Comparative Law Review Vol.11/1

Special Issue

For a minimal Vocabulary of Interculturality: a legal comparative perspective

ISSN:2983 - 8993

COMPARATIVE LAW REVIEW
The Comparative Law Review is a biannual journal published by the
I. A. C. L. under the auspices and the hosting of the University of Perugia Department of Law.

Office address and contact details:
Department of Law - University of Perugia
Via Pascoli, 33 - 06123 Perugia (PG) - Telephone 075.5852437
Email: complawreview@gmail.com

Comparative Law Review is registered at the Courthouse of Monza (Italy) - Nr. 1988 - May, 10th 2010.

COMPARATIVE
LAW
REVIEW
SPECIAL ISSUE - VOL. 11 /1
For A minimal Vocabulary of Interculturality: a Legal Comparative Perspective

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

Angelo Rinella

TABLE OF CONTENTS:

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

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

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

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

* 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).

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

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

A third way is offered by religious-based arbitration.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INTERCULTURALISM: FOSTERING OR HINDERING CULTURAL DIVERSITY? THE EXPERIENCE OF QUÉBEC*

Carla Maria Reale

TABLE OF CONTENTS:

This paper aims to explore the notion of interculturalism in the legal field for its concrete outcomes. After providing a theoretical framework, the author analyses the experience of Québec, one of the first regions to adopt intercultural policy. Québec's approach could in fact be useful in understanding the current use of interculturalism in Europe, and as a warning about some risks inherent to it, with a negative impact on cultural pluralism.

I. INTRODUCTION

The aim of this paper is to explore the notion of interculturalism in "action" in the legal arena and to warn about possible distortions of its premises. In this historical moment, when societies are characterized by increasing diversity and complexity, the debate in civil society as well as inside academia on how to better face this phenomenon remains open. Interculturalism has gained credibility as a possible model, alternative to both assimilationism and multiculturalism, to foster both diversity and cohesion in society. This model, however, finds explicit application in few contexts, with different implications and impacts on the cultural pluralism of the context. In this framework, the experience of Québec, one of the first regions to adopt intercultural policy, will be analysed and discussed. Québec is in fact a useful case study for understanding and assessing what kind of interculturalism could be applied in Europe, given the inherent risk of turning interculturalism into an empty shell, rather than an approach to fostering cultural diversity in society.

II. MULTICULTURALISM AND INTERCULTURALISM: TWO MODELS, TWO CO-DEPENDENT NOTIONS

The bond between multiculturalism and interculturalism is tight. Whether the focus is on political theory, legal theory, or legislation and policy, these two terms are interrelated and, arguably, might overlap. For this reason, no discussion on interculturalism is possible without disentangling its relationship with multiculturalism.

Scholars have widely discussed the crucial role of these definitions[1]; the relationship between these two terms was eminently described as a "word of war"[2]. Even if words and definitions appear to be the principal source of conflict amongst scholars in this field, it does not mean that this debate is sterile and lacks concrete consequences on the political and legal sides. Interculturalism, in fact, is a model for managing cultural pluralism born in reaction to a backlash against multiculturalism which has been occurring since the 1990s; it came about during a period of financial crisis and in the era of "superdiversity[3]" where multiple post-racial identities flourish and the level of diversity is such as to erode a homogeneous notion of majority.

Recently interculturalism has provided a legal and theoretical framework for overcoming the supposed limits and side effects of multiculturalism. This view is endorsed in Europe by the White Paper on Intercultural Dialogue published by the Council of Europe (2008)[4]. This achievement is the result of a debate within civil society and academia among different critical voices, turning "into a growing chorus of concern and a popular refrain about the failure, decline and even death of multiculturalism as a political philosophy as

---

* 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] C. Piciocchi, *L'interculturalismo nel diritto costituzionale: una storia di parole. Words are important: the constitutional role of interculturalism*, in DPCE online, 39(2), 1285-1303 (2019).

[2] C. Jopkke, *War of words: interculturalism v. multiculturalism*, in Comparative Migration Studies, 6, 11, (2018).

[3] This term refers to the contemporary status of western society, where global flows are increasing and are radically diversifying. This diversification refers to the variety of migrant-sending and migrant-receiving countries, to socioeconomic, cultural, linguistic, and religious factors but also to the personal background of migrants such as education and training, civil status, migration trajectories, etc. See S. Vertovec, *Super-diversity, and its implications*, in Ethnic and Racial Studies, 30(6), 1024-1054 (2007).

[4] Council of Europe, *White Paper on Intercultural Dialogue "Living Together As Equals in Dignity"*, Strasbourg, 2008. Available in English at https://www.coe.int/t/dg4/intercultural/source/white%20paper_final_revised_en.pdf.

well as a particular type of policy[5]". It should be noted, however, that most of these critiques are rooted in contexts where cultural diversity is linked to migration, and in particular to people of a Muslim background, while multiculturalism was unchallenged in relation to national minorities and indigenous peoples[6].

For the purpose of this paper, multiculturalism in its prescriptive and political terms[7] is understood as a political and legal model for a pluralist society that respects, recognizes, and protects the diversity of its groups and where minority entities can maintain their practices and identity[8]. As the Canadian Constitution suggests[9], it is possible to use the metaphor of the mosaic to describe multiculturalism, where each homogeneous piece of the pattern represents a cultural group/identity. In this image, however, each piece has a pre-defined shape, which is rigid and immutable, and its edges might be sharp as well. All these pieces contribute to the mosaic's picture, however there is no room for contamination and evolution. This metaphor suggests that multiculturalism might put excessive emphasis on cultural difference, by essentializing it. One of the main criticisms, in fact, is that multiculturalism exasperates cultural relativism and supports the idea of culture as something immutable and the main drive for human behaviour to the point of encouraging segregation and social fragmentation. This would also undermine the search for common values, as Putnam highlights: "diversity, at least in the short run, seems to bring out the turtle in all of us[10]". Scholars, indeed, have argued for a negative correlation between cultural diversity and social cohesion indicators, such as mutual trust and solidarity[11]. Further authoritative and influential critiques have classified multiculturalism as an anti-universalistic and anti-liberal approach[12]. Some scholars argue that this model

[5] F. Levrau, P. Loobuyck, *Introduction: mapping the multiculturalism-interculturalism debate*, in Comparative Migration Studies, 6, 13, 201 (2018).
[6] W. Kymlicka, *Multiculturalism: Success, failure, and the future* (2012).
[7] Multiculturalism can be understood in a descriptive way as a sociological fact referred to the presence of people from different backgrounds, in a prescriptive way with the ideological aim to celebrate diversity and on a political way with impact on policies. See: L. Brosseau, M. Dewing, *Canadian Multiculturalism Background Paper,* 1 (2018).
[8] The legal and constitutional literature on the topic is wide. For an overview of the Italian production see E. Ceccherini, *Multiculturalismo (diritto comparato)*, in Digesto delle Discipline Pubblicistiche, Aggiornamento 486 ff (IV, 2008); on the relationship between multiculturalism and pluralism in the Italian constitutional literature, see T. Groppi, *Multiculturalismo 4.0*, in AIC (2018).
[9] Canada is where multiculturalism was born and first theorized, as will be further discussed in paragraphs 4 and 5. For a theoretical analysis of multiculturalism in Canada, see W. Kymlicka, *Multicultural Citizenship A Liberal Theory of Minority Rights* (1995).
[10] R. Putnam, *Diversity and Community in the Twenty-first Century*, in The Scandinavian Political Studies, 30(2) 142 (2007).
[11] Ibid. 137-174.
[12] B. Barry, *Culture and equality. An egalitarian critique of multiculturalism* (2001).

would obstruct the effective integration of minorities by supporting the politicization of cultural group identities. This would further lead to social fragmentation and would deny conditions for socio-economic redistribution [13]. As an answer to these critiques interculturalism, as an alternative model for enhancing cultural diversity in society, is based on contacts and dialogue amongst people with different backgrounds and is aimed at fostering social interaction and strengthening the sense of shared membership.

Interculturalism aspires to be an alternative model based on contacts and dialogue amongst people with different backgrounds; it is aimed at fostering social interaction and strengthening the sense of shared membership while enhancing cultural diversity. If multiculturalism has traditionally adopted a macro perspective, with a focus on citizenship and "special" rights for certain groups, interculturalism - on the contrary - promotes a micro-social perspective with an emphasis on everyday interpersonal relations (it might not be a coincidence that one of the most flourishing fields of interculturality is education). According to some scholars the main features that distinguish interculturalism from multiculturalism are:

- Attention to communication and dialogue between cultures;
- Attention to the local level for the elaboration of policy;
- A more practical approach in decision-making, aimed at pragmatic compromise (e.g. reasonable accommodation)[14].

The distinction between interculturalism and multiculturalism is not, however, uncontested amongst scholars. For some, interculturality is not characterized by innovation and autonomy, as many of its focal points are already part of multiculturalism[15]. On the opposite side, some scholars argue for a substantial difference and an added value of interculturalism[16], while others support a middle position. Amongst these, for example, Parekh talks about "a multicultural sensitive interculturalism" or "interculturally attuned

[13] Ibid. 8. Arguing against this view: K. Banting, W. Kymlicka, *Multiculturalism and the welfare state. Recognition and redistribution in contemporary democracies* (2006).
[14] All these elements are mentioned by R. Zapata-Barrero, *Interculturalism in the post-multiculturalism debate: A defence*, in Comparative Migration Studies, 5, 6 (2017).
[15] For example, amongst these thinkers, Meer and Modood argue that multiculturalism is being accused unfairly and misunderstood by interculturalists. See N. Meer, T. Modood, *Interculturalism, multiculturalism and citizenship*, in N. Meer, T. Modood, R. Zapata- Barrero (eds.), *Multiculturalism and interculturalism. Debating the dividing lines*, 27-52 (2016).
[16] See for example: G. Bouchard, *What is interculturalism?,* in McGill Law Journal, 56(2), 435–468 (2011); T. Cantle, *Interculturalism: 'Learning to live in diversity'*, in Ethnicities, 16(3), 471-479 (2016).

multiculturalism"[17]. This position, shared by other thinkers[18], sees multiculturalism and interculturalism as complementary. This quickly sketched debate is far from being a mere definitory dispute in the academic field and might have concrete repercussions on social diversity and politics. Kymlicka warned that polarizing the debate around "good interculturalism versus the bad multiculturalism" level might "eventually play into the hands of assimilationists and xenophobes who reject both multiculturalism and interculturalism[19]".

III. INTERCULTURALISM IN ACTION: THE APPLIED MODELS IN THE LEGAL FIELD

Apart from the ongoing debate, what emerges is that both these models are far from being mere theoretical frameworks for diversity management in societies. On the contrary, they cease to be neutral as soon as they enter the political and the institutional realm and are translated into institutional policy and legislation. It is important to examine the already existing experience of interculturality in the legal dimension, to understand how it is applied in different contexts. From this perspective, it is possible to identify two different experiences of interculturalism. The first can be ascribed to the notion of horizontal or post-majoritarian interculturalism, the second can be called vertical or majoritarian interculturalism. Both represent a counter-model to multiculturalism, which is deemed inadequate, but their views diverge on the reasons behind it.

The first group of intercultural experiences is called post-majoritarian or horizontal. The main assumption of this model is that multiculturalism has failed because diversity has mainly been seen as a minority issue[20]. In fact, usually minority groups already need to practice some form of pluriculturalism, and do so with language, time management at

[17] B. Parekh, *Afterword: Multiculturalism and interculturalism. A critical dialogue*, in N. Meer, T. Modood, R. Zapata-Barrero (eds.), *Multiculturalism and interculturalism. Debating the dividing lines* 266-279 (2016).

[18] F. Levrau, P. Loobuyck, *Should interculturalism replace multiculturalism? A plea for complementariness*, in Ethical Perspectives, 20(4), 605–630 (2013); P. Loobuyck, *Towards an intercultural sense of belonging together: Reflections on the theoretical and political level*, in N. Meer, T. Modood, R. Zapata- Barrero (eds.), *Multiculturalism and interculturalism. Debating the dividing lines*, 225–245 (2016).

[19] F. Levrau, P. Loobuyck, *Introduction: mapping the multiculturalism-interculturalism debate*, in Comparative Migration Studies, 6, 13, 201(2018); W. Kymlicka, *Defending diversity in an era of populism: Multiculturalism and interculturalism compared*, in N. Meer, T. Modood, R. Zapata-Barrero (eds*.), Multiculturalism and interculturalism. Debating the dividing lines* 158-177 (2016).

[20] R. Zapata-Barrero, *Interculturalism in the post-multiculturalism debate: A defence*, in Comparative Migration Studies, 5, 6 (2017).

work or school, when they need to find a balance between their cultural/religious rules and those of the majority, which are embedded in the law[21]. In this situation, diversity is seen as "the other". This has fuelled segregation and mutual incomprehension. For this reason, horizontal interculturalism claims the need to "live in diversity"[22], dismantling the dichotomy of majority-minority culture and establishing a horizontal dialogue. Even though some universalistic values cannot be neglected, this process will create the common grounds for cultures to live together, so that the points of convergence are not given or pre-established.

This is what happens in Latin America, for example, under the strong influence of the decolonization process. In some of these countries, legislations and sometimes even national Constitutions now mention interculturality. This recognition aims to break with the dominant culture-subordinate cultures scheme[23], which has characterized for a long time the existence and the experience of indigenous peoples in these lands. This is expressed both in Constitutions and on a jurisdictional level[24]. For example, in Ecuador's Constitution the State itself is defined as plurinational and intercultural (art. 1, 2009); similarly in the Bolivian Constitution, where this term is frequently used[25]. Many fundamental rights, indeed, are explicitly characterized by an intercultural sensitivity: for example, the right to health[26] (art. 18(3) Constitution of Bolivia, art. 32 and 343 Constitution of Ecuador), right to social assistance (art. 45 Constitution of Bolivia), rights in the field of information and communication (art. 16 Constitution of Ecuador), rights related to science, which includes ancestral knowledge (art. 25 and 385 Constitution of Ecuador) and right to education (art. 17 and 78, c. 2 Constitution of Bolivia; art. 27 and 343 Constitution of Ecuador).

The latter has a crucial role in the Latin American context. In fact, according to some scholars the origin of this paradigm lies in the need for indigenous people to be granted a

[21] C. Piciocchi, *La libertà terapeutica come diritto culturale. Uno studio sul pluralismo nel diritto costituzionale comparato* (2006).
[22] T. Cantle, *Interculturalism: 'Learning to live in diversity'*, in Ethnicities, 16(3), 471-479 (2016).
[23] See C. Walsh, *Interculturalidad, Estado, sociedad: luchas (de)coloniales de nuestra época* 41 ff. (2009).
[24] S. Baldini, *Lo statuto costituzionale dei popoli autoctoni in Bolivia con particolare riguardo alla giustizia indigena*, in Federalismi.it, 24 (2015).
[25] See: S. Baldin, *La tradizione giuridica contro-egemonica in Ecuador e Bolivia*, in Boletín Mexicano de Derecho Comparado, XLVIII, 143, 483-530(2015); S. Bagni (eds.), *Lo stato interculturale: una nuova eutopia? The Intercultural State: A New Eutopia? El estado intercultural: una nueva eutopia?* (2017).
[26] A. Ruiz-Llanos, *La interculturalidad y el derecho a la protección de la salud: una propuesta transdisciplinaria*, in Bol. Mex. His. Fil. Med. 10(2) (2007).

formal education capable of including their cultural values[27]. It is also interesting to notice how the principle of interculturality needs to be applied in the field of justice[28], in particular at a constitutional level, specifically to solve conflicts in contact zones[29]. This implies the recognition of the need to overcome the majoritarian paradigm even in the application of law. The Constitutional Court of Bolivia has in fact affirmed that interculturality assumes "la construcción de una institucionalidad plurinacional descolonizadora, despojada de las lógicas de la colonialidad y bajo un proceso de reconstitución y re-encuentro de los propios saberes y conocimientos[30]". In 2020 Bolivia established a governmental organism, the *Ministerio de Culturas, Descolonización y Despatriarcalización* (Ministry of Cultures, Decolonization and Depatriarchalization), led by Sabina Orellana Cruz, a Quechua politician. This Ministry has the goal of subverting inequalities between nationalities and ethnicities as well as between men and women - these inequalities are considered both expressions of the same hegemonic vision - and accepting diversity to establish new inter-relations based on mutual acceptance and equal importance[31].

Majoritarian or vertical interculturalism[32] does not challenge the majoritarian paradigm; on the contrary, its main goal is to strengthen the position of the majority in society, while granting co-existence of other cultures. This dualistic (majority/minority) model comes to life in the experience of Canadian Francophone Québec and is connected to the province's nationalist-secessionist aspiration in relation to Anglophone Canada. It will be further explained (Paragraphs 4 and 5) how this experience is strongly characterized by the position recognized to the majority culture: "While seeking an equitable interaction between continuity and diversity, interculturalism allows for the recognition of certain elements of ad hoc (or contextual) precedence for majority culture[33]". This precedence of the majority culture does not imply any legal predominance, but the need for immigrants and other cultures to accept French as a public language and the presence of Québec's

[27] P. Brunet Ordoñez Rosales, *El derecho a la educación intercultural bilingüe (EIB) de las comunidades nativas del Perú*, in Pensamiento Constitucional, 18 (2013); C. Walsh, *La Interculturalidad en la educación,* (2005); N. López (eds.), *Equidad educativa y diversidad cultural en América Latina* (2012).
[28] See D. Montalván Zambrano, *El pluralismo Jurídico y la interpretación intercultural en la jurisprudencia constitucional de Ecuador y Bolivia*, in Ratio Juris, 14, 29, 147-185 (2019).
[29] Contact zones are those social fields where different cultural worlds meet, collide, discuss and negotiate. This definition is used by B. De Sousa, *Derecho y emancipación* (2012).
[30] Tribunal Constitucional Plurinacional de Bolivia, Sentencia SCP 698/2013 del 3 de junio de 2013.
[31] See the press release by the Bolivian government at https://comunicacion.gob.bo/?q=20201120/31286.
[32] The indications "majoritarian interculturalism" and "post-majoritarian" are developed in C. Jopkke, *War of words: interculturalism v. multiculturalism*, in Comparative Migration Studies, 6, 11 (2018).
[33] G. Bouchard, *What is interculturalism?*, in McGill Law Journal, 56(2), 45 (2011).

historical culture in the school curriculum, institutions, symbols, etc. If any form of interculturalism stresses the importance of dialogue, here the core values of this dialectic are already given and create a set of principles that cannot be compromised by immigrants' or others' diversity.

Interculturality, as we mentioned already, was proposed as a model in Europe by the Council of Europe, with the White Paper on Intercultural Dialogue "Living Together as Equals in Dignity". This document advocates for an intercultural dialogue based on equality and dignity in order to find shared values and contrast both multicultural politics and assimilationist tendencies. Here, intercultural dialogue is defined as "a process that comprises an open and respectful exchange of views between individuals and groups with different ethnic, cultural, religious and linguistic backgrounds and heritage, based on mutual understanding and respect. It requires the freedom and ability to express oneself, as well as the willingness and capacity to listen to the views of others. Intercultural dialogue contributes to political, social, cultural, and economic integration and the cohesion of culturally diverse societies. (…) Intercultural (…) is an essential feature of inclusive societies, which leave no one marginalized or defined as outsiders[34]." The application of the intercultural model in Europe and its more "vertical" tendencies will be the subject of Sabrina Ragone's paper in this same volume.

Understanding what we really mean when talking about interculturality is a key factor in investigating its impact on cultural diversity in society and on the social fabric. Even the model of interculturalism, indeed, is characterized by some potential distortions that might betray its initial premises. The major emphasis on shared views and common points might trivialize differences while neglecting power relations amongst groups in society, tending to a more assimilationist view.

The experience of Québec in this view is crucial and can help uncover issues that might be relevant for the European context as well.

[34] Council of Europe, *White Paper on Intercultural Dialogue "Living Together as Equals in Dignity*", p. 17.

IV. QUÉBEC, A MAJORITARIAN TALE OF VERTICAL INTERCULTURALISM

In the experience of Québec, despite its peculiarities, the development of interculturalism is again strictly connected to multiculturalism. Even in this context interculturalism does not exist *per se*, but it represents a reaction to federal multicultural policies enacted in Canada since 1971. Québec is a stateless nation within multicultural Canada[35] where citizenship has a deep symbolic meaning, and the phenomenon of migration has been used as a tool of political and cultural construction to contrast the perceived hegemony of the federal State[36]. Despite the absence of an explicit formulation, interculturalism can be deduced from the different legislation and policy on the issue of migration enacted by Québec's Government since the 1970s. At the core of Québec's interculturalism, three values can be found: I. The use of French as the common public language; II. The institutional separation between State and religion, III. The protection of equality between men and women[37].

Canadian multiculturalism has represented, since the beginning, a threat to Québec's minority identity[38]: interculturalism provided an answer to this danger. It can be argued that the birth of the Canadian idea of multiculturalism, is somehow tied to the resurgent Québécois nationalism of the 1960s[39]. After the institution of the Royal Commission on Biculturalism and Bilingualism 1963, in 1971 Trudeau declared Canada a country with no official culture but two official languages, establishing multiculturalism as an official policy. Unsurprisingly this strategy was understood by Québec as a tool to integrate the francophone Québécois into the Canadian mono-nation, treating their concerns as cultural issues, amongst others, rather than as a nation's concerns in a multinational State[40]. In this sense, Canadian multiculturalism, unlike the European one, has a broader scope

[35] J. F. Dupré, *Intercultural Citizenship, Civic Nationalism And Nation Building In Québec: From Common Public Language To Laïcité*, in Studies In Ethnicity And Nationalism, 12(2), 229 (2012).
[36] C. Blad, P. Couton, *The Rise of an Intercultural Nation: Immigration, Diversity and Nationhood in Québec*, in Journal of Ethnic and Migration Studies, 34(4), 6574 (2009).
[37] G. Bouchard, C. Taylor, *Building the future: A time for reconciliation* (2008).
[38] H. Meadwell, *The politics of Nationalism in Quebec*, in World Politics, 45(2), 203-241 (1993).
[39] The process that gave rise to Québécois nationalism began in the early 20th century but accelerated in the '60s during the so-called Quiet Revolution. During this process, French-Canadian Québécois started perceiving themselves not as a minority force in Canada but as a majority force inside Québec. Their major claim was the creation of a Québécois nation-state, either as a province in Canada or an independent State. To know more about this process, see R. Breton, *From Ethnic to Civic Nationalism: English Canada and the Québec*, in Ethnic and Racial Studies, 11, 85-102 (1988)..
[40] K. McRoberts, *Canada and the Multinational State*, *in Canadian Journal of Political Science*, 34(4), 698 (2001); N. Meer, T. Moodod, *How does Interculturalism Contrast with Multiculturalism?*, in Journal of Intercultural Studies, 33, 180 (2012).

and encompasses both new minorities (coming from migrations) and already existing ones such as autochthonous peoples and Francophones. In 1982 with the Constitution Act and the Canadian Charter of Rights and Freedoms, multiculturalism became structural in the Canadian legal system, as the whole charter "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians" (art. 27). This approach was further enhanced with the 1988 Canadian Multiculturalism Act, which recognizes multiculturalism as "a fundamental characteristic of the Canadian heritage and identity".

In the same years, Québec started to develop its own citizenship system, which would then be described as "intercultural", where an important role is given to the French language. In 1974 with Bill 22 French was declared the only official language of Québec. Bill 101 (the Charter of French Languages) in 1977 further enacted the predominance of French in the public sphere (e.g. in education and public signage) in order to create a monolingual society. With the creation of the Ministry of Immigration in 1968, Québec started negotiating with its federal counterpart to gain control over immigration policies[41]. The signing of the Cullen-Couture Agreement was a fundamental step in this process, together with a further agreement that determined the substantial delegation of all migration issues and services to the Provence of Québec, including establishing admissibility requirements[42].

In developing an intercultural approach, the 1990 statement on immigration and integration policy plays a crucial role. The document *Au Québec pour batir ensemble. Enoncé de politique en matière d'immigration et integration* (Let's build Québec Together: Vision. A Policy Statement on Immigration and Integration, Ministry of Cultural Communities and Immigration) established the instrument of "moral contract" for the integration of immigrants in the province of Québec. The document recognizes the value of cultural diversity and acknowledges cultural pluralism in Québec, alongside the importance of reciprocity and mutual accommodation and participation in common institutions. This "contract" between the host society and newcomers, defined as neo-Québécois, stresses the importance of the French language and the need to live according to the common

[41] C. Kostov, *Canada-Québec Immigration Agreements (1971–1991) and Their Impact on Federalism*, in Canadian Journal of Political Science, 38(1), 91-103 (2008); D. Strazzari, *Immigration and Federalism in Canada: beyond Québec Exceptionalism?*, in Perspective on Federalism, 9(3), E.56-E.84 (2017).

[42] On this see D. Strazzari*, Federalismo e immigrazione. Un'indagine comparata*, 340 ff. (2020).

public culture (c*ulture publique commune*) while requiring full participation of immigrants in socio-cultural-economic and institutional life.

In 2005 with the Guide for a Successful Integration, a pragmatic and didactic document for the integration of immigrants, the government stressed a set of common values without neglecting the importance of accommodation and compromise.

Until the early 2000s Québec's evolving intercultural strategy was based on the need to frame migration as a positive phenomenon for the Province, while preserving the francophone cultural and linguistic heritage in the acknowledgement of cultural pluralism. However, this model can be described as civic nationalism[43], also called by some scholars intercultural nationalism[44].

However, this model can be described as majoritarian interculturalism[45], because - despite a certain emphasis on dialogue amongst cultures - integration is conceived as minorities' onus; there is no attempt to challenge or question the dominant position of the majority culture.

On the contrary, its ultimate aim is to strengthen the conditions of the majority. If dialogue and exchange amongst cultures are desirable, limits and boundaries for the recognition of cultural pluralism are set (e.g. democratic values and gender equality)[46] in order to reaffirm the needs of the majority. The ultimate aim of Québec's interculturalism is to strengthen the position of the majority: the French language, with its related culture, is the main tool used in this phase. This specific model finds its origins in Québec's identity and linguistic anxiety in the broader context of Canada, and responds well to the need to find "a form of pluralism that acknowledges that the francophone majority is itself a precarious minority that needs protection in order to ensure its survival and development in the North American environment and the context of globalization[47]".

---

[43] D. Lamoreaux, *Citoyenneté, nationalité, culture*, in M. Elbaz, D. Helly (eds.), *Mondialisation, citoyenneté et multiculturalisme*, 14-15 (2000).

[44] C. Blad, P. Couton, *The Rise of an Intercultural Nation: Immigration, Diversity and Nationhood in Québec*, in Journal of Ethnic and Migration Studies, 34(4) 645-667 (2009).

[45] Moodod and Meer noticed that this model suffers from a majoritarian bias. See N. Meer, T. Moodod, *How does Interculturalism Contrast with Multiculturalism*?, in Journal of Intercultural Studies, 33, 188 (2012).

[46] E. Laxer, *Integration Discourses and the Generational Trajectories of Civic Engagement: A Comparison of the Canadian Provinces of Québec and Ontario*, in Journal of Ethnic & Migration Studies, 39, 10, 1581 (2013).

[47] G. Bouchard, *What is interculturalism?*, in McGill Law Journal, 56(2), 441 (2011).

V. QUÉBEC'S INTERCULTURALITY AND SECULARISM: TOWARDS A MORE "ASSIMILATIONIST" SHIFT?

This majoritarian yet pluralistic model of diversity management started to change at the end of the 2000s with an emphasis, within the public debate, on a new factor: religion. If the main cornerstone of the French-Canadian culture was language, alongside this secularism is becoming increasingly relevant for the reassertion of majoritarian stances.

In the meantime, Canada has developed its own model of dealing with cultural pluralism, where great importance is given to freedom of religion. Inside this framework, the legal doctrine of reasonable accommodation has been developed by the Supreme Court of Canada since 1985[48]. According to this doctrine all those who are governed by human rights legislation, including the State, have the legal obligation to adjust their decisions, practices, norms, and policy to specific religious beliefs[49], needs or practices of the interested person unless the accommodation imposes an "undue hardship". The latter notion is to be understood as something more than a minor inconvenience: it must be shown that the actual interference of the hypothetical accommodation is substantial[50].

Growing rates of dissatisfaction and distrust towards the measure of reasonable accommodation were recorded in Québec as a result of a lively debate on the well-known Multani case and its implications. This case reached the Canadian Supreme Court[51], after the decision from The Court of Appeal of Québec which rejected the request by a Sikh

[48] The doctrine was elaborated in a case dealing with religious discrimination in employment, where an employee asked to be exempted from work on Saturday to observe sabbat. After a few attempts, the employer refused the exemption and the Supreme Court ruled that indirect discrimination had taken place unless he could show that no reasonable accommodation was available. The first decision on reasonable accommodation is: Ontario Human Rights Comm. V. Simpsons- Sears (1985) 2 S.C.R. 536. After that, however, decisions on this issue flourished. To give a concrete idea of the application of the doctrine on reasonable accommodation, some decisions will be mentioned. For example in Markovicv.AutocomManufactuingLtd,2008HRTO64,[2008]2008CarswellOnt5936(WL 1. Can) it was stated that employers have to provide their employees unpaid leave to celebrate religious holidays and opportunities to make up for the related loss of income. In a different case reasonable accommodation meant modifying tasks and duties assigned to an employee. This was the case of a Jehovah's Witness who was exempted from administering blood transfusions (given that there was always someone else available for the transfusions), decided in Peterborough Civic Hospital v. ONA (1981), 3 LAC (3d) 21, 1981 Carswell Ont 1955 (WL Can) [Peterborough]. In another case a dietary aide in a hospital whose task it was to audit patients' food was exempted from tasting food on the base of religious reasons: see Victoria Hospital Corp v. London & District Service Workers' Union, Local 220 (1996), 45 CLAS (1st SEP) 90, 57 LAC (4th) 221 (Ont Arb).

[49] This doctrine now applies to all discriminatory grounds such as gender, race, colour, age, disability and to all forms of legally prohibited discrimination, be it direct or indirect. See the decision: British Columbia (Public Service Employee Relations Commission) *v.* BCGSEU, [1999] 3 S.C.R. 3

[50] See Central Okanagan School District No 23 v Renaud, [1992] 2 SCR 970.

[51] Multani v Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256, 2006 SCC 6.

student who claimed his right to wear a religious symbol (the *kirpan*, a religious knife/sword) in school in contrast with the general ban against cold weapons in schools. The Supreme Court stated that the school ban against the student's *kirpan* was a breach of religious freedom (Section 2(a) of the Canadian Charter of Rights). Moreover, according to the judges, under the Canadian Charter of Rights and Freedoms, the State has a burden to accommodate religious practice and beliefs unless adopting this measure might create "undue hardship".

This case had a huge impact on Québécois public opinion, raising many concerns on the concrete consequences of such a decision. The duty of reasonable accommodation was believed to be inconsistent with Québec's interculturalism. The main fear was that it would endanger Québec's French-language culture and common values by promoting a lack of reciprocity and a refusal of integration and compromise[52]. In response to this public discontent in 2007 Québec's government created a Commission (Consultation Commission on Accommodation Practices Related to Cultural Differences), composed of two prominent scholars - Gerard Bouchard, a sociologist, and Charles Taylor, a political philosopher - with the mandate of investigating the practice of reasonable accommodation of religious and cultural practices and its compatibility with Québec's legal principles and tradition. Their work was summed up in the Report "Building the Future: A Time for Reconciliation", which deals with issues such as cultural integration and common collective identity, church-state relations, and cultural/religious accommodation requests. The report, which has the advantage of summarizing more than 20 years of intercultural politics, focuses on the religious phenomenon suggesting the adoption of a "laïcité ouverte" model. In this model, considered an important aspect of Québec interculturalism[53], "state neutrality towards religion and the separation of church and state are not seen as ends in themselves, but rather as the means to achieving the fundamental objectives of respect for religion and moral equality and freedom of conscience and religion[54]". Open secularism suggests that the State must be neutral on religious matters, but people should be allowed to express their convictions both in private and public insofar as this does not interfere with other people's rights and freedom.

[52] G. Bouchard, C. Taylor, *Building the future: A time for reconciliation* 67-68 (2008).
[53] J. Bauberot, *Une laïcité interculturelle- Le Québec, avenir de la France?* (2009).
[54] R. Jukier, J. Woehrling, *Religion and the secular state in Canada*, in D. Thayer (eds.), *Religion and the secular state*, 158 (2010).

