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**The protection of the Islamic minority beyond religious freedom:  
legal pluralism and reasonable accommodation in Europe\***

**ABSTRACT:** In Europe's diverse societal landscape, the Islamic minority, or a significant portion thereof, seeks to navigate life under Sharia law, especially concerning family matters. Despite the fact that the application of Sharia law, where permitted, has demonstrated its ability to adapt to the legal context, as in the case of Islamic arbitration, in the case of family law, the perception of an irreducible contrast with the values of Western countries appears particularly strong producing an inevitable paradox in relation with freedom of religion that may be restricted by the legal system. The core paradox lies in the potential infringement on religious freedom if Muslims were asked to forsake religious tenets or practices that align with the foundational principles of the legal system. Modern legal frameworks are thus challenged to find methods to harmonize the identity assertions of Islamic communities with the safeguarding of individual rights within these communities. With no specific safeguards for religious minorities, this study scrutinizes jurisprudence on family law from selected European courts. The objective is to unearth effective legal tools that respect the Islamic community's minority religious identity while upholding the essential tenets of the legal system, fostering a balance between collective religious identity and individual rights protection in a multicultural Europe.

**ABSTRACT:** Nell'eterogeneo tessuto sociale dell'Europa, una parte rilevante della minoranza islamica aspira a condurre la propria vita secondo i precetti della Sharia, in particolare per quanto concerne le questioni di diritto di famiglia. Sebbene l'applicazione Sharia, laddove consentita, abbia dimostrato una capacità di adattamento al contesto giuridico europeo, come avviene nel caso dell'arbitrato islamico, la gestione delle questioni di carattere familiare può evidenziare percezioni che contrastano con il sistema di valori occidentali, generando un paradosso in relazione al rispetto della libertà religiosa. Tale paradosso emerge dalla potenziale violazione della libertà religiosa che si verificherebbe qualora fosse richiesto ai musulmani di abbandonare pratiche religiose che di fatto non si pongono in contrasto con i principi fondamentali dell'ordinamento giuridico. I moderni ordinamenti giuridici si trovano di fronte alla sfida di identificare modalità per conciliare le rivendicazioni identitarie delle comunità islamiche con la tutela dei diritti individuali. In assenza di garanzie specifiche per le minoranze religiose, questo studio si dedica all'analisi della giurisprudenza relativa al diritto di famiglia da parte di alcuni tribunali europei. L'obiettivo è quello di individuare strumenti giuridici efficaci che valorizzino l'identità religiosa minoritaria della comunità islamica, nel rispetto dei principi fondamentali dell'ordinamento, al fine di favorire un equilibrio tra l'identità religiosa collettiva e la protezione dei diritti individuali in un'Europa profondamente multiculturale.



**SUMMARY: 1 - Religious minorities between cultural identity and religious freedom: preliminary remarks - 2. Legal Pluralism and Religious Pluralism: Protection tools for religious minorities - 3. Muslims of Europe - 4.- The Interaction Between Sharia and the Legal System of the State: Techniques of Reasonable Accommodation and Islamic Family Law - 5. The protection of the Islamic minority beyond religious freedom: concluding remarks.**

## **1 - Religious minorities between cultural identity and religious freedom: preliminary remarks**

The intensification of migratory flows towards the West, alongside the processes of economic integration, requires a structured engagement with the Islamic world. The demographic growth of the population adhering to the Islamic faith presents a factor that mandates the formulation of social, economic, and institutional policies capable of managing the dynamics induced by these phenomena.

The principles entrenched in Western legal culture represent the primary ground for dialogue with Islamic communities, which, endowed with significant expansive force, challenge the typically Western ethnocentrism to defend indispensable religious and cultural traditions.

In European countries where the multicultural character of society is particularly pronounced, there is an evolution of the principle of equality towards a substantive understanding, which, together with the assertion of equal dignity of individuals, leads the legal system to adopt differentiated treatments or derogatory rights in favor of members of minority groups.

The recognition and protection of diverse cultural expressions in a democratic and pluralist society assume not only socially, but also constitutionally significance. The right to cultural identity, even if minority, contributes to the development of human personality. Consequently, the personalist principle, which underpins the Constitutions of democratic nature, finds significant reinforcement in the right to cultural identity<sup>1</sup>.

In this context, the issue of identity claims has returned to the center of public debate, particularly with reference to the so-called new minorities resulting from the most recent migratory flows. Among the most debated issues is the overlap between cultural and religious identity that characterizes some of these groups, as well as the adequacy of the protection offered to them by religious freedom.

The recognition demands by Islamic minorities in Europe highlight the complex interplay between religion and the integration and

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<sup>1</sup> M.F. CAVALCANTI, *Giurisdizioni alternative e Legal pluralism: le minoranze islamiche negli ordinamenti costituzionali occidentali*, Editoriale Scientifica, Napoli, 2023.



rights recognition processes. This challenge is further complicated by the crisis in Western democracies' traditional approach to separating state and religion: a rigidity that has become unsustainable as different institutional contexts interact and influence each other. Consequently, the rigid conception of separatism seems unable to withstand the impact of the cultural and religious pluralism characterizing contemporary societies.

At the same time, such a drive towards differentiation may bring about a range of potential conflicts, before which democratic systems run the risk of underestimating individual rights, in the name of enhancing and promoting collective interests<sup>2</sup>.

Minorities calling for the recognition of their cultural and religious identity inevitably push the liberal democratic state to reconsider its natural stance of neutrality, if not indifference, towards confessional claims, acknowledging every citizen's freedom to develop and promote their own identity. In this context, one of the most delicate issues relating to the recognition of cultural identities and the protection of minorities concerns the intersection with matters pertaining to the religious factor<sup>3</sup>.

Indeed, there exists an area of intersection and overlap between the components that outline the cultural identity of a community and its members and those that characterize its religious identity. Religious identity, just like cultural identity, is not limited to an inner spiritual movement but is also based on objective data related to the practice of worship, the conduct of rituals and religious practices, and its exercise in a collective and public form.

In this sense, the identity of a religious community can be clearly recognized as such even by those who do not belong to it. Consequently, the religious factor influences the processes of formation and transformation of the cultural identity of a social group and, in the same way, the culture and traditions of that community affect the different interpretation of a given religious practice, as well as the way in which religion is interpreted and experienced in different cultural groups.

Therefore, it becomes challenging to distinctly separate the cultural aspects that characterize certain practices from the religious elements, as well as to establish the relationship between religion and culture within a specific community. From an anthropological perspective, this distinction is not particularly significant; however, for the law, the distinction between cultural practice and religious practice takes on fundamental importance regarding the protection an individual can invoke.

In this regard, relatively few Constitutions have explicitly codified cultural rights and recognized the right to the protection of cultural

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<sup>2</sup> M.F. CAVALCANTI, *Giurisdizioni alternative*, cit., p. 13.

<sup>3</sup> N. DOE, *Law and Religion in Europe. A Comparative Introduction*, Oxford, Oxford University Press 2011.



identity.<sup>4</sup> In contrast, nearly all the fundamental charters of democratic countries consider religion a constitutionally protected good through the freedom of religion, recognized both individually and collectively.

While confessional practices are undoubtedly protected by the recognition of religious freedom, it can become challenging for a judge in a secular state, where the principle of separation prevails, to consider an institution or a confessional practice within the context of a dispute. This issue becomes even more complex when the practices that contribute to defining the identity of the group to which the parties belong lie midway between the cultural and religious spheres. This making it difficult to determine the extent to which a given behavior derives from religious sources or traditional ones, or how much the cultural aspect influences the interpretation of a religious norm and vice versa<sup>5</sup>.

In cases where culture and religion tend to overlap, the different legal treatment of religious and cultural practices risks creating situations of disparity and different outcomes depending on whether the judge, faced with practices difficult to classify, chooses to categorize the behavior in one category or the other<sup>6</sup>. This has inevitable negative consequences on the principle of legal certainty and on the principle of substantive equality.

The issue of the relationship between religious identity and cultural identity gains further significance when considered in the context of a multicultural society where different value systems coexist. Societies that, although at the peak of the secularization process, are permeated by religious claims.

Moreover, the religious factor represents one of the oldest aspects of diversity that, in recent times, has regained centrality in the ongoing construction of the legal response to the challenge of differences<sup>7</sup>. Given the guarantee of religious freedom recognized by democratic systems, the overlap between the religious factor and other differential elements, combined with the growing presence of religious minorities in contemporary European society, require states to develop specific tools for managing differences within a unified systematic framework, based on the principles of non-discrimination and reasonableness. The protection provided by religious freedom, with its essentially individual

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<sup>4</sup> For instance, consider: Article 2 of the Constitution of Peru (1993); Article 37 of the Constitution of Uganda (1995); Article 35 of the Constitution of the Congo (1992); Article 58 of the Constitution of Guatemala (1985); Article 32 of the Constitution of The Gambia (1996); Article 26 of the Constitution of Ghana (1992).

<sup>5</sup> P. BRAMADAT, *Beyond Christian Canada: Religion and Ethnicity in a Multicultural Society*, in P. BRAMADAT, D. SELJAK (eds.), *Religion and Ethnicity in Canada*, University of Toronto Press, Toronto, 2005, p. 18.

<sup>6</sup> I. RUGGIO, *Culture and the Judiciary: The Anthropologist Judge*, Taylor & Francis, 2018.

<sup>7</sup> F. PALERMO, J. WOELK, *Diritto costituzionale comparato dei gruppi e delle minoranze*, Wolters Kluwer, Milano, 2021, p. 227.



dimension, seems insufficient to fully address the specific challenges faced by minority groups.

Indeed, the already controversial definition of the concept of minority and its protection assumes further complexity for secular legal systems when related to the religious factor<sup>8</sup>. In this case, in addition to the criteria normally considered by law in determining how minorities can be identified, it is also necessary to take into account the relationship between minority cultural rights and religious freedom.

From the analysis of international and European legislation on religious minorities, as well as data collected from the *Atlas of Religious or Belief Minority Rights*<sup>9</sup>, it is possible to establish some key findings regarding the definition, recognition, and protection of religious minorities in European countries and more broadly in the Global North.

First and foremost, it highlights the difficulty of identifying a universally shared notion of minority.

Although international law has not yet reached a universally accepted definition of this concept, it is possible to identify some recurring features in the profile of minorities starting from the well-known definition developed by Francesco Capotorti in the renowned *Study on the rights of persons belonging to ethnic, religious and linguistic minorities* of 1979: «an ethnic, religious or linguistic minority is a group numerically smaller than the rest of the population of the State to which it belongs and possessing cultural, physical or historical characteristics, a religion or a language different from those of the rest of the population»<sup>10</sup>.

The element of belonging to the state referred to in this definition has raised doubts about its applicability to new minorities<sup>11</sup>, primarily composed of immigrants. However, it seems plausible to exclude that within the protection offered by Article 27 of the International Covenant on Civil and Political Rights of 1966, based on the universal model of human rights guarantees and the cornerstone of minority protection, a distinction between old and new minorities can still be considered meaningful.

Consequently, it appears necessary to adopt a definition of this concept that is not overly restrictive, attempting to identify some recurring elements that can contribute to outlining the physiognomy of religious minorities, at least from a strictly legal standpoint.

This seems to be confirmed by the more recent definition of minority offered by the United Nations Special Rapporteur on Minority

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<sup>8</sup> H. BIELEFELD, *Privileging the "Homo Religious"? Toward a clear conceptualization of Freedom of Religion and Beliefs*, in M. EVANS, P. PETKOFF, J. RIVERS (eds.), *The Changing Nature of Religious under International Law*, Oxford University Press, Oxford, 2015, p. 45.

