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GLOBAL NORTH, LEGAL PLURALISM AND RELIGIOUS ADJUDICATION: THE RELATIONSHIP BETWEEN MUSLIM COMMUNITIES AND THE STATE IN UNITED KINGDOM, FINLAND AND THE NETHERLANDS

Riccardo Arietti

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Within the borders of the countries that form the Global North, the links between informal justice and 'official' jurisdictional channels have become more intense. Such a situation leads to grappling with the notion of legal pluralism: in particular, a paramount role is occupied by Sharaitic justice, which is of great relevance to the Islamic communities spread all over Europe. This patchwork of unofficial courts, guardians of values and customs related to personal status comes to work far too often in the shadow and parallel with official courts. More precisely, by scrutinising the dynamics and relationships between religious marriages and civil ones, it is likely to notice the rise, in each country, of various models of legal pluralism, which switch based on the State's reply. A first example of this can be found in the British context, where the debate on the phenomenon of Sharia Councils has been going on for more than a decade. Similarly, Finland and the Netherlands also faced the emergence of almost identical demands.

Keywords: Global North; Muslim communities; Sharia Councils; Unregistered Marriages; Legal Pluralism.

I. MINORITIES, ISLAM AND GLOBAL NORTH: AN OVERVIEW

As societies in the Western legal tradition become more and more complex, some breaking points emerge between groups and the State, pushing the first ones farther away from the binaries of the 'official' legal system.

More precisely, we can identify each religious entity as an autonomous creator of rules and, thus, we can define them as a 'nomos', according to the notion offered by R. Cover, which can smash the State's monopoly of producing juridical provisions: while «the creation of legal meaning […] takes place always through an essentially cultural medium», and since the procedure of shaping the perception of legitimacy is a collective process, the religious communities are qualified to challenge the State's rule-making as they are guardians of a culture-based medium[1]. Within a world long handed the so-called 'end of history'[2] and that glimpses the powerful revival of religious issues as a tool employed to design the borders of every legal order, «it has become increasingly reductionist, and dangerous, to insist that 'law' or 'religion' as monist entities on their own can manage sustainably how we live together»[3].

The tensions between religion and the State, enhanced by globalisation[4], may just be decoded by balancing the competing interests at stake and harmonising the fundamental human rights

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[1] R.M. Cover, *The Supreme Court 1982 Term – Forward: Nomos and Narrative*, in 97 *Harv. L. Rev.* 1, 1983, p. 11.

[2] F. Fukuyama, *State-building Governance and World Order in the 21st Century*, Ithaca, 2004.

[3] W. Menski, *European Islam in the Age of Globalisation and Legal Pluralism: Not Easy Being European*, in 1 *Nord. J. L. Soc. Res.*, 10, 2021, p. 187.

[4] According to A. Büchler, *Islamic family law in Europe? From dichotomies to discourse – or: Beyond cultural and religious identity in family law*, in 8 *Int. J. Law Context* 2, 2012, p. 197, «globalisation has […] not only made society more pluralistic, it has also made social groups more ethnic».

involved[5]. That lesson seems ingrained in the Global South countries[6], as compared to the Global North ones, overwhelmed by an approach in which «official claims are advanced that the state law is uniform and supreme»[7]. The collision discloses a struggle between some models that are still locked in a scenario of legal centralism and those that support legal pluralism, a feature «seen as problematic by 'modern' scholars», but which «is […] the globally dominant legal arrangement»[8]. However, this is not a novelty in the West because, for many Centuries, legal systems were marked by several pluralistic trends[9].

The hints provided by discussions on minorities and legal pluralism receive tremendous leverage when they reach the issue of Muslim communities' relations within Western countries.

Here, it is clear that populations from Afro-Asiatic backgrounds belonging to the Islamic religion somehow tend to overcome their Diaspora by re-establishing, onto foreign soil, the body of rules they are bound[10]. With a share of the population of around 5% and the ever-increasing phenomena of Islamophobia[11], the Islam issue arose in Europe, along with the deception that Muslim communities require wholesale enforcement of any part of the Sharia. Otherwise, qualitative and quantitative research proves that «support is strongest for applying Muslim family law, and weakest for some of the sharia-based physical punishments, such as stoning, whipping, and amputation of limbs»[12]. The most risky area of intervention narrowed down to family and marriage matters, where Muslim communities, compelled by the Qur'an, choose the spiritual code rather than State rules in the performance of marriages, giving space for the growth of an internal legal pluralism filled by religious courts[13].

Using the comparative method[14], this paper aims to explore, through the analysis of case studies referring to three countries that have differently haggled with the troubles posed by European Islam, the links between Muslim communities and the State, focusing on how the State reaction affects in terms of legal pluralism. The research means to clarify if the

[5] *E.g.* I. Leigh, *Religious Adjudication and the European Convention on Human Rights*, in 8 *Oxf. J. Law Relig.* 1, 2019, p. 8, maintains that «the self-governance of religious communities is an important aspect of collective freedom of religion and belief. This entails freedom to associate with other likeminded religionists, and self-governance according to religious norms free from state interference follows from this. These norms typically involve such important aspects of communal and family life, including membership, admission, discipline and expulsion from religious communities, recognition of family events such as marriage, divorce, maturity into adulthood and the acceptance of children into full membership, inheritance as well as questions such as dietary observance». See M. Malik, *Minorities and the Law: Past and Present*, in 67 *Curr. Leg. Probl.* 1, 2014, p. 67-98; R. Hischl, A. Shachar, *Competing Orders: The Challenge of Religion to Modern Constitutionalism*, in 85 *U. Chi. L. Rev.* 2, 2018, p. 425-455.

