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Address Trento Student Law Review Association
c/o University of Trento, Faculty of Law
Via Verdi 53
38122 Trento (Italy)
Email trentostudentlawreview@unitn.it
Website https://thetslr.unitn.it

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La colpa in Agamben: Breve commento a *Karman*

Giada Coleschi*

Abstract: In *Karman: Breve trattato sull'azione, la colpa e il gesto*, ultimo lavoro del filosofo romano Giorgio Agamben, sono raccolte e sviluppate secondo direttrici inedite le ipotesi portanti della sua investigazione filosofica. Lungi dal voler rappresentare un'analisi sistematica dell'intero edificio filosofico agambeniano, non esauritosi con la conclusione del ventennale progetto di ricerca *Homo sacer*, il presente lavoro si propone di investigare la trattazione che il filosofo riserva, nel suo ultimo testo, ai concetti di "colpa" e alla "sanzione". Pur mostrando l'adesione a teorie controverse quali quella di Carl Schmitt sulla colpa e quella di Hans Kelsen sulle norme giuridiche, *Karman* rappresenta indubbiamente un interessante sviluppo nel percorso di pensiero di uno dei più importanti filosofi viventi, nonché un parziale punto di svolta nell'orizzonte teorico sinora tracciato da Agamben, con una inedita fascinazione orientale.

Parole chiave: Agamben; *karman*; *crimen*; colpa; sanzione.

Abstract: *In* Karman: A Brief Treatise on Action, Guilt, and Gesture*, the latest work of the Italian philosopher Giorgio Agamben, the central hypotheses of his philosophical investigation are gathered and expanded upon according to innovative directives. The present work is not intended to represent a systematic analysis of the entire agambenian philosophical construction. The purpose is that of scrutinising the concepts of "guilt" and "punishment". Even though Agamben adheres to the controversial theories of Carl Schmitt on guilt and of Hans Kelsen on legal norms, Karman undoubtedly represents an interesting development in the production of one of the most important philosophers alive, deepening and rearticulating some of Agamben's core insights.*

Keywords: *Agamben;* karman*;* crimen*; guilt; punishment.*

1. *Introduzione*

Benché, nel 2014, con la pubblicazione de *L'uso dei corpi* sia stato portato a conclusione il ventennale progetto di ricerca *Homo sacer*, dedicato al «nascosto punto d'incrocio fra il modello giuridico-istituzionale e il modello biopolitico del potere»[1], la carica disvelatrice di Giorgio Agamben non sembra affatto essersi esaurita. Nel suo ultimo lavoro, *Karman: Breve trattato sull'azione, la colpa e il gesto*, il filosofo romano raccoglie infatti le ipotesi portanti della sua investigazione filosofica per svilupparle ulteriormente.

In *Karman*, l'azione, la colpa e il gesto vengono esplorati tramite gli strumenti metodologici e i riferimenti teorici propri dell'investigazione agambeniana. Ritroviamo la prospettiva filologica e di archeologia del potere, i giuristi Carl Schmitt, Hans Kelsen e Yan Thomas, il filosofo Walter Benjamin, Franz Kafka, i testi romani di Cicerone, Festo, Gaio e Ulpiano. Tuttavia, nel testo si possono scorgere anche elementi di novità, dati da riferimenti inediti o inaspettati: infatti, nei capitoli centrali di *Karman*, lo studio dell'etimologia latina lungo le direttrici di Émile Benveniste lascia il posto a quello dell'etimologia sanscrita da parte di Adolphe Pictet, e Aristotele, sinora punto di riferimento della produzione filosofica di Agamben, viene progressivamente criticato, a lui contrapponendo Platone, Arthur Schopenhauer e, forse con «un'ardita torsione teorica»[2], Immanuel Kant.

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* Giada Coleschi, laureata in Giurisprudenza presso l'Università Bocconi dopo periodi di studio presso la New York University e la University of New South Wales, studia filosofia presso l'Università di Siena. Si è occupata di affari umanitari, migrazione e giustizia minorile. È volontaria di un'organizzazione umanitaria dove si dedica alle persone in condizioni di vulnerabilità, alla cooperazione internazionale e alla sensibilizzazione sui temi dei conflitti armati, delle migrazioni e delle diseguaglianze.

1. Giorgio Agamben, *Homo sacer: Il potere sovrano e la nuda vita*, Einaudi, Torino, 2005 [1995], p. 9.

2. Antonio Lucci, *Giorgio Agamben. Innocenza radicale* (Doppiozero, 26 settembre 2017), disponibile all'indirizzo http://www.doppiozero.com/materiali/giorgio-agamben-innocenza-radicale (visitato il 25 marzo 2019).

Il primo capitolo del testo, *La causa e la colpa*, si apre con la seguente enunciazione: «I due concetti che servono da soglia all'edificio del diritto – causa e colpa – mancano di un'etimologia»[3]. Ed è proprio in queste prime righe che il filosofo enuncia l'ipotesi che svilupperà compiutamente nelle pagine successive: "causa" e "colpa" sono concetti-soglia, liminari, a tal punto fondativi del pensiero giuridico, morale e politico dell'Occidente da rimanere oscurati da questa loro stessa costitutività. Delimitare la soglia dell'edificio del diritto significa, per Agamben, essere non già concetti giuridici in senso stretto, bensì «il punto in cui un certo atto o fatto entra nella sfera del diritto»[4]. Così, partendo dalla bipolarità del termine attestata da Yan Thomas, "causa" è una certa situazione, una "cosa" in sé stessa non giuridica, nell'atto in cui viene inclusa nell'ambito del diritto: nelle parole di Gaio, *res, de qua agitur*. In questo contesto, si deve quindi restituire al verbo *agere* il significato originario che, secondo Agamben, sulla scorta di Thomas, ci è attestato da Festo e da Gaio: «*agere* significa *verbis indicare*»[5] e «colui che agiva, diceva queste parole»[6]. La *res, de qua agitur*, la cosa che è in questione nel diritto, dunque la causa, è innanzi tutto ciò che viene espresso in parole e mostrato nella formula dell'*actio*[7] giudiziaria («ideo inseritur, ut demonstretur res, de qua agitur»[8]).

3. Giorgio Agamben, *Karman: Breve trattato sull'azione, la colpa e il gesto*, Bollati Boringhieri, Torino, 2017, p. 9.

4. Ivi, p. 16.

5. Sesto Pompeo Festo, *Agere*, in *De verborum significatione*, I.

6. Gai 4.17a.

7. Il termine *actio*, da cui deriva "azione" e che, a partire dagli stoici, traduce il greco *praxis*, in origine appartiene dunque alla sfera giuridica e religiosa e non già a quella politica. *Actio* designa a Roma anzitutto il processo. Così, nelle *Institutiones* si nominano le tre grandi categorie del diritto romano: le *personae*, le *res* e le *actiones* (il diritto processuale). In origine, tuttavia, il verbo *ago* significava "celebrare un sacrificio" e, secondo taluni, è in virtù di questo originario significato che, nei più antichi sacramentari, la messa è l'*actio* e l'eucarestia è l'*actio sacrificii*. È opportuno osservare come sia un termine proveniente dalla sfera giuridico-religiosa ad aver fornito alla politica il suo concetto fondamentale. Si veda Giorgio Agamben, *L'uso dei corpi*, Neri Pozza, Vicenza, 2014, pp. 46–47; Odo Casel, *Actio in liturgischer Verwendung*, in *Jahrbuch für Liturgiewissenschaft*, 1921, p. 39; Anton Baumstark, *Liturgia romana e liturgia dell'esarcato: Il rito detto in seguito patriarchino e le origini del* canon missae *romano*, Libreria pontificia di Federico Pustet, Roma, 1904, pp. 38–39.

8. Gai 4.40.

Nelle parole di Agamben:

> come nel vocabolario filosofico l'essere è ciò è "chiamato in causa" nel discorso, così, nella terminologia del diritto, causa è una situazione in quanto è "chiamata in causa" in un processo: in entrambi i casi, se si restituisce alla parola il suo rango ontologico, in questione è la "cosa" del linguaggio – la soglia in cui essa viene *catturata* e *inclusa* nell'ordine corrispondente[9] [enfasi aggiunta].

Quella di colpa è invece «una soglia funesta, perché conduce in una regione dove le nostre azioni e i nostri gesti perdono ogni innocenza e si assoggettano a una potenza estranea: la pena, che significa tanto il prezzo da pagare che una sofferenza di cui non sappiamo darci ragione»[10]. È quindi il concetto di "pena" che permette l'entrata delle nostre azioni e dei nostri gesti nell'edificio del diritto. Riprendendo la teorizzazione operata da Carl Schmitt, non esiste "colpa" senza "pena": al di fuori dell'edificio del diritto non esiste la "colpa", ma solo una radicale innocenza del vivente.

Nei capitoli successivi del testo, *Crimen e Karman* e *Le aporie della volontà*, il carattere liminare di "causa" (nel senso di "azione") e "colpa" viene messo in luce riflettendo sulla stringente corrispondenza tra il latino *crimen*, designante l'azione umana in quanto imputabile e sanzionata, dunque all'interno dell'edificio del diritto, e il sanscrito *karman*, contrassegnante l'agire generatore di conseguenze[11]. L'origine del latino *crimen* viene rinvenuta nel sanscrito *karman*. L'accostamento *crimen*/*karman* corrisponde per Agamben a una prossimità concettuale forte e stringente: il mondo retto dalla legge del *karman*, vale a dire dall'infinita connessione di azioni e conseguenze, risponde al medesimo principio cui risponde il *crimen* del diritto romano arcaico: «se A, allora B», «esistendo questo, esiste quello» (*imasmim sati, idam hoti*[12]).

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9. Agamben, *Karman*, p. 15 (citato alla nota 3).

10. Ivi, p. 17.

11. Gli indologi parlano di una connessione essenziale (*rta*) «tra gli atti e le loro conseguenze»: Lilian Silburn, *Instant et cause: Le discontinu dans la pensée philosophique de l'Inde*, Librairie philosophique J. Vrin, Paris, 1955, p. 192.

12. Si veda Raniero Gnoli (a cura di), *La rivelazione del Buddha*, I, Mondadori, Milano, 2001, p. XXVIII; cfr. Silburn, *Instant et cause*, p. 169 (citato alla nota 11).

Così, Agamben individua nell'accostamento *crimen/karman* la chiave di volta senza la quale crollerebbero sia l'edificio dell'etica e della politica occidentali, sia il soggetto libero e responsabile che dell'accostamento è il presupposto e l'effetto. La presa della sanzione sul soggetto si rinsalda sempre più proprio nel momento in cui – con la patristica – la nozione di libero arbitrio spodesta il primato aristotelico della potenza e assicura la sovranità della volontà. Secondo Agamben, il concetto di "volontà" non è altro che lo strumento teorico tramite il quale un'azione può legarsi inscindibilmente a un soggetto: quest'ultimo diviene «centro di imputazione dell'azione volontaria»[13]. Per inceppare il dispositivo volontà-azione-imputazione è necessario, per il filosofo, uscire dal paradigma della finalità, giacché «il fine non è che il punto di fuga che, già a partire dalla *proairesis* aristotelica, le intenzioni e le azioni di un soggetto proiettano davanti a lui»[14] e «il soggetto dell'azione non è che l'ombra portata che il fine getta dietro di sé»[15]. Come indica già il titolo del capitolo conclusivo del testo, occorre andare *Al di là dell'azione*. Contro la signoria dei fini va ripensata una politica di mezzi puri, già da Walter Benjamin affidata al gesto inoperoso, capace di disattivare le opere umane e destinarle «a un nuovo, possibile uso»[16].

Quelli di "uso" e di "gesto inoperoso" non sono concetti inediti nell'investigazione agambeniana. Da ultimo, ne *L'uso dei corpi*, il filosofo scrive che l'ipotesi della ricerca condotta nel testo è «quella di provare a pensare l'uso come categoria politica fondamentale»[17], revocando in questione la centralità dell'azione – posta, da Aristotele in poi, a fondamento della politica – e del fare – di cui Hannah Arendt riconosce la progressiva sostituzione, nel corso dell'età moderna, all'agire, spiegando così la decadenza della politica con la sostituzione dell'*homo faber* e, successivamente, dell'*homo laborans* all'attore politico. Nello stesso testo, scrive ancora Agamben:

13. Agamben, *Karman*, p. 127 (citato alla nota 3).
14. *Ibidem*.
15. *Ibidem*.
16. Ivi, p. 138.
17. Agamben, *L'uso dei corpi*, p. 46 (citato alla nota 7).

> Ciò che chiamiamo forma-di-vita non è definito dalla relazione a una prassi (*energeia*) o a un'opera (*ergon*), ma da una potenza (*dynamis*) e da una inoperosità. Un vivente, che cerchi di definirsi e darsi forma attraverso la propria operazione, è, infatti, condannato a scambiare incessantemente la propria vita con la propria operazione e viceversa. Si dà, invece, forma-di-vita solo là dove si dà contemplazione di una potenza. Certo contemplazione di una potenza si può dare soltanto in un'opera; ma, nella contemplazione, l'opera è disattivata e resa inoperosa e, in questo modo, restituita alla possibilità, aperta a un nuovo possibile uso. Veramente poetica è quella forma di vita che, *nella propria opera*, contempla la propria potenza di fare e di non fare e trova pace in essa. ... Un vivente non può mai essere definito dalla sua opera, ma soltanto dalla sua inoperosità, cioè dal modo in cui, mantenendosi, in un'opera, in relazione con una pura potenza, si costituisce come forma-di-vita, in cui *zoè* e *bios*, vita e forma, privato e pubblico entrano in una soglia di indifferenza e in questione non sono più la vita né l'opera, ma la felicità. ... La forma-di-vita non può né riconoscersi né essere riconosciuta, perché il contatto fra vita e forma e la felicità che in essa sono in questione si situano al di là di ogni possibile riconoscimento e di ogni possibile opera. La forma-di-vita è, in questo senso, innanzitutto l'articolazione di una zona di irresponsabilità, in cui le identità e le imputazioni del diritto sono sospese[18].