<sup>9</sup> <https://atlasminorityrights.eu/areas/>.

<sup>10</sup> F. CAPORTORTI, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on the rights of persons belonging to ethnic, religious and linguistic minorities*, 1979, p. 7.

<sup>11</sup> This includes minority groups whose creation derives from migratory phenomena.



Issues, according to which: « An ethnic, religious or linguistic minority is any group of persons which constitutes less than half of the population in the entire territory of a State whose members share common characteristics of culture, religion or language, or a combination of any of these. A person can freely belong to an ethnic, religious or linguistic minority without any requirement of citizenship, residence, official recognition or any other status»<sup>12</sup>.

Starting from this premise and taking into consideration the reflections of Alessandro Pizzorusso according to whom a minority receive from the legal system a special treatment aimed at eliminating the minority situation or, alternatively, at institutionalizing and regulating it within the State itself<sup>13</sup>, it seems possible to identify some recurring elements useful for defining a religious minority:

1) *Objective Element*: The minority constitutes a social group that is generally, though not necessarily, smaller in number compared to the majority. The significant factor is not the group's size, but rather its position of inferiority within society and relative to the majority. This position exposes the minority to the risk of discriminatory treatment or to having its members' essential needs insufficiently addressed by the legal system.

2) *Subjective Element*: The minority group is distinguished from the dominant majority by possessing a distinct and specific identity of a national, ethnic, cultural, religious, or linguistic character. More specifically, we can refer to a religious minority when the members of the group consider the religion they practice as the fundamental characteristic of their identity that distinguishes them from the majority. The members of the minority group are united not only by their professed faith but also by a bond of solidarity aimed at preserving and promoting their own identity and traditions, as well as achieving substantive equality with the majority.

3) *Relational Element*: For minorities to be worthy of protection, it is not necessary for them to be recognized by the State, nor do they necessarily have to be citizens. In this sense, the distinction between old and new minorities should, therefore, be irrelevant<sup>14</sup>.

The concept of a religious minority takes on the contours of a variable-geometry category, which, starting from universal legal mechanisms for the protection of rights, is shaped according to the different forms of individual affiliation<sup>15</sup>. Regarding the rights

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<sup>12</sup> <https://www.ohchr.org/en/special-procedures/sr-minority-issues/about-minorities-and-human-rights>.

<sup>13</sup> A. PIZZORUSSO, *Le minoranze nel diritto pubblico interno*, Milano, Giuffrè, 1967, p. 193.

<sup>14</sup> M.F. CAVALCANTI, *Giurisdizioni alternative*, cit., p. 89.

<sup>15</sup> D. FERRARI, *Il concetto di minoranza religiosa dal diritto internazionale al diritto*



recognized and the protection afforded to religious minorities, the debate has focused on the opposition between the politics of uniformity and the politics of difference. According to this perspective, the rights of minorities imply that equality can encompass difference<sup>16</sup>. The discrepancy between these two approaches does not preclude a possible practical convergence: many legal systems accept a certain degree of adaptation to respond to the challenges posed by a pluralistic and multicultural reality, thereby defusing potential intercultural conflicts without necessarily questioning the principle of equality<sup>17</sup>.

Currently, at least in most cases, religious minorities are formally covered by the protection offered by human rights, a standard applicable to all individuals regardless of their affiliation to a minority group and not to the community as such<sup>18</sup>. Even the protection offered by the European Union and individual member states, with some exceptions, appears essentially focused on individual religious freedom, only marginally recognized in its collective form, but not directly aimed at the specific protection of minority groups.

However, it is clear that the demands for protection made by religious minorities, attributing importance to the promotion and guarantee of collective identity, which presupposes active intervention by the state, implies a shift from the negative conception of religious freedom<sup>19</sup>.

What distinguishes minority rights from universally recognized human rights is the emphasis placed on the development of the community and its cultural identity: while religious freedom presupposes the existence of religious communities within which individuals can practice their faith, minority rights transform the existence of such communities into an objective of the protection activities of minority groups by the State<sup>20</sup>. Consequently, on one hand, safeguarding minority religious identity becomes a central element for the proper conceptualization of religious freedom, while on the other hand, typical elements of religious freedom, particularly individual freedom to choose, change, or abandon one's faith, become essential for a correct definition of the rights of these minorities<sup>21</sup>.

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*Europeo. Genesi, sviluppo e circolazione*, il Mulino, Bologna, 2019, p. 304.

<sup>16</sup> For a more comprehensive overview <https://atlasminorityrights.eu/areas/>.

<sup>17</sup> **M. FERRI**, *How to strengthen Protection of (Religious) Minorities and Cultural Diversity under European Law: Some Lessons from Human Rights Protection System*, in *Religion*, 12, 2021, pp. 864-885.

<sup>18</sup> **N. GHANEA**, *Are Religious Minorities really Minorities?*, in *Oxford Journal of Law and Religion*, 1, 2012, p. 60.

<sup>19</sup> **H. BIELEFELDT, N. GHANEA, M. WIENER**, *Freedom of Religion and Belief. An international Law Commentary*, Oxford University Press, Oxford, 2016, p. 415.

<sup>20</sup> **H. BIELEFELDT, N. GHANEA, M. WIENER**, *Freedom of Religion*, cit., p. 452.

<sup>21</sup> **S. FERRARI, K. WONISCH, R. MEDDA WINDISCHER**, *Tying the Knot: A Holistic Approach to the Enhancement of Religious Minority Rights and Freedom of Religion*, in S. FERRARI, K. WONISCH, R. MEDDA WINDISCHER (Eds.), *Religious Minorities in Europe and Beyond: A critical Appraisal in Global Perspectives*, Religious Special Issue, 12, 2021, p.



Today, the debate on religious minorities in Europe primarily focuses on identity issues, more precisely, on the majority's fear of losing its identity due to the cultural and religious diversity accompanying the intense migratory flows towards the countries of the Global North<sup>22</sup>.

The concerns expressed in this regard by public opinion have led many Western legal systems to regulate more restrictively certain religious practices typical of minority faiths, through measures that, although appearing neutral, in their concrete application have a discriminatory impact. Consequently, religious minorities require more impactful and specific forms of protection compared to those generally offered by religious freedom.

In light of these considerations, it is necessary to assess whether the approach to religious minorities, focused solely on religious freedom, is still capable of managing the new dynamics imposed by the identity issue in pluralistic societies. The main problem concerning the protection of religious minorities, therefore, appears to be identifying the real and specific needs of these groups and establishing whether these are adequately considered not only within the framework outlined by religious freedom but also within the system defined by the minority rights protection elaborated since the post-World War II period.

## 2 - Legal Pluralism and Religious Pluralism: Protection tools for religious minorities

In European legal systems, one of the most complex and articulated expressions of cultural pluralism pertains to the religious dimension and the presence of a plurality of religious communities carrying traditions, values, and norms that demand recognition in the public arena. To investigate the consequences of such circumstances, it is necessary to consider the controversial notion of legal pluralism, embraced by those constitutional systems open to the plurality of cultures and religions and, consequently, characterized by norms not directly attributable to the state legal system.

One of the first reference on this matter is embodied by Santi Romano's thesis on the plurality of legal systems, which, embracing the formula *ubi societas ibi ius*, acknowledges the presence of law not only within the state system but in any social body that exhibits a unified, organized, and objective existence<sup>23</sup>.

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<sup>22</sup> M. VENTURA, *The Two-Way legal making of Religious Minorities. Introductory Remarks*, in M. VENTURA (ed), *The Legal Status of Old and New Religious Minorities in the European Union*, European Consortium for Churches and State, Research Editorial Comares, Granada, 2021, pp. 1-8.

<sup>23</sup> S. ROMANO, *L'Ordinamento Giuridico* (1918), Firenze, Sansoni, 1946, p. 33.





Legal anthropologists have formulated the concept of legal pluralism to denote the phenomenon wherein norms, sanctions, and judicial bodies coexist, not formally attributable to the state legal system but nonetheless capable of operating within the same social arena<sup>24</sup>. The idea underlying the concept of legal pluralism is that the legal phenomenon is not limited to the official sources of law production of a state-centric nature but also encompasses all legal and non-legal norms that govern the behavior of individuals in practice.

These heterogeneous forms of non-state law often assert themselves independently of official recognition by the state legal system, operate outside of a clear and unambiguous hierarchy or jurisdictional system, and arise from a process of self-validation<sup>25</sup>.

The state legal system sees its normative production supplemented by norms that escape its control, but which, although not possessing the characteristics of legal norms, are effectively applied in relations among members of society. Therefore, it seems more appropriate to speak of normative pluralism<sup>26</sup>, rather than legal pluralism<sup>27</sup>, to distinguish those norms that do not properly exhibit the characteristics of legality.

Multicultural societies provide fertile ground for examining the extent to which the legal system governing the behaviors of all individuals within the state's territory can recognize, admit, and tolerate that some of these individuals, individually or collectively, observe norms derived from non-state sources.

In this context, there is a growing interaction between legal or normative pluralism and religious pluralism, accompanied by an increase in demands for recognition by religious minorities.

As highlighted by socio-anthropological analyses of legal pluralism, when possible, members of minorities seek to remain faithful to their legal culture, but they also take the institutions of state law as a reference point<sup>28</sup>. Consequently, minorities navigate through different legal systems, reconstructing their law in hybrid terms<sup>29</sup>.

Attributing legal status to the norms regulating the lives of minority members does not imply that these norms must automatically prevail. They must be evaluated considering a process of balancing with other constitutionally relevant interests and be compatible with the fundamental principles of the legal system, public order, and the

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<sup>24</sup> J. GRIFFITHS, *What is Legal Pluralism?*, in *Journal of Legal Pluralism*, 24, 1986, pp. 1-55.

<sup>25</sup> G. TEUBNER, *Global Law without a State*, Dartmouth, Aldershot, 1997.

<sup>26</sup> W. TWINING, *Normative and Legal Pluralism: a Global Perspective*, in *Duke Journal of Comparative International Law*, 20, 2010, pp. 473-517.

<sup>27</sup> W. TWINING, *Normative*, cit., pp. 473-517.

<sup>28</sup> P. PAROLARI, *Culture, Diritto e Diritti. Diversità culturale e diritti fondamentali negli Stati costituzionali di diritto*, Torino, Giappichelli, 2016, p. 230.

<sup>29</sup> P. SHAHA, *Legal Pluralism in Conflict: Coping with cultural diversity in law*, Glass House, London, 2005.



protection of fundamental rights. It is in this context that religious minorities seek mediation and reconciliation between the norms of the state legal system and the norms of religious and traditional character inherent to minority legal orders.

The presence of minorities who find their identity in religion, coupled with the increasing demand from such groups for recognition of religious and traditional institutions, leads Western legal systems to rethink the role of state neutrality towards religion and to identify effective solutions for the inclusion and protection of differences.

Consequently, there is a need for an interpretation of the principle of equality that can accommodate cultural and religious diversity. It is up to the State to strike a balance between the principle of equality and the protection of the right to identity and cultural diversity of religious minorities. In addition, there is a need to identify forms of collaboration between the State and religious communities, concerning the resolution of disputes between private parties on issues crucial to the religious identity of that community<sup>30</sup>.

