying among the Millets also the Islamic one, was largely maintained by the European powers that received the mandate to administer the territories that had been part of the Ottoman Empire. This was especially the case in what was known as Greater Syria, a territory that now includes Israel, Jordan, Syria, Lebanon and Palestine. After the colonial period, while the Millet system had been abandoned in many Arab countries, some of the new nation-States that governed within their territorial borders societies characterised by a plurality of ethnic and religious communities, maintained a legal regime based on the personality principle modelled on the Ottoman Millet scheme.

This is the system defined by the doctrine as *Neo Milletism*[41], adopted, through different historical and political processes, both by the State of Israel, for all the main religious communities, and by the Greek State, for the Islamic minority of Western Thrace only.

III. NEO MILLET SYSTEM IN ISRAEL: THE MUSLIM RELIGIOUS JURISDICTION

When British forces completed their occupation of Palestine in 1918, they consolidated their rule over the region, on the basis of their colonial experience, without alienating the religious communities, opting to incorporate pre-existing institutions into the new administration[42]. However, the region had a complex situation caused by the *Tanzimat* reform process that had recently started. The British authorities therefore had to choose between the new, uniform and modern family law applied by the Ottoman civil courts and the retention of the Millet system in its original form, to be applied to all religious communities, including Muslims.

[40] B. Lewis, *The Emergence of Modern Turkey* (2002).

[41] The concept of Neo Millett was used by Paul S. Rowe to describe the dynamics between authoritarian regimes in the Middle East and their non-Muslim citizens (P.S. Rowe, *Neo Millet System and transnational Religious Movements: The Humayun Decrees and Church Construction in Egypt*, in The Journal of Church and State, 49(2), 329-350 (2007)). This concept was later also used to indicate the dynamics between secular states and religious minorities, including Muslim communities, inspired by the Ottoman Millet system. See in this sense K. Tsitselikis, *The Pending Modernisation of Islam in Greece: From Millet to Minority Status*, in Südosteuropa, 55(4), 354-372 (2007).

[42] I. Shahar, *Legal Pluralism in the Holy City, Competing Courts, Forum Shopping and Istitutional Dynamics in Jerusalem,* 34 (2017).

The British administration opted for the second solution, which was more compatible with its colonial policy. With Ordinance No. 42 of 1918, amended by Ordinance No. 81 of the same year, it established that the rules on the jurisdiction of the various religious communities would remain those of Millet in its original form[43], with the difference of considering the Muslim community on a par with other religious minorities and Islamic law no longer as the law of the State.

In fact, the subsequent Ordinance No. 25 of 1919 mandated the application of Ottoman family law to all Muslim citizens, by the Sharia Courts, which went from being the Courts of the state court system, to being part of this neo-millet system promoted by the British Mandate[44]. The jurisdictional autonomy of the Islamic Courts was also guaranteed by the Palestine Order in Council of 1922[45], POC, which confirmed the application of the Ottoman Law of Procedure of 1917[46], which established religious courts exclusive jurisdiction in matters of personal status. However, the POC also introduced several modifications to the religious jurisdiction as conceived by the Ottoman authorities, among which was the possibility that the sentences of the Islamic Courts could be effective only after execution by the civil courts[47].

In 1948, with the end of the British Mandate, the Israeli state government decided to continue on the path taken by the previous administration, confirming the neo millet system. More precisely, the Provisional Government, through Article 11 of the Government and Law Order of 1948, confirmed the adoption of the legal system shaped by the British Mandate, subject to subsequent amendments[48].

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[43] Ibid., 35.

[44] A Muslim expert in religious sciences, *alim*, was appointed inspector of the Islamic Courts. The new *qadis*, the judges, were chosen by the British authorities themselves, after consultation between the *alim*, the British judicial officer, and the members of the Islamic Court of Appeal, composed of a president and two permanent members.

[45] The Constitution of Mandatory Palestine, know as the Palestine Order in Council or POC of 1922, was the codified constitution of Mandatory Palestine which was published after the Legue of Nation approval of the Mandate for Palestine, officially repleaced the British military occupation of Palestine with a civil administration, always under the british control.

[46] Palestine Order in Council 1922, art. 52.

[47] At the same time, in order to pacify the discontent of the Muslim population, the British authorities instituted the Supreme Muslim Council, which assumed the control and management of the Islamic Courts and the promotion of the Islamic cultural identity, to which was added an important political role. The autonomy of the Islamic community was greatly reduced from 1937 onwards, when most of the powers attributed to the SMC were transferred to a committee headed by a British magistrate, before being definitively abolished in 1951.

[48] The Ministry for Religious Affairs of the newborn Israeli State, established two Islamic Courts in Nazareth and Acre in August 1948. In 1950, the Islamic Courts of Jaffa and Tayyibe were established, followed in 1953 by the establishment of a Court of Appeal, composed of three quadis, based in Jerusalem: Shari'a Court (Validation of Appointment) Law 1953.

The system of neo-milletism adopted by the State of Israel has, in particular, taken on relevance in matters of family law, depriving citizens of a civil regulation of marriage to which only the religious discipline of the community of spouses can be applied.

Initially, there was no specific legislation in the Israeli legal system regulating the functioning of the Islamic jurisdiction, whose courts continued to function according to the rules adopted by the Ottoman system and confirmed by the British Mandate.

Soon, the Israeli State felt the need to regulate more analytically some aspects of Islamic jurisdiction: with the Shari'a Courts Law (Validation of Appeals) of 1953, the Israeli legislator recognised ex post facto all the decisions issued up to that moment by the Sharia Courts, confirmed the appointment of the *qadis*, the judges, already in office and placed Islamic jurisdiction under the responsibility of the Ministry for Religious Affairs, which was abolished in 2001 and replaced in this function by the Ministry of Justice. This legislation was followed by the Qadis Law no. 5721/1961, concerning the procedure for appointing judges, and the Religious Courts (Summons) Law no. 5716/1956, which grants the religious courts powers of internal management of hearings[49].