In *Mezzi senza fine: Note sulla politica*, il filosofo, nell'interrogarsi su cosa sia il "gesto", riprende un'osservazione di Varrone, distinguendo così nettamente il "gesto" sia dall'agire (*agere*) che dal fare (*facere*)[19]. Ciò che caratterizza il "gesto", per Agamben come per Varrone, è che

18. Ivi, pp. 313–314.

19. «Si può infatti fare qualcosa e non agirla, come il poeta che fa un dramma, ma non lo agisce [nel senso di "recitare una parte"]: al contrario, l'attore agisce il dramma, ma non lo fa. Analogamente il dramma è fatto dal poeta, ma non è agito; dall'attore è agito, ma non fatto. Invece, l'*imperator* [il magistrato investito del potere supremo], rispetto al quale si usa l'espressione *res gerere* [compiere qualcosa, nel senso di assumerne l'intera responsabilità], in questo né fa, né agisce, ma *gerit*, cioè sopporta»: Marco Terenzio Varrone, *De lingua Latina*, VI, VIII, 1.

in esso non si fa né si agisce, ma si assume e si sopporta[20]. Secondo il filosofo, la distinzione varroniana tra *facere* e *agere* deriva da Aristotele, il quale, in un celebre passo dell'*Etica nicomachea* così li oppone: «Il genere dell'agire [*praxis*] è diverso da quello del fare [*poiesis*]. Il fine del fare è, infatti, altro del fare stesso; il fine della prassi non potrebbe, invece, essere altro: agire bene è, infatti, in se stesso il fine»[21]. Diversamente da Varrone, Aristotele identifica, accanto all'agire e al fare, una terza categoria: se la *poiesis* è un mezzo in vista di un fine e la *praxis* è un fine senza mezzi,

> il gesto spezza la falsa alternativa tra fini e mezzi che paralizza la morale e presenta dei mezzi che, *come tali*, si sottraggono all'ambito della medialità, senza diventare, per questo, dei fini. *... Il gesto è l'esibizione di una medialità, il render visibile un mezzo come tale*. Esso fa apparire l'essere-in-un-medio dell'uomo e, in questo modo, apre per lui la dimensione etica. ... Nel gesto, è la sfera non di un fine in sé, ma di una medialità pura [*milieu pur*, nelle parole di Mallarmé] e senza fine che si comunica agli uomini. Solo in questo modo l'oscura espressione kantiana «finalità senza scopo» acquista un significato concreto. Essa è, in un mezzo, quella potenza del gesto che lo interrompe nel suo stesso esser-mezzo e soltanto così l'esibisce, fa di una *res* una *res gesta*. *... La politica è la sfera dei puri mezzi, cioè dell'assoluta e integrale gestualità degli uomini*[22].

In *Stato di eccezione*, scritto molto prima di *Homo Sacer: Il potere sovrano e la nuda vita* e poi pubblicato come prima parte del secondo volume del progetto di ricerca ventennale, Agamben spiega i concetti di "mezzo puro" e "medialità senza fini" attraverso gli scritti di Walter Benjamin. Così, puro è un mezzo che

> pur restando tale, viene considerato indipendentemente dai fini che esso persegue. Il problema non è allora quello di

20. Si veda Giorgio Agamben, *Mezzi senza fine: Note sulla politica*, Bollati Boringhieri, Torino, 1996, p. 51.

21. Aristotele, *Etica Nicomachea*, VI, 1140b.

22. Agamben, *Mezzi senza fine*, pp. 51–53 (citato alla nota 20).

> identificare dei fini giusti, ma, piuttosto, «di individuare una violenza di altro genere, che certo non potrebbe essere mezzo legittimo o illegittimo a quei fini, ma che non si riferisca in generale ad essi come mezzo, ma in qualche altro modo»[23]. ... Il medio non deve la sua purezza a una qualche intrinseca proprietà specifica, che lo differenzia dai mezzi giuridici, ma alla sua relazione con questi. Come, nel saggio sulla lingua, pura è quella lingua che non è strumento al fine della comunicazione, ma comunica immediatamente sé stessa, cioè una comunicabilità pura e semplice, così pura è quella violenza che non si trova in relazione di mezzo rispetto a un fine, ma si tiene in relazione con la sua stessa medialità. E come la pura lingua non è un'altra lingua, non ha un altro luogo rispetto alle lingue naturali comunicanti, ma si mostra in esse esponendole come tali, allo stesso modo la violenza pura si attesta soltanto come esposizione e deposizione del rapporto tra violenza e diritto. ... Ad aprire un varco verso la giustizia è non la cancellazione, ma la disattivazione e l'inoperosità del diritto – cioè un altro uso di esso[24].

Come è stato correttamente osservato, *Karman* rappresenta uno sviluppo interessante nel percorso di pensiero di uno dei più importanti filosofi viventi, un parziale punto di svolta nel suo stesso orizzonte teorico, con un inedito "passaggio a Oriente" filosofico[25]. Qui concentreremo la nostra analisi sulla trattazione ivi riservata a "colpa", concetto che, insieme a quello di "causa", segna il punto in cui un certo atto o fatto entra nella sfera del diritto. Ed investigheremo poi la ricostruzione della sanzione operata da Agamben, adottando una prospettiva storica, una linguistica e una teorica.

23. Walter Benjamin, *Zur Kritik der Gewalt*, in Id., *Gesammelte Schriften*, II, 1, Suhrkamp, Frankfurt am Main, 1991 [1921], p. 196.

24. Giorgio Agamben, *Lo stato di eccezione,* Bollati Boringhieri, Torino, 2003, pp. 80–83.

25. Si veda Lucci, *Giorgio Agamben. Innocenza radicale* (citato alla nota 2).

2. *La colpa in* Karman

Come anticipato, Agamben apre il testo osservando come i concetti di "causa" e di "colpa", concetti-soglia dell'edificio del diritto, manchino di un'etimologia. A conferma di tale osservazione, il filosofo porta il vocabolario etimologico della lingua latina di Ernout e Meillet, nel quale la voce *culpa* termina con il laconico enunciato: *sans* étymologie*, comme "causa"*.

E proprio dopo aver trattato l'altro concetto-soglia, quello di "causa", Agamben si dedica alla colpa. Ma a cosa si riferisce quando parla di "colpa"? Nel testo leggiamo:

> Nelle fonti giustinianee, [il concetto di "colpa"] ha innanzitutto il significato generico di imputabilità e indica che un determinato fatto va ricondotto alla sfera giuridica di una persona, che deve sopportarne le conseguenze. In questo senso, *culpa* è sinonimo di *noxa*, un termine la cui etimologia rimanda alla sfera oscura della morte violenta (*nex*)[26].

Ci troviamo quindi in una galassia squisitamente giuridica, come tale costellata da propri significati tecnici. Agamben non parla dunque di tutte le azioni umane, e neppure di tutte le azioni genericamente rilevanti per il diritto, ma di quelle azioni generatrici di responsabilità. Così delimitato il contesto nel quale si muove la nostra indagine, occorre fare chiarezza rispetto alla terminologia da usarsi. Agamben parla infatti di "colpa"; tuttavia, nel testo, sembra riferirsi con questo stesso termine sia alla colpa propriamente detta sia al dolo, requisiti ben diversi l'uno dall'altro e sui quali, unitamente ad altri, si fonda la "colpevolezza" del soggetto.

Nell'ambito del diritto penale, la colpevolezza è uno degli elementi della struttura del reato, col quale si designa «l'insieme dei requisiti dai quali dipende la possibilità di muovere all'agente un rimprovero per aver commesso il fatto antigiuridico»[27]. Si tratta dunque di un

26. Agamben, *Karman*, p. 16 (citato alla nota 3).

27. Giorgio Marinucci ed Emilio Dolcini, *Manuale di diritto penale: Parte generale*, 4ª ed., Giuffrè, Milano, 2012, p. 288.

elemento complesso, i cui requisiti, nel diritto penale italiano vigente, possono così individuarsi:

a) dolo, colpa, ovvero dolo misto a colpa;
b) assenza di scusanti (vale a dire, normalità delle circostanze concomitanti alla commissione del fatto);
c) conoscenza o conoscibilità della norma penale violata;
d) capacità di intendere e di volere.

Tutti i requisiti sui quali si fonda la colpevolezza dell'agente devono abbracciare tutti gli estremi del singolo fatto antigiuridico dallo stesso commesso.

a) Col termine "dolo" si indica la sussistenza di un duplice coefficiente psicologico: per muovere il rimprovero più grave che il diritto penale conosca è infatti necessario che si abbia *rappresentazione* e *volizione* di tutti gli estremi del fatto antigiuridico[28]. Ciò che si rimprovera all'agente è di aver preveduto l'evento dannoso o pericoloso come conseguenza della propria azione od omissione e di non essersi lasciato trattenere da quella rappresentazione ammonitrice, determinandosi anzi ad agire pur rappresentandosi come certo o probabile al limite della certezza (c.d. dolo diretto) o come seriamente possibile (c.d. dolo eventuale, o indiretto) il verificarsi dell'evento, ovvero al preciso scopo di realizzarlo (c.d. dolo intenzionale). Il momento rappresentativo del dolo esige la conoscenza effettiva (e non già meramente potenziale) di tutti gli elementi rilevanti del fatto concreto che integra una specifica figura di reato, ed esige altresì che tale conoscenza sussista nel momento in cui il soggetto inizia l'esecuzione dell'azione tipica, senza che la stessa debba perdurare nella sua mente per tutto il tempo dell'azione. La colpa, rispetto al dolo, non è solo un *minus*, ma anche un *aliud*, avendo una struttura propria e del tutto diversa. Detta autonomia

28. L'art. 43 c.p. dispone che «[i]l delitto è doloso, o secondo l'intenzione, quando l'evento dannoso o pericoloso, che è il risultato dell'azione o dell'omissione e da cui la legge fa dipendere l'esistenza del delitto, è dall'agente preveduto e voluto come conseguenza della propria azione od omissione». L'art. 47 c.p. esclude il dolo per difetto di rappresentazione del fatto, allorché, per una falsa rappresentazione della realtà ovvero per la difettosa interpretazione di una norma giuridica, l'agente è caduto in «errore sul fatto che costituisce il reato». Infine, l'art. 59, comma 4, c.p. dispone che «[s]e l'agente ritiene per errore che esistano circostanze di esclusione della pena, queste sono sempre valutate a favore di lui».

strutturale emerge con nitore dalla definizione legislativa della colpa, contenuta all'art. 43, comma 1, c.p.: «Il delitto è colposo, o *contro l'intenzione*, quando l'evento, anche se preveduto, non è voluto dall'agente e si verifica a causa di negligenza o imprudenza o imperizia, ovvero per inosservanza di leggi, regolamenti, ordini o discipline» (enfasi aggiunta). La colpa consta dunque di un requisito negativo (l'assenza di dolo) e di un requisito positivo (negligenza, imprudenza, imperizia ovvero inosservanza di norme giuridiche con finalità preventiva o cautelare). Le sembianze che la colpa può assumere si fondano tutte su un giudizio interamente normativo: è il contrasto tra la condotta concreta tenuta dall'agente e il modello di condotta conforme a regole di diligenza, prudenza o perizia che ad esse dà origine, e il grado della colpa corrisponde proprio al divario tra la condotta concreta e il modello di condotta. Infine, il dolo misto a colpa consiste nella rappresentazione e volizione di alcuni elementi del fatto antigiuridico e nella realizzazione per colpa di altri.

b) Per considerare colpevole l'agente non basta che questi abbia commesso un fatto antigiuridico con dolo, colpa o dolo misto a colpa. Un compiuto rimprovero di colpevolezza non può muoversi laddove l'agente abbia commesso il fatto in presenza di scusanti, vale a dire di circostanze anormali, tali, nella tassativa valutazione legislativa, da influire in modo irresistibile sulla volontà dell'agente o sulle sue capacità psicofisiche, rendendo inesigibile un comportamento diverso da quello tenuto nel caso concreto.

c) Il requisito della conoscenza o conoscibilità della norma penale violata richiede che l'agente sapesse, o potesse almeno sapere usando la dovuta diligenza, che il fatto antigiuridico da lui commesso era previsto dalla legge come reato (art. 5 c.p., come "riformulato" dalla Corte Costituzionale con la sentenza 24 marzo 1988, n. 364).

d) Infine, non può personalmente rimproverarsi chi, nel momento in cui ha commesso il fatto antigiuridico, non era imputabile[29]; vale a dire, chi non era capace né d'intendere, dunque di rendersi conto del significato o delle conseguenze delle proprie azioni od omissioni, né di volere, dunque di inibire o attivare i propri impulsi.