However, the issue becomes critical when the minority advocating for recognition and autonomy adopts as its reference point a system of values, culture, and norms that not only are foreign to the culture of the country in which it resides but, as in the case of Islam in the West, are even considered hostile by the majority. The paths taken by democratic legal systems to achieve the delicate balance between recognizing minority identity claims, pursuing the principle of substantive equality, and upholding the fundamental principles of the legal system are diverse, yet they share the goal of achieving a reasonable accommodation of differences between minority and majority through exceptions to the general and abstract rules dictated by the legal system. The purpose is to ensure equal treatment for all individuals through tailored measures aimed at avoiding unjustified discrimination against individuals who may find themselves in a disadvantaged position<sup>31</sup>.

The multicultural transformation of law can also occur through the recognition of rules and legal institutions from different legal contexts. The consideration by the legislature of institutions from different legal context and culture can lead to a process of transformation of the state legal system<sup>32</sup>. However, it is evident that this type of transformation presents many difficulties, including political ones, especially in particularly sensitive areas. This is the case, for example, in family law, where the majority is generally unwilling to accept a transformation of the legal system towards cultural inclusivity.

In light of this, recognition tools for differences can be categorized into three main groups:

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<sup>30</sup> M.F. CAVALCANTI, *Giurisdizioni alternative*, cit., 2023, p. 124.

<sup>31</sup> A. RINELLA, *La Sharia in Occidente. Giurisdizioni e diritto islamico. Regno Unito, Canada e Stati Uniti d'America*, il Mulino, Bologna, 2021, p. 84.

<sup>32</sup> P. PAROLARI, *Culture, Diritto*, cit., p. 84.



a) *The normative recognition of difference through special laws, differential treatment, and legislative exceptions:* This type of recognition entails an institutionalization of legal pluralism, which results in granting a certain degree of significance to the internal institutions of the minority. These institutions thus assume the responsibility of interpreting, applying, and enforcing the norms of the minority legal system, thereby eroding the State's monopoly over the production and interpretation of legal norms, as well as in the resolution of disputes. One of the essential elements of this model lies in the pursuit of solutions for the composition of cultural conflicts through granting minorities jurisdictional autonomy on matters deemed particularly relevant to the identity of the group and its members, without such responsibility being linked to territorial self-governance powers.<sup>33</sup>

b) *The recognition of spaces for normative and institutional autonomy in favor of minorities:* This form of recognition leads to an institutionalization of legal pluralism, which, in turn, entails granting relevance to the internal institutions of the minority. Consequently, these institutions are tasked with interpreting, applying, and enforcing the norms of the minority legal system, thereby diminishing the state's monopoly on the production and interpretation of legal norms, as well as in the resolution of disputes. An essential element of this model lies in seeking solutions for the resolution of cultural conflicts through granting minorities jurisdictional autonomy over issues deemed particularly relevant to the identity of the group and its members, without necessarily linking such responsibility to territorial self-governance powers<sup>34</sup>.

c) *The recognition of difference by the judiciary using the technique of reasonable accommodation:* The legislator hardly has the necessary conditions for adopting tools aimed at managing cultural diversity, whereas the jurisdictional power, structurally competent to resolve concrete and specific cases, seems more suitable for identifying compromise solutions. Furthermore, judicial activity naturally lends itself to facilitating forms of intercultural mediation, making the Courts the privileged venue for the resolution of multicultural conflicts<sup>35</sup>. It is not surprising, therefore, that in the case of identity claims advanced by religious minorities, the decision regarding the possibility of derogating

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<sup>33</sup> P. MARTINO, *La Carta canadese dei diritti e delle libertà e i diritti ancestrali: l'incerto procedere della giurisprudenza della Corte Suprema*, in G. ROLLA (ed.), *L'apporto della Corte suprema alla determinazione dei caratteri dell'ordinamento canadese*, Giuffrè, Milano, 2008, p. 295 ss.; F. ONIDA, *Genere e matrimonio nella nuova Repubblica del Sud Africa: uguaglianze e libertà di religione*, in *Quaderni di diritto e politica ecclesiastica*, 2008, n. 1, p. 6 ss.

<sup>34</sup> A. SHACHAR, *Multicultural Jurisdiction: cultural differences and women's rights*, Cambridge U.P., Cambridge, 2001; M. MALIK, *Minority legal orders in United Kingdom. Minorities, Pluralism and the Law*, British Academy, London, 2012.

<sup>35</sup> B. PASTORE, *Impegni ermeneutici: il diritto e le tensioni del pluralismo culturale*, in *Ars Interpretandi*, I, 1, 2012, pp. 41-58.



from general provisions is increasingly entrusted to the jurisprudence of the courts.

This requires judges to resort to hermeneutic techniques of inclusion and protection of differences, such as that of reasonable accommodation: a decision-making process, available to the judge, who is faced with constitutionally protected subjective legal situations and, at the same time, compressed or denied by the application of apparently neutral provisions, with the aim of introducing an exception to the general rule for the individual case.

The specificity of such legal reasoning lies in preserving the general rule which retains its normative core, neutralizing its generalizing effects and adapting it to the circumstances of the individual concrete case. In this way, certain individuals or groups of individuals, characterized by a distinct cultural or religious identity, are exempted from the application of the general rule<sup>36</sup>. The recognition of the exception arises from the judge's assessment of the distortive effects of the principle of equality that would result from a non-contextualized application of the norm. A necessary precondition for such forms of reasonable composition of differences is that the derogation from the general rule, which yields to differential rights, does not result in a violation of fundamental rights, public order, or the foundational values of the legal system<sup>37</sup>.

Measures and decisions inspired by the concept of reasonable accommodation aim to overcome the barriers that minority groups face in order to participate in public life. These measures can take various forms but always involve the adjustment, exemption, or adaptation of policies, norms, or practices of the state legal system with the goal of achieving a result consistent with the principle of substantive equality.

Given this premise, for there to be a true duty of accommodation incumbent upon the State, it is necessary that the application of the reasonable accommodation technique finds foundation and justification within the constitutional order. In this sense, it seems possible to relate such a duty to the principle of substantive equality and the principle of non-discrimination. The joint application of these principles materializes

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<sup>36</sup> L.G. BEAMAN (ed.), *Reasonable Accommodation. Managing Religious Diversity*, University of British Columbia Press, Vancouver, 2012.

<sup>37</sup> The leading case is represented by the Supreme Court of Canada in Ontario Human Rights Commission and Theresa O'Malley v. Simpson Sears, [1985] 2 S.C.R. 536. Other notable cases include: Supreme Court of Canada, R. v. Big M Drug Mart, [1985] 1 S.C.R. 295; Supreme Court of Canada, Syndicat Northcrest v. Amselem, [2004] 2 S.C.R.; Supreme Court of Canada, Multani v. Commission scolaire Marguerite-Bourgeoys, [2006], 1 S.C.R. 256; United States Supreme Court, Wisconsin v. Yoder, 406 U.S. 205 (1972); United States Supreme Court, Cheema v. H. Thompson, (36 F3d 1102), 1994; European Court of Human Rights (ECtHR), Thlimmenos v. Greece, App. No. 34369/97, April 6, 2000; ECtHR, Chapman v. UK, App. No. 27238/95, January 18, 2001; ECtHR, Muñoz Diaz v. Spain, App. No. 49151/07, December 8, 2009; ECtHR, Eweida and Others v. United Kingdom, App. Nos. 48420/10, 59842/10, 51671/10, 36516/10, January 15, 2013.



in the assertion of the prohibition of indirect discrimination and in the duty of differential treatment, whose guarantee requires measures of reasonable accommodation of differences in order to prevent a rule of apparently neutral character from causing unjustified disadvantage to minority groups.

Despite this hermeneutical technique finding increasingly widespread adoption in Western legal systems, its application is not always straightforward. One of the most controversial areas in this regard is that of family relations, within which individuals bearing specific and generally minority religious and cultural values appear less open to the acceptance of external interferences. Especially when religious motivations define the framework of such relationships, members of minorities appear particularly reluctant to conform to externally directed regulations. In the case of family law, more so than in other areas of law, religious denominations tend to propose a complete and predetermined normative corpus, leading to frequent confrontations between the state legal system and the minority one in this matter.

The issue has arisen especially in Western legal systems with reference to Sharia and its spread as an alternative legal system, to which members of Muslim communities turn to resolve disputes involving them according to the dictates of sacred Islamic law. This circumstance has prompted both politics and law to question the compatibility between the Western legal tradition and the Islamic model. After all, the technique of reasonable accommodation would have no utility if there were no reasons for incompatibility. It is precisely these critical aspects that trigger actions aimed at resolving the antinomy<sup>38</sup>.

In this regard, before proceeding to analyze the ways in which the Islamic legal system interacts with European legal systems, it seems appropriate to establish what is meant by Islamic law in this specific context.

### 3 - Muslims of Europe

Being a Muslim in Europe, and more generally, in a state where Islam is a minority religion, raises significant questions regarding the necessity and possibility of reconciling one's religious identity with the desire to fully participate in the life of a secular society.

This challenge involves not only individuals and their communities but also legal systems, which are required to respond to the demands put forward by a particularly diverse minority group, characterized by a strong religious and cultural identity, and endowed with considerable expansive force, such as the Muslim minority. A community that, although aiming for integration, considers certain

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<sup>38</sup> M.F. CAVALCANTI, *Giurisdizioni alternative*, cit., p. 146.



elements essential to its religious identity as non-negotiable. It is precisely these elements that the minority group requests to be governed according to Sharia, which, as a result, assumes the position of law within the minority legal order.

One of the main characteristics of European Islam has been identified in the multi-level approach to individual religiosity, associated with the presence of transnational movements for the redefinition of Islamic orthodoxy<sup>39</sup>. As emphasized by Jocelyn Cesari, historically, an individual's religiosity has been associated with three elements: belief, conduct, and membership or collective identity. In the specific case of Western Muslims, to these elements is added the fact that being Muslim is, first and foremost, perceived as a way of being, a lifestyle: many of those who declare themselves non-believers still identify as Muslims, due to a sense of belonging to the Islamic cultural identity<sup>40</sup>.

Furthermore, the phenomenon of European Islam is connected to what has been defined by scholars as Transnational Islam, which encompasses both a physical and a virtual dimension of Islam<sup>41</sup>. On one hand, Muslims migrate and move across state borders, preserving their cultural, social, and religious traits. On the other hand, they recognize Islam as a point of reference for their identity. In the effort to protect this identity, Muslims living in non-Islamic countries tend to identify with the global Muslim community, the Umma, rather than with the national, ethnic, and cultural identity of their country of origin<sup>42</sup>.

This does not mean that Western Muslims represent a single, homogeneous community. On the contrary, they exhibit multiple and changing identities, stemming from belonging to different social groups. The matrix defining their identity is, in fact, influenced by a plurality of factors, and their loyalty to the Umma does not exclude full integration into Western society. At the same time, the awareness of belonging to a global religious community can, in the most extreme cases, contribute to fostering isolation and radicalization<sup>43</sup>.

Therefore, it becomes evident that within Western Islam, different ways of being Muslim are found. More precisely, three variations of

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<sup>39</sup> J. CESARI, *Introduction*, in J. CESARI (ed), *Oxford Handbook of European Islam*, Oxford U.P., Oxford, 2014, p. 10.

<sup>40</sup> J. CESARI, *Why the West Fear Islam: An Exploration of Muslims in Liberal Democracies*, Palgrave MacMillian, New York, 2013, pp. 39-40.

<sup>41</sup> S. VETROVIC, *Transnationalism*, Routledge, London, 2009; S. ALLEVI, J. NIELSEN (eds.), *Muslim Networks and Transnational Communities in and across Europe*, Brill, Leiden, 2003; J. BOWEN, *Beyond Migration: Islam and Transnational Public Space*, in *Journal of Ethnic and Migration Studies*, 30 (5), 2004, pp. 879-894.