During the period in which Palestine was subject to the British Mandate and then also under Israeli State, until the reform implemented through the Family Court Law in 2001, the Islamic Courts exercised a particularly broad jurisdiction, greater than that granted to other religious Courts, including rabbinical ones. Religious courts exercise jurisdiction over personal status, however, the definition of this jurisdiction is defined differently for Islamic and other religious jurisdictions.

Article 51 of the Palestine Order in Council of 1922, in stating that jurisdiction over matters pertaining to personal status is exercised by the courts of the individual religious communities, specifies that matters pertaining to personal status include all disputes relating to «marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption, inhibition from dealing with property of person who are legally incompetent, succession, wills and legacies, administration of the property of absent person».

Article 52 below, unlike the original provisions of the Ottoman Millet system, specifies that the Islamic Courts exercise exclusive jurisdiction over the aforementioned matters involving Muslim believers in accordance with the Law Procedures of Muslim Religious Courts of 1933 and subsequent amendments, taking into account the fact that, as mentioned, the Israeli legal system does not provide for a secular discipline of marriage.

[49] There are a total of eight Islamic Courts currently operating in the State of Israel: In 1971, two more Courts were established in Haifa and Beersheva, 1988 saw the establishment of the West Jerusalem Court and 2006 saw the establishment of the Baqa Al- Gharbiya Court.

The jurisdiction of the Christian Courts and the Rabbinical Courts is, however, defined differently. According to the provisions of articles 53 and 54 of the POC, the Rabbinical and Christian Courts exercise their jurisdiction in matters of marriage, divorce, alimony and testamentary succession in relation to members of their own religious denominations. In all other cases, including those pertaining to personal status but not specified in the aforementioned rules, jurisdiction belongs to the civil courts unless the parties expressly request that the dispute be submitted to the religious court of their own community, as provided by the original Millet system, especially in the last period of the Empire's life[50].
Judgments issued by the Sharia Courts are appealable to the Islamic Court of Appeal, which is the final instance of the Islamic judicial system[51]. The jurisdiction of the Court of Appeal was subsequently clarified by the Mandatory Regulation of 1918, subsequently amended in 1919, which added to the Court's powers the power to resolve internal conflicts of jurisdiction. In order for decisions of religious courts to be legally binding in the legal system, they must be subject to enforcement by the competent civil courts[52].
Islamic jurisdiction in Israel was, therefore, conceived as an exclusive jurisdiction, parallel to that of the state. These characteristics have been progressively modified. Over time, the extensive exclusive jurisdiction of the Islamic religious courts has been eroded by the Israeli legislature, which has progressively attributed to the concurrent jurisdiction of civil and religious courts many matters relating to the personal status of the faithful[53].
An initial restriction on exclusive Islamic jurisdiction was introduced by the Age Marriage Law 5710/1950, which set the minimum age for marriage and gave only the civil courts the power to authorise marriages between persons below the age prescribed by law. In 1965 Succession Law No. 5725 established concurrent jurisdiction between civil and religious courts in matters of succession, with the result that any dispute in this matter is subject to civil jurisdiction unless the testator has expressly provided for the application of Islamic law and the jurisdiction of the corresponding court[54].

[50] Furthermore, again according to Art. 53 Palestine Order in Council, in the case of a dispute involving individuals belonging to different religious denominations, any of the parties can refer the matter to the President of the Supreme Court who, with the assistance, if he deems it necessary, of an expert from the communities involved, identifies the competent Court. Similarly, if a jurisdictional question arises as to the exclusive jurisdiction of a religious court, the decision is referred to a special tribunal composed of two judges of the Supreme Court and the president of the Court of Appeal of the community involved.
[51] Palestinian Order in Council, 1922, art.52.
[52] Palestinian Order in Council, 1922, art.53.
[53] This process of erosion actually affected rabbinical jurisdiction before Islamic jurisdiction, through the reform made to the Rabbinical Courts Jurisdiction Law 5713/1953 which, in particular, eliminated exclusive jurisdiction in matters of marriage and divorce.
[54] Succession Law 5725/1965, art.51.

Moreover, if one of the parties involved is a minor or incapacitated, any application of religious law may not result in the attribution of rights to a lesser extent than that laid down by civil law[55].

Spouse (property relations) Law 5733/1973, on the other hand, did not affect the exclusive jurisdiction in matters of marriage and divorce, but required Sharia Courts to act in accordance with civil law «in a matter dealt with by this law[56] (…) unless the parties have agreed before such court to litigate in accordance with religious law»[57]. The rule, therefore, did not intervene with regard to a change in jurisdiction, but provided for the application of religious law, only in some aspect of family law, only at the express request of the parties.

The most significant intervention in this matter took place by means of Amendment No. 5 to the Family Court Law approved in 2001, which officially transformed Islamic religious jurisdiction from an exclusive jurisdiction to a jurisdiction concurrent with the civil one in all matters pertaining to the personal status of members of the community. The sole exception are disputes concerning marriage and divorce, for which, however, as mentioned above, the religious judge must respect certain fundamental principles sanctioned by secular law.

The amendment thus represented the final act in a gradual process of transforming exclusive jurisdiction in matters of personal status into predominantly concurrent jurisdiction, retaining the character of exclusivity only in matters of marriage and divorce.

III.I JUDGES, PROCEEDINGS AND APPLICABLE LAW

The Qadis Law of 1961, modified by the Qadis Law Amendment of 2002[58], defines the qadis as the judges of the Sharia Courts and of the Islamic Court of Appeal[59]. The *qadis* are appointed by the Head of State on the proposal of a committee chaired by the Minister of Justice and composed of 9 members: 2 *qadis* elected for this purpose by the Islamic

[55] Succession Law 5725/1965, art.51.
[56] the reference is only to aspects related to age of marriage, prohibition of poligamy and *talaq,* and registration of marriage.
[57] Spouse (property relations) Law 5733/1973, art.13.
[58] The reform stemmed from criticism in the 1990s of the obscure eligibility criteria for *qadis*, which led to a series of appeals before the HCJ that delayed appointments for years.
[59] Qadis Law 5721/1961, art.1.

judiciary for a period of 3 years, 3 members of the Knesset, 2 of whom are Muslim, and 2 lawyers, 1 of whom is Muslim[60].