[6] A broad definition in J.L. Comaroff, J. Comaroff, *Theory from the South: Or, How Euro-America is Evolving Toward Africa*, Boulder, 2012.

[7] W. Menski, *supra* note 4, at p. 197.

[8] *Ibid.*, at p. 198.

[9] For example N.V. Vinding, *Sharia and the Scandinavian Welfare States*, in 16 *Scand. J. Islam. Stud.* 2, 2022, p. 10, assumes that «the state has always been a producer of religion, and the argument is that the pluralisation of the post-Westphalian state-and-religion relations facilitates breaking the monopoly on goods of salvation […]».

[10] A. Büchler, *supra* note 5, at p. 202.

[11] B. Polok, *Islamic Personal Law in Europe: A Chance for the Integration of European Muslim Community*, in 7 *LUMS L. J.*, 7, 2020, p. 152-153. See *also* https://www.pewresearch.org/religion/2017/11/29/europes-growing-muslim-population/.

[12] V. Dzutsati, C.M. Warner, *The socioeconomic matrix of support for sharia: a cross-national study of Muslims' attitudes*, in *Relig. State Soc.*, 2021, p. 13.

[13] M. Berger (ed.), *Applying Shari'a in the West: facts, Fears and the Future of Islamic Rules on Family Relations in the West*, Leiden, 2013.

[14] E. Örücü, D. Nelken (eds.), *Comparative Law: A Handbook*, Portland, 2007.

emergence of complex societies automatically involves the endorsement of legal pluralism and if the vehicles of religious justice should be opposed or incorporated into the web of the official legal order. The ultimate question is whether «state law should permit religious legal obligations to be enforced in the sense of allowing them to be adopted as or translated into state obligations»[15].

Therefore Section II will discuss the concept of legal pluralism. Then (Section III), the United Kingdom case is scrutinised, showing a vibrant interaction between Muslim law bodies and State Courts. In Section IV the focus moves to Finland, where cooperation between the State and the religious authorities has dramatically curbed the issue of legal pluralism. Lastly, Section V deals with the Netherlands. In this country the political climate utterly opposed to the Muslim minority has led to a severe enclavisation of the communities: although the judiciary tries to offer safeguards, the State ruled out any possible enforcement of the Islamic-based conventions. The final Section includes some considerations inspired by the review of the three countries.

II. LEGAL PLURALISM MODELS

Shifting to the peripheries of the foremost pillar of this article, we can outline numerous definitions of legal pluralism starting with the outbreak of studies in the 1970s[16].

This contribution offers a broad outline to provide the reader with some tools to face the consequent analysis effectively: approximately, «at its core, legal pluralism refers to the co-existence de jure or de facto of different normative legal orders within the same geographical and temporal space»[17].

Based on this initial statement, it is now possible to split the classification into chronological criteria. Alongside *classic legal pluralism*, which focuses on the search into the vestiges of customary and traditional law in the lands colonised by the West and explores their ties with European law, one finds *new legal pluralism*, which follows a similar survey in Western countries and, thirdly, *post-modern legal pluralism*, shaped by global and transnational law[18].

Within the studies coupled with the relationship between groups and the State, the most paramount one is the work by S. Falk Moore, who introduced the visionary image of a 'semi-autonomous social field', a kind of group-network that has «rule-making capacities, and the means to induce or coerce compliance». At the same time, the 'semi-autonomous social field' is «set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance», and is traceable as far «in a tribal society» as in «all the nation-states of the world». This paves the way for the research of the phenomena of pluralism in the West[19].

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[15] I. Leigh, *supra* note 6, at p. 3.

[16] *Ex multis*, L. Pospisil, *Anthropology of law: a comparative theory*, New York, 1971; J. Gilissen (ed.), *Le pluralisme juridique*, Bruxelles, 1972; M.G. Smith, *The Plural Society in the British West Indies*, Berkeley, 1974; M.B. Hooker, *Legal Pluralism – An Introduction to Colonial and Neo-Colonial Laws*, Oxford, 1975.

[17] H. Quane, *Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?* in 33 *Oxf. J. Leg. Stud.*, 4, 2013, p. 676.

[18] B. Sousa Santos, *State, Law and Community in the World System: An Introduction*, in 1 *Soc. Leg. Stud.*, 1, 2, 1992, p. 131-142; G. Teubner (ed.), *Global Law Without a State*, Aldershot, 1997; R. Michaels, *Global Legal Pluralism*, 5 *Ann. Rev. L. & Soc. Sci.*, p. 1-35, 2009..

[19] S.F. Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, in 7 *Law Soc. Rev.* 4, 1973, p. 720 ff. Lately, G. Swenson has also forged the four 'archetypes' of legal pluralism, which represent at times a dispute between groups and the State (*combative legal pluralism*; *competitive legal pluralism*) and at other times a partnership (*cooperative legal pluralism*; *competitive legal pluralism*). G. Swenson, *Legal Pluralism in Theory and Practice*, in 20 *Int. Stud. Rev.*, 2018, p. 438-462.