29. L'art. 85, comma 1, c.p. dispone che «[n]essuno può essere punito per un fatto preveduto dalla legge come reato, se, al momento in cui lo ha commesso, non era

La "colpa" è quindi solo uno dei requisiti dai quali dipende la possibilità di muovere al soggetto un rimprovero personale per aver commesso un fatto preveduto dalla legge come reato, dovendosi parlare di "colpevolezza" per includerli tutti. Inoltre, l'imputabilità non è, come invece sembra suggerire Agamben con le proprie parole («Esso [il concetto di "colpa", *rectius* "colpevolezza"] non è propriamente un concetto giuridico, ma indica piuttosto la soglia, varcata la quale un certo comportamento diventa imputabile al soggetto, che si costituisce come "colpevole"»), una conseguenza della colpevolezza, bensì uno dei suoi requisiti. E la colpevolezza, come anticipato, è solo uno degli elementi del reato che sono presupposto indispensabile per l'applicabilità della pena nel caso concreto, e nemmeno il più importante. È ben vero che il reato – ogni reato – risulta composto da una serie di elementi disposti, da un punto di vista meramente formale, l'uno accanto all'altro: «il reato è un fatto umano, antigiuridico, colpevole, punibile»[30]. Ma il legislatore italiano ha quasi costantemente costruito i reati assegnando il primato all'oggettivo rispetto al soggettivo, vale a dire al fatto rispetto all'autore: «nella legislazione italiana il reato è, innanzitutto, offesa a uno o più beni giuridici»[31]. Pertanto, lo schema di analisi del reato che meglio rispecchia la fisionomia che ogni reato possiede nel nostro ordinamento vi individua quattro elementi e li dispone logicamente, l'uno di seguito all'altro, secondo il seguente ordine:

a) un fatto (umano);
b) l'antigiuridicità del fatto (umano);
c) la colpevolezza del fatto (umano) antigiuridico;
d) la punibilità del fatto (umano) antigiuridico e colpevole.

Ne segue che punibile può essere solo un fatto (umano) antigiuridico e colpevole, colpevole può essere solo un fatto (umano) antigiuridico, antigiuridico può essere solo un fatto (umano).

Sia nella sua forma, sia nei suoi contenuti, il reato è un'entità giuridica storicamente condizionata. La storia del diritto penale moderno,

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imputabile».

30. Marinucci e Dolcini, *Manuale di diritto penale*, p. 169 (citato alla nota 27).

31. Ivi, p. 170.

inserendosi in un movimento ideale più vasto volto alla laicizzazione complessiva dello Stato, è segnata da una svolta epocale: il passaggio dalla repressione di comportamenti – anche di meri atteggiamenti interiori – puniti in quanto contrastanti col precetto divino, alla punizione dei soli comportamenti che mettano in pericolo o ledano beni individuali o collettivi. È quindi nelle azioni esterne socialmente dannose che deve rinvenirsi il *prius* di ogni legittima coercizione penale, essendo il dolo e la colpa solo condizioni per la punizione di siffatte azioni. Nella giustizia umana non si punisce la colpevolezza in sé, bensì un'azione esterna socialmente dannosa sorretta da un atteggiamento doloso o colposo: «errarono coloro che credettero vera misura dei delitti l'intenzione di chi li commette»[32]. Si è pertanto avuto un superamento in senso sostanzialistico sia del formalismo giuridico di ascendenza hobbesiana (il principio *nullum crimen, nulla pœna sine lege* è ora vincolato al fondamento materiale del *nullum crimen, nulla pœna sine iniuria*, secondo un'ispirazione evidentemente mossa da pulsioni garantistiche, restringendosi il campo dell'azione penale[33]), sia del soggettivismo giuridico kantiano, dove il criterio determinante della pena è la "malvagità interiore"[34]. Nel diritto penale secolarizzato sono pertanto i beni giuridici, individuali o collettivi, il perno sul quale poggiano le singole figure di reato e rispetto al quale le stesse sono classificate, fungendo la colpevolezza da *limite* alla rilevanza penale dell'offesa arrecata ai beni penalmente tutelati.

La colpevolezza è pertanto uno dei criteri che orientano e limitano le scelte di incriminazione del legislatore. In un diritto penale "primitivo" basterebbe la commissione di un fatto antigiuridico – vale a dire, una specifica forma di offesa a un bene giuridico non autorizzata né imposta dall'ordinamento – per fondare la responsabilità penale dell'agente: il soggetto verrebbe così assimilato a un qualsiasi altro fattore causale e verrebbe punito solo per aver materialmente cagionato il fatto. Come correttamente osservato da Agamben, nella formulazione delle leggi più antiche, la colpevolezza semplicemente non appare[35].

32. Cesare Beccaria, *Dei delitti e delle pene*, Feltrinelli, Milano, 2010 [1764], p. 46.

33. Si veda Luigi Ferrajoli, *Diritto e ragione: Teoria del garantismo penale*, 2ª ed., Laterza, Roma-Bari, 1990, pp. 367 e 466–469.

34. Si veda Immanuel Kant, *Die Metaphysik der Sitten*, in Id., *Kant's gesammelte Schriften*, VI, Reimer, Berlin, 1907 [1797], p. 333.

35. Si veda Agamben, *Karman*, p. 20 (citato alla nota 3).

Infatti, se si esaminano gli enunciati delle XII Tavole (ad esempio, *si membrum rupsit ... talio esto*; *si pater ter filium venum duit, filius a patre liber esto*; *patronus si clienti fraudem fecerit, sacer esto*), si può notare come la legge si limitasse allora a connettere un'azione umana a una conseguenza giuridica. Il concetto di "colpevolezza" comincia ad apparire allorché, già con le leggi di Numa, si inizia ad elaborare la nozione di *dolus*, designante l'intenzione malvagia o fraudolenta («si qui hominem liberum dolo sciens morti duit, paricidas esto»[36]).

Quando l'unica cosa che conta è «l'avvenimento nudo, brutale»[37], il soggetto non può mai sapere realmente perché qualcosa avvenga e non può esistere un'interpretazione razionale della legge, ma si ha solo, come osservato da Agamben in *Homo sacer*, una *vigenza senza significato* scholemiana[38] in cui la legge vige come "punto zero" del suo contenuto[39], come puro 'nulla della Rivelazione' («*Nichts der Offenbarung*»[40]) ovvero, secondo l'espressione kantiana, come 'semplice forma della legge' («*die bloß Form des Gesetzes*»[41]) la cui potenza vuota «vige a tal punto da diventare indiscernibile dalla vita»[42] e, alla fine, è la stessa cosa «che gli scolari abbiano smarrito la scrittura oppure che non sappiano più decifrarla, ... poiché una scrittura senza la sua chiave non è scrittura, ma vita, vita quale viene vissuta nel villaggio ai piedi del monte dove sorge il castello»[43].

Ed è in questo farsi della legge così pervasiva da confondersi con la vita vissuta nel villaggio nell'assenza della sua chiave di lettura che un colpo battuto inavvertitamente su un portone scatena processi surreali, come quello di Josef K. il quale, in quest'indiscernibilità fra *forma di*

36. Sesto Pompeo Festo, *Parrici quaestores*, in *De verborum significatione*, XIV.

37. Hannah Arendt, *Le origini del totalitarismo*, Edizioni di Comunità, Torino, 1999 [1951], p. 342.

38. Si veda Walter Benjamin e Gershom Scholem, *Briefwechsel 1933–40*, Suhrkamp, Frankfurt am Main, 1988, p. 163.

39. Si veda Agamben, *Homo sacer: Il potere sovrano e la nuda vita*, p. 59 (citato alla nota 1).

40. Benjamin e Scholem, *Briefwechsel 1933–40*, p. 163 (citato alla nota 38).

41. Immanuel Kant, *Kritik der praktischen Vernunft*, in Id., *Kant's gesammelte Schriften*, V, Reimer, Berlin, 1913 [1788], p. 28.

42. Agamben, *Homo sacer: Il potere sovrano e la nuda vita*, p. 61 (citato alla nota 1).

43. *Ibidem* (traduzione da Benjamin e Scholem, *Briefwechsel 1933–40*, p. 155 (citato alla nota 38)).

vita e *forma di legge*, finisce per coincidere col processo, è il processo[44]. Come osservato dal filosofo in *Mezzi senza fine*, «per uomini, cui ogni naturalezza è stata sottratta, ogni gesto diventa un destino»[45] e la vita diventa indecifrabile.

Il diritto penale moderno ha raggiunto uno stadio di civiltà nel quale i rapporti fra agente e fatto antigiuridico sono molto più ricchi e complessi di quanto lo fossero in origine. Perché sia legittimo il ricorso alla sanzione penale, non basta che sia commesso un "fatto" (un'offesa a uno o più beni giuridici tutelati da una norma incriminatrice), né basta che la commissione del fatto sia "antigiuridica" (non autorizzata o imposta da altra norma giuridica): occorre altresì che l'offesa possa essere personalmente rimproverata all'agente[46].

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44. *Ibidem*.

45. Agamben, *Mezzi senza fine*, p. 48 (citato alla nota 20).

46. Per quanto concerne l'ordinamento italiano, sul finire degli anni Ottanta la giurisprudenza di legittimità ha segnato una svolta storica, riconoscendo espressamente che responsabilità "personale", a norma dell'art. 27, comma 1, Cost., è sinonimo di responsabilità per un fatto proprio colpevole. Nella storica sentenza 24 marzo 1988, n. 364, il giudice delle leggi ha sostenuto la costituzionalizzazione del principio di colpevolezza, in particolare ricorrendo a un argomento sistematico volto a inquadrare il principio di personalità della responsabilità penale nell'intero sistema costituzionale. In primo luogo, la Corte ha messo in risalto l'esigenza di interpretare detto principio alla luce della funzione rieducativa della pena, di cui all'art. 27, comma 3, Cost.: «Collegando il primo al terzo comma dell'art. 27 Cost., agevolmente si scopre che, comunque si intenda la funzione rieducativa» della pena, «essa postula almeno la colpa dell'agente in relazione agli elementi più significativi della fattispecie tipica. Non avrebbe senso la "rieducazione" di chi, non essendo almeno "in colpa" (rispetto al fatto) non ha, certo, "bisogno" di essere "rieducato"». Inoltre, la Corte ha collegato il principio di personalità della responsabilità penale ai principi di legalità e irretroattività della legge penale, di cui all'art. 25, comma 2, Cost.: «Il sistema costituzionale ... allo scopo di attuare compiutamente la funzione di garanzia assolta dal principio di legalità», impone di «fondare la responsabilità penale su "congrui" elementi subiettivi». Nelle leggi penali «il soggetto deve poter trovare, in ogni momento, cosa gli è lecito e cosa gli è vietato: ed a questo fine sono necessarie leggi precise, chiare, contenenti riconoscibili direttive di comportamento. Il principio di colpevolezza è pertanto indispensabile ... anche per garantire al privato la certezza di libere scelte d'azione: per garantirgli, cioè, che sarà chiamato a rispondere penalmente solo per azioni da lui controllabili e mai per comportamenti che solo fortuitamente producano conseguenze penalmente vietate; e, comunque, mai per comportamenti realizzati nella "non colpevole" e, pertanto, inevitabile ignoranza del precetto. A nulla varrebbe, in sede penale, garantire la riserva di legge statale, la tassatività delle leggi, ecc., quando il soggetto fosse chiamato a rispondere di fatti ... in relazione ai quali non è in grado, senza la benché minima sua

Questa evoluzione del diritto penale viene comunemente riconosciuta come un progresso. La dottrina rinviene infatti nel principio di colpevolezza (o, se si vuole, di personalità della responsabilità penale) uno stadio avanzato della civiltà giuridica, contrapponendosi esso frontalmente ad una serie di residui di "inciviltà", quali la responsabilità oggettiva – responsabilità per un fatto proprio, ma realizzato senza dolo e senza colpa, secondo il vetusto principio *qui in re illicita versatur, tenetur etiam pro casu* –; la responsabilità penale di chi abbia commesso il fatto volontariamente o colposamente, ma ignorandone senza colpa l'illiceità penale; la responsabilità penale di chi abbia agito in situazioni anormali, tali da rendere inesigibile un comportamento diverso da quello concretamente tenuto, ovvero di chi sia incapace di intendere o di volere.

Inoltre, la colpevolezza è strettamente correlata alle funzioni che la dottrina riconosce alla pena. A quella general-preventiva, poiché solo se il fatto antigiuridico è frutto di una libera scelta dell'agente, o è almeno da lui evitabile con la dovuta diligenza, la comminatoria legale delle pene può orientare le scelte di comportamento dei consociati: non avrebbe senso alcuno minacciare la pena per distogliere il soggetto da comportamenti che giacciono al di fuori della sua sfera di controllo. Nonché a quella social-preventiva, poiché ha senso rieducare solo chi si trovi nella colpevolezza (come osservato dallo stesso Agamben, *in culpa esse*; *obnoxius*, "colpevole", non designa colui che ha causato il fatto, ma, secondo il significato originariamente locale della preposizione *ob*, colui che sta nella colpevolezza[47]).

Per Agamben, invece, non si tratta di un progresso bensì:

> di un rafforzamento del vincolo che lega l'agente alla sua azione, cioè di una interiorizzazione della colpa [*rectius*, colpevolezza], che non è detto ampli in alcun modo la libertà reale del soggetto. Il nesso tra l'azione e l'agente, che era definito in origine in modo esclusivamente fattuale, viene ora fondato in un principio insito nel soggetto, che lo costituisce

colpa, di ravvisare il dovere di evitarli nascente dal precetto. Il principio di colpevolezza, in questo senso, più che completare, costituisce il secondo aspetto del principio, garantistico, di legalità, vigente in ogni Stato di diritto»: Corte cost., 24 marzo 1988, n. 364, in *Riv. it. dir. proc. pen.*, 1988, pp. 686 ss.

47. Si veda Agamben, *Karman*, pp. 16–17 (citato alla nota 3).

> come colpevole. La colpa [colpevolezza] viene, cioè, spostata dall'azione al soggetto, che, se ha agito *sciente et volente*, ne porta l'intera responsabilità[48].