The office of Qadi is open to men and women of the Islamic faith who have a higher education in Islamic law or Islamic religious studies, or who have practiced law for no less than five years, whose lifestyle and personality are suitable for the office to which they aspire, who are at least 30 years old and who are or have been married[61]. Candidates must also pass an examination in front of a committee composed of the President of the Islamic Court of Appeal, a *qadi* in office, a lawyer and a Muslim member of the Knesset[62]. Once appointed to this position, the *qadi* must swear an oath of allegiance to the State of Israel, promising to perform his role in accordance with State law. The law guarantees Muslim judges full independence, stating that they are not subject to any authority other than State law[63].

In the application of substantive and procedural law, the Sharia Courts of Israel have taken as a point of reference the Islamic Ottoman law elaborated in the last years of the Empire: the civil code applied in the Empire since 1876, the so-called Majalla[64], the Ottoman Law of family rights, OLFR, of 1917 and the Law of procedure for Sharia Courts of the same year.

To the cited Ottoman sources, it is then necessary to add the Proclamation n.10 of 1918 and n.1 of 1919 which contain the procedural discipline elaborated by the Islamic Court of Appeal and confirmed by the British Mandate.

Despite adopting a substantial attitude of non-interference with religious jurisdiction, the Israeli legislator has not remained indifferent to the presence of certain elements of the substantive law applied that are considered discriminatory against women[65]. In order to eliminate gender inequities in all state jurisdictions, including religious ones, the Israeli legislature has passed a series of laws to be enforced by both civil and religious courts.

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[60] Qadis Law 5721/1961, artt.3 e 4.
[61] Qadis Law 5721/1961, art.2.
[62] Qadis Law 5721/1961, art.2.
[63] Qadis Law 5721/1961, art.9.
[64] The civil law codified by Majalla, drawn up in the context of the Tanzimat reforms, was based on the principles of the Hanafite school but was also strongly influenced by Western legal culture. The Ottoman Empire, in its efforts to reform the legal system, had envisaged the application of the code to all citizens of the Empire regardless of their religious affiliation. This choice was confirmed by the British Mandate and the State of Israel. In 1984, the Israeli legislature repealed the Majalla, by means of Law 5744/1984, at the end of a process of substitution of Ottoman and British law that had begun in the 1960s. From that moment, the Ottoman Civil Code was applied only to the Islamic community through its Courts (Law 5744/1984, art.2). I. Shahar, *Legal Pluralism in the Holy City, Competing Courts, Forum Shopping and Institutional Dynamics in Jerusalem*, 48 (2017).
[65] Ibid., 48.

The first of these was Article 1 of the Women's Equal Rights Law of 1950, which states that men and women must be accorded equal status with regard to any legal act. Consequently, any provision of law, whether civil or religious, that discriminates against women cannot have any legal effect in the system. According to Section 7 of the same Act all Courts, including religious Courts are bound to act under it unless all the parties are eighteen years of age or over and had consent before the tribunal of their own free will to have their case tried to according to the laws of their community[66].

The Supreme Court also affirmed the mandatory application by all courts, including religious courts, of the Basic Laws that recognise and guarantee fundamental rights and freedoms, as superordinate laws of the Israeli legal system[67].

The compulsory application of certain secular laws by religious courts has led to the creation of a complex system combining direct civil and religious law. Consequently, Israeli Islamic courts, as well as other religious courts, can be considered hybrid institutions that use norms and principles belonging to both the religious and secular orders[68].

IV. Neo Millet System in Greece: the Muslim Religious Jurisdiction of the Western Thrace

Greece is historically one of the European countries that has been confronted the most, and for the longest time, with the need to find effective solutions for managing cultural and religious pluralism. Given its constant proximity to the Islamic world, this State has experienced a legal pluralism determined by the overlapping of the rules of religious law with those of the state system, which has led to the creation of an Islamic jurisdiction parallel to the ordinary one.

The strong Muslim presence in Greece is the result of centuries of coexistence between Greeks and Ottomans, stemming from a complex historical and political framework that marked the birth and evolution of the modern states of Greece and Turkey, whose political relations still influence the lives of the Muslim population today.

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[66] Over time, the obligation for religious courts to apply certain secular laws has become more stringent with the passing of Capacity and Guardinaship Law 5722/1962, Succession Law 5725/1965, Spouse Property relation Law 5733/1973, Prevention of violence in the family Law 5751/1991.

[67] HCJ 6892/93; 3077/1995, 3856/2013.

[68] I. Shahar, *Legal Pluralism in the Holy City, Competing Courts*, 48.

In this regard, it should be made clear that the Greek population of Islamic faith can ideally be divided into two macro categories: old and new Islam[69]. The so-called old Islam is made up of Greek citizens belonging to the historical minority of Western Thrace, whose legal status derives from the complex of international treaties stipulated by Greece since 1830[70]. New Islam, on the other hand, is used to identify the immigrants of Muslim faith who have settled in Greece since the 1980s and 1990s, but also the other historical Islamic communities that, however, have been excluded from the application of a special regime. Only the first group is granted a differentiated legal regime resulting from its minority status.

The dissolution of the Ottoman Empire led to a gradual transformation of the dominant Muslim population in those territories into a minority group within the new Balkan nation-states. The rules for the protection of these religious communities within the emerging legal systems were established well before the establishment of the system of minority protection by the League of Nations[71].

The first international act to fully regulate the legal regime applicable to the Muslim minority in Greece dates back to 1881, when the annexation of Thessaly made some 40,000 Muslims Greek citizens. The Convention of Constantinople, signed in that year between Greece and the Ottoman Empire, not only defined the new borders of the Greek state but also officially recognised the status of a minority to its Muslim population, regulating their protection, guaranteeing freedom of worship and the survival of the community institutions historically present in those regions[72].

