

The Phenomenon of Religious Arbitration in Family Law: Perceptions, Reality and Perspectives for the Future in England and Wales

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Abstract: Every day our increasingly multicultural societies experience new manifestations of cultural and religious diversity. This paper specifically considers the practice among members of closed religious communities – particularly Muslims – of recurring to religious courts to adjudicate family law disputes according to the principles and laws of their own faith. The decisions issued by religious courts, which can profoundly affect the life of an individual, may under certain circumstances become relevant to the legal system. After reviewing the recent public and scholarly debate about this phenomenon – referred to as religious or faith-based arbitration – in England and Wales, this paper outlines the many key questions that remain unanswered, including the definition of religious courts and their number on the British territory. By examining the main points of connection between English family law and religious law, the paper introduces the new trends for out-of-court dispute resolution, particularly IFLA arbitration, and shows the limits that the Arbitration Act 1996 imposes when parties agree on a religious law as the substantive law to be applied in their cases. It further considers two areas where the current framework of arbitration laws, conceived to function in commercial disputes, appears to be inadequate to ensure sufficient protection to the parties in religious arbitration concerning family law disputes. After offering some reflections on the divergent approaches taken by legal systems toward family arbitration, the paper concludes by arguing for the desirability of a model (the so-called weak legal pluralism) which, by accommodating different beliefs and principles within the boundaries of the "official" system, allows religious courts to operate as arbitral tribunal in family law disputes.

Keywords: Faith-based arbitration; family arbitration; religious courts; religious duress; gender-based discrimination.

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1. *Introduction***

"So if you have such cases, why do you lay them before those who have no standing in the church? I say this to your shame. Can it be that there is no one among you wise enough to settle a dispute between the brothers, but brother goes to law against brother, and that before unbelievers?"¹.

Our increasingly multicultural societies experience every day new manifestations of cultural and religious diversity. The one I wish to discuss in this dissertation concerns the practice among members of closed religious communities of recurring to religious courts to

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1. 1 Corinthians 6:4–6.

adjudicate family law disputes according to the principles and laws of their own faith. These decisions issued by religious courts, that can profoundly affect the life of the individual, may under certain circumstances become relevant to the legal system. They may be assimilated to those forms of dispute resolution alternative to recurring to national courts, that many legal systems consider fully legitimate, such as arbitration. Paragraph 2 is devoted to the analysis of the public perceptions of religious courts in England and Wales and to the review of the academic studies that have been conducted on the matter. It will show that the attention of the English public opinion and institutions was – and still is – mostly focused on *Shari'a* (such as Islamic law) and on those local tribunals, so-called *Shari'a* councils, that administer "Islamic justice" all over the country. In my attempt to examine the current state of the scholarship, references to Islamic law and to problems linked to its application will undoubtedly prevail. Yet I trust that the discourse around family alternative dispute resolution (ADR) and religious law has the potential to overcome this limited focus on *Shari'a*. In the perspective of the empirical description of practices and procedures in dispute resolution, that I wish to adopt when looking at religious arbitration and its potential developments, the choice of one specific religious law over another should not – in principle – change the approach of the legal system toward the phenomenon as a whole. Specifically, I believe that the whole debate around religious arbitration in England should be re-examined in light of the most recent progress of English family law, to which subparagraph 3.1 is dedicated. Another aspect of particular relevance to my discourse is the development of arbitration as an alternative mean of dispute resolution for family law controversies. I will review its interplay with religious arbitration in subparagraph 3.2, based on recent case law. Entering into further details, I will focus on two ambits where English arbitration law – developed for commercial disputes – may be ineffective in granting adequate protection to the parties who opt for faith-based arbitration. Finally, Paragraph 4 concludes with some theoretical – and then comparative – reflections on the relationship between the "official" legal order and "unofficial" religious legal orders.

2. *Religious Courts Adjudicating Family Law Disputes: an Overview in England and Wales*

2.1. *The Perception of Religious Courts: from the Origins of the Public Debate to Its Latest Developments*

The social and legal phenomenon of religious arbitration in family law disputes has been brought to the attention of the public in a very peculiar way. The event has been characterized by a general misunderstanding and a certain degree of scandalized disbelief, amplified by the press. In February 2008, on the occasion of the foundation lecture in the Temple Festival series at the Royal Court of Justice, the Archbishop of Canterbury Rowan Williams gave a speech entitled *Civil and Religious Law in England: A Religious Perspective*². Williams was then covering an apical role in the Church of England and he ended its mandate at the end of 2012. His lecture had the ambition to discuss the interplay between "secular" law (that is, the law of the "official" legal order) and religious rules. He was advocating for the existence of a juridical space to allow religious groups to self-regulate according with their beliefs. It focused on *Shari'a* and Muslims as an example of religious law and religious minority present within the English society. In essence, according to Williams, the legal system should recognize that some individual carries a double identity, being a citizen of the state and a member of a religious community. The respect of these "overlapping identities" requires to overcome the idea that the state is entitled to a "legal monopoly" over certain fields of one's private life. While secular law entitles the individual with a set of rights and fundamental liberties, religious systems should be treated as "supplementary" jurisdictions that shape and rule over the individual's behaviour. Williams suggests the adoption of "a scheme in which individuals retain the liberty to choose the jurisdiction under which they will seek

2. See Rowan Williams, *Civil and Religious Law in England: A Religious Perspective*, in Robin Griffith-Jones (ed.), *Islam and English Law: Rights, Responsibilities and the Place of Shari'a* (Cambridge University Press 2013). The Archbishop's reflections take as a reference the academic work of the legal theorist Ayelet Shchar: see Ayelet Shchar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 *Theoretical Inquiries in Law* 573 (2008) (on religious arbitration specifically).

to resolve certain carefully specified matters"³. The role of secular law should be to "monitor religious affiliations", preventing the loss of elementary liberties of self-determination – what Williams refers to as a "negative" rule of law⁴.

It would be a pity if the immense advances in recognition of human rights led ... to a situation where a person is primarily defined as the possessor of a set of liberties and the law's function was seen as nothing but the securing of those liberties irrespectively of the individual's customs and conscience⁵.

In the intention of the lecturer, *Shari'a, Halakhah* (that is, the body of Jewish laws) and canon laws are on an equal footing to serve as basis for a "supplementary jurisdiction". This far-reaching aim was soon lost to what was perceived as the endorsement⁶ of a "parallel Islamic legal system", operating in England through a net of *Shari'a* councils. The Archbishop's insight on Islamic justice mentioned critical aspects, incompatible with British fundamental values, for example forced marriage⁷, discriminatory provisions for the inheritance of widows⁸ and, generally, violations of women's rights⁹. These issues had a strong resonance in the national press, obscuring the Archbishop's actual line of reasoning, and gave rise to a "mediatic storm"¹⁰. Williams's attempt to clarify followed shortly¹¹ but it resulted quite ineffective. The English public opinion had abruptly to confront itself with what was

3. Williams, *Civil and Religious Law in England* at 32 (cited in note 2).

4. *Id.* at 29.

5. *Id.* at 32.

6. See Riazat Butt, *Archbishop Backs Sharia Law for British Muslims* (The Guardian, February 7, 2008), available at <https://www.theguardian.com/uk/2008/feb/07/religion.world> (last visited March 25, 2019).

7. See Williams, *Civil and Religious Law in England* at 20 (cited in note 2).

8. See *id.* at 26.

9. See *id.* at 28.

10. Robin Griffith-Jones, *The 'Unavoidable' Adoption of Shari'a Law: The Generation of a Media Storm*, in Griffith-Jones (ed.), *Islam and English Law*, 7 (cited in note 2).

11. See Rowan Williams, Presidential Address to the Opening of the General Synod (February 11, 2008), available at <http://aoc2013.brix.fatbeehive.com/articles.php/1326/presidential-address-to-the-opening-of-general-synod-february-2008> (last visited March 25, 2019).

presented as a hidden reality, legally operating by virtue of secular law. The English Arbitration Act – readers were told¹² – allows the councils' rulings to be enforced as binding by national courts and the substance of these judgments systematically perpetrated violations of human rights, especially against women. An important role in the construction of the public perception of "religious courts", and particularly Islamic councils, has been played by TV networks. Few days before Williams's speech, Channel 4 broadcast a program entitled *Divorce: Sharia Style*. The documentary opens with an alarmist tone: "In Muslim countries people turn to *Shari'a*, Islamic law, to resolve their problems. In Britain 40 percent of Muslims now want *Shari'a* to be part of English law. Unknown to many, this parallel legal system is already here, ruling on people's life"¹³. The viewers are presented with some scenes from divorce proceedings before the Islamic Sharia Council (ISC), operating in Leyton, London. The main storyline follows a Pakistani couple, whose marriage was "arranged", going through a family dispute: the wife cannot accept that his husband religiously married another woman in Pakistan. It is quite straightforward to envisage the effect that the combination of Channel 4's documentary and the Archbishop's speech had on the public. The perception was that the Archbishop was legitimating, in the name of freedom of conscience, the same kind of misuse of religious laws that led to those abusive familiar situations broadcast only few days before. Another piece of the puzzle, that played a role in influencing the English public opinion, should be traced in a report published by the think-tank Civitas in 2009¹⁴. Religious arbitration was portrayed as the "legal" gateway that allows religious minorities to impose on the individual principles unacceptable in contemporary societies. This led to campaigns whose aim was to exclude the religious tribunal from operating under the

12. See Joshua Rozenberg, *What Can Sharia Courts Do in Britain?* (The Telegraph, September 14, 2008) available at <https://www.telegraph.co.uk/news/newstoppers/lawreports/joshuarozenberg/2957692/What-can-sharia-courts-do-in-Britain.html> (last visited March 25, 2019); Elaine Sciolino, *Britain Grapples with Role for Islamic Justice* (The New York Times, November 18, 2008) available at <https://www.nytimes.com/2008/11/19/world/europe/19shariah.html> (last visited March 25, 2019).

13. See *Divorce: Sharia Style* (Channel 4 television broadcast, February 3, 2008).

14. See Denis MacEoin, *Sharia Law or 'One Law for All?'* (Civitas 2009).

Act¹⁵. The public concerns on the social disruption and human rights violations¹⁶ linked to the "Islamic parallel legal systems" found their voice in Parliament in the Baroness Caroline Cox. In June 2011, she first presented the Arbitration and Mediation Services (Equality) Bill at the House of Lords¹⁷. The Bill is a genuine and important attempt to regulate religious courts, without surrendering to extreme measures as in Ontario. It mostly focuses on women's protection and some of the measures suggested – I would hold – have the potential to help in this worthy goal. Unfortunately, after a new version of the Bill passed to the House of Commons in February 2016, the 2016–2017 session of Parliament prorogued. According to the official web page¹⁸, Baroness Cox's proposal will not make further progress for now.

As mentioned, scholarly commentaries on the Archbishop of Canterbury's lecture flourished in the following years. One of the most belligerent critique came from Professor Elham Manea in her *Women and Shari'a Law*¹⁹. Manea adopted an empirical approach, interviewing several members of *Shari'a* councils around the U.K. It emerges clearly from her work that retrograde and patriarchal conceptions of family and society are not common among Islamic scholars in England. Acceptance – even praise – of underage marriage²⁰, lack of consideration of a single episode of domestic violence labelled as "not a serious

15. See <https://onelawforall.org.uk/> (last visited March 25, 2019).

16. See Jessie Brechin, *A Study of the Use of Sharia Law in Religious Arbitration in the United Kingdom and the Concerns That This Raises for Human Rights*, 15 *Ecclesiastical Law Journal* 293 (2013) (providing an academic study of potential human rights violations under the ECHR).

17. See Frank Cranmer, *Sharia Law, the Arbitration Act 1996 and the Arbitration and Mediation Services (Equality) Bill* (Law & Religion UK, October 24, 2012), available at <http://www.lawandreligionuk.com/2012/10/24/sharia-law-the-arbitration-act-1996-and-the-arbitration-and-mediation-services-equality-bill/> (last visited March 25, 2019); see also Sharon Thompson and Russell Sandberg, *Common Defects of the Divorce Bill and Arbitration and Mediation Services (Equality) Bill 2016-17*, 47 *Family Law* 425 (2017) (providing critical comments on the legislative proposal).

18. See *Arbitration and Mediation Services (Equality) Bill [HL] 2016-17* at <https://services.parliament.uk/bills/2016-17/arbitrationandmediationservicesequality.html> (last visited March 25, 2019).

19. See Elham Manea, *Women and Shari'a Law: The Impact of Legal Pluralism in the UK* 90–135 (I.B. Tauris 2016).

20. *Id.* at 98 (declaration of ISC member Haitham al-Haddad). See also *id.* at 131 (interview to Faiz-ul-Aqtab Siddiqi of the Muslim Arbitration Tribunal).

issue"²¹, are just some of the illegal practices attested. Additionally, the book puts a lot of efforts in mapping "the landscape of British Islam"²², showing the impracticability of Archbishop Williams's view of "religion as a supplementary jurisdiction". The existence of several different currents within Islam – as well as in others Abrahamic religions – makes it impossible to individuate a single interlocutor in defining *Shari'a* and its application.

My conclusions of this brief overview of the debate surrounding religious courts cannot be but an open one. In February 2018, exactly ten years after his predecessor's famous speech, the current Archbishop of Canterbury Justin Welby took the opposite direction. He strongly opposed the idea of *Shari'a* being granted any sort of recognition under English law, which – he argued – should re-discover its roots in Christian values. The affirmation had a scarce coverage in the press²³. Reflecting on the difference with the media backlash around Williams's lecture, it appears that, while voices advocating for pluralism and social inclusion are considered material for "breaking news", opposite claims are not brought to the attention of the public with similar alarmism and disbelief.

2.2. *The Scholarship: Religious ADR Institutions and Their Users*

Within a few months from the discussed lecture, the Parliament, under pressure from the denounce campaign in the national press, decided to act. Laudably, it immediately acknowledged the need to fill the knowledge gaps about *Shari'a* councils operating in England. Their number and the kind of proceedings they followed remained unclear, as well as the profile of their users. The push toward scientific analysis represents – in my opinion – an extremely positive result of the lively

21. *Id.* at 100.

22. *Id.* at 140.

