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Challenges of Pluralistic Societies with Dissimilar Cultural Identities and Religious Legal Traditions: ADR and the Role of Religious Mediation and Arbitration¹

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1 - The Challenges of Pluralistic Societies with Dissimilar Cultural Identities and Religious Traditions: from a Melting pot to a Cultural Mosaic

The cultural pattern of dispossession, displacement, and exile is - unfortunately- as old as mankind's history. Violent, compulsory or even peaceful but uncontrollable migrations, often because of wars, invasions, ethnic cleansing, and eradication of minorities is a regrettable constant pattern in human history. Subjugation, expulsion, and repopulation have

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been the most common elements of segregation and disintegration in world's history; most of the times as a result of religious, ethnic, or racial policies in a world ideologically divided between us and the others.

In the European Continent, Barbarian Confederate tribes -Goths, Heruli, Vandals, Suevi, Huns, Franks, Lombards, Angles, Saxons, Vikings, Normans, Huns, Slavs, Bulgarians, Magyars, Gepids, Avars, Pechenegs, Cumans, and many more. As well as the Berbers and the Vandals along the Mediterranean coastline of Africa at the dusk of the Eastern Roman Empire- occupied and ruled the territories in which they settled, initially as *foederati* or as raiders in the peripheries of the Empire.

In the pre-Islamic era, among others, Turkic peoples and Saracens - initially known as people from the Arabian Peninsula, including among other pagans, Jews, Judeo-Christians, Nestorian, Assyrians, Ishmaelite and Muslims, some of them Bedouins- occupied, raided or invaded lands and domains in the Near, the Middle and the Far East; as in Medieval times did the Khazars or the Mongols.

Everywhere, from the Antiquity to today's world, the process from segregation to integration among conquerors, settlers and immigrants with the indigenous and local population it is -as it always was- a long, complex, uneven and painful process of blending cultures and dissimilar communities. The cycle from segregation to integration is a constant pattern in human history.

Under the paradigm of assimilation, metaphorically identified as a melting pot, nation-states as the US, Canada or Australia were built up from massive immigration waves, developing their own rules and legal strategies to encourage the assimilation process. The US, for example, used the powerful narrative of Americanism as a secular-civic religion, becoming indeed a form of indoctrination about the belief in the US sacred values, as a secular nation of Protestant roots, under the political model of a Constitutional Republic. American identity binds her citizens under the motto *Pluribus Unum* (One from many), demanding full loyalty to the US values promoting full assimilation. Civic religion became in the US the binding patriotic religion with one language, English. It is not a completely new form of patriotism; Ancient Rome under Octavius Augustus developed her own civic identity, *Dea Roma*, worshipping her imperial values and expanding her language, Latin, as strategy to unify dissimilar cultures from Hispania and North Africa to the Middle East. It was a long process from legal separation between Romans and non-Romans to a progressive integration of dissimilar cultures under a common Roman citizenship as bonding identity to the Empire.



Language and religion, in a broad sense as a theistic or as a political belief, are the dynamic tools that channeled the development of new blended identities from Antiquity to today. It was, and still it is, a process by which legislation is an essential part, sometimes enforcing the separation or the segregation of communities to prevent violence. Other times, laws became an instrument for their unification and homogenization promoting a common identity. Legislation and judicial courts were the main instruments for maintaining or changing these two opposed paradigms -segregation and assimilation- in order to have control over the population.

Europe has been an example of both paradigms, from the Germanic hegemony of the Western Roman Empire and the Christian and Muslim clashes along the Mediterranean region to the Catholic and Protestant wars, which took place all over the Holy Roman Empire. The colonial European Empires repeated the pattern of invasion, conquest, occupation, and subjugation by segregation. The newborn American Republics of the 19th century were not an exception to this regretful human pattern in history.

The US Government by its legislation marginalized and confined Native-Americans in reservations; African Americans had a long path struggling for emancipation from slavery first and later for the liberation from the Jim Crow laws and the racial segregation norms until the sixties. The different waves of migrations to the US of Irish, Italians, Latinos, Chinese, Jews, as well as the immigrants from the Middle East, Africa, India or Far East are creating a new social fabric in which the Anglo-American WASPs and their cultural values are becoming a minority struggling to maintain their social and political hegemony. "Make America Great Again" is the slogan of Trump's electoral narrative trying to update the belief in their supremacy. It is not a new narrative. In the Ancient Rome in the 1st (between 29-19 BC), during the transition from a Republic to an Autocracy, Virgil was commissioned by Octavius to compose the Latin epic the *Aeneid* with purpose of exalting the glorification the Roman Empire and its cultural values: "You, Roman, must govern the Empire and the peoples of the world", proclaims the *Aeneid* ².

The USA transformation from a social melting pot during the 20th century -as a process of integration assimilating the WASP's system of values- to a cultural mosaic in which communities demand the

² *Tu regere imperio populos, Romane, memento (hae tibi erunt artes), pacique imponere morem, parcere subiectis et debellare superbos: Aeneis, VI, 851 - 853.*



development of their own identities under the dynamics of a new multicultural global world. Many other countries in the world with increasing waves of immigration are facing similar challenges. Two main questions emerge confronting this 21st century's challenge:

- Is it possible the development of a new paradigm of coexistence and integration without the negative aspects of assimilation, like the loss of traditions, values, and identity?
- What are the advantages of coexistence and the dangers of juridical fragmentation by implementing plural jurisdictions?

To address these questions I propose an initial historical look at two powerful legal religious traditions: the European Catholic and the Muslim. In my view, it is necessary to travel back in time more than the American and French revolutions to be able to outline these questions from a historical perspective as an evolving dynamic process. Human history did not start with Modernity, although most of the sociologists and political scientists focus their studies from there when the secular paradigm was born. This approach will allow us exploring how has been historically resolved the legal challenge of coexistence among dissimilar cultures. Complex processes, centuries old, have developed Catholic and Muslim legal traditions. What lessons can we learn from this legal past?

2 - European Catholic Tradition of Dual Legislation and Jurisdiction

Until the 18th century, the religious paradigm dominated over Christian and Muslim kingdoms and empires. Religion, as a core of beliefs, was an essential part of their identity as a community, protected by the ruler through his laws and indeed an instrument of power and domination. The Roman Empire was not an exception; the *Dea Roma* worship, as a civic religion, was bonding the Roman identity. The Imperial legislation from Constantine in 313 AD to Theodosius in 381 AD developed the Christian Roman Empire; since then, the Church became progressively entangled to the Empire. During this period, by imperial decrees ecclesiastical authorities had the power of jurisdiction through a new legal institution, the *Episcopalis Audientia* (Bishop's Audience). The result was the development of a dual jurisdiction, secular and religious.



2.1 - The Development of the Religious Jurisdiction: from the *Episcopalis Audientia* under the Christian Roman Empire to the Homologation of Religious Decisions by a Civil Judge

The Constantinian-Theodosian era introduces mediation and arbitration through a legal institution, the *Episcopalis Audientia*, in which Roman Imperial Law gives to the bishops the authority to mediate in conflicts among members of their dioceses. The first Constantinian constitution on the Episcopal Audience is from the year 318³; it was a powerful imperial institution that contributed to the development of canonical equity. In the Justinian era, the Episcopal Audience takes on a procedural character giving jurisdictional power to the bishops in the civil sphere, becoming another path to achieve imperial justice. Previously, during the Diocletian rule in the 3rd century, the judicial institution of the *defensor civitatis* was the mechanism giving access to justice for poor litigants, but progressively bishops absorbed its role by the Episcopal Audience becoming a usual litigation procedure for Roman citizens. The Novella 86 from the year 539, entitles bishops with the role of vigilance and control in the imperial administration of justice; therefore, the imperial administrative decentralization is strengthening. In the year 546, Novella 123 facilitates that Episcopal and secular jurisdictions exercise reciprocally the power of justice. Later on, Episcopal jurisdiction is revitalized and expanded in Europe by the 9th century's Frankish Carolingian imperial model, later by the Ottonian dynasty, and since the 11th century by the Holy Roman Empire structure until the Protestant Reformation. The legacy of this dual jurisdiction and legislation, secular and religious, was the key source in the development of the European Common Law.

The Catholic Church, as Imperial Church, builds up her own legal system, Canon Law, initially as a body of canonical rules from church councils. Canon Law absorbed the Roman legal rules and praxis, creating its own legal techniques, and it was essential in development of Civil Law

³ The main classic scholar literature on this topic: **G. VISMARA**, *Episcopalis audientia, l'attività, giurisdizionale del vescovo per la risoluzione delle controversie private tra laici nel diritto romano e nella storia del diritto italiano fino al secolo nono*. Milano, Società editrice "Vita e pensiero", 1937; **P. CASPERS**, *Der Güte- und Schiedsgedanke im kirchlichen Zivilgerichtsverfahren. Eine kirchenrechtliche Untersuchung über das Wesen der episcopalis audientia*. Düsseldorf, Triltsch-Verlag, 1954; also see, **A. PÉREZ VIVO**, *La "episcopalis audientia" y el principio de equidad en Constantino*. Univesidad de Alicante, 1984; **M.R. CIMMA**, *L'Episcopalis audientia nelle costituzione imperiali da Costantino a Giustiniano*. Giappichelli. Torino, 1989; **J. HARRIES**, *Law and Empire in the Late Antiquity*. Cambridge University Press, 1999 p. 191 and following.



in Europe through many new legal institutions and interpretations; for example, the legal concept of corporations and the marriage contract. Until the 11th century, as Harold Bergman explains, *ius canonicum* (canon law) was not regularly used, the term *ius ecclesiasticum* (ecclesiastical law) was referred to the imperial legislation governing the relationship with the Church⁴.

After the Protestant Reformation, Protestant churches renounced to exercise the Church jurisdiction, and the Protestant rulers, as heads of their churches, established one secular jurisdiction for their kingdoms and states. Only in the Catholic kingdoms, like France, Spain or Portugal, the Ecclesiastical Courts remain ruled by Church authorities, sometimes as a hybrid procedural system like the Inquisition Tribunals, by which the Church ruled the process, but the civil authorities implemented and executed the court's decision.

The aftermath of the American and French Revolutions and Napoleon's military expansion forced the growth and development of a new paradigm, the secular paradigm, based on the establishment of the Constitutional rule of law and the state territorial jurisdiction; by which the nation-state, not the Church, is the only source of power entitled to exercise legislative and judiciary powers. As a result, ecclesiastical tribunals were not any longer part of country's judiciary system. However, in the most of European Catholic countries, dual jurisdictions remained in place until almost the end of the 20th century, but only regarding canonical marriage celebrations and annulments or dissolutions of the bond.

In the majority of traditional Catholic countries, their enacted Constitutions do not recognize Catholicism as the official religion of the state any longer, embracing the secular state constitutional frame but allowing cooperation with religious entities by legal agreements. The agreements with the Holy See, in four countries of the European Union⁵ (Spain⁶, Italy⁷, Portugal and Malta), facilitate a link between both

⁴ H.J. BERMAN, *Law and Revolution. The Formation of the Western Legal Tradition*. Harvard University Press, 1983, p. 202.

⁵ E. CADELO DE ISLA, *La eficacia civil de las sentencias canónicas de nulidad matrimonial en la Union Europea. El Reglamento 2201/2003*. Thesis ad Doctorandum in Iure Canonico. Romae, 2005 (<http://bibliotecanonica.net/docsaa/btcaat.htm>).

⁶ M. CUBILLAS RECIO, *El sistema matrimonial español y la cláusula de ajuste al derecho del Estado*. Universidad de Valladolid, 1985; J. FERRER ORTIZ, "La eficacia civil del matrimonio canónico y las decisiones eclesíásticas en el derecho español". *Ius et Praxis*, 14/2, 2008 (http://www.scielo.cl/scielo.php?script=sci_arttext&pid=S0718-00122008000200001).



jurisdictions, secular and Catholic, by a new legal technique: the Homologation Clause. It is applicable to nullities and annulments of marriage. After the Catholic Court communicates their final decision to the parties, they are entitled to request to the civil family judge implementing the nullity and/or the annulment in the secular jurisdiction. It is a quick and easy civil procedure of adjustment by homologating Canon Law court decisions into the Civil Family Law, if the canonical causes for the nullity and/or the annulment legally fit into the civil ones. It is a system that, substantially, has been working well for several decades in those countries rooted in the Catholic tradition, balancing at the same time the individual right of religious freedom as a constitutional fundamental right. It means also, that Canon Law marriage regulations and procedures cannot be imposed on Catholics as an exclusive marriage jurisdiction in those countries, only as an optional procedure that can be initiated by the parties. It is a personal system different from family religious arbitrations and it is not applicable to prenuptial agreements, custody to children, or wills.

2.2 - The Development of Secular and Religious Jurisdictions: from the *Leges Barbarorum et Romanorum* under the Principle of Personality to Medieval Dual Jurisdiction in Europe

Today's world is universally under the principle of territoriality of law, as the dominant legal system, reinforced by the expansion of the nation-state as political entity and identity under the nationalist ideologies developed since the 19th century. However, the Antiquity is characterized by the existence of communities, or *nationes*, without a land, and territories without states. For this reason, the principle of personality of law was the dominant one, and communities live under their traditional customs and laws. As a result, legal and jurisdictional pluralism⁸ was deeply rooted in the communities, existing diverse types of judicial institutions from informal to official courts. As Uriel Simonsohn shows, legal pluralism

⁷ L.P. COMOGLIO, "Delibazione di sentenze ecclesiastiche e ordine pubblico flessibile". *Jus-online* n. 2, 2015 (www.unav.edu/.../33767_Comoglio_J2015_Delibazione.pdf).

⁸ For the sociological concept and the paradigm of legal pluralism, see J. GRIFFITHS, "What is Legal Pluralism?", *Journal of Legal Legal Pluralism* 24 (1986), pp. 1-55; S.E. MERRY, "Legal Pluralism", *Law & Society Review* 22/5 (1988), pp. 869-896.



exists across a number of legal orders as well as within a single legal order⁹.

The principle of personality of law was expanded under the Roman *ius gentium* (laws of peoples) as a legal practice using *ius natural* (natural law), as a reasoning technique, allowing legal interaction among peoples from different cultures. The Roman jurist Gaius (130-180 AD) masterfully described it:

“Every people that are governed by statutes and customs observe partly its own peculiar law and partly the law common to all mankind. That law, which a community establishes for itself, is peculiar to it, and is called *ius civile* as being the special law of that state, while the law that natural reason establishes among all mankind is followed by all peoples alike, and is called *ius gentium* as being the law observed by all mankind”¹⁰.

The decline of the Western Roman Empire and the rise of Germanic kingdoms during the Late Antiquity were extremely difficult, insecure, violent, and disturbing times. The civilized and refined Romans were often brutally submitted to the uncultivated and cruel Barbarians, in a time known as the vulgarization era, when the Western Roman civilization collapsed. It was the encounter of peoples with different stages in civilization. Romans and Barbarians were culturally very different, even in their Christians backgrounds; Romans followed the Nicean Trinitarian creed, and Barbarians were Arians; most of Roman elites considered Arianism a dangerous heresy. Besides, the Roman Empire had a highly sophisticated legal system when Barbarians laws were just tribal customs. Initially, the only way to survive in both communities was just by a strict separation between them. Legally speaking, it was applying the principle of personality of law. By this principle, Romans kept their laws in practice without submitting themselves to the Barbarians new rulers' laws.