In particular, the Convention provided for the recognition by the Greek legal system of the figure of the *mufti*, the spiritual and political leader of the Muslim community, who was given the power to exercise jurisdictional functions within an Islamic religious court[73].

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[69] K. Tsitselikis, *Old and New Islam in Greece. From Historical Minorities to Immigrant Newcomers* (2012).

[70] According to the State Legal Council, only Greek citizens who are of Islamic faith, descendants of members of the historical minority and registered in the registers of one of the municipalities of Thrace or in another municipality of the country can be considered members of the Muslim minority of Thrace (NSK, opinion 222/2014; Council of State, StE 290/2002).

[71] The London Protocols signed by France, Great Britain and Russia in 1829 set as a condition the recognition of Greece's independence, the guarantee of protection of the personal security and property rights of the Muslim population.

[72] In the period prior to the Constantinople Convention, the personal status of Greeks of Muslim faith was regulated by reference to imperial Islamic law in agreement between the Greek and Ottoman authorities. C. Katsiana, *The Legal Status of the Muslim Minority in Greece*, in Jura Gentium, 1 (2009).

[73] The figure of the mufti is also a legacy of the Ottoman legal system. However, under the Ottoman millet system, the mufti was appointed by the qadi, the judge, to provide the interpretation of the Sharia. In the Greek system, these two figures are confused, and the duties of spiritual leader and representative of the Muslim community before the Greek authorities are also added. At the time of the Constantinople Convention, there were about 50 mufti operating on Greek territory.

At that time, the *mufti's* jurisdiction was limited to strictly religious matters, including disputes concerning family relations[74].

The decisions of the religious court were not, however, legally binding. Rather, they represented advisory opinions that were carefully considered by the civil courts when settling disputes[75].

In implementation of the Constantinople Convention, Law 59/1982 on the regulation of spiritual leaders of Muslim communities, defined the legal status of the *mufti*, recognising to the *mufti* both as the spiritual leader of the Muslim community residing in his district and, with reference to the exercise of jurisdictional powers, as a public official appointed or removed from office by royal decree[76].

With the end of the Balkan wars (1912-1913), the Treaty of Athens of 1913 established a new discipline of the system to protect the Muslim community. The role of the mufti as spiritual leader, representative and judge of the Muslim community was confirmed with a significant novelty: Article 11 of the Treaty, unlike both the Ottoman tradition and that of other Muslim States, substituted the appointment of the mufti by the State with his direct election by the members of the community, thus introducing one of the most debated questions on the subject.

Pursuant to the Athens Treaty of 1913, Article 4 of Law 147/1914, which is still in force, reaffirmed the right of Greek citizens of the Muslim faith to have recourse to the mufti for the settlement of disputes concerning their personal status under Sharia law, confirming the incorporation of Islamic law, under certain conditions, into Greek legal system.

The question of defining the special status accorded to the Muslim community came back into focus with the end of the First World War when the 1920 Treaty of Sèvres redrew the borders of Greece through the annexation of the region of Thrace and the city of Smyrna (Izmir). Law 2345/1920 once again confirmed the legal status of the mufti and extended his jurisdiction to new Greek citizens of Islamic faith, establishing a discipline that would remain unchanged until 1990.

The described legal framework was enriched by the Lausanne Convention of 1923 following the definition of a new geographical map of the borders between Greece and Turkey. Based on the nationalist demands of the two states, the Lausanne Conference

[74] Constantinople Convention1881, art. 8 co.3.
[75] K. Tsitselikis, *Old and New Islam in Greece. From Historical Minorities to Immigrant Newcomers,* 34 (2012).
[76] Ibid., 34.

regulated the consequences of the break-up of the Ottoman Empire by promoting national homogeneity with decisive effects on the fate of the Muslim minority in Greece[77]. These effects were realised in two ways:

1) the Convention established the elimination of mutual minorities between Greece and Turkey through the instrument of population exchange;

2) a new regulation of the legal status of religious minorities excluded from the population exchange established by the Treaty of Lausanne, concluded a few months after the Convention[78].

The population exchange between Greece and Turkey took place in 1923 and consisted of two different population movements in opposite directions: Christians from Anatolia were deported to Greece and Greek citizens of Islamic faith to Turkey[79].

Article 2 of the Convention exempted the Muslims of Western Thrace and the Greek Orthodox communities of Istanbul, Imbros and Tenedos from the population exchange[80]. The exemption of these populations resulted in their qualification as minorities within their respective States.

Once again taking the ancient Ottoman Millet system as a point of reference, these minorities were defined on a strictly religious basis while maintaining a strongly pluralistic ethnic and linguistic character.

The legal status of the Islamic minority in Western Thrace is governed by a complex of rules deriving from the Treaty of Lausanne of 1923, the Greek Constitution of 1975 and the regulations approved in implementation of the international treaties concerning it.

First of all, the Treaty of 1923, in Articles 37 to 45, under the heading of the protection of minorities, guarantees the members of the so-called Lausanne minority the protection of their cultural identity and their participation in the social and political life of their community and State, on the basis of the principles of equality and non-discrimination. The regulation of relations between the minority and the state is based on the Ottoman Millet, whereby the minority enjoys autonomy and powers of self-government linked to religious identity[81].

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[77] E. Kontogiorgi, *Population Exchange in Greek Macedonia,* 165 (2006).

[78] K. Tsitselikis, *The Convention of Lousanne (1923): Past and current Appraisal,* in V. Lytra (ed), *When Greeks and Turks meet: Interdisciplinary perspectives on the Relationship Since 1923*, 211 (2014).

[79] R. Clogg (ed.), *Minorities in Greece. Aspect of a Plural Society* (2002).

[80] PCIJ Publication of the Permanent Court of International Justice, *Exchange of Greek and Turkish population,* Opinion n. 10, Series B, 21.2.1925.

[81] K. Tsitselikis, *A surviving Treaty: The Lousanne Minority Protection in Greece and Turkey,* in K. Henrard (ed), *The Interralation between the Right to Identity of Minorities and their Socio-economic partecipation,* 287-313 (2013); K. Barkey, *Empire of Difference. The Ottoman in Comparative Perspective,* (2008).