Concerning the categories, the classification drawn by J. Griffiths, who differentiates legal pluralism in a 'strong' sense, «a situation in which not all law is state law nor administered by a single set of state legal institutions, and in which law is therefore neither systematic nor uniform», and in a 'weak' sense «when the sovereign […] commands […] different bodies of law for different groups in the population», is still useful[20].
The models of legal pluralism, hence, range from the «classic example of non-state law co-existing with but separate from state law, to the formal integration of religious/customary law into state law, to non state law operating in a semi-detached manner from the state»[21], with the result that, as the current legal pluralism tendency maintains, «plural normative orders are found in virtually all societies»[22].
Yet, the matter doesn't remain confined to academic hypotesis. The European institutions carried a harsh view upon the compatibility of Sharia and the Western legal system, triggering what has been termed a 'moral panic'[23] against Islamic law in Europe, which has engaged States with increasing stakes of legal pluralism[24]. Notably, the ECHR's position is severe: starting with *Refah Partisi (the Welfare Party) and Others v. Turkey* (2003), the Court declared the wholesale irreconcilability between Sharia and the European Convention on Human Rights, in a strict manner not even overcome by the later *Molla Sali v. Greece* (2018) ruling[25]. The Court rejects the legal pluralist dimension, while this hard-line approach has been criticised because it is not unproblematic, inasmuch as «the criticism of Islam as a whole lead to an even more resolute rejection of Western values and radicalisation of Muslim views»[26]. Contrary to this Global North attitude quite unfriendly to multi-cultural and inter-cultural approaches[27], the Global South nations are more open, as witnessed by judgments of the African Court on Human and Peoples' Rights and the IACHR[28].

III. The UK among Sharia Councils and Muslim Arbitration Tribunal (MAT)

The first country comprising the review is the United Kingdom. In this nation, the immigration from lands within the British Commonwealth – mainly from the Indian Subcontinent and Eastern Africa – has created partings among Muslim communities at the territorial, political and legal tiers.

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[20] J. Griffiths, *What Is Legal Pluralism?*, in 18 *J. Leg. Plur. Unoff. Law*, 24, 1986, p. 5.
[21] H. Quane, *supra* note 18, at p. 681.
[22] S.E. Merry, *Legal Pluralism*, in 22 *Law Soc. Rev.* 5, 1988, p. 873.
[23] R. Sandberg, F. Cranmer, *The Council of Europe and Sharia: An Unsatisfactory Resolution?*, in 21 *Eccles. Law J.* 2, 2019, p. 212.
[24] I. Shahar, *Legal Pluralism and the Study of Shari'a Courts*, in 15 *Islam. Law Soc.* 1, 2008, p. 112–141; J. Auda, *Rethinking Islamic law for Europe. The concept of the Land of Islam*, in M. Hashas, J.J. De Ruiter, N.V. Vinding (eds.), *Imams in Western Europe. Developments, Transformations, and Institutional* Challenges, Amsterdam, 2018; P. Parolari, *Diritto policentrico e interlegalità nei paesi europei di immigrazione. Il caso degli shari'ah councils in Inghilterra*, Torino, 2020.
[25] *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], app. no. 41340/98 (2003); *Molla Sali v. Greece* [GC], app. no. 20452/14 (2018).
[26] B. Polok, *supra* note 12, at p. 167.
[27] W. Kymlicka, *The rise and fall of multiculturalism? New debates on inclusion and accommodation in diverse societies*, in 61 *Int. Soc. Sci. J.*, 61, 2010, p. 97-112; K. Banting, A. Harell, W. Kymlicka, *Nationalism, Membership and the Politics of Minority Claims-Making,* in 55 *Can. J. Pol. Sc./Rev. Canad. Sci. Pol.* 3, 2022, p. 537-560; N. Meer, T. Modood, *How Does Interculturalism Contrast with Multiculturalism?*, in 33 *J. Intercult. Stud.* 2, 2012, p. 175-196.
[28] *E.g.*, *Amnesty International and Others v. Sudan*, African Commission on Human and Peoples' Rights, Comm. No. 48/90, 50/91, 52/91, 89/93 (1999); *Saramaka People v. Suriname*, Inter-American Court of Human Rights (2007).

From the 1970s onwards, Muslims in the UK began to restrain their family law, including precise regulations for the celebration and annulment of marriage[29]. After few decades of 'stillness' the legal publications flared a vibrant debate in 2008, following a lecture by the Archbishop of Canterbury, Rowan Williams, who proposed to open up to Sharia law, claiming that the expansive use of spiritual rules by members of the Islamic belief would make it feasible to harmonise spiritual rules with State law[30]. A wide-ranging argument followed, taking on the shapes of what has been called a 'tabloid outrage'[31] and revealing Islamophobia in the British context, which has been described as «ethnic nationalism characterised by structural and cultural racism based on anti-immigrant, anti-minority and anti-Muslim rhetoric»[32].

Behind this clash, the informal marriage practices of Muslims, lacking recognition by the country's official law, foster the emergence of religious justice structures.

The so-called Sharia Councils, which operate informally and at the risk of violating the human rights of women and the minor children of couples, are alienating Muslims from the State. The only court formally recognised by the UK, the Muslim Arbitration Tribunal (MAT), is failing to meet the communities' demands, because «Muslims have deep disagreements on the nature of marriage and its legal and religious consequences, facts that give them reason to support legal pluralism»[33].