In the Antiquity, law and religion were personal belongings establishing a permanent link with their tribal or communitarian identity, or *nation*, in which territory had no bonds. Even during the hegemony of

⁹ U.I. SIMONSOHN, *A Common Justice. The Legal Allegiances of Christians and Jews Under Early Islam*. Pennsylvania University Press, 2011, pp. 25-40.

¹⁰ *Gai Institutiones or Institutes of Roman Law by Gaius*, with a Translation and Commentary by Edward Poste, 4th ed. revised and enlarged by E.A. Whittuck, with an historical introduction by A.H.J. Greenidge. Oxford, 1904, 1 (More on this topic <http://www.nlncrac.org/earlymodern/law-of-nations>).



the Roman Empire, Roman Law was a personal law attached to the Roman citizenship, the foreigners, *pellegrini*, were excluded¹¹.

As Simeon Guterman explains, the initial establishment of Germanic kingdoms as territorial domains in the Italic and Hispanic Peninsulas and North Africa reduced the law of the Roman population to the status of a tolerated personal legislation, but Germanic laws have territorial validity in disputes. Besides, the priority of Barbarians over Romans was clear in criminal cases. For example, the practice of blood money, as compensation for the killing of someone, known as *wergeld* in Germanic laws, had different rates according to the Salic Law, where the murder of a free Frank is assessed at 200 *solidi* (gold coins of Roman origin), and that of a Roman at 100 *solidi*¹². During the first period of those kingdoms, as a general practice, mixed marriages were prohibited in order to control the cultural identities by the political and religious elites. However, Romans have access to official positions, in part because they were more educated, later even as members of the king's council.

Roman judges and tribunals decided on Roman cases and Germanic ones ruled over Germanic lawsuits. More complex it was in cases concerning both identities and conflict of laws. However, the Roman civil law was applied more often because its technical superiority facilitated the best legal solution.

Progressively, as the population was more integrated became common mixed Barbarian and Roman courts; usually, the Romans judges were better resolving the conflicts in manners that were more professional. Civil Roman Law was the main source of evolution of Germanic laws, although Barbarians law still prevailed in criminal cases. In practice, most of the cases Roman judges resolved civil cases and Germanic judges decided over crimes; the laws of the victim were usually applied, not the laws of the perpetrator.

The Germanic rulers in order to improve the legal territorial structure had to accept the superiority of Roman Law. Barbarian codifications of laws were enacted, following the example of the Justinian Code, *Corpus Iuris Civilis*, accelerating the process of accommodation and absorption of Roman praxis and Jurisprudence. This process helped to

¹¹ S.L. GUTERMAN, "The Principle of the Law in the Early Middle Ages: A Chapter in the Evolution of Western Legal Institutions and Ideas" *Univ. Miami Law Rev.* 21 (1968), p. 272 (Available at: <http://repository.law.miami.edu/umlr/vol21/iss2/1>).

¹² S.L. GUTERMAN, "The Principle of the Law in the Early Middle Ages", cit., pp. 263 and 267.



level the legal status between Romans and Barbarians. As Guterman indicates,

"in Visigothic Spain, the personal law regime came to an end at the time that the Frankish system was being built up. Recceswinth (c. 654) forbade the use of laws other than the official Visigothic Code. Marriages between Romans and Visigoths were now permitted and the old interdict of the Roman law against such marriages was abrogated"¹³.

As a rule, in mixed marriages, the wife followed the husband's personal law. However, there were exceptions.

One of the latest Germanic territorial occupations was on the Italic Peninsula by the Lombards or Longobards in the 6th century. Probably, according to several sources, it was very violent, the Romans were dispossessed of their properties and lands, and their laws abolished except in the city of Rome, in which the Justinian laws survived¹⁴. One century later, during the ruling of Liutprand (712-744) his Catholicism and his legislation promoted the beginning of the integration process between Romans and Lombards. Particularly after the Donation of Sutri (728), when Liutprand and Pope Gregory II finally agree, and the Lombards returned to the Papacy the territories that belong by donations to the Church before the Lombard conquest, allowing the development of the Papal States.

Vulgar Latin and the acceptance of the Catholic faith by the Barbarians, abandoning their own Arianism, facilitated enormously the process of integration of Roman and Germanic identities. After the abrogation prohibiting of mixed marriages, the new blending families improved definitely the integration process between Barbarians and Romans and their names were romanized to Vulgar Latin.

The Catholic Church was subject to Roman Law as well as the hierarchy and clergy. After the Germanic kingdoms became officially Catholics, the clergy hold progressively privileges and immunities, *privilegium fori*. Simultaneously, the hierarchy developed an active and independent jurisdiction, in part reinforced by the *Episcopalis Audiencia* recovering the legacy of the Church's jurisdiction under the Christian Roman Empire. In addition, the Catholic clergy expanded their political power by the councils of the kingdom. Some examples are, the Councils of

¹³ S.L. GUTERMAN, "The Principle of the Law in the Early Middle Ages", cit., p. 290.

¹⁴ F. GREGOROVIVUS, *History of the city of Rome in the Middle Ages*, vol. 3, English version. London, 1895, p. 60.



Orleans in the Frankish Kingdom, and the Councils of Toledo in the Visigothic Kingdom.

The recognition of the freedom of choice of law seems to be applied by Liutprand in exceptional cases; after 9th century, the Carolingian Emperor Lothar I (Holy Roman Emperor, 817-855), gave to the people of the city of Rome the right to choose what law they wished to be applied, Roman or Barbarian¹⁵.

The expansion of the Frankish kingdom under Charlemagne (Holy Roman Emperor, 800-814) and his dynasty transformed the Frankish kingdom into an empire and the dualistic system - Barbarian and Roman - was replaced by the dominance of the principle of territoriality; as consequence, the due process was gradually established in the secular sphere as part of the imperial or royal judiciary system.

Simultaneously, the legal system of the Church, attached to the legal Roman legacy, developed her own legal system, Canon Law, as a tool for achieving bigger independence from the imperial and royal powers. Since the 11th century, both legal systems coexist in the Catholic Europe as dual jurisdiction, secular and religious, channeling the formation of the Western Legal Tradition.

The Church jurisdiction was developed from the principle of personality establishing its own boundaries as a personal jurisdiction, known as *privilegium fori*, and it was exercised over clergy and members of their household, students, Crusaders, pitiful persons as widows and orphans, Jews in cases against Christians, and travelers¹⁶. However, it was not a clear and peaceful separation of between secular and church jurisdictions, secular rulers were constantly trying to limit the jurisdictional space of the Church, while she was trying to expand it. Some of the biggest confrontations in the middle ages between popes or bishops and emperors or kings took place because of the struggle imposing their own jurisdictions in order to strengthen their own political power.

The Church's jurisdiction was widely extended when the structural system of Canon Law was progressively reinforced through the papal authority, particularly as a result the pope's leadership over the Christendom during the Crusades' era, and by the increasing of pope's legislative activity after Pope Gregory IX enacted his Decretals in 1234.

Therefore, the Catholic Church detached herself from the imperial power creating five types of jurisdictions. As Harold Berman details¹⁷: 1)

¹⁵ S.L. GUTERMAN, "The Principle of the Law in the Early Middle Ages", cit., p. 304.

¹⁶ H.J. BERMAN, *Law and Revolution*, cit., p. 222.

¹⁷ H.J. BERMAN, *Law and Revolution*, cit., p. 225.



out of the Church's jurisdiction over the sacraments, took control over marriage celebrations, annulments, and dissolutions; 2) out of the Church's jurisdiction over benefices, developed a full body of property laws; 3) out of the Church's jurisdiction over wills, elaborated a well crafted legal rules of inheritance; 4) out of the Church's jurisdiction over oaths, built up rules of contracts; 5) out of the Church's jurisdiction over sins, created procedures and tribunals over crimes and torts.

Simultaneously, the secular jurisdiction was multiplied in different legal spheres of power: imperial, royal, feudal, manorial, mercantile and urban¹⁸. As the society became more urban than rural and trade's rules more sophisticated, secular legal structures developed new institutions and laws, most of them based on Canon Law legal innovations. Religious and secular jurisdictions competed for expanding their domains, and rivalry and antagonism stimulated the development of both juridical systems. At the same time, the conflicts between both jurisdictions became multiplied. There was not a clear division of jurisdictions and both claimed the right of exclusive jurisdiction; although the development of some accommodation practices in court praxis and rules of compromise reduced those conflicts. However, the dilemma over the dual sovereignty remained without a clear solution or consolidated practices of harmonization¹⁹.

The violent contest between popes and emperors for universal jurisdiction and supremacy eroded both institutions of power. Moreover, since the 13th century the pope's supremacy and the ecclesiastical jurisdiction is challenged by strong critical doctrinal currents like Marsilians, Wycliffites, and Hussites in favor of the legal submission of the Church to the imperial or royal powers as secular powers, channeling the Protestant Reformation.

2.3 - Religious Minorities under Christian Rulers

¹⁸ H.J. BERMAN, *Law and Revolution*, cit.p. 274.

¹⁹ Particularly, regarding to the conflicts between Canon Law and English Common Law see, W.R. JONES, "Relations of the Two Jurisdictions: Conflict and Cooperation in England during the Thirteenth and Fourteenth Centuries", *Studies in Medieval and Renaissance History* 7 (1970), pp. 79-210; R.H. HELMHOLZ, "Conflicts between Religious and Secular Law: Common Themes in the English Experience, 1250-1640", *Cardozo Law Review* 12 (1991), pp. 707-728.



Pre-Christian Roman Civil Law had a basic distinction between Romans citizens and non-Romans (*peregrini*), regardless their communal and religious identity. Antonine Constitution in 212 expanded the Roman citizenship to all subjects of the Empire recognizing multiple cultural identities under the Roman citizenship; Jews were among those sub-identities having their own traditional legal system, known as *Lex Iudaica* or *Ius Iudaicum*. Besides the Roman legal order, applicable to all Roman citizens, plural jurisdictions remained in place alongside the Roman laws; civil arbitration under their own legal rules and courts was allowed, if both parts were agreed. Nevertheless, in litigations between citizens from different cultural communities, Roman law was applied.

However, as result of the violent clashes between Jews and Christians since the 1st century, both communities enacted many laws establishing a strict separation between them, in order to facilitate a peaceful coexistence. After the 4th century, Imperial Ecclesiastical Law and Canon Law developed a very restrictive body of Jewry Laws, as Christian legislation regarding the Jews. Justinian laws in the 6th century were particularly harsh on the Jews and the so-called heretics. As a result, many prohibitions were enacted on them; for example, they were not allowed to have access to public office positions, to teach, to testify against Christians or to have curial privileges²⁰. Simultaneously, segregation of religious communities was reinforced by many laws; for example, mixed marriages were prohibited in Jewish and Christian legislations, even under death penalty, although it is not possible to know precisely if those written rules were implemented or not.

Under the Barbarian rule, Jews had limited rights and the paradigm of separation or segregation was prevailing. The principle of personality was also maintained and non-Romans were under their own personal or local laws and customs. Jews were under the authority and jurisdiction of the *magister iudeorum* (magistrate of the Jews).

For example, Visigothic rulers initially applied the *Lex Romana Visigotorum*, or Breviary of Alaric (506), based on the anti-Jewish Roman legislation from the Theodosius code (437); after the conversion of King Reccared I to the Catholic faith in 587, ecclesiastic laws were progressively more oppressive towards non-Catholics, mainly the heretics - particularly the Arians - and the Jews. The III Council of Toledo (589), the first held

²⁰ R.W. MATHISEN, "The Citizenship and Legal Status of the Jews in Roman Law during Late Antiquity". J. Tolan, N. de Lange, L. Foschia, C. Nemo-Pekelman (eds.), *Jews in Early Christian Law: Byzantium and the Latin West, 6th - 11th centuries*. Brepols Publ., 2014, pp. 35-54.



under a Catholic Visigoth kingdom, ordered to baptize the children of unions between a Jewish man and a Christian woman. More repressive anti-Jewish policies and legislation was enacted by king Sisebut in the first decade of the 7th century, and endorsed by the canon 10 of the III Council of Seville (624), forcing conversions of all Jews²¹. Although later, the IV Council of Toledo (633) reversed the imposition of forced conversions, did not lift the death penalty for apostasy if the baptized Jews, even if they were baptized by force, returned to Jewish practices. Nonetheless, this Council enacted several anti-Jews canons: depriving Jews of their properties and expelling them from the Visigoth realm. This policy was reinforced by the VII and the XII councils²²; a full policy of eradication of Jews was implemented by Reccesvinth (653-672) and later by his grandson Erwig (680-687)²³.

In the Byzantine Empire, there are also examples of massive forced conversions of Jews by imperial decrees, as under Emperors Heraclius (630), Leo III (721) and Basil I (873)²⁴ enacted as a strategy to unify the Empire under the Christian identity.

In the case of Muslims under Canon Law, between 7th to 11th centuries - as David M. Freidenreich, explains - it is not always evident that any given statement about non-Christians in Canon law refers specifically to Muslims. In addition to using such terms as "Saracens", "Hagarenes", and "Arabs", Christian authorities regularly refer to Muslims as "pagans", "gentiles", and "barbarians"²⁵. There is also

²¹ **R.L. STOCKING**, «Forced Converts, 'Crypto-Judaism' and Children: Religious Identification in Visigothic Spain». *Ibid.*, pp. 243-266. Regarding the canon 10 of the III Council of Seville, see ft. 12.

Regarding forced conversion in the Gratian's *Decretum* and in the Decretists, see **K. PENNINGTON**, "Gratian and the Jews", *Bull. Medieval Canon Law* 31 (2014). (Access to CUA Scholarship Repository: <http://scholarship.law.edu/cgi/viewcontent.cgi?article=1903&context=scholar>).

²² In the 12th Council of Toledo 28 laws were enacted against Jews under the Title VIII. DE CONFIRMATIONE LEGUM QUAE IN IUDEORUM NEQUITIA PROMULGATE SUNT. | fol. 105vb |. (Internet access in http://www.benedictus.mgh.de/quellen/chga/chga_055t.htm).

²³ **R. GONZALEZ SALINERO**, "Una élite indeseable: los *potentiores* judíos de la España visigoda". *El mundo judío en la Península Ibérica: sociedad y economía*. Aldebarán, Cuenca, 2012, pp. 5-17.

²⁴ **O. PRIETO DOMINGUEZ**, "The Mass Conversions of the Jews Decried by Emperor Basil I in 873-4". *Jews in Early Christian Law: Byzantium and the Latin West, 6th - 11th centuries*, cit., pp. 283-310.

²⁵ **D.M. FREIDENREICH**, "Muslims in Canon Law, 650-1000". *Christian-Muslim Relations. A Bibliographical History*. Volume 1 (600-900). Brill, 2009, pp. 83-98.



important to keep in mind the distinction between Islamic Law from Saracen Law. The late term is applied by the Christians, from early medieval times, and by the 19th century's Orientalists, mostly in a derogatory narrative style²⁶.