23. See Steve Doughty, *Archbishop of Canterbury Says Islamic Rules Are Incompatible with Britain's Laws Which Have Christian Values* (Daily Mail, February 23, 2018), available at <http://www.dailymail.co.uk/news/article-5428849/Welby-Islamic-rules-incompatible-British-laws.html> (last visited March 25, 2019); Melanie Phillips, *Hallelujah! Welby Takes a Stand against Sharia* (The Times, February 27, 2018), available at <https://www.thetimes.co.uk/article/hallelujah-welby-takes-a-stand-against-sharia-c6kzv5hf9> (last visited March 25, 2019).

debate pictured in the previous subparagraph. At the end of 2008 the Research Unit of the Ministry of Justice assigned to a group of researchers²⁴ the task of producing a study²⁵ to cast light on Islamic alternative dispute resolution bodies operating in the country. Unfortunately, as Federica Sona accurately described²⁶, the empirical research suffered from the tense political situation. The continuous press attacks made many of the Muslims operating in *Shari'a* councils unwilling to interact with the scholars and to take part in the survey. "A number of council respondents – the final report specifies – were suspicious that the data collected would be used by the government to undermine the work of local community organisations and mosques"²⁷. The significance of the results of the "small exploratory study" was therefore undermined by the participants' reluctance.

As mentioned, this first stage of inquiries focused exclusively on Islamic courts. The limitation of target did not find any reasonable justification: both the Jewish and the Catholic communities had a long-established tradition of tribunals operating in England. Finally, a more comprehensive approach toward religious adjudication emerged in the academic study led by a research group from the University of Cardiff and founded by the Arts and Humanities Research Council²⁸ (hereinafter "2011 Cardiff Report" or "Report"). The Report

24. Jahan Mahmood, Rukhsana Bourgeoize, and Federica Sona, first coordinated by Professor Tahir Abbas and then by Dr. Samia Bano.

25. See Samia Bano, *An Exploratory Study of Shariah Councils in England with Respect to Family Law*, report to the Ministry of Justice of the United Kingdom (University of Reading 2012), available at <https://eprints.soas.ac.uk/22075/> (last visited March 25, 2019). The Ministry indicated the tasks of the research as the following: "1. To identify as accurately as possible the number and location of Shariah councils in England. 2. To describe the administrative structure, funding and membership of Shariah councils in England. 3. To describe the range and quantity of family related work carried out by Shariah councils". *Id.* at 9.

26. See Federica Sona, *Giustizia religiosa e islām: Il caso degli Shari' ah Councils nel Regno Unito*, Stato, Chiese e pluralismo confessionale (October 2016), available at <https://www.statoechiese.it/contributi/giustizia-religiosa-e-islam.-il-caso-degli-shariah-councils-nel-regno-unito> (last visited March 25, 2019).

27. Bano, *An Exploratory Study of Shariah Councils in England* at 17 (cited in note 25).

28. See Gillian Douglas et al., *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts*, report of a research study funded by the Arts and Humanities

primarily focused on the principles and procedures to be followed in case of marriage breakdown within the three Abrahamic faiths, specifically Judaism, Roman Catholicism and Islam. Its second aim was to explore "how religious law functions alongside civil law in England and Wales". Religious groups in England – the Report recalls as a general premise – are treated as voluntary associations and the relation between its members are fashioned as a quasi-contract²⁹. Additionally, religious law can become the basis for adjudication under section 46(1)(b) of the Arbitration Act 1996 (hereinafter "AA 1996") (see subparagraph 3.2). Religious bodies surveyed by the Report "very clearly recognised and advised those using them that they could not give binding rulings on [family law] matters within the jurisdiction of the civil courts"³⁰. Yet, any decision on financial disputes or arrangements for the children could be upheld by the Family Courts according to the mechanism that I will review in subparagraphs 3.1 and 3.2. The Report is prudent – yet open – in asserting the possibility to attach a certain value to determinations by religious courts concerning family law dispute settlements.

Mechanisms and procedures for divorce should be regarded bearing in mind the differences in each religious group's specific conception of marriage. I will limit myself to describing some key features, underlining the aspects that may be more relevant to the discourse on religious courts as arbitral tribunal. This will lead me to overlook references to Roman Catholicism – since it would be improper to label Catholic adjudication as arbitration – to focus instead on Jewish and Islamic family law. Without having the ambition to be exhaustive, I will look at long-established interpretations of religious norms. It is, however, important to bear in mind that each religion is composed of a variety of sub-groups and currents: progressive interpretations of the

Research Council (Cardiff University 2011), available at <http://orca.cf.ac.uk/26308/> (last visited March 25, 2019).

29. See *id.* at 8.

30. Gillian Douglas, *Use of Beth Din in Divorce Dispute Does Not Undermine the Primacy of Civil Law* (Cardiff University School of Law and Politics Blog, February 4, 2013), available at <https://blogs.cardiff.ac.uk/law-politics/use-of-beth-din-in-divorce-dispute-does-not-undermine-the-primacy-of-civil-law-professor-gillian-douglas/> (last visited March 25, 2019).

holy texts are continuously reshaping the traditional practices³¹. Marriage is a sphere of the individual's life that cultural and religious norms discipline in details and the Abrahamic faiths are not an exception to this. Consistently, disputes concerning marriage are traditionally deferred to religious authorities in order to be decided consistently with religious laws. Both Judaism and Islam conceive marriage as a contract, in other words an agreement between the spouses who is binding on them and that – under certain conditions – may be terminated. In contrast, the Catholic idea of marriage involves the celebration of a sacrament, a rite that creates an unbreakable bond between the spouses. In fact, canon law does not contemplate the dissolution of marriage by will of the spouses. Roman Catholic tribunals will declare the nullity of a marriage exclusively when it lacks essential requirements or is affected by vices of the spouses' consent³². According to the Jewish understanding of marriage "[c]onjugal relations and the consequent procreation and raising of children are referred to as *halakhic* obligations that are binding upon all Jews"³³. In shaping their agreement – within the framework of *Halakhah* law – Jewish spouses exercise what has been referred to as "freedom of contract"³⁴. They may regulate in advance their economic relationship, during the marriage or in case of breakdown. As far as divorce is concerned, Jewish tribunals (*Batei Din* or singular *Beth Din*, which means "house of judgement") restrict their role to witness the will of the parties to put an end to their union. They supervise the procedure through which the husband grants a *Get*³⁵ to the wife. This is essential for the divorce to be effective in respect of the wife, who would not otherwise be able to religiously marry again.

31. See, for example, Werner F. Mensky, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* 344–354 (Oxford University Press 2006) (on the latest evolutions within Islam).

32. See 1983 Codex Iuris Canonici canons 1055–1165.

33. Yehezkel Margalit, *The Jewish Family: Between Family Law and Contract Law* 16 (Cambridge University Press 2017) (providing an overview of Jewish marriage).

34. *Id.* at 40.

35. The *Get* is a bill of divorce reporting the sentence "You are hereby permitted to all men", that the husband must willingly give to the wife in order for the divorce to be effective. See Alexandra Goldrein and Mark Hands, *The Process for Jewish and Muslim Women Seeking a Divorce* (Family Law, December 11, 2017), available at https://www.familylaw.co.uk/news_and_comment/the-process-for-jewish-and-muslim-women-seeking-a-divorce (last visited March 25, 2019).

As the *Get* must be handed over by the husband in free will, it may be leveraged to obtain economic advantages. The situation where a wife is unable to obtain her husband's consent to the religious divorce, despite the end of the relationship, is known as *agunah*, which means "chained wife". Pre-nuptial agreements referred above may regulate this matter "by imposing monetary fines on a recalcitrant husband (or wife) to prevent the partner opposing the divorce from hindering the other partner from going through with the divorce"³⁶. In the Islamic world, the contractual view of marriage is particularly strong: it has been said that, ultimately, "[i]t is not possible to enter into a Muslim marriage without signing a contract"³⁷. The Qur'anic word for marriage itself, *nikah*, indicates an agreement between the men and the woman³⁸ – traditionally between the men and the woman's legal representative or guardian. Between the other terms of such agreement, the *mahr* plays a significant role. The *mahr* is a dower – in money or properties – that the husband must pay the wife upon marriage. The marriage contract sets the amount and it usually defers its payment to the moment of the termination of the marriage. This credit that the bride holds functions as a "security deposit" in her favour³⁹, aiming at preventing the husband from deciding to divorce her too lightly. In fact, traditionally the husband has the power to unilaterally terminate the marriage by *talaq*. The most common form is the so-called triple *talaq*, that is when the husband repeats for three times to the wife the sentence "I divorce thee", with the effect of immediately dissolving

36. Margalit, *The Jewish Family* at 41 (cited in note 33).

37. Nathan B. Oman, *Bargaining in the Shadow of God's Law: Islamic Mahr Contracts and the Perils of Legal Specialization*, 45 *Wake Forest Law Review* 579, 579 (2010). See also Roberta Aluffi Beck-Peccoz, *Il matrimonio nel diritto islamico*, in Silvio Ferrari (ed.), *Il matrimonio. Diritto ebraico, canonico e islamico: un commento alle fonti* (Giappichelli 2006) (providing an overview of Islamic marriage). See Fiona Read, *Non-Recognition of Islamic Marriages in England and Wales*, *International Family Law Journal* 452, 452 (November 2012) (specifically, on the approach taken by the English legal system toward Islamic marriage).

38. See Manea, *Women and Shari'a Law* at 124 (cited in note 19).

39. Emily L. Thompson and F. Soniya Yunus, *Choice of Laws or Choice of Culture: How Western Nations Treat the Islamic Marriage Contract in Domestic Courts*, 25 *Wisconsin International Law Journal* 361, 366 (2007). See Silvio Ferrari, *L'Islam e il diritto di famiglia*, lecture at Centro Culturale di Milano (December 4, 2000), available at <http://www.centroculturaledimilano.it/wp-content/uploads/2013/06/001204FerrariTesto.pdf> (last visited March 25, 2019).

the marriage. In principle, *talaq* divorce does not require the man to provide specific reasons, yet various modern interpretations impose further requirements for its validity, limiting the arbitrariness of the procedure. Conversely, the wife needs to obtain the permission of the husband to divorce. He may repudiate her willingly upon her request (*mabarar* divorce) or be persuaded through the offer of economic advantages (*khul'* divorce)⁴⁰. In the latter case the concession may be directly regulated by the marriage contract. Ultimately, under limited grounds – that vary between different currents of Islam⁴¹ – *Shari'a* councils may also have the power to terminate the marriage by judicial decree. The 2011 Cardiff Report notes that when facing a case of marriage breakdown, *Shari'a* councils appear to be specifically concerned with attempting a reconciliation between the spouses. Wives who are unable to get their husbands' consent are, most frequently, claimants before the councils, which would usually perform several attempts in order to convince the man to participate in the procedure. In English *Shari'a* councils the practice sees judges operating as facilitators in the process of obtaining the husband's consent in *khul'* divorces and they may require directly the wife to make economic concessions, such as to renounce to the *mahr*.

The most recent academic inquiry on religious courts is the *Independent Review into the Application of Sharia Law in England and Wales*⁴² (hereinafter "2018 Independent Review" or "Review"). Launched in 2016 by the former Home Secretary, Theresa May, the research was "tasked with understanding whether, and the extent to which, *Shari'a* law is being misused or applied in a way that is incompatible with the law within sharia councils"⁴³. Again, the focus shifted back exclusively on the Muslim communities and the reform proposals advanced by the researchers concern solely the activity of *Shari'a* councils. This is

40. See Ashraf Booley, *Divorce and the Law of Khul: A Type of No Fault Divorce Found within an Islamic Legal Framework*, 18 *Law, Democracy and Development* 37, 46 (2014).

41. These may include cruelty or infidelity: see *id.* at 50.

42. See Mona Siddiqui et al., *The Independent Review into the Application of Sharia Law in England and Wales*, report to the Home Secretary of the United Kingdom (Home Office 2018), available at <https://www.gov.uk/government/publications/applying-sharia-law-in-england-and-wales-independent-review> (last visited March 25, 2019).

43. *Id.* at 4.

utterly inconsistent with the Review's statement, according to which "[i]t is important that all religious communities should ... be treated alike by the state"⁴⁴.

The research was based on multiple sources, including a public call for evidence, an audition of family law experts and interviews with the persons concerned: users and members of the councils. Ensure a wide participation was, once again, an issue: "[D]espite hearing of many women who had negative experiences with *Shari'a* councils, it was difficult to find many willing to come forward"⁴⁵. The final report, released in February 2018, was firmly contested by groups advocating for women's rights, mostly for the composition of the panel of researchers – none of whom was a human rights expert – and for the choice of two Imams as advisers. This, according to the activists, results into an inadequate representation of the "needs and identity of minority women"⁴⁶.

"Even if some women appear to want this – the groups write in an open letter annexed to the report – we cannot stand by and watch the state being complicit in underwriting second-rate systems of justice, whereby minority women are treated as unequal before the law"⁴⁷. The Review unapologetically rejects the idea of a governmental intervention for the closure of *Shari'a* councils. In fact, these institutions represent a legitimate manifestation of religious freedom under article 9 of the European Convention on Human Rights (hereinafter "ECHR") and their existence is, as well, protected by the freedom of association under article 11 ECHR. However, moving from the limitation in the same article 9(2), the Review advocates for state intervention whenever the councils' activities infringe upon the rights and freedom of women. The violations observed are – in a very superficial manner – enumerated in a list entitled "Evidence of bad practice"⁴⁸. Among others: inappropriate and unnecessary questioning on personal life; insistence on the necessity to attempt a mediation, regardless of the level of deterioration of the relationship; women invited to make economical concession to convince their recalcitrant husbands to agree

44. *Id.* at 9.

45. *Id.* at 7.

46. *Id.* at 27.

47. *Id.*

48. *Id.* at 16.

to the divorce. Confirming the results of the 2011 Cardiff Report, the 2018 Independent Review denounces the common practice among Muslim couples, who often do not proceed to the civil registration of their religious marriage. It suggests that the lack of registration, and the subsequent impossibility to apply for a civil divorce and to benefit from the "full protection afforded to them in family law"⁴⁹, is one of the reasons that push Muslim women to apply for religious divorce. It has been argued⁵⁰ that this analysis fails short to consider the idea of the religious divorce as an intimate spiritual need of the individual.

Lastly, the 2018 Independent Review seems determined to discourage the possibility of conducting arbitral proceedings before religious courts: "A clear message must be sent that an arbitration that applies *Shari'a* law in respect of financial remedies and/or child arrangements would fall foul of the Arbitration Act and its underlying protection"⁵¹. Few lines later the research takes a more nuanced stand, clarifying that the "*Shari'a* award" may be considered valid and upheld by the national court if it "compl[ies] with the civil family law and the [Arbitration] Act"⁵². The Review is concerned that the spread of "religious arbitral proceedings" would disadvantage parties customarily perceived as vulnerable. It makes the example of a woman within a closed religious community:

She will believe that she is bound to adopt and abide by the arbitration award (in the case of financial remedies) and determination (in the case of children's issues) and not seek to challenge the provisions before a civil court. The effect would be that the award or determination made by the arbitration tribunal would in practice be upheld because she takes no steps to oppose its implementation⁵³.

49. *Id.* at 6.