Thanks to the protection offered by the Treaty of Lausanne, the minority enjoys a special autonomy that allows it to be placed within the framework of Greek public law[82]. Article 42 of the Treaty of Lausanne, together with Article 4 of Law 147/1914, constitutes the legal basis for the recognition of the mufti's jurisdictional functions and the consequent application of Sharia law in Greek law.

The aforementioned Article 42 requires Contracting States to take all necessary measures to ensure that all questions concerning the personal status of members of the minority are dealt with and resolved in accordance with their religious traditions[83].

Article 4 of Law 147/1914 identifies the law applicable in the territories annexed to Greece following the Treaty of Athens in 1913, establishing that all questions relating to the marriage of persons belonging to the Muslim or Jewish religion are governed by religious law and judged in accordance with it[84]. This legal framework was subsequently complemented by Article 5 of Law 1920/1991, which, having repealed and replaced the previous Law 2345/1920, also included succession matters within the jurisdiction of the Mufti.

The described jurisdictional functions are currently divided between three mufti: the mufti of Rodopi, the mufti of Xanthi and the mufti of Evros, each of whom has the power to act as a judge applying Islamic law within the limits of the jurisdiction set by law. The jurisdiction of the mufti is, therefore, a special jurisdiction, religiously and territorially based, which operates in parallel with that of the civil courts, which remain competent to check the conformity of religious decisions with the fundamental principles of the legal system and the rights enshrined in the Constitution[85].

The mufti's jurisdiction is strictly established by law and cannot be extended. Therefore, although many of these issues are still controversial, neither the property effects of

[82] K. Tsitselikis, *Annotateed Legal Documents on Islam in Europe: Greece,* 38 (2016).

[83] Lousanne Treaty 1923, art. 42, s. 1: «The [Greek] government undertakes as regards [muslim] minorities in so far as concerns their family law or personal status, measures permitting the settlement of these question in accordance with the customs of those minorities». On closer inspection, the provision makes no reference to an obligation to set up religious courts, nor is there any element that might limit the possibility of a future different regulation of the status of members of the minority, provided that the relevant disputes are decided in a manner that respects religious traditions. According to one view, Greece is obliged to respect its obligations regarding Islamic jurisdiction under the Treaty of Constantinople and the Treaty of Athens. According to another orientation, the Lausanne Convention is the only binding source on the matter. According to this option, Greece would have no international obligation to maintain the jurisdiction of the mufti.

[84] K. Tsitselikis, *Annotateed Legal Documents on Islam in Europe: Greece,* 38 (2016). The rule survived the passing of the law introducing the Greek Civil Code, Article 6 of which abrogated Jewish religious jurisdiction, but not Islamic jurisdiction.

[85] A. Rinella, M.F. Cavalcanti, *I Tribunali islamici in Occidente: Gran Bretagna e Grecia. Profili di diritto comparato,* in DPCE, 1, 103 (2017).

divorce[86] nor the institution of adoption[87] can be subject to religious jurisdiction. The possibility of entrusting the regulation of relations between parents and children following the dissolution of the marriage bond to the special jurisdiction is also debated[88].

From a subjective point of view, the law limits the possibility of recourse to religious jurisdiction to members of the historical minority of Thrace only, however, the muftis have often crossed these boundaries and decided cases in which only one of the parties belonged to the minority[89]. The issue, which remained controversial for a long time, was defined by Article 16 of Law 4301/2014 on the recognition of religious denominations by the State. The explanatory report attached to the law, after stating that the mufti's offices do not have to be registered according to the new procedures laid down in the law since they automatically assume the legal status of bodies governed by public law, specifies that «muslim outside the Thrace do not fall within the normative field of the present law»[90].

IV.I JUDGES, PROCEEDINGS AND APPLICABLE LAW

Greek law grants the mufti a special status, first established by the Constantinople Convention of 1881 and unchanged since then. More precisely, the mufti is recognised as the religious leader of the Muslim community with special jurisdictional functions. Since the stipulation of the Constantinople Convention, Law 59/1882 on the spiritual leaders of Islamic communities, Greek law has recognised the mufti as a public official, appointed or removed from office by royal decree[91].

Article 11 of the Treaty of Athens modified the procedure for appointing the mufti by making him subject to election by the Islamic community itself. This selection procedure was confirmed by Law 2345/1920 and remained unchanged until 1991, when the case concerning the selection of the mufti was brought before the European Court of Human Rights[92]. On 4 February 1991, the Greek Parliament passed Law No 1920, which repealed

[86] Trace Court of Appeal 356/1995, Tribunale di Xanthi 251/1982.
[87] Trace Court of Appeal 356/1995.
[88] Trace Court of Appeal 7/2001.
[89] A. Tsaoussis, E. Zervogianni, *Multiculturalism and Family Law: The Case of Greek Muslims,* in K. Boele-Woelki, T. Sverdrup (eds), *European Challenges in Contemporary Family Law,* 212 (2008).
[90] www.opengov.gr.
[91] A. Ziaka, *Greece: Debates and Challenges,* in M. Berger (ed), *Applying Shari'a in the West. Facts, fears and future of Islamic Rules on Family Relations in the West,* 130 (2013).
[92] The case concerning the selection of the mufti of Thrace, which necessitated the intervention of the European Court of Human Rights, arose from the death of the mufti of Rodopi in 1985, following which the Greek government appointed an interim mufti, who was subsequently confirmed in his functions by

and replaced Law 2345/1920 and definitively changed the procedure of the mufti, abolishing the procedure involving election by the communities.

Shortly after its entry into force, Law 1920/1991 was challenged on the grounds that it violated Greece's international obligations under the Treaty of Athens of 1913. The Council of State has, however, consistently held that both the Treaty of Sevres of 1920 and the Treaty of Lausanne of 1923 replaced the earlier Treaty of Athens, concluded when Thrace was not yet part of Greek territory. Consequently, the procedure of appointment by presidential decree of a civil servant, such as the mufti, cannot be regarded as contrary to international treaties[93].