Richiamando la trattazione che Carl Schmitt riservò alla colpevolezza, Agamben critica la riduzione di questo concetto a una categoria (per entrambi i filosofi) psicologica, implicita nella identificazione del dolo e della colpa quali suoi requisiti. Per Agamben, come per Schmitt, la colpevolezza andrebbe definita indipendentemente da queste due forme codificate. Tuttavia, per Schmitt, allorché si cerchi una definizione puramente giuridica e non già psicologica della colpevolezza, si corre il rischio di trovarsi obbligati a revocare in questione il fondamentale principio "non vi è pena senza colpa":

> Si potrebbe infatti argomentare che la pena preceda logicamente la colpa [*rectius*, colpevolezza], poiché non vi sarebbe alcuna colpa [colpevolezza] se essa non venisse punita. Il modo più semplice per eliminare il delitto dal mondo, sarebbe la cancellazione del codice penale. Il principio "non vi è pena senza colpa" dovrebbe allora suonare piuttosto "non vi è colpa senza pena"[49].

Tuttavia, una simile ricostruzione del concetto di "colpevolezza", che vede nel dolo e nella colpa delle istanze eminentemente psicologiche, è fuorviante e illiberale: la lotta alla criminalità deve rivolgersi contro il reato, non contro il reo. Se si cancellasse il codice penale, si eliminerebbero dal mondo solo i rei, non certo le condotte ritenute antisociali. Laddove si interpretassero realmente i concetti di "dolo" e "colpa" secondo coordinate esclusivamente psicologiche, si affiderebbero al potere giudiziario poteri incontrollabili, consentendogli di limitare la libertà personale sulla base di dati incerti e manipolabili come la "cattiva volontà" («*böse Wille*»[50]). Per tale ragione, l'accertamento del momento rappresentativo e del momento volitivo che compongono il

48. Ivi, pp. 21–22.

49. Ivi, p. 22 (traduzione da Carl Schmitt, Über *Schuld und Schuldarten: Eine terminologische Untersuchung*, Schletter, Breslau, 1910, p. 19).

50. Schmitt, Über *Schuld und Schuldarten*, p. 92 (citato alla nota 49).

dolo è, nel diritto penale moderno, ancorato a dati esteriori. La rappresentazione e la volizione non possono infatti accertarsi tramite i sensi, esse possono e devono essere desunte unicamente attraverso massime di esperienza che prendano in considerazione circostanze oggettive, che attengono alle modalità della condotta, e, solo qualora queste non consentano deduzioni univoche, potranno prendersi in considerazione circostanze soggettive, che attengono alla persona dell'agente (ad esempio, le sue cognizioni, le sue precedenti esperienze, l'interesse che si riproponeva di soddisfare con la condotta tenuta, il suo possibile movente[51]). Mentre, a ben vedere, nella colpa una volontà manca del tutto e le sembianze che essa può assumere si fondano tutte su un giudizio interamente normativo: come osservato poco sopra, è il contrasto tra la condotta concreta tenuta dall'agente e il modello di condotta conforme a norme giuridiche con finalità preventiva o cautelare che ad esse dà origine.

Vieppiù che il principio cardine del diritto penale non è solo "non vi è pena senza colpa", ma altresì, nella rienunciazione della formula classica operata da Franz von Liszt, *nullum crimen sine lege, nulla pœna sine lege*: il diritto penale, quale potere punitivo dello Stato, è delimitato giuridicamente nei presupposti e nei contenuti, nell'interesse della libertà individuale; il codice penale è la *Magna Charta* del reo, disponendo che non si perseguano intenzioni ma esclusivamente azioni, socialmente pericolose e tassativamente individuate dalle legge, come tassativamente individuata dalla legge deve essere la loro punizione. Il diritto non vede l'essenza del delitto in un determinato processo nell'animo del delinquente oggettivatosi esteriormente, come ritiene invece Schmitt[52], bensì in un'oggettivazione esteriore contraria ai propri fini. La colpevolezza non viene spostata dall'azione al soggetto,

51. Quanto al movente, la giurisprudenza italiana sottolinea come la relativa indagine debba avere carattere sussidiario rispetto all'accertamento del dolo raggiunto autonomamente per altra via: solo «qualora l'indagine limitata alle circostanze estrinseche e obiettive non consenta un sicuro giudizio» ai fini dell'accertamento del dolo, «è necessario, in via del tutto sussidiaria ed integrativa della prova, l'esame del movente ispiratore del delitto, che deve essere aderente alla dinamica del fatto e dei comportamenti del soggetto attivo e del soggetto passivo»: Cass., 17 febbraio 1993, n. 3957, Tonsig, in *CED Cassazione* n. 193919; Cass., 17 febbraio 1992, n. 3207, Silvestro, ivi n. 189663; Cass., 24 settembre 1985, n. 9778, Miceli, ivi n. 170840. Il movente non è che un mero indizio.

52. Si veda Schmitt, Über *Schuld und Schuldarten*, pp. 29–30 (citato alla nota 49).

come ritiene Agamben, ma rimane nell'azione. «In principio era l'Azione», per dirlo con le parole del *Faust* di Johann Wolfgang von Goethe, e pare che sia ancora così.

La colpevolezza non pertiene esclusivamente al diritto penale, rilevando anche nell'ambito del diritto civile quale uno degli elementi della struttura della responsabilità per fatto illecito – detta anche responsabilità extracontrattuale, civile o aquiliana (in omaggio alla *Lex Aquilia* del III secolo a.C., che per la prima volta la indicò) – rispetto alla quale limiteremo la nostra analisi. Nell'ordinamento italiano vigente, la disposizione fondamentale in materia è contenuta all'art. 2043 c.c.: «*Qualunque* fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno» (enfasi aggiunta). L'agente non è quindi chiamato a rispondere delle conseguenze dannose della propria condotta, commissiva od omissiva, per aver violato un dovere specifico, bensì per aver violato il dovere generico del *neminem laedere*.

Data la genericità della sua formulazione, il disposto di cui all'art. 2043 c.c. è considerato dalla dottrina una sorta di clausola generale dell'ordinamento, che si lega alla cosiddetta atipicità dell'illecito civile. È infatti l'autorità giudiziaria a decidere se, tenuto conto delle trasformazioni della società, con le sue mutevoli scale valoriali e le sue variabili esigenze, un determinato comportamento possa considerarsi o meno lesivo della regola fondamentale che garantisce la pacifica convivenza tra i consociati, comparando gli interessi in giuoco in base a un criterio di pubblica utilità[53], e verificando altresì la sussistenza di tutti gli elementi strutturali individuati dalla disposizione in parola.

Nella ricostruzione della dottrina, questa forma di responsabilità assolve molteplici funzioni. Anzitutto, ha una funzione riparatoria, essendo diretta a tenere indenne la vittima dell'illecito dai danni subiti. Inoltre, ha una funzione preventiva, volendo orientare le condotte dei consociati, scoraggiando la causazione di danni ingiusti con i loro comportamenti. Un tempo, inoltre, si era soliti identificare e rimarcare con vigore anche una funzione sanzionatoria dell'istituto in argomento, funzione che oggi appare invece in declino, se non del tutto

53. Si veda Pietro Trimarchi, *Istituzioni di diritto privato*, 18ª ed., Giuffrè, Milano, 2009, pp. 110–111.

superata a vantaggio dell'anzidetta funzione riparatoria[54], in armonia con i doveri di solidarietà imposti dalla Costituzione. Al centro della disciplina *de quo*, vi è oggi infatti il danneggiato, che necessita un opportuno ribilanciamento della propria posizione tenuto conto dell'effettiva entità del danno subito, previa verifica della reale ingiustizia di quest'ultimo.

Come nel diritto penale, anche nel diritto civile la responsabilità (lì penale, qui extracontrattuale) è un istituto complesso, essendo composta da una pluralità di elementi:

a) la condotta dannosa (commissiva od omissiva);
b) l'ingiustizia del danno (*contra ius* e *non iure*);
c) il nesso di causalità (giuridica e materiale) che deve legare la condotta al danno ingiusto;
d) il dolo o la colpa;
e) l'imputabilità.

Per quanto specificamente concerne la "colpevolezza", i concetti di "dolo" e "colpa" sono mutuati dall'ambito penalistico. Pertanto, il dolo consiste nella causazione del danno ingiusto con previsione, coscienza e volontà, mentre la colpa ha una struttura propria e affatto diversa rispetto al dolo. Anche qui, quello di "colpa" è un concetto dal carattere tecnico-giuridico, ben diverso dal significato invalso nel linguaggio comune. Colposo è quel comportamento caratterizzato da negligenza, imprudenza o imperizia, ovvero da inosservanza di leggi, regolamenti, ordini o discipline. Per considerare colpevole l'agente non basta che questi abbia tenuto una condotta dannosa (commissiva od omissiva) con dolo o colpa: un compiuto rimprovero di colpevolezza non può muoversi laddove l'agente abbia cagionato un danno in presenza di cause di giustificazione, vale a dire di circostanze tali da escluderne l'ingiustizia (artt. 50, 51 e 52 c.p.; artt. 2044 e 2045 c.c.). Infine, non risponde delle conseguenze del fatto dannoso chi, nel momento in cui ha cagionato un danno ingiusto, non era in possesso della capacità d'intendere e di volere, salvo che l'incapacità (naturale) dipenda da sua colpa (art. 2046 c.c.).

54. Si veda Emanuele Lucchini Guastalla, *Il contratto e il fatto illecito: Corso di diritto civile*, Giuffrè, Milano, 2012, p. 409.

Muovendosi in un'ottica riparatoria e non già sanzionatoria, il legislatore ha contemplato, accanto alla tradizionale responsabilità di cui all'art. 2043 c.c., alcune ipotesi di responsabilità per fatto altrui o indiretta (allorché sia tenuto a risarcire il danno, in sostituzione dell'agente o in solido con questi, chi non abbia materialmente commesso il fatto), e di responsabilità oggettiva (allorché sia tenuto a risarcire il danno chi, pur avendo commesso il fatto, non ne abbia colpa).

In ambito civilistico abbiamo pertanto: attività dannose che sono lecite e non sono fonte di responsabilità; attività dannose che sono illecite e sono fonte di responsabilità; attività dannose o rischiose consentite e che sono tuttavia fonte di responsabilità oggettiva (responsabilità senza colpa). Se, da un lato, la colpevolezza è solo uno degli elementi strutturali che sono presupposto indispensabile per far sorgere la responsabilità *ex* art. 2043 c.c. in capo al soggetto, dall'altro, la colpevolezza non rileva affatto in alcune ipotesi legislativamente previste, nelle quali si dà sanzione (o meglio, riparazione del danno ingiusto) ma non si dà colpa.

3. *La sanzione in* Karman

3.1. *Un'analisi storica*

Per Agamben, la colpevolezza esiste come tale soltanto in virtù della pena che la sancisce: "non vi è colpa senza pena". La sanzione non è, per il filosofo, accessoria alla legge; «piuttosto la legge consiste, in ultima analisi, essenzialmente nella sanzione»[55].

Se fino ad ora Agamben sembrava aderire alla riformulazione schmittiana del principio "non vi è pena senza colpa" con riferimento a un diritto in particolare, quello penale[56], la conclusione raggiunta con riferimento alla sanzione sembra volersi estendere all'intero diritto (oggettivo). Tuttavia, affermare che, in senso oggettivo, il termine "diritto" indica insiemi di norme sanzionati (accomunati da pene

55. Agamben, *Karman*, p. 27 (citato alla nota 3).

56. Nel testo, si parla infatti di «concetto fondamentale del diritto penale» (con ciò riferendosi al concetto di "colpa", o meglio "colpevolezza"), di «cancellazione del codice penale» al fine di «eliminare il delitto dal mondo», nonché di "pena" e non già di "sanzione"; ivi, p. 22; cfr. Schmitt, Über *Schuld und Schuldarten*, p. 19 (citato alla

comminate per l'inadempimento, o premi promessi per l'adempimento) e, dobbiamo aggiungere, istituzionalizzati (accomunati dall'istituzione di poteri che le producano e le applichino) significa utilizzare nozioni a loro volta ambigue e, soprattutto, tipicamente moderne[57].

Questa definizione di "diritto", fornita dal giuspositivismo teorico ottocentesco[58], e tuttora considerata il maggiore sforzo teorico mai compiuto per catturare il significato profondo di "diritto"[59], è apparsa in Occidente solo al tempo della formazione dello Stato moderno attorno a un potere centrale e suona estranea alle manifestazioni del diritto più antiche ed extra-occidentali[60]. Peggio ancora, questa stessa definizione comincia a suonare estranea anche a manifestazioni che vanno acquistando un ruolo sempre più centrale nel mondo contemporaneo[61]: diritto costituzionale, internazionale, comunitario, e così via.

Il diritto o qualcosa di simile ad esso, quale fenomeno sociale prodotto dalla convivenza umana, che presuppone e regola delle relazioni interpersonali, è presente in ogni comunità: *ubi societas, ibi ius*. Affinché un qualsiasi gruppo sociale possa sopravvivere, è infatti necessario che esso si dia una, sia pur rudimentale, organizzazione e che i suoi

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nota 49). Estendere la riformulazione aderita da Agamben oltre le coordinate tracciate (diritto penale) significherebbe distorcere l'argomentazione del filosofo romano, giacché nel testo non è possibile rinvenire alcun elemento dal quale si possa indurre la volontà di una simile estensione all'ambito civilistico.

57. Si veda Mauro Barberis, *Filosofia del diritto: Un'introduzione teorica*, 3ª ed., Giappichelli, Torino, 2008, p. 93.

58. Per giuspositivismo teorico, o formalismo giuridico, s'intende una lunga serie di teorie (conoscitive) e di dottrine (anche normative) sostenute a partire dall'Ottocento soprattutto in Francia, Germania e Regno Unito. Il giuspositivismo tedesco e francese inizia come giuspositivismo tecnico e non già teorico: civilisti come von Savigny o i giuristi della Scuola dell'Esegesi si limitano ad occuparsi del diritto positivo, ignorando il diritto naturale. Un giuspositivismo davvero teorico si sviluppa invece, fra Settecento e Ottocento, nel Regno Unito: prima con Bentham e poi con Austin, con la loro teoria della *(general) jurisprudence*. Un altro giuspositivismo teorico si sviluppa anche in Germania alla fine dell'Ottocento, con la *allgemeine Rechtslehre*. Si veda ivi, pp. 20–21.