50. See Russell Sandberg, *A Fear of Sharia: Why the Independent Report Is a Wasted Opportunity* (Law & Religion UK, February 7, 2018), available at <http://www.lawan-dreligionuk.com/2018/02/07/a-fear-of-sharia-why-the-independent-report-is-a-wasted-opportunity/> (last visited March 25, 2019).

51. Siddiqui et al., *The Independent Review into the Application of Sharia Law* at 6 (cited in note 42).

52. *Id.* at 21.

53. *Id.* at 21.

I would argue that this scenario is nonsensical, as it does not take into account the safeguard role of national courts in the enforcement of awards concerning family law matters (see subparagraph 3.1). This sort of speculation aims at delegitimizing the use of arbitration by *Sharia* councils, using the facade of aiming to prevent abuses at the expense of less-empowered individuals. To this end, I consider the opposite approach to be more beneficial. Instead of excluding religious arbitration from the scope of application of the Arbitration Act 1996 – as the 2018 Independent Review seems to suggest – religious institutions should be encouraged to act within and comply with arbitration law. From the application of the Act it follows, in fact, the respect of due process requirements, the equal treatment between parties and other important procedural guarantees. Additionally, the Act ensures the possibility of an interplay between civil courts and arbitral tribunals that, in the context of religious proceedings, can become particularly successful (see subparagraph 3.3). The Review itself appears – quite incoherently – to point at this direction when it recommends "a meeting with the president of the Family Division to consider a specific practice direction relating to mediation and arbitration by religious institutions (including *Sharia* councils)"⁵⁴.

2.3. *The Missing Definition: "Religious Courts" Adjudicating Family Law Disputes*

Each of the academic inquiries undertaken in the past years highlighted that there is no agreement on what a "religious court" is⁵⁵. Those studies which focused exclusively on *Sharia* councils encountered identical difficulties, notwithstanding the more limited object of research. Nonetheless, scholars converge in signposting certain elements, which I will try to review briefly. "Religious courts" are defined as voluntary associations⁵⁶ or

54. *Id.* at 22.

55. See Bano, *An Exploratory Study of Shariah Councils in England* at 5 (cited in note 25); Douglas et al., *Social Cohesion and Civil Law* at 24 (cited in note 28); Siddiqui et al., *The Independent Review into the Application of Sharia Law* at 4 (cited in note 42).

56. See Siddiqui et al., *The Independent Review into the Application of Sharia Law* at 4 (cited in note 42).

organizations of scholars⁵⁷ that offer their advice on the application of religious law. These bodies are said to operate mostly in the field of marriage and its termination and their structures and organizations "are variously styled according to the needs of the faith community in question"⁵⁸. Depending on the faith, "courts" and "councils" may or may not have their authority recognized outside of their local community. The lack of coordination and of any hierarchical authority within a single faith allows parties to apply to more than one court, when they are not satisfied with the first result. This "forum shopping"⁵⁹ attitude is mostly adopted by members of the Muslim and Jewish communities. Most adjudicating bodies operate in the context of the local mosque or synagogue and their judgements are, often but not exclusively, not acknowledged by other "religious courts". In this respect, it strongly emerges their nature of private method of dispute resolution to which parties recur to in the context of certain contractual agreements in force between them. This model is at odds with Roman Catholic adjudication, where the element of contractual will to defer the dispute to the ecclesiastical courts is absent. Moreover, the Catholic system of courts is organized according to a rigidly hierarchical structure and each party is granted the possibility to appeal decisions of the lower levels to the highest court in Rome, the Roman Rota. The Code of Canon Law encourages the use of mediation and arbitration as alternatives to litigation before ecclesiastical courts, in a way consistent with many other legal systems in the world⁶⁰. In light of these considerations, it can be appreciated that the label "religious court" has been indistinctly applied to identify sensibly different institutions. The 2011 Cardiff Report should probably have problematized this aspect, instead of incurring into dangerous generalizations.

57. See Bano, *An Exploratory Study of Shariah Councils in England* at 3 (cited in note 25).

58. Douglas et al., *Social Cohesion and Civil Law* at 24 (cited in note 28).

59. *Id.* at 4; Siddiqui et al., *The Independent Review into the Application of Sharia Law* at 20 (cited in note 42).

60. See 1983 Codex Iuris Canonici canon 1713 ("In order to avoid judicial contentions an agreement or reconciliation is employed usefully, or the controversy can be committed to the judgment of one or more arbitrators").

The other point, still unclear after a decade of public debate, concerns the number of religious courts operating in the United Kingdom⁶¹. In relation to Muslim courts, the 2018 Independent Review remains very vague: "[T]here is also no accurate statistic on the number of Shari'a councils, with estimates in England and Wales varying from 30 to 85"⁶². The same problem arises with Jewish courts in the analysis of the 2011 Cardiff Report: "[N]o figures exist concerning the number of Jewish courts in the United Kingdom today"⁶³. The failure to provide numerical data is due to the difficult communication between public institutions, academia and religious minorities, as shown by the experience of Dr. Samia Bano in her 2008 Report⁶⁴. This indicates social isolation and mutual distrust and is undoubtedly a source of concern. An additional reason may be found in the lack of agreement on the objects of the research. In short, it is impossible to count something that cannot be clearly identified. Professor Russell Sandberg suggests that the focus should shift from the structures to the services that these organization offer to the user: "[W]e still do not know enough about the activities of *Shari'a* councils to know how and the extent to which they operate in a way that is incompatible with English law and which discriminate against minorities within minorities"⁶⁵ (notably women). He talks specifically of Muslim adjudicating bodies, but his line of reasoning can be extended to religious courts in general. Religious organizations providing services in the context of familiar relationships have proved to be too variegated to comply even with broad standards of definition. The deadlock in the research may be the symptom that the current scholarship is searching for, even if not completely consciously, bodies with certain structures and procedures that mirror the common conception of what a court is. On the contrary, the services provided may not have been sufficiently investigated, nor they have been categorized. It is true that a certain degree of structure and procedural standards are needed to compare

61. See Douglas et al., *Social Cohesion and Civil Law* at 24 (cited in note 28).

62. Siddiqui et al., *The Independent Review into the Application of Sharia Law* at 4 (cited in note 42).

63. Douglas et al., *Social Cohesion and Civil Law* at 26 (cited in note 28).

64. See Bano, *An Exploratory Study of Shariah Councils in England* at 17 (cited in note 25).

65. Sandberg, *A Fear of Sharia* (cited in note 50).

the activities of religious courts to ADR facilities. However, courts and councils of any form are first providers of services to a certain community and they cannot be understood if decontextualized from the environment in which they operate. My impression is that some of the current scholarship lacks the sensitivity to recognize – and therefore to quantify – its own object of research. The 2018 Independent Review is emblematic: it puts forward recommendations that aim to "gradually reduce the use and need for sharia councils"⁶⁶ without seriously investigating what these personal exigencies are.

2.4. Religious Marriage (and Divorce) in the Secular Legal System

It may be helpful – following the 2011 Cardiff Report's line of reasoning – to clarify how divorce and marriage are framed in the religious and secular spheres and how they may interact with each other under English law. The Marriage Act 1949 recognizes civil effects to marriages performed according to religious rites, under the fulfilment of certain requirements. First, the spouses must have the capacity to enter into marriage according to English law. Secondly, it requires that the marriage was solemnised and the celebrant should be registered. Instead, a religious marriage contracted abroad is granted civil effects in England when it is recognized by a foreign state. It shall, in any case, comply with the legal requirements for marriage of the state where it took place (so-called *lex loci celebrationis*) and the parties shall be capable to marry according to the law of the place of their domicile before the marriage. Clearly, this is creating an unjustified differentiation: "Having such an anomaly where a Muslim marriage overseas is recognized, but not a marriage celebrated in this country [that is, England], may seem strange particularly in the light of the overall population of Muslims in the UK"⁶⁷.

Lacking one of the requirements referred to above, a religious ceremony – whether performed in England or not – does not produce civil effects and it gives rise to a situation described with the term

66. Siddiqui et al., *The Independent Review into the Application of Sharia Law* at 6 (cited in note 42).

67. Read, *Non-Recognition of Islamic Marriages in England and Wales* at 452 (cited in note 37).

"non-marriage". This kind of union is irrelevant to the legal system, with the obvious exception of the guarantee of the rights of children toward their parents. English law protects the parties who entered into an invalid or unlawful marriage (in other words, that may be subsequently declared null by the court), granting to the couple the possibility to divide their assets or deal with maintenance issues. Unlike void marriages, non-marriage situations were traditionally not allowed any sort of protection. In a recent case⁶⁸, the Family Court seemed to overcome this understanding. The Court stated that an Islamic marriage ceremony (*nikah*) that was not registered as civil marriage in the UK should be considered a void marriage under English law. The parties – Ms. Akhter, solicitor, and Mr. Khan, businessman, both of Pakistani origins – married in a public ceremony conducted by officials in London, cohabited for 18 years and had four children. She left him in 2016 and started a legal fight for obtainment of maintenance. "To all intents and purposes, they have been married" – reasoned Justice Williams – "To characterize all of that as a non-marriage in laws feels instinctively uncomfortable in 2018 and might rightly be regarded as insulting by many (although not all) of the participants"⁶⁹. The Court considered the ceremony undertaken by the parties as an attempt to comply with the formalities required by English law and that the failure to complete the registration process was due to the husband's refusal after the *nikah* ceremony had been undertaken. The marriage was qualified as void and Ms. Akhter was considered entitled to the same financial remedies available to other spouses in case of divorce or null marriage. Letting aside the technical aspects of the judgment on the interpretation of the Matrimonial Causes Act 1973, Justice Williams concludes that his decision was "informed by human rights arguments". The Court showed a certain sensitivity to Ms. Akhter's claim, according to which the definition of religious marriages as non-marriages amounts to a breach of articles 6 (right to a fair trial), 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the European Convention on Human Rights. In

68. *Akhter v. Khan*, EWFC 54 (2018).

69. *Id.* para. 8.

the eyes of the press, the ruling signalled⁷⁰ that the State was finally taking the lead over religious divorces: "Until now, – it was claimed in the New York Times – the only recourse for someone like Ms. Akhter, who married in London, would have been to present her case to a *Shariah* council"⁷¹. In truth, the decision is not concerned with the recognition of *nikah* marriages as such. The Court would not reason in terms of differentiating between religious ceremonies, according legal value to a specific one regardless of the provisions of the law. In *Akhter v. Khan* the attested celebration of a religious ceremony (a *nikah* marriage indeed) was only one of the elements – and per se not conclusive – that were considered in assessing the rights of the appellant. This new decision is, instead, symptomatic of an upcoming judicial tendency⁷² working towards the reduction of the gap in the legal protection of cohabitants who undertook a religious ceremony but did not proceed to formal registration.

Coherently with the traditional approach toward religious marriage, also the granting of a divorce in England is a long-standing monopoly of secular law: only a state court can allow a divorce with full civil effects⁷³. Procedures for religious divorces have no relevance as far as secular law is concerned, with a single exception. Section 10A of the Matrimonial Causes Act (1973), following a 2002 reform⁷⁴, is "one area of secular law which does indicate awareness of a separate

70. See Lizzie Dearden, *Muslim Women 'Given Hope' by High Court Ruling That Sharia Marriages Can Be Covered by English Law* (The Independent, August 2, 2018), available at <https://www.independent.co.uk/news/uk/home-news/sharia-marriages-nikah-ceremony-divorce-women-island-high-court-english-law-a8475141.html> (last visited March 25, 2019); Harriet Sherwood, *English Law Applies to Islamic Marriage, Judge Rules in Divorce Case* (The Guardian, August 1, 2018), available at <https://www.theguardian.com/law/2018/aug/01/english-law-applies-to-islamic-marriage-judge-rules-in-divorce-case> (last visited March 25, 2019).

71. Richard Pérez-Peña, *U.K. Court Can Dissolve a Muslim Marriage, Judge Rules* (The New York Times, August 2, 2018), available at <https://www.nytimes.com/2018/08/02/world/europe/uk-court-muslim-marriage-dissolve.html> (last visited March 25, 2019).

72. See *MA v. JA and the Attorney General*, EWHC (Fam.) 2219 (2014) (of the same orientation).

73. See Matrimonial Causes Act 1857.

74. Divorce (Religious Marriages) Act 2002.

religious process"⁷⁵, that is, the act of granting *Get*⁷⁶ in a Jewish divorce. According to the provision, the secular court is allowed to retain the issue of the civil divorce (*decree nisi*) "until a declaration made by both parties that they have taken such steps as are required to dissolve the marriage in accordance with those usages is produced to the court"⁷⁷. The provision specifically refers to the "usages of the Jews"⁷⁸ but it is open for other religious divorce to be "prescribed" according to paragraph 6 of the same provision⁷⁹. Many commentators have envisaged the extension of such rule to Muslim divorce⁸⁰, which would represent a step toward equality among religions.

The widespread reading in the literature sees religious courts – and proceedings for separation or divorce before them – as a phenomenon linked to the lack of recognition of religious ceremonies (that is, to the non-marriage situations described above). Objectively, according to the latest available data from the General Register Office (unfortunately updated only to 2011)⁸¹, places of worship licenced to celebrate registered marriages are relatively few for Muslims, Sikh, and other religious minorities⁸². Moreover, these religious communities appear to be reluctant to uniform to what is perceived as undue interference into the religious community's affairs. Dr. Sona, when describing

75. Andrew McFarlane, *'Am I Bothered?: The Relevance of Religious Courts to a Civil Judge*, keynote address at Cardiff Law School (May 18, 2011), available at <http://www.law.cf.ac.uk/clr/newsandevents/news2.php?id=907> (last visited March 25, 2019).

76. See note 34.

77. Matrimonial Causes Act 1973 §10A(2).

78. Matrimonial Causes Act 1973 §10A(1)(a)(i).

79. See Matrimonial Causes Act 1973 §10A(6): "Prescribed' means prescribed in an order made by the Lord Chancellor after consulting the Lord Chief Justice and such an order: (a) must be made by statutory instrument; (b) shall be subject to annulment in pursuance of a resolution of either House of Parliament".

80. See Goldrein and Hands, *The Process for Jewish and Muslim Women Seeking a Divorce* (cited in note 35).

81. See Office for National Statistics, *Marriages by area of occurrence, type of ceremony and denomination* (2011), table 7, *Buildings of worship in which marriages may be solemnised: area of location as at 30 June 2010, and denomination*, available at <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/datasets/marriagesbyareaofoccurrencetypeofceremonyanddenomination> (last visited March 25, 2019).