3 - Muslim Legal Tradition of Plural Jurisdiction

The Arab expansion from the borderlands of the Arabian Peninsula toward the Sassanian and the Eastern Roman Empire - as the Barbarian expansion did in the Western Roman Empire - created new dynamics from quiet settlements to violent clashes between outsiders and locals, channeling the later success of Islam as a new religious monotheistic paradigm.

Islam, aside from stereotyped and narrowed interpretations and defensive narratives, was the result of an Arabization of the Abrahamic legacy and probably an effect but not the cause²⁷ of a long period of wars, rebellions, migrations, political instability and uncertainty in the borderland between the Roman-Byzantine Empire and the Persian-Sassanian Empire clashing with each other for almost seven hundred years.

The Pre-Muslim Arab tribes and states, like the Barbarians, were often at the service of both empires under the rules of clientelism, developing gradually new religious, social, cultural, and political models shaping proto-Islam in many different ways. Mystery religions, Gnosticism, Messianic, Prophetic and holy book traditions, Mazdeism, Judaism, Judeo-Christianities and different heterodox Christian communities living in the desert, and distant from orthodoxies implemented by Imperial powers, nourished the emergence of multiple cultural, political, and religious identities converging under the umbrella of Islam.

Later, the interaction among Muslim and Christian kingdoms and empires brought new political struggles and military clashes, but also crucial cultural encounters and economic exchanges in the Medieval and

²⁶ For a complete analysis see J.V. TOLAN, *Saracens. Islam in the European Medieval Imagination*. Columbia University Press, 2002.

²⁷ See in detailed, E. GONZÁLEZ FERRÍN, *La Angustia de Abraham. Los orígenes culturales del islam*. Almuzara, 2013, p. 8 y ss. Also see "Islamic Late Antiquity and Fath: the effect as cause". Nangueroni Meeting, Milan, 2015 (Digital access https://www.academia.edu/12634825/Islamic_Late_Antiquity_and_Fath_-_the_Effect_as_Cause).



the Modern eras. The dynamics of Muslim identities -from the Berber, the Arab, the Moor, the Persian, the Indian, and the Turk legacies- facilitated the emergence of Muslim empires, as the Umayyad, the Almohad, the Almoravid, the Abbasid, the Safavid, the Mughal and the Ottoman, as main examples. Those empires created a rich and diverse cultural space, often breeding from the very same Hellenism as the Christian kingdoms and empires, but creating their own Islamic identities.

The Islamic legal tradition is based on the *Fiqh*, the jurisprudential interpretation of the verses of the Qur'an, as revealed divine law, and the *Sunna*, as the teachings and practices of the Prophet Muhammad. Among those practices, mediation and arbitration in disputes were also established as the legacy from Bedouin tribal customs in Arabia known as *Sulha*, linked to the notion of *musalaha* as reconciliation. Prophet Muhammad himself was a *Takhim*, arbitrator, before and after the founding of Islam²⁸. The Qur'an ((49:9; 4:35/58) and the Sunna encourage the reconciliation between Muslim parties in conflict.

During the Islamic Golden Age (8th to 13th centuries) legal schools implemented analogical reasoning, *qiyas*, and juridical consensus, *ijma*, as methodologies of interpretation, *ijtihad*; the legal schools developed different interpretations in arbitration as well, even between Muslims and non-Muslims²⁹. Through this era, new legal institutions and analysis were explored in innovative ways. Some of them resemble legal institutions implemented by the European and English Common Law traditions, offering remarkable similarities³⁰. Previously, the Roman law also had some influence in the political and civil structures under the Muslim rule, mainly in the former territories of the Eastern Roman Empire, Byzantium; for example, compiling collections of laws in Byzantine style during the Abbasid dynasty. Even it has been detected some parallelisms between the legal work of one of the founders of the Hanafi school, al-Shaybānī (749/750-805), and the Justinian Code³¹. Later, the relationship between

²⁸ D. PELY, *Muslim/Arab Mediation and Conflict Resolution*. Routledge, 2016. Chapter 1: Sulha in Muslim Jurisprudence and Customary Justice. Particularly footnotes 3-4. See also, A. RAMAHI, "Sulh: A Crucial Part of Islamic Arbitration". London School of Economics and Political Science Law Department. *Working Papers* 12/2008, pp. 10-13 (Available at [http://ssrn.com/abstract=\[1153659\]](http://ssrn.com/abstract=[1153659])).

²⁹ A. RAMAHI, "Sulh: A Crucial Part of Islamic Arbitration", cit., p. 15.

³⁰ For a general analysis and legal literature see R. POTZ, *Islamic Law and the Transfer of European Law*, in *European History Online* (EGO), published by the Institute of European History (IEG), Mainz 2011-11-21 (URL: <http://www.ieg-ego.eu/potzr-2011-en>).

³¹ B. JOKISCH, *Islamic Imperial Law: Harun al-Rashid's Codification Project*, Walter De Gruyter, Berlin 2007.



Islamic and European medieval legal practices and norms could be traced among the Muslim world and the Crusaders states, Sicily, Spaniard Christian kingdoms, and the Italian city-states.

3.1 - Muslim Empires and the *Dhimma* System

The paradigm of legal separation between Muslims and non-Muslims prevailed in the early Muslim Emirates and empires, as it did in the early Germanic kingdoms between Romans and Barbarians and later between Catholics and non-Catholics. Nevertheless, the outcome process was different, because the Arabization and Islamization of the locals took place at huge scale; the Barbarians, on the contrary, were romanized and progressively abandoned their Arian faith becoming Catholics as the local Romans, channeling the integration process by assimilation the Roman heritage. This was a blending process along the 12th century, in which took place the cultural transition from Romanesque to Gothic art, as an expression of a new urban society in Europe that was born from the synthesis of Roman and Germanic legacies.

One of the biggest challenges of the Muslim rulers was to elaborate regulations over non-Muslims; as it was for the Barbarians initially Arians and later Catholics³². The Islamic legal solution was more tolerant than the Visigoth policies particularly on the Jews; it was based on the development of the notion of *dhimmi*, as protected non-Muslim but not legally equal to Muslims, from the exegetical interpretation of Verse 9:29 from the Qur'an³³.

Dhimmis were enforced to pay a tax (*jizya*,) but at the same time, they were released from Muslim duties. Legally speaking, it was a compulsory membership applicable to the religious communities with a "Sacred Text". Most of the schools of Jurisprudence Sunnis and Shias include as *dhimmis*: Christians, Jews, and Zoroastrians. Aside from the scholar debate about its origins linked to the Covenant of Omar, as

³² For a comparative analysis see the collective work: *Religious Minorities in Christian, Jewish and Muslim Law* (5th -15th centuries). (Edited by Nora Berend, Youna Hameau-Masset, Capucine Nemo-Pekelman and John Tolan) Brepols Publ., 2017.

³³ M. ABDEL-HALEEM, "The *jizya* Verse (Q. 9:29) Tax Enforcement on Non-Muslims in the First Muslim State". *Journal of Qur'anic Studies*, 14/2 (2012) pp. 72-89.

For a critical legal analysis see about the *dhimma* system see: A.M. EMON, *Religious Pluralism and Islamic Law: Dhimmi and Others in the Empire of Law*. Oxford University Press, 2012.



apocryphal or non-spurious text, the heritage of this pact contributed to the interaction pattern with non-Muslims through the *dhimma* legal tradition.

It was a unified model of accommodation for religious minorities. Muslim Law did not distinguish between Jews and Christians, and those regulations were, in general, less oppressive than the Byzantine and Visigoth anti-Jewish legislation, as a principle forced conversions were not imposed according the verse of Qur'an non compulsion in religion (Q. 2:256). However, episodes of forced conversions have been recorded, like those that took place in the Christian kingdoms. Here are some examples: during the wars of Ridda (632-633) or wars of Apostasy, under the military campaigns of Abu Bakr; later, in 12th century under the Almohad rule; or in the Ottoman era, under the *devshirme* practice collecting Christian boys from Anatolia and the Balkans as a tax of blood, forcing them to convert to Islam and training them to be Janissaries; and under the Safavid dynasty in Persia, forcing conversion of Sunnis to Twelver Shism.

In the 9th and 10th centuries, more degrading restrictions were imposed on the Jews and Christians, many of them in clear parallelism with the Byzantine Jewry legislation. In the Medieval Muslim world, the most common restrictions for Christians and Jews were the following: forced to wear distinctive clothes or badges, restrictions in jobs and government positions, use of riding animals, prohibition of building new churches or synagogues³⁴. Many of those rules were included as a part of the so-called Covenant of Omar³⁵. However, there were many differences among Muslim territories, depending on geographical locations, the rulers, schools of jurisprudence, and different theological divisions in Islam; as a result, there was a wide variety of adaptations of the *dhimma* system³⁶.

This system, basically, ensured that non-Muslims must be separate and subordinate to the Muslim rule, preventing any religious contamination of Islam from non-Muslim religious beliefs; but this structure also reinforced the identity of those religious communities under their own leaders, who imposed their regulations favoring a strict formal

³⁴ Further analysis in **S.D. GOITIEN**, *Jews and Arabs: A Concise History of Their Social and Cultural Relations*. Chapter 3. (New York, 1955) Dover Publications, last ed. 2005.

³⁵ See the prohibitions and regulations in one of the well-known texts of the Treaty of Omar in: <https://sourcebooks.fordham.edu/source/pact-umar.asp>

³⁶ For an overview in the Islamic West, see the collective book *The Legal Status of the Dimmi-s in the Islamic West*. (Edit. by Maribel Fierro and John Nolan), Brepols, 2014 (<https://halshs.archives-ouvertes.fr/halshs-01079944>).



separation to control their own communities. The separation was often spatial reinforced progressively by having Jewish and Christian quarters, sometimes by choice, others by imposition. This communal space facilitated the sense of identity of each religious group, but also the control of their leaders and elites over them.

In the Iberian Peninsula, Jews under Muslim or Christian rule lived mostly in *juderías* and *morerias*, often isolated by walls and gates, in which Jewish communities, *aljamas*, had their own legal, fiscal and judicial systems applicable compulsory to Moors and Jews.

The Muslim legal tradition was more flexible regarding to mixed marriages; on the contrary to the Christian legal tradition, allows Muslim men to marry non-Muslim women, if their religions have a sacred text.

Religious minorities under the Muslim rule were able to have their own jurisdictional structures, mainly in civil cases, generally regarding Family law. Criminal offenses were usually held by Muslim judges, as the Barbarian courts did it. Similarly, in cases of civil conflicts between Muslims and non-Muslims were resolved by a Muslim judge.

Under the legal space created by the *dhimma* system, legal pluralism was developed. In the former territories of the Eastern Roman Empire and the Sassanian Empire, the Islamic rule allowed the development of multiple institutions, formal and informal, and plural interpretations into a single Muslim order, adjusting the diversity and the dynamics of those cultural and religious identities; Uriel Simonsohn called it a “judicial bazaar”³⁷.

The Islamic legal system allowed the interaction between the principle of personality of the law and the principle of territoriality, and Muslim and non-Muslims could apply to the Sharia regarding to contract law, property law, family law, and in heredity litigations, even if both parties were non-Muslim³⁸.

In Al-Andalus, the Jewish judges interpreted Talmudic law mainly according to the Babylonian School. Iberian Mozarabs had also their own tribunals and judges, named *censors*, applying Canon Law and the Visigothic Code enacted in 654 known as *Liber Iudiciourum* or *Forum Iudicum*.

Following the interpretation of the Verses Q. 5:42 and Q. 5:49, some Muslim jurists were in favor to designate Islamic courts as optional place for arbitration between *dhimmis*; when others interpreted those verses as

³⁷ U.I. SIMONSOHN, *A Common Justice*, cit., p. 63.

³⁸ N. AL-QATTAN, “Dhimmis in the Muslim Court: Legal Autonomy and Religious Discrimination”. *International Journal of Middle East Studies*. 31 (1999) pp. 429-444.



the primacy of the Islamic jurisdiction over *dhimmi*s legal controversies³⁹. There is an ongoing scholar debate about how rigid was in practice such a separation, and which were the dynamics of the Islamic paradigm of autonomy. Uriel Simonsohn suggests that this paradigm should be revisited⁴⁰ taking into account that those regulations were sporadically enforced, and often the religious leaders of those communities demanded the intervention of Muslim authorities when it was convenient. In his view, the symbolic separation allowed them to maintain a discourse of resistance, having their own place and identity⁴¹. Indeed, it was also an effective way to maintain the power of the religious elites over their own communities.

According to Goitein and Glick, Jews became more acculturated, not assimilated, in the Muslim domains than in the Christian territories, because under the Islamic rule there was more secular cultural space for scholar studies and sciences; as a result, Jews in the Islamic world, were completely Arabized by the 11th century⁴².

Al-Andalus was certainly a cultural mosaic of religious identities; the Muslim identity was not homogeneous, Berbers, Arabs, and mainly Iberian Neo-Muslims created new social dynamics shaping the Andalusian Moorish identity. Progressively, the last ones were incorporated to the ruling elites during the Caliphate, and throughout the Taifa period.

However, in Al-Andalus and Maghreb the secular cultural space, shared by Muslim, Jews, and Mozarabs, changed drastically when the Almoravid and Almohad violent expansions took place, from the 11th to 13th centuries, creating two successive Berber militarized empires imposing restrictive measures over the population, mainly over Jews and Mozarabs. Many Muslims, Jews, and Christian seek out refuge in Christian lands or other Muslim territories. Probably from that time is developed the narrative distinguishing Moor (*moro*), as Muslim Andalusian speaking Arab, and Christian, from the northern Iberian kingdoms, speaking Romance languages; Jews and Mozarabs often were holding positions of power, as *Diwan* members, viziers, and ambassadors. As Thomas Glick explains, in the 11th century Jews were a counterbalance between Berbers dynasties and the Arab elites; Jews managed the fiscal

³⁹ U.I. SIMONSOHN, *A Common Justice*, cit., p. 6.

⁴⁰ U.I. SIMONSOHN, *A Common Justice*, cit., pp. 6-10.

⁴¹ U.I. SIMONSOHN, *A Common Justice*, cit., p. 9.

⁴² For further readings S.D. GOITIEN, *Jews and Arabs: Their Contact Through the Ages*, cit.; T.F. GLICK, *Islamic and Christian Spain in the Early Middle Ages*. Brill, 2005.



and the administrative structure, while the social order was imposed by the Berber militia⁴³.

The next two examples show the flexibility adjusting the *dhimma* tradition by different Muslim Imperial models in two different eras: by Medieval Muslim dynasties in Egypt, and by the pre-Modern Turkish Ottoman Empire.