As mentioned above, the matter was also referred to the ECHR Court for violation of Article 9 ECHR[94]. The Strasbourg Court has stated that although in a democratic society it may be necessary to place limits on religious freedom in order to reconcile the interests of different religious communities or individuals, any restriction must respond to a pressing social need and be proportionate to the legitimate aim pursued[95]. Although Article 9 ECHR does not require states to enforce judgments of religious courts, under Greek law mufti are allowed to exercise limited jurisdictional powers. These circumstances may justify that it is in the public interest for the State to take measures to protect citizens whose legal relations may be affected by the acts of religious ministers. However, the religious community cannot be deprived of the freedom to choose its own religious leader[96].

With this decision, the Court of Strasbourg therefore legitimised the position of elected mufti but only within the limits of exercising the functions of spiritual leader.

presidential decree in 1990. Two Muslim members of parliament therefore expressly requested the Greek Government to hold elections for the posts of Mufti of Rodopi and Xanthi, which had in the meantime become vacant, as provided for by law. At the same time, the President of the Republic, at the request of the Council of Ministers, in accordance with Article 44 of the Constitution, adopted a legislative decree reforming the procedures for selecting mufti. The two deputies then organised the elections themselves, which were held on 28 December 1990 and at the end of which the Islamic communities of Rodopi and Xhanti had identified the two new muftis.

93 StE 1333/2001, StE 466/2003.

94 Following the entry into force of Law 1920/1991, the two elected mufti, Mehmet Agga and Ibraim Serif, refused to resign and leave the office to the mufti appointed by presidential decree. As a result, they were both put on criminal trial and convicted of usurping the functions of minister of a recognised religion on the basis of Articles 175 and 176 of the Greek Penal Code. In 1997 Ibraim Serif applied to the Strasbourg Court for a declaration that the Greek State had violated Article 9 of the ECHR, since his conviction and subsequent detention violated his religious freedom and the government's appointment of the mufti was contrary to Greece's obligations under the 1913 Treaty of Athens. The same appeal was filed in 2002 by the other elected mufti Mehmet Agga.

95 In this sense also ECHR Kokkinakis v Greece, 14307/1988.

96 ECHR, Serif v Greece, 38178/1997, 14.03.2000; ECHR, Agga v Greece, 50776/1999, 52912/1999,17.10.2002, ECHR, Agga v Greece, 32186/2002, 13.07.2006.

Consequently, the Greek legislator has left the rules of Law 1920/1991 unchanged. The effect is the presence of four mufti in two of the Greek Islamic jurisdictions, two of whom are directly elected by the community and perform only the functions of spiritual leader and two of whom are appointed by the State and perform jurisdictional functions[97].

In accordance with these regulations, Greek citizens who have graduated in Islamic studies from an Islamic theological school in Greece or abroad, or who have served as immam for a minimum period of ten years, may aspire to the office of mufti. The aspiring mufti must also have distinguished himself by his moral qualities and theological skills[98]. Within three months of the office becoming vacant, the local Prefect formally invites candidates to apply for the position. The applications are then forwarded to the Secretary General of the corresponding district, who convenes an eleven-member commission to examine the applications of aspiring muftis. On the basis of the committee's report, the Minister of Education and Religions selects the new mufti, who is appointed by presidential decree for a ten-year term. Before taking up his duties, the mufti must swear an oath as a civil servant in front of the competent Prefect[99].

As far as applied substantive law is concerned, although the muftis traditionally follow the Hanafi school, there is no evidence of the use of official manuals that would allow a certain uniformity in the interpretation of sacred law within the region. In fact, the interpretation of Sharia varies depending on the judge[100]. Rather than relying on a particular interpretation of Islamic law, muftis seem to take their decisions by attempting to strike a balance between Islamic law, civil law, common sense and the tradition of the individual community, adopting a case by case approach[101].

According to Article 3 of Law 1920/1991, in order for the decisions adopted by the Islamic courts to have binding legal effect within the legal system, they must be submitted to the control and subsequent enforcement by the civil court having jurisdiction over the territory. To this end, the decisions are summarised in Greek without, however, providing specific information on the logical and legal reasoning followed by the judge in reaching

[97] For more details see A. Rinella, M.F. Cavalcanti, *I Tribunali islamici in Occidente: Gran Bretagna e Grecia. Profili di diritto comparato,* in DPCE, 1 (2017).
[98] Legge 1920/1991, art. 1.
[99] Legge 1920/1991, art. 1.
[100] K. Tsitselikis, *Applying Shari'a in Europe: Greece as an ambivalent legal paradigm* in O. Scharbrodt, S. Akgonul, A. Alibasic, J.S. Nielsen, E. Racius (eds.), *Yearbook of Muslim in Europe,* 109 (2015).
[101] M. Berger, *De Enige Shariarechtbank in Europa,* in Tijdschrift voor Religie, Recht en Beleid, 3, 85 (2018).

his decision. As a result, it is particularly difficult for the secular judge to understand the reasoning behind the judgment[102].

There is no provision for appeal on the merits against the mufti's rulings[103]. Examination of the decision by the state courts is limited to checking compliance with jurisdictional limits, rights and the fundamental principles of the legal system, excluding an examination of the merits of the case, over which the religious court has exclusive jurisdiction.

The Greek Court of Cassation has generally taken a lenient attitude towards the application of Sharia within the limits of religious jurisdiction. This leniency is mainly dictated by political reasons aimed at maintaining the status quo of the historical minority in Thrace[104]. In many cases, especially in matters of inheritance, the civil courts have failed to intervene in judgments pronounced by Islamic courts where violations of the fundamental rights of at least one of the parties could be detected, precisely on the grounds of the *lex specialis* nature of Sharia within the Greek legal system[105]. Where, however, the courts have refused to enforce the judgments of the Islamic courts, they have done so on the grounds that the decision was contrary to public policy[106].