82. Of the buildings licensed for the solemnization of marriage, 205 are Muslim, 170 are Sikh, and 301 are generally labelled "Other".

her interactions with some English *Shari'a* councils, reported that these institutions were extremely concerned with being perceived as authentically Islamic by their users⁸³. The members of those communities are more exposed to experience a vacuum of legal protection under English law, whenever the spouses do not additionally undergo a separate civil union or do not register their marriage. Focusing narrowly on Muslims, the 2018 Independent Review insists in underlying that *Shari'a* councils' users are mostly in marriages which are not registered in England. This makes religious adjudication the only viable option for them, and particularly for women, to obtain a form of recognition of rights related to the dissolution of the marriage. The official legal system would – according to the Review's understanding – fulfil its duty of protection toward the individual by building mechanisms for the achievement of a higher percentage of registrations of religious marriages under English law. This would ensure the application of English family law to most unions, excluding *a priori* any interaction with religious alternative adjudication. The issue of non-marriage – Professor Sandberg and Professor Sharon Thompson noted in their critique to the Review – is not to be exclusively read in the perspectives of legal recognition of religious marriage rites, or even of the decisions of religious courts on religious divorces. It should be instead framed into a broader need for reform in family law in respect of the formalities for marriage and, ultimately, for the resolution of the uncertainties "as to which personal relationship the law should recognize"⁸⁴. Two orders of reasons militate against the superficial approach adopted by the 2018 Independent Review. First, it has been suggested⁸⁵ that there are no conclusive data to support the link between non-recognized marriages (that is, non-marriages) and the proliferation of religious courts; for example, we are not aware of the percentage of couples that, despite being in a registered marriage and having the possibility to bring their claims before national

83. See Sona, *Giustizia religiosa e islām* at 20 (cited in note 26).

84. Russell Sandberg and Sharon Thompson, *The Sharia Law Debate: The Missing Family Law Context*, 177 *Law and Justice* 181, 185 (2016).

85. See Frank Cranmer, Akhter: *Legal Consequences of an Unregistered Nikah Ceremony* (Law & Religion UK, August 3, 2018), available at <https://www.lawandreligionuk.com/2018/08/03/akhter-legal-consequences-of-an-unregistered-nikah-ceremony/> (last visited March 25, 2019).

courts, still recur to alternative religious adjudication. This is also linked to the fact that these courts or tribunals respond to religious needs of the individual (see subparagraph 2.3). In fact, while enabling the individual to remarry within the community, the religious bodies enter into details on arrangements that would also be relevant in any divorce case. Secondly, even assuming this link exists – that is, that the non-recognition of religious marriages forces couples to recur to religious courts – *Akther v. Khan's* line of reasoning dictates a different approach. Lack of registration would not represent an excuse for ignoring completely a marriage-like situation that would, in principle, deserve the same degree of protection as other marriages⁸⁶. In this process of equalisation with recognized marriages, alternative dispute resolution mechanisms may be granted a broader role.

3. *Family Law Arbitration in England: Is There (Really) a Place for Religious Courts?*

3.1. *IFLA Arbitration: the Rising ADR in English Family Law*

In English family law the use of methods for dispute resolution alternative to national courts is highly encouraged⁸⁷. Yet, when it comes to means of alternative adjudication that are binding upon the parties (in other words, that prevent the party actually recurring to the courts), such as arbitration, the fundamental principle remains that the Family Courts' jurisdiction "over matrimonial causes and child welfare matters, vested in it by Parliament cannot be ousted by agreement of the parties. The Courts have the ultimate duty to determine such issues"⁸⁸. This was authoritatively stated at the beginning of the

86. See Sandberg and Thompson, *The Sharia Law Debate* at 184 (cited in note 84).

87. See Family Procedure Rules 2010 rule 1.4 (The Court's duty to manage the case includes "(e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure").

88. See Donald Cryan, *Family Arbitration: The First Five Years and Its Future*, lecture at City, University of London (March 30, 2017), available at https://www.city.ac.uk/__data/assets/pdf_file/0004/365836/J-Cryan-Family-Arbitration-5-Years-on-lecture-text.pdf (last visited March 25, 2019).

last century by Lord Hailsham in *Hyman v. Hyman*⁸⁹. The underlying principle of the ruling – to which the Supreme Court recently referred as the *Hyman v. Hyman* "public policy rule"⁹⁰ – is still considered "good law" by courts at this date and, moreover, it is enshrined in legislative provisions⁹¹ in force. Following a more modern conception of family law, courts are increasingly leaving a certain room "for the individual to control the consequences of their own relationships"⁹². Prof. Gillian Douglas speaks of "de-juridification" of family law justice⁹³: the individual is allowed to make his or her choices, to which the judge may give relevance in the context of courts proceedings. A landmark case on the point is *Radmacher v. Granatino*⁹⁴, where the Supreme Court first recognized, with some limitations, legal effects to pre-nuptial agreements between spouses. The Court argued that "[i]t would be paternalistic and patronising to override their [that is, the couple's] agreement simply on the basis that the court knows best"⁹⁵.

The same line of reasoning that led the Supreme Court to attribute value to the parties' agreements concerning financial arrangements

89. *Hyman v. Hyman*, AC 601, 614 (1929) ("[T]he power of the court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but of the public, and that the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the court or preclude the court from the exercise of that jurisdiction").

90. In *Radmacher v. Granatino* (see note 94), the Supreme Court reasoned that the modern practice of pre-nuptial agreements allows an exception to the "rule in *Hyman v. Hyman*", which is regarded as a standing principle.

91. See Matrimonial Causes Act 1973 § 34 (declaring void a maintenance agreement that provides for any restriction to the right to apply to a court claiming an order for financial arrangements); Children Act 1989 § 10 (establishing that the courts' power to make an order when a question arises with respect to the welfare of any child cannot be restricted, with the exception of limited hypotheses – which do not include agreements to arbitrate).

92. Russell Sandberg and Sharon Thompson, *Relational Autonomy and Religious Tribunals*, 6 Oxford Journal of Law and Religion 137, 142 (2017).

93. Gillian Douglas, *Who Regulates Marriage? The Case of Religious Marriage and Divorce*, in Russell Sandberg (ed.), *Religion and Legal Pluralism* (Ashgate Publishing 2015).

94. *Radmacher v. Granatino*, UKSC 42 (2010).

95. *Id.* para. 78. See also Lucinda Ferguson, *Arbitral Awards: A Magnetic Factor of Determinative Importance – Yet Not to Be Rubber-Stamped?*, 37 Journal of Social Welfare and Family Law 99 (2015) (providing a critical review).

in case of divorce has been used to legitimize the recourse to arbitral tribunals for the adjudication of family law disputes⁹⁶. Arbitrability of family law claims presents a twofold limit, when compared to arbitrability of other areas of the law. First, the consent to arbitrate on family matters does not create an obligation to participate in the arbitral proceedings, in other words it does not prevent the party from recurring to the Family Court. Secondly, the result of the arbitral proceedings (that is, the award) is not – despite the parties' consent – binding upon them. Bearing these limits in mind, it is possible – and largely encouraged – to recur to an arbitral tribunal or a sole arbitrator with the purpose of settling a family dispute. Advantages of arbitration include speediness in comparison with state jurisdiction and the protection of the parties' privacy, as the arbitral proceedings are held in private (moreover, parties can subsequently require the court to keep the award confidential). Arbitration allows to select a neutral place and to identify the applicable law, as to avoid complicate issues related to establishing which courts has jurisdiction and to applying conflicts of laws principles. Despite of the arbitrators' fees, overall costs are said to be more restrained than in a long court litigation⁹⁷. Family law expert Frances Hughes QC⁹⁸ points at the cuts to governmental aids for family law justice as one of the main reasons that push divorcing couples toward private settlements and, in some cases, arbitration. The cuts, while on one side limiting parties' access to justice, hit the judiciary as well. Fewer judges must deal with an increasing workload of cases and this impacts on the duration and management of the proceedings. In some cases, Hughes denounces, the parties and their counsels opt for arbitration to ensure the quality of the final judgments. "I confidently predict – argued Sir Hugh Bennett in a past lecture⁹⁹ – that within the near future family finance arbitration will

96. See Suzanne Kingston and Victoria Nottage, *Family Law Arbitration in England and Wales*, Thomson Reuters Practical Law practice note (2018), available at <https://uk.practicallaw.thomsonreuters.com/2-521-5792> (last visited March 25, 2019).

97. See Donald Cyran, *Family Arbitration* (cited in note 88).

98. Interview with Frances Hughes, Partner, Hughes Fowler Carruthers (London, June 4, 2018).

99. Hugh Bennett, *Family Law Finance Arbitration: A New Dawn* (Family Law, May 6, 2014) available at https://www.familylaw.co.uk/news_and_comment/family-law-finance-arbitration-a-new-dawn (last visited March 25, 2019).

complement the court system just as private medicine complements the National Health Service".

With the aim of encouraging such instrument, the Institute of Family Law Arbitrators (IFLA) has developed a framework for family arbitration in England, by launching the Family Law Arbitration Financial Scheme in February 2012 and the Family Law Arbitration Children Scheme in July 2016 (hereinafter "IFLA Schemes"). These two sets of rules cover financial disputes and children-related domestic disputes¹⁰⁰ and they make England one of the most advanced forum for family law arbitration in Europe. The IFLA Schemes require arbitrators to conduct the proceedings in accordance with the Arbitration Act 1996. IFLA offers a service of appointment of the arbitrator(s) among a list of family-law practitioners¹⁰¹, if the parties so request. Agreements to arbitrate under the IFLA are considered valid if entered into by the parties after the dispute has arisen (see the forms for the submission agreement for arbitration, hereinafter "IFLA Form"¹⁰²). The IFLA Form, in fact, requires litigants to "describe and define the scope of the dispute they agree to arbitrate"¹⁰³. By signing the IFLA Form parties commit not to commence court proceedings on the same disputes. Yet, the family courts will still exercise a crucial role in shaping the outcome.

In standard commercial arbitration, awards are final and binding upon the parties. They are enforced by English courts "in the same manner as a judgment or order of the court" (section 66 of the AA 1996) and subject to limited challenge upon specific grounds (sections

100. See Kingston and Nottage, *Family Law Arbitration in England and Wales* (cited in note 96) (the authors mention, among others: disputes concerning chattels; liquidation of the parties' existing assets and management of debts; division of capital and ongoing support for the family; disputes involving foreign assets; proceedings for variation of maintenance; under the Children Scheme, substantive applications about with whom the child lives and spends time, changes to an existing order, issues about holiday contact and schooling, questions of routine medical treatment, etc.).

101. See <http://ifla.org.uk/search-for-an-arbitrator/> (last visited March 25, 2019).

102. Form ARBIFS (in the case of financial disputes) and Form ARBICS (in the case of children disputes) are available at <http://www.ifla.org.uk>.

103. Institute of Family Law Arbitrators, *A Guide to the Family Law Arbitration Scheme: An Introductory Guide for Family Arbitrators, Judges and Professional Referrers* (3rd ed. 2016), available at <http://ifla.org.uk/divi/wp-content/uploads/Arbitrators.pdf> (last visited March 25, 2019).

67–70). Interference of the courts in arbitral proceedings is largely seen as something that should be avoided or limitedly exercised in support of the arbitration. According to section 1(c), "[t]he court should not intervene except as provided" by the AA 1996. Instead, family law awards have no binding value upon the parties unless they are incorporated in an order by the Family Court. The court maintains total discretion on whether to issue such order or not and on whether to make amendments or modifications to the arbitrator's ruling. In *S v. S*, Justice James Munby clarifies that IFLA awards are to be accorded the same relevance that a long-standing case law of the Family Division¹⁰⁴ accords to settled agreements reached by the parties. "There is no conceptual difference – argues Justice Munby – between the parties making an agreement and agreeing to give an arbitrator the power to make the decision for them"¹⁰⁵. In respect of the court's decision to whether accord the order, the existence of the award acts as a "magnetic factor"¹⁰⁶, attracting the judge's decision toward consenting to the parties' will to be bound by the award. Yet, the court will not limit its activity to "rubber stamp"¹⁰⁷ what the arbitrator decided. He or she would act as guarantor of the regularity of the proceeding and of the validity of the award. The Court in *S v. S* issued a consent order, following the parties' lodgement for approval of a draft order that reported the arbitrator's rulings and practical directions. This procedure is to be followed when both parties wish the award to acquire binding value upon them¹⁰⁸. When, instead, one of the parties decides not to comply with the award nor is willing to apply for a consent order, the party who has an interest in the enforcement of the award should recur to a notice to show cause. "Where the attempt to resile [from the arbitral award] is plainly lacking in merit"¹⁰⁹ the court will summarily grant an order, therefore

104. See, for example, *Edgar v. Edgar*, EWCA Civ. 2 (1980) and *Xydhias v. Xydhias*, EWCA Civ. 1966 (1998).

105. *S v. S*, EWHC (Fam.) 7 (2014) para. 19.

106. *Id.* para. 11.

107. *Id.* para. 21.

108. Kingston and Nottage, *Family Law Arbitration in England and Wales* at 8 (cited in note 96).

109. *S v. S*, EWHC (Fam.) 7 (2014) para. 24.

upholding the award. Otherwise, the judge may consider that a further hearing is necessary¹¹⁰.

As acknowledged by the IFLA Form, courts retain full discretion as to the ground for refusing to make the order or issuing a different order. The judge may modify the draft order when it is presented with new evidences that have not been considered in the arbitral proceedings. One of these cases was *DB v DLJ*¹¹¹, where the wife argued that an award under IFLA was vitiated in relation to the true value of an immovable property. Justice Nicholas Mostyn held that the ample margin for review left by the IFLA Form should include remedies in case of supervening events that invalidate the assumptions upon which the award was made¹¹² and of mistakes by the tribunal on the facts of the case¹¹³. Apart from these two additional cases, Justice Mostyn was inclined on giving a restrictive interpretation of the right of the appellant to challenge an IFLA award:

[C]hallenge or appeal within the 1996 Act, these are, in my judgment, the only realistically available grounds of resistance to an incorporating order. An assertion that the award was 'wrong' or 'unjust' will almost never get off the ground: in such a case the error must be so blatant and extreme that it leaps off the page¹¹⁴.

The Children Scheme mostly mirrors the Financial Scheme¹¹⁵. The main difference concerns the fundamental focus on the child's protection. Parties are under the additional duty

to disclose fully and completely to the arbitrator and to every other party any fact, matter or document in their knowledge,

110. See Kingston and Nottage, *Family Law Arbitration in England and Wales* at 9 (cited in note 96).

111. *DB v DLJ*, EWHC (Fam.) 324 (2016).

112. See *id.* at 31–49.

113. See *id.* at 50–57.

114. *Id.* at 28.