The status of *dhimmi*s under Medieval Muslim dynasties in Egypt - Famities, Ayyubids, and Mamluks -, as it is verified by the extensive documentation of those periods, was not too restrictive allowing them to interact with the Muslim institutions and authorities in many legal ways beyond the limits of Sharia's frame. As Marina Rustov proves⁴⁴, the petition-and-response procedure provided evidence that invoking precedent, law, and justice; Muslims and *dhimmi*s were subject to similar treatment by the state in the *Mazalim* courts (administrative courts in which the subjects can apply to their rulers in cases of abuse of power by other authorities), but it does not mean that they were equal in torts or in court procedure.

The second example is the Ottoman *Millet* system⁴⁵, rooted in the *dhimma* legal tradition. It was the framework used by the Ottoman Turks to interact with their religious minorities; it was build up gradually and institutionalized by Mehmet II in 1453.

Each *millet*, or religious community, was entitled to have its own authority, legal system, and jurisdiction. The three main *millets* were the Rum (Orthodox Greek Christians under the Patriarch of Constantinople), the Armenian (not subjects to the Orthodox Patriarch but having their own Patriarch of Constantinople, as authority erected in the Ottoman era)

⁴³ For a detailed analysis see, T.F. GLICK, *Islamic and Christian Spain*, cit., Chapter 5.

⁴⁴ M. RUSTOV, "The Legal Status of Dimmi-s in the Fatimid East: A view from the Palace in Cairo". *The Legal Status of the Dimmi-s in the Islamic West*, Brepols, 2013 pp. 305-332, particularly p. 326.

⁴⁵ Further readings: B. BRAUDE, "Foundation Myths of the Millet System", *Christians and Jews in the Ottoman Empire: The Functioning of a Plural Society - Vol. 1*. (Ed. B. Braude & B. Lewis). New York, 1982, re-ed. B. Braude, 2014, Lynne Rienner Publishers, pp. 65-86. E. CEYLAN, "The Millet System in the Ottoman Empire", *New Millennium Perspectives in the Humanities*. (Ed., by Judith Urton-Ward) Fatih University, Brigham Young University, 2002, pp. 244-265. Y. BOR, "Millet System in Ottoman Empire: An Extraordinary Policy with Extraordinary Implications" (https://www.academia.edu/7521006/Millet_system_in_Ottoman_Empire). A. CHABOU, *Treatment of Religious Minorities under the Ottoman Millet System: Case of Study of Greek Orthodox Christians, Armenian Christian, and Jews*. 2016 ([https://www.academia.edu/30934024/TREATMENT_OF_RELIGIOUS_MINORITIES_UNDE R_THE_OTTOMAN_MILLET_SYSTEM_CASE_STUDY_OF_GREEK_ORTHODOX_CHRISTIANS_ARMENIAN_CHRISTIANS_AND_JEWS_Acknowledgement](https://www.academia.edu/30934024/TREATMENT_OF_RELIGIOUS_MINORITIES_UNDE_R_THE_OTTOMAN_MILLET_SYSTEM_CASE_STUDY_OF_GREEK_ORTHODOX_CHRISTIANS_ARMENIAN_CHRISTIANS_AND_JEWS_Acknowledgement)).



and the Jews⁴⁶ (under the authority of the Chief Rabbi, *Hakham Bashi*). It is important also to remember that arbitration was extensively used by the Ottomans, following the Hanafi interpretation in favor of a contractual nature of the arbitration; the first codification of Sharia, the Medjella, dedicates a complete section to arbitration⁴⁷.

The Muslims under the Ottoman Empire did not have a *Millet* system. This model - as the *dhimma* system itself - was developed to maintain the segregation among the religious minorities under certain degree of jurisdictional autonomy, and to prevent any contamination of the Islamic beliefs and assimilation to the Muslim identity. At the same time, the *Millet* system established a structure of control exercised simultaneously by the Muslim authorities and by the religious and civil leaders of those religious minorities.

3.2 - Islamic Communities in Transition: from the Pre-colonial era to the Colonial Rule

The classical Sharia was mainly a jurisprudential law in a constant process of creation by interpretation, and the legal opinions (*fatwas*) were issued by authoritative jurists; then, those opinions were compiled as textbooks, in a similar way that the Digest (*Pandectae*) of Justinian in Roman Law, or like the *Decretum* of Gratian in Medieval Canon Law. A proper appeal procedure did not exist, although the *Mazalim* courts could play in part that role mainly in criminal cases.

The Western Legal systems - European continental and English Common Law - had a deep impact in the Muslim empires and realms worldwide, when they became in contact during the Modern colonial era. Particularly, the British Empire, the Russian Empire, and France altered substantially the Muslim legal systems when a small number of European colonizers ruled over a large Muslim population.

⁴⁶ Additional readings, S.J. SHAW, *The Jews of the Ottoman Empire and the Turkish Republic*. New York University Press, 1991. Coll. work, *The Jews of the Ottoman Empire* (Ed. by Avigdor Levy), Princeton, Darwin Press, 1994. Further analysis on Syria, Tunisia, Tripolitania, Morocco, Yemen, and Iran in the collective work, *Jews among Muslims. Communities in the Pre-colonial Middle East* (Ed. by Shlomo Deshen and Walter P. Zenner), New York University Press, 1996; R. POTZ, "Islamic Law and the Transfer to European Law". *European History Online* (EGO), Institute of European History (IEG), Mainz 2011 (Available at: <http://www.ieg-ego.eu/potzr-2011-en>).

⁴⁷ A. RAMAHI, "Sulh: A Crucial Part of Islamic Arbitration", cit., pp. 16-17.



Under the colonial rule, the minority of foreigners ruled over the majority of locals, as in the Barbarian era, creating new dynamics and conflicts in those communities, and reshaping the principle of personality of the law.

The colonizers had their own legal system from their metropolis, and the local Muslims were under the Sharia. As Jun Akiba indicates, colonial empires incorporate the Islamic Legal system into the governmental and administrative institutions, assuming the role as guardians in the enforcement of the Sharia, and provoking a profound transformation of its nature⁴⁸.

This new frame created legal changes and contradictions (antinomies) that had to be addressed. As a result, the Muslim legal tradition became significantly modified by the colonizers' legal systems. Here are some examples: the creation of courts of appeals; the introduction of the case-law system and the principle of the precedent following the English legal tradition, or the process of codification according to the European continental Legal tradition. Also, the criminal system was softened restricting or abolishing physical punishments.

One of the biggest changes was the simplification of the Muslim legal system, standardizing the rules of interpretation; as consequence, the Sharia lost its traditional jurisprudential flexibility⁴⁹.

In the most Muslim territories submitted to the French colonizers, the Islamic jurisdiction became progressively reduced and replaced by French legislation except in Family Law.

In Algeria, as an example of French colonial policies, property and land laws changed to encourage the arrival of French settlers or colonists. A major legal transformation took place in the middle of 19th century when French authorities intervened in the administration of the Muslim courts in a process of institutionalization and bureaucratization, in order to control and limit its authority over the Muslim population. Initially, it was imposed French civil appeals courts and later the *ulama* was accommodated in those courts, including in each of them three French magistrates and two Muslim associate judges (*assesseurs*).

At the same time, it was created the *Conseil Supérieur de Droit Musulman*, composed of five Muslim jurisconsults as a consulting body on Islamic law; although in 1875, the Council was abolished, and in 1889,

⁴⁸ J. AKIBA, "Empires and Sharia: A Comparison of Colonial Islamic Legal Systems". *Eurasia's Regional Powers Compared- China, India, Rusia*. (Ed., by Shinichiro Tabata) Routledge, 2015, p. 171.

⁴⁹ J. AKIBA, "Empires and Sharia", cit., pp. 171-172.



the Muslim judges were excluded from the courts of appeals. Cadis, muftis, and imams became civil servants of the French government, reinforcing the bureaucratization of the Muslim judicial system in a similar way that Catholic clergy was part of the administrative French structure⁵⁰. The outcome of this process in Algeria under the French colonial powers was the development of the Algerian Muslim Law, mixing Islamic Maliki jurisprudence and French Law; according to Jun Akiba this blended Muslim law emphasized a more rigid and fundamentalist interpretation of Islam, in a similar way like in the Russian Empire and in the British Empire⁵¹.

During the last quarter of the 19th century, waves of violence and unrest increased, demanding Muslim solidarity, opposition, and liberation from the colonial empires. The Muslim communities under the colonial rule developed a strong current of political pan-Islamism anti-colonialist. The colonizer's empires reacted increasing the distrust with measures to weaken the *ulamas'* authority. The outcome was that social and political wounds from the colonial period still are present in the most Muslim postcolonial states after the reciprocal mistrust was build up.

The Ottoman Empire remained one of the few Muslim empires controlling its territories until the end of the IWW. However, the influence of the colonial ruling example and the Modern European legal systems, particularly the French model, channeled significant reforms in the Ottoman legal and administrative institutions starting in 1839.

The *Ilmiye*, developed in the 16th century, was one of the four pillars of the Ottoman structure: imperial power, bureaucracy, military structure, and religious authority. The *Ilmiye* implemented the religious power and it was in charge of the protection of the Muslim faith, its proper education and the enforcement of the Sharia among the Muslim population. When the process of secularization was accelerated in the middle of the 19th century, the *Ilmiye* became an institution in crisis; in part, because religious non-Muslim minorities were not equally treated like the Muslims,

⁵⁰ J. AKIBA, "Empires and Sharia", cit., pp. 178-179. Further reading: Ch. MENNESSON, *Organisation de la justice et du notariat musulmans en Algérie et législation applicable en Algérie aux musulmans*. Challamel et C. Éditeurs, Paris, 1888; A. CHRISTELOW, *Muslim Law Courts and the French Colonial State in Algeria*, Princeton University Press, 1985; C. COLLOT, *Les institutions de l'Algérie durant la période coloniale (1830-1962)*, C.N.R.S., Paris, 1987.

⁵¹ J. AKIBA, "Empires and Sharia", cit., p. 179.



embracing nationalist ideologies⁵² and demanding full sovereignty in the territories of the Ottoman Empire that they were a majority.

The sphere of Islamic jurisdiction of the *Ilmiye* was reduced in the secularization process and the codification of state laws was implemented. As a result, commercial, land, civil, and criminal laws were codified, while procedural laws and family laws were modified. Simultaneously, a dual judiciary structure - secular (*kanun*) and religious - was reinforced by the *Nizamiye* judicial system, as a secular territorial jurisdictional system under the Ottoman Ministry of Justice. It was completely separated from the Sharia system, as religious system mostly under the principle of personality⁵³. Sharia courts were in charge of family disputes, orphan's property, charitable endowments (*waqf*), and some felonies like retaliation and blood money.

Under the Ottomans, the Sharia Law became also simplified, standardized and less flexible like the Muslim law under the European colonial powers. This process is intensified when the Ottoman Empire collapsed at the end of the IWW, and a close encounter between the "Ottoman Sharia" and the "colonial Sharia" took place in the Middle East.

3.3 - The Exceptionality of Palestine and Israel

The British Empire and France occupied the most of the Ottoman territories in the Middle East during the IWW, signing in 1916 the Sykes-Picot Agreement with the acceptance of the Russian Bolshevik Government. The result of this treaty was the establishment of two Mandates: the French over Syria and Lebanon (1923-1946), and the British on the Mandatory Iraq (1920-1932) and the Mandatory Palestine (1923-1948). The artificial borders created, as the result of the emergence of new nation-states in the Middle East under nationalist ideologies, did not resolve the ethnoreligious conflicts; on the contrary, they were aggravated by geopolitical strategies and economic interest, keeping the region in a precarious political stability. Particularly, the Mandatory Palestine represents a unique and complex example, as a result of the political success of the Jewish-Zionist movement.

⁵² See N. ŞEKER, "Identity Formation and the Political Power in the Late Ottoman Empire and the Early Turkish Republic". *Historia Actual Online*, 1, (2005) pp. 59-67.

⁵³ See a detailed analysis in A. RUBIN, *Ottoman Nizamiye Courts: Law and Modernity*, Palgrave Macmillan, New York, 2011.



The Ottoman *Millet* system survived essentially in both Mandates; however, the challenge was to include the Muslims in the system. It requires the redefinition of the Muslim community as *millet* and the creation of its legal and judicial institutions, transforming the Millet system in an instrument of colonial control over Muslims and non-Muslims⁵⁴. Like in the territories with Muslim majority submitted to the colonial powers from the 19th century, in Palestine a similar new Islamic model is created reinventing the Muslim legal tradition by establishing communal courts and two ruling institutions: the Grand Mufti and the Supreme Muslim Council⁵⁵.

The Christian and the Jewish communities under the British rule, like under the late Ottoman rule, applied the personal religious jurisdiction only in marriage, divorce, alimony, and wills; in other personal civil litigations, both parties should agree to submit the case to the religious courts. On the contrary, the new Muslim courts uphold an absolute control over all matters regarding personal issues. According to Laura Robson, the creation of the Supreme Muslim Council in 1921 was an attempt to formulate a communal model of representation for Muslim Palestinians that would facilitate, as well, a communal space to the increasing European Jewish presence in Palestine, organized by the Jewish Agency, as a strategy to minimize nationalist tensions. The result of this strategy was the opposed; progressively since the 1930', the secular nationalist narrative was replaced by an Islamist political one among the Muslim Palestinian Arabs⁵⁶.

The recognition of the State of Israel in 1948 by a UN resolution created in the Palestinian lands a unique and challenging socio-political situation, unresolved until today.

Israel became a nation-state in 1948 by the exceptionality of the United Nations' Partition Resolution 181, voted by the General Assembly who requested to the Security Council to take the necessary measures for the implementation of a plan establishing two states, Palestine and Israel⁵⁷. This partition is known as the Two-States solution; it is currently under academic and intellectual analysis and debate of those scholars in favor of

⁵⁴ L. ROBSON, *Colonialism and Christianity in Mandate Palestine*. University of Texas Press, 2011, p. 57.

⁵⁵ L. ROBSON, *Colonialism and Christianity*, cit., p. 58.

⁵⁶ L. ROBSON, *Colonialism and Christianity*, cit., pp. 59-65.

⁵⁷ Full text in <https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD8976889B78526C330061D253>



the One-State solution⁵⁸, to be able to overcome seven decades of political instability, violence and insecurity in the region.

Israel does not have a written a Constitution, instead, it has several basic laws. One of them is the *Human Liberty and Dignity Law*, enacted in 1992; in its text, three basic fundamental rights are not specifically included: freedom of religion, freedom of expression, and right to equality⁵⁹.

In the State of Israel two opposing ideologies - one secular and other religious - converge in paradoxical ways under the label of "liberation"⁶⁰, as an outcome of a political compromise between the Zionists and the non-Zionist Orthodox group Agudat Israel in 1947 known as "the religious status quo"⁶¹.

It is a paradox, because of a secularist-nationalist ideology, Zionism⁶², is rooted in a common religious identity, Judaism, and based on the religious beliefs of the people who consider themselves chosen by God to possess the Promised Land, Palestine. An ideology, somehow, revitalized in the 21st century by a neo-Zionism that it is becoming more segregationist, refueled recently by the Israeli government's definition of Israel as a "nation-state of Jewish people only"⁶³.