The issue of Sharia Councils is surely controversial. According to Zee, these informal and unregistered councils apply Sharia in all areas of law, coming into conflict with the state by creating a parallel legal system[34]. Conversely, other authors confirm that «95% of the case load for Sharia Councils encompasses women seeking divorce, of whom women in unregistered 'Islamic' marriages form the predominant majority as they have no recourse to the English courts to dissolve their union should they so choose»[35]. As a result, Islamic communities' claims of legal pluralism are severely limited to family law. The necessity to engage Sharia Councils stems, indeed, from the need to appear divorced in the eyes of the community, which is considered just as important as a civil divorce. In the want of an Islamic judge, this absence must be compensated by granting the wife's request for dissolution in the Quranic cases or by ratifying the husband's unilateral divorce.

The position of the MAT is a different one. This tribunal, which is very important in sketching the main features of Muslim law in the UK, offers legally binding arbitration based on Islamic law. It operates under Secc. 46 and 66 of the *Arbitration Act* (1996)[36]. However,

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[29] Cf. S. Poulter, *Ethnicity, Laws and Human Rights: The English Experience*, Oxford, 1998, p. 196 ff.

[30] R. Williams, *Civil and Religious Law in England: A Religious Perspectiv*e, in 10 *Eccles. Law J.* 3, 2008, p. 262-282.

[31] See J. Wilson, *The Sharia Debate in Britain: Sharia Councils and the Oppression of Muslim Women*, in 1 *Aberd. Stud. Law Rev.* 4, 2010, p. 46.

[32] According to T. Abbas, *Islamophobia as racialised biopolitics in the United Kingdom*, in 46 *Philos. Soc. Crit.* 5, 2020, p. 498, «populism, authoritarianism and white supremacism are the paradigms that dominate political thinking in relation to questions of difference, diversity and division in societies across the global north».

[33] B. Clark, *Legally Pluralist and Rights-Based Approaches to South African and English Muslim Personal Law – A Comparative Analysis*, in 53 *Comp. Int. Law J. South. Afr.* 2, 2020, p. 4.

[34] M. Zee, *Five Options for the Relationship between the State and Sharia Councils. Untangling the Debate on Sharia Councils and Women's Rights in the United Kingdom*, in 16 *J. Relig. Soc.*, 2014, p. 3. This view is fairly endorsed by E. Manea, *Application of islamic law in the UK and universal human rights*, in 29 *Rev. Estud. Int. Mediterr.*, 2020, p. 73.

[35] S.S. Ali, *Authority and authenticity. Sharia councils, muslim women's rights and the English courts*, in 25 *CFLQ* 2, 2013, p. 132.

[36] *Arbitration Act* (1996), Sec. 46: «(1) 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 determined by the tribunal. (2) For this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules. (3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable». *Arbitration Act* (1996),

though the MAT may deliver judgments enforced as legally binding by the civil courts, it is not interested in marital issues, thereby failing to address this crucial topic in conformity with the English rules. Those examples display «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»[37]. Comparing the two cases, however, it appears that those courts dealing with the most sensitive subjects (Sharia Councils) are not recognised, while the MAT – which acts as a hinge between the systems – fails to satisfy general demand.

The real breaking point of the system is the unregistered Muslim marriage (the so-called 'nikah-only marriage'). According to contemporary estimations, around 75-80% of Muslim marriages celebrated on British ground are not registered[38]: this is a result of a legislation (Marriage Act, 1949; Matrimonial Causes Act, 1973) which is rigid and based on a set of formal requirements that British-Muslim couples often fail to comply with[39]. When these marriages are brought before the civil courts, they are ultimately declared as non-existent marriages, denying the weaker party of the financial support that could even be granted in the face of a decree of nullity: thereby, «the inaccessibility of the courts means that those married under Sharia Law have to obtain religious divorces from religious and cultural tribunals instead of resorting to the courts»[40], bringing a serious *vuluns* to women's and children's rights, which are pushed into a religious court that may not, in all cases, make binding rulings on their behalf. If, on the one hand, it is clear that «the role of the law in this context is to balance two rights of equal constitutional importance»[41] on the other, the case law has failed to resolve this conundrum, as the decision in *Akhter v Khan* (2018), which qualified these marriages as void rather than non-existent, was overturned on appeal two years later[42].

This opens up the chance to relate the UK's difficulties in accommodating Muslim marriage practices, which tend to the existence of informal religious tribunals, to the model of legal pluralism that best defines the actuality of the country. The British-Muslim community bears both the features of a 'nomos', in creating and implementing its own rules, and of a 'semi-autonomous social field', in interacting with its system of rules and that of British civil law. At the same time, failing to link Muslim legal institutions to the judicial system creates a *strong legal pluralism*. The lack of dialogue between the courts and the *Sharia Councils* reinforces this argument, while «better protection could be achieved by state regulation of religious and

Sec. 66: «1) 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. (2) Where leave is so given, judgment may be entered in terms of the award. (3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award […]». For practical details regarding the legislation see M. Zee, *supra* note 35, at p. 5.