59. Si veda Bruno Celano, *La teoria del diritto di Hans Kelsen: Una introduzione critica*, Il Mulino, Bologna, 1999, pp. 15–51.

60. Si veda, tra i molti, Riccardo Orestano, *Norma statuita e norma statuente: Contributo alle semantiche di una metafora*, in Id., *Edificazione del giuridico*, Il Mulino, Bologna, 1989 [1983], pp. 69–116.

61. Si veda Barberis, *Filosofia del diritto*, p. 94 (citato alla nota 57).

membri osservino delle regole di comportamento, alcune delle quali di carattere giuridico. Benché nelle società preletterate non esistesse qualcosa come lo Stato moderno, esistevano regole concepite e applicate come obblighi[62], la cui forza vincolante non era da individuarsi nella "sanzione", come potremmo aspettarci, bensì nel meccanismo della "reciprocità", nutrito da un intreccio di pubblicità, interessi personali, vanità e ambizione sociale[63]. Con ciò non si vuole privare la regola giuridica di qualunque caratteristica che valga a distinguerla dalle regole sociali, ma si vuole sottolineare come la mancanza, nelle società preletterate, di un intervento coercitivo non implicasse un meccanismo spontaneo di adeguamento alle regole, bensì una coercizione di altro tipo: psicologica. Come sostenuto da Louis Gernet, nelle società preletterate la cui organizzazione si basa su una serie di regole che non posseggono ancora i caratteri propri della giuridicità, la vita dei consociati sarebbe regolata dalle forze del "prediritto"[64]: i "doni ospitali" che regolavano le relazioni interfamiliari nel mondo greco, in particolare omerico[65], le tecniche magico-religiose greche e romane[66], i "giochi" e i

62. Si veda Bronis aw Malinowski, *Crime and Custom in Savage Society*, Harcourt, Brace & Company, New York, 1926, *passim*.

63. Ivi, *passim*. Ad esempio, vi erano regole che presiedevano alla divisone del pescato, distribuito anche a comunità diverse da quelle dei pescatori, che fornivano altri prodotti in cambio del pesce. Queste regole, secondo Malinowski, erano rese vincolanti dall'interesse economico di ciascuna comunità ad avere provviste di diverso genere, nonché dall'esigenza psicologica di esibire il cibo, elemento fondamentale del prestigio sociale e pertanto distribuito ed esibito secondo rituali solenni, di rilevanza collettiva.

64. Si veda Louis Gernet, *Droit et société dans la Grèce ancienne*, Sirey, Paris, 1955, *passim*.

65. Si veda Louis Gernet, *La notion mythique de la valeur en Grèce*, in *Journal de Psychologie*, 1948, pp. 415–462; Alberto Maffi, *Rilevanza delle "regole di scambio" omeriche per la storia e la metodologia del diritto*, in Arnaldo Biscardi (a cura di), *Symposion 1974*: *Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Böhlau, Köln-Wien, 1979, pp. 33–62; Marcel Mauss, *Essai sur le don, forme primitive de l'*échange, in *Année sociologique*, 1923–1924, pp. 30–186; Steve Reece, *The Stranger's Welcome: Oral Theory and the Aesthetics of the Homeric Hospitality Scene*, University of Michigan Press, Ann Arbor, 1993.

66. Si veda Eva Cantarella, *I supplizi capitali in Grecia e a Roma: Origini e funzioni della pena di morte nell'antichità classica*, nuova edizione rivista, Feltrinelli, Milano, 2011.

duelli, la "cultura di vergogna" (*shame culture*)[67] e, probabilmente la più importante, la vendetta privata.

Già nelle società preletterate, infatti, vendicare i torti subiti non significava solamente soddisfare un bisogno privato di reazione a un'offesa, essendo la vendetta privata un dovere sociale per chi volesse mantenere l'onore e meritare il rispetto della collettività. Il mondo omerico, in buona sostanza, affidava alla vendetta privata il compito di mantenere l'assetto sociale[68], giacché allora il peso sociale di un individuo e di un gruppo erano legati all'onore (τιμή) e chi subiva un torto senza reagire lo perdeva. Tuttavia, se incontrollata, la vendetta privata rischiava di portare con sé una lunga serie di rappresaglie, per evitare le quali il mondo omerico aveva sviluppato alcune regole fondamentali, che possono essere considerate le prime regole giuridiche greche. E se è vero che Solone, riferendosi alla sua attività di legislatore, afferma di "aver unito con la forza della legge violenza e giustizia" (*kratei / nomou bian te kai dikēn synarmosas*), e che Pindaro, trattando del *nomos basileus*, sottolinea il lato oscuro della legge che "di tutti sovrana / dei mortali e degli immortali / conduce con mano più forte / giustificando il più violento" (*dikaiōn to biaiotaton*), e se può esser vero che, nel *Gorgias*[69], quando Callicle rovescia questo stesso testo pindarico, scrivendo "facendo violenza a ciò che è più giusto" (*biaiōn to dikaiotaton* anziché *dikaiōn to biaiotaton*), Platone intenda suggerire che «la giustificazione della violenza operata dalla legge è, nella stessa misura, un far violenza a ciò che è più giusto»[70], è certamente vero che si era allora diffusa, anche nel mondo eroico[71], la prassi di offrire a chi aveva subito un torto una ποινή (una *poiné*, da cui il latino *pœna* e, successivamente, l'italiano "pena"), vale a dire una compensazione in natura o in danaro che, se accettata, veniva solennemente e pubblicamente consegnata dall'offensore all'offeso e consentiva a quest'ultimo

67. Si veda Ruth Benedict, *The Chrysanthemum and the Sword: Patterns of Japanese Culture*, Houghton Mifflin, Boston, 1946; Eric R. Dodds, *The Greeks and the Irrational*, University of California Press, Berkeley, 1951.

68. Si veda Eva Cantarella, *Diritto romano: Istituzioni e storia*, Mondadori Università, Milano, 2010, p. 10.

69. Platone, *Gorgia*, 484b.

70. Agamben, *Karman*, p. 37 (citato alla nota 3).

71. Si veda la lettura della scena processuale scolpita sullo scudo di Achille, in Omero, *Iliade*, XVIII, vv. 495–506.

di rinunciare onorevolmente alla vendetta. E per controllare che la prassi della ποινή venisse rispettata, la comunità si era dotata di un organo giudicante composto dai suoi anziani che doveva intervenire nel caso in cui l'offeso pretendesse ancora di vendicarsi nonostante la compensazione accettata e ricevuta.

Pertanto, chi usava la forza fisica conformemente alla prassi della ποινή (vale a dire, a seguito dall'autorizzazione degli anziani) non si può dire che compisse una vendetta privata, agendo piuttosto come «agente socialmente autorizzato»[72] all'uso della forza fisica. Nel mondo omerico, pertanto, il diritto s'*innesta* sul terreno della vendetta privata[73], nascendo sul solco di questa e delle sue regole, ma proponendosi come complesso di norme da questa *distinto* e a questa *sostitutivo*, che ne regola l'esercizio nell'interesse collettivo al fine di eliminarne o quantomeno limitarne gli effetti negativi.

Di questa nascita del diritto sul solco della vendetta privata troviamo tracce – sebbene più frammentarie di quelle offerte dalle fonti greche – anche nel diritto romano arcaico, dove la *civitas* individuò in forma scritta i comportamenti che autorizzavano l'uso della forza. Nel 451-450 a.C. i *decemviri legibus scribundis* emanarono infatti la nota *lex* delle XII Tavole, con la quale si intendeva individuare i *mores* e stabilire per iscritto la loro interpretazione, sottraendo l'una e l'altra all'arbitrio dei giudici. Si trattò di una novità di grande rilievo, giacché prima di questo *corpus* non esisteva un elenco dei comportamenti illeciti, dipendendo la valutazione dei comportamenti considerati lesivi di un interesse o dell'onore esclusivamente dalla parte offesa, di modo che lo stesso comportamento potesse essere considerato illecito o permesso a seconda della forza sociale di chi lo teneva e di chi lo subiva.

Una delle regole contenute nelle XII Tavole era la cosiddetta legge del taglione, la quale stabiliva che colui che reagiva all'offesa ricorrendo alla forza dovesse infliggere all'offensore lo stesso male che questi gli aveva inflitto. Il termine *talio* deriva infatti verosimilmente da *talis*, "lo stesso". Per Agamben, ciò significa che:

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72. E. Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics*, Harvard University Press, Cambridge (Mass.), 1967, trad. it. di Antonio Colajanni, *Il diritto nelle società primitive: Uno studio comparato sulla dinamica dei fenomeni giuridici*, Il Mulino, Bologna, 1973.

73. Si veda Cantarella, *Diritto romano*, p. 11 (citato alla nota 68).

> la legge non si manifesta semplicemente come la sanzione di un atto trasgressivo, ma come la ripetizione dello stesso atto senza alcuna sanzione, cioè come lecito. E questo non rappresenta tanto la punizione del primo atto violento, quanto la sua inclusione nell'ordine giuridico, una volta come sanzionato, la seconda come lecito[74].

Tuttavia, non si deve dimenticare come la "legge del taglione", codificando il requisito della proporzionalità tra offesa e reazione, altro non era che uno dei modi con cui il nascente sistema giuridico voleva limitare e controllare la vendetta privata, la quale aveva i caratteri di un dovere sociale e non già di un diritto[75].

La prossimità tra sanzione e vendetta – osservata anche nelle *Etymologiae* di Isidoro (*talio est similitudo vindictae, ut taliter quis patiatur ut fecit*), nonché da taluni giuristi e antropologi contemporanei, secondo i quali «la vendetta appartiene a quella stessa dimensione del giuridico cui appartiene la sanzione»[76] – non deve proiettare sulla vendetta lo stesso sentimento di doverosità e di giustizia proprio invece dell'ordine giuridico. Come concede lo stesso Agamben, da tale rilievo si può al più inferire che il diritto s'innesta sul terreno della vendetta privata, ma da essa si distingue: a ben vedere, chi usava la forza fisica conformemente alle XII Tavole, proprio come chi la usava conformemente alla prassi della ποινή, non compiva una vendetta privata, agendo egli piuttosto in qualità di «agente socialmente autorizzato»[77], cui il diritto aveva conferito la facoltà di applicare la sanzione con la coercizione fisica, in quanto parte che aveva subito il torto.

Inoltre, con riferimento al versetto delle XII Tavole che stabiliva *si membrum rupsit, ni cum eo pacit, talio esto*, deve darsi la giusta importanza alla clausola *ni cum eo pacit*: "se non si è addivenuti a un accordo". Essa segnala infatti l'esistenza di un'altra norma, che regolava la vendetta privata in via generale, quindi fuori dai casi preveduti dalla "legge del taglione", e che vietava di far luogo alla stessa qualora tra le

74. Si veda Agamben, *Karman*, p. 38 (citato alla nota 3).

75. Si veda Cantarella, *Diritto romano*, p. 242 (citato alla nota 68).

76. Francesco D'Agostino, *Sanzione*, in *Enciclopedia del diritto*, XLI, Giuffrè, Milano, 1989, p. 312.

77. Hoebel, *The Law of Primitive Man*, p. 43 (citato alla nota 72).

parti fosse stato concluso un accordo pacificatorio (la *pactio*), basato su una compensazione, dapprima in beni e poi in danaro.

La "legge del taglione" peraltro non era il solo modo di controllare l'esercizio della vendetta privata, quando, in mancanza di *pactio*, a questa si faceva ricorso. Altre volte, la collettività imponeva infatti alla vendetta limiti di tipo diverso. Ad esempio, il *fur nocturnus* colto in flagrante che si difendesse con le armi poteva essere ucciso *iure*, vale a dire conformemente al diritto.

Infine, le XII Tavole erano pervase dal formalismo: chi usava la forza doveva farlo seguendo un rituale preciso, pronunziando formule e compiendo gesti prestabiliti, che non potevano in alcun modo essere modificati. Secondo parte della dottrina, sia la pratica della *obvagulatio*, consistente nel cantare formule magiche di fronte alla porta del testimone che rifiutasse di recarsi in giudizio, sia il formalismo richiesto nel momento dell'uso della forza fisica sarebbero il residuo di antiche credenze sull'efficacia magica delle parole e dei gesti. Taluni autori hanno inoltre ipotizzato che il diritto nasca dal rito, vale a dire proprio dalla pronunzia di parole e dal compimento di gesti solenni e immutabili[78]. Tuttavia, *contra* tale ricostruzione è stato notato come anche le parole dei più antichi rituali contengano il riferimento a un "diritto" preesistente[79].

Pertanto, benché la definizione per cui "diritto", in senso oggettivo, indica un insieme di norme sanzionato e istituzionalizzato sia ancora ampiamente condivisa, o almeno ancora ossessivamente ripetuta nei manuali, questa stessa definizione non ha mai corrisposto a tipi di diritto anteriori allo Stato (moderno) e comincia a non corrispondere più nemmeno ai tipi di diritto caratteristici dell'epoca contemporanea. Inoltre, le vicende storico-politiche che hanno caratterizzato l'evoluzione del fenomeno sociale qui d'interesse hanno originato le indeterminatezze di cui vedremo soffrire lo stesso termine "diritto", che possono dunque considerarsi il prodotto linguistico o concettuale delle prime, e di cui diremo nel paragrafo successivo. Conclusa l'analisi storica, si deve quindi procedere con l'analisi linguistica.