The new State of Palestine is only *de iure* a sovereign state. It was founded in 1988 by the PLO in exile, forming after the 1993 Oslo Accords the Palestinian Authority; in 2012, UN changed its status from entity to state but still as a "Non-Member Observer"⁶⁴. Its original borders have

⁵⁸ In this sense, see **V. TILLEY**, *A One State Solution: A Breakthrough for Peace in the Israeli-Palestinian Deadlock*. Manchester University Press, 2005; **A. ABUNIMAH**, *One Country: A Bold Proposal to End the Israeli-Palestinian Impasse*. MacMillan, 2006; **C. GLICK**, *The Israeli Solution: A One-State Plan for Peace in the Middle East*. Crown Publishing Book, 2014. Also see the commentary of **N. MEZVINSKY**, "The One State Solution" (<http://othersite.org/norton-mezvinsky-the-one-state-solution/>).

⁵⁹ https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm

⁶⁰ See the sociologist analysis of **M. WALZER**, *The Paradox of Liberation. Secular Revolutions and Counterrevolutions*. Yale University Press, 2015, particularly Chapter 2, Zionism v. Judaism.

⁶¹ **H. LERNER**, "Entrenching the Status-Quo: Religion and State in Israel's Constitutional Proposals" 16/3 (2009) *Constellations* 16/3 (2009), pp. 1-26.

⁶² For a detailed analysis of Zionism, its evolution and its multiple facets (political, cultural, socialist, religious, messianic, revisionist), and post-Zionism as a minority ideology rooted in the Israeli Academia see, **Z. BRAITERMAN**, "Zionism" *Cambridge History of Jewish Philosophy: The Modern Era* (eds. Martin Kavka, Zachary Braiterman, and David Novak), Cambridge University Press, 2012, pp. 606-634.

⁶³ <http://www.theguardian.com/world/2014/may/04/binyamin-netanyahu-israel-jewish-state>

⁶⁴ <http://www.un.org/press/en/2012/ga11317.doc.htm>



been substantially reduced by the Israeli's occupation in 1967 and by an intensive process of colonization by new continuous Jewish settlements in Palestinian lands.

After the new Middle East nation-states came into existence, the *Millet* system's legacy still is present somehow in most of them⁶⁵; like Egypt, Iraq, Syria, Lebanon, Jordan, and even in Turkey, there is a residual part of it. Although the *Millet* system was formally abolished in Turkey under the Atatürk's leadership, in order to promote a secular state under the principle of equality among its citizens.

In Israel and Palestine, the *Millet* system - implemented as well initially under the Ottoman rule⁶⁶ and modified by the British Mandate - stills is applied.

The Israeli *Millet* system has its own peculiarities, completely different from the other Arabs nation-states with a Muslim majority of the population, because of the uniqueness of Israel as a Jewish neo-colonial nation in the region. Let us take a closer look.

The Israeli legal system can be considered very plural in applying the principle of personality of law⁶⁷, because has maintained the granted legal status of the eleven ethnoreligious communities given by British Mandate, including the Jewish Community, and adding three more: Druses in 1957, Episcopalians in 1970, and Baha'is in 1971; and never tried to abolish their status⁶⁸. Each of those communities exercises their sole

⁶⁵ K. BARKEY, G. GAVRILIS, "The Ottoman Millet System: Non-Territorial Autonomy and its Contemporary Legacy". *Journal of Ethnopolitics* (Formerly *Global Review of Ethnopolitics*) 15/1 (2015), pp. 24-42. Issue 1: Non-Territorial Autonomy and the Government of Divided Societies.

⁶⁶ See a comparative analysis with Bosnia in D. TSIMHONI, "The Status of the Arab Christians under the British Mandate in Palestine". *Middle Eastern Studies* 20/4 (1984), pp. 166-192.

⁶⁷ For an overview see: Y. SEZGIN, "A Political Account for Legal Confrontation between State and Society: The Case of Israeli Legal Pluralism", *Studies in Law, Politics & Society* 32 (2004), pp. 199-235.

⁶⁸ According the Palestine Order in Council (1922) the following communities were officially recognized by the Mandatory regime in addition to the Sunni Muslim community: the Eastern (Orthodox) Community, the Latin (Catholic) Community, the Gregorian Armenian Community, the Armenian (Catholic) Community, the Syrian (Catholic) Community, the Chaldean (Uniate) Community, the Jewish Community, the Greek Catholic Melkitem Community, the Maronite Community, and the Syrian Orthodox Community. See, Y. SEZGIN, "The Israeli Millet System: Examining Legal Pluralism through the Lenses of Nation-Building and Human Rights", *Israel Law Review* 43 (2010), p. 632 ft. 2 and 5.



jurisdiction over marriage, divorce and alimony, and concurrent with civil jurisdiction mainly on inheritance and testaments.

The Israeli authorities are entitled to accept or reject the juridical recognition of religious communities. Orthodox Judaism is the only officially recognized Jewish community, but not Reform Rabbis or Conservative Rabbis. As a result, two main issues arise: 1) the government does not grant citizenship to converted Jews under the Law of Return to Reform and Conservative Jews although the Supreme Court granted in 2016, still is not legally implemented⁶⁹; 2) Israeli Jewish marriages only can be celebrated by an Orthodox rabbi, in order to be fully recognized by the State of Israel under Family Law.

Israel inherited its system of registering marriage from the Ottoman Empire via the British Mandate; under this system, only the Orthodox Chief Rabbinate is entitled to celebrate Jewish marriages, and still legally is holding the monopoly over Jewish marriage. The 1953 Law of Rabbinical Courts established that marriages of Jews in Israel, whether citizens or residents are under the exclusive jurisdiction of Orthodox rabbinical courts.

As Yükel Sezgin explains, among the strongest opponents of this situation have been the Reform and Conservative Movements, because they cannot celebrate legally weddings in Israel; Israeli weddings performed privately, which includes Reform and Conservative ceremonies, cannot issued a valid marriage certificate for registration, depriving those couples of several economic benefits like residence, health, education, insurance, and tax deductions. Moreover, the 1977 Law of Penalties establishes criminal punishment (up to six months imprisonment) for anyone who performs a Jewish wedding ceremony

⁶⁹ As Reformed Judaism explained in 2016: "Fifteen years ago, we at the Israel Religious Action Center filed a lawsuit demanding that people converted by Reform and Conservative rabbis in Israel be recognized as Jews and be granted Israeli citizenship under the Law of Return. This past May, the Supreme Court granted status to Jews converted by private Orthodox rabbis (as opposed to the government-sponsored Orthodox Rabbinate). Following the ruling, we demanded equal treatment under the law. The court ordered the government to justify the rules that continue to discriminate specifically against us. The government filed their answer this past Friday, and asked the court not to take action because the Interior Ministry supposedly intends to introduce new legislation to address the problem next year" (<http://reformjudaism.org/blog/2016/12/07/who-jew-protecting-converts-israel>).

The most updated information on this new bill that I managed is June, 29th, 2017 (in <http://www.timesofisrael.com/new-government-backed-conversion-bill-targets-the-orthodox-not-the-reform/>).



aside of the Orthodox Rabbinate, knowing that this action is against the law⁷⁰. As a result, Israeli Jews, regardless their religious or non-religious beliefs, cannot legally marry not only non-Jews but also non-Orthodox Jews in Israel. For this reason, many interfaith couples celebrate their marriage abroad in order to be recognized in Israel according to International Private Law. As we saw, the Marriage legislation for the Jews is imposing the Orthodox Rabbinical authority over marriage, divorce, the legitimacy of the children, and inheritance. Since 2010, civil unions are recognized only if both spouses are registered as not belonging to any religion. However, domestic partnership relations can be recognized by a procedure established by the Ministry of Interior.

From the preservation of the ethnoreligious identity point of view, the Israeli *Millet* system looks very like the old Ottoman one. In both of them, the aim is to preserve the power in the hands of dominant group by keeping this segment of the population as more separate from the rest and as more homogeneous as possible to maintain their identities, Israeli Jews in Israel, Ottoman Muslims in the Ottoman Empire⁷¹. In both, the individual rights are reduced or even ignored in favor of the communal ones creating unequal legal models. The Ottoman model was abolished in Turkey in 1923; the Israeli model still is in force.

Part of the strategies to maintain the identity of the dominant group in any society is to preserve its purity prohibiting mixed marriages, as the Barbarian did when they settled and ruled over the lands of the Western Roman Empire, initially prohibiting marriages between Barbarians and Romans. In addition, as it was established in the Visigoths laws and later in the Christian kingdoms and in Canon Law regarding marriages between Catholics and Jews or Muslims.

The preservation and the hegemony of the Jewish identity in Israel are top priorities in its policies since its creation in 1948. As Yükel Sezgin point out⁷², Golda Meir declared once, that the survival of Israel and the Jewish people depended, largely, on their connection to their religion. Ben Gurion also considered that the safety and purity of the link between the Jewish people and their faith could only be ensured by the preservation of rabbinical courts' monopoly over marital affairs of all Israeli Jews.

⁷⁰ <http://www.irac.org/TextFromSearch.aspx?ContentName=Marriage%20in%20Israel>

⁷¹ F.A. ERGUL, "The Ottoman Identity: Turkish, Muslim or Rum?" *Middle Eastern Studies* 48 (2012), pp. 629-645.

⁷² Y. SEZGIN, "The Israeli Millet System: Examining Legal Pluralism Through the Lenses of Nation-Building and Human Rights", cit., p. 639, ft. 22 and 23.



However, looking at the 2016 statistics elaborated and analyzed by the Pew Research Center for Religion and Public Life⁷³, Israel seems a deeply divided society on religious issues; religious freedom in Israel is paradoxical because there is a limited freedom of religion but not freedom from religion⁷⁴.

In sum, the Israeli legislation is an essential tool in the process of homogenization the Jewish-Zionist identity, as well as in the process of segregating communities by the *Millet* system. Moreover, in Israel the individual right of religious freedom⁷⁵ is not protected when the norms of a particular religious organization are imposed to preserve the Jewish identity as it is envisioned by the political Zionist ideology and by the Ashkenazi ruling elite. Izhak Englard affirms that conflicts about law, state and religion in Israel are grounded in the very idea of establishing a Jewish state⁷⁶. Furthermore, the identification as a Jewish state creates an ongoing conflict with the non-Jewish Israeli citizens related to their ethnocultural identity as Arabs⁷⁷, including few Christians and many Muslims.

As I mentioned at the beginning of this work, language and religion are the main elements in building up identities, as it was maintained by the Historical School of German jurists under the leadership of Savigny. Even more, such a political identity can be reinforced when promotes an emotional link to the notion of the homeland as the core of a civic religion. For this reasons, in Israel, the secular Zionist ideology favors the connection with the Jewish religious legacy of the ancient land of Palestine. Israel is a paradoxical example of secularism and nationalism presented as deeply rooted in a religious cultural identity⁷⁸, its Jewishness; although there are increasing anti-Zionist movements of *Halakha* Orthodox Jews opposed to the identification of Israel with the Jewish religious identity⁷⁹.

⁷³ <http://www.pewforum.org/2016/03/08/israels-religiously-divided-society/>

⁷⁴ I. ENGLARD, "Law and religion in Israel", *The American Journal of Comparative Law*, 35/1 (1987), pp. 196-203 (Available at <http://www.jstor.org/stable/840166>).

⁷⁵ Further analysis about religious freedom in Israel F.S. RAVITCH, "Religious Freedom and Israeli Law", *Drake Law Review* 57 (2008-2009), pp. 879-895.

⁷⁶ I. ENGLARD, "Law and religion in Israel", cit., p. 208.

⁷⁷ Further reading G. BARZILAI, *Communities and Law. Politics and Cultures of Legal Identities*. University of Michigan Press, 2003, Chapter 3.

⁷⁸ As it is elaborated in synthesis by D.J. ELAZAR, *Israel as a Jewish State*. Jerusalem Center for Public Affairs (Available at <http://www.jcpa.org/dje/articles2/isrjewstate.htm>).

See also S. SMOOHA, "The Model of Ethnic Democracy: Israel as a Jewish and Democratic State", *Nations and Nationalism* 8/4 (2002), pp. 475-501.

⁷⁹ Two examples, the Neturei Karta, Jewish United Against Zionism,



Still it constitutes today one as one of the most controversial examples of the fusion of secular neo-colonialism and ethnoreligious nationalism. In which the religious legacy, as sacred texts, of the Exodus - justifying territorial occupation by divine law - and the Book of Ezra - prohibiting mixed marriage - still is playing a substantial role in the political Zionist narratives of the Jewish identity⁸⁰, and in the legislation of the State of Israel.

In Israel the Sulha arbitration system was also inherited from the Ottoman code *Medjella* via British Mandate, and it is the foundation of the 1984 Israeli Mediation Code applied under the principle of territoriality, coexisting with the Sulha applied to the Muslim Arab population under the principle of personality and interacting with the Israeli Judiciary system⁸¹.

4 - Toward a Global World: Legal Pluralism and the Development of ADR. The Role of Religious Mediation and Arbitration

Legal pluralism, as a scholar topic, became in fashion since 1930', mostly among legal sociologist, and later on among legal anthropologist, when George Gurvitch's concept of 'social law'⁸² confronts the traditional juridical notion of law.

The new social approach is developed from the idea that law is a broader notion than state-centered law under the nation-state paradigm. In the eighties, John Griffiths provoked a further debate affirming that legal centralism is just an ideology, distinguishing sociological legal pluralism from the juridical or classical legal pluralism⁸³. To open the

(<http://www.nkusa.org/>) and the True Torah Jews (<http://www.truetorahjews.org/>). Further reading, **Y.M. RABKIN**, *A Threat from Within: A Century of Jewish Opposition to Zionism*, Zed Books, 2006.

⁸⁰ However, there are a new generation of Israeli-Jews, post-Zionists scholars, very critics with the official history of Israel like, **I. PAPPÉ**, *A History of Modern Palestine: One Land, Two People*. Cambridge University Press, 2004. From another provocative and controversial approach see **S. SAND**, *The Invention of the Jewish People*, English translation from Y. Lotanm, Verso, London, 2009.

⁸¹ Further analysis in **D. PELY**, *Muslim/Arab Mediation and Conflict Resolution*, cit., Chapter 7.

⁸² **R. BANAKAR**, "Integrating Reciprocal Perspectives. On Georges Gurvitch's Sociology of Law", *Oñati Prize Essay in Sociology of Law*, Oñati/Internet, 2000.

⁸³ **J. GRIFFITHS**, What is Legal Pluralism?, *The Journal of Legal Pluralism and Unofficial Law* 18/24 (1986), pp. 1-55; **S.A. JACKSON**, "Legal Pluralism between Islam and the



debate among social scholars the new *Journal of Legal Pluralism and Unofficial Law* was created in 1981⁸⁴. Until then, most of the positivist legal scholars paid a limited attention to it, focusing their analysis on international and comparative legal studies. Initially, sociological and anthropological studies were centered in postcolonial states, later also include non-colonial states. Indeed, such a dialectical analysis channels a better understanding of the dynamics between the imposition of the law and the resistance to it, as well as the interaction among the ruling elite and the subordinate groups⁸⁵. Furthermore, as Baudouin Dupret explains⁸⁶, with the emergence of the “concept” of post-modernity, scholars oriented their research in legal pluralism toward a new definition of pluralism focused in the juxtaposition of many cultural and legal histories.