37 E. Odorisio, *The Muslim Arbitration Tribunal (MAT)*, in 11 *Comp. L. Rev.* 1, 2020, p. 80.

38 S. Gondal, *Limping marriages: a problem cured or hidden?*, in 51 *Fam. L.*, 2021, p. 1181.

39 By now, the bibliography is huge: since it is not convenient to review the full case at this stage, we would refer to R. Probert, S. Saleem, *The Legal Treatment of Islamic Marriage Ceremonies*, in 7 *Oxf. J. Law Relig.* 3, 2018, p. 376-400; R. Akhtar, *Modern Traditions in Muslim Marriage Practices, Exploring English Narratives*, in 7 *Oxf. J. Law Relig.* 3, 2018, p. 427-454; V. Vora, *The Continuing Muslim Marriage Conundrum: The Law of England and Wales on Religious Marriage and Non-Marriage in the United Kingdom*, in 40 *J. Muslim Minor. Aff.* 1, 2020, p. 148-162.

40 B. Clark, *supra* note 34, at p. 9 ff.

41 J. Wilson, *supra* note 32, at p. 52.

42 *Akhter v. Khan*, [2018] EWFC 54; *HM Attorney General v. Akhter*, [2020] EWCA Civ 122.

cultural practices, including Islamic arbitration»[43]: contrariwise, Muslim communities create a 'hybrid law' named *Angrezi Shariat*, which is far below human rights protection standards[44]. As long as the touchpoints are narrow[45], it is obvious that «failure to formally recognise Islamic legal institutions operating in Britain would force these institutions to continue operating in the private sphere, where women are at the mercy of their communities», whereas «by formalising the Sharia Council and subjecting Islamic legal institutions to secular state regulation, arbitrators could be encouraged to comply with national human rights and gender equality legislation»[46].

IV. APPROPRIATE GOVERNANCE FOR THE MINORITY GROUPS IN THE FINNISH SYSTEM?

The aforementioned scenario is fundamentally at odds with the Finnish example for many reasons. The relationship between Muslim Communities and the State has been studied for a short time in this country, nevertheless, the issue is a well-known one to Nordic scholars. The latter have been reasoning at length on how the arising of Islamic courts in the West may manifest themselves[47].

In Finland, the history of Muslim residents is a young one. Apart from the only community with historical ties to the region, i.e. the Tatars, that dates back to the 19th Century, Muslims came in between the 1980s and 1990s and stayed small in population numbers at a maximum of 100,000 individuals, thus avoiding both marginalisation and radicalisation. Hence, a public debate centred upon the 'Islamic dilemma' is absent in the country[48].

We have already noticed how one precise moment of a clash between Islamic practices in the European context and national states lies in the parting between Muslim wedding traditions and State legislation. The first *Finnish Marriage Act*[49] entrusted all religious congregations with the right to celebrate marriages: in case of Islam, the *Freedom of Religion Act* (2003), which recognises Muslims as a religious community, reinforces these provisions[50]. Under the *Performing of Marriage Ceremonies* (2008), the local register office ('maistraatti'), following a request, gives authorisation to a religious celebrant, who is free to perform a legally binding marriage: the marriage certificate is, subsequently, registered by the same

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[43] J. Wilson, *supra* note 32, at p. 51.

[44] D. Pearl, W. Menski, *Muslim Family Law*, III, London, 1998; I. Yilmaz, *Law as Chameleon: The Question of Incorporation of Muslim Personal Law into the English Law*, in 21 *J. Muslim Minor. Aff.* 2, 2001. See: *http://dx.doi.org/10.2139/ssrn.1782170;* A.A. Ahmed, *Anglophone Islam: A new conceptual category*, in 16 *Cont. Islam.* 2, 2022, p. 135-154.

[45] *Uddin v. Choudhury*, [2009] EWCA Civ 1205.

[46] J. Wilson, *supra* note 32, at p. 63. See also VV.AA., *The independent review into the application of sharia law in England and Wales*, 2018.

[47] J. Petersen, *The Islamic Juridical Vacuum and Islamic Authorities' Role in Divorce Cases*, in 1 *Nord. J. L. Soc. Res.* 10, 2021, p. 71 ff. Later on, Petersen himself observes: «women therefore rely on their husbands consent if they want an Islamic divorce that is accepted socially but in cases of disputes there are no legal institutions that can hear their cases. For this reason, some women start searching for court-like institutions that can play the role of an Islamic court or Islamic authorities who can play the role of an Islamic judge. In other words, it is not the imam or Islamic religious authority who tries to uphold a jurisdiction, he is cast in the role of a sort of quasi Islamic judge by a demand among a segment of Muslim women».

[48] Cf. M. Al-Sharmani, S. Mustasaari, *Between 'Official' and 'Unofficial': Discourses and Practices of Muslim Marriage Conclusion in Finland.*, in 7 *Oxf. J. Law Relig.* 3, 2018, p. 461 ff.

[49] *Marriage Act* (1929), act no. 234/1929.