<sup>42</sup> A.S. AHMED, D. HASTINGS (eds.), *Islam, Globalization and Postmodernity*, Routledge, London, 1994; J. CESARI, *Islam in the West: From Immigration to Global Islam*, in *Harvard Middle Eastern and Islamic Review*, 8, 2009, pp. 148-175; O. ROY, *Globalized Islam: The Search for a New Ummah*, Columbia U.P., Columbia, 2006.

<sup>43</sup> T. MODOOD, *The place of Muslim in British Secular Multiculturalism*, in N. GHANEA (ed.), *The Challenge of Religious Discrimination at the Dawn of the New Millennium*, Brill, 2004, cap. 10°, pp. 223-243.



Western Islam have been identified, related to the expression of individual religious identity, which, in turn, have different legal implications<sup>44</sup>:

a) *Visible associative active Islam* adopts an explicit religious stance, making Sharia clearly perceptible in the Western institutional landscape, especially through the actions of Muslims who seek to build associative structures, erect places of worship, and provide for the teaching of Islam<sup>45</sup>;

b) *Cultural agnostic silent Islam* includes those who do not explicitly manifest their religious affiliation, preferring to keep their faith separate from daily life, as well as those who consider Islam primarily as a cultural heritage that merges with other forms of identity<sup>46</sup>;

c) *Reinterpreted spiritualized implicit Islam* is directed towards a spiritual conception of Islamic law and an effort to interpret what it means to be Muslim in contemporary society<sup>47</sup>.

Despite such diversity, it is possible to trace some common identifying traits that allow outlining the general physiognomy of Western Islamic minorities. These are numerically smaller groups compared to the rest of the state's population, placed in a non-dominant position, whose members possess specific identity characteristics and show among them a sense of solidarity aimed at preserving cultural, traditional, and religious practices.

Clearly, the identifying element of these communities is the religious one, which surpasses the internal pluralism related to the national, ethnic, and linguistic identity of its members. Therefore, these groups find their unitary matrix in the single faith, whose normative rules are, however, susceptible to interpretations that may be even partially different. Ultimately, the Islamic community can be defined as a diversified religious minority, with a strong identity connotation that, while generally willing to integrate into Western society, considers certain elements essential to its religious identity as non-negotiable<sup>48</sup>.

Tacking as point of reference the classification developed by Alessandro Pizzorusso, which distinguishes between a) *secessionist minorities*, that seek separation from the state; b) *autonomist minorities*, that demand specific forms of self-government within the state legal system; c) *identity minorities*, that advance demands for particular legal guarantees allowing them to maintain certain fundamental cultural

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<sup>44</sup> F. SONA *Griglie di lettura e analisi dell'Islam europeo. Diritto interculturale e relazioni sciaraitiche*, in *Stato, Chiese e pluralismo confessionale*, Rivista telematica ([www.statoechiese.it](http://www.statoechiese.it)), 40, 2016.

<sup>45</sup> Y.Y. HADDAD, J. SMITH, *Muslim minorities in the West. Visible and invisible*, New York, Altamira Press, 2002, pp. 5-18.

<sup>46</sup> T. RAMADAN, *Les musulmans d'occident et l'avenir de l'Islam*, Sindbad-Actes sud, Arles, 2002.

<sup>47</sup> F. SONA, *Griglie di lettura*, cit.

<sup>48</sup> M.F. CAVALCANTI, *Giurisdizioni alternative*, cit., p. 167.



characteristics, Islamic minorities are in an intermediate place between autonomist minorities and identity minorities.

This characterization corresponds to the demands advanced by this minority: 1) obtaining exemptions from general norms, 2) the possibility of regulating some essential aspects of their identity such as those related to personal status and family relations, in accordance with Sharia, 3) recognition of typical institutions of Islamic law by the state courts and a certain margin of jurisdictional autonomy.

Today, the issue of the Islamic presence in the West has essentially taken on social and political connotations. The search for points of divergence and elements of compatibility is inevitably driven by a political vision: depending on the perspective adopted, the divergences may appear insurmountable, or the compatible intersections may lead to a sustainable intercultural system<sup>49</sup>.

Invoking the application of Sharia before the political authorities of the host country means seeking a meeting point between distant legal traditions. If we start from the assumption of total incompatibility between Islamic law in its multiple expressions and the law of European states, the claim to apply Sharia in a democratic legal system would have no chance of being accepted. Similarly, the attempt to obtain recognition of elements of Islamic law in clear contrast with democratic values, such as gender equality or religious freedom, would be doomed to failure.

Therefore, it seems more reasonable to see in the request for the application of certain rules and institutions of Sharia, the attempt to formulate an interpretation of sacred Islamic law that reconciles Muslim tradition with the prevailing legal framework. After all, if there were a complete lack of intention to modulate Islamic law in light of the non-negotiable elements of European legal systems, the very request would lose its meaning<sup>50</sup>.

The perception that there is an irreducible conflict between Sharia and European political and legal values mainly concerns those precepts of Islamic law that, by intervening in the personal sphere of individuals, establish rules whose traditional interpretation can impose discriminatory practices. Yet, empirical studies show that observant Muslims seeking harmony between religious traditions and the social context in which they live are particularly numerous. Similarly, there are many Islamic faithful who do not perceive this irreconcilable conflict between their European lifestyle and Islam<sup>51</sup>. In this context, it therefore seems reasonable to ask in what terms and from which perspective Muslims settled in Western countries, and more generally in non-Islamic countries, look at Sharia, and what they mean when they call for the application of sacred Islamic law within a secular legal system.

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<sup>49</sup> A. RINELLA, *La Sharia in Occidente*, cit., p. 158.

<sup>50</sup> M.F. CAVALCANTI, *Giurisdizioni alternative*, cit., p. 169.

<sup>51</sup> W. FAROUQ, *La Fatwa, specchio della religiosità islamica in Europa*, in *Oasis*, 28, 2018, pp. 70-86.





In this regard, it is first necessary to bear in mind that Sharia, within the Western context, does not refer solely to the Islamic legal system but also to a broader domain. Consequently, it appears necessary to adopt an anthropological legal approach that considers not only the notion of Sharia but also Muslims as individual persons; and this in order to understand which norms of Islamic law are indeed indispensable for them and to what extent such rules can be considered conformable or adaptable to the secular legal system in question<sup>52</sup>.

Although studies on the subject have been limited<sup>53</sup>, it is still possible to identify some elements that allow defining the representation that members of Islamic minorities have of Sharia.

Muslims living in Western countries seem to consider the sacred law essentially in abstract terms, or rather as a virtuous abstraction: Sharia is the law of God, and as such, it represents everything Muslims need and all that is good and beneficial for them. This is an abstract concept that is difficult to define, and this perception of Sharia is not always accompanied by an awareness of the implications and effects of its concrete application. Thus, invoking the application of Sharia can represent a form of expressing one's aspiration for a just and virtuous society<sup>54</sup>.

Generally, Western Muslims who aspire to live their lives in accordance with Sharia, confine its concrete application to four areas: a) the strictly religious sphere, which includes precepts regarding prayer, fasting, funeral rites and burial, ritual slaughter, dietary prescriptions, clothing; b) family law, with particular reference to aspects related to marriage and divorce; c) rules on financial transactions, particularly regarding the prohibition of imposing interest and practicing usury; d) social relations, especially concerning gender relations and relationships with non-believers.

The Sharia norms governing these matters hold a particularly significant position in the hierarchy of sources elaborated by Islamic doctrine, as they are directly traceable to the words dictated by the Prophet, contained in the Quran, and subject to the unanimous consensus of the community. Consequently, these elements are indispensable for any devout Muslim.

However, it must be considered that of these rules, only those pertaining to family law and financial transactions, being of a strictly legal nature, have a direct impact on the state legal system. All other rules

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<sup>52</sup> **M.S. BERGER**, *Applying Shari'a in the West*, in M.S. BERGER (ed), *Applying Shari'a in the West*, Leiden U.P., Leiden, 2013, pp. 7 ss.

<sup>53</sup> See **J.L. ESPOSITO, D. MOGAHED**, *Who speaks from Islam? What a Billion Muslim Really Think*, Gallup Press, Washington, 2008; **PEW RESEARCH CENTER**, *Strong Religious beliefs are only one part of Muslim American Identity*, 2017; **PEW RESEARCH CENTER**, *U.S. Muslims are religiously observant, but open to multiple interpretations of Islam*, 2017; **M. MIRTZA, A. SENTHILKUMARAN, Z. JA' FAR**, *Living Apart together. British Muslim and the Paradox of Multiculturalism*, Policy Exchange, 2007.

<sup>54</sup> **M.S. BERGER**, *Applying Shari'a in the West*, cit., p. 9.



assume legal significance to the extent that they may lead to a violation of fundamental rights, the fundamental principles of the legal system, or public order<sup>55</sup>.

In this context, the application of Sharia demonstrates a tendency to adapt to the legal, political, and social context of European legal systems. On one hand, such flexibility represents a positive characteristic in terms of adaptation and dialogue between the minority legal order and the state legal system. On the other hand, it highlights a strong heterogeneity of the Islamic legal system, arising not only from its internal pluralism but also from the varying willingness and openness of the state legal system towards religiously rooted practices. Consequently, the diversity of Sharia interpretation in the West is determined not only by internal divisions within minorities or the stance taken by state legal systems but rather by the cultural and social context in which its application is embedded<sup>56</sup>.

The dichotomy between law and culture represents the key to understanding the contrasting reactions to Sharia: the West has produced legal systems that allow the exercise of religious practices, including Islamic ones, but at the same time, it has preserved a cultural identity that may conflict with these practices. At the same time, members of Islamic minorities seem willing to adapt the interpretation of Sharia, for which they request application only to specific aspects of their lives.

However, the question arises as to how willing European legal systems are to reasonably accommodate such practices, and how much space they are prepared to allow for the application of Islamic legal norms within well-defined limits. Since these religious demands represent an emerging phenomenon in Europe, the state cannot exempt itself from finding appropriate responses and identifying possible interactions between Sharia and the legal system, taking into account cultural and religious pluralism<sup>57</sup>.

#### **4 - The Interaction Between Sharia and the Legal System of the State: Techniques of Reasonable Accommodation and Islamic Family Law**

Historically, the response of Western legal culture to the conflict between loyalty to the state legal system and the respect for confessional commitments has notably been that of the separation between law and religion. Consequently, except for some specific provisions, state law represents the only formal source applicable, even in matters of personal

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<sup>55</sup> M.S. BERGER, *Applying Shari'a in the West*, cit., p. 9.

<sup>56</sup> M.S. BERGER, *Applying Shari'a in the West*, cit., pp. 15-16.

<sup>57</sup> M.F. CAVALCANTI, *Giurisdizioni alternative*, cit., p. 177.



status and family law<sup>58</sup>. However, not all individuals adopt the same perspective, nor does religious sentiment hold the same meaning for everyone. In particular, members of Muslim communities continue to seek a compromise between the demands of their faith and those of civil law.

Refusing to duly consider this effort could risk eliciting reticence from these communities towards the state legal system. A distrust that already manifests in various forms and can reach the point of leading such groups to substitute the parallel and informal legal system within the religious community, regardless of its recognition and formal efficacy, with an inevitably negative impact in terms of legal certainty and the protection of the fundamental rights of the most vulnerable individuals<sup>59</sup>.