However, under the Rule of Law system some questions should be answered in order to establish a common principle of legality in such juxtaposition. How fits in this approach the notion of individual fundamental rights? Like equality before the law or religious freedom, or who is in charge of public policy; or how to guarantee the security or the publicity of a juridical action? Somehow, the challenge still is how to balance dissimilar cultures, and how to accommodate them in the rule of law system governing the nation-state paradigm under a Constitutional frame of the Modern legal systems.

In sum, how accommodate dissimilar cultures and religious traditions into a secular nomocracy?

As we saw already, historically multiple legal orders have been coexisting since the Antiquity. According to the leading legal scholar William Twining⁸⁷, expert in Jurisprudence, legal pluralism as a social fact is a common phenomenon, taking into account that: 1) legal pluralism is simultaneously a social fact and a normative fact; 2) it must be distinguished between legal pluralism and legal poly-centricity, coexisting

Nation-State: Romantic Medievalism or Pragmatic Modernity?” *Fordham Int’l Law Journal*, 30 (2006), p. 158.

⁸⁴ The *JLP* was first published in 1969, under the title *African Law Studies* (issues 1-18). From 2013, the *JLP* is in volume format (Volume 45 onwards). The Journal publishes three issues a year (<http://www.tandfonline.com/toc/rjlp20/current>).

⁸⁵ See in this sense **S.E. MERRY**, “Legal Pluralism”, *Law & Society Review*, 22/5 (1988), pp. 869-896. Particularly, pp. 889-890.

⁸⁶ **B. DUPRET**, “Legal Pluralism, Plurality of Laws, and Legal Practices”. *European Journal of Legal Studies* 1/1 (2007), pp. 1-26, p. 9.

⁸⁷ **W. TWINING**, “Normative and Legal Pluralism: A Global Perspective”. *Duke Journal of Comparative & International Law* 20 (2010), pp. 473-517. Particularly, pp. 488-89.



in time and space two or more autonomous or semi-autonomous legal orders, not necessarily in conflict or competition; 3) it cannot be opposed or debilitate the rule of law, human rights, and democracy.

Legal sociologists and anthropologists provide a dialectical and an interactive analysis extremely useful to legal scholars focusing on how plural identities and legal traditions can decentralize the state law system; they are opening new possibilities with the increase of the globalization process and its dynamics; as a result, more attention is paid to legal pluralism from a global approach.

The globalization process in which we are immersed expands, even more, the challenge of legal pluralism. The complexities of today's world require a change of methodology dealing with the globalization process. As José Casanova describes, the limited Western-centrism approach and comparative national analysis demand a new methodology⁸⁸ able to replace local or even international understanding by a transnational global comprehension of the dynamics of societies and the notion of multiples modernities, as "ongoing reconstructions of multiple patterns"⁸⁹ in this multilayered digital information age of the 21st century.

As consequence, legal pluralism demands a change of perspective in the conventional division between territorial and personal laws, national and international, private or public laws. Even more, globalization has further implications particularly to non-state laws transforming them in transnational laws⁹⁰; like for example, the expansion of religions or the local customs as result of global immigration.

⁸⁸ In this sense **J. CASANOVA**, "Public religions Revisited", *Religion: Beyond the Concept* (Hent de Vries, ed.), Fordham University Press., 2008, pp. 101-119.

⁸⁹ **S.N. EISENSTADT**, "Multiple modernities". Transaction Publishers, 2000. Also in *Daedalus*, Winter, vol. 129 (2000), pp. 1-29.

⁹⁰ **W. TWINING**, "Normative and Legal Pluralism: A Global Perspective", cit., p. 506, affirms: "in considering the implications of globalization for the discipline of law as it is institutionalized in a particular country or region, it is helpful to distinguish between (a) established transnational fields that command increased attention (e.g., regional integration, transnational commercial law, human rights law); (b) new or developing subjects that have strong transnational aspects (e.g., transitional justice, Internet law, environmental law); (c) established fields formerly perceived as domestic that have recently acquired increased transnational dimensions, such as torts, family, and criminal law; (d) the diffusion of religious law and customary practices associated with large scale migration; and (e) the interface with municipal state law in Northern countries of the religious and customary practices of ethnic minorities (both immigrant and indigenous). Most of these examples relate to state law, but globalization also has implications for the diffusion of religion, custom, and other forms of non-state law and for the interaction of state and non-state law at different levels of relations and ordering".



Global legal pluralism, for legal scholars, seems a term too ambiguous to fit in the technicalities and the precise interpretations required by a juridical approach. However: 1) it offers a different vision of the relations among communities, power and authority, allowing to study neglected or non-visible legal orders, like the informal justice systems (IJS) that resolve 80% of disputes in many countries⁹¹; 2) it provides with a wider inter-legality comparative analysis; 3) and facilitates the relationships among state legal systems and legal cultures of communities in multicultural societies.

One powerful expanding example of global legal pluralism is the transnational experience of arbitration, conciliation, and mediation in communities transcending legal systems. Basically, consists in the intervention of a neutral party in a conflict between two opponents facilitating its resolution; when the neutral party takes an authoritative interventionist role is called conciliation; arbitration requires that both parties bind themselves to the arbiter's decision, and in mediation, the parties are not tied to any mediator decision.

Traditional mediation and conciliation are ancient practices from the Antiquity, as I mentioned. Modern mediation is a social movement and practice that started in the US about four decades ago, in the seventies, opening a new alternative path to conflict resolution. The dual Western legal traditions of Anglo common law and Continental European civil Law, globalized by the European colonialism, is challenged by this new mediation as alternative dispute resolution (ADR); particularly, as a process to overcome the crisis in the traditional administration of justice⁹². The most innovative tool in this process is the multi-door courthouse introduced by Frank Sander institutionalizing ADR inside the courts and helping to speed up and diminish adversarial interaction in legal processes. Since then, in common law and civil law countries, ADR has been developed extensively and the skills of mediators have been improved. Particularly, the role of religion and religious organizations in mediation is expanding quickly at international level and at a communal level.

⁹¹ For a study of IJS see *A Study of Informal Justice Systems: Charting a Course of Human Rights-Based Engagement*. Publication commissioned by UN Women, UNICEF, and UNDP (<http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Informal-Justice-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement.pdf>).

⁹² N. ALEXANDER, "Global Trends in Mediation: Riding the Third Wave" 6/3 (2003) *ADR Bulletin*, p. 5, footnote (Available at: <http://epublications.bond.edu.au/adr/vol6/iss3/1>).



Religion can play a dual role, as a source of conflict or as a bridge to peacemaking⁹³, as an obstacle or as a strategy for conflict resolution. Religion and religious leaders have been blamed consistently for encouraging bigotry and hate, and for their active role participating or promoting conflicts and even justifying violence; such a role always is linked to power, resentment or/and politics. Some examples: the role of the Papacy in the Crusades, the religious wars in Europe between Protestants and Catholics, or the today's increasing conflict between Sunnis and Shias in Middle East⁹⁴; in most of the cases, theological disputes play a lesser role, although can be used to justify violence as well.

However, religious communities and religious leaders can also engage in a powerful peacemaker's role at three levels: leadership, inter-communal and intra-communal.

- At the leadership level, the medieval Papacy played a consistent role as mediator or as arbiter in Europe among rulers in many political disputes. More recently, for example, Pope John Paul II mediated in the conflict between Argentina and Chile in 1985 and recently Pope Francis offered his mediation between the Venezuela's government and the opposition. In Palestine and Israel, the Council of Religious Institutions of the Holy Land established in 2005 is taking an active role promoting peace and reconciliation in Palestine and Israel⁹⁵.
- At inter-communal level, many religious organizations are taking also active roles as peacemakers. Here are some examples: the Quakers in Nigeria through the Interfaith Mediation Center; in Sierra Leone the Inter-religious Council facilitating the reconciliation peace process; the Catholic organization the Community of San'Egidio in Mozambique⁹⁶; and the Sulha Peace

⁹³ Further readings: **M. GOLPIN**, *Between Eden and Armageddon: The Future of World Religions, Violence, and Peacemaking*. Oxford University Press, 2000, Chapter II: "Between Religion and Conflict Resolution: Mapping a New Field of Study"; **D. LITTLE**, *Peacemakers in Action: Profiles of Religion in Conflict Resolution*. Cambridge University Press, 2007; **D. SMOCK**, "Religion in World Affairs: Its Role in Conflict and Peace". Institute of Peace, Special Report 201, 2009. (<https://www.usip.org/sites/default/files/resources/sr201.Pdf>).

⁹⁴ **S. HUNTER**, "Sunni-Shia Tensions Are More About Politics, Power and Privilege than Theology" (Available at <https://acmcu.georgetown.edu/sunni-shia-tensions>).

⁹⁵ <https://www.crihl.org/history>

⁹⁶ **J. BERCOVITCH, S.A. KADAYIFCI-ORELLANA**, "Religion and Mediation: The Role of Faith-Base Actors in International Conflict Resolution", *International Negotiation* 14 (2009), pp. 175-204, particularly pp. 180-183. See also **F. MATTHEWS-GIBA**, "Religious



Project is working in the reconciliation between Israelis and Palestinians⁹⁷. As Ricardo Padilla affirms⁹⁸, religious belief-system in the faith-based mediation field is the essential and transcendent factor because can serve as the context, the method, and the medium facilitating the understanding and the reconciliation processes.

It is also important to grasp the role of religious interfaith dialogues in which sacred text can be a powerful tool and a moral anchor⁹⁹ opening or facilitating by theological shifts a common ground in religious narratives, values, and peaceful coexistence. On the other hand, religious dialogues are extremely challenging; and from a logocentric approach, they have limitations, as Thomas Scheffler affirms¹⁰⁰, like for example the Regensburg's speech of Pope Benedict XVI in 2005 misunderstood by many Muslims reacting emotionally against what they considered an attack on the Islamic faith.

One of the biggest challenges to interfaith dialogues is to overcome defensive and emotional aspects of collective egos and self-identities promoting sectarianism, trying to prove that one of them possess the whole truth. There are many historical examples: the Christological disputes between Arians and Trinitarians in the Imperial Ecumenical councils' era until the III Council of Constantinople (680) imposing finally the Trinitarian Nicene-Constantinopolitan Creed; the famous Middle Age debates among Christians, Muslims and Jews hosted by rulers in their domains; or the disputations in the 16th century Imperial Diets, *Reichstage*, between Catholics and Protestants, even although they reached to the agreement of *cuius regio eius religio* (*whose realm his religion*) - established by the Peace of Augsburg (1555) under the principle of religious segregation and the submission of the subjects to the ruler's religion - such an agreement did not prevent the outcome of political-religious wars that

Dimension of Mediation" *Fordham Urban Law Journal* 27 /5 (1999), pp. 1695-1710.

⁹⁷ <http://www.sulha.com/>

⁹⁸ **F. PADILLA**, "Understanding Faith Based Mediation: A Multidimensional Model" 2014 (Available at <http://www.mediate.com/articles/PadillaR1.cfm>).

⁹⁹ **J.L.HURST**, "Holy Conflict: the Intersection of Religion and Mediation". *The Journal of Living Together*, International Center for Inter-Religious Mediation, 2015, pp. 32-38. (<https://www.icermediation.org/projects-campaigns/journal-of-living-together/jamie-l-hurst/>).

¹⁰⁰ **T. SCHEFFLER**, "Interreligious Dialogue and Peacebuilding". *Die Friedens-Warte. Religion, Krieg und Frieden*, 82/2,3 (2007), pp. 173-187, p. 174 (http://www.jstor.org/stable/23773933?seq=1#page_scan_tab_contents).



lasted in Europe until the Treaty of Westphalia (1648). Most of these debates did not stop persecution or violence, on the contrary, expanded it.

Asymmetrical communities also represent a huge test for interfaith dialogues, when rapid social changes or new religious movements alter the traditional coexistence among communities, like aggressive fundamentalist Evangelical proselytism, or Salafist and Wahhabist ideologies¹⁰¹.

Contemporary interfaith dialogue requires four types of dialogue, according to Francis Cardinal Arinze, President of the Vatican's Pontifical Council for Interreligious Dialogue (1985-2002): a dialogue of life, a dialogue of social engagement, a dialogue of theological exchange, and dialogue of religious experience¹⁰².

In sum, in international and transnational spaces, religious leaders can play an essential role bringing moral authority and respect as reliable and effective mediators, helping enormously in processes of building peace and reconciliation as well as in the interfaith dialogues. At inter-communal level, they can also facilitate the pacific coexistence among diverse ethnoreligious communities.

- Finally, at an intra-communal level, religious organizations can channel private mediation and arbitration among their members in many multi-dimensional paths. In recent years, the so-called religious arbitration has been developed in secular nation-states creating an ongoing legal and politically polarized debate regarding the legitimacy of religious courts, as arbitration tribunals, under the secular rule of law system. This debate also reopened the multiculturalism discussions and the distinction between an old multiculturalism and a new multiculturalism, and the challenges of sectarianism¹⁰³; therefore, the risks of latent clashes between public policies or fundamental rights, and religious arbitration.

What are the potential dangers in religious arbitration?

- 1) Pressure or even coercion on the members of a religious community to bring the case to a religious court, preventing the voluntary nature of the arbitration.
- 2) Applying unfair rules; for example, regarding women in Jewish and in Islamic laws.

¹⁰¹ T. SCHEFFLER, "Interreligious Dialogue and Peacebuilding", cit., p. 181.

¹⁰² T. SCHEFFLER, "Interreligious Dialogue and Peacebuilding", cit., p. 176.

¹⁰³ M.A. HELFAND, Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders. *New York University Law Review*, 86/5 (2011), pp. 1231-1305.



- 3) Weakening the secular rule of law system in favor of strengthening religious sovereignties.
- 4) Reinforcing the communal religious freedom in detriment of the individual religious freedom by empowering religious authorities.
- 5) Promoting the isolation of religious communities by emphasizing less interaction with the rest of the population and other communities in the society.

To be able to address properly those risks we should take a closer look at those countries implementing religious arbitration and the interaction of legal mechanisms to prevent or limit the dangers mentioned above.

4.1 - The American Experience in Religious Arbitration: the Jewish *Beth Din* Courts and the Challenge of Islamic Arbitration

The United States of America represents the success of a nation-state build up by a continuous flow of immigrants, although African slaves and Native Americans are the biggest moral burden and the darkest legacy of its success.

Particularly, the process of jurisdictional accommodation of the Native American nations, more than 500 tribes, has been very challenging because of abusive peace treaties often violated by the American government, and their relocation in Indian reservations in poor lands. One of the biggest tests was their legal autonomy and jurisdictional sovereignty. The combination of the principle of territoriality and the principle of personality developed a triple jurisdiction in a unique model implemented in the US based on three types of sovereign entities: Federal, State, and Indian tribes. Each of them has their own judicial system because of the Indian Reorganization Act of 1934. As Justice O'Connor explained¹⁰⁴, in 1992 there were about 170 tribal courts with jurisdiction over one million Native Americans, and since then there is an increasing process to incorporate their own customs and moral values, even integrating traditional Indian dispute-resolution methods, although some of them still prefer the adversarial process¹⁰⁵.