115. See Suzanne Kingston and Victoria Nottage, *Children Law Arbitration in England and Wales*, Thomson Reuters Practical Law practice note (2018), available at <https://uk.practicallaw.thomsonreuters.com/w-004-4100> (last visited March 25, 2019) (providing an overview of the rules of arbitration).

possession or control which is or appears to be relevant to the physical or emotional safety of any other party or to the safeguarding or welfare of any child the subject of the proceedings¹¹⁶.

On this regard, they are required to fill a specific questionnaire¹¹⁷ and to give notice of criminal convictions, caution or involvement concerning themselves or other person with whom the children is likely to have contact. So far, there has been no relevant case law on Children Scheme application, nor it is possible to assess in such a short time its success.

Finally, a brief note on the relation between the IFLA and arbitration before religious courts. In the context of the described privatization of family law adjudication, the Rules make the express choice of excluding manifestations of autonomy that involve the application of religious principles and rules. Article 3 IFLA limits the applicable law to the substance of the dispute to the law of England and Wales. The provision is mandatory, and represents the only element of the IFLA Rules that cannot be excluded, replaced or modified by the parties' free contractual will. The 2015 *Commentary* to the IFLA states that the provision was expressly conceived to "set IFLA arbitrations apart from arbitrations carried out by religious bodies (such as *Shari'a* councils), which apply their own law"¹¹⁸. Religious arbitration is therefore confined outside the framework of the Rules – observed Justice Munby in *S v. S* – and the "proper approach in that situation will be considered when such a case arise"¹¹⁹. The investigation of this hypothetical "proper approach" and of an embryonic version of its concretization in practice will represent the object of the paragraphs that follow.

116. IFLA Family Law Arbitration Children Scheme Arbitration Rules (effective July 1, 2018) art. 17.1.2.

117. See <http://ifla.org.uk/divi/wp-content/uploads/ARBICS.pdf> (last visited March 25, 2019).

118. FamilyArbitrator, *Commentary* on IFLA Family Law Arbitration Scheme Arbitration Rules (effective March 23, 2015), art. 3, available at https://www.familyarbitrator.com/wp-content/uploads/IFLA_2015_rules_annotated-1.pdf (last visited March 25, 2019).

119. *S v. S*, EWHC (Fam.) 7 (2014) para. 19.

3.2. Religious Law as Substantial Law in Arbitration Proceedings

According to the AA 1996, arbitration is an alternative method for dispute resolution where the parties defer their controversy – future or actual – to an impartial tribunal of their choice and "agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest"¹²⁰. Section 46 of the AA 1996 governs the applicable law to the substance of the dispute. The choice is left to the parties, who can opt for having their controversy decided in accordance "with such other consideration as agreed by them or determined by the tribunal". This includes religious rules and principles¹²¹. An agreement to arbitrate a commercial dispute according to *Shari'a* law, for example, is binding on the parties under English law. Consistently, the award resulting from such proceedings will be enforceable by English courts "in the same manner as a judgment or order of the court" (section 66(1), which applies regardless of the seat of the arbitration). Parties' freedom to have their dispute settled by arbitration meets a general limit in "public policy" or "public interest" (section 1(b) AA 1996). Awards made in proceedings where England was the seat of the arbitration may be challenged for being contrary to English public policy on the ground of section 68(2)(g), while foreign awards would not be recognized and enforced under section 103(3). The concept is extremely articulated in its contents and it includes: when an award has been obtained by fraud; when it is tainted by illegality; when it breaches the rules of "natural justice" or it affects the United Kingdom's obligations under international law¹²². Refusal of recognition on this ground is considered a last resort measure, as English courts tend to apply a pro-arbitration approach¹²³. In a famous sentence,

120. Arbitration Act 1996 §1(b).

121. Ian Edge, *Islamic Finance, Alternative Dispute Resolution and Family Law: Developments Towards Legal Pluralism?*, in Griffith-Jones (ed.), *Islam and English Law*, 121 (cited in note 2).

122. See Maxi Scherer, *England*, country report for the International Bar Association's Recognition and Enforcement of Arbitral Awards 2014-2015 study, 7 (2014), available at <https://www.ibanet.org/Document/Default.aspx?DocumentUid=DB68248A-6EC4-45A7-8324-EF6266C699EE> (last visited March 25, 2019).

123. See Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* 641 (Oxford University Press 6th ed. 2015).

public policy is "never argued at all but when all other points fail"¹²⁴. In the landmark case *Soleimany v. Soleimany*, for example, parties committed to arbitrate before the London *Beth Din* any dispute arising from a contract concerning the smuggling of carpets from Iran. The Court of Appeal considered the agreement valid and recognized the *Beth Din's* jurisdiction. Nevertheless, the enforcement of the award was refused on the ground that, being the contract illegal, it breached English public policy.

Public interest considerations are said to include the respect of human rights legislation and treaties¹²⁵. In *Pellegrini v. Italy*¹²⁶, the European Court of Human Rights found that a judgement from the Roman Rota – the highest appellate tribunal of the Catholic Church – should have been checked for compliance with article 6 ECHR¹²⁷ (right to a fair trial) by the Italian court before being enforced. However, it is controversial whether this line of reasoning should be extended to arbitral awards. These are, in short, the legal basis – and the limits – for religious arbitration under English law. In practice, however, religious courts that operate under the AA 1996 appear to be a minority. Among these, two are particularly active in promoting their activities as arbitration courts: the London *Beth Din*, in London, and the Muslim Arbitration Tribunal (hereinafter "MAT"), based in Nuneaton. The London *Beth Din* is a secular institution that provides the Orthodox Anglo-Jewish community with a forum for dispute resolution. It deals mostly with commercial disputes, "includ[ing] family business issues and communal issues such as Rabbinic contract disputes and other congregational issues"¹²⁸. Controversies are adjudicated according to the *Halakhah* and in application of English laws on arbitration. Established in 2007, the Muslim Arbitration Tribunal aims at providing an alternative to "unregulated *Shari'a* courts and local *imams*", whose decisions "would of course have no backings of the law and

124. *Richardson v. Mellish*, 2 Bing. 229, 252 (1824) (Burrough J.).

125. See William Robinson, *The Effects of the Human Rights Act 1998 on Arbitration*, Amicus Curiae 24 (July–August 2002).

126. *Pellegrini v. Italy*, 35 EHRR 2 (2002).

127. See ECHR art. 6(1): "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing".

128. United Synagogue, *Arbitration (Dinei Torah)*, available at <https://www.theus.org.uk/article/arbitration-dinei-torah> (last visited March 25, 2019).

often raised more questions than answers¹²⁹. The MAT adjudicates commercial disputes on the basis of Islamic Sacred Law and its areas of expertise include Mosques disputes (for example, employment contracts and disputes on the treasure of the mosque) and Islamic wills. The two institutions successfully occupy a specific segment of the ever-expanding market of arbitration. They offer to their clients a synthesis between religious authoritativeness – being both well considered within the communities of reference – and binding effects of their rulings under English law.

3.3. Perspectives on Religious (Non-Binding) Arbitration Adjudicating Family Matters

Considering the existing practice of religious arbitration under the AA 1996 and the recent trend of family arbitration, it is legitimate to speculate on the possible interplay between the two under English law. The principle remains firm that the jurisdiction of the Family Court cannot be overstepped. On this point, it should be clear that religious courts and secular courts may have overlapping jurisdictions only on those issues to which the 2011 Cardiff Report refers as "ancillary matters", that is "the consequences of the ending of the marriage in relation to arrangements for the parties' children, or money and property"¹³⁰. Proceedings for purely religious determinations do not fall within the concept of arbitration as they are not relevant to national law. The application for a religious divorce is not – nor is meant to be – an alternative to civil divorce. What the parties pursue is to be able to remarry within their own faith. To this extent they are required to follow the specific procedure embodied into religious laws, under the guidance of a minister of cult. The authority of religious courts "to rule on the validity/termination of a marriage – reasoned the 2011 Cardiff Report – does not derive from the parties' agreement to submit their 'dispute' to them (indeed, there may be no dispute) in the same way as an arbitration clause in a contract"¹³¹. The couple will

129. Muslim Arbitration Tribunal, *Commercial and Civil Arbitration*, available at <http://www.matribunal.com/commercial-and-debt-disputes.php> (last visited March 25, 2019).

130. Douglas et al., *Social Cohesion and Civil Law* at 47 (cited in note 28).

131. *Id.* at 44.

in any case need to recur to family courts in order to get a separation or divorce under English law. Undeniably, some of the decisions to be taken following the crisis of a marriage touch upon personal religious beliefs. It is therefore legitimate that the individual, when called upon to make these choices, may seek the guidance, the approval, or even the comfort of its own religious community. Equally reasonable, as seen with the IFLA, is the desire to opt out of courts proceedings and to recur to arbitration. In practice, however, none of the arbitral institutions mentioned above deals with family law disputes. The *Beth Din's* website is particularly firm in excluding the adjudicability of family law under English arbitration law. In alternative, it offers a service labelled as mediation. Also, the MAT advertises a similar service of familiar mediation. The procedure at the London *Beth Din* is so described:

In certain cases, where both parties provide full written consent, and at the discretion of the Beth Din, our *Dayanim*¹³² will undertake the mediation of a dispute, in an attempt to bring parties to a mutually agreed settlement of their conflict. This is different to an arbitration and does not produce an award that is directly enforceable through the courts. If a mediation is successful, the outcome will be drawn up as a settlement agreement and, as long as the parties expressly provide for their agreement to be embodied in a court order, it can then be enforced through the court system.

It is important to stress that none of the *Dayanim* is qualified as a family mediator, according to their résumés published online. According to article 10 of the MAT rule of procedure, the procedure requires two mediators, specifically a scholar of Islamic Sacred Law and a solicitor or barrister. There is no evidence as to whether mediators are selected from a specific panel, different from the MAT arbitrators' panel, and whether they are qualified as family mediators. In Islam as well as in Judaism, religious law aims at regulating the whole life of the individual with detailed provisions, established in holy texts and in long-standing interpretative traditions. The main reason why

132. Literally meaning "arbitration judges".

parties recur to religious courts is the possibility to acquire authoritative advice on the proper application of these religious laws. Also, the degree of deference that a religious person may attach to the determinations of a minister of cult should be taken into account. In case of disagreement, it is possible that the opinion of said minister on the application of religious law would appear conclusive to the parties. The aim is not – as in a mediation – to facilitate the settlement of the dispute between the litigants. It is, instead, to ensure the proper application of religious laws and principles to the facts of the case. The non-binding value of the result should not lead to confusion, as what we are trying to define is the process and not the outcome¹³³. It may ultimately be wrong to apply the label of mediation to a judicial-like procedure, where the parties remit themselves to the ultimate determination of a third person¹³⁴. Regardless of how religious courts may define their services, the literature is – in my view correctly – identifying them as arbitral tribunal¹³⁵. It could be worthy to assess whether the exclusion of family arbitration from the services may be the result of a deliberate choice from the religious courts. In this regard, I would recall the findings of Prof. Sona's field research¹³⁶: the idea of religious authenticity of faith-based adjudication may collide with the instrument of arbitration, a method for dispute resolution recognized – and provided for – by the secular state. However, it should be also considered that family arbitration is entirely new to the English legal system. It represents a significant shift from the previous paradigm that imposed significant limitations on the individual's autonomy in the field of family law matters. It may take a while for this increasing recognition of autonomy to develop from guaranteeing secular alternatives (that is, the new IFLA arbitration) to promoting a pluralistic

133. See Tamara Tolley, 'When Binding Is Not Binding and When Not Binding, Binds: An Analysis of the Procedural Route of Non-Binding Arbitration' in *AI v. MT*, 25 Child and Family Law Quarterly 484 (2013) (providing a like-minded approach).

134. But see Neil Addison, *Sharia Tribunals in Britain – Mediators or Arbitrators?*, foreword to MacEoin, *Sharia Law or 'One Law for All'?* (cited in note 14).

135. See Michael J. Broyde, *Sharia Tribunals, Rabbinical Courts, and Christian Panels: Religious Arbitration in America and the West* 3–28 (Oxford University Press 2017); Michael C. Grossman, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 Columbia Law Review 169 (2007) (providing an analysis of the interplay between the Uniform Arbitration Act and the phenomenon of religious arbitration).

136. See Sona, *Giustizia religiosa e islām* (cited in note 26).

vision of family-law adjudication, therefore including religious arbitral tribunals among the possible options.

It is a fact that the non-binding value of family arbitration in England would not be an obstacle for religious courts to keep acting as arbitral tribunals even in respect of family law dispute, consistently with the secular practice under the IFLA scheme. They would follow the AA 1996, as they do in the rest of their judicial activities. Awards could, as the London *Beth Din's* website itself suggests, be upheld by courts under the "consent order" mechanism. Ultimately, it would be a form of prejudice to take for granted that incompatibilities exist between religious family law and the guarantees provided by arbitration law. The case *AI v. MT*¹³⁷ suggests that the interplay between religious principles, arbitration and English family law can indeed be successful. In 2010, a married couple with two daughters, a British mother, and a Canadian father was involved in proceedings before the High Court. When the matter was presented before Justice Jonathan Baker the parties, Orthodox Jews, conjunctly requested to dismiss the proceeding:

In particular, the order recited that the parties were agreeing "to enter into binding arbitration before Rabbi Geldzehler" and undertaking to "seek and abide by any determination of the family issues through binding arbitration before the New York Beth Din" and specifically asserted that they "both shall be bound by any award made in the New York Beth Din"¹³⁸.

The request was denied as it breached the *Hyman v. Hyman* principle on the mandatory jurisdiction of family courts. The judge, however, showed himself to be sensitive to "the parties' devout religious beliefs and [to] wish to resolve their dispute through the rabbinical court"¹³⁹. He suggested that he would endorse a process of non-binding arbitration: the *Beth Din's* award, while not preventing further application to the courts by the parties, would receive a "considerable

137. *AI v. MT*, EWHC (Fam.) 100 (2013).

138. *Id.* para. 11.

139. *Id.* para. 12.

weight" by the Court in its final decision¹⁴⁰. Precondition to such order was a positive evaluation of the procedure followed by the rabbinical court and the substantial principles applied. The correspondence between Justice Baker and Rabbi Geldzehler represents, in my view, an illuminate example of how cultural understanding can become the starting point for the development of the law.