This also implies the right to reasonable accommodation. This model does not justify a general prohibition of public expression of religious beliefs from State agents, nevertheless, there might be some legitimate restriction to it. For example, the report suggests that State agents should be banned from wearing religious symbols when the appearance of impartiality is required by their duties. Under this category fall all those roles that exemplify State neutrality, such as judges, police officers, Crown prosecutors, prison guards, and the president and vice-president of the National Assembly[55].

The endorsement of open secularism was one of the most controversial aspects of the report, as many people and social actors openly rejected this model, pointing to a strict religion-state separation model, which might find its roots in the 1960's emancipation from the Catholic church. It was also argued that the model of interculturality described in Bouchard and Taylor's report was somehow distant from the concrete implementation of it carried out by the Québec government[56]. After the document was issued, many Bills were presented in the direction of affirming State neutrality[57] and constraining freedom of religion for public employees (i.e. Bill 94[58] in 2001; Bill 60[59] in 2013; Bill 62[60] in 2017; Bill 21[61] in 2019). One of the first attempts, Bill 60, also known as *Charte de Valeurs Québécois*, established the ban on wearing religious symbols for all public servants[62]. In 2017, Bill 62, Loi favorisant le respect de la neutralité religieuse de l'état et visant notamment à encadrer les demandes d'accommodements pour un motif religieux dans certains organismes, was

[55]G. Bouchard, C. Taylor, *Building the future: A time for reconciliation* 272 (2008).

[56] L. B. Tremblay, *The Bouchard-Taylor Report on cultural and religious accommodation: multiculturalism by ay other name?*, 18, 15 (2009).

[57] Influence from France and other French-speaking countries such as Belgium or Switzerland is, in this scenario, undeniable. See for example: A. Barras, *Formalizing Secularism as a Regime of Restrictions and Protections: The Case of Québec (Canada) and Geneva (Switzerland)*, in Canadian Journal of Law and Society / Revue Canadienne Droit Et Société, 36(2), 283-302 (2021); V. Amiraux, D. Koussens, *Laïcité (France) vs accommodements raisonnables (Québec): Circulation transnationale des discours publics sur la définition des rapports au religieu*x, in D. Koussens, C. Mercier, V. Amiraux (eds.), *Nouveaux vocabulaires de la laïcité*, 49–66 (2019).

[58] Bill 94. An Act to Establish Guidelines Governing Accommodation Requests within the Administration and Certain Institutions, 2nd Sess, 39th Leg, Québec, 2011.

[59] Bill 60. Charter Affirming the Values of State Secularism and Religious Neutrality and of Equality between Women and Men, and Providing a Framework for Accommodation Requests, 1st Sess, 40th Leg, Québec, 2013

[60] Bill 62. *An Act to Foster Adherence to State Religious Neutrality and, in Particular, to Provide a Framework for Requests for Accommodations on Religious Grounds in Certain Bodies*, C-19, SQ, 2017.

[61] Bill 21. *An Act Respecting the Laicity of the State*, C-12, SQ, 2019.

[62] M. Olivetti, *Una "Carta dei valori" per il Québec?*, *in Quaderni costituzionali*, 4, 990 ff. (2013); on a critical note see D. Dabby, *Constitutional (mis)adventures: Revisiting Québec's proposed Charter of Values*. *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 71(14), 352–83 (2015).

approved[63]. This law provided specific criteria for requesting and granting religious accommodation and imposed on all public servants to exercise their functions with their face uncovered (symmetrically, the person requiring the public service must have their face uncovered). Bill 62 was soon declared to be against freedom of religion according to article 2a of the Charter and Article 3 of the Québec Charter by the Supreme Court of Québec[64]. The latest attempt is Bill 21, Loi sur la laïcité de l'état[65], approved in 2019, which provides in articles 34 and 33 a notwithstanding clause, to shield the law from judicial review[66]. This piece of legislation prohibits public servants in a position of authority from wearing religious symbols (art. 6). This includes a wide range of employees such as teachers (the purpose of this article is broader than what Bouchard and Taylor's report suggested, based on the presence of coercive powers). Chapter 3 (articles 7-10) stipulates the duty for public servants to deliver their services with uncovered faces and the ability to require service users to uncover their faces for security or identification purposes. Another relevant aspect pertains to Article 17, which establishes that the law on the neutrality of the State does not affect the toponomy or does not require public institutions to remove property adorning an immovable building, ensuring that the Christian heritage of these institutions is protected[67].

---

[63] Text available in French at http://legisQuébec.gouv.qc.ca/fr/ShowDoc/cs/R-26.2.01. For a commentary from a cultural perspective see V. Narain, *Québec's Bill 62: Legislating Difference*, in Columbia Journal of Race and Law, 1, 53-94 (2019).

[64] Cour Supérieure du Québec, National Council of Canadian Muslims (NCCM) v. Procureur général du Québec, 2018 QCCS 2766, para. 11.

[65] For some critical remarks on this law see: D. Dabby, Le *western* de la laïcité: regards juridiques sur la *Loi sur la laïcité de l'État*, in L. Celis, D. Dabby, D. Leydet, R. Vincent (eds.), *Modération ou extrémisme? Regards critiques sur la loi 21* (2020); P. C. Noël, *Critical comment on the recent law on «laïcité» in Québec*, in Quaderni di diritto e politica ecclesiastica, 2, 481-494 (2020); G. Panzano, *Québec's Bill 21: the collision of secularism, religious freedoms, and reasonability*, in diritticomparati.it, 3 June 2019.

[66] This clause implies that the law cannot be contested on the grounds of section 2 and sections from 7 to 15 of the Canadian Charter and from 1 to 38 of the Québec Charter. This law operates, in fact, notwithstanding its infringement of certain rights stated in the abovementioned acts. These articles are formulated according to Section 33 of the Canadian Charter of Rights and Freedom, which allows Parliament or provincial legislature to temporarily override some Sections of the Charter. These are section 2 (fundamental freedoms), sections 7 to 14 (legal rights) and section 15 (equality rights). It does not apply to democratic rights, mobility rights or language rights. Once invoked, section 33 precludes judicial review of the relevant legislation under the listed Charter sections. This mechanism is valid for 5 years; however, the clause might be re-enacted. This clause is unique in the constitutional panorama, and it is justified as a form of compromise between parliamentary supremacy and judicial supremacy. On the functioning of the notwithstanding clause see D. Johansen, P. Rosen, *The Notwithstanding Clause of the Charter* (2008).

[67] Some scholars suggested that this law endorses a view of Christian heritage as something exempted from the "scrutiny of laïcité" as mentioned by A. Barras, *Formalizing Secularism as a Regime of Restriction and Protections: The case of Québec (Canada) and Geneva (Switzerland)*, in Canadian Journal of Law and Society/Revue Canadienne Droit et Société, 36(2), 283-302 (2021).

This law fuelled controversies and divisions inside Québécois society amongst different civil actors but also between the French-speaking majority and the English-speaking population. Despite the notwithstanding clause, after the failure of the legal challenge[68] in the Québec Superior Court to stay the application the Bill[69], several other court challenges were attempted[70]. It is not surprising that the most successful challenge to Bill 21 is based on Article 23 of the Québec Charter, which protects minority rights in education and schools. In this decision[71], the Supreme Court of Québec acknowledged the stigmatizing effect of this law against religious minorities. The fear, humiliation, stress, anxiety, and rejection many people face since the approval of Bill 21 is mentioned and explicitly recognized by the Court. Interestingly, the judge stressed the particular impact the Law has on Muslim women wearing the veil, as widely discussed by the Applicants[72], both affecting their freedom of religion and their freedom of expression. In the end, the Court held that this law would be in contrast with freedom of religion, but the law cannot be declared void due to the notwithstanding clause. However, the applicants' claims based on Section 23 are upheld by the Court: the provisions violate minority-language education rights, therefore the ban on religious symbols cannot be applied to English schools in Québec. These schools, which are the expression of a cultural minority, retain autonomy over their organization to preserve and maintain their linguistic and cultural diversity. Enhancing cultural and religious diversity can be considered part of this autonomy; for this reason, English schools are exempted from Bill 21.

[68] See https://www.nccm.ca/wp-content/uploads/2019/06/2IMK-Originating-application-FINAL-2-10-06-17.pdf.
[69] Ichrak Nourel Hak e National Council of Canadian Muslims e Association Canadienne des libertés civiles c. Québec, C.S.Q.
[70] D. Dabby, *Le Western De La Laïcité Regards juridiques sur la Loi sur la laïcité de l'État*, in L. Celis, D. Dabby, D. Leydet, V. Romani (eds.), *Modération ou extrémisme? Regards critiques sur la loi 21*, 239-254 (2020).
[71] Hak c. Procureur général du Québec, 2021 QCCS 1466 (CanLII).
[72] The impact of such policies and legislations on Muslim women is widely debated amongst scholars and feminist scholars. Similar critiques were already raised during the debate on Bill 64 in Québec: see C. Hong, *Feminists on the Freedom of Religion: Responses to Québec's Proposed Bill 64,* in Journal of Law and Equality, 2011. In this decision however the Court stated that Article 28 was a mere interpretative provision and could not be applied in this case. For arguments against this point see C. Strauss, *Section 28's Potential to Guarantee Substantive Gender Equality in Hak c Procureur général du Québec*, in Canadian Journal of Women and the Law, 33(1), 84-115 (2021).

VI. Similarities between Europe and Québec: the cultural insecurity and the religious factor

The experience of vertical interculturalism in Québec suggests that it is challenging to enact such a model without triggering assimilationist outcomes. If this model has been successfully applied for decades, the growing concern and dissatisfaction around the issue of reasonable accommodation constitute a turning point in Québécois society. The shift from a linguistic emphasis towards the enforcement of a strict form of secularism is apparently hindering cultural pluralism in society and fostering divisions and conflicts.

The kind of law on religious neutrality is fuelling divisions amongst religious groups and immigrants but also between Anglophone Quebecers and Francophone Québécois, as the decision of the Supreme Court clearly shows. This dynamic is strengthening a polarized view of linguistic, religious and cultural differences, in a strict majority/minority dichotomy that deliberately ignores the power dynamics amongst groups in society. For the purpose of the alleged protection of a minoritarian identity in Canada, the francophone Québécois one, minority forces and identities in Québec are being relegated to a subaltern position. Majoritarian interculturalism in Québec has apparently reached a paradox at the current moment: in the name of dialogue amongst cultures and cohesion in society it is pushing minorities to assimilation or marginalization.

Such approach fails to acknowledge the multi-faceted nature of identity nowadays, which cannot be ignored when questioning the plurality of our society. The current Québec approach, despite openly promoting gender equality, for example, disproportionately burdens Muslim women, without acknowledging, in an intersectional perspective[73], both their gender and their religious background.

The current situation however is still evolving as many new judicial cases are pending and must be understood in the broader framework of the relationship between Canada and Québec and their jurisdiction[74]. Nevertheless, the experience of Québec resonates in Europe, and it is relevant not only because it is one of the few and one of the first regions

[73] The first formulation of this notion is to be found in K. Crenshaw, *Mapping the margins: Intersectionality, identity politics, and violence against women of color*, in Stanford Law Review, 43, 1241-1299 (1990).

[74] From a constitutional perspective see L.P. Lampron, *La Loi sur la laïcité de l'État et les conditions de la fondation juridique d'un modèle interculturel au Québec*, in Canadian Journal of Law and Society, 36(2), 323-337 (2021).

which openly adopted an intercultural framework, but also because it shows how the model of interculturality might be applied and sometimes distorted in its premises, coming closer to an assimilationist model. The same risk is crossing Europe at the moment, with specific regard to the aspect of religion as a factor of cultural diversity. In two decisions, one by the European Court of Human Rights, and the other by the Court of Justice of EU, the same view on religion and public spaces emerged. In these decisions, while judging on religions and religious symbols, both Courts implicitly endorsed a vertical conception of that intercultural dialogue which is often mentioned in their soft-law documents[75]. In S.A.S. vs. France[76], the Strasbourg Court stated that the French law[77] banning any form of face covering in public spaces did not violate the European Convention of Human Rights. What is interesting to note is that the Court bases its decision on the importance of community living on the notion of *vivre ensemble*, stating that the veil (in this specific case) could hinder interpersonal relationships. At paragraph 122 the Court affirms: "It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, form an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialization which makes living together easier". Similarly, the European Court of Justice in the joint cases WABE and MH Müller Handel[78] stated that a law banning employees from wearing religious symbols in the workplace could be justified by the need of employers to appear neutral towards costumers. Even in this decision, in fact, religious symbols are represented as potential sources of social conflict which need to be neutralized. Again, the decision is based on the need to sterilize the collective dimension from potential conflicts, without acknowledging the disproportionate

[75] See for example the already mentioned White Paper on Intercultural Dialogue from the Council of Europe, or the program on Intercultural cities of the Council of Europe. On the EU side see the initiative of the "European Year of Intercultural Dialogue" launched in 2008 by the European Parliament. Moreover, intercultural Dialogue is also mentioned in the document "Work Plan for Culture 2019-2022" ST/14984/2018/INIT adopted by Member States.
[76] Case of SAS v. France, Grande Chambre, Application no. 43835/11, 1 July 2014.
[77] Loi n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public.
[78] Judgment in Joined Cases C-804/18 and C-341/19. The Court also specified that these provisions could be justified on the basis of a genuine need of the employer only. Moreover, the national courts may take into account the specific context of their Member State and, in particular, more favourable national provisions on the protection of freedom of religion.

burden this legislation has on already marginalized people and questioning the position of the dominant culture.

In this view the experience of Québec, which is much more dated and extensive, could serve as a warning on the exact meaning and implications of certain forms of interculturalism. This could be a relevant case study for Europe to avoid reducing interculturality to an instrument for facing the "anxiety of the majority[79]" in the face of important demographic and cultural changes. If interculturality needs to be a sustainable alternative to multiculturalism towards the goal of social cohesion, it probably needs to depart from the majoritarian paradigm enacted in Québec. Examining the existing experience is, in fact, one of the key factors in developing a European intercultural model that, given some irrefutable premises such as the respect of fundamental rights and the valorisation of diverse and intersectional identities in society, can pave the way towards a sustainable pluralism[80] in our complex society.

[79] This identity-related anxiety voiced in Quebec concerns now all Westerns countries, in particular the ones traditionally homogeneous. For the concept of "anxiety of a majority group" see: G. Richard, *Rapport Bouchard-Taylor- Une majorité trop minoritarie?*, in Le Devoir, 12 June 2008, p. A7; L. B. Tremblay, *The Bouchard-Taylor Report on cultural and religious accommodation: multiculturalism by ay other name?*, EUI Working Papers 18, 10 (2009).

[80] On this concept see R. Toniatti, *Minoranze e minoranze protette: modelli costituzionali comparati*, in T. Bonazzi, M. Dunne (a cura di), *Cittadinanza e diritti nelle società multiculturali*, 279 ff. (1994).

WHO INTEGRATES WHOM, IN WHAT AND, ABOVE ALL, WHY? A CRITICAL REFLECTION ON THE PARADIGM OF MULTICULTURALITY AND ON THE EPISTEMOLOGIC FOUNDATIONS OF LEGAL COMPARISON*

Ciro Sbailò

TABLE OF CONTENTS:

The paradigm of inclusion dominates the contemporary legal lexicon. A fundamental role in this sense is played by legal comparison, divided between relativism and neo-natural law. At the basis of the inclusivist positions there is the idea of a neutral public space that logically precedes political will. This is a self-contradictory thought. The root of public space, according to the Western Tradition, lies in a voluntary act. For this reason, the restoration of a Foundation of Public Space is impossible today, as well as a Foundation of a new Natural-Law: we are living is the age of reticular positivism. So, we have to discover the political role of the Jurist in Western Civilization. The case of citizenship.

I. INTEGRATION / INCLUSION

Inclusion and integration are two key concepts of the contemporary legal debate, marked by the confrontation with the problems of multi-ethnic society, in particular as regards the management of multicultural issues.

There is some confusion in the doctrine. It seems that integration and inclusion are values *in themselves*, regardless of who the subjects and recipients of inclusion are, respectively, what scope the inclusion (or integration) needs to develop and finally, what are the reasons for including (or integrating). It can be hypothesized that the inclusion must be promoted and managed by the agents of social dynamics, that is, first of all politicians, but then also social organizations and jurists. As for the recipients, our thoughts turn to the minorities mentioned above. Finally, the complement of place of integrating or including should consist in Western society as broadly understood, and then, depending on the case, with reference to individual countries or to Europe. If so, then it would be necessary to explain how far the process of inclusion or integration can go without missing the place complement of integration and, with this, the agents that operate in it. Let's take an extreme example: the linguistic community A implements an inclusive policy towards the linguistic

minority B. Now, if inclusion goes so far as to completely replace the language of A with that of B, we are no longer faced with an inclusive process, but to a metamorphosis. This is to say that the massive and uncritical use of the category of inclusion generates confusion in the public space and can provoke violent reactions of identity defense on the part of people.

The comparative jurists play a fundamental role in this regard. Part of the comparative doctrine, in fact, believes that the legal strategies of inclusion (or integration) must also be accompanied by a change in the taxonomic logic, which would be too euro-centric, not very inclusive and not open to the so-called "other legal cultures". All this, of course, has repercussions on legislative activity and administrative decisions, where, when it comes to issues relating to cultures or social groups in some way considered minority (meaning outsiders with respect to cultures or traditionally dominant groups within a public space), the adoption of the inclusive paradigm seems almost mandatory, and intellectuals, opinion leaders and exponents of the entertainment world are also fighting for it.

Now, it is possible that inclusion and integration are indeed absolute values and that comparative doctrine, both in terms of theoretical elaboration and in support of the political decision-maker, does well to promote them. It is possible, but instead it is taken for granted. Since, in an ever complex and sometimes chaotic world, the world looks more and more to jurists, to orient and understand, it is good not to take anything for granted, much less concepts and theories that do not enjoy the undisputed and indiscriminate favor of the population: the risk that the massive and indiscriminate use of the inclusivist paradigm provokes violent defensive reactions of an identity sign, with consequent delegitimization of the same social role of the jurists, is anything but theoretical, as the news shows.

Let's start, therefore, by clarifying the two terms.

The two concepts are only partially overlapping.

Both must be distinguished from assimilation. The latter indicates the dissolution of cultural differences, which entails the total objective adherence of the individual to the system of values and to the rules of society. We are talking about objective adhesion, as it does not necessarily correspond to the awareness or will of the individual: adhesion is presupposed by the social system (of which, in this sense, the legal system must be considered as a subset) and therefore becomes the parameter for the evaluation of its conduct. This is the so-called French republican model, which involved, for example, the banning of the Islamic veil from public places.

The concepts of integration and inclusion, on the other hand, refer to a process of mutual adaptation between society and the individual. In the case of integration, this process develops against the background of an essential but in any case, predetermined axiological and juridical horizon. In the case of inclusion, the horizon itself comes into play in the relationship between the individual and society.

Integration is to be understood as a political process, which governs the adhesion of people to a specific community, through administrative choices and legislative operations aimed at minimizing the points of friction of individuals with respect to the dominant values and the legal system, in view of a mutual adaptation that also involves a renewal of the social pact.

Conversely, inclusion has an eminently juridical structure: it consists in the neutralization of the identity traits of the legal system, in such a way as to make any form of discrimination impossible. To include means to welcome, in the name of a social pact to be built dynamically, relying on inter-individual dynamics, considered as fundamental to the public space.

Exemplifying, using the masters of contemporary thought, we can identify three basic positions: Schmitt and Rawls, in mutual opposition, and Habermas, in an intermediate position.

All the aforementioned authors move within the state-national horizon, albeit in the awareness of the progressive darkening of the latter.

Schmitt's position is marked by a miraculous vision of public space, deriving from an anthropological pessimism of clear biblical origin.[1] Public space arises from a self-founded political will, which responds – in a Hobbesian way – to the need to stem the effects of the original sin, starting with violence. In this sense, public space always has a strongly identity connotation, which primarily affects the legal sphere.

People, self-organizing as a nation, can guarantee equal rights to all. Even to minorities: subjective and human rights, however, not political privileges.

The greatest form of rationalization of public space, in this sense, is found in the Westphalian model, applied in Europe after the Thirty Years' War. The model is based on

* 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] This aspect of Schmitt's thinking is addressed in C. Sbailò, *Weimar, un laboratorio per il costituzionalismo europeo. Scienza giuridica e crisi dei valori occidentali*, 267 ff., 339 ff. (2007).

rigid conceptual couples, such as "inside" and "outside" or "before" and "after": these are the space-time coordinates of the concept of jurisdiction, which represents the juridical precipitate of sovereignty. It is a system that guarantees symmetry and congruence between decision-making agents and areas in which decisions have an effect, as well as between the individual and the State. The nation is a pre-juridical and, ultimately, pre-political fact. It follows that the set of citizenship rights are deductible from the will that gave rise to the public space.

On the opposite side we have Rawls' theories. The latter interprets society as the result of the free meeting of individual wills, within a neutral axiological and ideological space. "Rational egoism" is the engine of public space. Space and individuals are thought of separately from their reciprocal interactions, so the latter are always to be considered as reversible. It follows that people are to be considered originally and equally free and owners of their fundamental rights and that the perimeter of the interactions is the negative result of the description of the potential reciprocal conflicts between individual freedoms. According to Rawls, the problem of disagreement between different political visions is resolved with pluralism, on the basis of a substantial sharing of elementary principles of coexistence common to all reasonable people.[2]

Between these two somewhat polarized positions is that of Habermas, who rejects Rawls's neutralizing and individualistic vis, because it leads to an abstract and totally disconnected position with respect to historical reality, but also marks his own difference from Carl Schmitt, whose theory he deems capable of justifying social exclusion if not just nationalism and racism.

According to Habermas, the person, therefore, is originally placed in a double dimension, public and private: democratic procedures have the task of guaranteeing the dynamic balance between the two dimensions, avoiding that one dominates over the other, which would entail, evidently, an impoverishment of both public and private life. Integration is seen as a dialogic process, in which diversity is not denied, but not even uncritically accepted, but juridically "treated" in such a way as to harmonize it with public interests.

According to Habermas, the concept of nation is therefore obsolete and can no longer be the foundation of public space. It is based on a cultural homogeneity of ethnic groups and social groups that is no longer possible and no longer necessary. This homogeneity is still

[2] See J. Rawls, *Reconcilation through the Public Use of Reason* in Journal of Philosophy, 92(3), 132-180 (1995). See also A. A. An-Na'im, *Islamic Politics and the Neutral State: a friendly Amendment to Rawls?* in T. Bailey and V. Gentile (Ed.), *Rawls and Religion*, 242 ff. (2015).

today the theoretical presupposition of a fusion between dominant classes and cultures, which arbitrarily restricts the space of citizenship. Democratic citizenship today is based, on the other hand, on the Constitution, elaborated and launched according to democratic procedures, in a dialogical context dominated by public opinion and political forces. So public opinion and political forces guarantee the cultural homogeneity that forms the basis of the processes of democratic integration.

The inconsistencies of Schmitt and Rawls are highlighted by Habermas. In both positions an ideological background emerges. But Habermas himself pays for an inconsistency. He does not explain why there must be integration. He presupposes the existence of large mass parties (integration must be favored by the "political machine"). It is therefore clear what has led Habermas, in recent years, to re-evaluate the role of religion in the public space, arguing that the redevelopment of the "political", which he now sees totally flattened on technology and administration, must lead to the end of prohibition of access in the public sphere of religious issues such as salvation or redemption. Even Rawls, albeit in a different form, has recently spoken out in favor of a political rehabilitation of religious issues.

Beyond the more or less shared hopes expressed by philosophers, the fact remains that the recent positions expressed by them confirm that their theories on inclusion and integration presuppose the existence of the Westphalian-type national state, in the absence of which transcendent references to public life are sought. It is research that is doomed to failure by definition.

The research is doomed to failure because it presupposes a cultural horizon that is now non-existent. The crisis of the national state is much more than the crisis of an institution. It is the crisis of a paradigm.

II. Deconstructing The myth of relativism by adopting the paradigm of "bebelarchy"

The crisis of the system of sources is common experience.

The reconstruction of congruence and symmetry between decision-making agents and areas in which the decision has an effect – presuppositions of the modern notion of jurisdiction and *conditio sine qua non* for the guarantee of the principle of effectiveness of the legal rule – engages the jurist in the evaluation of an increasing number of variables, to the

point that a "strategic" approach, no longer "paradigmatic", prevails among legal practitioners, in the sense that the criterion of effectiveness tends to absorb that of validity. What happens in the economy and finance is emblematic. The multinational company moves on different legal, fiscal, territorial levels, etc. and develops negotiation strategies with the executives, also thanks to law firms, from whose activity a negotiating use of law arises.

In the specific context of public law, there is a multiplication of the sources of legitimation of political power and a growing uncertainty about the boundaries of the sphere of impact of the decisions of the latter, with consequent multiplication of intra-state conflicts, even in the context of a public space, like that of the European Union, born from the need to rationalize the inevitable progressive intersection and overlapping of political decision-making flows. This entails a growing simplification of internal decision-making processes, in favor of the Executive, and a reduction in the range of action of the legislative Assemblies. Thus, the sources overlap and intertwine and sometimes it is not possible to reconstruct in a unified way the discipline relating to a specific one.

With the Covid-19 pandemic we have all realized what philosophy and sociology have been telling us for at least twenty years: not only has the world changed profoundly after the end of the Cold War, but the way in which things change has also changed. We have moved from a world dominated by Newtonian logic to a world that can often be understood only with the tools of quantum physics.

In yesterday's world, in all the scenarios we were going to analyze there were a subject and an object, a cause and an effect, a center and a periphery. We are not talking about how things actually worked, but about a paradigm, a conceptual scheme that dominated the world and its representation. It was a world in which there were "hierarchies" (hierarchies of problems, of competences, of power and so on, of values). Hierarchy as we know comes from the Greek ἱερός (joined to ἀρχία, which comes from ἄρχω, "to lead", "to begin"), which we can translate as "sacred". The term was used to designate, among other things, the spaces and times of priestly competence. That concept makes an orderly representation of earth and sky possible. Today we live in a messy world. Many call it anarchist. Anarchy is precisely the opposite of hierarchy. It means the absence of government, of command and, therefore, of rules. Ultimately, it means chaos. The challenge of the study centre is that it is not chaos, but something that can be understood and, in some way, dominated. We just need to work on new cognitive tools, on new paradigms.

The way things change has changed.

From the world of the hierarchy, one does not simply pass to its opposite, to chaos: this is still a mechanical way of reasoning. From the opposition between subject and object, we do not pass to the cancellation of one and the other, but to their relationship as something constitutive, original, which must be taken into account in the analysis. If I study a particular strategic threat, I need to know that my firm, for reasons related to culture and technological development, is interacting with that same threat. The relationship between subject and object changes and the relationship between cause and effect changes. Just as the relationship between center and periphery changes. According to the center/periphery paradigm, each input is presented as the emanation from an originating point ("beginning", "nucleus", "vertex" etc.), more or less distant. Today the center/periphery paradigm yields to that of the "network", which is not opposed to the first, but incorporates and "uses" it, partially accepts it and ignores it when it is not needed, reduces it from a presupposition to an option, without never denying its validity. According to the network paradigm, the impulse is consciously reinterpreted, and to some extent recreated at each "node". The αρχία – the "guide", the "address" in the technical sense of "regime", understood as a set of behavioral rules – exists, but is no longer supported only by ιερός, by the "sacred". To support it – the classical world still helps us here – is the "other" from the "sacred", that is to say the "profane", the "open" – in Greek βέβηλος, a term that also indicates the space in front the temple. If we really wanted to find an alternative term to "hierarchy" we would therefore speak not of anarchy, but of "bebelarchy", thus indicating a regime with a tendentially (not absolutely) "horizontal" character, in which communicative capacity counts more than accuracy, relationships tend to be multidimensional and incongruent and the transgression is as important as the rule since the latter is never defined once and for all, but subjected to continuous negotiation.

This molecular change of the social space, in the juridical comparison, is causing two symmetrical attitudes.

On the one hand, there is an exaltation of absolute relativism, which goes so far as to question the very notion of law ("there are rights, there is no law": it is therefore not clear what are the characteristics of a social experience to be qualified as "juridical": how can there be rights if there is no law?). It starts from the obvious observation that there are many ways, in addition to the typically Western ones, to build and manage a public space and pay greater attention to cryptotypes, which often work in a religious or cultural context. The comparison is carried out in the principle of the most genuine *Voraussetzungslosigkeit*.

Not only there are no better legal systems than the others, but the taxonomy itself appears to be devoid of any foundation. It follows that relativism is the king. Legal comparison has the mission of bringing to light the relativity and growing fragility of the juridical and taxonomic categories of the West and of opening the scholar's gaze to "other" juridical experiences.

On the other hand, we have, in a decidedly minority position, the Habermas theories, which demand an opening of the legal debate to the issues of religion, in a clear neo-naturalistic perspective.

Now, the question is of no small importance, if we consider the essential function performed by juridical comparison in doctrine. It is worth trying to understand to what extent this *cultural mood*, which now seems to be dominant in comparative public law, is compatible with the very existence of comparative public law itself.

Just think of the weight that comparison plays both in the legislative activity and in the jurisprudence – and not only of the constitutional one – of various Western countries.

From this point of view, therefore, it can be said that in those positions there is a defect of abstractness. The phenomenon of the broadening of the comparative horizon is seen in isolation from the awareness that the same scholar has of it. In other words, it is reconstructed as something objective and external, not as the result of the development of legal comparison. For example, it is not taken into account that this enlargement – that is to say the entry of non-Western legal cultures into the jurist's horizon – is part of a process of westernization of the globe, in which the legal comparison itself carries out an essential role. Just think of the role played by comparatists, starting from the end of the Cold War, to legitimize the idea that common law systems and instruments are particularly suitable for the development of market integration and finance rationalization processes.

III. LEGAL COMPARISON AS THE ORIGIN AND STRUCTURE OF LEGAL KNOWLEDGE

The internal aporias of the comparative doctrine are the contradictions of the juridical doctrine itself.

There is an original link between juridical doctrine and comparison.

All the great breakthroughs in Western legal culture are related to comparison.

Just think of the role played by glossators in the rearticulation of European public law, after the "discovery" (an operation of diachronic juridical comparison) of Justinian. We should consider how the foundations of the rule of law in Eurocontinental legal experience were

laid by Montesquieu, who re-elaborates Lockean doctrine and the English experience, adopting the paradigm of the "circulation of models": the principle of separation of powers, identified at the time in the recent English constitutional history, was reworked on the basis of the characteristic data of the French public space of the time, already characterized by a strong administrative centralization, with the relative growth of the bureaucratic elite, and by a growing weight of the judiciary. Legal comparison played a decisive role in the birth of the Constitution of the United States of America, in the European constitutional movement of the nineteenth century, in the democratic constitutions of central Europe between the two wars (Germany, Austria, Czechoslovakia), in the post-war Constitutions of Italy and Germany, in the constitutional movements of the Islamic world after decolonization (Tunisia, Egypt 1970), in the post-communist constitutional experiences, in the constitutional reforms of the Islamic world starting with the Arab Spring.

It is therefore necessary to start from this hotspot, in other words from the original relationship between comparison and Western public law. The fact that at a certain point the juridical comparison separated from the doctrine casts a shadow over the original relationship existing between juridical comparison and Western public law. That separation – or the birth of legal comparison as a specific discipline – took place during the second industrial revolution: this was the era of great specializations; the era in which the power of ἐπιστήμη is maximum and is expressed in the tumultuous development of capitalism, supported by technoscience. The comparison was born, in the age of colonialism, as a reaction to the Enlightenment rationalistic universalism, in a historicistic key, to defend the particularity and specificity of non-European legal cultures. But in doing so it becomes an essential tool for the westernization of the planet. The expansion of the spatial horizon involves an expansion of the temporal one, towards the past and towards the future, in search of the foundation – that is, the form of evolution – of the *ius publicum*.