Therefore, the search for forms of dialogue, at the institutional and legal level, between Islamic minorities and legal systems, appears justified. The case of Sharia in Europe is emblematic in this respect: the main challenge faced by Islamic minorities and the secular legal systems that govern them is precisely to understand whether it is possible to reconcile Western secular law with Islamic law, through the identification of forms of interaction and dialogue.

Given this premise, it seems possible to identify five instruments or modes of interaction between Sharia and European legal systems, which allow the application, in a formal or informal manner, of some of its norms to individuals residing within the state's territory:

*a. International Private Law:*

It allows a form of interaction between different national legal systems, which find application to a specific case or situation. As is well known, international private law consists of a system of rules and principles that regulate legal relationships between private parties that present elements foreign to the state legal system, through the mechanism of referral to the legal system of a foreign state. Consequently, the legal relationship established abroad does not cease to exist merely because the parties cross the state borders; likewise, the rights and subjective legal situations founded in those relationships do not cease to exist.

When the conditions are met, provisions of Sharia can find application in Western legal systems when they are an integral part of

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<sup>58</sup> **M.C. FOLETS**, *Accommodating Islamic Family Law(s). A Critical Analysis of some Recent Developments and Experiments in Europe*, in M.S. BERGER (ed), *Applying Shari'a in the West*, cit., p. 207 ss.

<sup>59</sup> **M. BERGER**, *Conflicts Law and Public Policy in Egyptian Family Law: Islamic Law through the Backdoor?*, in *The American Journal of Comparative Law*, 2002, pp. 555-594; **O. EWAN**, *L'Islam et les systèmes de conflits de lois*, in J.Y. CARLIER M. VERWILGHEN (Eds.), *Le statut personnel des musulmans*, 1992, pp. 313-341.



the foreign state's legal system, provided they are compatible with the state's legal system.

One of the institutions of classical Islamic law that poses the greatest compatibility issues with Western legal systems is the talaq: the unilateral divorce that grants the husband the power to end the marital relationship through a declaration of repudiation, without the need for any justification<sup>60</sup>. This institution inevitably conflicts with the principle of equality between spouses<sup>61</sup>, and consequently, it has no chance of being recognized by a Western legal system, at least in the majority of cases<sup>62</sup>. The problem arises, rather, in terms of the consequences and effects of the talaq that has been pronounced in a country whose orientation considers this institution fully legitimate.

More specifically, the question arises whether, bearing in mind the limits related to public order and the fundamental principles of the legal system, the effects of this institution should be upheld in certain circumstances, such as when the woman, who is generally the more vulnerable party in the family relationship, could derive a legitimate benefit from the recognition of the dissolution of the marriage.

The approach adopted by European legal systems on this matter is not uniform. However, in very general terms, it can be stated that if the conditions justifying divorce under the state legal system are met, there is no violation of the fundamental rights of the parties, and there is a possibility that the more vulnerable subjects could benefit from it, the institution of talaq and its effects could be recognized based on the norms of international private law<sup>63</sup>.

A similar argument can be made regarding polygamous marriage legitimately contracted by the parties under the legal system of a foreign state, compared to the one in which the parties seek its recognition. Polygamy is, in principle, prohibited by Western legal systems, most of which also consider it a criminal offense.

The issue becomes problematic when the recognition of such unions and their effects depends on the protection of the rights of one of

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<sup>60</sup> **L. WELCHMAN**, *Women and Muslim Family Law in Arab States. A Comparative overview of textual development and Advocacy*, Amsterdam U.P., Amsterdam, 2007; **Z. MIR HOSSEINI**, *Islamic Family Law and Social Practice: Anthropological Reflections on the Terms of the Debate*, Austrian Association for the Middle East Hammer-Purgstall, 2009, pp. 37-48; **M. VOORHOEVE** (ed), *Family Law in Islam: Divorce, Marriage and Women in Muslim World*, I.B. Tauris, London, 2012.

<sup>61</sup> **M. ROHE** *Islamic Law in Past and Present*, Brill, Leiden-Boston, 2014; **M.C. FOLETS** *The Admissibility of Repudiation: Recent Developments in Dutch, French and Belgian Private International Law*, in *Hawwa*, 5 (1), 2007, pp. 10-32.

<sup>62</sup> House of Lords, *R v Secretary of State for the Home Department ex p. Fatima Ghulam*, [1986] AC 527 (HL).

<sup>63</sup> Court of Appeals Hamm, 7.03.2006, BeckRS2007, 00423; Court of Appeals Frankfurt am Main, 11.05.2009, 5 WF 66/09; Court of Appeals Cagliari, 16.05.2008, n. 198; Spain Supreme Court, ATS, 21.04.1998, RJ 3563; per France Court of Cassation 17.02.2004 n. 01-11-549; n. 02-11-618; France Court of Cassation 03.01. 2006, n. 04-15-231; 04.11.2009, n. 08-20.574; BGH Fam RZ 2004-1952; NJW-RR 2007.



the parties, such as in cases of claims for recognition of the right to economic maintenance of the second wife, or her right to inheritance or to participate in the deceased husband's pension<sup>64</sup>. In these cases, the failure to recognize such unions and their effects, while corresponding to the due respect of the limits imposed by public order, can cause unjust harm to the more vulnerable party<sup>65</sup>.

In these cases, the system devised by international private law seems to show some limits, ending up harming the individual that the legal system intends to protect. Additionally, especially in matters of personal status and family law, the system of international private law applies only to those individuals whose personal situation allows for the referral to foreign law. The application is excluded for members of minorities who do not present this type of connection, necessary for the application of Sharia as the law of another state.

*b. Incorporation of Sharia into the state legal system:*

The incorporation of Sharia into the state legal system is based, first and foremost, on the principle of autonomy of the parties, to which the legal system recognizes the ability to shape some aspects of their lives, combining non-derogable and indispensable elements of secular law with elements of religious law.

This system can also find application in family law, for example, by allowing spouses to enter into prenuptial agreements to frame their union according to their particular religious and cultural needs, within the limits imposed by the state legal system<sup>66</sup>. This type of indirect incorporation of Sharia, rather rare in continental Europe<sup>67</sup>, has found widespread use in North America, where the formulation of contractual clauses in accordance with Islamic family law is permitted.

Some European countries have directly incorporated elements of Sharia into their state legal systems.

A prime example of this can be found in the British regulation of marriage celebration, as provided by the Marriage Act of 1949 and the

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<sup>64</sup> **M. ROHE**, *Sharia in Europe*, in **J. CESARI**, *The Oxford Handbook of European Islam*, Oxford, Oxford U.P., 2015, p. 680.

<sup>65</sup> UK: Court of Appeal *Bibi v Chief Adjudication Officer* [1998] 1 FLR 375; NL: District Court Utrecht, 21.01.2009, LJN BH 3029, District Court Rotterdam, 20.07.2006, LJN AY 5484, contra *Rechtsbank Den Haag* 23.11.2009; Francia: Court of Cassation, 6.07.1988 n. 85-12-743, contra Court of Cassation, 24.09.2002, N. 00-15.789

<sup>66</sup> **M. ROHE**, *Sharia in Europe*, in **J. CESARI**, *The Oxford Handbook of European Islam*, cit., p. 682.

<sup>67</sup> **S. RUTTEN**, *Erven naar Marokkaans recht: aspecten van Nederlands internationaal privaatrecht bij de toepasselijkheid van Marokkaans erfrecht*, Intersentia, Antwerp, 1997; **A.K. PATTAR**, *Islamisch inspiriertes Erbrecht und deutscher Ordre public: die Erbrechtsordnungen von Egypten, Tunesien und Marokko und ihre Anwendbarkeit im Inland*, Duncker & Humblot, Berlin, 2007.



Matrimonial Causes Act of 1973<sup>68</sup>. Under this regulation, the legal system recognizes the validity of a religious marriage celebrated in accordance with the requirements mandated by law. To this end, Muslim institutions can request the necessary recognition for the registration of marriages celebrated according to the rites and rules established by Sharia, which, if the conditions are met, are incorporated into the legal system.

The German legal system, despite considering polygamy contrary to public order and a criminal offense under section 172 of the Criminal Code, recognizes the validity of polygamous marriages contracted abroad, but only for social security purposes. In this case widow's pensions are divided among all the wives<sup>69</sup>.

*c. Religious-based arbitration:*

The interaction between the state legal system and the minority legal system can occur through the tool of Alternative Dispute Resolution, in the form of voluntary religious jurisdiction, based, therefore, on private autonomy.

This tool allows resolving antinomies between state laws and religious norms in those matters that cannot escape the law produced by state bodies but, at the same time, are subject to non-derogable religious rules from the perspective of the faithful Muslim. The distinguishing element of these dispute resolution tools lies in the possibility of obtaining a jurisdictional decision through an alternative procedure to the ordinary legal process, with the possibility for the parties to choose the applicable law for resolving the dispute.

Through the use of ADRs, therefore, the parties entrust, where permitted by the legal system, an adjudicating authority external to the state judicial system with the task of resolving a dispute using, as a reference parameter, the sacred law of their religious confession. In this way, the state's monopoly on jurisdiction is diminished, but at the same time, the objective of safeguarding the identity of religious minorities is pursued: the faithful invoke the observance of religious precepts and, for this reason, with an act of private autonomy, legitimize a third party, with whom they share faith, to resolve the dispute<sup>70</sup>.

The possibility of submitting the dispute to a judge other than the state one requires two conditions to be met. Firstly, it is necessary that the state legal system expressly provides for this possibility: it is the state law that defines the functions, and their limits, that the parties can assign to the designated arbitrator. Secondly, it is essential to have an agreement between the parties in which they express their consent to resort to an

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<sup>68</sup> E. BUTLER-SLOSS, M. HILL, *Family Law: Current Conflicts and their Resolutions*, in R. GRIFFITHS-JONES (ed), *Islam and English Law: Rights, Responsibilities and the Place of Sharia*, Cambridge U.P., Cambridge, 2013, p. 108 ss.

<sup>69</sup> Social Code I, par. 34, Section 2.

<sup>70</sup> A. RINELLA, *La Sharia in Occidente*, cit.



alternative form of jurisdiction, elect the adjudicating body, and choose the discipline according to which the dispute will be settled, which in the case of religious arbitrations is the confessional law of their community of affiliation.

Given these premises, the contact between Western legal culture and the traditions and legal principles followed by Islamic minorities has favored forms of hybridization also in the context of alternative dispute resolution tools, not only from a procedural standpoint but also in a substantive sense.

The ADR system thus seems to offer a useful option to constitutional states that, faced with identity claims advanced by minority groups, seek to dynamically achieve a balance between the principle of equality and the right to diversity. In the case of Islamic minorities, the use of religious arbitration as an alternative jurisdiction to that of the state has generated some of the most significant experiences of encounter between the state legal system and the minority legal order, such as those of Islamic arbitration in the United Kingdom<sup>71</sup>.

*d. The informal application of Sharia:*

Religious norms can find application within the state legal system regardless of their formal recognition.

Generally, members of the Islamic minority, as is natural, tend to maintain the structure of family relationships typical of the Muslim tradition or their country of origin, and it often happens that they bypass the state's dispute resolution mechanisms, turning instead to the minority legal system. These scenarios can lead to various cases of informal application of Sharia, with possible negative repercussions regarding the guarantee of rights for the most vulnerable subjects.

The issue of the informal application of Sharia in European countries mainly concerns unregistered religious marriages that are incapable of having legal significance or producing binding legal effects.