What has been of most concern to Greek jurists, in particular, the lack of certainty regarding procedures and applicable law in proceedings before Islamic Courts, as well as the absence of a Court of Appeal. Issues that have been partially addressed by the 2018 reform, which will be discussed shortly.

Islamic jurisdiction was originally designed as a religiously and territorially special jurisdiction, operating in parallel with that of the civil courts, which are competent to review the conformity of religious decisions with the fundamental principles of the legal system and the rights established by the Constitution. The mandatory or optional nature of this special jurisdiction has long been debated, at least until the intervention of the Strasbourg Court in 2018.

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[102] Y. Sezgin, *Muslim Family Law in Israel and Greece: can non muslim courts bring about legal change in Shari'a?,* in Islamic Law and Society, 24, 1 ff. (2017).

[103] Z. Papasiopi-Pasia, *Reflection about the implementation Field of the Personal Law in Greece and the Jurisdiction of the Mufti,* in Koinodikion, 7, 67 ff. (2001). The proposal put forward by the Inspectorate for Minorities to set up a special Court of Appeal, consisting of the President of the territorially competent Court of Appeal and three experts in Islamic law, has never been followed up by the Greek government. On this subject, see K. Tsistelikis, *Personal Status of Greeces's Muslim: A Legal Anachronism or an Example of Applied Multiculturalism?,* in B.P.R. Aluffi, G. Zincone (eds), *The Legal Treatment of Islamic Minorities in Europe,* 109 (2004).

[104] B. S. Turner, B. Z. Arslan, *Legal Pluralism and the Shari'a: A Comparison of Greece and Turkey,* in Sociological Review, 3, 439 ff. (2014).

[105] Areio Pagos 322/1960; 2113/2009; 1097/2007; 1497/2013; 1862/2013; 2138/2013.

[106] Areio Pagos 17/1999; 9/1990; 335/2006.

Until then, none of the normative sources of reference had ever explicitly defined the nature of special Islamic jurisdiction. The prevailing doctrine has always affirmed the need to consider religious jurisdiction as voluntary and alternative, so as to allow Muslims in Western Thrace to choose freely whether to turn to religious or civil jurisdiction[107]. Consideration of Islamic jurisdiction in terms of exclusivity would lead to segregation on religious grounds of certain Greek citizens who would be denied access to the State Courts, with a consequent violation of the principle of equality and due process[108].

Contrary to the opinion of the doctrine, the constant orientation of Greek jurisprudence has affirmed the compulsory and exclusive nature of Islamic jurisdiction over citizens belonging to the historic Lausanne minority[109]. According to the Court of Cassation, the mufti's jurisdiction is an indispensable and unavoidable element of the minority's religious tradition, which, according to Article 42 of the Treaty of Lausanne, the State has a duty to protect. Religious judges are, in fact, the only ones competent to decide on the content of religious norms and to provide an adequate interpretation thereof[110].

The minority orientation of jurisprudence opposed the qualification of Islamic jurisdiction in terms of compulsoriness and exclusivity, considering that when citizens belonging to the minority expressly manifest their willingness to turn to the civil system also for those matters falling within the jurisdiction of Islamic jurisdiction, for example by contracting a civil marriage or drawing up a will under civil law, Sharia and Islamic jurisdiction cannot be applied[111].

It is in this legal and jurisprudential context that the Molla Sali v Greece case[112] matured and brought the question of the nature of Greek Islamic jurisdiction before the Strasbourg courts. The case concerned an inheritance dispute. The applicant complained of a violation of Articles 6 and 14 of the ECHR, as well as Article 1 of Protocol 1, on the ground that the Court of Cassation had declared illegitimate the will of her deceased husband, who belonged to the minority of Thrace, drawn up under civil law. The Court

[107] K. Tsitselikis, *The Jurisdiction of Mufti as a religious judge. The Case 405/2000 of the first Istance Court of Thiva,* in Nomiko Vima, 49 (2001); P. Naskou Perraki, *The Legal Framework of Religious Freedom in Greece* (2000). Contra K. Beis, *First Istance Court of Thiva* 405/2000, in Dike International, 1097 (2001) according to which the mufti has exclusive jurisdiction. Consequently, the intervention of the ordinary courts would be allowed only if a violation of human rights is invoked before the civil court in the course of the proceedings or on the merits of the decision.

[108] K. Tsitselikis, *The legal Status of Islam in Greece,* in R. Potz, W. Wieshaider (eds), *Islam in the European Union,* 109 ff. (2004).

[109] Athen Tribunal 16613/1981; Komotini Tribunal 21/2002; Areios Pagos 1723/1980.

[110] Areios Pagos 2138/2013.

[111] Thivas Tribunal 405/2009; Rodopi Tribunal 9/2008; Xanthi Tribunal 1623/2003 and 102/2012.

[112] ECHR, *Molla Sali v Greece,* 2045/2014.

of Cassation therefore held that Islamic law applied to the case and that the competent religious court had jurisdiction[113].

The European Court of Human Rights has therefore set itself the objective of answering a specific question: whether or not the refusal by the Court of Cassation to apply civil law to the case submitted to it, on account of the testator's religious affiliation, constitutes a discriminatory difference in treatment.

According to the Court, there is no doubt that the regulation defining the special status of the Muslim minority is indeed intended to preserve its cultural and religious identity and that Islamic law represents a *lex specialis* applicable to members of the minority in certain matters without there being any violation of the Greek Constitution or the ECHR. The Court adds that the enjoyment of special rights cannot lead to discrimination: an individual's religious convictions cannot be regarded as an implicit waiver of certain individual rights: «refusing member of a religious minority the right to voluntarily opt for and benefit from ordinary law amounts not only to discriminatory treatment but also to breach of a right of cardinal importance in the field of protection of minorities, that it is to say the right to free self identification»[114]. In view of this, the Strasbourg Court found that the difference in treatment suffered by the applicant had no reasonable objective justification and was therefore unlawful and in breach of Article 14 ECHR and Article 1 of Protocol No 1.