According to Nietzsche, this is the Age of Comparison: «The less men are fettered by tradition, the greater becomes the inward activity of their motives; the greater, again, in proportion thereto, the outward restlessness, the confused flux of mankind, the polyphony of strivings. For whom is there still an absolute compulsion to bind himself and his descendants to one place? For whom is there still anything strictly compulsory? As all styles of arts are imitated simultaneously, so also are all grades and kinds of morality, of customs, of cultures. Such an age obtains its importance because in it the various views of the world, customs, and cultures can be compared and experienced simultaneously, – which was

formerly not possible with the always localised sway of every culture, corresponding to the rooting of all artistic styles in place and time. An increased aesthetic feeling will now at last decide amongst so many forms presenting themselves for comparison; it will allow the greater number, that is to say all those rejected by it, to die out. In the same way a selection amongst the forms and customs of the higher moralities is taking place, of which the aim can be nothing else than the downfall of the lower moralities. It is the age of comparison! That is its pride, but more justly also its grief. Let us not be afraid of this grief! Rather will we comprehend as adequately as possible the task our age sets us: posterity will bless us for doing so – a posterity which knows itself to be as much above the terminated original national cultures as above the culture of comparison, but which looks back with gratitude on both kinds of culture as upon antiquities worthy of veneration».

In this piece by Nietzsche, the connection between ἐπιστήμη and comparison is seen in a dramatic way, in the process of westernization of the globe. The fact that juridical comparison from opening towards "other" cultures becomes an instrument of assimilation (first conceptual, but then also political) of those same cultures is sometimes read as a sort of "Heterogony of ends". This is a serious error of perspective, as it leaves the original relationship above mentioned in oblivion. In general, Eurocentrism, opportunely denounced by authoritative doctrine on several occasions, can be seen not so much as a pathology of comparative law, but as an original and, in some way, constitutive characteristic of the latter. In this sense, the "subversive" function of comparative law and the role it plays in the westernization of the planet are two sides of the same coin. [3]

IV. ORIGINARY RELATIONSHIP BETWEEN COMPARISON AND PUBLIC LAW AND CRISIS OF THE FOUNDATION

The relationship between comparison and law is rooted in the original link between public space and ἐπιστήμη. It is still necessary to clarify why the original link between the birth of political thought and ἐπιστήμη is a matter of extreme interest for the constitutional doctrine. It is clear that the opening, at the dawn of Western thought, of the question about ἀρχή[4]

[3] F. Nietzsche, *Human, All Too Human: A Book for Free Spirits*, 23, transl. by H. Zimmern (1910). See L. Pegoraro, *Imposición cultural, la búsueda de denominadores comunes y la "misión comparatista" de las Revista de Derecho constitucional*, Revista N. 371, Academia Colombiana de Jurisprudencia (Enero-Junio de 2020); A. Somma, *Per un dialogo tra comparazione e diritto positivo*, in A. Somma, V. Zeno-Zencovich (Eds.), *Comparazione e diritto positivo un dialogo tra saperi* (2021).

[4] G. Reale, *Il pensiero dei Presocratici*, cit., p. XXIII.

does not concern, as has long been assumed, "nature" understood as a counterpart to the world of "politics", but it concerns the whole, that is the set of entities and relationships in the world, starting with the entities and the relationships in which the question about the principle and about the whole is constituted. [5] If the political dimension is originally constitutive of ἐπιστήμη, it is in Parmenides – or in the philosopher who, as Severino says, poses the problem of nothingness for the first time – that the idea of politics as a project, or of human planning as an eminently *political* problem, arises. For the first time explicitly, according to the accurate philological work carried out by Giorgio Colli, Parmenides raises the problem of the *distance* between thinking and acting, or rather of the primacy of the concept over acting: the commitment in πόλις is necessary because the whole itself, in its intimate unity, cannot be reduced to an object of mystical contemplation.

Classical philology confirmed this: the epistemic *vis* can then be traced back to Herodotus and Aeschylus, where the sense of the separation of the Greeks – and, with them, of Europe – from Asia emerges strongly, understood precisely as something "different". [6] A link is found between axiological universality and the relativity of (comparison between) legal systems – a link that remains central to Western politics. The idea of comparing the various forms of organization of public space is thus presented as co-originary with respect to the idea that public space must be founded on the basis of a consciously chosen purpose.

We remain within this ideal horizon even when we try to reconcile juridical universalism and cultural relativism. When, for example, Habermas[7] reconstructs the universality and primacy of rights on a pragmatic-transcendental basis, demonstrating that one cannot but consent to those principles, since they are the very foundation of communicative

[5] G. Colli, *La sapienza greca*, 32-33. (II, 1994). As regards Pericles' speech (Thucydides, *Peloponnesian War*, 1, 139-144), see the introduction by Davide Susanetti in Tucidide, *I discorsi della democrazia* (Ed.) D. Susannetti, 7-46 (2015). We also refer to C. Sbailò, *«Ad Atene facciamo così»: l'elogio della democrazia nel discorso di Pericle*, held in the cycle of conferences «La parola e la storia. I grandi discorsi che hanno cambiato il mondo», GEODI-Research centre on Geopolitics and Comparative Law, Università degli Studi Internazionali di Roma – UNINT, Roma, www.unint.eu, November 4th 2020, forthcoming. See C. Sbailò, *Sul sentiero della notte – La πόλις. Introduzione alle imminenti sfide del diritto pubblico* (2020).

[6] In this sense, there is an illuminating passage from Burkhardt: «In the troubled and troubled life of the polis, one of the most expensive results achieved was that the Greek spirit learned to consider and describe political forms objectively, comparing them the one with the other». In the view of the Greeks, «the Oriental, with its sacred right and effective despotism, was a prisoner of the narrow horizon of its state». It is the Greeks of Ionia who opened the discussion «on the best form of government (on the occasion of the advent of Darius)» and Herodotus should be credited with having «presented in literary form the discussions, both political and on other topics, which were held at the Court of Xerxes» (my translation).

[7] Especially in J. Habermas, *Discourse ethics: Notes on a program of philosophical justification* in *Moral consciousness and communicative action,* 43–115, (1990).

elaboration, centered on the individual, he is moving within the Greek epistemic approach, as it presupposes – because it is a presupposition, in which one has *faith* – that the individual represents himself as an entity that wants and knows to want and consciously elaborates values. Habermas, in fact, is forced to recognize that the evolution of the intercultural discourse on rights presupposes the willingness of the participants to look at their own tradition with the eyes of their interlocutors, or to (again) adopt the aforementioned universalistic-relativistic Western paradigm. The very identification of the nomological necessity of an abstract regulation of public life is possible within a voluntaristic-discursive representation of reality (i.e. within the faith in becoming, in the presumed evidence that things become other than themselves and are, therefore, placed between the nothingness and the being), or through a vision of the world essentially centered on man as the architect of his destiny. Outside of such a perspective that need is a mere fact, not conceptualized, or no longer conceptualized of other needs that weigh on humans, from food to reproduction, hygiene and so on.

The nomological instance and the juridical comparison are, therefore, to be considered in the light of the originary relationship between public space and ἐπιστήμη, as two sides of the same coin.

Taxonomy comes from τάξις, order, and νόμος, meaning law / rule / discipline. By definition, therefore, the taxonomic activity – that is to say, the essence of legal comparison – must separate the subject from its predicate, or keep the semantic dimension distinct from the apophantic one. This entails the qualification of the predicate as something accidental, or potentially "nothing" with respect to the subject being preached. Taxonomic activity, in this sense, implies in itself the assumption, by the scholar, of a tendentially rational and universalistic position, that is, in the Severinian perspective, epistemically oriented (the scholar has faith in becoming and thinks the nothing as "something") and, therefore, internal to the history of Western nihilism.

These concepts are based on an idea of foundation (or of the impossibility of the foundation) as the opening of a neutral space, which pre-exists the subjects that populate it.

The idea of comparing the various forms of organization of public space thus coincides with the idea that public space should be founded on the basis of a consciously chosen purpose. We remain within this ideal horizon even when we try to reconcile juridical universalism and cultural relativism.[8]

[8] According to Burkhardt, among the Hellenes, the very birth of the polis cannot be thought of without a prior deliberation; then the agora immediately arises with its inevitable consequences: the discussion of

V. Constitutional Mereology and the Will to Power

Therefore, we have seen that the "foundation" of public space and the comparative instance are two sides of the same coin. Comparison is made because, consciously or not, one's notion of "foundation" is tested. The foundation of the public space is sought because new and unknown juridical experiences arrive in the horizon of the jurist. Moreover, that very arrival arises within the link between the comparison and the foundation of public space. The precomprehension of the "comparability" of legal systems (and the awareness of the problem of comparability is already present in Herodotus) in turn opens the question of the foundation. The will to find the foundation of the public space comes into contradiction with itself, as the foundation, being "placed", remains under the dominion of the will.

Now, taking up the thread of the reasoning on inclusion, if the identification of the scope and the purpose of inclusive processes must refer to principles that transcend the domain of positive law, or to transcendental conditions of legislation, that identification is sucked *ab origine* in the context of the will of power.

It may be helpful here to carry out some considerations of constitutional mereology referring to the Italian case, starting with the obvious observation that the constitutional text presupposes the ordering principle in the way in which the part presupposes the whole. This is why, on the one hand, there can be major textual changes, without deep constitutional revisions and, on the other hand, there can be major constitutional revisions – and at least changes – in the absence of significant changes to the text. The constitutional revision indicates a change that can be reconstructed as an evolution of the legislation, or a transformation that does not affect the substance, the *identifiability* of the Constitution itself. The change is to be understood as the destruction of the substance: it is no longer *that* Constitution. It is the state of health of the ordering principle that makes the difference.

---

the state as a whole and of all the single problems of daily political life. The philosophers devoted their best energies to the polis. And not only the Hellenic state was studied; in fact, from the Greeks we have everything that, until the discoveries of our century, we knew about the Egyptians, the Persians and Carthage, relating to political institutions of other ancient peoples; Polybius himself said the most solid and conclusive things about the Roman State in its golden age than has ever been written. The Greeks alone saw and compared everything. (See J. Burkhardt, *Griechische Kulturgeschichte,* Ed. by J.J. Oerrli, 360 ff. (I, 5th ed., 1908). Here we take up again the well-known thesis of François Châtelet, with particular reference to the reworking of the theories supported on this point by W. Dilthey and WF Hegel. See F. Châtelet, *La Naissance de l'Histoire. La formation de la pensée historienne en Grèce* (1962). For the anthropological-cultural aspects, see W. H. Mecnell, *The Rise of the West. A History of the Hyman Community*, 189 ff. (1990).

The identification of the supreme principles as "limits" to the revision or "counter-limits" to the entry of foreign regulations (Constitutional Court of Italy, 1146/1988) presupposes, therefore, the notion of the ordering principle, the violation of which makes the revision becoming a constitutional change, or annihilation of the Constitution. In the judgment cited, the Court does not say what the criterion for identifying these principles is, nor could it say so.

This does not mean that they are arbitrary principles. A concrete and hermeneutically oriented approach to law and to the problem of the foundation of the legal system must hold together the part with the whole, considering the transcendence of the whole and its inenarrability, as something inseparable from immediacy. Conceiving the foundation and the founded as two separable entities or conceiving inseparability as identity or distinction as separation – all this means thinking about nothing, or staying in the contradiction without being aware of it and not being able to understand the essence of the normative datum. The shift of the center of gravity of the regulatory system from the law to the Constitution and from this to the ordering principle does not involve the "opening" of the system. The Court is affirming itself as an interpreter of the ordering principle. It adopts a self-expansive logic, which has made the Court the major protagonist of constitutional mutations.

Constitutional jurisprudence is increasingly oriented towards a hermeneutic of the ultimate principles of the legal system, which, by definition, transcend the constitutional text itself. For this reason, on the one hand it increasingly directs the activity of the legislator, who now looks less at the constitutional text and more at the values that inform it. On the other hand, it pushes ordinary judicial activity more and more towards the adoption of extra-legislative parameters, derived directly from constitutional law, also understood in a reticular key.

The growing role of jurisprudential activity is explained precisely by the affirmation of this legal-positivistic and reticular paradigm, which in the system of sources moves the Constitution from the super-legislative sphere, ontologically close to the legislative one, to the meta-legislative sphere. This entails a downsizing of the role of the parliamentary legislator and a strengthening of the role of the judge, where the latter must be seen as part of a phronetic community. Therefore, the Court must draw up the limits within which the Legislator can operate. But these limits are not derived from immutable and transcendent values, but, in a horizontal key, from the "network" constituted by the dialogue between the courts.

The reading "according to values" – in Barbera's opinion[9] – opens the way to cultural relativism, which is ultimately incompatible with the very notion of "Constitution", as this presupposes the *identification* of the constituent subject and therefore the reconstruction of the *constitutional pact*, or rather of the *principles* and the *people.*

The observation is well founded.

We can draw a classic example of this risk from the Italian debate on citizenship. The interpretation of the Constitution by values leads towards a potentially unlimited extension of citizenship rights, or towards an absorption of this within the sphere of fundamental rights. Taken to its extreme consequences, the interpretation of values seems to lead to an extension of citizenship to all.

The supporters of the *ius soli* justify their position by referring to the "popular" character of sovereignty, relying on the "factual data" of the changes that have taken place in the *demos* ("society is increasingly multi-ethnic", etc.). But this is a logically incorrect operation. The "people" referred to in the aforementioned sovereignty has nothing to do with the "population": the people of 2017 are not "other" than the people of 1947. For this reason, the discipline that regulates the *identification* (think, for example, of the electoral register for the elections of the Chambers) cannot be subject to considerations of an ethnic-demographic-sociological nature, but only to choices of a political nature, which refer to *that* people and to the political project around which the Republic was built. One could therefore ask why the Constitution does not provide for particular legislative precautions in the matter of citizenship (as it does, however, for example in matters of constitutional reform or electoral laws). The answer is that the question of citizenship is originary, that is, it logically precedes the reconstruction of the constituent process itself. If the "people" is not *identified* (and the people is identified through the discipline relating to citizenship), therefore, a Constitution is not given.

The voluntaristic foundation is evident here. Augusto Barbera rightly speaks of nihilistic drift. Barbera, on the other hand, is wrong in believing that it is a reversible process, of something that springs from a specific ideology and can, therefore, be stopped. This trend cannot be stopped because it represents the essential destiny of our time. But it can be guided, so it can become part of the awareness that legal doctrine has of itself. The trend

[9] See A. Barbera, *Costituzione della Repubblica italiana*, in *Enc. Diritto.*

described by Barbera must rather be brought to light, so it must somehow be grasped by reason and taken to its extreme consequences.

Going to the root of this trend, it will be seen that it is not a degeneration. The voluntarism denounced by Barbera – which can be defined as a voluntarism of a eudaemonistic nature – is, in fact, internal to the process of secularization, of which it is an essential part, not an accidental one. It is its core. This form of voluntarism is rooted in modern intramundane anthropology, which makes man a self-referential entity, devoid of transcendent references, since the latter are reconstructed as his direct emanation.

VI. DIALOGUE BETWEEN COURTS & RETICULAR POSITIVIZATION

The public space arises from the «Isolation of the Earth»,[10] understood as a decision of individuation / separation: here the subject is placed at the center of reality and here, with Plato, the move from truth as unconcealment to truth as correctness began.[11] In other words, politics has an original nihilistic matrix: it arises from the decision to separate the public from the private sphere, or to identify a private sphere as something autonomous. But for this to be possible, first of all it is necessary to "separate", meaning the act of will that "isolates" a part from the whole – that is, that reconstructs the whole as the sum of the parts. Therefore, it is originally necessary to decide that the whole world is isolated from the whole, that is, that the world floats in nothingness and that all things, as things, or objects of knowledge and manipulation, or of individuation, are placed in nothingness, going out and back into nowhere. It is necessary that man himself is separated from his being-self, that is, from his being in relation, and that he is therefore an individual, to whom relations with other individuals pertain only at a later time.

The fact that individualism is a typically modern phenomenon should not distract our attention from the fact that the (voluntaristic) foundation of public space in itself involves

[10] «Nessuna decisione (dei mortali o dei divini) può condurre al tramonto dell'isolamento. Ogni decisione si fonda infatti sull'isolamento della terra. Nessun salvatore (artefice di salvezza) è possibile. Ma ogni decisione appartiene al destino dell'isolamento. Se il tramonto dell'isolamento della terra è destinato ad accadere, allora è necessità che tutte le decisioni siano prese e il decidere portato al suo compimento» [«No Decision (neither of mortals nor of gods) can lead to the sunset of Isolation. In fact, every Decision is based on the isolation of the earth. No savior (creator of salvation) is possible, but every decision belongs to the fate of isolation. If the sunset of the isolation of the earth is destined to happen, then it is necessary that all Decisions are made and Deciding brought to its fulfillment»], E. Severino, *Destino della necessità. Κατὰ τὸ χρεών*, 448-449 (2010).

[11] A move to be considered not as a simple "mistake" o "traison", but, in a certain sense, as a primitive posture of the Western way of thinking. See M. Heidegger, *Zur Sache des Denkens*, 78 ff. (1969).

the creation of a space, the one of the private sphere, subtracted from it. Nietzsche's denunciation of Euripides and Socrates, of having opened the way to bourgeois individualism and secularization, or rather to the reduction of truth to a "method", appears to be well founded in this sense. On the other hand, Nietzsche is wrong in not seeing how the turning point of Euripides and Socrates is a destiny, something inherent in the very concept of ἀρχή.

The *political* character of the very demarcation between the public and private spheres is, according to Weber's well-known reconstruction, a peculiarity of Western civilization: «A systematic theory of public law was developed only in the West», because only in the West the political group assumes a complete institutional character, with rationally articulated competences, and it is only in the West that there is a clear check and balances system between powers. Public law regulates actions relating to the state, while private law regulates actions relating to private subjects. But the structure of the "regular", in both cases, has its origins in the legal sphere. This is not a historical reconstruction: the historical interpretation is used by Weber as a hermeneutic strategy, for the understanding of an original and structural characteristic of Western civilization. [12]

Politics, therefore, is born within the ἐπιστήμη, or it is the original manifestation of the ἐπιστήμη. For this reason, already with Plato, *the positive laws are the "natural" laws of man*. If politics arises after (from the fact) that the gods have abandoned the world, legislative activity can only be based on human qualities, such as common sense and reasonableness. Which means that the search for a foundation of public life will never be found, but also that this search will never have an end. [13]

The epistemic *vis* is aimed at «saving the world», at giving ontological dignity to appearances, in other words, to the «opinions» of men, therefore to the *polis*, which for the Greek language is the original dimension of men (the context in which the man "knows" that he is a man). The path of madness, in this sense, is the path of politics, understood as the foundation, organization and management of public space (it is possible to found, organize

[12] M. Weber*, Vorbemerkung*, in *Gesammelte Aufsätze zur Religionssoziologie,* 1-16 (Bd. 1, 1920).

[13] Francesco Adorno observes in this regard: «In the latter [*The* Laws] Plato operates, resorting to the laws, the moment of the establishment of the living unity of intelligence as one with the first soul, understood as activity, and, therefore, of the 'speech one' (*logos*), emphasizes that positive laws correspond to the very moments of the unfolding of logos, so that positive laws become obligatory because they become the 'natural' laws of man, such inasmuch as it is politically constituted, and, therefore, the natural laws of the State, and without which it would not have existed, nor would it be the States of today» (F. Adorno, *Introduzione a Platone*, 224 (1978).

and manage only what is separated from the activity of founding, organizing and of managing).

The affirmation of legal positivism, therefore, must be interpreted not only as a specific historical event, which can be explained in the light of a certain number of cultural and social phenomena, but as an original trait of the Western jurist. In the age of legal positivism and codifications, the voluntary character of the norm –that is, its being enforceable only by virtue of an auctoritas is explicitly stated.

This structural datum of the western public space appears today difficult to understand as the subject of the *ponor* is identified with the territorial national state. The progressive erosion of the monopoly of legislative activity by the State, strictly connected to the affirmation of the transnational character of jurisdiction together with the primacy of fundamental rights, generates the impression of a symmetrical crisis of sovereignty and positive law.

In reality, juridical experience continued to develop according to the model of positive, or secularized law, but the *positum* ceased to be univocal and centralized, as it was in the state-centered juridical universe, and it began to have a reticular character, since it is entrusted to the dialogue between the courts, within which the procedural element necessarily prevails over the substantive one, which can only lead to the exasperation of the desacralization of the rule, or the exaltation of the *affected* character of the latter compared to the *will*. In this sense, the *technical* character of law has been accentuated, that is, its being a means for the effective pursuit of aims, regardless of the purposes.

A school case, in this regard, is constituted by the Superior Courts Network (SCN), born on the initiative of the European Court of Human Rights, in 2015, to promote the exchange of jurisprudential experiences in the field of fundamental human rights and the dialogue between the courts. The purpose of the network is to increase itself. The network orients the courts not on the basis of certain principles, but on the basis of the intrinsic value of reticularity. To demonstrate the validity of his thesis, today, the jurist usually no longer refers to extrajudicial contents, as happened in continental Europe up to the end of the Eighteenth Century and in common law countries up to the beginning of the Twentieth Century. Legal reasoning develops within the legal universe, made up of positive norms (laws, sentences, etc. are nothing but norms, placed at different hierarchical levels). The very alleged "creativity" of the courts is part of this sphere.

The voluntary character of the norm remains, already present in the Westphalian model, with the difference, compared to what happens in the state-national universe, that the will is not understood as an expression of the State or of a centralized subject, but as a

widespread will. Widespread, not anonymous, as it can be reconstructed as the result of the intersection of various wills on the network. The will creates not only new rights, but also new subjects of law. For years, we have witnessed a geometric growth of rights, the perimeter of which gradually tends to coincide with that of desires. The desire to procreate even in the absence of the natural conditions of procreation becomes a right to procreation. The desire to change sex or to end one's suffering through assisted suicide become in turn rights.

The solution cannot be in neo-natural law, as Norberto Bobbio demonstrated,[14] when he brought to light the impossibility of finding an absolute foundation for human rights. This hermeneutic situation can also be read – or represented – as an intimate contradiction of the ἐπιστήμη itself. The ἐπιστήμη, in fact, is the considering itself of the foundation problem. The epistemic *vis* wants to find a foundation, but it cannot presuppose it as an original and undiscussable datum. The foundation is constituted as such within the ἐπιστήμη. So the foundation can be conceptually reconstructed. But if the foundation is conceptually reconstructable, it means that it is dominated by what it is reconstructed with, that is, the epistemic *vis* itself. This means that no foundation is *certain*. Every foundation is exposed to the corrosive critique of reason, in other words, dominated by the same *vis* that created it.

In this way, we face the problem of nihilism. Here nihilism is to be understood not as a radical scepsis on the congruence of historical values with respect to an absolute value, but as a denial of the possibility that a universally valid evaluation parameter can be determined. In this sense, to say, as Böckenforde does, that «the liberal, secularized State lives by prerequisites which it cannot guarantee itself» means to say an obviousness. [15] The assumption can never – by definition – be guaranteed, since to be guaranteed it would have to be represented. But if it were the object of representation it would cease to be a presupposition. [16] The idea that something must have a "foundation" that saves it from becoming, from which the need arises that the search for the foundation must in turn be founded and founding, is the very essence of ἐπιστήμη. But, as we have seen, in the essence of ἐπιστήμη we also find the instance of overcoming the foundation. The only foundation

[14] See N. Bobbio, *L'età dei diritti*, 5-16 (1990).
[15] See E.-W. Böckenförde, *Staat, Gesellschaft, Freiheit*, 60 (1976).
[16] The theme of the aporia of the "foundation that asks to be founded", with reference to the neo-Kantian genesis and the theological-Jewish roots of Hans Kelsen's Pure Theory of Law, was addressed in C. Sbailò, *Principi sciaraitici*, cit., 14 ff.

that can always be demonstrated, in fact, is that of the possibility of undermining any foundation.

VII. RECOGNIZING THE STRUCTURAL APORIAS OF "CITIZENSHIP"

Foundational requirement and positivistic proceduralism are therefore the two poles of an original aporia that affects the European concept of public space. This aporia is found in the concept of sovereignty and, obviously, in the subjective reflection of the latter, which is the concept of citizenship. Just as a universal sovereignty is self-contradictory, the concept of universal citizenship is also self-contradictory. But this contradiction is desired by the will of power.

Being a citizen is always a being a citizen of, within a determined space-time, voluntaristically founded, structured on specific values and interests. Citizenship, in this sense, is linked to the "isolation of the earth", desired by the epistemic will. The "isolation of the earth" involves that of the individual: modern individualism is sovereignty itself, considered from the point of view of legal obligation. Rights are rooted in sovereignty and sovereignty is incompatible with rights. The aporia is original.

Man is a political animal means that «the *polis* exists by nature, that human beings are political animals, and that the city is by nature anterior to every single citizen».[17]

But who deserves to be a citizen and who doesn't? Aristotle asks himself. Aristotle does not answer. He says: «To identify a citizen in the true sense of the term all is needed is the right to participate in the administration of justice and government». Then comes the decisive point, of eligibility for citizenship: «In fact, a citizen is defined as a child of two citizens and not of just one – the father or the mother; others go back even further, up to the second or third generation or even more. However, having established this in political and coarse terms, some ask themselves to what title an ancestor of the third or fourth generation was a citizen».[18]

The question concerns the essence of constituent power. It is connected to the other fundamental question of constitutional continuity: is a city the same city even if it changes its constitution? It is the problem of the persistence of legal and political obligations towards other States by a State that has radically changed its constitution. Aristotle says no: if a city changes its constitution, it is no longer the same city. As has rightly been noted,

[17] R. Kraut, *Introduzione* to Aristotle, *Politica* [Greek text and Italian translation] (Vol. I, XCIII, 2014).
[18] Aristotle, *Pol.* III, 1275a - 1257b.

this doctrine, although perhaps not entirely devoid of logical coherence, does not find correspondence in any other passage of the *Politics*, and seems somewhat incompatible with the overall structure of the work. In general, it seems incompatible with Aristotelian mereology: everything is the same and different at the same time, according to the criteria adopted. It does not always happen that «changing into a different species» determines the end of one particular being and the beginning of another. For example, a person ceasing to be a child does not mean that person's end. The constitution is not the criterion by which we define that a city or a State is that particular thing. If this were the case, the absurd consequence would follow that a city cannot change its constitution without committing suicide.[19]

Indeed, Aristotle is telling us that the political space has a voluntaristic-decisional root. But isn't the city a given of nature? In fact, even this connotation of the city has a voluntaristic-decisional character.

To return to the initial question, "who" includes "who", where and why, the answer is unitary: the will of power. It is the political will that includes and at the same time decides the object of inclusion, the space of inclusion and its reason.

All the constitutional systems of the West, including those in which citizenship is acquired jure soli, are constructed with a state-national paradigm, according to which access to citizenship is subject to the rules set up to protect the originality and independence of State power. In the Republic, this originality and independence has been legally reconstructed with the principle of popular sovereignty, the application of which encounters constitutive limits in the recognition of fundamental rights (which obviously cannot include citizenship by definition) and, in some ways, in the acceptance of the fundamental principles of *ius gentium* as well as of the obligations deriving from accession to the European Union (in both cases, the discipline of citizenship is recognized, however, as an exclusive prerogative of the States). In fact, constitutional jurisprudence has built a system of access to fundamental rights – which now include welfare rights – independent of Italian citizenship, while the citizen has the exclusive political rights and access to offices and public offices. Now, the "people" (referred to in the aforementioned sovereignty) should not be considered historically by the jurist (from these sociological-juridical hybridizations derives, in my opinion, the excessive ease with which projects of global constitutional reform are

[19] R. Robinson, *Comments*, *Pol.* III, 1275a-1277a (1,2,3), in Aristotle, *Politics*, (III and IV, 1962).

launched: but this is another discourse), but, precisely, juridically: in this sense, the "people" of 2017 is the same as in 1947. The discipline that determines its identification is not in the absolute availability of the Legislator.

It is precisely the history of the countries where the *ius soli* is in force that demonstrates that the reform of citizenship is always the expression of a political plan.

In the USA, the acquisition of citizenship *iure soli* is a right recognized only since the end of the Nineteenth Century, when it came to integrating black people into the political and economic system of the nation, after a war that costed over 600 thousand deaths (the Indians, on the other hand, or the "native" Americans in the historical sense, had to wait until 1924).

The same can be said for the two European colonial superpowers, France and the United Kingdom. As far as France is concerned, today's *ius soli* is the result of the need for personal and fiscal rationalization and the strengthening of the production base that arose in France during the industrial age, when the country was populated by workers from the colonies, who escaped their obligations towards the Republic (military service, taxes, because they were not citizens). In the United Kingdom, after centuries of imperial-inclusive policies, with the downsizing of the Empire and the increase of migrants, increasingly restrictive orientations prevailed, up to the 1984 reform, when the birth in Britain ceased to be a sufficient condition for the recognition of citizenship.

The political nature of a law on citizenship essentially consists in identifying both the community to be integrated and the conditions to which integration is subordinated. What is, then, the political project that supports the choice of integration.

Thinking of going beyond this horizon is madness. The concept of citizenship can be rejected, as some authors consistently do, saying that it is a constricting concept, which ends up limiting freedom. We have doubts that such a position could have a future, given that, it seems to us, it lashes out against Western culture, immersing itself more and more into its subsoil (its humanitarian universalism is unthinkable outside the epistemic horizon).

EPILOGUE

Awareness of the original connection between ἐπιστήμη and public law obviously entails awareness of the political role of the scientist, starting with the scientist of law. This may seem contrary to the value free ideal of science. In truth, today it is clearly coming to light that the value free character of Western science does not coincide with the neutrality of the

latter, but is the expression of a certain vision of the world, of a way of seeing and "manipulating" things, not at all universal, even if it can now be defined as global, as it concerns the entire planet. Max Weber himself was deeply aware of this, as clearly emerges from his treatment of "intramundane ascesis", that is, the structure and origin of modern secularization processes.

Among the main tasks of the jurist today there is certainly a correct reconstruction of the question of integration. Speaking of integration in the abstract is a sign of intellectual dishonesty. It is always necessary to explain who integrates whom, in what area and, above all, why.

In this regard, we will give the example of the Italian case.

When in Italy we talk about integration or inclusion we can only refer to the Islamic question. Thinking of reconstructing the Islamic question in Italy from a juridical point of view as a mere question of religious freedom and confessional pluralism means not knowing Islam. Mediterranean Sunni Islam, which is the closest to Italy, historically and geographically – cannot be assimilated *sic et simpliciter* to a religious confession: those who know Islam also know and respect the community paradigm and the expansive natural *vis* in the legal space, that is, they experience its significant political-social weight, its great proactive and innovative capacity on a cultural level as well as its potential antagonism towards some pillars of Western public law, such as the pre-eminence of the individual over the community or the tendential neutralization of public space. In summary, we are faced with a legal syntax that has its own history and its own solid philosophical foundation, which does not interact automatically with that of the social realities of the West.

According to ISMU data, Islam, among non-Christian religions, is the first religion among non-Italian residents in Italy: Muslims are about 1,200,000, or 33.3% of the non-Italian population and 3.7% of the total population.

Despite this, the Italian State has not yet signed an Agreement pursuant to article 8 of the Constitution with Muslim communities, while it did so with much smaller groups, such as, for example, Buddhists (2.3% of the non-Italian population and 0.55 of the total population) and Hindus (respectively 3.1% and 0.35%).

We will not repeat here already made analysis about the reasons of this delay. It is evident that the problem cannot be traced back - as has often been done - to the ideological conflicts existing in the Islamic sphere and to the absence of a true priestly hierarchy. In this sense, similar conflicts can be registered between Christian confessions, but this has

not prevented the State from entering into agreements with the various denominations. Let us recall only, by way of example, the cases of the Union of Seventh-day Adventist Christian Churches and the Baptist Evangelical Christian Union of Italy. The problem is that ideological conflicts, in the case of Islam, arise in the context of a holistic vision of the public space, based on the principle of *din wa dawla*, as already underlined above. The various proposals of understanding born in the Islamic sphere, in fact, contain strong demands of a legal-public nature, inhospitable in the Italian system. For example, in the hypothesis of an agreement drawn up by Co.Re.Is - (Islamic religious community in Italy) an association of indigenous Muslims known for its moderation and its commitment to religious and cultural dialogue - the Republic is expressly asked to "recognize" the ("the Republic takes note of") the foundations (the Pillars) of Islam. Now, by virtue of the combination between the sense of "recognition" in Italian legal language (which also represents a commitment to justice), on the one hand, and the meaning of the aforementioned Pillars in Islam, on the other, this act could produce expansive effects of Islamic law in the Italian legal system.