78. Si veda Pierre Noailles, *Les tabous du mariage dans le droit primitif des Romains*, in Id., *'Fas et ius': Études de droit romain*, Belles Lettres, Paris, 1948 [1937], pp. 1 ss.

79. Si veda Giovanni Pugliese, Francesco Sitzia e Letizia Vacca, *Istituzioni di diritto romano*, 3ª ed., Giappichelli, Torino, 1991.

3.2. *Un'analisi linguistica*

Qual è l'utilità linguistica di una definizione di "diritto" in senso oggettivo? Come preannunciato, il senso oggettivo di "diritto", così come reso dal giuspositivismo, soffre di alcune indeterminatezze. Esso non è semplicemente ambiguo[80], ma è anche combinatoriamente vago: "diritto" in senso oggettivo non presenta caratteristiche comuni a tutti i tipi di diritto, bensì caratteristiche distribuite in differenti combinazioni[81]. A ben vedere, norme, sanzioni o istituzioni possono mancare del tutto nei casi dubbi. Inoltre, esso è quantitativamente vago: norme, sanzioni o istituzioni possono darsi in misura minima, dando così luogo a casi di difficile applicazione del termine, che si distinguono dai casi di facile applicazione e da quelli di non applicazione.

Affermando che "diritto" in senso oggettivo indica *tipicamente* un insieme di norme sanzionato e istituzionalizzato, si cerca di rimediare alla vaghezza combinatoria del termine, correggendo la tradizionale definizione connotativa, *per genus proximum et differentiam specificam*, fornita dal giuspositivismo: "diritto" in senso oggettivo ha come genere prossimo norme e come differenza specifica, in particolare rispetto alle norme morali, sia sanzioni, sia istituzioni. Se "diritto" in senso oggettivo è combinatoriamente vago, a rigore, non potrebbe darsene una definizione connotativa per genere prossimo e differenza specifica, ma solo una definizione denotativa per casi paradigmatici: «... indica *tipicamente* ...».

Pretendendo di catturare l'essenza del diritto, individuando qualcosa di comune a tutte le cose chiamate con questo nome, una definizione connotativa cadrebbe nell'essenzialismo: vale a dire, nella falsa credenza che debba necessariamente esservi qualcosa di comune a

80. Essendo l'*ambiguità* l'indeterminatezza per cui un termine si applica a cose differenti ma dotate di una qualche caratteristica comune, e comunque non totalmente irrelate, distinguendosi con ciò dall'omonimia. In altri termini: «Uno stesso termine T si applica: alla cosa X, con caratteristiche A e B; alla cosa Y, con caratteristiche A e C; alla cosa Z, con caratteristiche A e D; a tutti i T (X, Y, Z) è comune A, cambiano B, C, D»: Barberis, *Filosofia del diritto*, p. 55 (citato alla nota 57).

81. In altri termini, nella *vaghezza combinatoria* «[u]n significato di uno stesso termine T si applica: alla cosa X, con caratteristiche A e B; alla cosa Y, con caratteristiche A e C; alla cosa Z, con caratteristiche B e C. I T (X, Y, Z) non hanno caratteristiche comuni *a tutti*, ma solo diversamente combinate»: ivi, p. 56.

tutte le cose chiamate con lo stesso nome[82]. Falsa credenza nella quale cade lo stesso Agamben, nell'affermare che «la legge consiste, in ultima analisi, essenzialmente nella sanzione»[83]. Norme, sanzioni e istituzioni, in realtà, si trovano solo nei casi paradigmatici di diritto, come il diritto statale interno. In altri casi, come il diritto costituzionale o internazionale[84], sanzioni e istituzioni sono mancate sino alla seconda metà del Novecento, quando si è deciso di istituire corti costituzionali e internazionali per vigilare sulla produzione e sul rispetto del relativo diritto.

Inoltre, vi sono casi in cui sanzioni e istituzioni mancano ancora, essendovi solo norme, come nel diritto naturale moderno e nel diritto naturale antico, laddove reinterpretato come diritto consuetudinario[85]. Vi sono poi casi di diritto eminentemente giudiziale in cui, pur essendovi sia sanzioni che istituzioni, paiono mancare le stesse norme, giacché i giudici sembrano decidere caso per caso e non già applicando norme generali e astratte precostituite al giudizio[86].

Questi contro-esempi hanno indotto a rinunciare a qualsiasi definizione di "diritto" in senso oggettivo quanti ritenevano la definizione connotativa *per genus proximum et differentiam specificam* l'unica ammissibile. Così, Herbert Hart decise di limitarsi a un'analisi del concetto di diritto[87]. Altri, invece, seguendo una definizione implicita di Giovanni Tarello, ricalcata su diritto penale, privato e pubblico[88], hanno proposto una definizione per casi paradigmatici: «"diritto" indica la repressione dei crimini, l'attribuzione di beni, l'istituzione

82. Si veda Hans-Johann Glock, *A Wittgenstein Dictionary*, Blackwell, Oxford, 1996, p. 120.

83. Agamben, *Karman*, p. 27 (citato alla nota 3).

84. Che John Austin, nell'Ottocento, si rifiutava di considerare autentico diritto: si veda John Austin, *The Province of Jurisprudence Determined*, Cambridge University Press, Cambridge (UK), 1995 [1832], trad. it. di Giorgio Gjylapian, *Delimitazione del campo della giurisprudenza*, Il Mulino, Bologna, 1995, pp. 182, 290.

85. Si veda Gustav Radbruch, *La natura delle cose come forma giuridica di pensiero*, in *Rivista internazionale di filosofia del diritto*, 1941, XVIII, pp. 151–152.

86. Si veda Santi Romano, *L'ordinamento giuridico*, Sansoni, Firenze, 1977 [1918], p. 20.

87. Si veda H.L.A. Hart, *The Concept of Law*, Clarendon, Oxford, 1994 [1961], pp. 15–16, 279–280.

88. Si veda Giovanni Tarello, *Organizzazione giuridica e società moderna*, in Giuliano Amato e Augusto Barbera (a cura di), *Manuale di diritto pubblico*, Il Mulino, Bologna, 1984, p. 15.

dei poteri pubblici, e cose simili a queste»[89]. La definizione in parola, nella quale possiamo riconoscere con facilità le tre caratteristiche della definizione tradizionale – normatività, coattività, istituzionalizzazione – ha tuttavia l'unico pregio di non escludere la giuridicità di diritto costituzionale, internazionale, e simili, risultato questo che si può ottenere molto più semplicemente avvertendo che normatività, coattività e istituzionalizzazione si danno solo tipicamente, nei casi tipici o paradigmatici di diritto.

Laddove si presentassero tutt'e tre le caratteristiche della definizione tradizionale, come nel diritto statale interno, si avrà un caso paradigmatico di "diritto" in senso oggettivo; laddove non se ne presentasse nessuna, si avrà un caso paradigmatico di "non-diritto"; laddove invece se ne presentassero diverse combinazioni, come nel diritto costituzionale o internazionale, si avranno casi più o meno dubbi[90]: situazione simile a quella della vaghezza quantitativa. Tuttavia, si deve osservare come, introducendo la clausola *tipicamente*, questa versione riveduta e corretta della definizione per genere e differenza finisce per rimediare alla vaghezza combinatoria del *definiendum* solo nel senso di segnalarla: la vaghezza combinatoria si rivela dunque irrimediabile[91].

Come enunciato in apertura, "diritto" in senso oggettivo è anche quantitativamente vago. La definizione per genere e differenza proposta dal giuspositivismo, così come riveduta e corretta con l'introduzione della clausola *tipicamente*, si sforza di rimediare anche a questo tipo di indeterminatezza, indicando parametri di giuridicità qualitativi (se si danno norme, sanzioni e istituzioni, allora certamente si darà diritto) e quantitativi (più si danno norme, sanzioni e istituzioni, più si darà diritto). Vaghezza quantitativa e vaghezza combinatoria tendono a confondersi, rivelandosi la distinzione tra l'una e l'altra essa stessa vaga[92]. Concettualmente, le due indeterminatezze sono distinte: "diritto" in senso oggettivo è combinatoriamente vago perché norme, sanzioni o istituzioni possono mancare del tutto; lo stesso è quantitativamente vago perché norme, sanzioni e istituzioni possono

89. Mauro Barberis, *L'evoluzione nel diritto*, Giappichelli, Torino, 1997, pp. 130–131.

90. Si veda Enrico Diciotti, *Il concetto e i criteri della validità normativa*, in Mario Jori e Letizia Gianformaggio (a cura di), *Scritti per Uberto Scarpelli*, Giuffrè, Milano, 1997, pp. 311–313.

91. Si veda Barberis, *Filosofia del diritto*, p. 97 (citato alla nota 57).

92. Ivi, p. 98.

mancare in maggiore o minor misura. Tuttavia, è spesso impossibile distinguere fra i due casi.

Entrambe le indeterminatezze, in particolare la vaghezza quantitativa, si pongono soprattutto in riferimento a forme di diritto diverse dal diritto occidentale moderno, quali il diritto antico e il diritto non occidentale. Storici, comparatisti, nonché teorici del diritto come Joseph Raz adottano solitamente la definizione moderna e occidentale di diritto, della quale ammettono la relatività storico-culturale, e la proiettano su esperienze antiche e non occidentali al fine di analizzarle, benché gli stessi soggetti interessati da tali esperienze le chiamassero o le chiamino tuttora con vocaboli intraducibili con il nostro "diritto"[93].

Infine, non solo il *definiendum* "diritto" in senso oggettivo, ma anche i *definientes* "norme", "sanzioni" e "istituzioni" sono combinatoriamente e quantitativamente vaghi, e dunque a loro volta da definire, in termini fatalmente vaghi. La definizione per genere prossimo e differenza specifica proposta dal giuspositivismo, così come riveduta e corretta con l'introduzione della clausola *tipicamente*, non può risolvere le indeterminatezze di cui soffre il termine in analisi, le quali, come già avvertito, sono il prodotto linguistico o concettuale delle vicende storico-politiche che hanno caratterizzato l'evoluzione del fenomeno sociale che qui ci interessa. Il problema della definizione di "diritto" in senso oggettivo non è fondamentale in quanto preliminare e pregiudiziale a tutti gli altri, bensì in quanto costringe a guardare le cose stesse indicate dal termine[94]: per il resto, come è stato sapientemente affermato, nulla è meno interessante di una definizione[95].

93. Si veda Joseph Raz, *Can There be a Theory of Law?*, in Martin P. Golding e William A. Edmundson (eds.), *Blackwell Guide to the Philosophy of Law and Legal Theory*, Blackwell, Oxford, 2005, pp. 324–342.

94. Si veda Ludwig Wittgenstein, *Philosophical Investigations* (trad. ing. di G.E.M. Anscombe), Blackwell, Oxford, 1953, trad. it. di Renzo Piovesan e Mario Trinchero, *Ricerche filosofiche*, Einaudi, Torino, 1967, p. 46.

95. Si veda Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument*, Princeton University Press, Princeton, 2005, trad. it. di Corrado Del Bò, *In principio era l'azione: Realismo e moralismo nella teoria politica*, Feltrinelli, Milano, 2007, p. 92.

3.3. *Un'analisi teorica*

Come affermato poco sopra, non solo il *definiendum* "diritto" in senso oggettivo, ma anche i *definientes* "norme", "sanzioni" e "istituzioni" sono combinatoriamente e quantitativamente vaghi. Il giuspositivismo teorico si è lungamente interrogato su quale fosse la caratteristica distintiva delle norme giuridiche, che valesse a distinguere queste dalle altre, in particolare morali. E proprio nella coattività del diritto, vale a dire nella sanzione, tale caratteristica distintiva è stata rinvenuta.

Il primo tentativo di distinguere norme giuridiche e norme morali è rappresentato dalla *teoria del diritto come regola della forza*, avanzata anzitutto dai padri secenteschi del giusrazionalismo moderno, specialmente dagli esponenti del volontarismo hobbesiano[96], e sostenuta poi dalla sociologia otto-novecentesca[97] e dal giuspositivismo teorico novecentesco[98]. Hans Kelsen ha ridefinito "diritto" e "Stato" come sistemi di norme che influenzano la condotta dei consociati servendosi della tecnica sociale della sanzione: diversamente da quanto sostenuto dai giuspositivisti sino ad allora, una norma non sarebbe giuridica in quanto sanzionata da un'altra norma, bensì in quanto dispone essa stessa una sanzione[99]. Kelsen nega la distinzione tra norme primarie, che stabiliscono un precetto (ad esempio, "non rubare"), e norme secondarie, che stabiliscono una sanzione (ad esempio, "se qualcuno ruba, sarà punito"): «la formulazione della prima delle due norme è superflua, in quanto il non-dover-rubare consiste giuridicamente nel

96. Si veda Thomas Hobbes, *Leviathan*, Clarendon Press, Oxford, 2012 [1651], trad. it. di Raffaella Santi e altri, *Leviatano*, Bompiani, Milano, 2001.

97. Si veda Max Weber, *Politik als Beruf*, in Id., *Max Weber-Gesamtausgabe*, I, 17, Mohr Siebeck, Tübingen, 1992 [1919], trad. it. di Alfonso Cariolato ed Enrico Fongaro, *La politica come professione*, in Id., *Scritti politici*, Donzelli, Roma, 1998.

98. Si veda Norberto Bobbio, *Diritto e forza*, in Id., *Studi per una teoria generale del diritto*, Giappichelli, Torino, 1970 [1966]; Hans Kelsen, *General Theory of Law and State*, Harvard University Press, Cambridge (Mass.), 1945, trad. it. di Sergio Cotta e Giuseppino Treves, *Teoria generale del diritto e dello stato*, Etas, Milano, 1966; Alf Ross, *Om ret og retfærdighed: En indførelse i den analytiske retsfilosofi*, Arnold Busck, København, 1953, trad. ing. di Margaret Dutton, *On Law and Justice*, University of California Press, Berkeley, 1959, trad. it. di Giacomo Gavazzi, *Diritto e giustizia*, Einaudi, Torino, 1965.