After eighteen months of arbitral proceedings, the award was presented to the Court. While arrangements for the children were made and financial issues were solved, the parties were unable to agree on the solution proposed due to a further controversy on their Jewish divorce. "[T]he mother was unwilling to agree to the complex provisions of the arbitration award unless the *Get* was given. Equally, the father was unwilling to agree to give the *Get* until the court had approved the award and indicated that it would agree to its terms being incorporated in a court order"¹⁴¹. The judge indicated that he would be prepared to make the order, as he did few hours after the *Get* procedure at the London *Beth Din*. "The parties' devout beliefs had been respected." – concluded Justice Baker – "The outcome was in keeping with English law whilst achieved by a process rooted in the Jewish culture to which the families belong". The judgement was pioneering in referring a matrimonial case for arbitration, two years before the launch of the IFLA Financial Scheme. As to the application on the substance of a "religious" law, the Court's central concern appeared to be the respect of the fundamental principle of the "child's best interest". The child's welfare is the primary factor to consider when settling any family law dispute, according to the Children Act 1989¹⁴². The interpretation of the principle requires a certain degree of flexibility to accommodate multicultural conceptions¹⁴³ of well-being. Lecturing on the "relevance of religious arbitration to a civil judge", Justice Andrew McFarlane elaborated on the importance of taking into account, following a case-by-case approach, the familiar cultural and religious context:

140. *Id.* para. 15.

141. *Id.* para. 23.

142. Children Act 1989 §1(3).

143. See, for example: *Re J (A Child) (Custody Rights: Jurisdiction)*, UKHL 40 (2005); *Re A (Leave to Remove: Cultural and Religious Considerations)*, EWHC (Fam.) 421 (2006); *Re S (Specific Issue Order: Religion: Circumcision)*, EWHC (Fam.) 1282 (2004).

"Where, to take one example, a Muslim family is before the court, what regard does the secular English court have to Sharia Law?"¹⁴⁴. As the child "does not exist in a vacuum", religious considerations, for example concerning circumcision or the attribution of the custody to one of the parents, could deeply influence his or her life. It is therefore for the court to assess how certain arrangements for the child's care "will be received by the family and wider community in accordance to the dictates of the faith and law of that community"¹⁴⁵. Justice McFarlane clarified that in any case the court should be "subservient to or reliant upon the determination of a religious court". Yet – he concluded – as a civil judge he felt committed to consider religious arbitration "if the religious element is a significant part of the parent's, family's or child's experience"¹⁴⁶.

3.4. *Faith-Based Awards Within the "Commercial" Framework for Arbitration*

The judgement in *AI v. MT* and Justice McFarlane's approach have attracted some criticism. Their analysis is said to be focused on the fairness of the final outcome in the light of English family law, while not attributing sufficient attention to the fairness of the arbitral proceedings as such¹⁴⁷. This sub-paragraph is devoted to the potential interplay between the current procedural law of arbitration and religious arbitral proceedings. My aim here is to see to what extent the current commercial arbitration law is able to accommodate the concerns raised by religious arbitration. I will focus on two issues: the problem of consent to religious arbitration and gender-based discrimination in the proceedings. As widely known, the modern conception of arbitration has its roots in the practice of international commerce between merchants. Even if states show different attitudes toward this mechanism, the widespread influence of the UNCITRAL Model Law on International Commercial Arbitration (1985) highlights the existence of grounds of common understanding of what the

144. McFarlane, *'Am I Bothered?'* (cited in note 75).

145. *Id.*

146. *Id.*

147. See Alison Diduck, *Autonomy and Family Justice*, 28 *Child and Family Law Quarterly* 133 (2016).

fundamental principles governing arbitration are. It is no coincidence that the 1958 New York Convention on Recognition and Enforcement of International Awards (hereinafter "NY Convention"), provides for a "commercial reservation" (article I(3) NY Convention). This exclusion reflects the limits to arbitration in many countries, where non-commercial matters are not to be resolved through a settlement between the parties¹⁴⁸. Traditionally public policy reasons reserve to the state the authority to rule on disputes concerning the status of the individual, criminal matters, or the validity of intellectual property rights¹⁴⁹. National laws governing arbitration are essentially concerned with promoting trade by providing a flexible and efficient alternative to state courts in international commercial disputes, encouraging parties to include arbitration clauses in their contracts. Among many specifications of this objective I would mention the minimization of formal requirements for the validity of the agreement; the reference to general clauses of "due process" and "fair hearing" to ensure procedural fairness without interfering with the efficiency of the proceeding; international treaties, such as the mechanism for recognition and enforcement under the NY Convention, that promotes free circulation of awards in different countries. Family law arbitration in England had to develop, unlike elsewhere¹⁵⁰, based on the existing set of rules for commercial arbitration, as recalled by the long-experienced Judge of the High Court (Family Division), Donald Cryan:

When the working group [for the drafting of the IFLA Scheme] was considering the way forward, it became clear that for various reasons the government was not prepared to legislate for the introduction of family arbitration and if it was to be introduced in England and Wales it would have to be done within existing legislation¹⁵¹.

148. See Blackaby et al., *Redfern and Hunter on International Arbitration* at 111 (cited in note 123).

149. *Id.* at 112.

150. In the United States, most states have specific provisions on family arbitration; the Uniform Family Law Arbitration Act, drafted by the Uniform Law Commission in 2016, has been enacted in Arizona and Hawaii. In Australia, the framework is composed by the Family Law Act 1975, the Family Law Rules 2004, and the Family Law Regulations 1984.

151. Cryan, *Family Arbitration* (cited in note 88).

It has been argued that commercial arbitration is poorly equipped to deal with family law, unless specific provisions are enacted¹⁵². Following *S v. S* and *DB v. DL*, it became apparent that, regardless of non-final qualification of the awards, the framework of the Arbitration Act could not be considered sufficient to guarantee the parties' protection due in family law disputes. On the basis of the analysis that I will make, however, I would consider that – although not sufficient – the application of the AA 1996 by religious courts should be promoted, as it offers some important procedural and substantial guarantees to the parties. Unfortunately, the 2018 Independent Review voices the opposite approach and it may have a strong influence on English public institutions in the near future. In 2013, the English legal system demonstrated, through the *AI v. MT* case, to be open to accommodate the instances of individuals who wish to resolve familiar disputes within their religious community, in line with the pluralist approach I advocate for below (see paragraph 4). Further developments in this direction would require a systematization of the approach that the judiciary should maintain in regard to the phenomenon, including a new sensibility according to which scrutinize the religious awards before granting them any legal relevance.

3.4.1. *Agreements to Arbitrate Before Religious Tribunals: the Problem of Consent*

Arbitration rests on the pillar of the contractual will of the parties freely expressed¹⁵³, and it is one of the many strategic moves available in the contractual bargaining that concern the solution of potential or actual disputes. It is generally agreed upon when both parties to the contract see relevant advantages in opting out of national courts systems and recur to a professional figure for reasons such as expertise in a specific subject, privacy or speed of the proceedings. Under section 67 of the AA 1996 the arbitrator's decision (where the seat of the arbitration was in England) can be challenged before the court if

152. See Wendy Kennett, *It's Arbitration, But Not as We Know It: Reflections on Family Law Dispute Resolution*, 30 *International Journal of Law, Policy and the Family* 1 (2016).

153. See Blackaby et al., *Redfern and Hunter on International Arbitration* at 71 (cited in note 123).

the arbitral tribunal lacked substantial jurisdiction, including lack or vices of the parties' consent to the arbitration. Parties in separation and divorce cases have usually different contractual power, with one being substantially disadvantaged, mainly for financial reasons. This imbalance may reflect on the individual's ability to freely express consent to arbitration and to be adequately advised and defended throughout the proceedings.

Within the context of religious family arbitration, consent becomes an even more complex issue. Unlike commercial contracts, where the parties often strategically plan ahead their recourse to arbitration, the choice of religious arbitration in familiar crises may be far from the logic of practical convenience. Empirical evidence¹⁵⁴ suggests that the decision to seize a religious court mostly occurs when the dispute has already arisen, so that it can be categorized as submission agreement. As seen, agreements to arbitrate familiar disputes lack binding value under English law, therefore pre-dispute arbitration clause in pre-nuptial agreements only rest on the willingness of the parties to abide by their previous commitments. Since 2016, for example, the London *Beth Din* has recommended to couples who apply for an authorization of marriage by the Chief Rabbi to sign a standard form of prenuptial agreement, deferring future marital disputes to the "mediation" of the *Beth Din*¹⁵⁵.

Regarding the matter of disputes, it may be useful to recall the distinction made above. It is pointless to think in terms of consent to the religious procedures such as the granting of a *Get*, of a *khul'* divorce, or of a declaration of nullity of the marriage according to canon law. The only element of choice in these situations concerns the additional decision on whether to acquire the status of divorced in the eyes of the religious community or not¹⁵⁶. The idea of contractual consent, embodied into national and international arbitration laws, comes into play with regard to those disputes that the 2011 Cardiff Report labeled as "ancillary matters". In these cases, religious adjudicating bodies are seized to rule on matters relevant to secular law: they act as private

154. See Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 *Yale Law Journal* 2680, 3021 (2015).

155. See United Synagogue, *Pre-Nuptial Agreement*, available at <https://www.theus.org.uk/article/pre-nuptial-agreement> (last visited March 25, 2019).

156. See Douglan et al., *Social Cohesion and Civil Law* at 53–67 (cited in note 28).

alternatives to national courts, within the limits seen above. It is evident that the legal system should not allow such alternatives unless a precise will of the individual in this respect can be assessed.

The recent analysis of religious private adjudication is bringing scholars¹⁵⁷ to refine the traditional vices of consent to be able to fully catch this developing reality. It is the case of what is referred to as "religious duress", a form of coercion exerted by the religious community on the individual. Duress – intended as the pressure, especially actual or threatened physical force, put on a person to act in a particular way¹⁵⁸ – is a cause of invalidation of consent well-known to contract law. However, its different nuances in the religious context may demand the judiciary and public institutions to acquire a certain level of cultural understanding of the dynamics operating in each religious minority. Under Jewish law, for example, the litigant who refuses to bring the dispute before a rabbinical tribunal "may be subject to a *seruv* (also spelled *siruv*), a public declaration that the party is in contempt of court"¹⁵⁹. The practical effects of this measure depend on the community, yet they are sometimes described as catastrophic:

A *siruv* can have the effect of ruining the very fabric of an individual's existence. If one is a member of a very small sect of Judaism, defying the *Beth Din* can potentially result in the failure of one's business, the inability to have one's children marry within the community, or the ability to participate in necessary communal activities¹⁶⁰.

The question becomes whether this type of social pressure exerted by the community should be considered as a factor able to undermine the consent to arbitration. The answer varies depending on the applicable contract law and the actual impact of the *seruv* needs to be

157. See Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 Vermont Law Review 157, 178 (2012).

158. See Jonathan Law and Elizabeth Martin, *Duress*, in Jonathan Law (ed.), *A Dictionary of Law* (Oxford University Press 7th ed. 2014).

159. Brojde, *Sharia Tribunals, Rabbinical Courts, and Cristian Panels* at 222 (cited in note 135).

160. Ginnie Fried, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 Fordham Urban Law Journal 633, 652 (2004).

evaluated with a case-by-case approach¹⁶¹. In respect of subtler forms of duress, less codified and manifest than the Jewish *seruv*, it is controversial to define the border between the membership to the religious community and episodes of coercion of the individual will. It may be the case of the influence exercised upon minorities within minorities, notably women belonging to close religious groups.

Nevertheless, it would be an unacceptable simplification to conclude that the phenomenon of "religious duress" makes it impossible for parties belonging to such minorities to express genuine consent to arbitral proceedings¹⁶². Lord Stanley Kalms – quoted by Prof. Manea – during the parliamentary debate on Baroness Cox's proposal was particularly emphatic on this point: "How do people in this House suppose that a young girl born in such a town and brought up to defer to religious leaders should behave when those same religious leaders hold themselves out also as legal authorities?"¹⁶³. The Arbitration and Mediation Services (Equality) Bill proactively suggested a solution through the addition to the Family Law Act 1996¹⁶⁴ of section 9A. According to the proposed amendment, consent orders based on a "mediated settlement" or "other negotiated agreement between the parties" shall be set aside by the court "if it considers on evidence that one party's consent was not genuine"¹⁶⁵.

In assessing the genuineness of a party's consent, the court should have particular regard to whether or not (a) all parties were informed of their legal rights, including alternatives to mediation or any other negotiation process used, and (b) any party was manipulated or put under duress, including through psychological coercion, to induce participation in the mediation or negotiation process¹⁶⁶.

161. A *seruv* does not amount to duress according to the New York Supreme Court in *Greenberg v. Greenberg*, 238 A.D.2d 420, 421 (1997).

162. See John Bingham, *Sharia Courts As Consensual As Rape, House of Lords Told* (The Telegraph, October 20, 2012), available at <https://www.telegraph.co.uk/news/religion/9621319/Sharia-courts-as-consensual-as-rape-House-of-Lords-told.html> (last visited March 25, 2019).

163. Manea, *Women and Shari'a Law* at 104 (cited in note 19).

164. Section 4 of the Bill proposed a modification of section 9 of the Family Law Act 1996, by inserting section 9A.

165. Arbitration and Mediation Services (Equality) HL Bill (2015-2016) § 4(1).

166. *Id.* § 4(5).

In my opinion, the proposal is an excellent example of the new, ad hoc approach that acknowledges the difference between straightforward commercial arbitration and religious arbitration in family law – but also of family arbitration in general. The new section 9A would give relevance to "religious duress", offering the victim and qualified third-parties (for example, relatives or groups advocating for women's rights) a chance to bring the issue of non-genuine consent to the attention of the judge. Also, it would prevent the vitiated agreement from acquiring legal relevance. It may be even more accurate to think of genuine or informed consent as a prerequisite for arbitral proceedings. Ideally, parties should be aided by an independent family law professional, who would give advice on the possible procedure before national courts and on the consequences of the choice of arbitration. In her 2004 proposal addressed to the government of Ontario, Advocate General Marion Boyd maintained that the inclusion of "certificates of independent legal advice or explicit waivers [of such advice]" should become a validity requirement for any arbitration agreement concerning family law. Both Cox's Bill and Boyd's proposal rely on awareness of the possibilities offered by the legal system as an indicator of autonomous consent to religious arbitral proceedings. Yet, information may not be enough when secular alternatives do not represent a real option for the individual, who feels compelled to act within the standards of his or her religious community. Prof. Michael Helfand warned on this aspect: "The legal system should measure duress not by a secular yardstick, where the decision to be religious is optional, but in the case of *Beth Din* decisions, measure the reasonable person as an orthodox Jew who views religion as an unquestionable necessity"¹⁶⁷.