The regularization of Islam in Italy cannot ignore geopolitical and legal-comparative evaluations. Italian Muslims still have strong national roots. The phenomenon of second or third generation Islam, where national identity tends to downsize in favor – depending on the case – of social integration or adhesion to the religious community in a universalistic and ultra-national key, already known for decades in Northern Europe, is definitely irrelevant in Italy. The Italian one is, to a large extent, an Islam "of the States", in the sense that most of the Muslims present on the national territory were born in Islamic countries or from young couples, born in Islamic countries. Moreover, they are not here because they are fleeing despotic regimes or wars, but because – perhaps also in the wake of the geopolitical criticalities of the Mediterranean, which have made it difficult to control flows – they want to enter Europe and stay there to live better. In this way, it could be possible to encourage the formation of religious guides and authorities in Italy, initially under the supervision and control of North African religious authorities, with a fundamental role of mediation and guarantee of political authority, also based on the evolution of bilateral relations between Italy and the country concerned from time to time. This whole preparatory phase, of course, could only have a purely geo-political nature, not a strictly juridical one. The juridical precipitate of this process – that is, the Understanding – could only take place after certain communities and authorities of reference had been identified, within the framework of Italian and European policy in the Mediterranean, with reference to the problem of migratory flows.

Let's make an example.

In Morocco (a country from which a very significant part, if not most of the Muslims present in Italy, come from), the King is also at the top of religious authority, as head of believers. Islam, therefore, is strongly nationalized. In that country there are some important training schools for imams, controlled by the government. Therefore, it could be possible to agree with the Moroccan government the arrival in Italy of accredited imams, who will help the Italian government to counter the phenomenon of do-it-yourself imams, in particular as regards Moroccan immigration. Thanks to these imams, it would be possible to encourage the creation of courses (in the form of masters, first or second level of training for aspiring religious guides. In this sense, there are already interesting experimental experiences in Italy: it would be a matter of generalizing and institutionalizing them, country by country), where a very large space would be reserved for the teaching of Italian and European law, but with a significant difference: the religious part would be handled directly by experts accredited in the countries of origin of the Muslims and the qualification awarded, for this reason, it would be something more than a mere certificate of participation.

In a certain sense, based on the perspective outlined above, it would be the Republic itself to guide the formation of the Italian Islamic community and to build, in a certain sense, the subject of the Agreement pursuant to article 8 of the Constitution. It would be an operation of "legal hermeneutics", inserted in the framework of a geopolitical strategy in the Mediterranean. It is evident that such operations require an enhancement of the political role of the jurist, as indeed is the case in the glorious tradition of European legal science.

.

"NON-WESTERN" SECULARISM:
THE CASE OF "RELIGIOUS" CITIZENSHIP IN ISRAEL AND TURKEY*

Anna Parrilli

TABLE OF CONTENTS

The essay examines the connection between citizenship and religious affiliation. To this end, it focuses on two case studies, namely Israel and Turkey. In Israel, the Law of Return acknowledges to all Jews a "fundamental right" to Israeli citizenship. In Turkey, while the constitution explicitly affirms the principle of State secularism, ethnicity and religion are closely interrelated, and they both contribute to defining Turkish national identity. This interrelation produces flaws between the black-letter constitution, and the operational rules governing citizenship. The essay argues also that Israel's and Turkey's legal systems are both characterized by the persistent influence of the Ottoman legal tradition, as well as that of the communitarian paradigm underling Jewish and Islamic traditions. In both countries, citizenship and State approach towards religious communities follow the logic of the millet*, which operates in an institutionalised form, in Israel, as a cryptotype in Turkey.*

I. INTRODUCTION

The essay examines the connection between citizenship and religious affiliation. To this end, it focuses on two case studies Israel and Turkey.

Since its foundation in 1948, the "Jewish and Democratic" nature of Israel has been deeply embedded in the constitutional and legislative structure of the State. The dichotomy between the (universal) principle of democracy and Israel's Jewish character extends over to encompass immigration and citizenship law. As I shall discuss in the first section, Nationality Law (1952)[1] regulates the acquisition, loss, and attribution of Israeli citizenship by adopting

* 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).

universal and neutral criteria. The Law of Return of 1950,[2] by contrast, takes a different attitude. The status of "Jew" qualifies as a prioritizing factor for citizenship. Moreover, the foundation of the State as the "national home" of the Jewish people creates a strong link between Jewish ethno-religious belonging and the State.[3]

The connection between religious affiliation and citizenship also stands at the base of Israel's system of personal laws. In this respect, when Israel was founded in 1948, State authorities decided to preserve the *millet* system of personal laws inherited from the Ottoman Empire.[4] The Israeli *millet* thus grants fourteen religious communities a large degree of administrative and jurisdictional autonomy.[5] Religious courts are granted exclusive jurisdiction over matters of marriage and divorce. In other issues, such as succession, maintenance, and alimony, religious courts have concurrent jurisdiction with civil courts. [6]

As a consequence of the "Jewishness" of the State and the implementation of the *millet* system, we shall see the extent to which religious affiliation is legally relevant when determining the rights and obligations of Israeli citizens with respect to personal status and public-law issues, such as immigration law, citizenship rights and duties, access to public services and facilities, and participation in State religious institutions.

As regards the Republic of Turkey, the essay argues that religion-citizenship connection is arranged in a different way. After the demise of the Ottoman Empire, the *millet* system was abolished, and Mustafa Kemal Atatürk fully secularized the legal system. Accordingly, the 1928 constitutional amendments abolished Art. 2 of the 1924 Constitution, according to which Islam was the official religion of the State. It also repealed Art. 16 concerning the duty

[1] Nationality Law 5712-1952, Palestine Gazette No. 1210 of the 16th of July 1942, Suppl. II, p. 1193 (English Edition).

[2] Law of Return, 5710-1950, passed by the Knesset on the 5th of July 1950 and published in Sefer Ha-Chukkim No. 51 of 5th July, 1950, p. 159; the Bill and an Explanatory Note are published in Hatza'ot Chok No. 48 of the 27th June, 1950, p. 189.

[3] Y. Sezgin, *The Israeli Millet System: Examining Legal Pluralism through Lenses of Nation-Building and Human Rights*, in Israel Law Review, 631-654 (2010).

[4] The *millet* system of personal laws was established in 1452 by the Ottoman ruler Mehmet II. The system was primarily based on the Islamic legal tradition of *dhimma* (sanctioned by the *qur'an* (9: 1-3), and the *hadith* tradition), which regulated the personal and public affairs of those religious minorities living under Islamic rulers. Until its abolitions in the nineteenth century, the millet granted space for self-government and a certain degree of legal autonomy to Greeks (*rum milleti*), Jews (*yahudi milleti*) and the Armenians (*ermeni milleti*), while Muslims were considered as part of a single tradition and nation (*umma islamiyya*). The millet structure in Palestine was preserved under the British mandatory regime (Law and Administration Ordinance 5708-1948, May 19, 1948) and it was then adopted by the State of Israel, with some modifications as Jews became the majoritarian religious community. See S. Navot, *The Constitution of Israel a contextual analysis*, 195 ff. (1st ed. 2014). On the Islamic *dhimma*, K. Hashemi, *Religious Legal Traditions, International Human Rights Law and Muslim States*, 133 ff. (2008); E. Don-Yehiya, *The resolution of religious conflicts in Israel,* in: Stuart A. Cohen, E. Don-Yehiya (eds.), *Conflict and Consensus in Jewish Political Life*, 203 - 218 (1986); I. Englard, *Religious Law in the Israel Legal System*, 13 (1975); A. Rubinstein, *Law and Religion in Israel*, in Israel Law Review, 384-399 (1967).

[5] F. Palermo, J. Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze*, 57 ff. (3nd ed. 2021).

[6] S. Navot, *The Constitution of Israel a contextual analysis* ,76 (2014)

of the Parliament "to apply shari'a law".[7] By 1930, *shari'a* courts were abolished and legal dualism came to an end.[8] In 1937, the principle of *laiklik* eventually received constitutional status (art. 2 Const.). The principle has been interpreted by the Constitutional court (*Anayasa Mahkemesi*) as an essential condition for democracy.[9]

The mainstream narrative on Turkish constitutionalism revolves around the rupture with the Ottoman Empire and the adoption of a French-inspired "assertive model" of secularism.[10] Yet, this is not the whole story. In Turkey, State and religion are not fully separated. Take, for example, the Presidency of Religious affairs (*Diyanet İşleri Başkanlığı*, hereinafter: *Diyanet*) which is part of the public administration with the aim of regulating Islamic religious activities in accordance with the principle of *laiklik*.[11]

Not only does the constitutional and legal framework institutionalize Sunni Islam, but religion also plays a pivotal role in nation building and identity creation.[12] As I shall argue in section two, in Turkey, the connection between the ethno-religious element and citizenship is apparent from the disclosure of citizens' religious affiliation in the State population registry and the identity cards. In addition, the concept of "religious minority" (as understood by Turkish authorities) reveals the persistence of the *millet* logic, which constitutes a legacy of the Ottoman legal *substratum* and, therefore, a cryptotype of Turkish constitutionalism.[13]

As for Israel, the essay argues that the constitutional and legal framework disclose the prevalence of an ethno-religious concept of nationality over the civic concept of citizenship.[14] As for Turkey, a «tension between the black-letter law and rules 'in action'» emerges[15] with regard to citizenship and minority rights. In this respect, by reading beyond the black-letter constitution and law, Turkish citizenship emerges as membership to a nation State defined

[7] M. Kocak, *Islam and national law in Turkey*, in: J.M. Otto (ed.), *Sharia incorporated. A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, 243, (2010).
[8] M. Koçak, *Islam and national law in Turkey*, 436 – 487, (2010)
[9] *Turkish Constitutional Court Decision, E.1989/1, K.1989/12*, March 7, 1989, Anayasa Mahkemesi Kararlar Dergisi[Constitutional Court Reports], n. 25, 133 -165.
[10] R. Hirschl, *Constitutional Theocracy*, 26 ff (2010).
[11] The *Diyanet* was established under Act n. 429 of 3 March 1924 on the "Abolishment of the Ministry for Religious Affairs" (*Şeriye Vekaleti*). According to Art. 136 of the Constitution (1982) «The Presidency of Religious Affairs, which is within the general administration, shall exercise its duties prescribed in its particular law, in accordance with the principles of secularism, removed from all political views and ideas, and aiming at national solidarity and integrity».
[12] F. Piazza, V.R. Scotti, *La Repubblica di Turchia un processo costituzionale continuo*, in: C.D. Bonella (ed.), *Itinerari costituzionali a confronto. Turchia, Libia, Afghanistan*, 27-131 (2013).
[13] R. Bottoni, *Secolarizzazione e modernizzazione nell'Impero Ottomano e nella Repubblica di Turchia: alle origini del principio di laicità*, in Rivista di Studi Politici Internazionali, 242-260 (2007).
[14] S. Baldin, *Lo Stato Nazione del popolo ebraico. Considerazioni sulla forma dello Stato israeliano alla luce della Legge fondamentale del 2018*, in Revista General de Derecho Publico Comparado, 1 ff. (2018).
[15] J-L. Halpérin, *Law in book and Law in Action: The Problem of Legal Change*, in Maine Law Review, 47 (2011).

on the basis of the majority religion (Sunni Islam). In both countries, citizenship displays a "collective-religious dimension".[16]

Furthermore, the essay highlights that both approaches towards citizenship and minority rights are grounded in a communitarian paradigm shared by the Islamic and Jewish traditions. This paradigm influences the legal formants – explicitly formulated or cryptotypes - of both systems of law.[17]

II. THE RELIGIOUS DIMENSION OF CITIZENSHIP IN ISRAEL

2.1 The *Law of Return*

The Law of Return of 1950 (hereinafter, LR) constitutes «one of the clearest reflections of the State of Israel as a Jewish State».[18] Together with the Nationality Law (1952), it grants Jewish immigrants in the country a nearly absolute right to Israeli citizenship.[19]

Indeed, Art. 1 of the LR states: «[E]very Jew has the right to come to this country as an *oleh*». The *oleh* (pl. *olim*) is the Jewish immigrant who undertakes *aliyah* (Jewish immigration) and expresses the wish to settle in Israel and to acquire Israeli citizenship. He/she has the right to obtain the visa and the *oleh* certificate, without any reservation or other formalities required to non-Jews (sects. 2-3).[20]

The ties between the LR and the Jewish tradition is apparent from the very letter of the law. The terms *oleh* and *aliyah* retain their original religious meaning inasmuch as they describe the "ascension" of Jews to their homeland, i.e., Israel. According to some commentators, the

[16] F. Alicino, *Cittadinanza e religione in Turchia*, in: F. Alicino (ed.) *Cittadinanza e religione nel Mediterraneo*, 174 (2017).

[17] R. Sacco, *Legal formants. A Dynamic approach to comparative Law (Installment I of II)*, in The American Journal of Comparative Law, 1 ff. (1991).

[18] S. Navot, *The Constitution of Israel*, 76 (2014).

[19] In *HCJ 3648/97 Stamka v. Minister of Interior, PD 53(2)728* on the right of a non-Jewish who married an Israeli Jewish citizen to immediate citizenship upon request, Justice Cheshin stated: «[the] primary characteristic of the right of return is that is almost an absolute right. Every Jew, wherever he may be, can and is entitled – at his volition alone – to realize the right of return».

[20] Odd as it may seem, the requirement of a *real desire* to settle in Israel gave the way to controversy before the Supreme Court. In 1959 Mr. Rotenberg, a Jew of Polish origin, entered Israel and obtained the *oleh* visa and certification. In order to avoid compulsory military service in Israel, the applicant argued before the court that he had never intended to permanently settle in Israel, nor to acquire Israeli citizenship. Mr Rotenberg wanted to leave Poland and to settle in the Soviet Union. However, the Soviet authorities in Poland denied him the visa. Therefore, he moved to Israel under the *Law of Return*; then, he asked the Soviet consulate in Israel the permission to enter the Soviet Union. Ruling against Mr. Rotenberg, the Israeli Supreme Court, however, affirmed that it was not possible to evade the obligation to perform military service on the ground that, at the time of obtaining the *oleh* visa, he lacked the real desire to acquire Israel's citizenship. HCJ, *Rotenberg v. Deputy Head of Manpower Division*, 1959 in M.D. Goldman, *Israel Nationality Law*, 20 ff. (1970).

most correct translation of the provisions contained in Art. 1 would in fact be: «Every Jew has the right to 'ascend' to the Land of Israel as an 'ascender' (or, a returning Jew) ».

Being part of the Israeli State building project, the LR was designed to encourage Jewish immigration by establishing a strong link between the nascent State and the Jewish Diaspora. This connection has recently acquired constitutional status in the Basic Law: 'Israel as the Nation State of the Jewish People' (2018), according to which «the State shall be open for Jewish immigration, and for the Ingathering of the Exiles» (sec. 5). Furthermore, the 2018 Basic Law recognises the right to self-determination *uniquely* to the Jewish people (sec. 1.c), raising the development of Jewish settlement to a "national value" promoted by the State (sec. 7).[21] In 1948, the Declaration of the Establishment of the State of Israel (hereinafter; the Declaration) had already done so by inviting Jewish Diaspora «to rally round the Jews of Eretz-Israel in the tasks of immigration and upbuilding» of the State.

As the constitutional and legal framework uphold, Israel has been primarily conceived as a country of Jewish immigration and settlement. Consequently, the State has the responsibility to ascertain religious belonging of people wishing to join the Jewish *millet*. While "Jewishness" clearly qualifies as a prioritizing factor for the acquisition of Israeli citizenship, the definition of "Jew" within the Israeli legal system remains controversial.

Israeli law uses the term "Jew" in relation to religious tribunals jurisdictions, matters of civil registration and the LR. As regards the LR, the *Knesset* and the Supreme Court provided a secular interpretation of the term "Jew". Under the LR, a Jew is «a person who was born of a Jewish mother or has become converted to Judaism, and who is not a member of another religion». As further illustrated below, the definition was then broadened to include family members of Jewish immigrants which are not considered "Jews" under *halachah* (Jewish law). As far as religious law is concerned, it provides a clear definition of Jewish belonging: a Jew is a person who was born to a Jewish mother or who converted to Judaism (*ghiur*).

Thus, the secular definition of "Jew" adopted by LR only partially squares the religious one. The latter is applied by the Chief Rabbinate of Israel and the Rabbinical courts to determine Jewish status for the purposes of personal status law, as well as for granting access to public religious services. [22]

[21] While granting constitutional dignity to the Jewish identity of Israel, the Basic Law: The Nation State deliberately omit any reference to the democratic character of the State. On the consequences of this omission see, A. Harel, *Basic Law, Israel as the Nation State of the Jewish People*, Nationalities Papers, 262 ff. (2021).

[22] The Chief rabbinate of Israel is a statutory State body controlled by the Orthodox establishment. The Chief Rabbinate of Israel Law, 35, L.S.I, 97, 1980 established the functions, composition and the election process of the main organs of the Rabbinate: The Rabbinical council and the two Chief Rabbis. The Law

2.2 Jews as Citizens: a controversial relationship

The definition of "Jew" adopted by the State to regulate Jewish immigration and citizenship has been subject to harsh political and legal debate. Originally, the LR did not provide for a definition of "Jew" for the purposes of *aliyah*. In 1958, the Ministry of Interior adopted a residual subjective criterium prescribing that it is considered "Jew" a person who declares himself to belong to the Jewish people "in good faith", provided that he/she does not belong to another religion

The government's decision was harshly contested by the Jewish Orthodox establishment, which has been always trying to maintain the monopoly over the definition of Jewish status and conversion, calling for the strict application of *halachah* in determining religious affiliation.

These attempts have been partially balanced by the Supreme Court, acting as a "standard-bearer of secularism".[23] In the seminal cases *Rufeisen* (1962) and *Shalit* (1970), it addressed the legal connection between Israel and Jewish tradition. In 1962, in *Rufeisen (Brother Daniel)*, the court hold that, for the purpose of *aliyah*, the meaning of "Jew" had to be interpreted by applying the ordinary rules of interpretation instead of the religious criteria adopted by Jewish law. This was due to the fact that the LR is a secular law.[24] The background is well-known. Mr. Rufeisen was a Polish Jew who converted to Christianity, becoming a Carmelitan monk by the name Brother Daniel. In 1953, he moved to Israel and sought to be recognized as Jew under the LR. Israeli authorities refused his request since, according to the said law, the term "Jew" does not apply to a person who converted to another religion. The judges reasoned that «in the absence of a definition either in the statute itself or in the decided cases», the term "Jew" had to be interpreted according to its «ordinary meaning», i.e., taking into consideration the perception of the community on who is a Jew. Since a Jew who converted to Christianity is no longer deemed as part of the community by ordinary Jewish people, Mr.

on Religious Public Service (consolidated version) (5731- 1971) rules the terms of work of city rabbis under the supervision of the Rabbinate. Under Israeli law, the Rabbinate has a say over the authorization of *dayanim* (Jewish religious judges) and it acts as an appellate court. Moreover, it enjoys the monopoly over the supply of public religious services, such as the issuing of *kashrut* and conversion certificates, and licensing marriages and divorces among Jews.

[23] S. Baldin, *Lo Stato nazione del popolo ebraico*, *Considerazioni sulla forma dello Stato israeliano alla luce della Legge fondamentale del 2018*, in Revista General de Derecho Publico Comparado, 10, (2018).

[24] See *HCJ 72/62 Rufeisen v Minister of the Interior, P.D.16, 2428 (1962)*

Rufeisen/Brother Daniel was not regarded as Jew for the purpose of the LR [25] (although he could still have been considered Jew under Jewish law).[26]

In *Shalit*, the Supreme Court applied the test of "communal understanding" developed in *Rufeisen* and ordered the registration of a child born to a Jewish father and a non-Jewish mother as Jew in the Population Registry.[27] A child who was not Jew under religious law, was considered Jew in Israeli case law.[28]

Following *Rufeisen* and *Shalit*, the *Knesset* repeatedly amended the LR. As already mentioned, under its current formulation, the law states that a "Jew" is «a person who was born of a Jewish mother or has become converted to Judaism, and who is not a member of another religion». The *Knesset* does not entirely depart from Jewish tradition, as the LR accepts the matriarchal rule of religious origin. However, contrary to Jewish law - according to which a Jew converted to another religion is still a Jew – in application of the *Rufeisen* case, a Jew converted to another religion is not considered part of the Jewish community by Israeli civil law.[29] Perhaps most important of all is that Section 4a of the LR further departs from religious criteria, thus broadening the scope of the law to include other family members of a Jew, i.e. the spouse, children (and their spouses), and even grandchildren (and their spouses). In sum, even family members who are not considered Jews under Jewish law qualify as Jews under the current formulation of the LR.

As regards conversion, section 4b of the LR establishes that immediate citizenship rights are vested in people who converts to Judaism. Since «conversion in the context of this Law is a public-civil act»,[30] it requires supervision by the State. The validity of conversion is an essential factor for the purposes of Jewish immigration under the LR - as the law applies to Jews only - and then, for the determination of the personal status law applying to the

[25] In delivering the dissenting opinion, Justice Cohn diverged from the "communal understanding" test in favor of a subjective approach which took into consideration Mr. Rufeisen's statement of being Jew because of his subjective feeling. See, J. Cohn dissenting opinion, *HCJ 72/62 Rufeisen v Minister of the Interior, P.D.16, 2428 (1962).*

[26]According to Jewish law a person who is born Jew is part of the Jewish people, even though they decide to convert to another faith or does not fulfill their religious obligations.

[27] *HCJ 58/68 Shalit v. Minister of the Interior P.D. 23(2)*.

[28] The child was registered as a Jew under the Registration of Inhabitants Ordinance 1949, which preceded *the Population Registry Law of 1965*, by filling the entry *le'um*, a term generally referred to the (very different) concepts of "peoplehood", "ethnicity", "nationality" but whose translation is almost impossible, and not under the entry "*dat*", which indicates religious affiliation for the purpose of personal laws. On the *Shalit* case, see further A.R. Petty, *The Concept of "Religion" in the Supreme Court of Israel,* in Yale Journal of Law and the Humanities, 211-268 (2014).

[29] The communal test was further applied in *Beresford* (1987). Justice Barak held that the applicant (a couple who declared to be Messianic Jews) did not qualify under the Law or Return because the ordinary Jew - in Barak's words «the Jew from the marketplace» - would not have recognized them as part of the Jewish people.[29] *HCJ 265/87 Beresford v. Minister of the Interior 43(4) PD 793, 1987*

[30] HCJ 7625/06 *Rogachova v. Minister of Interior,* March 31, 2016 (President Naor).

newcomers on matters of marriage and divorce (and ancillary issues). Despite the importance of this matter, a conversion law is still lacking,[31] and regulation of this issue has been mainly left to government and courts.[32] According to the Supreme Court's precedents, the term "converted" refers to a person who joins a «recognized Jewish community»,[33] that is, «an established, active community with a common, known Jewish identity, which has fixed frameworks of communal administration and which belongs to one of the streams recognized by the international Jewish community».[34] Under this inclusive criteria set by the Supreme Court, not only Orthodox conversion, but also Reformed and Conservative conversions performed both in Israel and abroad are recognized by the State for the purposes of the LR.[35]

As part of an effort to build the Jewish State, the current formulation of the LR allows a great number of people to come to Israel as Jews and obtain immediate citizenship. However, those immigrants who acquire citizenship under the secular LR, but whose Jewishness is contested by the Rabbinate under Orthodox religious law, are left in a "limping legal status" with regards to personal status law. This occurs because, as aforementioned, in Israel religious affiliation is legally relevant on matters of *status personae*, which is partially regulated by religious laws. Uncertainties about the religious status of a person may jeopardize her/his constitutionally protected rights, in particular the rights to freedom of religion and *from* religion, to marry and family life, to be equal before the law, to non-discrimination in the access to public religious services, as well as children and women's rights.

Idiosyncrasies between the (partially) secular criteria adopted by the LR and the religious ones applied by the Israeli religious authorities reflects the inherent tension between the democratic (secular) character of the State and the relevance of religious affiliation on matters of citizenship and personal status.

---

[31] At the time of writing, a Conversion Bill proposed by the Interior Minister and leader of the Shas party, Aryeh Deri, is under discussion. The scope of the bill is limited to conversion performed within Israel and it would recognize legal validity to Orthodox conversion only.

[32] Government decisions n. 3613 (4 July 1998) and n. 3155 (14 February 2008).

[33] Section 4b of the Law of Return (1950). See HCJ 264/87 Se*pharadi Torah Guardians, Shas Movement v. Population Registrar*, IstrAr, 43(2) P.D. 723 (11989; *Rodriguez-Tushbeim v. Minister of Interior*, IsrSC 59(6), 721; HCJ 1031/93 *Pessaro (Goldstein) v. Minister of the Interior*, 1995, IsrSC 49(4), *HCJ 5070/95 Naamat v. Minister of the Interior [2002] IsrSC 56(2) 721*, HCJ 7625/06 *Rogachova v. Minister of Interior,* March 31, 2016. Lower courts further contributed to the cause of non-Orthodox converts. For instance, in 1998, the Chief judge of the District Court in Jerusalem ruled the Ministry of the Interior to register as Jews 23 immigrants who converted under non-Orthodox procedures in Israel. *Gigi v. Minister of the Interior, 5757(3) P.M. 454 (1998*).

[34] CJ 7625/06 *Rogachova v. Minister of Interior,* March 31, 2016 (President Naor).

[35] *Rodriguez-Tushbeim v. Minister of Interior*, IsrSC 59(6), 721; HCJ 1031/93 *Pessaro (Goldstein) v. Minister of the Interior*, 1995, IsrSC 49(4), HCJ 7625/06 *Rogachova v. Minister of Interior,* March 31, 2016.

With regard to the LR, the Supreme Court repeatedly stated that the peculiarity of Israeli immigration and citizenship legislation finds its justification in the "Jewish and Democratic" nature the State, which is entrenched in the 1948 Declaration, the Basic laws 'Human Dignity and Liberty' (1992) and 'Freedom of Occupation' (1994), and 'the Knesset' (1992).[36]

Over the years, the Supreme Court has pursued a secularizing agenda on matters of recognition of Jewish belonging and conversion, while preserving the Jewish character of the State. Several rulings ordered the registration of non-Orthodox Jews as citizens under the LR for in the Population Registry.[37] However, when it comes to personal status issues, the Rabbinical institutions and tribunals still rely on the Orthodox interpretation of Judaism. The Supreme Court case law and the parliamentary debate When addressing the fundamental question "Who is a Jew?", the Supreme Court and the *Knesset* struggle to find a common ground with the religious institutions. The controversy surrounding the the definition of who is a Jew is revealing of the inherent contradictions of the Israeli forms of State as "Jewish and democratic".

In sum, the "religious" dimension of citizenship in Israel is further strengthened by the adoption of the *millet* system.[38] Since the inception of Israel as an independent State, Israeli authorities have preferred to avoid confrontations over religious matters.[39] Hence, religious courts retained jurisdiction over the *status personae*, and they were therefore incorporated into the State institutional structure. In so doing, potentially conflicting legal systems were kept in force but accommodated under State control. But, the implementation of the *millet* structure was also aimed of preserving and homogenizing Israeli-Jewish identity; as well as

[36] Art. 1, Basic Law: Human Dignity and Liberty, passed by the Knesset on 17th March 1992; Art. 2, Basic Law: Freedom of Occupation (1994) passed by the Knesset on the 9th March 1994, which repeals and replaces the Basic Law: Freedom of Occupation enacted in 1992; Art. 7, Basic Law: The Knesset passed by the Knesset on 12th February 1958;

[37] *HCJ 5070/95 Naamat v. Minister of the Interior [2002] IsrSC 56(2) 721; HCJ 2597/99 Rodriguez-Tushbeim v. Minister of the Interior [2005] IsrSC 58(5) 412 (May 31,.2004)*

[38] The Palestine Order in Council 1922-1947 recognized Jewish and Sunni Muslim communities, as well as the following Christian religious groups: the Latin Catholic Community, the Eastern Orthodox Community, the Gregorian Armenian Community, the Catholic Armenian Community, the Catholic Syrian Community, the Chaldean Community, the Maronite Community, the Orthodox Syrian Community and the Greek Catholic Mellcite Community. Moreover, the Druze (1957) and the Bahai (1971) communities are recognized.

[39] The reasons behind the government's decision to retain the millet system have been broadly discussed by the literature. See, among others, R. Harris, *Historical opportunities and absent-minded Omissions: on the incorporation of Jewish Law, in Nascent Israeli Law,* in M. Bar-On, Z. Zameret (eds.), *Both sides of the Bridge: Church and State in Early Israel* (in Hebrew) cited in Y. Sezgin, *The Israeli Millet System: Examining Legal Pluralism through Lenses of Nation- Building and Human Rights*, in Israel Law Review, 638 (2010); D.M. Sassoon, *The Israel Legal System*, in The American Journal of Comparative Law, 405 ff. (1968).

keeping the differentiation between Jews and non-Jews.[40] In other words, the *millet* manages diversity in society by drawing the communities along ethno-religious lines; at the same time, it favours the creation of a common national identity among Israeli Jews. Consequently, the ethno-religious concept of nationality prevails over the civic concept of citizenship, raising questions in terms of freedom of religion (and *from* religion), citizens' equality before the law, and identity rights with regard to both non-Jewish minorities and non-Orthodox Jewish groups *within* the Jewish majority of the population.[41]

III. THE RELIGIOUS DIMENSION OF CITIZENSHIP IN TURKEY

3.1 The "hidden" millet

Whereas the concepts of religion and ethnicity, in Israeli legal system frequently overlap,[42] Islam clearly separates ethnicity from religion.

The link between religion, ethnicity, and nationality is an entirely modern construction which was introduce by the secular governments in States like Turkey and Egypt; both have experienced nationalism, and religion was functional for nation and identity building.

Before dealing with the "religious dimension" of Turkish citizenship, a premise is necessary. During the period of the *tanzimat* (reforms) (1839 – 1878), Ottoman rulers re-interpreted and re-used concepts, categories, principles, and institutions of the Islamic tradition by mixing them with borrowings of the Western legal traditions. One of the most interesting metamorphoses is the reinterpretation of the religious concept of *umma* which is associated and combined with terms by no means coincident, such as of *watan* (homeland) and *qawmiyya*

[40] Y. Sezgin, *How to integrate Universal Human Rights into Customary and Religious Legal Systems*, in Journal of Legal Pluralism, 5 (2010).

[41] In CA 630/70, *Georges Raphael Tamarin v. the State of Israel*, known as "The Tamarin Decision", Justice Agranat held that in order to grant a declaratory order about one's membership of a certain nationality, there must be objective evidence about the existence of that nationality. A subjective belief is insufficient for determining the existence of a certain nationality for purposes of registering in the Population Registry. In addition, J. Agranat affirmed that there was no evidence that an "Israeli" nationality was formed in the State of Israel that is separate and distinct from the Jewish nationality. The *Tamarin* decision was confirmed in the subsequent ruling CA 8573/08 *Ornan v. Ministry of the Interior*. S. Baldin, *Lo Stato nazione del popolo ebraico*, 10 (2018) .

[42] Art. 1 of the Foundation of Law Act states that when the court «finds no answer to it in statute law or case-law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel's heritage (*moreshet israel*)». Foundations of Law, 5740, 1980, p. 163, in Laws of the State of Israel: Authorized translation from the Hebrew, vol. 34, Government Printer, Jerusalem, Israel (1948-1989), p. 181.

(ethnicity).[43] This interpretative choice served the purpose of attenuating the universal character of the "community of believers" (*ummat al-mu'minin*), which increasingly took on the contours of an "*umma* - nation". In other words, an original operation of transposition and tuning was carried out by the Ottoman rulers.[44] Concepts indebted to Western legal tradition were transported into the Ottoman legal system and adapted to the local legal-cultural context. The same occurred with the Arabic term *millah*. Originally, indicating religious communities recognized under the *millet* system, it took on increasingly national and less religious contours.[45] Consequently, the entire *millet* structure changed its meaning, becoming less religious and more ethnic (and national) in nature.[46]

Following the demise of the Ottoman Empire and the foundation of the Republic of Turkey, the *millet* structure was abolished. However, the model is still present in the Turkish legal system as its cryptotype, which slyly shapes the definition of "who is a Turk" and, consequently, State's approach towards religious minorities.

As regards the acquisition, loss, and granting of Turkish citizenship, Art. 66 of the 1982 Constitution and the Citizenship law n. 5901 (2009) (as amended in 2018)[47] identify two basic principles: the acquisition of citizenship by birth and by naturalization. In the first scenario, a child born in Turkey or abroad from a Turkish father or mother is a Turkish citizen pursuant to Art. 7.1 of the Citizenship Law. However, if the child is born outside the marriage bond, the law differentiates according to whether the citizenship is passed on from the mother or from the father (art. 7.2 and 7.3). In the hypothesis of matrilineal transmission, Art. 7.2 of the Law provides for its immediate acquisition at birth. In case of acquisition *iure sanguinis* from a Turkish father and a foreign mother, the child acquires citizenship on condition that the criteria and procedures for ascertaining paternity pursuant to Art. 7.3 and 8 of the Citizenship Law are met. Finally, citizenship by naturalization requires the assent and discretionary decision of the Ministry of the Interior, which is competent in verifying the presence of the condition required by the law.