99. Si veda Kelsen, *General Theory of Law and State*, p. 29 (citato alla nota 98).

dover-essere-punito collegato alla condizione del rubare»[100]. Dal punto di vista del diritto positivo, secondo Kelsen, non esiste alcuna azione od omissione che sia illecita in sé, vale a dire indipendentemente dalla sanzione: «Non ci sono *mala in se*, ma solo *mala prohibita*. E questa è soltanto la conseguenza del principio generalmente riconosciuto nel diritto penale: *nullum crimen sine lege, nulla poena sine lege*»[101]. Alf Ross ritiene che siano specificamente giuridiche solo quelle norme che dispongono l'applicazione della forza[102], mentre Norberto Bobbio sostiene che la forza non sia solo uno strumento, ma lo stesso contenuto del diritto[103]. Secondo la prospettiva della teoria del diritto come regola della forza, i veri destinatari del diritto parrebbero i giudici e non i consociati, perché solo ai primi spetta esercitare la forza che risiede nella sanzione.

Il secondo tentativo di distinguere norme giuridiche e norme morali è rappresentato da un'autentica teoria delle norme giuridiche: la *teoria dei frammenti di norma*. All'ovvia obiezione che non tutte le norme giuridiche sono sanzionate, è stato ribattuto che quelle non sanzionate non sono norme giuridiche "complete", bensì frammenti di norme giuridiche "complete"[104]. Secondo i sostenitori della teoria in parola, tra cui Kelsen, tutte le norme che non dispongono sanzioni possono raffigurarsi come parti o frammenti di norme giuridiche "complete". Si compongono così delle macro-norme, ognuna delle quali avrebbe sempre al proprio interno una norma, rivolta ai giudici, che dispone la sanzione, e una miriade di frammenti di norma che non la dispongono. Questa raffigurazione del diritto, che Kelsen chiama *nomostatica* e che costituisce, insieme alla *nomodinamica*, la sua *Reine Rechtslehre*, incontra almeno tre obiezioni.

Anzitutto, è opportuno chiedersi se valga la pena raffigurare in modo così complicato le norme giuridiche, al solo scopo di dimostrare

100. Hans Kelsen, *Allgemeine Theorie der Normen*, Manz, Wien, 1979, trad. it. di Mirella Torre, *Teoria generale delle norme*, Einaudi, Torino, 1985, p. 209.

101. Hans Kelsen, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik*, Deuticke, Wien, 1934, trad. it. di Mario G. Losano, *La dottrina pura del diritto*, Einaudi, Torino, 1966, p. 134.

102. Si veda Ross, *Om ret og retfærdighed*, p. 52 (citato alla nota 98).

103. Si veda Bobbio, *Diritto e forza*, pp. 119–138 (citato alla nota 98).

104. Come afferma Kelsen con riferimento alle norme costituzionali: «parti intrinseche di tutte le norme giuridiche che i tribunali e gli altri organi devono applicare»; Kelsen, *General Theory of Law and State*, p. 146 (citato alla nota 98).

che dispongono tutte una sanzione[105]. In secondo luogo, v'è da domandarsi se, come sostenuto da Herbert Hart, una simile teoria ottenga solo «la distorsione come prezzo dell'uniformità»[106] anziché la quintessenza del diritto. Al fine di dimostrare che nella forza risiede l'essenza del diritto, Kelsen artificiosamente raffigura quest'ultimo come un insieme di norme relative all'irrogazione di sanzioni e pertanto rivolte ai giudici. Secondo Hart, sarebbe preferibile l'opinione comune per cui le norme giuridiche si rivolgono sia ai consociati, imponendo obblighi, sia ai giudici, conferendo poteri (di giudicare e di punire). Lo stadio evoluto del diritto, secondo Hart, è rappresentato dall'unione di questi due tipi di norme[107]. In terzo luogo, si può osservare come il problema della giuridicità delle norme possa non ricevere soluzione entro la stessa teoria della norma giuridica, bensì solo entro una teoria del sistema giuridico. Così, partendo dal presupposto che sia impossibile individuare il carattere distintivo delle norme giuridiche analizzando la sanzione, Norberto Bobbio sostiene che lo stesso vada individuato «nel fatto che [la norma] fa parte di un insieme di norme che in quanto insieme ha qualche caratteristica che lo contraddistingue da altri sistemi di norme»[108]. Pur sostenendo che la forza sia il contenuto tipico del diritto, per Bobbio, affinché una singola norma possa considerarsi giuridica, non occorre che essa disponga sanzioni, essendo sufficiente che la stessa appartenga a un sistema di norme che, nel suo complesso, dispone sanzioni. La ricerca del carattere distintivo delle norme giuridiche non deve pretendere di definirlo una volta per tutte, attribuendo alle norme giuridiche caratteristiche rigorosamente immutabili con definizioni che pretendono di essere universalmente valide. La teoria dei frammenti di norma ha dunque sollevato perplessità tra gli stessi giuspositivisti. Lo stesso Kelsen, dopotutto, ha affiancato alla teoria nomostatica una teoria nomodinamica (una norma è giuridica non in quanto sanzionata, bensì in quanto appartenente al sistema giuridico), tuttavia non richiamata da Agamben nel proprio testo.

105. Si veda Carlos Santiago Nino, *Introducción al análisis del derecho*, Astrea, Buenos Aires, 1983, trad. it. di Mauro Barberis e altri, *Introduzione all'analisi del diritto*, Giappichelli, Torino, 1996, p. 75.

106. Hart, *The Concept of Law*, pp. 27–42 (citato alla nota 87).

107. *Ibidem*.

108. Norberto Bobbio, *Sanzione*, in *Novissimo digesto italiano*, XVI, UTET, Torino, 1969, p. 538.

Il terzo tentativo di distinguere norme giuridiche e norme morali è rappresentato dalla *teoria della forma logica*, sostenuta dal giuspositivismo e dal giusrealismo novecenteschi. Secondo questa teoria, tutte le formulazioni, superficiali e contingenti, che le norme giuridiche possono assumere celerebbero in realtà un'unica forma logica, *profonda* e *necessaria*: si tratterebbe di prescrizioni ipotetiche costituite da una premessa ("se A ...") e da una conclusione ("... allora B")[109]. Lo stesso Kelsen ha elaborato una versione della teoria della forma logica secondo la quale le norme giuridiche sarebbero giudizi ipotetici della forma "se A, allora B" nei quali il nesso fra premessa e conseguenza sarebbe normativo (prescrittivo: "se A, allora B – la sanzione – dev'essere"), e non conoscitivo (predittivo: "se A, allora sarà B"). Nella teoria di Kelsen, l'illecito «non è un fatto estraneo e contrario al diritto, bensì un fatto interno al diritto e da esso determinato e il diritto, conformemente alla sua essenza, si rivolge proprio a esso e particolarmente a esso»[110]. Lo stesso Kelsen, tuttavia, ha ammesso che la forma logica della prescrizione ipotetica non sarebbe caratteristica delle norme emanate dal legislatore, le quali sarebbero invece prescrizioni categoriche o comandi, bensì delle proposizioni conoscitive sulle norme formulate dalla dottrina[111]. In questo modo, Kelsen ha finito per riconoscere che, lungi dall'essere l'essenza delle norme giuridiche, la sanzione «è solo il principale ingrediente di una loro possibile riformulazione da parte della dottrina, se non della stessa filosofia del diritto»[112].

Carlos Alchourrón ed Eugenio Bulygin hanno ulteriormente affinato la teoria della forma logica: le norme giuridiche sarebbero prescrizioni ipotetiche che connettono a una fattispecie astratta una conseguenza normativa, secondo lo schema "se si dà il caso C, allora è obbligatoria/vietata/permessa/... la soluzione S". Benché anche in questa versione della teoria si conservi una qualche relazione fra norma giuridica e sanzione, sanzione e forza arretrano sullo sfondo e la forma logica proposta può essere utilizzata per riformulare qualsiasi tipo di norma: non solo regole, ma anche princìpi e norme morali. V'è pertanto da chiedersi che senso possa avere formulare come

109. Si veda Celano, *La teoria del diritto di Hans Kelsen*, pp. 141 ss. (citato alla nota 59).

110. Kelsen, *Reine Rechtslehre*, p. 135 (citato alla nota 101).

111. Ivi, pp. 87–88.

112. Barberis, *Filosofia del diritto*, p. 130 (citato alla nota 57).

prescrizioni ipotetiche i princìpi, che differiscono tanto dalle regole da sembrare categorici anziché ipotetici. E soprattutto, potendosi riformulare in forma logica anche le norme morali, la teoria in parola non serve più a raggiungere lo scopo per il quale era stata pensata.

Considerando tutti e tre i tentativi di distinguere norme giuridiche e norme morali (la teoria del diritto come regola della forza, la teoria dei frammenti di norma e la teoria della forma logica), si può osservare come non solo la sanzione arretri ogni volta sullo sfondo, ma lo stesso problema del carattere distintivo delle norme giuridiche tenda gradatamente a dissolversi. Anche per "norma (giuridica)", come per "diritto" in senso oggettivo, non vi è necessariamente una caratteristica distintiva comune a tutte le cose chiamate così. Anche nell'analizzare il termine "norma (giuridica)" si rischia di cadere nella falsa credenza dell'essenzialismo.

4. *Conclusione*

Karman rappresenta indubbiamente un interessante sviluppo nel percorso di pensiero di uno dei più importanti filosofi viventi, un parziale punto di svolta nell'orizzonte teorico tracciato nel ventennale progetto di ricerca *Homo sacer*, con una inedita fascinazione orientale. E ciò anche se il filosofo romano aderisce, nella sua trattazione, a teorie controverse quali quella di Carl Schmitt sul concetto di "colpa" e quella di Hans Kelsen sulle norme giuridiche.

Con riferimento alla colpa (*rectius*, colpevolezza), sarebbe forse stato più proficuo, rispetto all'intenzione dell'Autore di teorizzare una radicale innocenza del vivente, espandere sull'origine etimologica del termine "peccato". Come sottolineato da Ernout e Meillet nel loro vocabolario, *pecco* sarebbe rispetto a *pes* (piede) quello che *mancus* (monco) è rispetto a *manus*. Anche *scelus* (delitto) e *sceleratus* (delinquente) hanno una etimologia simile e rimandano al sanscrito *skhalati* (faccio un passo falso). E la radice verbale ebraica **ht'*, che nel testo biblico esprime l'idea del peccato, significa originariamente "fare un passo falso", "mancare il bersaglio", come i vocaboli greci *amartano* e *amartìa*. In origine, la lingua non disponeva pertanto di un termine specifico per rendere l'idea del peccato. Detto termine sembra essere stato elaborato a partire dalla nozione di errore involontario, com'è il mancare il bersaglio o il mettere il piede in fallo. Per Agamben, ciò

implica che, nella costruzione di "peccato", la presupposizione di una libera volontà del soggetto non è in alcun modo necessaria: essenziale è solo la connessione tra un determinato atto e le sue conseguenze, proprio come nel diritto penale "primitivo" o nella moderna responsabilità civile oggettiva.

Con riferimento invece alla sanzione, l'idea di una legge di essa priva venne avanzata già dalla giurisprudenza romana. Un passo delle *Regulae* di Ulpiano (1-2), infatti, distingue le leggi proprio rispetto alla presenza o all'assenza delle sanzioni: perfetta è la legge che vieta che qualcosa sia fatto e, se viene fatto, lo annulla («perfecta lex est, quae vetat aliquid fieri, et si factum sit, rescindit»); imperfetta è la legge che vieta che qualcosa sia fatto e, se viene fatto, né lo annulla né infligge una pena a colui che ha agito contro la legge («imperfecta lex est, quae vetat aliquid fieri, et si factum sit, nec rescindit nec poenam iniungit ei qui contra legem fecit»); meno che perfetta è la legge che vieta che qualcosa sia fatto e, se viene fatto, non lo annulla, ma infligge una pena a colui che ha agito contro la legge («minus quam perfecta lex est, quae vetat aliquid fieri, et si factum sit, non rescindit, sed poenam iniungit ei qui contra legem fecit»). Come sottolineato dallo stesso Agamben, è alquanto singolare che proprio la cultura che ha trasmesso all'Occidente i princìpi fondamentali del diritto abbia legato la sanzione a una minore perfezione della legge, se non a una sua imperfezione. Come ammonito dallo stesso Autore, giuristi e filosofi non dovrebbero omettere di misurarsi con la teorizzazione di una legge del tutto priva di sanzione, che in quanto tale impone di fondare su altro la sua "santità".

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

Angela Maria Felicetti*

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.

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

* Angela Maria Felicetti is a trainee lawyer and research assistant in civil procedure law at the University of Bologna. She holds a law degree from the University of Bologna and an LL.M. in International Dispute Resolution from King's College London. Her research interests focus on arbitration law and alternative dispute resolution.

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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 Shachar: see Ayelet Shachar, *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 law[4].

> 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 conscience[5].

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 endorsement[6] 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 marriage[7], discriminatory provisions for the inheritance of widows[8] and, generally, violations of women's rights[9]. 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 shortly[11] 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 told[12] – 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 2009[14]. 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/newstopics/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).

Act[15]. The public concerns on the social disruption and human rights violations[16] 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 Lords[17]. 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 page[18], 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 marriage[20], 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 press[23]. 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 researchers[24] the task of producing a study[25] to cast light on Islamic alternative dispute resolution bodies operating in the country. Unfortunately, as Federica Sona accurately described[26], 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 Council[28] (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* Sharīʿah 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-contract[29]. 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 practices[31]. 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' consent[32]. 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 woman[38] – 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 favour[39], 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 (*mabarat* 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 variate between different currents of Islam[41] – *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 argued[50] 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 implementation[53].