[50] See M. Al-Sharmani, S. Mustasaari, *Governing Divorce Practices of Somali Finnish Muslims: Does Religious Literacy Matter?*, in I. Rissanen, M. Ubani, T. Sakaranaho (eds.), *The Challenges of Religious Literacy. The Case of Finland*, Cham, 2020, p. 58.

celebrant[51]. Thanks to these circumstances, the spiritual communities in Finland are entitled to enter into legally binding marriages via authorised people: so, they perform «marriages […] as valid as civil marriages concluded at a notary office»[52]. This shows a notable tendency in cooperation on the part of both religious authorities and the State. As stressed by M. Al-Sharmani and S. Mustasaari, differently from what occurs in the prevalence of Western countries, «some mosques — in their roles as officially registered religious communities undertaking the responsibility of attending to the spiritual needs as well as the integration of Muslim families into the larger society — promote Muslim marriage and divorce practices that combine and reconcile between Islamic and Finnish laws»[53]. This encourages a renewed understanding of secular and religious law as two pillars of an extremely significant stage in the lives of people. This framework of far-reaching liberalisation of matrimonial affairs is reinforced by the lack of penalties for marriages that were concluded informally. Similarly, there is no requirement to perform a civil marriage just before a religious one[54]. This virtuous link is even boosted by the flexibility of marriage laws and the limited number of Muslims in Finland. These conditions promote the development of best practices due to a case law exceptionally careful to protect minorities and migrants[55]: unlike the UK, «disputes about the validity of Muslim marriages or their legal existence have not been reported in Finnish courts»[56].

The interaction of the Finnish Islamic 'nomos' and the State then leads to a kind of *weak legal pluralism*, whereby the State prescribes the general regulations and frees the communities to arrange the marriages along the ritual norms[57]. In addition to bridging the detrimental consequences concerning the weak parties this makes it easier to achieve *joint governance* as first proposed by A. Shachar, resulting in cooperation among the social actors to reach the well-being of the whole citizenship[58].

The existing situation obviates the desire (for Muslim devotees) to seek for Sharia Council-like bodies, which is not witnessed in Finland: moreover, unregistered and, in turn, not legally binding marriages are decreased to a minimal number. The power of the Finnish model rests on the assertion that «as the state grants the mosque a sense of legal authority it simultaneously grants the religious community a recognized space for exercising religious authority»[59].

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[51] S. Mustasaari, V. Vora, *Wellbeing, law, and marriage. Recognition of Nikah in multicultural Britain and the Finnish welfare state*, in M. Tilikainen, M. Al-Sharmani, S. Mustasaari (eds.), *Wellbeing of Transnational Muslim Families. Marriage, Law and Gender*, I, London/New York, 2019, p. 49.

[52] M. Al-Sharmani, S. Mustasaari, *Islamic Family Law(s) in Finland: Reflections on Freedom of Religion from the Wellbeing Perspective*, in 58 *Nord. J. Stud. Relig.* 2, 2022, p. 225-226.

[53] M. Al-Sharmani, S. Mustasaari, *supra* note 51, at p. 57.

[54] In M. Al-Sharmani, S. Mustasaari, *supra* note 49, at p. 460 ff, the authors state that «unlike some other European states, the Finnish state has so far not viewed religious marriages as problematic», and, thus, «Finnish law includes no provisions that would […] penalize religious-only marriages or require that a civil marriage be concluded prior to a religious one».

[55] See *Finnish Supreme Court*, KKO:2005:84, where the Court upheld the validity of a wedding entered into to circumvent the immigration rules.

[56] M. Al-Sharmani, S. Mustasaari, *supra* note 49, at p. 473.

[57] Based on the survey of M. Al-Sharmani, S. Mustasaari, *supra* note 51, at p. 59, it is quite obvious that «for Muslims in Finland, it is often a case of legal pluralism where individuals use both Finnish and Islamic legal systems to organize their marriages and divorces».

[58] A. Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights*, Cambridge, 2001.

[59] M. Al-Sharmani, S. Mustasaari, *supra* note 49, at p. 467.

V. CLASH, CONCURRENCY AND INFORMAL LAW IN THE NETHERLANDS

The situation in the Netherlands is even slightly non-identical to what has been reported in UK and Finland. It is, we would suggest, stuck someway in the midpoint of the two foregoing models.

The Dutch are historically oriented towards a deep pluralism in the governance of their societies. Between the two World Wars – and more accurately since the 1950s – the so-called 'Pillarisation' model became well established in the Netherlands. The Dutch population was partitioned into several pillars ('zuilen') on the grounds of their religious (i.e. Catholic pillar, Protestant pillar) as well as political (i.e. Socialist pillar, Liberal pillar) memberships, in which groups could arrange themselves separately and autonomously[60]. Under this system, which lasted until the late 1970s, the Netherlands was split into a cluster of parallel, autonomous entities[61].

Regardless, this technique of the government to hold minorities and group rights drastically moved in the later decades, right when more heavy Muslim immigration broke out. Whereas the 1960s and 1970s brought the rise of the two major communities – the one from Turkey and the one from Morocco – their membership in the Islamic faith wasn't felt to be problematic by Dutch institutions, «in the early 1980s, the number of migrants with an Islamic background had increased considerably, mainly as a result of family reunion, and they became more visible in society»[62]. Thus, the phenomena described as 'Muslim enclavisation' grew explosively from this moment onwards[63]. So on, Muslims in the Netherlands alienate themselves from civil society, not least because «forms of Islamophobia, have influenced Muslims' lives considerably and also impacted on their social and political participation»[64]. Hence, a narrative that views the Muslim communities as bearers of a stigma increases and the former largely pro-minority approach is displaced by a hard-line assimilationist trend[65].

This relatively rough attitude is also mirrored in the experience of Muslim marriages, which are dealt with in an erratic manner in the Global North countries.