At a first reading, the legal framework seems to fully adhere to a civic, Western conception of citizenship, which separates the *status civitatis* from the *status religionis*. Likewise, the ethnic

[43]E. Rossi, *Dall'Impero Ottomano alla Repubblica di Turchia. Origini e sviluppi del nazionalismo turco sotto l'aspetto politico-culturale*, 364 – 365(1943).
[44] E. Örücü, *Law as Transposition*, in The International and Comparative Law Quarterly, 205-223 (2002).
[45] F. Castro, *Il sistema sciaraitico Siy'asa Sariyya e modelli normativi europei nel processo di formazione degli ordinamenti giuridici dei Paesi del Vicino Oriente*, 167 (1981).
[46] G.M. Quer, *Pluralismo e diritti delle minoranze. Il sistema del "millet*", in Stato, Chiese e pluralismo confessionale, 257 ff. (2010).
[47] Citizenship Law (as amended in 2018) [Turkey], Law No. 5901, April 2018.

element is formally irrelevant. However, when reading the law in the light of the «institutionalized political formulas»-[48] namely the «aims and values» that the Parliament intended to foster when drafting the constitutional and legislative provisions regulating citizenship – the "ethno-religious" dimension of citizenship emerges. In other terms, it is necessary to broaden our gaze on Kemalist policies for the construction of Turkish identity – pursued through the instruments of law – to understand the interrelations between Turkish citizenship and the ethno-religious element.

For instance, until 2010, under the transitional provision no. 1 of the Citizenship law, applicants classifiable as "ethnically Turks" had to prove long-term residence in Turkey for two years only, compared to the five years required for other applicants pursuant to Art. 11, paragraph 1 (b) of the law. The key to reading this provision is to be found in the Kemalist project aimed at building a homogeneous national identity that differentiate between "Turks" and other citizens belonging to different groups, as emerges from the General Assembly preliminary drafts reports.

3.2 Disclosing religious information on identity cards

Since the establishment of the Republic, the connection between Turkish identity and Islam has been strengthened. Although, in fact, the Kemalist *elite* promoted the image of a 'civilized' and 'patriotic' Turkish citizen[49], whose loyalty goes the nation, instead of the *umma.* At the same time, Kemalism made use of (Sunni Hanafi) Islam as a fundamental tool of nation-building, along with Turkish language.[50] The association between national identity and Islamic religious belonging, which originated from extra-legal factors, consolidated over time as a cryptotype influencing the attitude of the State towards ethnic-religious minorities.

The disclosure of religion in the identity cards and in the civil registry is of particular interest in relation to freedom of religion (and *from* religion), the non-discrimination principle, and, ultimately, the principle of *laiklik* as enshrined in the Constitution.

[48] G. Lombardi, *Premesse al corso di diritto pubblico comparato. Problemi di metodo*, 69-70 (1986).

[49] The imagine of a 'modern', 'civilized' Turkish citizen, who is devoted to the Republic, rather than to the religious community, can be found in numerous speeches given by Mustafa Kemal, as reported in the literature. Atatürk's project of 'civilization' became one was infused by the Kemalist elite into popular culture and, from there, it passed on Turkish legal culture. For instance, the Preamble of the 1982 Constitution reads as follow: «this Constitution […] embodies […] the determination […] to attain the standards of *contemporary civilization* as an honorable member with equal rights of the family of world nations». The official English translation of the 1982 Constitution is published on the Grand National Assembly official website www.global.tbmm.gov.tr (last visited, November 1, 2021)

[50] R. BOTTONI, *Secolarizzazione e modernizzazione nell'Impero ottomano e nella Repubblica di Turchia,* in Rivista di Studi Politici Internazionali, 242 (2007).

Pursuant to Art. 35 of the Law on civil registration services,[51] Turkish identity cards contemplate the following religious identities: Muslim, Greek-Orthodox, non-Orthodox Christian, Jewish, Hindu, Zoroastrian, Confucian, Taoist, Buddhist, no religion, or other. The administrative practices and procedures reveal a presumed equivalence between national and religious identity. In other words, children are generally identified as Muslims in the civil registry, unless their parents (or their legal representatives) declare and *prove* the children belong to a different religious group recognized by the State.[52]

Members of religious communities not recognized by the Turkish state have raised this issue several times before Turkish administrative and constitutional courts, as well as before the European Court of Human Rights, mainly at the request of. In *X v. Turkey Supreme Court of Administration* (1994), for instance, the applicant was a follower of Jehovah Witnesses, which had been identified as a Muslim on his identity card. He complained about the administration refusal to change the information on the "religion" box. In line with other rulings on this issue, the administrative court ordered the removal of the wording 'Islam' from the applicant's document. However, the court refused to order the replacement with 'Jehovahs Witness', since the State does not recognise this religious group as separated from Christianity.[53]

The question of disclosure of religion on identity documents was also addressed by the Constitutional Court in 1979 and 1995. On both occasions, the Court ruled the requirement to fill in the information box on religion set forth in the 1972 Art. 43 Population Law (*Nüfus Kanunu)* in compliance with the rights of freedom of religion and conscience (art. 24 of the Constitution, *ex* art. 19 of the 1961 Charter).

In the 1979 ruling, the court affirmed that the Constitution prohibits any act of coercion aimed at forcing an individual to disclose his/her religious affiliation. However, in the court's opinion, under the 1972 Population Law, citizens were not *forced* to reveal their faith. When

[51] Population Service Law L. No. 5490, adopted by the TGNA on Apr. 25, 2006; published in the Official Gazette on Apr. 29, 2006 (No. 26153).

[52] H. Gülalp, Country profile. *Turkey*, [Global Governance Programme], GREASE, Country Reports, 2019, [Cultural Pluralism], p. 4 on Cadmus, European University Institute Research Repository available at https://hdl.handle.net/1814/69933 (last visited, October 19, 2021).

[53] Similarly, in Egypt, religion is mentioned in the identity cards. Since the law only recognizes three religions (Islam, Judaism and Christianity), people belonging to non-recognized religious groups often cannot obtain identification document. The same applies to Muslims who converts to another religion. On Turkey, S. Esen, L. Gonenç, *Religious Information on Identity Cards: A Turkish Debate*, in Journal of Law and Religion, 579-603 (2008). On Egypt, M. Berger, N. Sonneveld, *Sharia and national law in Egypt*, in: J.M. Otto, *Sharia incorporated.A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, 80 ff. (2010).

asked by civil registrars, they could simply decide not to answer. In 1995, the Constitutional court confirmed the previous decision in favour of the constitutionality of Art. 43 of the *Population Law*. On that occasion, however, the court took the principle of *laiklik* (art. 2 Const.) as the main constitutional parameter. In this respect, the *Anayasa Mahkemesi* observed that *laiklik* requires the State be neutral towards all religious groups. The Population Law fulfilled this condition, since the provisions contained therein addressed all faiths.[54]

The issue of ethnic-religious affiliation on Turkish identity cards was later brought before the European Court of Human Rights in *Sinan Işık v. Turkey* (2010)[55]. In the present case, Mr. Işık complained about the refusal opposed by the public administration officer to change his religious affiliation on the identity card from "Muslim" to "Alevi". The ECtHR ruled that the indication of religion on the identity card violated Art. 9 (Freedom of religion and conscience) of the European Convention on Human Rights. Challenging the coercion test developed by the Turkish Constitutional Court in 1979 and 1995, the ECtHR highlighted that the mere presence of a "religion" box on the identity cards obliged the individual to disclose information regarding their attitude towards religious or their philosophical convictions. The same holds true for having to apply for religious indication to be deleted from the population registry.

In 2006 the Turkish General Assembly intervened by passing the Law on Civil Registration Services of 2006,[56] thus, allowing Turkish citizens to leave the religion box blank. Alternatively, they could submit, upon reaching majority, a request to change the wording on their identity documents pursuant to Art. 266 [cc].[57] The choice not to reveal one's religious affiliation, however, does not come without consequences.

Turkish constitution provides for mandatory religious and moral education in primary and secondary schools (art. 24). Students belonging to recognised religious communities are granted the right to be exempted from the "Religious Culture and Ethics" (*Din Kültürü ve Ahlak Bilgisi*) classes upon verification of confessional affiliation as indicated on the identity

[54] Turkish Constitutional Court *E. 1979/9, K. 1979/44*; Turkish Constitutional Court *E. 1995/17, K. 1995/15*
[55] ECtHR, *Sinan Işık vs. Turkey*, Application No. 21924/05, 2, February 2010.
[56] Law on civil registration services n. 5480/2006.
[57] Five to eleven judges stated that Art. 43 Law on civil registration *services* was contrary the right to freedom of religion and conscience protected *ex* Art. 24 of the present Constitution as: « parents or legal representatives of children are obliged to declare the religion of their children, failing which no entry will be made. The inclusion of religion in the family record and on identity cards, before the child reaches the age of majority and without his or her consent, constitutes de facto mandatory disclosure of religion in daily life ... That disclosure obligation, stemming from the indication of religion on a document confirming civil status, and the presentation of that document when registering at a school or when carrying out military service formalities, does indeed amount, in my view, to 'compulsion'». S. Esen, L. Gonenç, *Religious Information on Identity Cards, a Turkish debate,* in Journal of Law and religion, 579-603 (2008).

documents and the civil status register.[58]

A clear example of how a formally neutral legislative framework may be repressive in its effects: the law operates within the context of important social factors, of which it is necessary to be aware in order not to lose sight of the concrete functioning of legal system.[59]

Turkish law regulating the disclosure of religious belonging on identity cards virtually applies to *all* citizens; thus, satisfying the requirements of State formal neutrality and *laiklik*. In a socio-legal context which implicitly links Turkish identity and Muslim identity, this disclosure is likely to produce incidentally a discriminatory effect against religious minorities, such as the Alevis. The latter do not qualify as minorities under the Treaty of Lausanne (1923),[60] nor they are conferred legal recognition as autonomous religious confessions under Turkish law. This approach towards the Alevi faith is twofold, it precludes Alevis' claims for legal protection and services provided by the *Diyanet*, such as the administration and founding of places of worship, and the employment of religious leaders as public servants; at the same time, it denies them the privileges granted to officially recognized religious minorities, such as the right to be exempted from compulsory religious classes.

It is precisely the protection of ethnic-religious groups other than Sunni Islam that reveals the blend between Kemalist ideology and religious tradition, as well as the influence of the Ottoman *millet*. The latter works in Turkish legal system as its cryptotype.

The Ottoman interpretation of the concept of minority further influences the interpretation of the 1923 Lausanne Treaty by Turkish authorities. The Treaty only refers to "non-Moslem".[61] However, under Turkish law the status of recognized religious minorities has been recognised to Christian, Armenian and Jews only. With the sole exception of the *Law on civil registration services* of 2006, no reference to religious denominations other than the "People of the Book" was found in legal texts regulating citizenship, identity documents, public education, and religious services, nor did any non-Sunni Islamic groups seem to be mentioned.

---

[58] Supreme Council for Education Decision n. 1, 9 July 1990 in S. Esen, L. Gonenç*, Religious Information on Identity Cards: a Tuskish debate,* in Journal of Law and religion, 528 (2008).

[59] F. Palermo, J. Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze*, 47 (3ed 2021).

[60] The Lausanne Treaty is particularly interesting in that, unlike other international agreements on the protection of minorities, it does not distinguish between racial, linguistic or religious groups, but groups all possible minorities into a single category: 'non-Muslims' (*Müslüman olmayan azınlıklar*). The criterion used to identify groups is therefore purely religious and draws a line between Muslims and others (ethnic-religious groups). Among non-Muslim communities, by virtue of an established practice, the Turkish State officially recognises only Greek Orthodox communities, Armenians and Jews (in essence, Christians and Jews). Treaty of Peace with Turkey signed at Lausanne, Arts. 37-45, July 24, 1923, 28 L.N.T.S available at http://wwi.lib.byu.edu/index.php/Treaty_of_Lausanne (last visited, September 9, 2021).

[61] Treaty of Peace with Turkey, July 24, 1923, 28, L.N.T.S, arts. 37-45.

As regards non-Sunni groups, the refusal opposed by Turkish public authorities to recognize them as religious minorities constitutes a legacy of the Ottoman *millet* as well as the Islamic legal tradition, under which the community is regarded as a uniform entity united under the Islamic religion. According to Turkish authorities, as they are part of the Islamic community, the Alevis cannot be recognized as an autonomous religious group.[62]

IV. CONCLUSIONS

In dealing with the Jewish character of the State, in Israel, and the interrelation between citizenship and (ethno-)religious affiliation, in Turkey, this essay has highlighted how use by national authorities of the majority religion as a tool for nation building and identity creation. Indeed, both Israel and Turkey an ethno-religious conception of citizenship prevails over a civic one.

As regards Israel, the Law of Return and Nationality law recognize to all Jews a "fundamental right" to Israeli citizenship. We have seen that, the definition of "Jew" provided by the LR is secular; thus, it only partially squaring with religious criteria followed by the Rabbinate (matrilineal descent and conversion to Orthodox Judaism) for the purposes of personal laws, as well as for granting access to public religious services. Uncertainties about the religious status of a citizens may jeopardize her/his constitutionally protected rights, in particular the rights to religious freedom, to marry and family life, to be equal before the law, as well as children and women's rights.

In Turkey, the Constitution protects *laiklik* as a fundamental pillar of democracy; at the same time, Islamic religious identity was incorporated within Turkish national identity in an original "Turkish-Islamic synthesis" (*Türk-Islam sentezi*).[63] The foundation of the Republic in 1923 was not followed by the establishment of a genuinely a secular citizenship based on the separation between *cives* and *fideles*.[64] Instead a differentiation was drawn among the dominant *millet* (Sunni Muslim Turks), other *millets* (religious communities recognized under the Lausanne Treaty), and the remaining confessional groups.

---

[62] A. Parrilli, *Religious freedom, Minority rights and Turkish secularism: The Case of the Alevis,* in Revista General de Derecho Público Comparado, 12 (2018).

[63] F. Alicino, *Cittadinanza e religione in Turchia*, in: F. Alicino (ed.) *Cittadinanza e religione nel Mediterraneo*, 157-190 (2017).

[64] F. Alicino, *Cittadinanza e religione in Turchia*, 180 (2017).

The latter are mainly identified by Turkish authorities as "sects" instead of being recognised as autonomous religious communities.[65] This approach to minority rights and politics of recognition constitutes a legacy of the Ottoman legal culture, since it resembles the *millet* structure of the society.[66] The discovery of this cryptotype – the Turkish "hidden *millet*" - is facilitated as the idea which is implicit in Turkey's legal system, is explicit in the Israeli legal systems, as well as in other Middle-eastern countries which adopt a system of personal religious laws (i.e., Cyprus, Egypt, Jordan, Lebanon, Syria).

In conclusion, the *millet* model of religious diversity governance - institutionalized (in Israel) or emerging as a cytotype (in Turkey) – is mainly based on a communitarian paradigm which contributes to drawing the ethno-religious communities as monolithic blocks for the purposes of nation-building and religious minority governance. In so doing so, the system portrays the society as composed by homogeneous communities. However, this picture hardly mirrors the reality. Perhaps most important of all, is that it poses serious challenges to both religious minorities living in the two countries, as well as to minorities *within* the religious majority community, such as non-Orthodox Jewish citizens in Israel, and the Alevi community in Turkey.

[65] ECtHR, *Hasan e Eylem Zengin v. Turkey*, n. 1448/04, 9 January 2008, § 66. Apart from those religious denominations endowed with the status of recognized minorities by the abovementioned Treaty of Lausanne and few other international treaties, Turkish law does not provide for any procedure by which religious groups can be recognized and registered or they can acquire legal personality, either under public or private law. They can only operate indirectly as foundations (*evakaf*) or cultural associations. E. Öktem, *Statut juridique des fondations des communautés non-musulmanes en Turquie. La nouvelle loi sur les fondations*, in Quaderni di diritto e politica ecclesiastica, 477-500, (2009).

[66] The Ottoman *hatt-i humayum* of 1856 already distinguished religious belonging from citizenship (*ginsiyya*). Among the most significant measures, the 1856 rescript abolished *jizya* (in Turkish, *cizye*), i.e., the tax enforcement on non-Muslim protected under the Islamic rulers (*dhimmi*). Nevertheless, *dhimmi* continued to pay a fee (*bedel-i askeri*) in order to be exempted from military service. F. Öztürk, *Ottoman and Turkish Law,* 23 ff. (2014).

THE MUSLIM ARBITRATION TRIBUNAL (MAT)

Emanuele Odorisio

TABLE OF CONTENTS

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].

---

[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].

---

[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.

---

[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.

THE COUNCIL OF EUROPE'S EVOLVING APPROACH TO INTERCULTURALISM: MAIN DOCUMENTS (AND ONE EXAMPLE)

Sabrina Ragone

TABLE OF CONTENT

This paper carries out a diachronic comparison of official documents of the Council of Europe concerning cultural diversity, in order to elaborate on the evolution of its approach, with particular reference to interculturalism. It provides the example of intercultural cities, which confirms the essential role of local government in the pursuit of better arrangements of diversity and finally explains to what stream of interculturalism the CoE's understanding can be ascribed.

INTRODUCTION

This paper examines the evolution of the approach to the management of diversity within several documents of the Council of Europe (CoE), particularly focusing on the rise and application of an intercultural approach. In fact, the progression seems similar to the evolution of the scholarly and political debate, endorsing at first assimilation, then multiculturalism and finally interculturalism.

It embraces a bottom-up approach, assessing the concept in the light of the documents instead of infusing the conceptual framework into their interpretation. A diachronic comparison of a selection of official descriptions of policies is performed to understand the evolution of the approach (§ I), while providing the example of the Intercultural Cities programme - ICC (§ II). Finally, the paper provides a critical assessment of the findings explaining to what extent the European supranational approach respects the standards of majoritarian multiculturalism (§ III).

I. THE EVOLVING UNDERSTANDING OF CULTURAL DIVERSITY MANAGEMENT IN THE OFFICIAL DOCUMENTS

The historical reconstruction of the CoE's approach to the management of cultural differences must start with a reference to the *European Cultural Convention* (1954). Its objective was «to

foster among the nationals of all members, and of such other European States as may accede thereto, the study of the languages, history and civilisation of the others and of the civilization which is common to them all»[1]. The focus was on the promotion of cultural understanding among States and the protection/diffusion of their own cultural elements.

Such approach, which explicitly referred to cultural exchange, could seem *prima facie* respectful towards cultural diversity. Nevertheless, the exchange which was envisaged then was addressed to the signing European States, therefore fostering a Eurocentric strategy devoted to the spread of local cultures independently of the diversities within domestic societies.

The posterior *European Convention on the Legal Status of Migrant Workers* (1977)[2] clearly promoted assimilation[3]. The premise of such document was that «the legal status of migrant workers who are nationals of Council of Europe member States should be regulated so as to ensure that as far as possible they are treated no less favorably than workers who are nationals of the receiving State in all aspects of living and working conditions» and that the Member States of the CoE wished to «facilitate the social advancement of migrant workers and members of their families» through the granting of rights and privileges to each other's nationals. Several actions of the Convention were directed to encourage foreign workers to accept the prevalent cultural models in the hosting country.

The first shifts occurred in the 90s.

One may mention the *Convention on the Participation of Foreigners in Public Life at Local Level* (1992)[4], which defined the residence of foreigners on the national territory as «a permanent feature of European societies», being these foreigners subject to the same duties as citizens at local level. The signing States were then «aware of the active participation of foreign residents in the life of the local community and the development of its prosperity, and convinced of the need to improve their integration into the local community, especially by enhancing the possibilities for them to participate in local public affairs». As a consequence, they committed to guarantee their right to freedom of expression, including «freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers» (art. 3); the right to peaceful assembly and enter into associations, particularly local associations of their own «for purposes of mutual assistance, maintenance and expression of

[1] Available at: https://rm.coe.int/168006457e. Last accessed on the 14th of November 2021.
[2] Available at: https://rm.coe.int/1680077323. Last accessed on the 14th of November 2021.
[3] Contrarily to what could be expected, the *European Social Charter* (1961) did not contain significant elements in this respect. Critical on this point J.L. Fuentes, *Cultural diversity on the Council of Europe documents: The role of education and the intercultural dialogue*, in Policy Futures in Education, 14(3), 380 (2016).
[4] Available at: https://rm.coe.int/168007bd26. Last accessed on the 14th of November 2021.

their cultural identity or defence of their interests in relation to matters falling within the province of the local authority» (again, art. 3). In addition to consultations of foreign residents, chapter B regulated the possibility to establish consultative bodies to represent foreign residents at local level and chapter C referred to the right to vote and to stand in local elections. The preservation of cultural identity of foreigners seemed to be one of the targets of the Convention.

The *European Charter for Regional or Minority Languages*[5] was adopted in 1992 as well, recognizing the value of linguistic pluralism and promoting the protection of historical regional or minority languages for the «maintenance and development of Europe's cultural wealth and traditions», as well as the «the right to use a regional or minority language in private and public life». The Charter emphasized the importance of interculturalism and multilingualism, still stressing that «the protection and encouragement of regional or minority languages should not be to the detriment of the official languages and the need to learn them». Additionally, it expressly mentioned the aim to build a Europe based on democracy and cultural diversity «within the framework of national sovereignty and territorial integrity». It devoted to the States the decision about which languages to protect and how, without necessarily taking into account migrants' languages. The word "interculturalism" was introduced into this document, but it is just an anecdote, as it is exclusively present in the Preamble without further developments or implications.

A genuine change of perspective may derive from the *Framework Convention for the Protection of National Minorities* (1995)[6], which is the first obligatory multilateral instrument dealing with national minorities, seeking the promotion of their equality vis-à-vis nationals and fostering conditions for them to "express, preserve and develop their identity". Similarly to the *Convention on the Participation of Foreigners in Public Life at Local Level*, it fixed rights related to the public sphere (like freedom of peaceful assembly, freedom of association, freedom of expression, etc.) and again to languages and education. The Preamble stated that «the creation of a climate of tolerance and dialogue is necessary to enable cultural diversity to be a source and a factor, not of division, but of enrichment for each society».

Interestingly, this Convention proclaimed the failure of assimilation[7], as it clearly emerges from art. 5: «1. The Parties undertake to promote the conditions necessary for persons belonging to

[5] Available at: https://rm.coe.int/1680695175. Last accessed on the 14th of November 2021.
[6] Available at: https://rm.coe.int/168007cdac. Last accessed on the 14th of November 2021.
[7] Multiculturalism as well can be considered as a defective model, particularly if one takes into account that such approach treated diversity as a minority issue and not as something involving the entire society. See R. Zapata-Barrero, *Interculturalism in the post-multiculturalism debate: A defence*, in Comparative Migration Studies, 5 (2017). An assessment of the dichotomy can be found in N. Meer, T. Modood, R. Zapata-Barrero

national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage. 2. Without prejudice to measures taken in pursuance of their general integration policy, the Parties shall *refrain from policies or practices aimed at assimilation* of persons belonging to national minorities against their will and *shall protect these persons from any action aimed at such assimilation*». This document may be considered as a keystone in the evolutionary path of the CoE's approach to cultural diversity. Notably, the ratifications/accessions are numerous, reaching a total of 39.

The start of the new Century was characterized by several meetings at the CoE among experts and national Ministers of foreign affairs, migration, culture, and education, leading to discussions on new approaches to cultural differences. After the *Declaration on Cultural Diversity* (2000)[8], the *Final Declaration of the 7th Conference of Ministers responsible for Migration Affairs*, Helsinki 16-17 September 2002[9] (the general theme of the conference was "Migrants in our societies: policy choices in the 21st century") dealt with the importance of comm social participation of migrants and nationals for social cohesion, while stating that foreigners make a substantial contribution to the host society, not only from an economic perspective.

This document set a renewed path in the consideration of cultural issues, as it is proven by the later *Declaration of Opatija* (2003)[10], which defined a European cooperation framework, in order to lead to the necessary conditions for the «promotion and construction of a society based on intercultural dialogue and respect for cultural diversity and fostering the prevention of violent conflicts, conflict management and control and post-conflict reconciliation». The actions envisaged shall involve all generations, bringing cultures closer thanks to "constructive dialogue" and "cultural exchanges" concerning all facets of culture, from the arts to economy and language.

(eds), *Multiculturalism and Interculturalism: Debating the Dividing Lines* (2016), as well as C. Piciocchi, *L'interculturalismo nel diritto costituzionale: una storia di parole*, in **DPCE Online**, 39(2) (2019).

[8] *Declaration on cultural diversity* (Adopted by the Committee of Ministers on 7 December 2000 at the 733rd meeting of the Ministers' Deputies). Available at: https://rm.coe.int/16804bfc0b. Last accessed on the 14th of November 2021.

[9] Available at: https://rm.coe.int/09000016809274a6. Last accessed on the 14th of November 2021.

[10] Council of Europe (2003), Opatija Declaration, – Declaration on intercultural dialogue and conflict prevention, Conference of the European Ministers for Cultural Affairs. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805de16e. Last accessed on the 14th of November 2021.

The *Framework Convention on the Value of Cultural Heritage for Society*[11] (2005) contained the commitment to «promote cultural heritage protection as a central factor in the mutually supporting objectives of sustainable development, cultural diversity and contemporary creativity» and «recognise the value of cultural heritage situated on territories under their jurisdiction, regardless of its origin», somehow anticipating the approach adopted by the *White Paper on Intercultural Dialogue*[12] (2008, same year in which the EU proclaimed the European year of intercultural dialogue[13]). It stated that cultural diversity is a feature of European identity, as well as a basic condition for the development of societies based on solidarity. In spite of being difficult to define, intercultural dialogue is intended as a means to prevent ethnic, religious, linguistic and cultural divides, while promoting awareness, understanding, reconciliation and tolerance, as well as avoiding conflicts.

The specific contextual situation of the start of the new millennium was considered as a key-element to understand cultural diversity as a result of migration, but also of technological developments and globalization: «In recent decades, cultural diversification has gained momentum. Europe has attracted migrants in search of a better life and asylum-seekers from across the world. Globalization has compressed space and time on a scale that is unprecedented. The revolutions in telecommunications and the media – particularly through the emergence of new communications services like the Internet – have rendered national cultural systems increasingly porous. The development of transport and tourism has brought more people than ever into face-to-face contact, engendering more and more opportunities for intercultural dialogue» (section 2.1). Within such factual situation, the risks of non-dialogue become clear (section 2.4), being the spread of stereotypical perceptions of the others, tension, anxiety, and the development of intolerance and discrimination. On the contrary, dialogue is essential for inclusive societies aiming at mediation, mutual understanding and respect. Therefore, dialogue is conceived as an instrument for integration and social cohesion, but there is no clear explanation of how it shall contribute to intercultural arrangements.

The White Paper established five "policy approaches" to the promotion of intercultural dialogue, which was based on the democratic governance of cultural diversity, involving participation and democratic citizenship: 4.1 Democratic governance of cultural diversity; 4.2

[11] Available at: https://rm.coe.int/1680083746. Last accessed on the 14th of November 2021.

[12] Council of Europe, White Paper on Intercultural Dialogue "Living Together As Equals in Dignity", Launched by the Council of Europe Ministers of Foreign Affairs at their 118th Ministerial Session, Strasbourg 7 May. Available at: 2008.https://www.coe.int/t/dg4/intercultural/source/white%20paper_final_revised_en.pdf. Last accessed on the 14th of November 2021.

[13] The text of the MoU for the cooperation agreement between the EU and the CoE of 2007 listed intercultural dialogue and cultural diversity among the Shared Priorities and Focal Areas for Cooperation. See M. Kolb, *The European Union and the Council of Europe*, 148 ff. (2013).

Democratic citizenship and participation; 4.3 Learning and Teaching Intercultural Competences; 4.4 Spaces for Intercultural Dialogue; 4.5 Intercultural Dialogue in International Relations. It focused on substantive, not formal equality (4.1.3 From equality of opportunity to equal enjoyment of rights) and again emphasized the importance of education[14], recalling previous documents such as the *European Charter for Regional or Minority Languages* (1992), the abovementioned *Framework Convention for the Protection of National Minorities* (1995), which identified education as the major tool for protecting and fostering the promotion of languages and cultures, as well as the *Framework Convention on the Value of Cultural Heritage for Society* (2005), which stated that education is a means to «develop knowledge of cultural heritage as a resource to facilitate peaceful co-existence by promoting trust and mutual understanding with a view to resolution and prevention of conflicts», and also to «encourage reflection on the ethics and methods of presentation of the cultural heritage, as well as respect for diversity of interpretations» (Article 7)[15], and the *Reference Framework of Competences for Democratic Culture*[16]. A paramount role is allotted to territorial bodies, as «Every actor – whether NGOs, religious communities, the social partners or political parties – is implicated, as indeed are individuals. And every level of governance – from local to regional to national to international – is drawn into the democratic management of cultural diversity» (section 1.3).

[14] See sections 4.1: «It entails an education system which generates capacities for critical thinking and innovation, and spaces in which people are allowed to participate and to express themselves»; 5.2: «Public authorities and all social forces are encouraged to develop the necessary framework of dialogue through educational initiatives and practical arrangements involving majorities and minorities» and particularly section 5.3: "Learning and teaching intercultural competences": «The learning and teaching of intercultural competence is essential for democratic culture and social cohesion. Providing a quality education for all, aimed at inclusion, promotes active involvement and civic commitment and prevents educational disadvantage. […] Intercultural competences should be a part of citizenship and human-rights education. Competent public authorities and education institutions should make full use of descriptors of key competences for intercultural communication in designing and implementing curricula and study programmes at all levels of education, including teacher training and adult education programmes. Complementary tools should be developed to encourage students to exercise independent critical faculties including to reflect critically on their own responses and attitudes to experiences of other cultures. All students should be given the opportunity to develop their plurilingual competence. Intercultural learning and practice need to be introduced in the initial and in-service training of teachers […]».

[15] See D. Faas, C. Hajisoteriou, P. Angelides, *Intercultural education in Europe: Policies, practices and trends*, in British Educational Research Journal, 40(2), 300–318 (2014). According to these authors, intercultural education encompasses the development and implementation of policies and reforms fostering equal education opportunities to culturally (and/or ethnically) diverse groupings, "regardless of origin, social rank, gender or disability". Teachers shall contribute adjusting their pedagogy so as to support and empower their marginalised students.

[16] Available at: https://www.coe.int/en/web/campaign-free-to-speak-safe-to-learn/reference-framework-of-competences-for-democratic-culture. Last accessed on the 14th of November 2021. See M. Barrett, *The Council of Europe's* Reference Framework of Competences for Democratic Culture*, Policy context, content and impact'*, in London Review of Education, 18(1), 1–17 (2020).

This vision was then developed by the *Recommendation 261 (2009) on intercultural cities* of the Congress of Local and Regional Authorities of the Council of Europe[17], as well as the *Recommendation of the Committee of Ministers on intercultural integration* (2015)[18], which explicitly recalls the previous document as it recognized «the importance of creating spaces for cross-cultural exchange and debate, facilitating access to and exercise of citizenship and fostering intercultural competence, particularly at the local level» (Preamble). It recalls scholarship and studies which have demonstrated «the value of diversity for human and social development and cohesion, economic growth, productivity, creativity and innovation and that these benefits of diversity can only be realised on condition that adequate policies are in place to prevent conflict and foster equal opportunities and social cohesion».

The Recommendation affirms that culture and cultural heritage are essential for the construction of the city «as a shared common public space by encouraging people in exploring the plurality of identities through the diversity of heritage and contemporary cultural expressions, and in fostering a sense of a shared past and an aspiration to a common future». Cities, then, become the major territorial dimension for the enhancement of cultural differences from a strategic perspective, as they are «at the front line of integration and diversity management, are laboratories for policy innovation».