Since the colonial times, European religious refugees settled their religious communities in America. The birth as nation-state under the

¹⁰⁴ S.D. O'CONNOR, "Lessons from the Third Sovereign: Indian Tribal Courts", *Tulsa Law Journal* 33/1 (1997), pp. 1-6 (<http://digitalcommons.law.utulsa.edu/tlr/vol33/iss1/1>).

¹⁰⁵ For an updated list see <http://www.tribal-institute.org/lists/justice.htm>



constitutional principle of the separation of church and state, constituted another jurisdictional challenge for those religious communities because they lost not only their status as established churches but also their religious jurisdictions. Consequently, their religious courts lost their power. After 1820, some new religious movements, like the Mormons, initially did not take their legal disputes to the state court system; after Utah became state in 1850, the Mormons tried to have their arbitration tribunals coexisting with the state courts for a while, becoming progressively less powerful when the population of the state became more dissimilar¹⁰⁶.

Traditionally, the Jewish communities tried to avoid secular courts since the Antiquity, because it was a *halakhic* general prohibition to resolve disputes in gentile courts, and accepting secular court is considered a denial of the Torah laws, although they are exceptions¹⁰⁷. After the Roman administration abolished the Jewish courts in Palestine, religious arbitration became a regular practice among Jews under the principle of personality of laws. The immigrant Jewish communities in America continued this tradition and at the beginning of the 20th century, they established in New York the *Kehillak* tribunals that practically disappeared after the I WW. Under the legal frame of the 1925 Federal Arbitration Act (FAA) two Jewish courts are created: the Jewish Arbitration Court in 1929 and the Jewish Conciliation Court of America in 1930.

The FAA is rooted in the contract theories establishing a limited space of jurisdictional autonomy. Its main characteristics are: 1) creates a common legal structure for arbitration; 2) it is based on the freedom of the parties to accept the arbitration; 3) but when it is accepted, it has a binding nature¹⁰⁸.

¹⁰⁶ M. J. BROYDE, *Sharia Tribunals, Rabbinical Courts, and Christian Panels. Religious Arbitration in America and the West*. Oxford University Press, 2017. Chapter 4 B: *Religious Arbitration in America*.

For a comparative analysis between US and Canada, see N. WALTER, "Religious Arbitration in the United States and Canada", *Santa Clara Law Rev.*, 52 (2012), pp. 501-569 (Available at: <http://digitalcommons.law.scu.edu/lawreview/vol52/iss2/4>).

¹⁰⁷ Y. FEIT, "The Prohibition Against Going to Secular Courts". *The Journal of the Beth Din in America*, 1 (2012), pp. 30-47 (<http://jlaw.com/Articles/ProhibitionSecularCourts.pdf>). See also, M. WILLIG, "Retaining the Proceeds of Secular Court Judgments" *The Journal of the Beth Din in America*, 2 (2014), pp. 11-14. For access to all the articles in *The Journal of the Beth Din in America*, vol. 1 (2012) and vol.2 (2014) <https://bethdin.org/journal/>

¹⁰⁸ M.J. BROYDE, *Sharia Tribunals, Rabbinical Courts, and Christian Panels* cit., *ibidem*, particularly footnotes 57-66.



The main areas of religious arbitration under the FAA are Labor and commercial relations, prenuptial agreements, marriage dissolution, and Family Law. In any case, as a ruling principle, fundamental individual rights - as they are recognized by the Bill of Rights - are guaranteed and cannot be suppressed or restricted by arbitration. As a result, Jewish, Christians, and Muslim arbitration courts, tribunals or panels have been operating harmoniously with secular US courts as any other arbitration tribunal.

In 1960, the Beth Din of America (BDA) is founded among American Jewish communities, as Rabbi Michael Broyde explains¹⁰⁹, to provide a settlement forum for Jews living in accordance with *halakha* in the American secular legal context under and the American arbitration legal frame. As a result, the Jewish Arbitration in the US takes place in the Beth Din Courts. However not all disputes accepted by the FAA can be resolved in them; for example, these courts cannot grant a divorce if a husband refuses to divorce his wife, and as a result, she cannot remarry remaining chained to that marriage as *agunah*.

In general, it is considered a successful arbitration process because they are neutral, technical, and transparent procedures compatible with the American secular legal frame. The main features of the Ben Din Arbitration judicial process are the following¹¹⁰:

- 1) Formal published procedural rules, regarding objectivity and impartiality to the arbitration process and admissibility of evidence.
- 2) Simultaneously consistent with the Jewish law and the secular due process.
- 3) The structural and hierarchical composition of the court and is recommended that its members should have a dual legal system background as experts in *Halakha* and American Law.
- 4) Optional transcription of the proceedings.
- 5) Guarantees preventing coercion of one of the parties.
- 6) An internal appellate process to review the case in a period of 20 days. This is an addition to fit in a secular due process because traditional Jewish law didn't have a formal right to appeal.

¹⁰⁹ **M.J. BROYDE**, *Sharia Tribunals*, cit., Part 3, Chapter 7 A. Further information on the rules and procedures, opening a case, specific provision for contracts and prenuptial agreements, and general guidelines of the Ben Din courts <https://bethdin.org/forms/>

¹¹⁰ Further analysis of these features in **M.J. BROYDE**, *Sharia Tribunals*, cit., and **M. BRODYE**, "Jewish Law Courts in America: Lessons offered to Sharia Courts by the Beth Din of America Precedent", *New York Law School Law Rev.*, 57 (2012-2013), pp. 287-311.



Other existing judicial models in America under the principle of personality with a long nomocratic tradition are the Ecclesiastical Tribunals of the Catholic Church. However, there are not under the American arbitration system. They are an independent judiciary structure ruled by Canon Law codes, Latin or Eastern, regarding sacraments - among them canonical regulations for a valid celebration of marriage - ecclesiastical disputes, disciplining clergy, and marriage canonical annulments which only have a canonical effect, not civil or secular consequences. In the US there are about 200 Catholic Tribunals taking an average of 15.000 marriage annulment cases per year¹¹¹.

Most of Christian Protestant churches and denominations are not nomocratic and for this reason, they don't have structural procedures; usually, they can accommodate easily to the secular arbitration system, although often they have pastoral mediation and disciplinary mechanisms mostly for clergy.

The Muslim communities in the US are also establishing their own arbitration tribunals, using the *fiqh* scholar legal tradition and the *sulha* as reconciliation practices, following the example of many other religious communities involving commercial disputes and Family Law.

The 2010 Imams Conference, the Assembly of Muslim Jurists of America (AMJA) was in favor to promote and improve Islamic arbitration establishing some clarifications and parameters¹¹² that, eventually, can facilitate harmonizing the Legal Muslim tradition with the secular legal tradition and with the American arbitration laws. According to Rabbi Michael Brodye¹¹³, the Beth Din experience can be a useful comparative example for Muslim arbitration tribunals. Although, he is aware of the significant segments of the American society distrusting Islamic law and arbitration tribunals, and many secular judges are cautious regarding to enforce their decisions because they perceive Islamic arbitration informal, close, and secret.

Islamic scholars have to find their own legal resources to adjust the three main procedural jurisprudential interrelated paths in Muslim

¹¹¹ For an overview see the Pew Forum "Applying God's Law: Religious Courts and Mediation in the U.S." (<http://www.pewforum.org/2013/04/08/applying-gods-law-religious-courts-and-mediation-in-the-us/>).

¹¹² <http://www.amjaonline.org/en/declarations/20-declarations/105-decisions-and-recommendations-of-amja-seventh-annual-convention-kuwait>

¹¹³ **M. BRODYE**, "Jewish Law Courts in America: Lessons offered to Sharia Courts by the Beth Din of America Precedent", cit, and his 2017 book *Sharia Tribunals, Rabbinical Courts, and Christian Panels* cit., Part 3, Chapter 8, C.



disputes - *qada* (judicial), *takhim* (arbitration), and *sulha* (mediation as a reconciliation process) - to the US legal frame, the FAA, and the public interest.

In recent years, Muslim immigration to the US is becoming a new source of tensions like in the most of the European countries. According to the 2015 Pew Center research and survey of US Muslims, there is a total population of 3,3 million, and it is estimated as the fastest growing immigrant population in the US¹¹⁴. Unfortunately, as it happened with each new immigration wave to US rejection and discrimination re-emerged cyclically in the American society; first, with the Jews¹¹⁵, and then with the Irish, the Italians, the Latinos, and with the Catholics in general until an Irish descendant and Catholic, John Kennedy, was elected US President.

In the 21st century, the fast growing Muslim immigration is galvanizing fear - in addition to the Islamophobic rhetoric since 9/11 fueled by the ongoing Middle East wars - also because Sharia law is considered a threat to the American secular legal system. A similar process is taking place in Europe¹¹⁶.

As a result, at least in 15 states their Legislative bodies are passing state bills banning specifically the use of Islamic (Sharia) law in the American courts, and even the use of any foreign law or international law¹¹⁷. As consequence, those state bills would compromise and invalidate

¹¹⁴ See the *Pew Forum* 2016 and 2017 surveys and research <http://www.pewresearch.org/fact-tank/2016/01/06/a-new-estimate-of-the-u-s-muslim-population/>; <http://www.pewforum.org/2017/07/26/findings-from-pew-research-centers-2017-survey-of-us-muslims/>

¹¹⁵ Until the II WW it was a deep anti-Semitism in US even among scholars; as example, the words of the well-recognized and awarded scholar W.O. SWINTON (1833-1892), who has 46 books catalogued on the Library of Congress and had the gold medal for textbooks in the Paris Exhibition of 1878 with his book *New Word Analysis*. In his presentation of the *Outlines of General History*, N. York, 1880, re-edited several times he explains that “*the race to which we belong, the Aryan, has always played the leading part in the great drama of the world’s progress*”). And considers that “*the Semites do not make nearly so important or so conspicuous a figure in history as do the Aryans. They have never been greatly progressive (...). If we trace back the present civilization of the advanced nations of the world, -our own civilization, and that of England, Germany, France, Italy, etc,- we shall find that much of it is connected by a direct and unbroken line with Roman*”.

See it in the Gutenberg Project available at <http://www.gutenberg.org/ebooks/19346>

¹¹⁶ Further reading: *Muslim Family Law in Western Courts* (ed. By Elisa Giunchi). Routledge, 2014.

¹¹⁷ For example, the Amendment to the Oklahoma Constitution, that forbade the use of international law and Sharia Law. (Available at <https://www.sos.ok.gov/documents/questions/755.pdf>).



the religious arbitration settlements; although the most of US Federal Courts are blocking those state bills and amendments on the grounds of the violation of the First Amendment. US Supreme Court consistently has ruled that judges and other government officials may not interpret religious doctrine or rule on theological matters¹¹⁸. At the same time, US courts have a long tradition using foreign laws, even mentioning religious laws as part of the Judeo-Christian legacy. For this reason, US Courts occasionally quote religious laws without theological interpretation.

In sum, the tension between the US First Amendment's Constitutional Clauses (Free exercise and non-Establishment of religion) is also present in the religious arbitration debate. Here is the core question: Is religious arbitration expanding religious freedom by restricting the secular rule of law system? It is not a new debate; how to balance religious freedom with the limits of the separation between religious organizations or communities and a secular state has been the main problem in the US Supreme Court since *Reynolds v. US* in 1875 (regarding Mormon polygamy), addressed by evaluating public interest, public morality, applying accommodation rules, and creating standard tests.

Historically, the US as a nation-state is considered a secular nation of religious citizens, initially rooted in Protestant communities and culture. According to the analysis and statistics of the Pew Forum organization, in the last decade, United States is changing its religious landscape toward a society more secular than ever¹¹⁹, as Western Europe did in the last decades as well; however, religious communities continue flourishing in America. Perhaps, as Oliver Roy maintains¹²⁰, there is a process of reconstruction of religious identities, and we are witnessing a reconfiguration of the relations among religion, state, society and communities, because the demands of more visibility of religion in the public sphere. Certainly, new forms of religiosity, including new religious movements and neo-fundamentalisms, are taking advantage of the globalization process¹²¹ for the reason that they can connect with those who are experiencing a process of loss of identity in their communities and societies, and they are searching for new ideals to rely on.

¹¹⁸ <http://www.pewforum.org/2013/04/08/applying-gods-law-religious-courts-and-mediation-in-the-us/>

¹¹⁹ <http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/>

¹²⁰ **O. ROY**, *Secularism Confronts Islam* (English trans. from G.G. Holoch). Columbia University Press, 2005, Chapter 2.

¹²¹ Further reading, **O. ROY**, *Globalized Islam. In Search for a New Ummah*. Columbia University Press, 2004.



4.2 - Confronting the Fear of Islamic Arbitration Tribunals in the UK, Canada, and Australia

The UK, Canada, and Australia are facing similar challenges like the US regarding Muslim legal traditions and its interaction with common law secular democracies.

Among Muslim scholars, there is not an analogous approach on this issue; some scholars consider that Sharia has the potential to coexist with secular traditions¹²². Abdullahi An-Na'im offers a challenging view affirming that Sharia will always remain open to reinterpretation and evolution, and he distinguishes between Islam and state, and Islam and politics; in his analysis, one aspect of modernization and colonization has been the fossilization and distortion of the role of Sharia in Islamic societies. In sum, he considers that secularism is able to unite diverse communities of believing and practice into one political community; it means that "a secular state is a necessary framework for negotiating ethical differences among citizens, but not for adjudicating and resolving such a differences", that implies "protecting civil reasoning and adjudicating disputes according to established constitutional and judicial criteria and processes"¹²³.

Unfortunately, the media often played a bias and alarming role creating confusion and rejection in the public opinion about the role of Sharia in secular legal systems and the risk of Islamization and enforcement of Sharia changing the legal frame of in these countries.

The UK has a very diverse Muslim population, initially emigrating from the British colonies around the world. According to the British Council of Muslims¹²⁴ and the data from 2011 Census, there are over two million Muslims, almost 5% of the British population and it is the fastest growing one.

In Britain, a fierce debate is taking place regarding the role of Sharia in Muslim arbitration procedures and its accommodation to the common law system¹²⁵.

¹²² A.E. SPARR, "Legal Pluralism and Sharia: Implementing Islamic Law in States and Societies" (Available at <http://www.e-ir.info/2014/12/18/legal-pluralism-and-sharia-implementing-islamic-law-in-states-and-societies/>).

¹²³ A.A. AN-NA'IM, *Islam and the Secular State. Negotiating the Future of Shari'a*. Harvard University Press, 2008. Chapter 7.

¹²⁴ <http://www.mcb.org.uk/muslimstatistics/>

¹²⁵ For an overview on the different levels of possible accommodation of Sharia tribunals in the UK legal frame, the debate in favor and against, and the initial arguments presented in 2008 by Lord Phillips as Lord Chief Justice in England and Wales affirming



The 1996 English Arbitration Act is enacted with similar limits like the American 1925 FAA. Basically, they are public interest and procedural protection for impartial arbitration, but didn't follow the UNCITRAL Model Law on International Commercial Arbitration adopted by UN in 1985 and amended in 2006.