The issue of unregistered Muslim marriages spread on a significant scale from the 2000s onwards and is modelled, similarly to the United Kingdom, in a wholly informal way[66]: even

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[60] J. Rath, R. Penninx, K. Groenendijk, A. Meyer, *The recognition and institutionalisation of Islam in Belgium, Great Britain and the Netherlands*, in 18 *J. Ethn. Migr. Stud.* 1, 1991, p. 57.

[61] The '*Pillarisation*' scheme is outlined as such by I. Sportel, *Claims-making in court cases on children: Religion, ethnicity, and culture in cases of Dutch minority families against the state*, in 11 *Oñati Socio-Leg. Ser.* 4, 2021, p. 1072: «Since the late 19th century, Dutch society was organised in denominational spheres, called "pillars", where Catholics, Protestants, and social-democrats – as well as smaller humanist and liberal groups – each had their own political parties, social institutions, trade unions, radio and television programming, and even shops».

[62] M. de Koning, T. Sunier, *"Page after Page I Thought, That's the Way It Is". Academic Knowledge and the Making of the 'Islam Debate' in the Netherlands*, in 10 *J. Muslims Eur.* 1, 2021, p. 93.

[63] T. Sunier, *Islam, locality and trust: making Muslim spaces in the Netherlands*, in 44 *Ethn. Racial Stud.* 10, 2021, p. 1741.

[64] M. de Koning, T. Sunier, *supra* note 63, at p. 90-91.

[65] According to I. Sportel, *supra* note 62, at p. 1072, «from the 1990s onwards this minority-based approach, characterised by an ideology of multiculturalism and plurality started to shift. A harsher, more nationalistic and disciplinary discourse of assimilation slowly became dominant». About adverse opinions on Islam in the Netherlands, see J. Rath, R. Penninx, K. Groenendijk, A. Meyer, *supra* note 61, at p. 63.

[66] A. Moors, V. Vroon-Najem, *Converts, marriage, and the Dutch nation-state. Contestations about Muslim women's wellbeing*, in M. Tilikainen, M. Al-Sharmani, S. Mustasaari (eds.), *Wellbeing of Transnational Muslim Families. Marriage, Law and Gender*, I, London/New York, 2019, p. 24-26. Those cases had already a poor public reputation from previous periods, insofar as «in the 1970s migration marriages were considered as having a negative impact on the wellbeing of white Dutch women who were allegedly tricked into fraudulent marriages by migrant men, while by the 1980s and 1990s post-migrant women were seen as victims of their families, marrying them off for a high dower to men from the country of origin who were eager to migrate and gain residency rights». This

in this area, the State's reaction is «a broad preventive and repressive approach to counter radicalisation and violent extremism»[67]. First of all, in the Netherlands, it must be noted that the sole civil marriage is legally acknowledged by the Courts: of course, there is room to celebrate a religious marriage, but this one is without any legal relevance if not preceded by a registered civil marriage. As a result, in the presence of a merely religious marriage, the «marriage is not legally recognized and no marital rights can be enforced»: due to this very reason, the various religions organised their courts to manage family law and religious rules. Yet, such a court network doesn't exist in the case of Muslim minorities and unlike in the United Kingdom, they are apparently not even arranged around Islamic councils[68]. Furthermore, the Dutch penal code makes non-compliance with the regulations on civil marriage as well as the performance of a religious ceremony without legal conditions, a criminal offence[69].

In short, this system is caught in a blatant inconsistency. On the one hand, there is the premise, particularly on the part of politics and lawmaking, that «rules of sharia are contrary to fundamental principles of the Dutch legal order and that, as a consequence, their application in any form should be prohibited»[70]; on the other, the case law embraces a certainly milder line of reasoning – which complies with the State's duty to protect the weaker parties involved in marriage – and recognises the unregistered Muslim marriage as void in the eyes of the law, enabling the judge to provide suitably on the economic aspects of the controversy[71].

The overall impression is that this clash between politics, legislature and case law affects the design of the whole Muslim-State relationship. The atmosphere of rejection against Islamic law, although softened by the Courts' attempt at accommodation which pursue a 'colour-blind approach', keeps Muslims away from the rule of law[72]. On the opposite, the Dutch-Muslim 'nomos' abandons the trail of the courts to «turn to imams of local mosques and other respected 'key persons' in the community to look for workable solutions to their private and family disputes»[73]. Though there is a lack of well-organised bodies such as the Sharia Councils or the Muslim Arbitration Tribunal (MAT), several investigations show that single imams fulfil a quasi-judicial assistance, offering communities the relief they are unable to secure elsewhere[74].

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theory is also supported by M. Berger, *The Year 2004: Historiographical Issues Concerning Islam in The Netherlands*, in 12 *J. Muslims Eur.* 3, 2023, p. 1-22.

67 M. de Koning, T. Sunier, *supra* note 63, at p. 99.

68 Cf. M. Berger, *Responding to sharia in the Netherlands*, in 33 *Can. J. Netherl. Stud.* 2, 2012, p. 136-137.

69 *Dutch Penal Code* (1886), Artikel 449. See A. Moors, M. de Koning, V. Vroon-Najem, *Secular Rule and Islamic Ethics: Engaging with Muslim-Only Marriages in the Netherlands*, in 6 *Sociol. Islam* 3, 2018, p. 274-296.