Following the intervention of the European Court of Human Rights, the Greek legislature, through Law 4511/2018, amended Article 5 of Law 1920/1991, whose new paragraph 4 states that the matters falling within the competence of the mufti are regulated by the ordinary legislature. On the other hand, the application of Islamic law is provided for only in the event of the express will of the persons concerned. Similarly, the subjection of a dispute to the jurisdiction of the religious court is allowed only in the event of the express and common will of all the parties involved.

The Greek legislator, resolving the age-old problem of the relationship between civil and religious jurisdiction, defined Islamic jurisdiction as a special jurisdiction, alternative to civil jurisdiction, which can only be activated on a voluntary basis.

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[113] Areios Pagos 556/2017. For more details see M. C. Locchi, *La minoranza musulmana di Tracia tra protezione dell'identità religiosa, divieto di discriminazione e diritto all'autodeterminazione,* in DPCE on line 1, 909-920 (2019); M. F. Cavalcanti, *Pluralismo giuridico e giurisdizioni alternative: la giurisdizione islamica in Grecia davanti alla Corte di Strasburgo,* in Archivio Giuridico Serafini, 1, 301-328 (2020).

[114] EHRC, *Molla Sali v Greece,* 20452/2014.

The subsequent Presidential Decree 52/2019 confirmed the jurisdiction of the Islamic jurisdiction over disputes involving members of the minority in matters of marriage, divorce, maintenance payments, guardianship, trusteeship, emancipation of minors, Islamic will and intestate succession in application of Islamic law provided there is the consent of both parties, or by express choice of the testator. Once expressed, such a choice becomes irrevocable and precludes the jurisdiction of the ordinary courts[115]. The decree also introduced the obligation for the parties to be represented by a lawyer and established uniform rules of procedure for all Islamic courts[116].

Clearly, Law 4511/2018 has set the default option on the civil law and courts, whereas the civil courts have the presumption of jurisdiction[117]. Minority Muslims have, therefore, the possibility of appealing to both civil and religious law and jurisdiction according to a system of opting in-opting out.

V. CONCLUDING REMARKS

The Greek and Israeli legal systems, thanks to their historical heritage, are two examples of the search for solutions to accommodate the reasons of cultural and religious identity with legal pluralism, the protection of individual rights and the fundamental principles of the legal system. The reference point taken by both legal orders for this purpose is personal federalism.

The context in which the above considerations can be placed is that of pluralism in the weak sense, insofar as the forms of recognition of minority legal orders are based on the affirmation of the primacy of the State legal system: the legal norms of minor systems are devoid of legal effectiveness until they are introduced into the State system through a formal recognition.

Consequently, the Islamic legal system is in a necessarily different position from the state legal system, being recognised and authorised by the State insofar as it can be considered compatible with its own normative and value system.

This compatibility appears, in both systems examined here, to be the result of a long process of adaptation of the conditions of coexistence of the two legal orders. This process does not yet seem to have come to an end, but rather to be in constant evolution.

[115] Presidential Decree n. 52 11.09.2019, art. 2
[116] Presidential Decree n. 52 11.09.2019, articles 5-11.
[117] Law 1920/1991, art. 5 §4.

The continuous interaction between the minority legal order and the state legal order found in the Greek experience and, above all, in the Israeli one, seems to express the phenomenon that Shachar calls *Transformative Accommodation*[118]. This phenomenon provides for a scheme of division of powers between religious and civil courts in family law matters according to three principles: the sub- matter allocation of authority, the no monopoly rule and the establishment of a clearly delineated choice option.

An accommodation based on these foundational principles, Shachar argues, would potentially transforms the religious communities and institutions by encouraging them to reform discriminatory internal practice and rules. The transformative accommodation model that Shachar has developed seems to be particularly suitable for addressing the practical challenges of accommodating religious law and courts within otherwise secular and democratic regimes.

This transformation, brought about by the dialogue and continuous interaction between the religious and secular systems, between Islamic courts and civil courts, is particularly evident in the evolution of the neo millet system of Greece and Israel.

The evolution of the system in the two countries in the sense of transformative accommodation has, however, been determined in partially different ways. In Israel, the intervention of the legislator in the transformation of Islamic jurisdiction and the desire of the Islamic Courts to avoid interference from secular courts, have made it possible to achieve a truly hybrid result between religious and secular law. This has made it possible to eliminate certain interpretations of Islamic law that are contrary to the fundamental principles of the legal system.

In the case of the Greek legal system, on the other hand, there is a static attitude on the part of the State, which has left unresolved, for a long time, the problems of adaptation between the religious and secular systems, especially as regards the compatibility of religious law with the fundamental principles of the legal system. In this case, in fact, the impulse for transformative accommodation came only recently and thanks to the intervention of the Strasbourg Court.

Moreover, more than in the Israeli case, in the Greek case the critical issues typical of a system of personal federalism appear more evident. The recent decision of the Greek legislator to recognize the Islamic jurisdiction as an alternative jurisdiction to the civil one and activated only on a voluntary basis undoubtedly represents a step forward in the realization of a correct balancing system that must avoid the trap of excessive alienation,

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

if not even segregation of the Muslim community. However, there is still a long way to go, especially with regard to the review of decisions also on the merits.

In Israel, while the system is more advanced in terms of these issues, there is still the critical issue of exclusive religious jurisdiction in matrimonial matters, which is also dictated by the absence of civil marriage regulations. Although religious law in this area has now reached a hybrid result thanks to the intervention of the legislator, citizens are still unable to choose between secular and religious law.

In spite of some criticalities, the coexistence of two jurisdictions, one secular and one religious, interacting with each other in a perspective of transformative and reasonable accommodation, can represent a virtuous example of legal pluralism. But this is only on condition that the freedom of personal choice to submit to one or the other jurisdiction is guaranteed, that an effective control on the respect of constitutional principles is guaranteed and that the system is equally open to all citizens belonging to the religious denomination.

There seems to be no doubt that the first priority of the neo-millet system should be to ensure that the most vulnerable parties have the possibility to claim an equal position within the legal system.