To be able to grasp the roots of the debate in the UK, we have to mention the creation in 1982 of the Islamic Sharia Council (ISC) that has been acting as informal arbitration tribunal, although there is recent criticism about the ISC accused of promoting and applying 19th century Muslim neo-fundamentalist revivalist interpretations of Sharia of two Islamist movements: the Deobandi movement¹²⁶, developed in the aftermath of the failed Indian Rebellion of 1857 against the British colonial rule; and the Salafism, developed first in Egypt and later in the Arab Peninsula as counter movement against the modernization process that took place in the Ottoman Empire¹²⁷.

In 2007, the Muslim Arbitration Tribunal (MAT)¹²⁸ is formed in the UK addressing commercial disputes, family mediation, premarital agreements, dowry, divorce, and inheritance laws and wills; setting a clear policy against forced marriages and fully supporting the civil protection of 2007 Forced Marriage Act¹²⁹. The efforts of the MAT are also oriented to a legal harmonization between Muslim legal traditions and the British Common Law system. As a result, MAT is creating several legally sophisticated procedural mechanisms and creative interpretations to accommodate the legal Islamic tradition to the British rule of law system, in order to guarantee legal fairness and protection of both parties involved in the dispute.

that "There is no reason why principles of Sharia Law or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution" supported by Rowan Williams, Archbishop of Canterbury at that time. See **M. ZEE**, "Five Options for the Relationship between the State and Sharia Councils Untangling the Debate on Sharia Councils and Women's Rights in the United Kingdom" *Journal of Religion and Society* 16 (2014), pp. 1-18. (http://www.academia.edu/5732256/Five_Options_for_the_Relationship_between_the_State_and_Sharia_Councils_Untangling_the_Debate_on_Sharia_Councils_and_Women_s_Rights_in_the_United_Kingdom)

¹²⁶ Further readings, **M. MOJ**, *The Deoband Madrassah Movement: Countercultural Trends and Tendencies*. Anthem Press, 2015.

¹²⁷ For a recent analysis of the Wahabbist Salafism see **M. BIN ALI**, *The roots of religious extremism. Understanding the Salafi Doctrine of Al-Wala' wal Bara'*. Imperial College Press, London, 2016.

¹²⁸ <http://www.matribunal.com/>

¹²⁹ <http://www.matribunal.com/forced-marriages-intiative.php>



However, one of the main recent debates involves the possible coercion of Muslim women under narrow interpretations of Sharia. For this reason, two new bills have been proposed to balance and protect Muslim women facing possible intimidation: The Divorce (Financial Provision) Bill 2016-17[HL] and The Arbitration and Mediation Services (Equality) Bill [HL] 2016-17, still both are in discussion in the House of Lords¹³⁰.

In sum, in the UK is clear the trend in favor of implementing legislation to balance and promote equal treatment under the law, preventing the risk of women's discrimination under unfair religious laws or abusive cultural traditions. However, the biggest challenge indeed at this moment still is to evaluate the perils and the social consequences of excluding accommodation and intervention in religious arbitration, because it can promote a communal space outside the frame and the protection of the secular rule of law system, fortifying undercover abuses and oppression on religious grounds. This is the challenge that Canadians and Australians are facing too.

In **Canada**, the first Muslims immigrants were few Bosniaks mainly after the IWW. According to the 1991 Census, Muslim population was then more than a quarter of million, and in 2011 Census is over a million¹³¹, a 3.2% of the population, the fastest growing population, in comparison Jewish population that is about quarter a million.

Religious arbitration was operating under the 1991 Arbitration Act; the Jewish Beth Din courts have been fluently arbitrating in the Orthodox Jewish communities, like some other religious communities.

In 2003 was founded a Muslim platform, the Islamic Institute of Civil Justice (IICJ), offering Muslim arbitration as part of its services under the Arbitration Canadian Legislation legal frame, addressing Muslims to resolve their disputes by the IICJ. The creation of the IICJ opened a bitter social and political debate about Muslim arbitration in Canadian provinces.

¹³⁰ For a comparative evaluation see, **S. THOMSON, R. SANDERS**, "Common defects of the Divorce Bill and Arbitration and Mediation Services (Equality) Bill 2016-17". *Family Law* 47 (2017), pp. 425-451 (Available at https://www.researchgate.net/publication/316215907_Common_defects_of_the_Divorce_Bill_and_Arbitration_and_Mediation_Services_Equality_Bill_2016-17 and at <http://orca.cf.ac.uk/99619/>).

¹³¹ <http://www12.statcan.gc.ca/nhs-enm/2011/dp-pd/prof/details/page.cfm?Lang=E&Geo1=P&R&Code1=01&Data=Count&SearchText=Canada&SearchType=Begins&SearchPR=01&A1=Religion&B1=All&Custom=&TABID=1>



In 2004 Marion Boyd, a member of the New Democratic Party in Ontario and a well-known defender of women's rights, was commissioned by the Attorney General and by the Minister Responsible for Women's Issues, to make a report regarding arbitration in Family Law. As the Report indicates¹³², there was significant confusion in the media and public consciousness about a plan by the Islamic Institute of Civil Justice to establish a "Sharia Court" in Ontario. In her report, she recommended the possibility to incorporate religious arbitration including Muslim arbitration, adding a good number of safeguards for the proper implementation.

Among the opponents, Muslims and non-Muslims, to establishing religious arbitration tribunals under the 1991 Arbitration Act, Shirish Chotalia is mainly concerned about the constitutional obligations of the Canadian government to ensure that Muslim law is not used to bypass or subvert Canadian law¹³³. In favor of the religious arbitration by the IICJ, Marie Egan Provins considers that, even if coercion in family cases and premarital agreements can eventually take place, there are solutions to prevent it, as Marion Boyd recommended¹³⁴. Among those measures or safeguards, written records of the proceeding can be implemented by creating a provincial registry, and the independent Legal Advice (ILA), designed to protect vulnerable people, can provide with an autonomous counselor able to explain to Muslim women their rights under Canadian laws.

However, the media reports about on beating, stoning, and beheading, imposed mainly on women by extremist Sharia courts in the Middle East and Africa¹³⁵, create an atmosphere of distress and rejection toward Muslim arbitration in the public opinion; as a result, in 2005 the Ontario's premier ban religious arbitration under the 1991 Arbitration Act (adopted in Ontario in 1992). In addition, in 2005 the Quebec Legislature passed a motion against Sharia to be used in the legal system of this province¹³⁶.

¹³² <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesummary.html>

¹³³ **S.P. CHOTALIA**, "Arbitration Using Sharia Law in Canada: A Constitutional and Human Rights Perspective", *Constitutional Forum*, 15/2 (2006), pp. 63-78.

¹³⁴ For a detailed analysis of the pros and cons, see **M.E. PROVINS**, "Constructing an Islamic Institute of Civil Justice That Encourages Women's Rights", *Loyola L.A. Int'l & Comp. L. Rev.*, 27 (2005), pp. 515-540. (<http://digitalcommons.lmu.edu/ilr/vol27/iss3/5>).

¹³⁵ https://www.thestar.com/opinion/editorialopinion/2010/09/14/one_law_for_all_ontarians.html

¹³⁶ [https://www.theglobeandmail.com/news/national/quebec-rejects-sharia-system\(article11194](https://www.theglobeandmail.com/news/national/quebec-rejects-sharia-system(article11194)



The main problem in both, political and legislative, decisions is that they cannot prevent the existence of private informal arbitration outside the Canadian legal system, on the contrary, they will proliferate; as a result, women rights cannot be fully protected. Banning formal Islamic arbitration open the path to informal underground arbitration, that is not able to be supervised by formal procedures, and is not harmonized with the secular legal frame of the Arbitration Act, impeding secular courts to intervene in cases of unfair treatment toward the party most vulnerable.

In sum, banning Muslim arbitration under the Canadian Arbitration Act does not resolve the problem of discrimination and coercion of women; just leave them defenseless to abusive informal and unofficial courts operating underground and out of public legal scrutiny.

In **Australia**, Muslim communities have been a part of their cultural mosaic from the 19th century. Between 2006 and 2016, the Muslim population has grown almost double, over 600.000, making 2.6% of the total Australian population¹³⁷. As it happens in Canada, it is an increasing fear of Islamization and it is an ongoing similar angry debate about banning or accommodating Sharia arbitrations courts that have been operating unofficially underground as personals laws for Australian Muslims outside the Australian legal system.

Anne Black, after exploring critically the lessons from Britain and Canada¹³⁸, considers that Australian society is not ready for the official recognition of Muslim arbitration, but without giving convincing arguments for it, besides the risk of isolation of Muslim communities that underground informal arbitration promotes too. She realizes that actually, Sharia courts for family disputes in Australia are indeed underground, leaving the parties involved in a dispute out of protection of the Australian laws. In this situation is not legally possible to verify the fairness neither in the arbitration process nor in the decision.

In my view, formal religious arbitration under a secular state legislation offers more procedural guarantees, facilitating accommodation and harmonization of religious laws in a secular legal frame. It is also important to keep in mind that the inner pluralism of Islam, about schools of legal interpretation and ethnocultural backgrounds, can play an

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¹³⁷ <http://www.dailymail.co.uk/news/article-4641728/Number-Muslims-Australia-soars-Census-2016.html>

¹³⁸ **A. BLACK**, "Accommodating Shariah Law in Australia's Legal System. Can we? Should we?", *Alt Law JI* (2008), pp. 214-219. (Available at <http://www.austlii.edu.au/au/journals/AltLawJI/2008/63.pdf>)

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important role facilitating a plural Muslim identity capable to integrate, British, Canadian or Australian identities under the fundamental and constitutional rights of those countries, without the negative aspects of assimilation and ghettoization. That is the challenge for Muslim and non-Muslims citizens under secular juridical systems.

13 - Conclusions

We are witnessing a new era of fear and uncertainty, politically and economically, at the same time transnational migrations at large scale are increasing, and the coexistence of multicultural identities are becoming a source of new forms of religious and cultural intolerance and, eventually, new conflicts of identities are paving the path toward violence.

Regrettably, now as always, political geostrategic games and the control for economic resources lead to inevitable confrontations and disintegrations among diverse communities when some political ideologies marginalized or excluded by demonizing some religious identities, even manipulating the public opinion by fear them, as a strategy in the rhetoric of power. As a result, the polarization between Westernization and Westoxification, as ideologies of manipulation, has been increased since the Iranian religious revolution and the aftermath of the Arab Spring.

The meaning of identity, about who are we, is changing everywhere. The role of religion has been reviewed in secularized societies, creating new tensions and demands challenging the secular state paradigm when secular values are imposed over religious values, and both became opposed.

The today's world is located at a historical moment that faces the end of existing paradigms that are breaking down by erosion, and others are emerging by its needs. Whose features still are unknown and unpredictable, although ruled by the globalization process that is taking place in the last decades, and it is speeding up by the digital progress in communication.

The dynamics of the evolving social process that history shows have provided us with empirical and practical tools for its analysis, but the complexities of today's world require a change of methodology dealing with the failures of aggressive secularization and assimilation policies that can have been channeling rejection from deeply rooted internal resentments.



Identity, religious and political, is a concept always attached to transformation and multiple realities. Static past or present identities are always imagined and cultural and global changes demand new mechanisms to face those challenges and give answer to the main juridical questions:

- How can be accommodated dissimilar cultures and religious traditions into a secular nomocracy?
- How plural identities and legal traditions can decentralize the state law system without reducing the guarantees of the fundamental rights?
- How the fundamental right of religious freedom can be protected from religious oppression or secularist policies?
- How to promote individual rights in religious communities that focus religious freedom as a communal right?
- Can religion and religious legal systems become a tool of mediation for restorative justice preventing and exiting from violence?

Religion can play a dual role, as a source of conflict or as a bridge to peacemaking, as an obstacle or as a strategy for conflict resolution. Religious communities and religious leaders can also engage in a powerful peacemaker's role at three levels: leadership, inter-communal and intra-communal. In international and transnational spaces, religious leaders can play an essential role bringing moral authority and respect as reliable and effective mediators, helping enormously in processes of building peace and reconciliation as well as in the interfaith dialogues.

Religious leaders and religious organizations are taking active roles as peacemakers and promote religious interfaith dialogues, in which sacred texts can be a powerful tool and a moral anchor opening or facilitating, by theological shifts, a common ground in religious narratives, values, and peaceful coexistence. One of the biggest challenges to interfaith dialogues is to overcome defensive and emotional aspects of collective egos and self-identities promoting sectarianism, trying to prove that one of them possess the whole truth. Asymmetrical communities also represent a huge test for interfaith dialogues, when rapid social changes or new religious movements alter the traditional coexistence among communities.

At an intra-communal level, religious organizations can channel private mediation and arbitration among their members in many multi-dimensional paths. In recent years, the so-called religious arbitration has been developed in secular nation-states creating an ongoing legal and politically polarized debate regarding the legitimacy of religious courts, as



arbitration tribunals, under the secular rule of law system. This debate also reopened the multiculturalism discussions and the distinction between an old multiculturalism and a new multiculturalism, and the challenges of sectarianism, therefore, the risks of latent clashes between public policies or fundamental rights, and religious arbitration. For a successful religious arbitration, some principles should be guaranteed and rules should be implemented: 1) to prevent coercion on the members of a religious community to bring the case to a religious tribunal; 2) applying fair rules; 3) assuring individual fundamental rights; 4) and preventing the isolation of religious communities by emphasizing less interaction with the rest of the population and other communities in the society. As I said, in my view, formal religious arbitration under a secular state legislation offers more procedural guarantees, facilitating accommodation and harmonization of religious laws in a secular constitutional legal frame.

We are witnessing an increasing process of globalization of knowledge, the 19th century's division of sciences is outdated and fields of philosophy, law, sociology, political science, theology, economy... are merging into a new approach that requires flexible narratives preventing being lost in the translation among those fields and facilitating a constructive transdisciplinary dialogue among them. It is a collaborative task. We live in a *nomos*, in a world of laws; in this normative world, law and narrative are inseparable related. As Robert Cover explained¹³⁹, we all live in a *nomos* world, constantly creating and maintaining a world of right or wrong, lawful or unlawful, valid or void, in this normative world law and narrative are deeply interconnected, because in the context of narratives, law is not only a system of rules to be observed and implemented but a world in which we live. Sacred texts in a broad sense, secular and religious, open the space for legal narratives and interpretations, myths and symbols, that legal traditions developed interactively establishing paradigms of behavior and communication in a dynamic social interaction. Legal systems and traditions, secular and religious, are able to create paths showing us how to live in this normative world and how to improve our coexistence under narratives that can facilitate paths to prevent, to avoid or to exit from violence.

¹³⁹ R.M. COVER, "The Supreme Court, 1982 Term -- Foreword: Nomos and narrative" (1983). Faculty Scholarship Series. Paper 2705. (Available at http://digitalcommons.law.yale.edu/fss_papers/2705).