Therefore, the Committee of Ministers recommended that the governments of member States:

a. take note of the guide "The intercultural city step by step: Practical guide for applying the urban model of intercultural integration" and facilitate its dissemination, including via its translation into their official languages;

b. bring the urban model of intercultural integration and the tools which have been designed to facilitate its implementation and measure its impact, to the attention of local and regional authorities, as well as relevant national, regional and local institutions, organisations and networks, via the appropriate national channels;

[17] Available at https://rm.coe.int/168071ae5f. Last accessed on the 14th of November 2021. This document affirmed that strong inclusive intercultural cities have successfully managed intercultural diversity making citizens of diverse origins identify with their cities. In 2019, the Congress published as well the *Human rights handbook for local and regional authorities*. One chapter is devoted to policies to tackle discrimination against refugees, asylum seekers, migrants and internally displaced persons. Examples are provided with best practices of local and regional authorities. Available at https://www.coe.int/en/web/congress/migration-and-integration. Last accessed on the 14th of November 2021.

[18] **Recommendation** CM/Rec(2015)1 **of the Committee of Ministers to member States on intercultural integration** *(Adopted by the Committee of Ministers on 21 January 2015 at the 1217th meeting of the Ministers' Deputies). Available at:* https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c471f. Last accessed on the 14th of November 2021.

c. encourage within their means of competences the implementation of the urban model of intercultural integration at the local level and support the setting-up of city networks for the exchange of experience and learning in this respect;

d. take the urban model of intercultural integration into account when revising and further developing national migrant integration policies or policies for intercultural dialogue and diversity management.

II. INTERCULTURAL CITIES (THE EXAMPLE)

The programme Intercultural Cities implements the guidelines and prescriptions indicated in the abovementioned documents[19], in order to provide support lo municipal entities in the design and adjustment of policies «through an intercultural and intersectional lens» and help them adopt intercultural strategies for a positive management of diversity and its exploitation. The programme proposes a set of analytical and practical tools to help local stakeholders through the various stages of the process. It involves nowadays more than 140 cities in Europe and beyond (e.g., individual cities from Australia, Canada, Israel, Japan, Korea, Mexico, Morocco, Turkey, and the United States). The achievement of these results was construed as a progression, therefore one of the targets of the "intermediate policy" was the controlled expansion of the network's membership, with a timeline of 100 cities by end 2017, and 120 cities by end 2019. By 2020, 117 cities had completed the full ICC index[20], assessing and monitoring their progress over time vis-à-vis their starting point.

The cities which are allowed to enter the programme shall have a population of at least 30.000 inhabitants (although smaller ones have been accepted) with a significant degree of diversity. Within Europe, Italy is the country with the most cities involved (almost 30), followed by Spain and Portugal.

Candidate cities are called to express their interest with a communication by the Mayor or a high-rank representative[21]. Afterwards, the city and the CoE sign a "statement of intent", and the first fills in the abovementioned ICC index which is assessed comparatively with respect to other cities' best practices. An expert visit follows, to start the dialogue with local

[19] See https://www.coe.int/en/web/interculturalcities/about. Last accessed on the 14th of November 2021.
[20] See https://www.coe.int/en/web/interculturalcities/about-the-index. Last accessed on the 14th of November 2021.
[21] See https://www.coe.int/en/web/interculturalcities/how-to-join-. Last accessed on the 14th of November 2021.

administrators and stakeholders and provide the data for the report on the intercultural profile of the city, on which the posterior activities are based. Therefore, the cities establish an "intercultural support group" to review and amend their policies in an intercultural framework and commit to pay the yearly contribution of 5.000 euros. The rest of expenses is covered by the CoE, which provides experts and facilitators as well, fostering policy debates and changes. Strategical projects pursued by this action involve "anti-rumors" strategies (identifying stereotypes, collecting and spreading data on the impact of migration, creating anti-rumors networks at the local level, campaigning, etc.); "business and diversity" (focused on the advantages brough to business by diversities and the recognition of equal rights); "cultural heritage" (to promote knowledge, dialogue and map the presence of different cultures); "gentrification" (to foster access to housing in the entire city and avoid segregation); "intercultural competence" (implying educational activities for public officers – such as the "intercultural integration academies" aimed at different target groups); as well as policies concerning refugees and the elimination of systemic discriminations, or the achievement of sustainable cities.

III. WHAT SORT OF "INTERCULTURALISM"?

From a theoretical perspective, there are two elements which recall the discussion on interculturalism developed in this special issue, namely the "micro" approach to these measures, involving educational policies and local entities[22], as well as the relevance of migration[23] as a factor pushing European countries towards the adoption of intercultural solutions.

Within such context, the idea of interculturalism drafted in the analyzed documents is particularly characterized, in my opinion, by two basic features, namely *heterogeneity* (involving different and overlapping aspects, such as nationality, language, ethnicity, gender identity, religious beliefs, etc.) and *utilitarianism*, somehow privileging the majority culture within the recognition and integration of diversity[24]. In fact, interculturalism is construed as an advantage for societies in which communitarian connections can get stronger. With respect to ICC, for instance, the dedicated website explicitly states that «Realising the **Diversity Advantage** involves a commitment by the public authorities to recognise and preserve

[22] On the importance of local policies, see R. Zapata-Barrero, op. cit., 6.
[23] A. Dellios, E. Henrich (eds), *Migrant, Multicultural and Diasporic Heritage: Beyond and Between Borders* (2021).
[24] On this approach, see G. Bouchard, *What is interculturalism?*, in McGill Law Journal, 56(2), 45 (2011).

diversity as an intrinsic feature of human communities; and to pursue the 'diversity advantage' that accrues from the presence of diversity when coupled with specific policies and strategies that enable diverse contributions to shape the cultural, economic and social fabric of the city, and to manage conflicts which may threaten community cohesion». The "diversity advantage" is listed before the targets of real equality, respect for diversity and intercultural interaction between diverse groups. Therefore, in spite of the signs included in the White Paper which seemed inspired by horizontal or post-majoritarian interculturalism, the overall approach of the CoE seems to be more prone to majoritarian interculturalism[25], endorsing the permanence of a majority while ensuring peaceful and harmonious coexistence to the rest of cultures.

[25] See C. Joppke, *War of words: interculturalism v. multiculturalism*, in Comparative Migration Studies, 6 (2018). On the Canadian application of such model, see the article by Carla Maria Reale in this special issue; on the application of the horizontal/post-majoritarian model in Latin America, see S. Bagni, *Lo Stato interculturale: primi tentativi di costruzione prescrittiva della categoria*, in S. Bagni, G.A. Figueroa Mejía, G. Pavani (coords), *La ciencia del derecho Constitucional comparado. Libro homenaje a Lucio Pegoraro*, p. 111 ff. (II, 2017).

POLITICAL PARTICIPATION AND REPRESENTATION OF THE MUSLIM POPULATION IN EUROPE[***]

Leonardo Lage – Maria Chiara Locchi

TABLE OF CONTENTS

The article deals with the topic of political participation and representation of Muslim communities in European democracies as a relevant aspect of the multiple transformations generated by the increasing cultural and religious diversity in European political and legal systems. The question is addressed by both a Western and Islamic legal perspective: with respect to the first one, by outlining some political and legal factors that are likely to affect the active presence of European Muslims in the political arena and identifying some main rationales that could allow for restrictions and prohibitions against this presence in consolidated democracies; as for the second one, by discussing the notion of fiqh al-aqalliyat *("fiqh for minorities") and exploring the different views on political participation of Muslim communities in Europe.*

INTRODUCTION

The impact of the increasing cultural and religious diversity on European immigration countries' political and legal systems has long been a hot topic of both public debate and academic reflections. Within the legal doctrine, in particular, the focus is mostly on investigating the actually crucial role played by (constitutional, supranational and international) courts in responding to the claims of historically marginalized minorities and groups in multicultural societies, while the transformation of political participation and representation in European pluralistic and multicultural democracies turns out to be an aspect comparatively less addressed by law scholars. It is true that the concrete and case-by-case judicial approach proves in many ways to be the most suitable for addressing the controversial issues relating to cultural and religious accommodation, filling the gaps too often left by legislators in dealing with the many questions raised by super-diversity[1]. The retreat of democratic politics from the regulation of critical aspects of coexistence in super-

[*] 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).

[**] The paper is the result of discussions and shared reflections between the two authors; however, sections 1, 2, 3 are attributed to Maria Chiara Locchi, while sections 4 and 5 are attributed to Leonardo Lage.

[1] S. Vertovec, *Super-diversity and its implications*, Ethnic and Racial Studies, 6, 1024-1054 (2007).

diverse societies, however, does not justify the little scholarly attention paid to the tensions and conflicts which have been affecting fundamental legal principles and categories – such as "democracy", "political representation", "pluralism", "citizenship" – for some time now. These tensions and conflicts appear to be mostly fueled by the presence of Islam in the public space and, under the conditions that will be explored, in the political arena of European immigration countries, where the process of secularization was expected to have definitively relegated religion to the private sphere. Instead, there are relevant signs of a renewed centrality of religion in politics, and Islam is undoubtedly the privileged reference of both minority (religiously oriented) groups and, with a reactive stance, right-wing populist parties invoking Christian values as a marker of European identity. Nevertheless, trying to detect the multifaceted character of "Islam in Europe" proves to be a challenging task – in general terms and, even more, in relation to the issue of political participation and representation.

In order to increase the knowledge on such an articulated set of questions we'll start with an overview of "European Islam"'s many declinations in order to shed light on some factors that affect its complexity (section 1). In the following paragraphs the issue of Islamic communities' political participation and representation will be addressed by identifying the main political and legal factors that affect the active presence of Muslims in the political arena of European democracies (section 2) as well as analyzing some main rationales that may legitimately justify restrictions, in constitutional States devoted to democratic principles and liberties, to the Islamic presence at the political level (section 3). The article also highlights the debate surrounding the notion of *fiqh al-aqalliyat* (section 4) and its occurrence in Islamic views on political participation of Muslims in the West (section 5).

I. WHAT WE TALK ABOUT WHEN WE TALK ABOUT "EUROPEAN ISLAM"

As of mid-2016 the Pew Research Center estimated the Muslim population in Europe (to this end including the United Kingdom, Norway and Switzerland) at 25.8 million (4.9% of the overall population), a number that has increased since 2010 (when it was 19.5 million - 3.8%) and is expected to further risen by the 2050, even with a "zero migration" scenario (to 7.4%)[2].

[2] Pew Research Center, *Europe's Growing Muslim Population*, November 29, 2017, https://www.pewforum.org/2017/11/29/europes-growing-muslim-population/.

Providing a comprehensive picture of this population of almost 30 million people proves to be impossible since the highly differentiated features of European Islam prevents the identification of unitary trends; in fact, not only the origins of the presence of Muslim communities in European countries are marked by relevant differences (in terms of the time of their creation and the geographical areas of origin of the population), but the complex processes of interactions and reciprocal adaptations with ethnic and religious majority population as well as with the legal and political institutions of European States have also contributed to increase this diversity[3]. The inner plurality of European Islam, which stands for a fluid and "porous" conception of cultural and religious identity, is also reflected by the syncretism of theological doctrines and religious practices: as Zahalka effectively remarks, European Muslims «might pray at a mosque with a *salafi* imam, seek the answers to their questions from *wasatī* leaning religious adjudicators, and read *sala* literature, all while imitating the general, non-Muslim population in their everyday lives»[4].

As we shall see, the issue of political participation and representation of European Muslims in EU constitutional States is not an exception to this variegated picture, to the extent that most "Muslims" in sociological terms[5] «do not take active roles in debates about Islam, do not always highlight that dimension of their identity in their everyday lives»[6].

Trying to comprehend the complexity of European Islam requires to start from its definition itself, which has been developed by a plurality of Muslim thinkers: while Hashas argues that «European Islam is possible theologically and politically», to the extent that "Islamic" theological and theoretical concepts are reinterpreted and recontextualized in "European" politics and societies[7], Cesari hopes that the concept could mean the «symbolic integration of the Islamic heritage and cultural practices within different European national cultures without endangering the basic principle of equality between citizens»[8].

The distinctive feature of European Islam is being a "minority Islam", in terms of Muslim communities residing in non-Islamic countries. This very "fact", and its consequences in relation to the application of Islamic law on a personal (rather than territorial) basis, has been differently conceptualized by those Muslim intellectuals who have been reflecting on

[3] See the monographic issue of Oasis, 28 (2018), dedicated to *Musulmani d'Europa. Tra locale e global* and, in particular, J. S. Nielsen, *L'Islam europeo. Tendenze e prospettive*.
[4] I. Zahalka, *Shari'a in the Modern Era. Muslim Minorities Jurisprudence* 139 (2016).
[5] That is to say people whose cultural and religious background is related to the Islamic tradition, even if they are not actual "practicing believers".
[6] J. R. Bowen, *Can Islam be French? Pluralism and Pragmatism in a Secularist State*, 11 (2010).
[7] M. Hashas, *The Idea of European Islam. Religion, Ethics, Politics and Perpetual Modernity*, 3 (2019).
[8] J. Cesari, *Conclusion: Is There a European Islam?*, in J. Cesari (ed.), *The Oxford Handbook of European Islam*, 805 (2015).

the relationship between European Muslim communities and State institutions and, in particular, on the role of Islam in the public and political space of European States[9]. To name only a few of the most influential Muslim thinkers who have contributed to this debate in recent years, and without intending to be exhaustive, their diverse positions range from Bassam Tibi's secularized "Euro-Islam" (which rejects Islamism and embraces "cultural modernity" as based on secularization of politics, endorsement of individual human rights and pluralism[10]), to Tariq Ramadan's quest for a "radical reform" aimed at, among other aspects, considering Europe as a "space of testimony" (*dār al-shahāda* – where Muslims have to live their faith publicly and are allowed to enjoy the rights to found their own organizations and to autonomous representation, within a conception that reconciles «loyalty to one's faith and conscience» and «loyalty to one's country»[11]), including Tareq Oubrou's focus on the need for a "geotheology" as a theology that considers (geographical and temporal) "local" conditions in order to develop a situated version of living Islam and gets to relativize and "ethnicize" Islamic law itself (*shari'a de minorité*)[12].

The issue of Islam's accommodation to secular and liberal European States has been also addressed, within the theoretical context of European Islam, by a rather different perspective, that of *fiqh al-aqalliyyat* ("fiqh for the minorities" – see *infra*, section 5). Even if the scope of this "minority Islamic jurisprudence" is still the integration of Muslims into Western societies (and, to this end, a special attention is given to Muslims' full and active political participation), the paradigm employed is that of "religious minority", which implies the idea of preserving and potentially reinforcing identity without specifically engaging in the establishment of a "European Islam"[13].

European Muslim communities thus appear highly differentiated with regard to their organization, public discourse as well as typology and extension of their demands to the

[9] For a thorough analysis of the extent to the contribution of European Islamic theology to the debates related to secular-liberal democracies of Western Europe see M. Hashas, *The Idea of European Islam*, cit.

[10] See, in particular, B. Tibi, *The Challenge of Fundamentalism: Political Islam and the New World Disorder* (1998) and Id., *Political Islam, World Politics and Europe* (2008).

[11] T. Ramadan, *To be a European Muslim*, 172 (1999). According to this view «Implementing the Shari'a, for a Muslim citizen or resident in Europe, is explicitly to respect the constitutional and legal framework in the country in which he is a citizen […] the Shari'a requires honest citizenship within the frame of reference constituted by the positive law of the European country concerned», ibidem.

[12] L. Babes, T. Oubrou, *Loi d'Allah, loi des hommes: liberté, égalité et femmes en islam*, 95 (2002); T. Oubrou, *Un imam en colére: intégration, laïcité, violences* (2012).

[13] M.S. Berger, *A Brief History of Islam in Europe: Thirteen Centuries of Creed, Conflict and Coexistence*, 211 (2014): «Among Muslims it is a matter of debate whether they are to perceive and organize themselves as a religious minority (as is argued by the prominent Muslim cleric shaykh Qaradawi) or as European citizens with a distinctive Islamic identity (as is argued by the equally prominent Muslim intellectual Tariq Ramadan)». Ramadan expressly rejected the "minority" paradigm by considering that «the minority concept is inoperative: there is no such thing as 'minority citizenship'. They (Muslims) must therefore overcome this 'minority' mindset and fully participate in society on an equal footing with the 'majority'», T. Ramadan, *What I believe*, 58 (2009).

State. This differentiation, as we already observed, surely depends on their internal debate on the conditions and characteristics of a possible adaptation of Islamic principles and rules to the specific and local context in which Muslims are a minority population[14], but it is also affected by the various models of State-religion relationships in Europe.

In France, for example, the fundamental principle of secularism, in its "militant" version (*laicité de combat*), has been interpreted as implying, on the one hand, that the State does not recognize any religion and must be neutral towards all religions and, on the other hand, that no one can use his religious creed in order to overcome the common norms governing the relationship between public authorities and individuals[15]. The focus on the *assimilation* to the Republican values results in the active opposition to (the alleged) Muslims' tendency to communalism, in terms of creating their own Islam-based associations (such as mosques or schools) and following religious values and rules instead of (or even in addition to) State law. The 2021 "law strengthening the respect for the principles of the Republic"[16] is the last piece, on the State side, of the complex *puzzle* of French model of Muslims' integration: by reconnecting with the 1905 law on the separation between Churches and the State, the Bill aims to be «un élément structurant de la stratégie gouvernementale pour lutter contre le séparatisme et les atteintes à la citoyenneté» and to foster individual emancipation against identity essentialism[17]. If Islam is not expressly mentioned in the Bill, the *Exposé des motifs* identifies the threat represented by the «insidieux mais puissant entrisme communautariste» which is «pour l'essentiel d'inspiration islamiste» as the «manifestation d'un projet politique conscient, théorisé, politico-religieux, dont l'ambition est de faire prévaloir des normes religieuses sur la loi commune que nous nous sommes librement donnée». Some observers have been criticizing the illiberal character, or at least the "quasi-religious" nature, of such a radical anti-communitarist position[18], which undoubtedly makes it more difficult, for practicing French Muslims, navigating «between two spatially distinct realms of

[14] The difficulty of taking a position on the very controversial issue of "creative" interpretation of scriptures, so as to derive general principles from specific rules given in scriptures and adapt them to the local context and present time, appears to be higher in those countries where the public expression of cultural and religious identity is stigmatized, if not prohibited.

[15] Dec. 2004-505 of the French Constitutional Council, 19 Novembre 2004, par. 18. Nevertheless, as a liberal and democratic constitutional State, France protects religious freedom as a fundamental right, under both national constitutional and international provisions.

[16] *Loi* n° 2021-1109 du 24 août 2021 confortant le respect des principes de la République.

[17] *Compte rendu du Conseil des ministres du 9 décembre 2020*, Communiqué de presse du Conseil des ministres du 9 décembre 2020. The Bill is organized around two main axes: first of all, it aims to guarantee the respect for the Republic's laws and principles in all those areas exposed to the risk of separatist influence; secondly, it aims to update the system of organization of worship resulting from the 1905 Law.

[18] See, among others, F. Khosrokhavar, *Le débat censuré*, Orient XXI, 5 novembre 2020, https://orientxxi.info/magazine/le-debat-censure,4262

justification: a transnational one, based on the norms and traditions of Islam, and a national one, based on the civic values of France»[19]. The issue of political participation has been also debated in the context of this legislative process: in March 2021 the Senate had amended the text introducing an explicit, and highly controversial, ban on "communitarian lists"[20]; the ban wasn't included in the final draft of the *loi*, whose Art. 35-1 forbids to hold political meetings as well as to display, distribute or disseminate electoral propaganda in facilities normally used as a place of worship.

The British model of State-religion relationship and integration of diverse communities, as is well known, is based on a profoundly different approach, which may be framed as "pluralist" or "multicultural" to the extent that it tries to promote an open and inclusive citizenship while enforcing cultural rights of minority groups. If, in a first stage, multiculturalist policies could be politically explained with liberal elites feeling guilty about colonialism, the communitarian approach in accommodating cultural and religious diversities of the population with migrant background has been consolidating over time. The British legal system can thus be viewed as oriented to both eliminating *de facto* discriminations by ensuring equal opportunities and taking ethnic, cultural and religious differences into account [21]. Cultural rights and equal opportunities for minority communities, in particular, have been mostly developed at the local level, thanks to the crucial contribution of ethnic-based associations; religious and ethnic-based organizations, sometimes in collaboration with local authorities, have successfully lobbied for "positive actions" in order to help members of under-represented groups to overcome disadvantages in competing with other applicants, e.g. for the purpose of recruitment, both in the public and private sector, or in accessing social care[22]. The British experience has been therefore marked by a relevant presence of minority groups in civil society and political arena; Muslims have been politically active since their arrival in Britain, back in the 19th century,

[19] J.R. Bowen, cit., p. 6-7: « France contains a tension, if not a contradiction, between its Republican political model and the way religion minded citizens organize their lives. In the ideal world of Republican France, everyone develops similar values and orientations by participating in public institutions, starting from their education in state schools. This direct, sustained contact between the state and the individual underwrites the dual capacity to live together and to deliberate in rational fashion, because everyone lives and reasons starting from the same first principles. On this view, intermediate institutions such as voluntary associations, private schools, and religious practices are to be discouraged, lest they nourish divergent values and create social divisions».

[20] The *listes communautaires* are framed with regard to one or more candidates having made public statements contrary to the principles of national sovereignty, democracy or secularism in order to support the demands of a "portion" of the people based on the ethnicity or religious affiliation.

[21] A. Rinella, *La shari'a in Occidente. Giurisdizioni e diritto islamico: Regno Unito, Canada e Stati Uniti d'America*, 73-74 and 177 ff. (2021).

[22] See C. Joppke, *Immigration and the Nation-State: The United States, Germany, and Great Britain*, 208 ff. (1999), and Id., *Is multiculturalism dead?*, 127 ff. (2017).

even if their political engagement has risen as a reaction to growing Islamophobia in 1988-1989 (after the *The Satanic Verses* affair) and more recently after 9/11 and the 'War on Terror'[23].

Germany and Italy are, for their part, characterized by yet another different migration history and integration policies.

In Germany the "differentialist turn" of the 1980's and 1990's deeply questioned the concept of "assimilation", with all its burdensome legacy in terms of "forced germanization". On the side of the citizenship's acquisition, in 2000 the nationality law was reformed by relaxing the "right of blood" (*ius sanguinis*) in favor of the "right of birthplace" (*ius soli*) and allowing, albeit in exceptional circumstances, dual citizenship; as for integration policies, the communitarian approach implemented within the *Gasterbeiter* model has proved to be functional to a "detached tolerance" and institutionalized separation between nationals and immigrants. The *focus* of cultural and religious minorities' integration policies was on social rights, and in particular on school (with the introduction of a specific curriculum on immigrants' language and religion of origin) and social welfare (engaging immigrants' associations and communities, including Muslim ones, to provide for social benefits)[24]. The increasing visibility of Islam and its place in German civil society and public space, especially from the 1990's, led to a growing identification with Islam among immigrants themselves: from this perspective, «the growing interest of Muslims in becoming members of political parties and contributing to the media as well as the developing influence of Islamic associations in public life can be interpreted as an increasing naturalization of Islam in German society»[25].

The Italian approach to the integration of Muslims is hardly correspondent to a real model: the Italian "non-strategy", based on a non-aggressive version of secularism, quite paradoxically has allowed Muslim migrants to integrate themselves into society in a relatively natural way. Accordingly, while in many European countries second or third

[23] T. Peace, *Muslims and Political Participation in Britain*, xv (2015).
[24] A. Rinella, cit., 70-71.
[25] G. Nordbruch, *Germany: Migration, Islam and National Identity*, 11 (2011). These developments haven't occurred without resistance, as demonstrated by public debates on the (alleged) threat to German "lead culture" ("*Leitkultur*"), "Christian-Occidental culture" ("*christlich-abendländische Kultur*") or "Judea-Christian civilisation" ("*Jüdisch-christliche Zivilisation*") posed by cultural and religious minorities' practices and demands. The focus on "*Leitkultur*" has been at the heart of the reflections of one of the most important European Muslim intellectuals, the already cited Bassam Tibi: in his 1998 book *Europa ohne Identität* (*Europe without identity*), he defined the concept in terms of what are commonly called "Western values", framing it as a *European*, rather than German, "*Leitkultur*" and identifying as its building blocks the values of modernity, democracy, secularism, the Enlightenment, human rights and civil society (B. Tibi, *Europa ohne Identität*, 154 (2000).

generation Muslims, by holding national citizenship of a EU State, may refuse to feel part of the society in which they grew up, in Italy the children of Muslim migrants, born in the 1990's, are asking to be recognized as an integral part of the society in which they live and, more precisely, to be recognized as "citizens of Islamic faith"[26]. The absence of harsh conflicts with State institutions in the integration process of Muslim migrants, on the other hand, does not automatically mean the dilution of their religious identity, which, on the contrary, can be mobilized as a resource for civic and social action, thus investing public space and contributing to change it[27]. While in recent years the activism of the various associations aiming at representing the Italian Muslim community has led to the intensification of the institutional dialogue with the State, political participation and representation does not seem to have undergone any significant development[28]. In fact, the existing scholarship on Italian Muslims suggests that, even though they are more involved with political activities than they were two decades ago[29], their political participation remains «surprisingly limited»: Italian Muslim communities remain less engaged compared to Muslims in France and the UK and face strong and growing anti-Muslim sentiment, without their political activism leading to a notable impact in national politics[30].

Lastly, the variegated picture of European Islam is also related to the different ways of its "institutionalization", an articulated concept that encompasses the plurality of political and institutional "actors" aiming at representing Muslim communities' interests and demands[31]. These different instruments and subjects may range from "Muslim public actors" freely

[26] B. Conti, *L'Islam in Italia, tra comunità e cittadinanza*, in Oasis, 28, 67 (2018).
[27] M. Brignone, *L'islam in Italia, tra partecipazione civica e reti transnazionali*, in Quaderni di diritto e politica ecclesiastica, 1, 18 (2019).
[28] In 2017 an "Islamic constituent (assembly)" (*Costituente islamica*) has been instituted, in order not to act as a political party but to represent Italian muslims as an "ente esponenziale" (a representative body aiming at protecting collective interests); as of March 2021, however, the *Costituente islamica* does not seem to be operational. In 2020 the creation of a new Islamic electoral list, the *Nuova Italia*, was announced: the new political movement, based in Magenta (in the metropolitan area of Milan), is expected to run for the 2022 administrative elections.
[29] For example, protests and non-electoral means of participation, voting and running for office, building Muslim civic and political organizations (such as the UCOII – Union of Islamic Organizations and Communities in Italy; the COREIS – Islamic Religious Community; the GMI – Young Muslims of Italy; the ASMI – Association of Muslim Women in Italy.
[30] J. Pupcenoks, *The Difficulties of Italian Muslim Political Mobilization: Anti-Muslim Sentiment and Internal Fragmentation*, in Journal of Muslim Minority Affairs, 2, 233-249 (2021). The main challenges to participation, in particular, are represented by the extremely negative popular opinion of Islam and discrimination against Muslim as well as by great internal fragmentation within the Italian Muslim communities themselves.
[31] For a taxonomy «on the basis of the approach used by state or promotion of these bodies» see S. Silvestri, *Public policies towards Muslims and the institutionalization of 'Moderate Islam' in Europe. Some critical reflections*, in A. Triandafyllidou (ed.), *Muslims in 21st Century Europe*, 51 (2010).

active within Muslim communities in European countries[32] and associations spread out from a strong civil society mobilization[33] to Islamic representative bodies and/or forums for dialogue aiming at consulting with the State on matters affecting Muslim communities [34] and organizations institutionally linked to migrants' countries of origin[35].

II. Political and legal issues affecting European Muslims' participation and representation

Classic academic studies on political participation of migrant background communities in Western democracies have been highlighting the plurality of channels for migrant and minority participation and representation; Miller's analysis, for example, which dates back to 1981, identifies the following five main ways: «homeland influence», in terms of the involvement of migrants in the political affairs of their native societies, which proves to be of potential political significance also to receiving countries; «extra-parliamentary opposition» performed by engaging protest rallies, hunger and rent strikes, petitioning,

[32] Bowen identifies different types of "Islamic public actors", «each with specific claims to legitimacy and specific bases in social institutions, particularly religious schools, mosques (imams), and Islamic associations», since the traditional Islamic institutions that define specific authorities (such as *muftis*, *'ulamâ*, and *faqîhs*) are «virtually absent from Europe», J. R. Bowen, cit., 24.

[33] The CEM (Council of European Muslims), based in Brussels, for example, defines itself as a «cultural organization», «the largest Islamic organization in Europe», bringing together hundreds of varied associations with the aim of «publicising Islam, inspiring and supporting Europe's Muslims to practise the rituals of their faith, and participate effectively in the varied aspects of life, within a frame of moderate understanding and a reformist, innovating approach». For a critical analysis of the CEM see G. Spanò, *Islamic activism: between representation and representativeness. Two case studies in Europe*, in Revista General de Derecho Público Comparado, 29, 1-31 (2021).

[34] In the 1980's and 1990's many European governments (e.g. France, the Netherlands, Belgium and Germany) tried to find ways to organize Muslim representation: although these attempts were not always successful, they had the benefit of being a good learning experience for both government and Muslim groups. According to S. Cherribi, *Islam and Politics in Europe*, in J.L.Esposito, E. El-Din Shahin (eds.), *Oxford Handbook of Islam and Politics*, 285 (2013), while «governments understood the difficulty in one representative body for all Muslims because of their diversity», «Muslim groups understood the logic of governments». See, for example, the *Conseil français du culte musulman*, the *Comisión Islámica de España*, the *Deutschen Islam Konferenz*, the *Consiglio per le relazioni con l'Islam italiano*, the *Muslim Council of Britain*. There are also many critical voices pointing out how, when a top-down approach is followed by State institutions, Muslim communities' institutionalization processes end up undermining the original character of such organizations and contributing to create "artificial" institutions, see F. Fregossi, *L'Islam en Europe, entre dynamiques d'institutionnalisation, de reconnaissance et difficultés objectives d'organisation*, in *Religions, Droit et sociétés dans l'Europe Communautaire*, 91-117 (2000).

[35] See, for example, the interesting example of the Moroccan Council of *ʿUlamāʾ* for Europe (and its Brussels-based local section - the European Council of Moroccan Ulema) as part of Moroccan "diaspora policies", F. Tamburini, *The Moroccan Council of* ʿulamāʾ *for Europe: the development of a "remarkable model" of Islam for Europe or just another form of state control on religion?*, in Revista General de Derecho Público Comparado, 29, 1-27 (2021).

picketing, etc., thanks to freedom of speech, press and assembly protected by Western constitutions; «ability to join unions and to vote and especially if given representation in union and factory elections», which allow foreign workers to influence questions of economic and social policy; participation, both direct and indirect, in «indigenous organizations» such as political parties, civil rights groups and religiously-affiliated organizations; «institutionalized consultation» of migrant and minority interests when interacting with public institutions at local, regional or national level[36].

The impact of Muslim communities on the politics of Western democracies, in terms of both political participation and representation, is proving to be just as multifaceted and needs to be appreciated by considering the many political and legal factors able to affect the quantitative and qualitative dimension of their active presence in the political arena[37].

Leaving aside the (purely political) question of a "Muslim vote", namely the electoral behavior of European Muslims or immigrant citizens of Muslim origin[38], a first relevant aspect is the presence of "Muslim politicians" within European political parties, both secular and religiously oriented.

As for the formers, Muslim citizens may wish to join a political party whether they belong to groups or associations whose ideological orientation is closely linked to "political Islam" or not; in this last case they eventually may prefer not to declare their Islamic background and refuse to be identified as "Muslims" in the political arena[39]. With respect to these situations, from a legal perspective, a problem may arise with regards to the possible religious discrimination, by political parties, against Muslim citizens, insofar as they may be, directly or indirectly, excluded or disadvantaged *as Muslims*.

As we shall see in the following paragraph, in consolidated democracies political parties' statutes and internal regulations generally do not include restrictive clauses on the basis of ethnic or religious affiliation. In some countries this trend is strengthened by specific

---

[36] M.J. Miller, *Foreign Workers in Western Europe: An Emerging Political Force* (1981), and Id., *The Political Impact of Foreign Labor: A Re-evaluation of the Western European Experience*, in The International Migration Review, 1, 27-60 (1982).

[37] See V. Colombo, *Political Islam and Islam in politics in Europe*, in European View, 12, 143-144 (2013).

[38] Although some studies on the so-called "Muslim vote" have been already implemented in some EU countries, the question surely needs a more adequate and comprehensive investigation. In any case, in general terms, «thus far Muslim citizens have generally voted for traditional mainstream parties», M. Martiniello, *Political participation, mobilisation and representation of immigrants and their offspring in Europe*, in R. Bauböck, *Migration and Citizenship Legal Status, Rights and Political Participation*, 93 (2006).