70 M. Berger, *supra* note 69, at 140, who also argues: «However, the domestic setting out of court provides a different picture. If one were to apply the fundamental principle of gender equality to any kind of relation and situation within the Netherlands, then surely many religious rules in this respect would have to be abandoned: the Catholic church should allow female priests, Protestant schools should be denied their right to refuse non-Protestant pupils and staff, and a Jewish divorce should not be the exclusive prerogative of the husband but also the right of the wife».

71 For example, *Hoge Raad* 17 juni 2005, LJN: AS9035. For more details M.F. Cavalcanti, *Le interazioni tra ordinamento giuridico e ordinamento islamico: pluralismo giuridico e marital captivity nel Regno Unito e nei Paesi Bassi*, in *DPCE online* [S.I.], 50, 2022, p. 1446 ff.

72 Cf. I. Sportel, *supra* note 62, at p. 1072-1079.

73 A. Muradin, *Religious Authority and Family Dispute Resolution among Moroccan Muslims in the Netherlands*, in 11 *J. Muslims Eur.* 1, 2022, p. 54.

74 *Ibid.*, at p. 56 ff. See also E. Van Eijk, *Khulʿ Divorce in the Netherlands*, 26 *Islam. Law Soc.* 1/2, 2019, p. 36-57.

So, the legal pluralism in the country incorporates a slightly *weak* tendency – which is embodied in the activities of the Courts and fails to reconcile the social fabric – that ends in a *strong legal pluralism* as Islamic worshippers can self-administer their family law through informal channels, thus competing with the State.

VI. SOME CONCLUDING REMARKS

We trace here some potential findings based on the previous examination. The research demonstrates that the belief of the Western legal orders as enclosed systems – mainly ruled by the centrality of State law as the only source of lawfulness – is quite unrealistic.

Conversely (*supra*, Sec. II), legal pluralism represents the existing state of affairs in the West and it varies radically in accordance with the reaction shown by the State, for example, to claims coming from religious groups on the territory. The presence or the absence of dialogue between the State and the communities ultimately does not witness the existence or non-existence of legal pluralism, but merely its descriptive typology[75].

Among the three paradigms scrutinised, the United Kingdom (*supra*, Sec. III) showed the most harsh features, as well as the largest gap between State and Muslim 'nomos'. While facing a huge number of informal marriages performed by this community, the Courts fail to lead these unions into the State-sanctioned legal framework. Consequently, some literature describe this approach as a 'laissez-faire attitude' which drives Muslims towards unofficial judicial bodies, i.e. the Sharia Councils that operate in the shadows and, at times, in conflict and in competition with State law[76]. On the contrary, the Muslim Arbitration Tribunal (MAT) is not chosen for marriage disputes, which are settled in a dimension of strong legal pluralism, thus promoting the creation of parallel justice systems right alongside the State.

The Finnish situation is quite the opposite since we find a very positive understanding of power-sharing towards religious communities, which includes the Muslim one (*supra*, Sec. IV). Here, «rather than being something that rigidly follows from one particular norm, 'legality' is […] something constructed and mutually defined by the various sources of authority»[77]: the cooperation which arises amongst the law, Courts and group practices – set up in a context of *weak legal pluralism* – wipes out the problematic issues affecting other European countries. There is, accordingly, neither an alternative justice system nor a precise issue related to the recognition of unregistered marriages: basically, «Muslim marriages have not been the focus of much public debate»[78].

Lastly, a *tertium genus* affects the Netherlands (*supra*, Sec. V), where formally *weak legal pluralism* is in place, but, at the same time, it is possible to spot the shadow of *strong legal pluralism*. Indeed, although Dutch history displays a highly sympathetic attitude to organising society into several different groups, its politics radically shifted approach in coincidence with the rise of the Muslim population. Right from the very beginning, «much literature on […] Muslim marriages» assumed «a state-centric point of view, considering such marriage as a threat to the integrity of the nation-state»[79] and portrayed the situation as pernicious. As an outcome, besides a body of legislation that strives to hold Muslim customs out of the scope of the law, the Courts in this country sought to safeguard vulnerable parties. Nonetheless,

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[75] On those matters A. Büchler, *Islamic Law in Europe? Legal Pluralism and its Limits in European Family Laws*, Farnham, 2011; M. Burchardt, I. Michalowski (eds.), *After Integration. Islam, Conviviality and Contentious Politics in Europe*, Wiesbaden, 2015.

[76] Cf. S.S. Ali, J. Jones, A. Shahid, *To register or not to register? Reflections on Muslim marriage practices in Britain*, 1 *Nord. J. L. Soc. Res.* 10, 2021, p. 30 ff.

[77] S. Mustasaari, M. Al-Sharmani, *supra* note 49, at p. 457.

[78] *Ibid.*, at p. 461.

[79] A. Moors, V. Vroon-Najem, *supra* note 67, at p. 27.

this hasn't avoided the emergence of self-regulating Islamic policy-making institutions, often embodied by single imams.

Ultimately, it is clear that European society is forced to deal with the Muslim communities living across the Continent. This dynamic 'nomos' obliges a tense encounter that throws into argument the Western notion of the unity of law. Setting due limits in terms of respect for human rights, we observe how European countries still struggle to accept some flexibility of the legal system, opening up to some forms of *weak legal pluralism*. Nevertheless, when this happens, the experiences are extremely positive and it is possible to manage the complexity of contemporary social fabric in a more harmonious manner[80].

[80]Cf. B. Polok, *supra* note 12, at p. 168.