Other areas of arbitration law have triggered a reflection on consent and on the genuine freedom of the party to access certain arbitration agreements. It is the case of sport arbitration, when dealing with disputes that are also relevant to national legal systems. Arbitration is said to be a "mandatory alternative" for those athletes who wish to compete at the international level. In fact, sport federations unilaterally insert in their contracts arbitration clauses for disputes arising in the context of international championships (for example the UEFA

167. Fried, *The Collision of Church and State* at 653 (cited in note 160).

Cup and Olympics Games). Ultimately, to sign the agreement is mandatory for the athlete who wishes to compete. In the 2016 *Pechstein* case¹⁶⁸, the German Federal Tribunal (*Bundesgerichtshof*, hereinafter "BGH") reasoned that the "mandatory consent" to arbitration did not, after a detailed analysis, made the arbitration agreement invalid. The Court considered acceptable, following a balance between the athletes' rights and the federations' rights, to contractually impose the use of arbitration to the former party, provided that enough guarantees were offered. The proceedings before the Court of Arbitration for Sport (Lausanne, Switzerland) were undertaken according to procedural rules evaluated as fair, in light of the fundamental principles of German procedural law, and even the composition of the tribunal was considered to ensure sufficient impartiality¹⁶⁹. The line of reasoning of the BGH offers an interesting perspective for the reflection on the problem of consent before religious tribunals. The BGH considered legitimate an attenuation of the freedom to consent to arbitration only when balanced against high standards of procedural and substantive guarantees. The existence of the necessary safeguards needs to be assessed case-by-case, mirroring Justice Baker evaluation of the New York *Beth Din's* proceedings in *AI v. MT*¹⁷⁰. When it is verified that arbitration before a religious court ensures a degree of protection of the individual's fundamental rights that is equal to the one granted by secular justice, then it is reasonable for the legal system to take a step back and leave the choice of a religious alternative to the domain of personal autonomy.

3.4.2. *Due Process: Gender Equality Before Religious Tribunals*

It is commonly objected that religious laws apply different standards to women and men, due to the social role attached to women in patriarchal societies. Professor Manea brings abundant evidence

168. Bundesgerichtshof, KZR 6/15, *Pechstein v. International Skating Union*, 210 BGHZ 292 (2016).

169. See *id.* para. 49–50. For a case commentary see Elena Zucconi Galli Fonseca, *Arbitrato dello sport: l'attesa decisione della corte suprema tedesca nel caso Pechstein*, 32 *Rivista dell'arbitrato* 131 (2017). See also Elena Zucconi Galli Fonseca, *Arbitrato nello sport: una better alternative*, 1 *Rivista di diritto sportivo* 1 (2016).

170. *AI v. MT*, EWHC (Fam.) 100 (2013).

of this¹⁷¹ and I will limit myself to refer some examples: according to Islamic law a daughter should inherit from her father half of the quota received by her brother¹⁷² or a Jewish woman will not be able to remarry unless the husband freely consents to grant a *Get*¹⁷³, while he can religiously marry again. As a signatory of the 1986 Convention on the Elimination of all Forms of Discrimination Against Women, the United Kingdom is committed to promote gender equality, to fight existing disparities and to sanction unequal treatments¹⁷⁴. It is therefore clear that an award or a settlement in family law that applies discriminatory principles on the substance will not be considered as a suitable base for a consent order by family courts. When presented with determination from religious courts, judges should be prepared to take into account also forms of procedural discrimination, that may be less evident from an analysis of the arbitral award or of substantial principles applied. In this respect Professor Alison Diduck may be right in accusing Justice Baker's approach in *AI v. MT* of not being sufficiently attentive. In terms of access to justice, women within close religious communities may face particular difficulties in being adequately represented by counsels¹⁷⁵ during the arbitral proceedings. Specific procedural rules may be an obstacle to equality: traditionalistic Islamic law, for example, considers the testimony of a man to equal that of two women. Even when this rule is not applied, it creates an environment that minimize the woman's claims, while taking in greater consideration the requests and arguments of the man¹⁷⁶. The AA 1996 may offer some specific protections in this respect, without recurring to broad – yet legitimate – public policy arguments. Under section 33 the arbitral tribunal has an imperative duty to guarantee an equal treatment for the litigants and to ensure each of them a reasonable opportunity to present his or her case. Section 68 allows to

171. See Manea, *Women and Shari'a Law* at 124–127 (cited in note 19).

172. *Id.* at 126.

173. See note 34.

174. See Jemma Wilson, *The Sharia Debate in Britain: Sharia Councils and the Oppression of Muslim Women*, 1 *Aberdeen Student Law Review* 46 (2010).

175. See *General recommendation No. 33 on women's access to justice*, Committee on the Elimination of Discrimination against Women, 61st session (August 3, 2015), UN Doc. CEDAW/C/GC/33.

176. See Manea, *Women and Shari'a Law* at 101 (cited in note 19).

challenge the arbitral award when serious irregularities occurred in the proceedings that "caused or will cause substantial injustice to the applicant", including any breach of the tribunal's duties under section 33¹⁷⁷. The broad drafting of these provisions allows to interpretatively include gender bias. In this regard, Baroness Cox's Bill proposed an amendment to the Arbitration Act that commendably aimed at making explicit the invalidity of any agreement to arbitrate that applies discriminatory terms¹⁷⁸. Discrimination is correctly intended in a double meaning. On the one side, it is the application to the matter of the dispute of principles that unlawfully differentiate rights and obligations of the parties based on their gender. On the other, discrimination refers to the application of procedural principles that put women in a less favourable position than men to have the case decided in their favour. The proposed revision emphasizes the latter aspect, prescribing that no rule of an arbitration process shall provide that "the evidence of a man is worth more than the evidence of a woman, or vice versa"¹⁷⁹. In a sense, the provision is reassessing something obvious. Yet, it would contaminate the framework of commercial arbitration with a new awareness of the problem of gender-based discrimination. The result would be the construction of a new series of procedural guarantees that, even if structurally unrelated to commercial controversies, would make arbitration suitable for family disputes applying religious laws.

4. Religious Arbitration as a Manifestation of "Weak" Legal Pluralism: the Comparative Perspective

4.1. Religious Arbitration as a Manifestation of "Weak" Legal Pluralism

The phenomenon to which I referred as "religious arbitration" or "faith-based arbitration" in family law can be analyzed in the perspective of the field of study known as "legal pluralism". Legal pluralism is a concept as fascinating as it is ambiguous. Its multiple meanings and

177. Arbitration Act 1996 § 68(2)(a).

178. Arbitration and Mediation Services (Equality) HL Bill (2015-2016) 12 § 3.

179. *Id.*

applications in various knowledge domains – from sociology, to legal anthropology, to political sciences and many others¹⁸⁰ – give rise to a lively academic debate. I originally assumed that I could excuse myself from entering this discussion, to which I feel I do not have much to offer. Yet, I later realized that the scholarship on legal pluralism provides precious lenses to look at religious arbitration. Without the necessary theoretical background, national laws fail in their attempt to address, regulate – or even fight – the issue of religious adjudication. It may be ultimately more efficient to put some effort into looking at the broader picture, making a conscious choice about the kind of legal system that would be desirable to promote. In his 1986 influential article *What Is Legal Pluralism?*¹⁸¹, Professor John Griffiths defines legal pluralism as the result of the coexistence in a society of many rule-generating fields that forms different legal orders¹⁸². These include “[t]he family, corporations, factories, sports leagues, and indeed just about any social arena with social regulation”¹⁸³. Among these, the religious legal order – yet being part of the culture of each society – “merits separate mention for the reason that it is often seen by people within a social arena as a special and distinct aspect of their existence”¹⁸⁴. It seems reasonable to consider a religious court as the manifestation of a legal order, being it the body entitled to the task of adjudicating disputes within a certain organized community or social field. Religious courts and tribunals are “forms of ordering that may be perceived as ‘legal’ but do not rely upon state law to determine their power and

180. See Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 *Sydney Law Review* 375 (2008); Paul S. Berman, *The New Legal Pluralism*, 5 *Annual Review of Law Social Science* 225 (2009).

181. See John Griffiths, *What Is Legal Pluralism?*, 18 *The Journal of Legal Pluralism and Unofficial Law* 1 (1986). A relatively unknown forerunner of Griffiths was Santi Romano, an Italian scholar of the early 20th Century. His seminal work published in 1913, recently translated into English, was extremely innovative in discussing the idea of the existence of a plurality of legal orders. See Santi Romano, *The Legal Order* (Routledge 2017) (Mariano Croce, trans.). See also Filippo Fontanelli, *Santi Romano and L'ordinamento giuridico: The Relevance of a Forgotten Masterpiece for Contemporary International, Transnational and Global Legal Relations*, 2 *Transnational Legal Theory* 67 (2011) (on the influence of Romano's work on the contemporary scholarship).

182. See Griffiths, *What Is Legal Pluralism?* at 38 (cited in note 181).

183. Tamanaha, *Understanding Legal Pluralism* at 30 (cited in note 180).

184. *Id.* at 39.

authority"¹⁸⁵. The scholarship on legal pluralism has been focusing on the interaction among the "official" legal system – to which it may be referred to as "the State" – and other legal orders. Generally, the literature focused on the perception that the former has of the latter. It is held that this "unilateral acknowledgement" may be fashioned in two ways¹⁸⁶. In the first scenario, the State guarantees legal status to other normative systems, for instance it incorporates or recognizes "legal value" to some religious norms within its own law. This may happen by recognizing that certain minorities are subject to alternative sets of rules. For example, British colonial law in India included Muslims and Hindu personal law, depending on the cultural identity of the subject to which it was applied¹⁸⁷. Differently, the State may grant legal relevance within its own court systems (that is, to enforce and recognize) to decisions taken in the other legal order. In Israel, the Ministry of Justice licenses and manages courts applying *Sharia* since 2001¹⁸⁸. They have a recognized jurisdiction, limited on personal status issues within the Muslim community. This is an example of what Griffiths refers to as "weak" legal pluralism: pluralism is conceived through the centralization into the official legal system of normative rules from other orders¹⁸⁹. The system resulting from such centralistic approach is a "juristic" construction, the product of the work of lawyers¹⁹⁰. In the opposite scenario, instead, any form of official recognition is simply denied. Yet religious norms and institutions are "viewed as 'legal' on their own terms"¹⁹¹ by believers and they are duly obeyed. In Griffiths's view this is pluralism in its "strong" or "socio-scientific" form, where two or more independent bodies of law coexist¹⁹². To explain this, Professor emeritus Jacques Vanderlinden adopts "the standpoint of

185. Samia Bano, *Islamic Family Arbitration, Justice and Human Rights in Britain*, 10 *Journal of Law, Social Justice and Global Development* 2, 8 (2007).

186. See *id.* and Edge, *Islamic Finance, Alternative Dispute Resolution and Family Law* at 138 (cited in note 121).

187. See Bernard S. Cohn, *Colonialism and Its Forms of Knowledge: The British in India* 57–75 (Princeton University Press 1996).

188. Ministry of Justice of Israel, *The Sharia Courts*, available at <https://www.justice.gov.il/En/Units/ShariaCourts/Pages/default.aspx> (last visited March 25, 2019).

189. See Griffiths, *What Is Legal Pluralism?* at 5 (cited in note 181).

190. *Id.* at 5.

191. Tamanaha, *Understanding Legal Pluralism* at 39 (cited in note 180).

192. Griffiths, *What Is Legal Pluralism?* at 38 (cited in note 181).

the individual"¹⁹³: pluralism exists when "more than a single legal order mee[t] at the level of a 'sujet de droits'"¹⁹⁴, that is, different orders assess the acts of the single subject in light of their specific sets of values. Prof. Ian Edge uses the label "unofficial legal pluralism":

Its proponents see this as a purely descriptive state of affairs in which more than one legal or cultural order operates within a given social field; legal pluralism, therefore, is simply seen as a statement about social reality in that people may be subject to or may follow more than one rule system. ... Religious communities such as Jews or Muslims abide by practices which they accept as obligatory, but which are not enforced by the state¹⁹⁵.

This dissertation inquired whether, and to what extent, laws in force – specifically, English law and soft law for family arbitration – have the potential to accommodate 'religious' means of dispute resolution. This empirical form of pluralism falls in Griffiths' "weak" categorization. In fact, it deals with the construction of a pluralistic vision of the individual's private life within the "official" legal order, provided that any alternative conception demonstrates to be compatible with the former. Borrowing Archbishop Williams's words¹⁹⁶, this kind of legal acknowledgement of religious norms "does not leave blank cheques". The prerequisite for recognition is – and must be – absolute compatibility with Western fundamental values. In contemporary legislation it is often the case, as Prof. Edge highlights, that religious minorities are accorded exceptions to English laws, so to be able to follow their own principles:

For example, by accepting religious methods of animal slaughter or allowance for religious dress or ... by providing for special

193. Jacques Vanderlinden, *Return to Legal Pluralism: Twenty Years Later*, 21 *The Journal of Legal Pluralism and Unofficial Law* 149 (1989).

194. *Id.* at 157.

195. Edge, *Islamic Finance, Alternative Dispute Resolution and Family Law* at 139 (cited in note 121). See also Ido Shahar, *Legal Pluralism and the Study of Shari'a Courts*, 15 *Islamic Law and Society* 112 (2008).

196. See Williams, *Civil and Religious Law in England* at 20–34 (cited in note 2).

tax rules to promote religious types of contract. In a sense this is not making the state pluralistic but merely accepting that state law should accommodate as much as possible the desires of minorities to be governed according to their religious or cultural norms provided always that they are applied within the strictures of state law¹⁹⁷.

If religious principles are able to provide substantial guidelines to arbitration, are there any reasons to reserve a different treatment to believers seeking guidance within their faith for dispute resolution on family-law matters? It may be so – considering the current state of the art – as I suggested when dealing with the problem of consent (see sub-paragraph 3.4.1) and gender discrimination (see sub-paragraph 3.4.2). Yet, as the interplay between legal orders is necessarily said to bring reciprocal interferences and modifications¹⁹⁸, so the model of "weak" pluralism within family law would require some adjustments to the current legal framework. Arbitration law should be better equipped to fit religious courts, specifically it should be implemented to provide further guarantees against human rights violations.