The reasons why members of the Muslim minority fail to comply with legal requirements in this area are varied and include the belief that

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<sup>71</sup> **A. RINELLA**, *La Sharia in Occidente*, cit.; **E. ODORISIO**, *The Muslim Arbitration Tribunal (MAT)*, in *Comparative Law Review*, vol. 11, n. 1, 2021, p. 80 ss; **R. BLACKETT**, *The Status of Religious Courts in English Law*, in *Decisions: Dispute resolution & International Arbitration Newsletter*, december 2009, pp. 11-19; **I. IEDGE**, *Islamic Finance, Alternative Dispute Resolution and Family Law: Developments Towards Legal Pluralism?*, in R.R. GRIFFITHS-JONES (ed), *Islam and English Law. Rights, Responsibility and the place for Shari'a*, Cambridge U.P., Cambridge, pp. 116-143; **A. MAROTTA**, *A Geo Legal Approach to the English Sharia Courts: Cases and Conflicts*, Brill, Leida, 2021; **S. BANO**, *Muslim Women and Sharia Councils. Transcending the Boundaries of Community and Law*, Palgrave MacMillan, Basingstoke, 2012; **P. PAROLARI**, *Diritto policentrico e interlegalità nei paesi europei di immigrazione. Il caso degli Sharia Councils in Inghilterra*, Torino, Giappichelli, 2020; **M. KESHAVJEE**, *Islam, Sharia and Alternative Disputes Resolution: Mechanism for Legal Redress in the Muslim Community*, IB Tauris, London, 2013.



the only real marriage is the religious one, ignorance of the law, mistrust towards the official legal system, and the difficulty in obtaining the documents required by law for registration<sup>72</sup>. The phenomenon of informal marriages produces a series of quite significant consequences, especially regarding the protection of the rights of women and minor children.

The issue has recently been addressed by British jurisprudence, in whose legal system marriage and divorce are considered matters of public policy. According to the regulation outlined by the Marriage Act of 1949 and the Matrimonial Causes Act of 1973, the legal system recognizes the validity of religious marriages, provided they are celebrated in accordance with the requirements established by law. Specifically, regarding Islamic marriages, Muslim community institutions can request to be recognized as suitable for registering religious marriages, thereby also attributing civil effects to them<sup>73</sup>.

However, for this purpose, the celebration of the marriage must meet specific requirements: the marriage must be celebrated in a registered place of worship, following the fulfillment of a series of preliminary obligations by an authorized religious official or in the presence of a civil official who will proceed with the registration of the marriage and the issuance of the corresponding certificate<sup>74</sup>. In the absence of such requirements, the marriage must necessarily be preceded or followed by a civil ceremony. If the marriage is not registered for civil purposes, remaining solely in the religious form and lacking the legal requirements, it must be considered null or non-existent, as established by the Matrimonial Causes Act of 1973<sup>75</sup>.

When the issue of the validity of an informal religious marriage arises, the judge called upon to make a judgment regarding its possible recognition generally has two options: a) declare the marriage null and

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<sup>72</sup> For a more in-depth look at the topic: **R.J AKHTAR**, *Unregistered Muslim Marriage: an Emerging Culture of Celebrating Rites and Compromising Rights*, in J. MILLER, P. MODY, R. PROBERT (eds.), *Marriage Rites and Rights*, Bloomsbury, London, 2015; **I. YILMAZ**, *Law as Chamaleon: The Question of Incorporation of Muslim Personal Law into English Law*, in **J. MUSLIM** Min. Aff., 21, 2010, p. 297 ss.; **V. VORA**, *The Continuing muslim marriage conondrum: the Law of England and Wales on Religious Marriage and non marriage in UK*, in **J. MUSLIM** Min. Aff., 1, 2020, p. 148 ss.; **S. RUTTEN**, *Protection of spouse in informal marriages by Human Rights*, in *Utrecht L. Rev.*, 2, 2010, p. 77ss.; **J. VAN DER LEUN, A. LEUPEN** *Informele huwelijken in Nederland, een exploratieve studie*, Leiden UP, Leiden, 2009.

<sup>73</sup> Marriage Act, 1949, Section 46.

<sup>74</sup> **E. BUTLER-SLOSS, M. HILL**, *Family Law: Current Conflicts and their Resolutions*, in R. GRIFFITH-JONES (ed), *Islam and English Law: Rights, Responsibilities and the Place of Sharia*, Cambridge U.P., Cambridge, 2013, p. 108 ss.; **R. PROBERT, S. SALEEM**, *The Legal Treatment of Islamic Marriage Ceremonies*, in *Oxford Journal of Law and Religion*, 7, 3, 2018, p. 376 ss.

<sup>75</sup> Law Commission, *Getting Married a Scoping Paper: Executive Summary*, 2015, p. 9.





void under section 11 of the Matrimonial Causes Act of 1973<sup>76</sup>, in which case, although the marriage is not legally valid, the judge may recognize certain economic and property rights in favor of the weaker spouse<sup>77</sup>; b) declare the marriage as non-existent, not marriage, because it “falls so far outside the provisions of the marriage legislation that it is neither a valid nor a void marriage”<sup>78</sup>. This qualification does not allow the judge to offer any legal protection to the parties.

As can be easily understood, the informal nature of the Islamic marriage and its subsequent declaration of non-existence lead to a series of negative consequences on the protection of women<sup>79</sup> who remain trapped in a situation where, for the state legal system, the husbands are not legally obligated to assume any responsibility towards them, yet for the minority legal order, they remain effectively married<sup>80</sup>.

A recent judgment has called into question this established orientation, although it has remained, at least for the moment, an isolated case. This is the decision issued in the case of *Akhter v. Khan* in 2018<sup>81</sup>, which was later reversed on appeal in 2020<sup>82</sup>, concerning the request for recognition of an informal Islamic marriage<sup>83</sup>.

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<sup>76</sup> Section 11 of the Matrimonial Causes Act of 1973 stipulates that a marriage is void when « it is not a valid marriage under the provisions of the Marriage Acts 1949 to 1986 (that is to say where, (i) the parties are within the prohibited degrees of relationship; (ii) either party is under the age of sixteen; or (iii) the parties have intermarried in disregard of certain requirements as to the formation of marriage); (b) that at the time of the marriage either party was already lawfully married, in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales». Pursuant to the combined provisions of Article 49 of the Marriage Act of 1949 and Article 11 of the Matrimonial Causes Act of 1973, a void marriage must be considered distinct from mere cohabitation or from a non-marriage (*Asaad v Kurter* [2014] EWHC (Fam) 3852 [95] (Eng.); *El-Gamal v Al-Maktoum* [2011] EWHC (Fam) 3763 [13] (Eng.); *Gandhi v Patel* [2001] EWHC (Ch) 473 (Eng.).

<sup>77</sup> **V. VORA**, *The Continuing muslim Marriage Condrum*, cit., p. 151.

<sup>78</sup> Law Commission, *Getting Married. A Scoping Paper*, London, 2015, [www.lawcom.gov.uk/app/uploads/2015/12/Getting\\_Married\\_scoping\\_paper.pdf](http://www.lawcom.gov.uk/app/uploads/2015/12/Getting_Married_scoping_paper.pdf).

<sup>79</sup> **A.R. MOOSA, D. HELLY**, *An Analysis of British Judicial Treatment of Islamic Divorce 1997-2009*, in **E. GIUNCHI**, *Muslim Family Law in Western Courts*, Routledge, New York, 2014, p. 132 ss.

<sup>80</sup> *Dunkali v Lamrani* [2012] EWHC 1748 (Fam); *Sharbatly v Shagroon* [2012] EWCA Civ 1507; *Al-Saedy v Musawi* [2010] EWCA 3293 (Fam); *El Gamal v Al Maktoum* [2011] EWHC B27 (Fam). Contra *Ma v JA and the Attorney General* [2012] EWHC 2219 (Fam).

<sup>81</sup> *Akhter v Khan* [2018] EWHC (Fam) 54 [1] (Eng.).

<sup>82</sup> *Her Majesty's Attorney General v Akhter* [2020] EWCA Civ 122.

<sup>83</sup> In December 1998, Nasreen Akhter and Mohammed Shabaz Khan celebrated their marriage according to Islamic rites in Southall, near London. Despite the agreement between the spouses, the husband did not initiate the necessary procedures for the civil registration of the marriage. From the day of the wedding, the couple cohabited as husband and wife and were recognized as such by their community. Furthermore, four children were born from the relationship. In 2005, the parties moved to Dubai, where the informal marriage celebrated in Great Britain was recognized as fully valid. In November 2016, Nasreen Akhter approached the England and Wales Family Court to request a divorce from her husband.



In a manner innovative with respect to established jurisprudence, the judge of first instance accepted the protection request advanced by the petitioner, declaring the marriage null and void, based on the application of Articles 8 and 12 of the ECHR and Article 3 of the 1989 Convention on the Rights of the Child. The decision was adopted with an approach that the judge himself described as holistic, inspired by the principle of substantive equality, aimed at defusing the indirectly discriminatory effect that the law would produce against the most vulnerable subjects, relying on the qualification of the ECHR as a living instrument, susceptible to an evolutionary interpretation<sup>84</sup>.

As anticipated, the judgment was overturned on appeal. The appellate court reaffirmed the prevailing jurisprudential orientation, emphasizing the need to ensure the public interest in observing the formal requirements imposed by law on marriage, which prevail also to protect the parties themselves, excluding a violation of Article 8 of the ECHR and Article 12 of the Convention, to which, in any case, horizontal effect cannot be attributed<sup>85</sup>.

Another example demonstrating the critical issues arising from an informal application of Sharia is that of the chained wife or limping marriage<sup>86</sup>: whether valid or not in the legal system, the religious marriage can only be dissolved by a religious authority. Similarly, the pronouncement of dissolution of the marital bond, formed following the celebration of the marriage in civil form and its registration, has no value within the minority legal order; in the eyes of the community, the parties will continue to be married until the religious bond has been dissolved.

To obtain the dissolution of an Islamic marriage, the woman will need, in most cases, the cooperation or consent of the husband. In the event of the man's refusal, the woman will remain chained to an unwanted marriage, with a series of personal freedom limitations<sup>87</sup>.

Faced with this particular situation, the question has been raised whether the state can intervene in a dispute of a strictly religious nature, arising from a situation that has value only in the informal legal order and is, instead, non-existent for the state system. The affirmative answer from the Dutch Supreme Court came as early as 1982, on the occasion of resolving a case related to Jewish religious marriage, which represented the leading case of a now well-established jurisprudence<sup>88</sup>.

More specifically, the Supreme Court confirmed that civil courts have no jurisdiction over the dissolution of an informal religious marriage, as such a relationship is not recognized by the state legal system. At the same time, the husband's refusal to cooperate in

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<sup>84</sup> Akhter v Khan, §93.

<sup>85</sup> Akhter v Khan and another (2020) EWCA Civ 122 (2020) All ER (D) 88 (Feb).

<sup>86</sup> S. RUTTEN, B. DEOGRATIAS, P. KRUNINGER, *Marital Captivity. Divorce, Religion and Human Rights*, Den Haag, 2019.

<sup>87</sup> M.F. CAVALCANTI, *Giurisdizioni alternative*, cit., p. 197.

<sup>88</sup> HR 22.1.1982 NJ 489/1982.



dissolving the religious marital bond can have consequences within the legal system, constituting an unlawful act.

In making such an assessment, the judge must balance the interests of the parties, taking into account both the harm caused to the wife and the reasons for the husband's refusal to cooperate in the religious divorce<sup>89</sup>. If, following such an assessment, the judge finds that the husband's conduct constitutes an unlawful act, they may order him to cooperate in the divorce under penalty of a financial sanction for each day of delay<sup>90</sup>.