[39] See M.S. Berger, *A Brief History of Islam in Europe*, cit., 211, who observes that generally «the representation of Muslims in political positions, like municipal councils, parliaments or government, is […] often not on a religious ticket as 'Muslim', but on a political ticket such as socialist, liberal and even Christian Democrat».

legislative provisions, e.g. anti-discrimination law: in the UK, for example, although political parties enjoy a wide freedom in determining their organizational structure and internal functioning, the 2010 *Equality Act* represents a relevant source of limitations, also addressing those, within political parties, who provide a service or carry out a function[40]. Anti-discrimination law primarily concerns political party's membership, which cannot be refused (or granted on less favorable terms) on the basis of a protected characteristic, such as religion. Other relevant aspects affected by the *Equality Act* are, on the one hand, the possibility for parties to undertake positive actions aimed at overcoming particular groups' under-representation within elected bodies and, on the other hand, data monitoring on candidates' "diversity". Even in light of these legal obligations, the main British parties have generally adopted internal codes of conduct binding MP's, party officials and members to the respect of equality of chances, diversity, and tolerance[41].

Obviously, the lack of formal restrictive clauses on party membership does not automatically imply that Muslim citizens actually do have an effective space for political participation on equal terms: an example of this is the 2019 German debate on the speculation about the possibility of a Muslim chancellor in 2030, put forward, as a matter of fact, as little more than a joke during an interview by Ralph Brinkhaus, the CDU (Christian Democratic Union) parliamentary group leader. In response to the positive answer by Brinkhaus ("Why not, if they're a good politician, and they represent our values and our political views?"), the absolutely negative positions expressed by other important members of the party demonstrate how challenging, if not inadmissible, the idea of high-level Muslim political participation still proves to be[42].

As for Islamic oriented parties, in several European immigration countries there are political parties and movements that aim to represent the interests of Muslim citizens and

[40] See, in particular, the *Equality Act*'s sect. 101, 104 and 158, which prohibit discrimination based on age, disability, race, religion and belief, sex, sexual orientation, gender reassignment, pregnancy and maternity, marriage and civil partnership. The 1968 *Race Relations Act* did not extend to political parties, except in relation to the recruitment of employees or the supply of goods and services to the public (eg. through a club or bar). A first step forward was represented, already in 1976, by the *Race Relations Act*, which had extended the prohibition of racial discrimination to any association with more than 25 members, including non-profit associations, in relation to the behavior towards potential members and the provision of goods and services to members.

[41] See the Appendix 9, dedicated to the *NEC Codes of Conduct*, of the *Labour Party Rule Book 2020* and the *Code of Conduct for Conservative Party Representatives*. The *Labour Muslim Network* (LMN) is an inclusive organisation which seeks to promote British Muslim engagement with the *Labour Party* and in the political process; in July 2021 the first Islamophobia code of conduct in the history of the *Labour Party* has been adopted, supplementing the aforementioned Appendix 9.

[42] *A Muslim as German chancellor? CDU leader slammed for saying 'why not'*, Deutsche Welle, 07.03.2019, https://www.dw.com/en/a-muslim-as-german-chancellor-cdu-leader-slammed-for-saying-why-not/a-47813302.

residents; in some countries of Southern and Central-Eastern Europe (as Greece, Bulgaria, Romania) Islamic oriented parties are more likely to be connected to Turkish minorities.
The very notion of "Islamic oriented parties" is actually quite challenging: it may be broadly defined starting from the notion of "religiously oriented parties" proposed by Ozzano and Cavatorta[43], and thus related to the indeed disputed concept of "political Islam" as «any political movement or doctrine that advocates the pertinence and legitimacy of giving public voice to Islamic values, interests, arguments, and preferences»[44]. Understood in this broader sense, the catch-all term "Islamist", associated to organizations, movements and political parties, is likely to be controversial as it potentially covers «any form of political activism or theorizing justified using an Islamic vocabulary […]», with the effect of «tainting Muslim activism as inherently anti-democratic»[45]. In light of these pitfalls, some authors prefer to refer to this notion with the aim of identifying a «distinctive form of Muslim politics» which is intended to establish an «Islamic political order in the sense of a state whose governmental principles, institutions, and legal system derive directly from the *shari'ah*»[46]: it is quite clear that not all Islamic oriented parties are "Islamist" in this narrower sense. One of the major problems in referring to "political Islam"/Islamism" as umbrella terms is that they actually encompass practical expressions of what it may even be a common ideological matrix but inevitably is confronted with the variety of social and political (local) contexts. If this holds true for Islamic countries[47], it is even more the case for Western states, where Muslims often represent fewer than 5% of the population with

[43] The two Italian political scientists define "religiously oriented parties" as «political parties focusing significant sections of their manifestos on "religious values", explicitly appealing to religious constituencies, and/or including significant religious factions», L. Ozzano, *The many faces of the political god: a typology of religiously oriented parties*, in Democratization, 5, 810 (2013).
[44] T. Lindholm, *The Strasbourg Court Dealing with Turkey and the Human Right to Freedom of Religion or Belief: An Assessment in Light of* Leyla Şahin v. Turkey, in W.C. Durham Jr, R. Torfs, D. Kirkham, C. Scott (eds.), *Islam, Europe and Emerging Legal Issues*, 162 (2012).
[45] S.H. Jones, *Islam and the Liberal State. National Identity and the Future of Muslim Britain*, 36 (2020).
[46] P. Mandaville, *Islam and Politics*, 73-74 (3rd ed. 2020), who stresses how Islamists greatly differ in methods and priorities: while many of them have taken the form of political parties and social movements seeking to achieve an Islamic political order «via political (electoral, legislative, power-sharing) or social (civil society, informal networking) means», radical Islamists combines «a vision of Islamic political order that rejects the legitimacy of the modern sovereign-state and seeks to establish a pan-Islamic polity or renewed caliphate» with «an emphasis on violent struggle (*jihad*) as a primary or even the exclusively legitimate method for the pursuit of political change», 345-346.
[47] J.M. Owen IV, *Confronting Political Islam. Six Lessons from the West's Past*, 47 (2015): « Islamists do share the general goal of making Sharia the actual positive law of their societies. But Islamists come in many different varieties. Some are Arab, others Persian or Pashtun or Bengali. Some are Sunni, others Shia. Some practice terrorism, others work through peaceful means. Some are nationalists, others internationalists or imperialists. Cutting across all of these groups are deep disagreements as to who has the right version of Sharia, and who gets to say so. And some Islamists regard other Islamists as enemies. Enmity between the Taliban and Iran's ruling regime is long-standing and deep. One of the Saudi dynasty's most lethal enemies is al-Qaeda. Both of these regard Iran as an enemy […] ».

Islamist groups having to «adjust the purposes and goals of their movement to suit very different conditions»[48].

European Islamic oriented parties and movements are quite diversified in respect of ideological manifestos, political positioning and electoral performances: as for the latter aspect, while some of them have not yet participated in elections or never succeeded in elect their candidates[49], other parties have already elected their representatives at both the national and the local level[50].

A relevant example of parties that succeeded gaining legislative seats at the national level[51] is the Dutch political movement *Denk*, founded in 2015 by two Dutch members of the House of Representatives of Turkish origin with the aim of representing Muslim immigrants against the radical positions of Geert Wilders'PVV (*Partij voor de Vrijheid*)[52]. At first *Denk* released a political manifesto proclaiming itself as a party aiming at promoting the interests of all immigrants, regardless of their ethnic or religious background, by focusing on four main goals: integration, social welfare, education and justice; nevertheless, already in 2016 *Denk* appears to have undertaken a process of radicalization, turning into a party increasingly consecrated to the interests of Muslim immigrants of Turkish descent, so much so that it has to come to be labelled as "pro-Erdogan"[53]. Furthermore, the *Denk* case

[48] P. Mandaville, cit., 430-431, who mentions the examples of the *Muslim Brotherhood* and the *Jama'at-I Islami party* as having influenced, respectively, organizations such as the *Union des Organisations Islamique de France*, the *Islamische Gemeinschaft in Deutschland*, and the *Muslim Association of Britain* (the former) and the *Islamic Foundation* in Leicester, the *UK Islamic Mission*, and the *Islamic Forum Europe* (the latter). Today many younger Muslims are nevertheless not actively mobilized by this kind of political movements and parties, and are likely to find (both violent, like *Al-Qaeda* and *Isis*, and nonviolent, like *Hizb Ut-Tahrir*) radical Islam more attractive.

[49] E.g. the French *Parti égalité et justice* and *Français et Musulmans*; the *Neue Bewegung für die Zukunft* in Austria; the *Islamic Party of Britain*, active until 2006; the Spanish PRUNE – *Partido Renacimiento y Unión de España*, which in 2018 changed its name in *Partido Renacimiento y Unión de Europa.*

[50] An example of an Islamic oriented party currently represented at the local level is the German *Bündnis für Innovation und Gerechtigkeit*, whose representatives were elected in the city councils of Bonn, Frankfurt am Main, Wiesbaden and Offenbach. The Belgian ISLAM elected two representatives at the 2012 municipal elections (Anderlecht and Molenbeek-Saint-Jean, in the Brussels-Capital region), but failed in gaining local seats in 2018 elections; the French *Union des démocrates musulmans français* also gained one seat at the Bobigny's city council in 2012. In the Netherlands both *Islam Democraten* and *Nida* have their representatives at the city councils of The Hague and Rotterdam.

[51] Denk elected three MPs at the Lower House in both the 2017 and 2021 elections. In 2005 also the British party RESPECT, a coalition of far left and Muslim political activists, won one legislative seat and came second in three other constituencies; although the party never presented itself as an "immigrant party" and the far left-wing was its dominant component, its voting base was concentrated in areas in London with large Muslim communities, see T. Peace, *All I'm Asking for Is for a Little Respect: Assessing the Performance of Britain's Most Successful Radical Left Party*, in Parliamentary Affairs, 2, 405-424 (2013).

[52] M. Blankvoort, *Ethnic outbidding and the emergence of DENK in the Netherlands*, 10-01-2019, 18.

[53] M. Blankvoort, cit., who stresses that «DENK has received most of its votes from Muslim immigrants of which the largest group are immigrants of Turkish descent and the second largest group are Moroccan immigrants», 25. This is corroborated by S. Otjes, A. Krouwel, *Why do newcomers vote for a newcomer? Support for an immigrant party*, in Journal of Ethnic and Migration Studies, 7, 1161 (2019), who signal

has been studied as part of a broader trend of «re-articulation and contestation of anti-racist critique» which affects not only Dutch politics but, more generally, Western democracies' political arena; this re-articulation, in particular, implies a renovated role for religion in the public sphere, against earlier dominant theories about secularization as the definitive decline of religion in Western States[54]. As political discourses on national identity enhances the role of religion, as well as other crucial issues such as culture and race, political parties like *Denk* may prove to be crucial actors by highlighting the positive contribution of ethnic and religious diversity in a debate that typically exclude minority religions like Islam.

In any case, in general terms the political impact and electoral performances of Islamic oriented parties in Europe are negatively assessed, especially due to their inadequacy of representing the highly heterogeneous (ethnic, religious, cultural, and linguistic) features of European Muslim communities; in this respect, their poor performances must be considered in light of these parties' inability to politically represent the complexity and fluidity of European Islam.

A second important issue affecting the effectiveness of Muslim communities' political participation is related to the recognition of both the right to join political parties and the right to vote to aliens, to the extent that in many European states Muslim population largely consists of migrants from Islamic countries. In this respect national legislation in Europe is varied, with more than half of EU countries (including some consolidated democracies like France, Germany and Italy) excluding non-European foreigners from the right to vote and to be elected, while their political rights, whenever granted, mostly concern local elections; on the other hand, migrants are generally allowed to participate in politics within movements, trade unions, political and religious associations[55].

A third point to be considered concerns more specifically political representation, with regards, for example, to electoral systems[56] and other legal mechanisms able to promote or

---

that DENK «does not appeal to voters without a migration background and its appeal is limited to what we defined here as the immigrant group, Muslims».

[54] S. Loukili, *Fighting Fire with Fire? "Muslim" Political Parties in the Netherlands Countering Right-Wing Populism in the City of Rotterdam*, in Journal of Muslims in Europe, 9, 26 (2020). On the Denk case see also A. Spektorowski, D. Elfersy, *From Multiculturalism to Democratic Discrimination. The Challenge of Islam and the Re-emergence of Europe's Nationalism*, 204-205 (2020).

[55] See J. Paffarini, C. Calvieri, *Los límites a los derecho politicos de los extranjeros. La experiencia italiana y europea en comparación*, in Revista General de Derecho Público Comparado, 29, 1-31 (2021). Martiniello points out that, although «in European literature on immigration, the thesis of the political quiescence or passivity of immigrants was the first to emerge and it was for a long time dominant […] Many studies show that immigrants have always been active in those less conventional types of participation» (eg. trade union politics, associations and community organization). This suggests that «being politically passive is not always an indicator of general disinterest in politics. Passivity can sometimes be a form of resistance and defence», M. Martiniello, cit., 90 ff.

[56] The Muslim population is more represented in states that adopt proportional electoral systems than in those in which there is a majority system A.H. Sinno, *Muslim Underrepresentation in American Politics*,

ensure the election of Muslim candidates (so called "descriptive representation"[57]). This term, as it is known, implies that political institutions, and especially legislative bodies, should proportionally reflect the social articulation of the different groups and communities by means of legal instruments such as reserved seats, decentralization, federalism (in addition to the already mentioned proportional electoral system). In Western Europe institutional mechanisms aiming at guaranteeing political participation and representation may operate for linguistic communities, but do not apply on the basis of race, ethnicity or religion[58], with the consequence that in European countries the "diversity" of parliaments is more the result of political dynamics concerning the effectiveness of minority members' political participation and citizens' free electoral choices. In this regard, it has been pointed out that the attitude towards political representation of religious and ethnic minorities varies across different countries on the basis of various elements related to political and legal culture, such as «prevailing repertoires of belonging and exclusion» and the «legal status of targeted policies for identity groups»: the different rates of success of minority candidates in the UK and France, for example, can be explained in terms of the differing conceptualization of the role of diversity in the public arena and the typologies of diversities worthy of legal protection[59].

The United Kingdom and the Netherlands are probably the European countries where Muslims are mostly integrated in the political arena, with their inclusion in «parties all along the full political spectrum from Christian Democrats to the communist parties and Greens

in A.H. Sinno (ed.), *Muslims in Western Politics*, 69 ff. (2009). Once political parties begin to compete for the "Muslim vote", in fact, candidates of Islamic faith will have a better chance of being elected, to the extent that with proportional representation systems there are more parties than in majority systems and the majority of the parties will decide to place these candidates in a good position on the list in order to attract, or in any case not completely disperse, the minority vote, 84. In the period 2003-2006, the ten Dutch representatives of Muslim faith elected to the *Tweede Kamer* belonged to six different parties, while their seven successors, elected in 2006, belonged to five different parties.

[57] The notion of "descriptive representation" was proposed by H. Pitkin, *The concept of representation* (1967), who opposed it to that of "substantive representation", which instead refers to the effective influence of minorities on the political process: while descriptive representation can serve as a mechanism for obtaining substantial representation, the latter can also be achieved without the former.

[58] M.L. Krook, *European States and their Muslim Citizens: The Impact of Institutions on Perceptions and Boundaries*, in J.R. Bowen, C. Bertossi, J.W. Duyvendak, M.L. Krook (eds.), *European States and their Muslim Citizens. The Impact of Institutions on Perceptions and Boundaries*, 189 (2013). The Romanian case is worth mentioning in relation to the Art. 62.2 Const. (later implemented by the 1992 Romanian election law), which establishes special legislative seats for recognized minorities; according to R.F. King, C.G. Marian, *Minority Representation and Reserved Legislative Seats in Romania*, in East European Politics and Societies, 3, 566 (2012), «extensive minority representation immediately after 1989 was a symbol to the West indicating a commitment to human rights. It would imply a rejection of the nationalist chauvinism of the Ceausescu regime, promising recognition to wide range of ethnic voices». Currently reserved legislative seats for ethnic minorities groups are 17, among which there is 1 representative of the Democratic Union of Turkish-Muslim Tatars of Romania, a political party established in 1989 with the aim of representing the Tatar community.

[59] M.L. Krook cit., 192 ff.

(and even in the far right party LFP in the Netherlands)»[60]. As has already been noted, however, the presence of Muslim politicians does not automatically imply a political engagement connected to that specific religious identity: in the UK, for example, «Muslim politicians do not only promote a limited range of 'Muslim issues' whilst in office, but also focus on a variety of other issues that resonate with their broader constituencies»[61].

Therefore, the appreciation of parliaments' religious "diversity" from a perspective which aims at considering also the substantive and effective minority representation proves to be problematic, not only because being Muslim does not necessarily means pursuing Islamic political goals[62], but also, at an earlier stage, in relation to the collection of data on political representation of minorities. In fact, in many cases existing research does not focus specifically on religious identity, but rather on ethnic origin, and, furthermore, politicians and parliamentarians generally are not required to officially state their ethnicity; this means that data collected must be considered taking into account that not all "immigrants" or "black and minority ethnic" individuals, even when they come from Muslim majority countries, are actually Muslims[63]. In any case, considering the ethnic minority background

[60] S. Cherribi, cit., 287. It is worth mentioning that the Mayor of London, Sadiq Khan, comes from a Sunni Muslim family of Pakistani origin.

[61] See E. Kolpinskaya, *Muslims in Parliament: A Myth of Futility*, who discusses Muslim mps, and E. Tatari, A. Yukleyen, *The Political Behaviour of Minority Councillors across London Boroughs: Comparing Tower Hamlets, Newham, and Hackney*, who focuses on Muslim councillors, in T. Peace, *Muslims and Political Participation in Britain*, cit.

[62] In fact, as already noted, substantive representation – in terms of representatives acting «in the interest of the represented, in a manner responsive to them», H. Pitkin, cit., 109 – is something different from descriptive representation and the latter does not imply the former. Besides, there is still much room for debate on what substantive representation exactly entails and how to measure it: for example, «is it linked to certain activities in the legislative process and to actual policy outcomes […], or do representatives also substantively represent when they speak on behalf of a marginalized group in the broader public sphere […]? Where shall we look for representative acts – is one place/level of socio-political interaction more important, powerful, and meaningful to society, than another, and will it help us refine its definition and thus move forward? Moreover, does substantive representation of one marginalized group (for instance, women) have the same meaning as substantive representation of another group (for instance, ethnic or religious minorities), and if not, wherein lies the difference? How should we assess and measure the quality of substantive representation across social groups and political contexts? And, finally, why should we care: what makes substantive representation so important? Is there a link between the quality of substantive representation and the level and expression of equality within a country?», E. Rashkova, S. Erzeel, Abstract of the Panel "*Substantive Representation of Marginalised Groups: Re-Conceptualising, Measurement, and Implications for Representative Democracy"*, European Consortium for Political Research (ECPR), *The Joint Sessions of Workshops 2021*, 17-28 May 2021.

[63] See K. Bird, T. Saalfeld, A. M. Wüst (eds.), *The Political Representation of Immigrants and Minorities* (2010). In the UK the use of expressions such as BME (Black and minority ethnic) and BAME (Black, Asian and minority ethnic) has given rise to a lively debate on the appropriateness of the labels used in both institutional and academic context to talk about ethnic and cultural diversity. Recently the British Government has pointed out that it will no longer use the terms BAME or BME because «they include some groups and not others – for example, the UK's ethnic minorities include White minorities and people with a Mixed ethnic background» and «the acronyms BAME and BME were not well understood in user research». Similarly, also the expression 'people of colour' has been overcome «as it does not include White minorities». See the section *Writing about ethnicity* in the Government website *Ethnicity facts and figures*, https://www.ethnicity-facts-figures.service.gov.uk/style-guide/writing-about-ethnicity.

of parliamentarians, a 2020 study reported that the UK has a comparatively higher percentage rate (65 MP's – 10% of the House of Commons) than that of other important European immigration countries such as Germany (58 – 8,2% of the German Federal Parliament) and France (35 – 6,4% of the National Assembly); however, «if the House of Commons reflected the UK population (14.4% ethnic minorities in 2019) there would be around 93»[64].

If, as we already observed, the Muslim population is more represented in those countries with a proportional electoral system than under a majority system, this is even truer for the election of Muslim women[65]. Traditionally ethnic and religious minority women have undergone a specific disadvantage in terms of political participation and representation, due to the "multiple" jeopardy of intersectional discrimination[66]. European States' political and legal responses to this structural problem of under-representation largely differ depending on cultural ideologies as well as legal differences about discrimination laws and affirmative action policies[67].

III. What legal regulation for Muslims' presence in the political arena?

The expression of Islamic religious affiliation in Western States' political arena, regardless of whether it is a sectarian and anti-democratic manifestation of identity or not, is generally

[64] E. Uberoi, R. Lees, *Ethnic diversity in politics and public life*, 8 (2020). In Germany the reference is to the so-called "migration background" of parliamentarians, which is defined «as either not being born as a German citizen themselves or having a parent who was not». The 8,2% must be compared with the 22.5% of the total population with "migration background" in 2017, Mediendienst Integration, *58 MPs have a Migration Background*, October 2017, https://mediendienst-integration.de/artikel/58-mps-have-a-migration-background.html. In France it is not possible for public authorities to collect data on ethnicity, religion or race; the 6,4 percentage has been indicated in a report by the broadcaster France 24, see France 24, *Diversity gains ground in France's new-look National Assembly after vote*, 21/06/2017, https://www.france24.com/en/20170621-france-diversity-gains-ground-new-look-national-assembly-after-legislative-election.

[65] M.M. Hughes, *Electoral Systems and the Legislative Representation of Muslim Ethnic Minority Women in the West, 2000-2010*, in Parliamentary Affairs, 3, 1-21 (2016).

[66] V. Purdie-Vaughns, R.P. Eibach, *Intersectional invisibility: The distinctive advantages and disadvantages of multiple subordinate-group identities*, in Sex Roles: A Journal of Research, 5-6, 377-391 (2008).

[67] In France, for example, the Parliament adopted a law promoting an "equal access of women and men to electoral mandates and elective functions" in 2000, which obliges political parties to nominate 50% women candidates in most elections; however, the advocates of the law, although questioning the universalistic conception of French *citoyenneté*, (unsurprisingly) did not extend its reasoning to other minority categories, such as ethnic and religious groups (and, in particular, the female component within these groups), C. Raissiguier, *Reinventing the Republic: Gender, Migration and Citizenship in France*, 7 ff. (2010). On the other hand, parity has been considered to have activated, albeit unintentionally, the promotion of a more general "descriptive representation", with the consequence that in the last years there has been a growing number of minority candidates, although they are usually placed in unwinnable seats.

perceived in negative terms. Restrictions and prohibitions of such political manifestations are frequently invoked in public discourse of consolidated democracies, with a view to preserving the public sphere's (supposed) neutrality from the (likewise supposed) disruptive effect of cultural and religious particularisms and, ultimately, to guaranteeing the conditions of democratic coexistence in pluralistic legal systems. In the field of political participation and representation, from this perspective, seems to be confirmed what Berger, more generally, observes with regard to the clash of values between "Islam" and "Europe", that is to say that such a clash «is not that European Muslims adhere to values that are prohibited by law – on the contrary, the political-legal values allow for diversity and liberty –, but by the religious-cultural objection that 'this is not how we do things here'»[68].

This call for a restrictive stance, on the other hand, must be carefully examined in the light of those principles and liberties which are protected by both international law[69] and democratic constitutionalism: the principle of democracy itself, as well as freedoms of expression, of thought, belief and religion, of assembly and association, do not allow to consider the ban of religious expressions from the political realm as a measure *per se* necessary, or even legitimate, in a democratic society.

Within the context of contemporary constitutionalism in Western countries, in particular, democratic principles and liberties mark the perimeter, continuously changing on the basis of constitutional interpretation, within which the manifestation of religious identity in the political arena can be considered legitimate and must be guaranteed at the same time. Restrictions and prohibitions against Islamic oriented parties, as well as other forms of Islamic presence at the political level, are therefore acceptable as many, proportionate, exceptions to the centrality of those principles and rights, and they will be legitimate to the extent that they prove to serve to the protection of other constitutional principles and interests (e.g. the principle of democracy itself and the integrity of the constitutional order; the principle of equality and prohibition of discrimination; the defense of national security and public order).

Comparative analysis of consolidated democracies' legal orders makes it possible to identify some main rationales at the basis of the adoption of restrictive measures.

The first one is related to the heterogenous set of principles, rules and institutions of "militant democracy", aimed at limiting or prohibiting anti-democratic and/or anti-system

[68] M.S. Berger, *A Brief History of Islam in Europe*, cit., 234.

[69] On the tensions raised by absolute bans on religious oriented political parties with respect to the main International human rights conventions see J. Temperman, *State-Religion Relationships and Human Rights Law. Towards a Right to Religiously Neutral Governance*, 320-321 (2010).

political movements and parties[70]. The defense from internal and external threats can refer both to the adoption of consolidated instruments of militant, or defensive, democracy (as in the German case[71]), and to the protection of the State's interest in contrasting any support activity, even tacit, of terrorism (e.g. in Spain[72]). The most ancient constitutions do not generally include a specific constitutional discipline for the protection of democracy and such constitutional silence is suitable to opposite interpretations with regard to the legitimacy of any restrictions to the freedom of political association; in several cases constitutional norms are worded rather ambiguously and their «insidious formulas» often refer to legislators for the repression of abuses[73]. Constitutional and legislative restrictions related to militant democracy – which may consist in the loss of tax benefits or the exclusion from public funding, up to the actual dissolution – might be enforced insofar as the Islamic oriented movement or party pursues an anti-constitutional ideology, or the very appeal of

[70] Constitutional and legislative provisions aimed at restricting freedoms of expression and political association in "protected democracies" are extremely varied. As for the object of the protection, in particular, there are not only restrictions designed to defend "ideological integrity", in terms of those values and principles which lie at the foundation of democratic and pluralistic constitutional orders, but also norms that protect "territorial integrity" and other principles and values considered to be "fundamental" (such as the peaceful coexistence between peoples, secularism, political pluralism and the rule of law, prohibition of the incitement to racial, national, ethnic or religious hatred, others' rights and freedoms of others, etc.). On the notion of "protected democracy" see A. Di Giovine (a cura di), *Democrazie protette e protezione della democrazia* (2005); J.-W. Müller, *Militant Democracy*, in M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, 1253 ff. (2012); L. Pegoraro, *Para una clasificaión "ductil" de "democracia militante"*, in Revista vasca de administración pública, 2, 191 ff. (2013); A. **S**ajó (ed.), *Militant Democracy*, Utrecht 2014; S. Tyulkina, *Militant Democracy: Undemocratic Political Parties and Beyond* (2015).

[71] See the art 21 of the German Basic Law, specifically dedicated to "protect democracy" in terms of the obligation for political parties to intra-party democracy and the legal regime of sanctions against anti-democratic parties. There are also several other constitutional provisions related to the German system of militant democracy, such as Artt. 9, 10 par. 2 and 11 par. 2, 18, 20 par. 4. On the recent trends in the enforcement of Art. 21 by the *Bundesverfasssungsgericht* see A. Gatti, *Il* Parteiverbot *e la nuova incostituzionalità a geometria variabile nell'ordinamento tedesco*, in Rivista AIC, 3, 5 (2017). E. Caterina, *La metamorfosi della "democrazia militante" in Germania. Appunti sulla sentenza NPD del Tribunale Costituzionale Federale e sulla successiva revisione dell'art. 21 della Legge Fondamentale*, in Diritto Pubblico Comparato ed Europeo, 1 (2018). The Art. 21 of the Basic Law has been invoked so far twice in the 1950's, resulting in the dissolution of the Socialist Reich Party (in 1952) and the Communist Party of Germany (in 1956). As for Islamic political movements, in 2012 the German Ministry of Interior proscribed the activities of *Hizb Ut-Tahrir* since its activities were directed against the principle of international understanding and their leaders advocated the use of violence as a means to achieve their political goals; this decision, however, has been issued on the basis of sect. 15 § 1 and 18 § 2 of the Law on Associations since the organization wasn't labelled as a "a political party" but rather as an association, albeit religiously oriented, pursuing political objectives.

[72] See the *Ley Orgánica* 6/2002 *de Partidos Políticos*, which provides for an *ex post* control on political parties' activities by the *Sala Especial* of the Supreme Court. Such a control can result in a declaration of illegality in the event that the conditions established by the Criminal Code in relation to "illicit associations" are verified (Article 10.2.a) and if the party seeks to deteriorate or destroy the system of rights and freedoms, or to eliminate the democratic system (Articles 7, 8 and 10.2.b). From 2002 to date there have been six cases of both declaration of illegality and refusal of registration and they all concerned parties linked to the Basque terrorist organization ETA (*Euskadi Ta Askatasuna*).

[73] See L. Pegoraro, cit., 212.

values and principles related to a religious belief is qualified as contrary to the constitutional system, and is deemed to represent an actual and effective threat to the democratic order. Considering that Islamic oriented political movements and parties in Europe, as we already noted, are definitely small and generally have a poor electoral performance, the implementation of such restrictions and prohibitions, as a matter of fact, would not be so much aimed at avoiding an actual danger to the democratic order, but rather, and problematically, at denying radical parties «the forum of institutional expression, the legitimacy, and the aura of respectability that is naturally granted to political parties in modern democracy»[74].

One of the major trends in Western democracies after September 11th is undoubtedly focused on the restriction of Islamic movements and parties, considered to be threats to the integrity of the democratic-constitutional order and to internal security. What seems to be taking place, in this respect, is a shift in the meaning of militant democracy that may be appreciated under at least two aspects: on the one hand, Western states tend to use militant democracy legal mechanisms in order to take a "militant" position with respect to the exercise of religious freedom, insofar as religion, and especially Islam, is considered to fuel that threat[75]; on the other hand, measures to contrast international terrorism and to protect public security are gradually being drawn into the sphere of militant democracy (although the two areas do not overlap in principle, in fact, anti-terrorism legislation can also consist in preventive measures that severely limit the constitutional freedoms of expression, association and religion).

A second rationale for restrictions is related to the prohibition of incitement to hatred on the behalf of religion, or for other reasons based on religious arguments.

In consolidated democracies political parties and, more generally, associations enjoy the freedom to pursue their own goals and carry out their own activities by using, among other things, religious arguments and resources; restrictions aimed at prohibiting hate speech, in this context, can raise compatibility issues with respect to the constitutional and international provisions in defense of freedom of expression and association. In light of the fundamental character of freedom of expression enjoyed by members of political parties

[74] G. Bligh, *Defending Democracy: A New Understanding of the Party-Banning Phenomenon*, in Vanderbilt Journal of Transnational Law, 46, 1365 (2013), which believes there has been a transition, in terms of bans on political parties, from a "Weimar paradigm" (characterized by the ban on parties that seek to abolish the democratic order itself, preventing such parties from coming to power and implementing its own anti-democratic program) to a "paradigm of legitimacy", in terms of the will of the State to deprive extremist parties of the "space" (which means resources and legitimacy) to express themselves in the political arena.

[75] See P. Macklem, *Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe*, in SSRN Electronic Journal, 20 August 2010, 2 ff.

and, more generally, by anyone who contributes to public debate in pluralistic democracies, the general tendency, especially in case law, is in fact to circumscribe legislative restrictions of religious hate speech to situations where incitement is likely to produce violent events in the near future. In the same democratic contexts, however, the constitutional protection of freedom of expression in relation to hate speech is highly diversified and both legislators and courts, even within the same legal system, express changing orientations over time. In Europe the general approach appears to be based, firstly, on the explicit identification of the limits to freedom of expression and, secondly and consequently, on the balancing of freedom of expression with other conflicting rights and interests[76].

A third rationale concerns prohibition of discrimination on religious grounds, or on other grounds but for religious reasons, with respect to party membership, internal organization and division of power and nomination of candidates. Restrictive measures, for example, could affect the possibility for actors other than individuals (e.g., trade unions or other types of associations, including religious ones) to participate in forming political parties; or, as for party membership and access to internal party positions, the freedom to determine access requirements related to religion (e.g., based on religious affiliation, or on other grounds but on the basis of religious arguments)[77].

The adoption of such restrictive measures proves to be problematic in consolidated democracies, where internal party organization and procedures are not generally regulated in detail by state norms and are rather discretionally determined by parties. In fact, those who form an association (whether it be a religious association or a political party) can, in principle, decide who to admit to membership, excluding those who do not share certain ideals and beliefs. This does not mean, however, that there are no limits: even if no specific restrictions are envisaged, a ban is generally considered to be in force for political parties

[76] For a comparative study on the limits to the freedom of expression in relation to religious hate speech see C. Cianitto, Cristiana, *Quando la parola ferisce. Blasfemia e incitamento all'odio religioso nella società contemporanea* (2016).