4.2. *Comparing Different Approaches*

The theoretical framework of legal pluralism – and the identification of religious arbitration as a manifestation of "weak" pluralism¹⁹⁹ – may be of use to pursue a comparative analysis on how different national legal orders are facing this phenomenon. It is certain that, in the latest decades, most of the Western countries had to confront themselves with religious pluralism, following the migration waves from the Global South. The way toward social inclusion of religious

197. Edge, *Islamic Finance, Alternative Dispute Resolution and Family Law* at 139 (cited in note 121).

198. See Berman, *The New Legal Pluralism* at 237 (cited in note 180).

199. See Jan Paulsson, *Arbitration in Three Dimensions*, 60 *International & Comparative Law Quarterly* 291 (2011) (for an approach that emphasizes the pluralistic element in arbitration); Maria Reiss, *The Materialization of Legal Pluralism in Britain: Why Shari'a Council Decisions Should Be Non-Binding*, 26 *Arizona Journal of International and Comparative Law* 739 (2009) (specifically on religious arbitration in the English context).

minorities appears to be at a particularly early stage in those countries where, in the past, the population had uniform religious and cultural backgrounds. To further complicate any attempt to comparatively analyze the phenomenon of religious arbitration in family law, different legal traditions show divergent approaches toward arbitration and arbitrability of family matters. Generally, arbitration of family law disputes is somehow considered as the new frontier for this mechanism of dispute resolution: most of the jurisdictions in the world still consider that reasons of public policy justify the exclusive competence of national courts²⁰⁰. Among the arguments that are said to militate in favor of the non-arbitrability of family disputes, it is worth mentioning two. First, the aim to protect traditionally vulnerable parties by limiting damages that may occur to them in the context of separation or divorce agreements. Second, the attempt to reduce the burden on the national welfare systems that may otherwise be caused by unbalanced financial arrangements among the parties following the marriage breakdown²⁰¹. Both aims are reached at the jurisdictional level through the control function that national courts exercise over family law dispute settlements. In some countries such as England, this judicial control is being, however, lessened in favor of the individual's autonomy to determine the modalities and possibly the terms of settlement of the disputes in which he or she is involved (that is, the above-mentioned privatization or de-judicialization of divorce and separation proceedings). Furtherly, in an even more restricted number of countries the process of privatization has led to the introduction of family arbitration. "[P]olicies favoring private ordering" – notes Dr. Wendy Kennett²⁰² – "combined with pressures on family courts have encouraged reconsideration of the policy issues. This is notably true in common law jurisdictions. Similar developments in

200. Influential textbooks of international and comparative arbitration show family law as outside the perimeter of those disputes that the parties' contractual will may validly defer to an arbitral tribunal. See Blackaby et al., *Redfern and Hunter on International Arbitration* at 110 (cited in note 123); Loukas A. Mistelis and Stavros L. Brekoulakis (eds.), *Arbitrability: International and Comparative Perspectives* 15 (Kluwer Law International 2009); Jean-François Poudret et al., *Comparative Law of International Arbitration* 289 (Sweet & Maxwell 2nd ed. 2007) (Stephen Berti and Annette Ponti, trans.).

201. See Jan Paulsson, *The Idea of Arbitration* 117 (Oxford University Press 2013).

202. Kennett, *It's Arbitration, But Not as We Know It* at 1 (cited in note 152).

civil law jurisdictions are inhibited by the wording of national civil codes".

It could be argued that also civil law jurisdictions – though not to the degree of common law countries – show a certain tendency toward privatization of family law. Italy, for example, has recently introduced a non-judicial form of dispute resolution in family law. Law no. 162/2014²⁰³ establishes, in fact, that parties may agree to undergo a "negoziante assistita", that is an "assisted negotiation" procedure to settle disputes in separation and divorce cases, as well as other financial disputes between the spouses, provided that there are no underage or non-self-sufficient children involved. The negotiation among the parties is assisted by the parties' lawyers – strictly one for each party²⁰⁴. The final agreement acquires the value of a judicial decree of divorce or separation, following a positive evaluation from the public prosecutor. The Italian scholarship²⁰⁵ started investigating to what extent this new extrajudicial means of dispute resolution is overruling the idea of family law rights as rights which cannot be adjusted by the parties – and therefore which cannot be the object of arbitral proceedings – according to article 806 of the Italian Code of Civil Procedure. This "assisted negotiation" procedure certainly represents an important step in the granting of greater autonomy to parties in family law matters. Italy is not an isolated case: all over Europe extrajudicial procedures entrust public notaries for the settlement of disputes in the context of separation and divorce proceedings. Uncontroversial divorces and separations may be granted by public notaries in Latvia²⁰⁶ and

203. Decreto-legge no. 132/2014, converted into legge no. 162/2014.

204. This is an exception to the general framework for assisted negotiation, where one lawyer can represent both parties if so agreed. The legislator (legge no. 162/2014 art. 6(1)) establishes that family law disputes require the two sides to be distinctively represented in order to avoid conflicts of interests. See Michele Angelo Lupoi, *Le tutele legali nella crisi di famiglia* 456 (Maggioli 2018).

205. See Elena Zucconi Galli Fonseca, *Arbitrato e famiglia: una via possibile?*, 65 *Rivista trimestrale di diritto e procedura civile* 141 (2011); Filippo Danovi, *L'arbitrato di famiglia in Italia, tra antitesi e possibili consonanze*, 26 *Rivista dell'arbitrato* 49 (2016).

206. See *Notariāta likums* (Notariate Law) art. 325–339.

Romania²⁰⁷, as well by the administrative authority in Portugal²⁰⁸. In France, public notaries can dissolve civil unions but not marriages²⁰⁹.

Taking after Kennett's observation above, it remains true that some provisions of national civil codes and codes of civil procedure expressly exclude arbitration on separation, divorce, and other matrimonial issues (for example the French and Spanish codes²¹⁰). However, for most of the other legislative provisions it is indeed the way those norms are traditionally interpreted that excludes family law disputes from the perimeter of action of arbitration. As said above, in Italy each controversy concerning rights of which the parties can freely dispose is deemed to be arbitrable²¹¹. The German Civil Code provides for the arbitrability of any dispute involving pecuniary interests²¹². Both Italian and German scholars argue for the arbitrability of disputes on patrimonial rights following the dissolution of marriage²¹³, while claims concerning the change of marital status and arrangements for children are categorically excluded. Notwithstanding favorable theoretical premises, this practice is substantially null in Italy: there are no institutions offering family arbitration services and the case law is limited to a judgement in the 1950s²¹⁴. In Germany, instead, there are several functioning family arbitration tribunals, which operate according to their own arbitration rules²¹⁵. Yet, there is no case law on the enforcement of a family law award from a religious court to this date. Most of the European civil law jurisdictions, unable

207. See Romanian Civil Code art. 375–378.

208. See decreto-lei no. 272/2001 art. 14.

209. See French Civil Code art. 515–517.

210. See French Civil Code art. 2060 ("One may not enter into arbitration agreements in matters of status and capacity of the persons, in those relating to divorce and judicial separation or on controversies concerning public bodies and institutions and more generally in all matters in which public policy is concerned"); Spanish Civil Code art. 1814 ("It is not possible to reach a settlement in respect of the civil status of persons, matrimonial issues or future support").

211. See Italian Code of Civil Procedure art. 806.

212. See German Civil Code art. 1030.

213. See Laura Baccaglini, *Arbitration on Family Matters and Religious Law: A Civil Procedural Law Perspective*, 5 *Civil Procedure Review* 3, 12 (2014).

214. Corte di Cassazione, 2 agosto 1954, n. 2925.

215. The best known is the Süddeutsches Familienschiedsgericht in Munich, whose website is available at <http://www.familienschiedsgericht.de> (last visited March 25, 2019).

to overcome the wall of non-arbitrability, remain outside the debate around family arbitration and faith-based arbitration. Moreover, the fact that family law matters are considered non-arbitrable basically prevents the enforcement of foreign arbitral awards that touch upon these issues. In fact, article V(2)(a) of the 1958 New York Convention allows each country to refuse enforcement or recognition of a foreign award when "the subject matter of the dispute is not capable of settlement by arbitration under the law of that country". Ultimately, European civil law jurisdictions are not embracing the idea of "weak" pluralism as the process of acknowledging faith-based adjudication through the categories and frameworks of national arbitration laws. They are ignoring these parallel legal systems despite their existence – with different extensions and forms – in European countries²¹⁶. In a minority of jurisdictions, instead, acknowledgement of the role of religious courts in family dispute resolution has taken place. One of these is England, where the ongoing public debate (see subparagraph 2.1) starting with Archbishop Williams's 2008 speech has reached its climax with Baroness Cox's battle in Parliament. IFLA arbitration is providing a brand-new framework – though not a legal framework – for this arbitration to become efficient for the user. Under the auspices of the *AI v. MT* judgement, religious courts are equally entitled to operate as arbitral tribunals in family law matters and it is highly likely that a practice will develop soon. Following the publication of the 2018 Independent Review, the English legislator seems to be intervening on religious courts. A decade ago a similar situation happened in the Canadian province of Ontario, where, after a lively public debate, a controversial position on religious family arbitration was taken. As a premise, it is important to consider that Canada has a longstanding tradition in promoting arbitration. In the Province of Ontario, under the framework of the Arbitration Act 1991 in combination with the Family Law Act 1990, couples could enter into "marriage and separation agreements that define each spouse's respective rights relating to property, support, children, and any other matter in the settlement

216. See, as a general reference for Muslim communities, Maurits S. Berger, *Understanding Sharia in the West*, 6 *Journal of Law, Religion and State* 236 (2018).

of their affairs"²¹⁷. These contracts may include binding arbitration clauses. Prior to 2006, parties could agree on any substantial law to be applied by the arbitral tribunal to adjudicate their disputes, provided that it did not amount to a breach of Ontarian law. The Ontarian legal system was an interesting example of a pluralistic approach to family law, where religious communities could adjudicate according to their own principles – within the limits of the "law of the land". This state of affairs left many possibilities open to religious arbitration and the Islamic Institute of Civil Justice (hereinafter "IICJ") started developing a framework for Islamic arbitration²¹⁸. As the public debate around the IICJ became particularly tense²¹⁹, the Government decided to take a strong action on religious courts operating in the Ontarian territory. The decision was taken regardless of the 2004 Report²²⁰ by the Advocate General Boyd, that gave a positive picture of religious arbitration, although recommending some improvements to the existing legislation. The measure²²¹, that took the form of an indirect ban, *de facto* limited the effects of awards resulting from religious arbitration proceedings. Arbitrators' decisions that apply family law other than the law of Ontario or of other Canadian provinces would only have an advisory function: Ontarian courts would no longer enforce them²²². It could be argued that this approach represents a poor response to the concerns for human rights violations and gender-based discrimination that led the Ontarian government to adopt the amendment. The decision to quit "weak" pluralism in favor of denial, in fact, does not tackle the problem of clashes between norms from

217. Bilal M. Choksi, *Religious Arbitration in Ontario: Making the Case Based on the British Example of the Muslim Arbitration Tribunal*, 33 *University of Pennsylvania Journal of International Law* 791, 797 (2012).

218. *Id.* at 794.

219. See Donald Brown, *A Destruction of Muslim Identity: Ontario's Decision to Stop Shari'a-based Arbitration*, 32 *North Carolina Journal of International Law and Commercial Regulation* 495, 499 (2007).

220. See Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*, report to the Ministry of the Attorney General of Ontario (2004). The executive summary of the report is available at <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesummary.html> (last visited March 25, 2019).

221. Family Statute Law Amendment Act 2006.

222. See Family Law Act § 59(2).

different legal orders. The literature on pluralism is used to discuss this type of conflicts between "coexisting normative systems"²²³. Liberal individualist cultural norms, such as most of the codified human rights norms, may be incompatible²²⁴ with religious norms, which are occasionally non-liberal: "The most commonly cited clashes surround the position and treatment of women, family related issues, and caste related issues – including child marriages, arranged marriages, divorce rights, inheritance rights, property rights, treatment of low caste, and religious imposed punishments"²²⁵. The indirect ban leaves incompatibilities untouched: "I believe that faith-based arbitration will continue – denounced Advocate General Boyd commenting on the amendment – and that, since it will operate outside the law, there is no guarantee that individual rights will be respected and that coercion will not prevail"²²⁶. Religious arbitrations may only become more secretive, potentially continuing to apply discriminatory principles. The State seems to abandon its duty to police the respect of human rights, using the shield of the non-enforceability of these decisions issued by religious courts. Moreover, the indirect ban appears to promote social isolation of religious minorities. This dissertation provides several arguments against the adoption of the Ontarian "solution" to the "problem" of religious courts. This may apply to any jurisdiction that will come across a similar choice: considering the tendency toward privatization of family law in the civil law jurisdictions, European countries may be called soon to adopt some measures on religious arbitration. In this respect, I regard England as a positive example, where a serious debate is going on – albeit with ups and downs – on the identification of possible forms of accommodation of faith-based adjudicating bodies within the English legal system. "[I]nstead of trying to stifle legal conflict either through a reimposition of territorialist prerogative or through universalist harmonization schemes" – Prof. Paul S. Berman maintained in a 2007 article – "communities might seek (and

223. Tamanaha, *Understanding Legal Pluralism* at 43 (cited in note 180).

224. They are among the four most common orientation clashes for Tamanaha, *Understanding Legal Pluralism* at 56 (cited in note 180).

225. *Id.*

226. Marion Boyd, *Ontario's 'Shari'a Court': Law and Politics Intertwined*, in Griffith-Jones (ed.), *Islam and English Law*, 184 (cited in note 2).

increasingly are creating) a wide variety of procedural mechanisms and institutions for managing, without eliminating, pluralism"²²⁷.

This approach of "weak" legal pluralism, once duly implemented through the necessary reforms, would have the advantage to be sensible toward the religious needs of the individual, without renouncing the protection of fundamental values and rights.

5. Conclusion

I reviewed the scholarship that focused on the practices of religious courts in England. It is clear that further research on the matter would be highly beneficial, in terms of data collection and possibility to make sensible recommendations on the most critical issues. Yet, I valued as highly negative the approach taken by the 2018 Independent Review, that ultimately seems to look at religious courts as a phenomenon to fight.

The idea of allowing the believer to recur to the religious community appears in line with the increasing recognition, as promoted by the case law of the Family Division, of the individual's freedom of choice in the field of familiar relations. I tried to give an insight of how arbitration – a new entry among the family ADR – is becoming a tool to serve the purpose of parties' autonomy. Starting with the case law under the IFLA scheme, I reviewed the illuminating approach to a religious award undertaken by the Family Division of the High Court. On the other side, I took into consideration many concerns raised by religious arbitration. Specifically, I looked at two problems that should be evaluated before considering whether to attach legal value to religious awards adjudicating family law disputes: religious duress and unequal treatment between women and men.

The whole analysis brought me to a question: is the current framework for arbitration, shaped at the service of commercial disputes, suitable to sustain and regulate religious arbitration adjudicating family law disputes? The answer may be partially negative, at the current state of the art, for the reasons discussed, and for others that have not been specifically considered. Nevertheless, I conclude from my

227. Berman, *The New Legal Pluralism* at 238 (cited in note 180).

examination that Jewish and Islamic religious tribunals in England should be actively encouraged to apply the AA 1996. Simultaneously, most of the critical aspects of religious arbitration could be solved through attentive reforms, while developing an ad hoc legislative framework for family arbitration. This area of the law has the potential to become a model for its capability to promote pluralism and integration in multicultural societies.

Finally, I made some theoretical considerations on the divergent approaches that legal systems show toward religious arbitration and on the desirability of a model that accommodates different beliefs and principles within the limits of the "official" system (that is, "weak" pluralism). This – I argued – may potentially be a better solution than to deny pluralism, particularly in a sensitive context such as family law adjudication.