In this way, although the legal system does not recognize the religious marriage, jurisprudence acknowledges some effects of the informal application of the religious rules that govern it, by attributing legal effects to the husband's refusal to adopt a religiously oriented behavior. The objective is undoubtedly to protect the woman who finds herself in a disadvantaged position<sup>91</sup>.

Since 2010, Dutch jurisprudence has stated that the civil wrong arising from the husband's refusal to cooperate in dissolving the religious marriage is based on the violation of Articles 8 and 12 of the ECHR: in the balancing process that the judge must undertake, the interests protected by these norms prevail over the husband's religious freedom, which is required to adopt a specific religiously oriented behavior<sup>92</sup>.

In an attempt to find a solution to the negative consequences arising from the informal application of Sharia, jurisprudence has used human rights as a reference point. Thus, the norms of the ECHR, generally used as a shield against possible rights violations within the minority legal order, are used as a key to make it emerge and interact with the state legal system.

What is worth noting, in any case, is that despite legislators tending to overlook the effects arising from the informal application of Sharia, jurisprudence, in order to protect the most vulnerable subjects, has created a *fictio iuris*, resorting to the concept of civil wrongdoing, strengthened by the involvement of human rights law, implicitly

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<sup>89</sup> Hof Den Haag 21.11.2017 EB 2018/21, RB Oost-Brabant 3.8.2016 EB 2016/88.

<sup>90</sup> F. IBILI, *De Rol van de Nederlandse Rechter bij de ontbinding van informele religieuze huwelijken*, in *JCDI*, 25, 2019, p. 1 ss.

<sup>91</sup> HR 10.11.1989 NJ 1990/112. Contra RB Rotterdam 6.1.2016 EB 2016/40, RB Rotterdam 9.9.2016, ECLI:NL:RBROT:2016:6943, Hof Den Haag 21.11.2017.

<sup>92</sup> RB Rotterdam 8.12.2010 ECLI:NL:RBROT:2010:BP8396, RB Den Haag 8.6.2012, 418988/KGZA 12-489, RB Amsterdam 10.4.2012, LJNBW 3800; RB Den Haag 21.10.2014 ECLI:NL:RBDHA:2013:5254, Hof Den Haag 21.11.2017 EB 2018/21, RB Ost-Brabant 3.8.2016 EB 2016/88, Rb Rotterdam 28.2.2018, ECLI:NL:RBROT:2018:1720; RB Amsterdam 21.12.2018 ECLI:NL:RBAMS:2018:9363, Hof Den Haag 16.10.2018 ECLI:NL:GHDHA:2018:2893, RB Oost-Brabant 3.8.2016 EB 2016/2018, RB Den Haag 21.10.2014 ECLI:NL:RBDHA:2014:14191, GEHO Den Haag ECLI:NL:GHDHA:2019:1818, RB Oost-Brabant 13.8.2019 ECLI:NL:RBOBR:2019:4641; RB Rotterdam 14.4.2020 ECLI:NL:RBROT:2020:3468. Contra GH Den Haag 4.6.2013, ECLI:NL:GHDHA:2013:5254; RB Amsterdam 2.4.2014 ECLI:NL:RBAMS: 2014:1644.



recognizing not only the existence of religious marriages but also the value of the informal legal order.

*e. Dispute resolution through the technique of reasonable accommodation:*

In cases where members of the minority choose to resort to the state jurisdiction, it will be up to the judges to exercise that cultural sensitivity which allows for decisions based on the reasonable composition of differences. The prudent assessment in dispute resolution enables the judge, within the limits imposed by the legal system, to formulate interpretative solutions aimed at a reasonable composition between state law and Islamic law.

In the field of Islamic family law, the technique of reasonable accommodation has often been applied by civil courts in European countries to resolve disputes related to the institution of the *mahr*.

The *mahr*, one of the fundamental elements of the marriage contract, consists of a sum of money or a certain quantity of goods that the groom commits to donate to the bride<sup>93</sup>. If the *mahr* is not specified in the marriage contract, a judge, *qadi*, can determine its value. The amount of the *mahr* is established based on what may be considered appropriate, according to local customs, for a woman of the same social status and with the same level of education as the bride<sup>94</sup>.

From a strictly legal point of view:

“*mahr* is not a matrimonial right. It is not a right derived from the marriage, but is a right in personam, enforceable by the wife or widow against the husband or his heirs. In a strict contractual sense, the right is not derived from the marriage, but from a contractual agreement between two consenting adults”<sup>95</sup>.

The institution of the *mahr* can come to the attention of Western judges in two ways: through international private law or by the express request of the parties. In the latter case, the recognition of the *mahr* depends on its compatibility with the legal system and the judge's sensitivity towards recognizing the cultural, traditional, or religious claims of the parties.

Based on this premise, it is possible to identify three different approaches adopted by European judges in response to the request for recognition of the *mahr* advanced by members of the Islamic minority<sup>96</sup>:

*x<sup>1</sup>) The approach based on legal pluralism:*

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<sup>93</sup> E.J. VAN DONZEL (ed.), *The Encyclopaedia of Islam*, vol. 6, Brill, Leiden, 1991, p. 78.

<sup>94</sup> N. YASSARI, *Understanding and Use of Islamic Family Law Rules in German Courts. The Example of Mahr*, in M. BERGER (ED.), *Applying Shari'a in the West*, cit., pp.165-187.

<sup>95</sup> J.J. NASIR, in *Understanding and Use of Islamic Family Law Rules in German Courts*, in M. BERGER, *Applying Shari'a in the West*, cit., p. 65 ss.

<sup>96</sup> P. FOURNIER, *Muslim Marriage in Western Court. Lost in Transplantation*, Routledge, London, 2016, p. 11.



This approach recognizes the coexistence of normative systems not all of which are attributable to the State but are nevertheless capable of acting in the public space. From this perspective, state law loses its centrality, giving way to the interaction between a variety of legal systems that interact and influence each other.

Through this approach, the judge explores and analyzes the different manifestations of non-State Law, identifying them as a living element of the legal system according to a multicultural vision<sup>97</sup>.

In this context, some judges have valued the relationship between the secular legal system and Islamic law in light of the principle of multiculturalism<sup>98</sup>, while others have rejected the idea of a possible interaction between the two normative systems<sup>99</sup>. In other cases, judges have arrived at a hybrid result, entirely new for both legal systems<sup>100</sup>.

Among the paths followed to resolve disputes in light of legal pluralism, the most effective seems to be that aimed at achieving a hybrid result between religious law and secular law, respectful of the minority legal order, the will of the parties, and the state's legal system. This is undoubtedly an example of the correct application of the criteria typical of reasonable accommodation, although not without its criticisms.

The main risk of using such an approach lies in the fact that judges, while willing to give relevance to the minority legal system, may not have sufficient knowledge of it, leading in some cases to incorrect interpretations, the need for expert intervention, or to assess the contravention to public order of the institute under examination. At the same time, the value of an approach based on the recognition of the effectiveness of legal pluralism is evident:

“The legal pluralist perspective invites legal subjects to imagine themselves as legal agents to discover the constitutive potential of their own actions. The practice of legal pluralism is, consequently, foundation building. We teach ourselves to examine our own interactions, and to learn about law, first and foremost, from ourselves»<sup>101</sup>.

X<sup>2</sup>) *The approach based on the principle of formal equality:*

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<sup>97</sup> P. FOURNIER, *Muslim Marriage*, cit., p. 70.

<sup>98</sup> Rb. Maastricht, (The Netherlands), 16.04.2003, 72204/2003; Rb. Arnhem, (The Netherlands), 07.02.1985, NIPR, 271/1986; Rb. Amsterdam, (The Netherlands), 01.10.2014, 76/2014, OLG Bremen, (Germany), 03.07.1980, FamRZ 606/1980; Cour de Cassation (France), 04.04.1978, 000137/1987; Cour de Cassation (France), 22.02.2005, 03.14.96; Malmö Tingsrätt (Sweden), 10.02.1992, Mr S. v Mrs S: T137-92, RH 1993:116; Halmstads Tingsrätt (Sweden), 24.10.2002.

<sup>99</sup> Court d'Appel de Lyon, 2.12.2002, 2001/02390. In a compliant sense Court d'Appel de Douai (France), 07.04.1976, 76/1976.

<sup>100</sup> AG Hamburg (Germany), 19.12.1980, IPRA 1983, pp. 64-65

<sup>101</sup> R.A. MACDONALD, *Pluralistic Human Rights? Universal Human Wrongs?* Springer, Dordrecht, 2012, p. 70.



This approach assumes that the law is identified as an autonomous entity separate from society. The fundamental element of this approach is the individual, who is left free to pursue their interests within a system that minimally interferes with their choices. In assessing the requests for recognition of Islamic law institutions such as the *mahr*, what is significant to judges is the agreement's conformity with the legal system and the contractual freedom of individuals, which the state guarantees to enforce, provided it can be translated into an institution of civil law not contrary to public order.

Conversely, cultural and moral elements characterizing the institution and influencing the real will of the parties are of little significance. The defining elements of this approach are thus: a) the qualification of the *mahr* according to contract law; b) the irrelevance of the ethnic, cultural, and religious characteristics of the parties; c) the translation of the *mahr* into secular terms.

In the application of this approach, the *mahr* has been recognized in terms of a contractual obligation<sup>102</sup> or as a condition or contractual effect arising from the marital relationship<sup>103</sup>.

In judging the *mahr*, the approach directed at applying the principle of formal equality proposes a secular conception or translation of this institution. Stripped of its traditional function and religious significance, the *mahr* becomes a contract, enforceable or not based on civil contract law, regardless of the concrete effect of such a "translation".

Despite this approach representing an attempt to solve a problem related to the foreignness of the *mahr* institution to the secular legal system, while preserving the original will of the parties, its concrete effect ends up deviating from it, depriving the *mahr* of its original rationale. Indeed, although it may be correct to state that the *mahr* is closely linked to the marriage contract and constitutes an agreement, its existence does not derive from a free act of will, being an essential element of Islamic marriage.

*X<sup>3</sup>) The approach based on the principle of substantive equality:*

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<sup>102</sup> Hamm FamRZ (Germania); 516/1988; Amtsgericht Buende (Germany), 25.03.2004, 845/2004; OLG Düsseldorf (Germania), 12.08.1992, Fam RZ 188/1993; OLG Cologne (Germany), 21.04.1993, NJW-RR, 201/1993; BGH (Germania), 9.12.2009, XI ZR 107/08; BGB (Germania), 28.01.1987, FamRZ 463-466/1987; OLG Hamburg (Germania), 21.05.2003, FamRZ 450-461/2004; Rb. 's-Gravenhage (Paesi Bassi), 10.07.1989, NIPR 399/1989, n.88/1440; Kt. Beetsterswaag (Paesi Bassi), 07.08.1990, NIPR 446/1990, n.189/90; Rb. Rotterdam (Paesi Bassi), 20.07.2000, NIPR 10/2001; HR (Paesi Bassi), 10.02.2006, NIPR 94/2006, n.C04/340HR; Götebogs Tingsrätt, T 10691-06 (Sweden).

<sup>103</sup> Court de Cassation (France), 2.12.1997, 343/97; OLG Cologne (Germany), 23.03.2006, FamRZ 1380/2006.



This approach is rooted in the concept of reasonable accommodation. It involves the application of seemingly neutral norms which, when applied to specific cases considering the religious and cultural identity of the parties, produce a discriminatory effect. This justifies a direct exemption to achieve a result of substantive equality.