[77] The case of the Dutch Reformed Orthodox Party (SGP - *Staatkundig Gereformeerde Partij*) has proved to be an interesting test in Europe. On the basis of a rigorous interpretation of the Bible, women were barred from joining the party as well as standing as candidates on the party lists; a group of associations and NGOs for the protection of human rights and against gender discrimination filed an appeal for breaching international and constitutional prohibition of discrimination and women's right to political participation, bringing the case to both the Council of State and the Supreme Court. The latter, in particular, held that women's rights not to be discriminated in their political rights had to prevail on party's ideological freedom, in light of the importance of the political and electoral domain: in fact, since the right to run for office and be elected is crucial for the functioning of democracy, it is unacceptable that political parties are allowed to determine candidate lists in violation of fundamental principles and citizens' political rights, even when their behavior rests on views and opinions based on a religious or philosophical belief. On the the SGP see B. Oomen, J. Guijt, M. Ploeg, *CEDAW, The Bible and the State of the Netherlands: the struggle over orthodox women's political participation and their responses*, in Utrecht Law Review, 2, 158-174 (2010).

to insert statutory clauses in express violation of fundamental values such as personality rights, dignity and freedom. The "amphibious" nature of political parties, as private associations with very relevant public tasks, explains why the judicial scrutiny of admission requirements is so narrow, even if the loss or reduction of public funding as a sanction, or at least a disincentive, for political parties in relation to the compliance with internal democracy constraints has become increasingly common[78]. Therefore, in consolidated democracies political parties generally tend to avoid inserting membership conditions based on ethnic or religious affiliation in their statutes; however, the absence of clauses resulting in direct discrimination does not prevent certain categories of people (e.g. women, members of ethnic or religious minorities) from being indirectly discriminated. For this reason, exclusion criteria not strictly related to association's or party's purposes – such as gender, sexual orientation, ethnicity, religious identity – must be assessed very rigorously[79].

IV. *FIQH AL-AQALLIYAT* (THE JURISPRUDENCE OF MUSLIM MINORITIES) AND THE REINTERPRETATION OF ISLAMIC TRADITION IN LIGHT OF MUSLIMS' PRESENCE IN EUROPE

The previous sections of this work dealt mainly with the legal framework within national systems that concerns the political participation of Muslim minorities in European countries. While positive state law can either incentivize or constrain their ability to fully exercise political rights through electoral procedures and democratic representation (by regulating the conditions for acquiring citizenship and the creation of religiously oriented political parties and associations, for example, as the previous comparative analysis shows), Muslims' attitudes towards their own Islamic background, on the one hand, and towards Western politics and legal systems, on the other, are also part of the set of social, cultural, political and legal conditions that enable them to participate effectively in the public sphere. Therefore, it is useful for the purposes of this article to consider the same issue from the perspective of Islamic law and, in particular, to discuss the notion of *fiqh al-aqalliyat*, as mentioned above (section 1).

[78] On the limitation of judicial scrutiny in light of the centrality of the freedom of association see F. Scuto, *Internal party democracy: constitutional profiles of a transition*, 134-135 (2017).

[79] See, with reference to the German experience, T. Spier, M. Klein, *Party membership in Germany: rather formal, therefore uncool?*, in E. Van haute, A. Gauja (eds.), *Party Members and Activists*, 86 (2015), who point out that, «as parties are free to turn down membership applications without justification, it is possible to circumvent these limitations in individual decisions without officially excluding any social group».

From the sacredness of Islamic law derives its personal character[80], which contrasts with the principle of territoriality that governs the applicability of the law in Western nation-states. This aspect helps understand the extent to which Islamic law may be relevant to Muslim persons living in European countries nowadays. Recent public opinion in Western societies and, more specifically, in Europe regarding the applicability of Islamic legal norms in European jurisdictions has varied from the European Court of Human Rights' assertion that *shari'a* is fundamentally at odds with democracy[81] to the speech by the Archbishop of Canterbury Rowan Williams in 2008 in which he sustained the possibility of accommodation between British and Islamic Law[82]. Overall, it is possible to observe expressions of opinion that treat Muslims' presence in Europe as if it were a problem because of an alleged contradiction between Islam and Western cultural and constitutional values[83], including democracy and gender equality. However, dealing with the sociological fact that Islam is part of the public space in Europe currently requires «a preliminary recognition that the high degree of fluidity, mutuality, and also reversibility of religious commitments among Muslims is, increasingly, not the exception but the rule in the fast changing religious and political field in Europe»[84].

Etymologically, the term *shari'a* means «the path or track by which camels were taken to water»[85]. In Islam, it is the straight path revealed by God so that believers may achieve

[80] A. D'Emilia, *Scritti di diritto islamico*, edited by F. Castro, 57 (1976). In the same sense, see also F. Castro, *Il modello islamico*, 10 (2007).

[81] European Court of Human Rights, Case of Refah Partisi (The Welfare Party) and Others v. Turkey (Grand Chamber, 13 February 2003), 39. See also M.C. Locchi, *La disciplina giuridica dei partiti a orientamento religioso*, 122 ff. (2018).

[82] See R. Williams, *Civil and Religious Law in England: A Religious Perspective*, in Ecclesiastical Law Journal, 3, 262-282 (2008).

[83] For example, according to Armando Salvatore, "the presence of Muslims in Europe, in spite of the great variety of their political and religious orientations (also including various types and degrees of commitment to secular lifestyles and even to atheism), is often perceived by the majority cultures and public opinion leaders as a sectarian intrusion into an assumedly (though not really) solid politico-cultural body" (A. Salvatore, *Power and Authority within European Secularity: From the Enlightenment Critique of Religion to the Contemporary Presence of Islam*, in The Muslim World, 96, 554 (2006). Angelo Rinella, in turn, mentions European political parties' stances on Islam as examples of their aversion towards Islamic communities and their claims. According to the author, these parties exploit anti-Islamic sentiment in order to gain electoral support, justifying their position on the grounds of the alleged intolerant character of the Muslim religion and the discrimination against women (see A. Rinella, *La Shari'a in Europa: questioni di diritto comparato*, in Diritto pubblico comparato ed europeo, special volume, 639 (2019)).

[84] A. Salvatore, cit., 555. Maurizio Oliviero defines Islam as a "complex legal system", endowed with a complete and detailed legal order based on divine revelation (see M. Oliviero, *I paesi del mondo islamico*, in P. Carrozza, A. Di Giovine, G.F. Ferrari, *Diritto costituzionale comparato*, 599 (1, 2014). Similarly, H. Patrick Glenn describes the Islamic legal tradition as complex because of its epistemological ability to deal "with diversity, contradiction and demands for what is usually known as a factor of change" (H. P. Glenn, *Legal Traditions of the World*, 180 ff. and 367 (5a ed, 2014.).

[85] S. G. Vesey-Fitzgerald, *Nature and sources of the Sharī'a*, in M. Khadduri, H. J. Liebesny (eds.), *Law in the Middle East*, 86 (I, 1955).

salvation. For Wael B. Hallaq, the use of the English word "law" in reference to *shari'a* is problematic by itself, because it tends «to project, if not superimpose, on the legal culture of Islam notions saturated with the conceptual specificity of nation-state law»[86]. Although Islamic thought considers *shari'a* a reflection of God's will, both divine revelation and human reason converge to the institutionalization of Islam as a system of beliefs and norms that include an original legal order: "This dual identity of Islamic law is reflected in the two expressions *Sharī'ah* and *fiqh*"[87]. The term *fiqh* represents the intellectual activity oriented towards the knowledge of divine will[88], based on revealed and "human" sources (the Quran, the *sunna* of the Prophet Muhammad, *ijma* and *qiyas*). According to Ibn Khaldun's classic definition, *fiqh* (or jurisprudence, in the English translation of his work), "is the knowledge of the classification of the laws of God, which concern the actions of all responsible Muslims, as obligatory, forbidden, recommendable, disliked, or permissible"[89]. Both *shari'a* and *fiqh* comprise elements that Western legal traditions exclude from the realm of law, including the discipline of religious rituals.

Aside from this theoretical definition, differences in the social, cultural, political and legal backgrounds of Muslim migrants originating from North Africa, the Middle East, Iran, Central, South or Southeast Asia (for example), as well as second and third-generation Muslims born and raised in Europe[90], result in a plurality of needs, creeds and demands within the Muslim population that are neither homogenous nor consensual. In fact, Maurits S. Berger identifies at least three meanings that Muslims living in the West attribute to *shari'a*, which do not always coincide with the scholarly description of Islamic law in its classical conformation. According to the author, «The first answer to what Muslims might mean by 'shari'a' in a Western context is shari'a as a slogan or an abstraction with a virtuous connotation. Shari'a stands for 'the law of God', or 'all that Muslims need', and, effectively, for everything that is 'good' for Muslims»[91]. It is this abstract notion, he argues, that makes

[86] W.B. Hallaq, *Sharī'a: Theory, practice, transformations*, 2 (2009).
[87] M.H. Kamali, *Shar'ah law: An introduction*, 40 (2008). Massimo Papa and Lorenzo Ascanio explain that both *shari'a* and *fiqh* can be understood as synonyms of "Islamic law" (M. Papa, L. Ascanio, *Shari'a*, 10-11 (2014)).
[88] Th.W. Juynboll, *Manuale di diritto musulmano secondo la dottrina della scuola sciafeita*, Italian edition, translated by G. Baviera, 14-15 (1916).
[89] Ibn Khaldūn, *The muqaddimah: An introduction to history*, translation by F. Rosenthal, edited by N.J. Dawood, 344-345 (2015).
[90] Massimo Papa emphasizes the differences between the first generation of Muslim migrants and their descendants, resulting in a religious practice that serve increasingly less as conservation of the original traditions of migrants (M. Papa, *Il fiqh al-aqalliyyāt e il proselitismo islamico*, in Quaderni di diritto e politica ecclesiastica, (1), 165 (2020)).
[91] M.S. Berger, *Introduction: Applying Shari'a in the West*, in M.S. Berger (ed.), *Applying Shari'a in the West: Facts, fears and the future of Islamic rules on Family relations in the West*, 9 (2013). See also A. Rinella, *La Shari'a in Europa*, cit., 637 ff.

shari'a a powerful force for Muslims living in Western countries. Secondly, when Muslim persons ask for the application of *shari'a* or Islamic law in Western courts, they might be referring to the national law of their country of origin, not to the classical Islamic jurisprudence. Finally, it is possible to identify a commitment to living in accordance with *shari'a* limited to the fields of religious rules and practices (such as prayer and fasting, for example), family matters, financial transactions and social relations (in particular, gender relations)[92].

Historically, there has been no frequent requests from Western Muslim communities for the integral and decontextualized application of *shari'a* norms. Instead, their effort seems to be an adaptation of Islamic dictates to European nation-states' law[93]. One of such attempts has been the elaboration of *fiqh al-aqalliyat*, that is, the jurisprudence of Muslim minorities. One of the first Muslim religious figures to use this expression was Taha Jabir al-Alwani, who presided the *Fiqh* Council of North America. He defined it as follows:

> «'*Fiqh* of the minorities' [*Fiqh al-Aqalliyyat*] is a specific discipline which takes into account the relationship between the religious ruling and the conditions of the community and the location where it exists. It is a *fiqh* that applies to a specific group of people living under particular conditions with special needs that may not be appropriate for other communities. Besides religious knowledge, practitioners of this *fiqh* will need a wider acquaintance with several social sciences disciplines, especially sociology, economics, political science and international relations».[94]

Fiqh al-aqalliyat, therefore, is an effort of developing an Islamic jurisprudence specifically for Muslims living in countries where they constitute a religious minority, mainly through

[92] M.S. Berger, *Introduction: Applying Shari'a in the West*, cit., 10-11.
[93] M. Papa, cit., 166. For Angelo Rinella, however, "I segnali della società islamica in Europa sono contraddittori. Da una parte si registra una propensione delle minoranze musulmane a adattarsi ai valori della società occidentale che li ospita e a nutrire una sostanziale fiducia nelle istituzioni nazionali; dall'altro, si registra anche una persistente cultura patriarcale e la pervasiva influenza di quegli orientamenti religiosi che propongono una lettura del Corano in contrapposizione alla cultura occidentale e ai valori liberali dei paesi europei. Naturalmente tutto ciò non fa che alimentare trai i cittadini europei i dubbi circa la reale volontà delle comunità islamiche di adattarsi al contesto valoriale e culturale nel quale sono inserite socialmente e politicamente. Eppure recenti indagini empiriche mostrano che sono assai numerosi i musulmani europei osservanti che ricercano l'armonia fra le tradizioni religiose e il contesto sociale nel quale vivono; così come sono assai numerosi anche i musulmani che non avvertono contraddizioni tra il proprio stile di vita di tipo occidentale e l'Islam" (A. Rinella, *La Shari'a in Europa*, cit., 652).
[94] T.J. Al-Alwani, *Toward a fiqh for minorities: Some reflections,* 3 (2003).

the issuance of legal opinions (sing. *fatwa*; pl. *fatawa*)[95]. Massimo Papa classifies the discourses on *fiqh al-aqalliyat* into three lines of thought: the first, "puritan-literalist", is characterized by supporters of a literalist reading of Islamic texts, regardless of the social context; the second, which the author calls "conservative", has the University of Al-Azhar, in Egypt, as its main reference and sustains that Muslims in Western societies need special rules that exempt the application of Islamic law for reasons of necessity and contingency; finally, the third strand of *fiqh al-aqalliyat* is "innovative", whose leaders were Taha Jabir al-Alwani (previously mentioned) and Yusuf al-Qaradawi, who became president of the European Council for Fatwa and Research (ECFR)[96].

In fact, the ECFR, founded in 1997, represents «the institutionalization of collective *ijtihad*» and «the institutionalization of collective *fatwa* bodies»[97] in Europe. It is, according to Alexandre Caeiro's definition, «a transnational institution committed to the elaboration of a Muslim jurisprudence for minorities (*fiqh al-aqalliyyāt*) through the production and dissemination of fatwas for Muslims living in Europe»[98], although its membership remains exclusively male and Sunni, predominantly ethnically Arab and ideologically close to *wasatiyya*, an approach to Islamic law championed by al-Qaradawi[99]. Caeiro, describing the production of *fatawa* by the ECFR, points to «an underlying tension between, on the one

[95] In Islamic legal history and tradition, *mufti* is the jurist or scholar of law who issues a legal opinion (most frequently, on the rule applicable to a certain case). For the definition and historical usages of *fatawa*, see E. Tyan, *Judicial organization*, in M. Khadduri, H.J. Liebesny (eds.), *Law in the Middle East*, 248 ff. (1, 1955), and K.S. Vikør, *Between God and the Sultan: A history of Islamic law*, 141 ff. (2005). As the latter explains, "the most common type of *fatwa* over the centuries is the judicial one, a *fatwa* that is given on the basis of a case before the courts […]. Such a *fatwa* has a standard form: a 'questioner' (*mustaftī*) puts a problem that is before the court to the *mufti*. The question must be put in an abstract form, 'if such and such is the case, what is the law on such a matter?' The *mufti* will then answer, 'in that case, the law is so-and-so'" (*ivi*, 142-143).

[96] M. Papa, cit., 167-168.

[97] A. Caeiro, *The making of the fatwa*: *The production of legal expertise in Europe*, in Archives de sciences sociales des religions, 56, 81-100 (2011); Id., *The power of European fatwas: The minority fiqh Project and the making of an Islamic counterpublic*, in International Journal of Middle East Studies, 3, 435-449 (2010). The author provides a full account of the production of *fatawa* at the European Council for Fatwa and Research, relying on data collected through observation of its sessions, as well relevant academic literature on the subject. See also M. Rohe, *Islamic law in Western Europe*, in A.M. Emon, R. Ahmed (eds.), *The Oxford Handbook of Islamic Law*, 740 ff. (2018).

[98] A. Caeiro, *The power of European fatwas*, cit., 435.

[99] For an explanation about *wasatiyya*, see U. Shavit, *Sharī'a and Muslim minorities: The wasaṭī and salafī approaches to fiqh al-aqalliyyāt al-Muslima*, 16 ff. (2015) in particular: "*Wasaṭiyya* […] is an approach to Islamic law and, more broadly, a call to reform Muslim societies. This approach has been led, systemized, institutionalized, and popularized by the Egyptian-born Yūsuf al-Qaraḍāwī (b. 1926), a graduate of al-Azhar and a former member of the Muslim Brothers. […] al-Qaraḍāwī's scholarship is characterized by an attempt to cross the factionalism of the Brothers and appeal to wider audiences. The *wasaṭiyya* approach calls for adapting religious laws to changing times and circumstances in a way that would make the lives of Muslims easier and Islam more attractive. It promotes the objective of *al-taysīr fī al-fatwā wal-tabshīr fī al-da'wa*—facilitation in issuing religious laws and proselytizing by gentle means and in a gradualist manner. Application of this objective emphasizes the supremacy of the Quran to all other sources and the need for a contextual reading of its verses, promotes cross *madhhab* search, and broadly and flexibly utilizes the mechanism of determining *maṣlaḥa*".

hand, the attempt to reconcile traditional Islamic norms with the dominant practices of the mainstream host society and, on the other hand, a reiteration of the Islamic tradition's contemporary relevance»[100]. During deliberative sessions of the ECFR, members «engage in a hierarchization of textual authorities, weighing different interests and establishing priorities – in other word, they set about construction, each time anew, what Qaradawi calls a *fiqh* of balances and priorities (*fiqh al-muwazanat wa fiqh al-awlawiyyat*)»[101]. In addition,

> «Given the strong emphasis placed by the leadership of the ECFR on conformity with the Law, part of the task is to issue fatwas that stay within the limits of the laws of the different European states. Furthermore, since the fatwa must not 'destabilize' the society […], the production of a *pan-European fatwa* also requires an assessment of the shifting moods of European audiences regarding public religion in general, and Islam in particular. In other words, the fatwa must gauge the boundaries of acceptable religious discourses at each moment and across European countries in order to be able to serve 'the interests of Muslims' and 'the interests of the societies they live in'»[102].

However, as we already mentioned (see *supra*, section 1), the project of *fiqh al-aqalliyat* for Muslims in non-Muslim majority countries, in particular in Europe, faces the opposition of leading Muslim scholars and activists, who argue that Muslim persons are an integral part of European societies, and therefore should not isolate themselves by adopting the status of a minority. They should instead engage actively in the political process with the purpose of contributing to the common good and establishing a culture of entrenchment, while at the same time preserving their Muslim identity[103]. As an example, for Tariq Ramadan, «Toutes les lois qui protègent la vie et la dignité humaine, promeuvent la justice et l'egalité, imposent le respect de la nature, etc. sont *ma charia* appliquée dans *ma* société, même si celle-si n'est pas majoritairement musulmane ou que ces lois n'ont pas été pensées et

[100] A. Caeiro, *The power of European fatwas*, cit., 436. This tension, according to the author, reveals itself through the reading of ECFR's *fatawa*, particularly because of the oscillation between the emphasis on the powerlessness of Muslims in Europe and on their moral responsibility: "The former founds a regime of exceptions that suspend traditional Islamic norms through concepts such as 'necessity' and emphases on the need to abide by European laws. The latter purposively ignores the context (or minimizes its importance) in order to consolidate a Muslim identity rendered fragile – in the eyes of the muftis – by deep pressures towards assimilation" (*ibidem*).
[101] A. Caeiro, *The making of the fatwa*, cit., 94.
[102] *Ivi*, 95.
[103] M. Rohe, *Islamic law in Western Europe*, cit., 742-743.

produit par des savants musulmans»[104]. Other challenge comes from some of the *salafis*' criticism, since that, for them, living in non-Muslim majority societies is unacceptable, except for the purpose of proselytization. In fact, «They stress the universality of Islamic laws and thus reject, in principle though not always in practice, the accommodation of decisions to the unique conditions of Muslim minorities or the issuance of concessions as a means to enhance proselytization»[105].

The debate surrounding the applicability of Islamic law in Europe, especially in consolidated democracies, and the idea of *fiqh al-aqalliyat* seems to confirm Armando Salvatore's assertion that the process of redefinition of Muslim traditions in Europe tends to remain conflicted and multi-leveled. It is possible, as he sustains, that the consolidation of social and political agency does not derive from the hybridization of predefined Western and Islamic norms, «but rather reflect original and complex forms of interaction cutting through 'majority" and "minority' political cultures»[106].

V. ISLAMIC VIEWS ON POLITICAL PARTICIPATION OF MUSLIM MINORITIES IN EUROPE

As previously discussed, Muslim scholars issue *fatawa* in order to produce and disseminate legal opinions on issues concerning Islamic law and its application in a variety of settings, including where Muslims are a religious and political minority. These texts contain a normative point of view about what constitutes "a good Muslim life", and therefore reveal possible interpretations of specific subjects or legal matters from an Islamic perspective.

One such issue is the political participation of Muslims in European nation-states – if it is permissible under the normative framework of *shari'a* and for which reasons. A previous study distinguished between religious authorities from the Islamic world and from the Western world, adding a third and residual type of religious authority, «for instance by bringing together religious authorities from Europe and the Muslim world into one collective body»[107], which includes the European Council for Fatwa and Research. Studying

[104] T. Ramadan, 2009, 86, quoted in F. Frégosi, *Usages sociaux de la reference à la charia chez les musulmans d'Europe*, in B. Dupret (ed.), *La charia aujord'hui. Usages de la reference au droit islamique*, 74 (2012). In the same sense, see T. Ramadan, *Western Muslims and the future of Islam*, Oxford 2004, 224-225. For an account of Tariq Ramadan's position and its differences in comparison to the notion of *fiqh al-aqalliyat*, see also M. Papa, cit., 172 ff.

[105] U. Shavit, cit., 79.

[106] A. Salvatore, cit., 557.

[107] W. Shadid, P.S. van Koningsveld, *Religious Authorities of Muslims in the West: Their Views on Political Participation*, in W. Shadid, P.S. van Koningsveld (eds.), *Intercultural Relations and Religious Authorities: Muslims in the European Union*, 151 (2002).

the content of legal opinions that these authorities had issued, the authors found different answers and justifications for the question of political participation of Muslims in the West. For example, regarding the positions of scholars from the Islamic world, they present two opinions: the first had been written by Jadd al-Haqq Ali Jadd al-Haqq, the late Shaykh of Al-Azhar. When asked if it was permissible for a Muslim to join a Danish secular or Christian political party in order to take part in an election for local councils or national assemblies, the religious scholar allowed political participation «on the condition that this does not touch upon the creed of Islam or the fundamental interests of Muslims»[108]. The second is al-Qaradawi's, for whom political participation is a duty for Muslims in the West. If faced with a political party or candidate who holds hostile ideas against Muslims, the latter should choose in accordance with "the jurisprudence of balancing" (*fiqh al-muwazanat*), which «means that the Muslim weighs things and has to select the less prohibited and lighter depravity, leave the lower benefits to obtain the higher ones, select the smaller damage to avoid the more dangerous damage, and select the personal damage to avoid the general damage»[109].

In turn, most scholars living in Western countries sustain the obligatory character of political participation. Muhammad Rassoul, for example, justifies political participation of Muslims in Germany based on the possibility of the development of a "German caliphate" by means of the democratic political process. In the Netherlands, Muhammad Zaki Badawi presented a *fatwa* stressing that «Those who interpret Islamic citizenship as confining Muslim loyalty to only one section of humanity miss the essential universality and humanity of Islam»[110].

Finally, the European Council for Fatwa and Research issued a fatwa to answer if it was permitted for a Muslim to participate in local elections in Europe. The ECFR referred the question back to local Islamic foundations and associations, who could better assess if political participation would promote the general interest of Muslims, «on the condition that this does not imply a greater concession from the part of the Muslims than the advantage they enjoy»[111].

Uriya Shavit drew upon this work by focusing on *wasati* and *salafi fatawa*, demonstrating the existence of a predominant agreement among Muslim scholars on the permissibility of political participation in the West. According to him, «Legitimization of Muslim minorities'

[108] *Ivi*, 157.
[109] Quoted in *ivi*, 158.
[110] Quoted in *ivi*, 160.
[111] Quoted in *ivi*, 162.

political participation in non-Muslim majority countries was a logical result of the *wasati* approach to electoral politics and to their jurisprudence of Muslim minorities (*fiqh al-aqalliyyat al-Muslima*)»[112]. In particular, *wasati* scholars justify their opinion by stressing that participation serves a *maslaha* (i.e., a purpose of *shari'a*): promoting permanent Muslim presence in Western countries and the spread of Islam. They also stress the application of *fiqh al-muwazanat*, «suggesting that, while participation in infidel political systems involves harm from the religious point of view, or constitutes evil, the potential implications of abstention for Muslims and for Islam should be also considered»[113]. In this perspective, whenever the benefits for the Muslim community outweigh the harm in taking part of a system contrary to Islamic law, participation is allowed or even required.

In addition, many *salafi* jurists also permit political participation in the West. Although they reject the *wasati* approach, *salafis* reach a similar practical conclusion, since «their *fiqh* for Muslim minorities – which invokes proselytizing as a justification for residing in the West – recognizes the legitimacy of concessions when the communal *maslaha* of spreading Islam at large is at stake»[114]. Hence, «the mainstream *salafi* prohibition on being elected to parliaments that govern by laws other than Allah's is not categorical; it is lawful to run for office and to vote, if the purpose is to change the system into one that abides exclusively by Allah's laws»[115]. Nevertheless, Shavit's research revealed the lack of consensus on the issue, considering that some *salafi* jurists and *jihadi-salafi* activists refute the possibility of political participation because of their rigid application of the principle of loyalty and disavowal and their opposition to liberal-democratic norms[116].

These juristic opinions on the issue of political participation of Muslims in Western countries and, in particular, in Europe indicate a form of transnational politics and legal culture that challenges «the traditional demand of nation-states to be the primary source of citizens' allegiance»[117]. They corroborate the observation that European state law and Islamic law coexist in hybrid legal spaces and interact in many different ways,[118] including in the field of the public law's discipline of political participation. However, consolidated democracies in Western countries set up constitutional structures aimed at absorbing

[112] U. Shavit, *"The Lesser of Two Evils": Islamic Law and the Emergence of a Broad Agreement on Muslim Participation* in Western Political Systems, Contemporary Islam, 8, 242 (2014).
[113] *Ivi,* 244.
[114] *Ivi*, 250.
[115] Id., *Sharī'a and Muslim minorities*, cit., 74.
[116] See Id.,*"The Lesser of Two Evils"*, cit., 252.
[117] *Ivi*, 254.
[118] P. Parolari, *Taking interlegality seriously: Some notes on (women's) human rights and the application of Islamic family law in European countries*, in Revista General de Derecho Público Comparado, 28 (2020).

dissent and dealing with particularistic demands of specific groups, while *shari'a* and *fiqh* do not offer an uniform and rigid answer to the question of political participation of Muslims in Europe.

CONCLUDING REMARKS

The analysis developed throughout the article allow for some concluding remarks that, as a matter of fact, are likely to open a space for further reflections that are definitively needed in order to face the big challenge posed by the increasing cultural and religious pluralism to European democracies.

If we stay within the traditional constitutional framework of European pluralist democracies, as we saw, we must conclude that the free expression of cultural and religious identities in the public space, and in particular at the political level, is somehow implied by the centrality of democratic rights and liberties – and Islam is not an exception to that. Furthermore, not only this expression is legitimate, but it may also prove to be appropriate to the extent that it allows for historically marginalized groups to finally overcome discrimination and exclusion. Restrictions, let alone prohibitions, against the Islamic presence in the political arena are therefore acceptable insofar they are proportionate and functional to the protection of constitutional principles and interests.

If we move the analysis on a different level – trying to investigate whether this increased cultural and religious pluralism affects the form of State and, in particular, in which terms an "intercultural State"[119] may be conceptualized – the focus is not so much on the limits of fundamental rights and liberties but on the potential of representing minority cultural and religious identities in the political arena. The notion of "interculturalism", as is well known, relies on the dialogue between people with different (ethnic, cultural, religious, ideological) identities on an equal basis, with a view not only to let differences coexist side by side, but rather to make a new synthesis which is likely to represent a new (internally plural) identity. Reflecting on an "intercultural State" goes a step further by implying it is not sufficient to focus on specific (judicial, legislative, administrative) intercultural

[119] S. Bagni, *Lo Stato interculturale: primi tentativi di costruzione prescrittiva della categoria*, in S. Bagni, G. A. Figueroa Mejía, G. Pavani (eds.), *La ciencia del Derecho constitucional comparado. Estudios en Homenaje a Lucio Pegoraro*, 117 (II, 2017). See also the papers collected in the monographic issue "*La búsqueda de modelos de gestión intercultural de los conflictos sociales*", in Revista General de Derecho Público Comparado, 28 (2020).

solutions, but a re-framing of the State's fundamental principles from the perspective of constitutionalism and the form of State is needed. In identifying the intercultural State's essential elements, Silvia Bagni stresses the importance of political participation and representation, to the extent that it is crucial that every subject is involved on an equal basis in the definition of the (constitutional and legislative) rules that make it possible to "live together"[120].

It thus becomes essential to search for conditions and forms of interaction and coexistence between different worldviews, religious beliefs, cultural practices, taking into account that cultural and religious belonging may also imply, as with Islam, the adherence to an autonomous legal system.

Is it possible, from this perspective, looking at *fiqh al-aqalliyat* as a way to imagine an "intercultural law"? This very notion and its related jurisprudence are undoubtedly controversial and are challenged by harsh criticism within the community of Muslim scholars and activists. Despite its shortcomings, however, and while considering that it does not provide for an unequivocal answer to the question of political participation of Muslims in Europe, the idea of a "fiqh for the minorities" seems to demonstrate that there is room for original forms of interaction and overlapping legitimation between majority and minority political and legal cultures.

And, in addition, what role may minority (and Muslim, in particular) political participation and representation play in this search for the intercultural State's essential elements and conditions? While we agree that, for an intercultural State to really promote diverse citizens' search for the common good, the "question" of Islam in the political arena must be conceptualised not in the light of an "Islamic exceptionalism", but rather in terms of re-signified citizenship and political participation[121], the possibility for minority cultural and religious identities to really participate and be *substantially* represented at the political level remains a controversial issue. In fact, on the one hand, active political participation and effective access to representation of cultural and religious minorities, resulting in "diverse parliaments" where the multiple articulations of society are acknowledged, are relevant indicators of the form of State turning "intercultural". On the other hand, as already noted, descriptive and substantive representation do not necessarily coincide, since political actors with a minority background, even if they enjoy strong support and are eventually legitimized by the vote of the members of a minority group, do not automatically act «in the interest

[120] S. Bagni, cit., 169-170.

[121] See. G. Spanò, cit., 30, who regards the presence of Islam in the political sphere of Western democracies as a «legitimate *framework of argumentation* and a shared space for (particularistic) claiming, not letting different identities run in circles inside stereotypical roles».

of the represented, in a manner responsive to them»[122]. Furthermore, the ambiguities of ascriptive identities, with their potentially sectarian and anti-democratic character, cannot be underestimated[123], as well as the pitfalls that are likely to stem from political activism aimed at representing European Muslims[124].

[122] H. Pitkin, cit., 109.
[123] See M. Nadim, *Ascribed representation: ethnic and religious minorities in the mediated public sphere*, in A.H. Midtbøen, K. Steer-johnsen, K. Thorbjønsrud (eds.), *Boundary Struggles: Contestations of Free Speech in The Norwegian Public Sphere*, 230 (2017), who notes how minority groups managing to participate in public and political debate (e.g. by having access to the media) often experience a process of "ethnicization" in terms of being "trapped" in a specific ethnic and religious identity, with that single aspect of a person's identity determining how she is represented and what topics she can address.
[124] M. Didero, *Muslim Political Participation in Germany: A Structurationist Approach*, in J.S. Nielsen (ed.), *Muslim Political Participation in Europe*, 50 (2013), for example, identifies them in «foreigners being equated with Muslims and both being perceived as social out-groups, any political organisation which knowingly positions itself with relation to both of these categories needs to be aware of the severe headwinds it will face».

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

Maria Francesca Cavalcanti

TABLE OF CONTENTS

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.

---

[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.

---

[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].

[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].

---

[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.

[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.

---

[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].

---

[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].

---

[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.

---

[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.

---

[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.