The approach based on the principle of substantive equality builds upon the legal pluralism approach, adding to the protection of group interests also the individual protection of its members. It diverges from the approach based on formal equality, which fails to consider the actual consequences of removing the cultural and religious components inherent to the *mahr*, thereby decontextualizing it.

The characteristic elements of this approach are: a) an interpretation of the *mahr* within the context of Islamic family law; b) the production of a hybrid outcome halfway between secular and religious law; c) attempts to translate the *mahr* into an element of secular law that closely resembles its function as envisaged by Islamic law.

In applying this approach, the *mahr* is thus framed within the framework of family law, taking into account the function assigned to it by Islamic law and classified as: a) a maintenance obligation<sup>104</sup>; b) an element of the spouses' property regime<sup>105</sup>. Judgments rejecting its enforcement have characterized it in terms of unjust enrichment or as contrary to the principle of fairness<sup>106</sup>.

In judging the *mahr*, this approach seeks to achieve a reasonable accommodation of differences between Islamic law and secular law, attempting to interpret this institution in secular terms while respecting its functions and original purpose. However, while this approach manages to avoid distortions in practice, such as preventing the *mahr* and maintenance obligation from overlapping and producing an unfair outcome, it often ends up distorting the original function of the *mahr*, aiming to translate it into a secular legal institution.

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<sup>104</sup> OLG Köln, 28.01.2003, IPRax 73/1983; KG Berlin (Germania), 12.11.1979, FamRZ 470/1980; AG Hamburg (Germania) 19.12.1980, IPRax 63/1980; AG Kerpen (Germania), 29.01.1999, FamRZ 29/1999, OLG Frankfurt a. M. (Germania), 11.01.2011, 04199/2011, AG Rüsselsheim, FamG, BeckRS 2011-04198; Eidsivating Court of Appeal, 10.12.1986, LE-1986-447 (Norvegia); Rb Utrecht (Paesi Bassi), 10.12.2008, LJN: BH3018; Rb. Utrecht (Paesi Bassi), 30.01.2008, LJN: BC2923, Hof 's-Gravenhage (Paesi Bassi), 17.12.2008, LJN: BG9476/JPF 2009.50; Rb. 's-Gravenhage (Paesi Bassi), 23.02.2006, LJN, 23946; Rb 's-Gravenhage (Paesi Bassi), 10.02.1999, NIPR, 143/1999; Rb. 's-Gravenhage (Paesi Bassi), 24.01.2006, NIPR 69/1996; Rb. 's-Gravenhage (Paesi Bassi), 17.12.2008, LJN: BG9476/JPF 2009.50, Rb. Maastricht (Paesi Bassi), 72204/2003, GH Arnhem-Leeuwarden (Paesi Bassi), 1109/2013, Rb. Rotterdam (Paesi Bassi), 22.02.2010, BN 1643/2010.

<sup>105</sup> OLG Bremen (Germania), 09.08.1979, FamRZ 756/1979; OLG Hamm (Germania) 262/2015; OLG Cologne (Germania), 29.10.1981; Hoge Raad (Paesi Bassi), 08.02.2008, LJN BC3841; Court of Appeal of Arnhem and Leeuwarden (Paesi Bassi), 04.05.2021, ECLI: GHARL:2021:4341.

<sup>106</sup> OLG Cell (Germany), FamRZ 374/1998; Rb. 's Gravenhage, 24.01.1996, NIPR, 69/1996.



## 5 - The protection of the Islamic minority beyond religious freedom: concluding remarks

In recent decades, contemporary legal systems have grappled with the challenges posed by an increasingly diverse ethnic, cultural, and religious landscape, often leading to an unprecedented legal pluralism. Among the most pressing issues is the identification of legal solutions that transcend the fears and conflicts arising from such complexity, ensuring the protection and fulfillment of the rights and expectations of minority groups, while also accommodating the desires of individuals to integrate into the social fabric without relinquishing their cultural, ethnic, and religious identities.

Concurrently, there is a need to redefine the principle of equality to ensure not only equal treatment but also the right to diversity. This reflects the multicultural dilemma that resonates in the debate between universality and particularity, between individual and collective rights<sup>107</sup>.

In the context of a multicultural society, the presence of minorities such as the Muslim community, which identifies strongly with religious factors, coupled with the increasing demand from its members for recognition of forums to resolve their disputes based on religious law, has led democratic systems to reconsider the role of state neutrality towards religion, seeking solutions for inclusion and protection of differences.

Religion constitutes an essential element in individuals' lives not only as a tool for seeking and understanding the transcendent dimension of life but also because it embodies a set of personal, cultural, and symbolic beliefs that lead individuals to feel part of a community with whom they share values and religiously oriented behaviors. This phenomenon accompanies individuals in every aspect of life.

In this context, although religion may bring with it a certain degree of instability for the secular order, it also constitutes an inherent element in the cultural identity of its population and, for some, an indispensable aspect of life. Far from being stifled by secularism, religion is protected through religious freedom, under which the state must ensure the free expression of all faiths and the freedom not to believe in any transcendent aspect of life.

It is precisely this cultural mosaic, of which religion is an essential element, that drives democratic systems to seek solutions aimed at promoting peaceful coexistence among individuals with diverse cultural

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<sup>107</sup> N. FIORITA, *Il riconoscimento della giurisdizione religiosa nelle società multiculturali*, in F. ALICINO (ed.), *Il costituzionalismo di fronte all'Islam. Giurisdizioni alternative nelle società multiculturali*, Bordeaux Ed., Bordeaux, 2016, p. 107 ss.





backgrounds, as well as achieving integration of these groups within the legal framework and society.

This tendency, in those legal systems that seek to preserve the existence and specificity of minority groups, materializes in the acceptance of exceptions to the general legal framework, allowing for deviations based on differences. In this context, Western legal systems allow for exceptions and derogations in favor of minority groups, balancing between identity rights and political obligations, employing techniques of reasonable accommodation of differences.

This dialogue between the state legal system and minority legal systems seems to encounter numerous obstacles when the minority legal order is Islamic. Prejudice and limited knowledge of this system, mostly perceived by the public in its most extreme forms, have hindered mutual understanding between legal systems and religious systems alike.

The Islamic law, observed by Muslim communities settled in non-Islamic states, contributes to shaping the framework of legal and normative pluralism characterizing modern Western societies, competing with state legal systems<sup>108</sup>. As a result, there is a need to study forms and mechanisms that allow for a positive interaction between Sharia and Western legal systems, capable of overcoming the prejudice of absolute incompatibility between the two systems.

In this context, the protection system provided by religious freedom, mainly focused on individual aspects, does not seem sufficient to address the collective identity demands put forward by the minority.

In the absence of specific protection dedicated to religious minorities that goes beyond the limits of religious freedom, it is necessary to explore new modes of dialogue, which, in more strictly legal terms, means drawing on the tools offered by law to relate deeply different normative and value systems. Therefore, in light of the willingness to engage in dialogue with the minority legal system, after establishing some basic conditions, it is possible to question what place Sharia law might have within Western legal systems, considering the rules governing the legal sources system and legal pluralism.

The approach adopted by European jurisprudence regarding the recognition of institutions inherent to Islamic family law reveals a certain awareness on the part of the judiciary that the state legal system coexists and competes with the Islamic minority legal system.

The interaction between the two systems is determined by the behavior of minority members who naturally navigate between the realm of secular law and that of traditional and religious law. Members of the minority turn to the courts to mediate between traditional and secular norms, employing diverse and evolving strategies to manage the legal complexity in which they are immersed.

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<sup>108</sup> M.F. CAVALCANTI, *Giurisdizioni alternative*, cit., p.457.



In this context, forms of contamination and interaction are inevitable, regardless of the official recognition of the informal legal system. However, from the analysis of cases, another fundamental problem seems to emerge, represented by the inadequacy of the legal framework offered by various legal systems in addressing the specific needs of religious minority members in general, and the Islamic minority in particular.

Indeed, one would expect that in the face of societal change towards multiculturalism and pluralism, the legislature would take responsibility for adapting legislative tools to new social needs. Instead, it seems that judges have taken on this responsibility, contradicting the binary logic of a strict distinction between the application and creation of law, making the judiciary one of the key institutions of pluralistic society.

This is particularly true for those minority groups that, facing resistance in political representation, have turned courtrooms into not only places of dispute resolution but also of expression and debate of identity issues. Despite resistance from the legal system and its political component, there is a clear effort from the judiciary to seek solutions that can reconcile the requirements of national law with the cultural and religious needs of the parties involved. However, this effort, while helpful, is often insufficient and uncertain, as it is left to the discretion of the judges themselves, who are not obliged to consider minority demands or interpret norms through the technique of reasonable accommodation.

Excluding informal applications, resorting to Sharia in resolving disputes among Muslim believers is indeed traceable to the parties' will, permitted by the state legal system within certain limits. Consequently, such a choice does not appear to alter the hierarchy of legal sources. In this sense, the state legal system, considering the principle of legal and normative pluralism, renounces normative imperativism and admits, in certain areas, competition with other legal systems, which can be activated upon individuals' requests without being incorporated into it<sup>109</sup>.

In this way, sources derived from different legal systems intersect, dialogue, and influence each other, often giving rise to hybrid outcomes: The reasons for this dialogue are of a constitutional nature, responding to the need to strengthen the ties between the law and the human person<sup>110</sup>.

Given this and considering the various forms of recognition of Islamic law by secular legal systems, it seems possible to assert that, with respect to the system of legal sources, Sharia, or rather those of its norms

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<sup>109</sup> F. VIOLA, *Il diritto come scelta*, in A. PLAIA (ed), *La competizione tra ordinamenti giuridici. Mutuo riconoscimento e scelta della norma più favorevole nello spazio giuridico europeo*, Milano, Giuffrè, 2007, pp. 169-199.

<sup>110</sup> A. RINELLA, *La Sharia in Occidente*, cit., p. 323.



whose application is invoked by members of minorities within the limits imposed by democratic legal systems, is established as a legal fact.

The application of such norms is the result of a flexible referral by the dominant legal system, which, once their existence is established, admits their applicability mainly in relation to the approach based on legal pluralism.

In other cases where recognition of an Islamic legal institution is granted by the courts upon request of the parties, it's not strictly a referral to Islamic law, but rather an interpretation of civil law norms in light of religious law, corresponding to the actual intention of the parties. In this case, therefore, Sharia and the interpretation provided by the parties become part of the facts upon which the judge bases their legal reasoning and identifies the law applicable to the specific case.

In conclusion, it can be asserted that such legal norms of a traditional and religious nature, produced outside the formal framework of the legal system and lacking the formal requirements to be recognized as internal legal sources, become part of the existing legal system as normative facts that contribute to shaping positive law. This occurs through a mobile referral or recognition by the legal system itself, although it does not entail their formal incorporation.

Indeed, the recognition of identity claims put forward by the Islamic minority raises several issues concerning some of the fundamental principles of secular and democratic legal systems, especially considering that the absolute monopoly of secular law still remains one of the fundamental elements of Western legal culture.

Faced with the request for recognition of legal elements alien to the legal system, aimed at protecting the cultural and religious community identity, there are, however, instruments capable of defining new spaces for dialogue between majority and minority. Despite the difficulties, it still seems useful to proceed along the path of legal pluralism and reasonable accommodation, seeking solutions that allow for the reconciliation of individual rights, collective rights, and fundamental principles of the legal system.

The aim is to consider individuals not merely as abstract subjects but as persons, to evaluate not only the specific case but above all individual.