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.lawandreligionuk.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 *Shari'a* 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 *Shari'a* 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" is[55]. Those studies which focused exclusively on *Shari'a* 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 associations[56] 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 scholars[57] 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 world[60]. 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 Kingdom[61]. 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 Report[64]. 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 case[68], 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. Akther 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 signalled[70] 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 *Akther 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 tendency[72] 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 effects[73]. 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 reform[74], 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 provision[79]. Many commentators have envisaged the extension of such rule to Muslim divorce[80], 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 minorities[82]. 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 users[83]. 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 suggested[85] 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 marriages[86]. 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 encouraged[87]. 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 provisions[91] 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 justice[93]: 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 disputes[96]. 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 litigation[97]. Family law expert Frances Hughes QC[98] 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 lecture[99] – 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 disputes[100] 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 practitioners[101], 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 ARB1FS (in the case of financial disputes) and Form ARB1CS (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 Division[104] 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 them[108]. 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 necessary[110].

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 made[112] and of mistakes by the tribunal on the facts of the case[113]. 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 page[114].

The Children Scheme mostly mirrors the Financial Scheme[115]. 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 proceedings[116].

On this regard, they are required to fill a specific questionnaire[117] 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.

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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/ARB1CS.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 principles[121]. 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 law[122]. Refusal of recognition on this ground is considered a last resort measure, as English courts tend to apply a pro-arbitration approach[123]. 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 treaties[125]. 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 ECHR[127] (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 answers"[129]. 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 outcome[133]. 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 person[134]. Regardless of how religious courts may define their services, the literature is – in my view correctly – identifying them as arbitral tribunal[135]. 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 research[136]: 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 decision[140]. 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 1989[142]. The interpretation of the principle requires a certain degree of flexibility to accommodate multicultural conceptions[143] 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 such[147]. 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 parties[148]. 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 rights[149]. 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 elsewhere[150], 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 legislation[151].

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 enacted[152]. 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 made, 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 expressed[153], 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 evidence[154] 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 not[156]. 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 labelled 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/prenuptial-agreement (last visited March 25, 2019).

156. See Douglas 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 scholars[157] 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 way[158] – 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 activities[160].

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. Broyde, *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 approach[161]. 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 proceedings[162]. 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 1996[164] 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 process[166].

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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* case[168], the German Federal Tribunal (*Bundesgerichtshof*, hereinafter "BGH") reasoned that the "mandatory consent" to arbitration did not, after a detailed analysis, made the arbitration agreement inval*id.* 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 impartiality[169]. 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 this[171] 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 brother[172] 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 treatments[174]. 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 counsels[175] 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 man[176]. 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 33[177]. 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 terms[178]. 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 others[180] – 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 orders[182]. 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 Griffith 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 ways[186]. 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 applied[187]. 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 *Shari'a* since 2001[188]. 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 orders[189]. The system resulting from such centralistic approach is a "juristic" construction, the product of the work of lawyers[190]. 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 coexist[192]. 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 state[195].

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 words[196], 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 law[197].

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 modifications[198], 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" pluralism[199] – 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 courts[200]. 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 breakdown[201]. 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 Kennett[202] – "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. 162/2014[203] establishes, in fact, that parties may agree to undergo a "negoziazione 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 party[204]. The final agreement acquires the value of a judicial decree of divorce or separation, following a positive evaluation from the public prosecutor. The Italian scholarship[205] 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 Latvia[206] 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.

Romania[207], as well by the administrative authority in Portugal[208]. In France, public notaries can dissolve civil unions but not marriages[209].

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 codes[210]). 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 arbitrable[211]. The German Civil Code provides for the arbitrability of any dispute involving pecuniary interests[212]. Both Italian and German scholars argue for the arbitrability of disputes on patrimonial rights following the dissolution of marriage[213], 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 1950s[214]. In Germany, instead, there are several functioning family arbitration tribunals, which operate according to their own arbitration rules[215]. 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 countries[216]. 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 arbitration[218]. As the public debate around the IICJ became particularly tense[219], the Government decided to take a strong action on religious courts operating in the Ontarian territory. The decision was taken regardless of the 2004 Report[220] by the Advocate General Boyd, that gave a positive picture of religious arbitration, although recommending some improvements to the existing legislation. The measure[221], 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 them[222]. 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 incompatible[224] 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.

The Benefits of Investing in Low-Profit Limited Liability Companies by Not-for-Profit Organizations: The Case of L3Cs in the United States

Valeriya Avdeev and Hannah Wong*

Abstract: The low-profit limited liability company (L3C) is a hybrid entity that allows its owners to generate a profit while furthering an important social purpose such as a charitable, educational, religious or benevolent drive. By it very definition, L3Cs are ideal investment options for private foundations. Specifically, as an alternative to grants, private foundations can invest in L3Cs as long as such investments operate within the boundaries of the Internal Revenue Code and continue to fall under the allowed investment for tax-exempt entities. Several states have adopted legislation allowing the creation of L3Cs. However, due to the lack of guidance from the Internal Revenue Service whether L3Cs fall under the allowed investments for tax-exempt entities, it remains to be seen whether private foundations will indeed invest in L3Cs. As part of this research, a survey was conducted to ascertain whether the newly-created L3Cs have benefited from investments from private foundations. Among the survey findings, it was discovered that only seven percent of the surveyed L3Cs received investments from private foundations.

Keywords: Limited liability company; hybrid entity; L3C; private foundations; program-related investments.

1. *Introduction*

A low-profit limited liability company, or an L3C, is a dynamic entity that statutorily combines such competing characteristics as a social purpose and profit generation. Although not all states have statutes allowing the creation of L3Cs, the entity has proven to be quite popular, especially in the non-for-profit and social enterprise arenas. Presently, there are about 1,000 L3Cs in operation in the United States[1]. This article discusses L3C entities which were specifically designed to increase the number of program-related investments (PRIs) that private foundations make to such social-purpose businesses.

Part 2 introduces L3Cs, their social purpose and the use of program-related investments. Part 3 analyses a Vermont L3C statute as an example of L3C legislation. Part 4 examines a survey of L3C entities designed to examine the use of PRIs and profit levels. Finally, Part 5 addresses the tax uncertainty surrounding PRIs and possible future developments.

2. *Creation of the L3C*

The low-profit limited liability company (L3C) is a relatively new business entity allowing owners to marry the flexibility and profit motive of a regular limited liability company (LLC) with a charitable mission or purpose. In the United States, statutes enabling the creation of such a hybrid entity have so far been enacted in eleven states

* Dr. Valeriya Avdeev and Dr. Hannah Wong are Associate Professors at William Paterson University, Cotsakos College of Business (New Jersey, United States).

1. See Anne Field, *Another Reason to Become an L3C* (Forbes, August 22, 2014), available at https://www.forbes.com/sites/annefield/2014/08/22/another-reason-to-become-an-l3c (last visited March 25, 2019).

and two Native American tribes[2]. An L3C organized in any of those jurisdictions can be legally operated in all other states[3].

The L3C is one of the most flexible business entities ever envisioned. It combines the elasticity of the LLC, where the business owner is protected against unlimited liability, with a choice of being a taxable or a pass-through entity. In addition, L3Cs allow owners to both generate profits and further a social purpose that they are passionate about[4]. While an L3C is neither tax-exempt nor eligible to receive tax-deductible charitable contributions, the statutes for this new hybrid entity were specifically drafted to encourage a certain type of investing as the foundation for capital contributions to an L3C – program-related investment[5].

The concept of program-related investment is relevant to private foundations. In order to keep their tax-exempt status, private foundations must generally direct 5 percent of their assets annually for charitable purposes[6]. The primary means to satisfy this requirement has typically been grant giving. PRIs, however, are a much more attractive option for private foundations than grant distributions. PRIs can take many forms; they can be, for example, regular loans with repayment schedule and threat of penalties or, more interestingly, equity investments, bank deposits, or guarantees[7]. Most often, PRIs are repaid and can even earn a profit[8], if they have an interest rate which is set lower

2. See Madeleine Monson-Rosen, *Companies with Purpose: The L3C Option in the US* (MissionBox, September 25, 2018), available at https://www.missionbox.com/article/401/companies-with-purpose-the-l3c-option-in-the-us. The following eleven states have L3C legislation: Illinois, Kansas, Louisiana, Maine, Michigan, Missouri, North Dakota, Rhode Island, Utah, Vermont, and Wyoming. The Crow Tribe of Montana and the Oglala Sioux Tribe have also adopted the L3C. Interestingly, the state of North Carolina has abolished the L3C legislation that it enacted in 2010. For further details, see Ann Field, *North Carolina Officially Abolishes the L3C* (Forbes, January 11, 2014), available at https://www.forbes.com/sites/annefield/2014/01/11/north-carolina-officially-abolishes-the-l3c.

3. See Americans for Community Development, *Laws*, available at www.americansforcommunitydevelopment.org/laws (last visited March 25, 2019).

4. See Cassady V. Brewer and Michael J. Rhim, *Using the "L3C" for Program-Related Investments*, 21 Taxation of Exempts 11, 17 (2009).

5. See *id.*

6. See Field, *Another Reason to Become an L3C* (cited in note 1).

7. See *id.*

8. See Brewer and Rhim, *Using the "L3C"* at 12 (cited in note 4).

than the prevailing market rate[9]. In addition, capital gains on such investments are excluded from the definition of gross investment income for the purposes of the 2 percent annual excise tax on private foundations[10]. PRIs also qualify as an exception to the excess business holdings rule of section 4943 of the Internal Revenue Code[11]. Finally, PRIs require greater accountability to the foundation as they will likely be repaid[12].

Despite these advantages, private foundations would shy away from PRIs prior to the creation of L3Cs[13]. Uncertainty can arise as to whether a specific PRI arrangement meets the applicable IRS requirements, will not be subject to the 10 percent tax, and will not cause the foundation to lose its tax-exempt status. In order to overcome such uncertainty, a private foundation not using an investment in an L3C must request a costly and time-consuming private letter ruling from the IRS[14]. Private letter rulings can take months to be issued and are very expensive. The new hybrid entity, the L3C, was specifically designed to counter these obstacles and qualify for PRI requirements under the Internal Revenue Code.

3. *L3C Legislation*

In April 2008, Vermont was the first state to enact legislation enabling the creation of an L3C [15]. In Vermont, L3Cs are required by statute to have the primary purpose of furthering a charitable or educational mission and not maximizing its profits[16].

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9. See Robert Lang and Michael Martin, *DAFs, PRIs, L³Cs – Tools of Social Impact Investing* 6, available at http://americansforcommunitydevelopment.org/downloads/DAFs.%20PRIs.%20L3Cs%20-%20Tools%20of%20Social%20Impact%20Investing.pdf (last visited March 25, 2019).

10. See Internal Revenue Code (IRC) § 4940(c)(2).

11. See Lang and Martin, *DAFs, PRIs, L³Cs* at 19 (cited in note 9).

12. See *id.* at 11.

13. See Lang and Martin, *DAFs, PRIs, L3Cs* at 11 (cited in note 9) (stating that the record of private foundations making PRIs has been very poor).

14. See *id.* at 17.

15. See 2008 Vt. Laws 106.

16. See 11 Vt. Stat. Ann. § 3001(27)(i), added by 2008 Vt. Laws 106.

Section 4001 of the Vermont Limited Liability Company Act defines an L3C as "a limited liability company that elects to be a low-profit limited liability company ... and meets the requirements of section 4162 of this title"[17].

Pursuant to Section 4162:

> A limited liability company shall be organized for a business purpose that satisfies, and shall at all times be operated to satisfy, each of the following requirements:
>
> (1) The company:
>
> (A) significantly furthers the accomplishment of one or more charitable or educational purposes within the meaning of 26 U.S.C. § 170(c)(2)(B); and
>
> (B) would not have been formed but for the company's relationship to the accomplishment of charitable or educational purposes.
>
> (2) No significant purpose of the company is the production of income or the appreciation of property; provided, however, that the fact that a person produces significant income or capital appreciation shall not, in the absence of other factors, be conclusive evidence of a significant purpose involving the production of income or the appreciation of property.
>
> (3) No purpose of the company is to accomplish one or more political or legislative purposes within the meaning of 26 U.S.C. § 170(c)(2)(D).

In addition, "[t]he name of a low-profit limited liability company shall contain the abbreviation L3C"[18].

Section 4163(a) of the Act further provides that:

> A limited liability company that elects to be an L3C and subsequently fails to satisfy any one of the requirements set forth in section 4162 of this title shall immediately cease to be a low-profit limited liability company, but by continuing to meet all the other requirements of this chapter, continues to exist as a limited liability company.

17. 11 Vt. Stat. Ann. § 4001(13).
18. 11 Vt. Stat. Ann. § 4005(a)(2).

Section 4162(1)-(2) of the Vermont statute bears a strong resemblance to the PRI requirements set out under section 4944(c) of the Internal Revenue Code. This is not a coincidence[19], because, as noted above, L3Cs were specifically designed to qualify for the PRI exception[20]. The drafters of L3C legislation envision that the IRS will issue a corresponding Revenue Ruling, accepting the L3C as a suitable avenue for program-related investments, as well as further guidance regarding the use of L3Cs. Most importantly, the promoters of L3Cs envisage that the IRS will soon accept L3Cs as a legitimate PRI investment vehicle and eliminate the need for private foundations to request private letter rulings every time they wish to enter into a PRI arrangement[21]. Through the increase in investments made by private foundations and the flexibility afforded by the L3C, it is also anticipated that L3Cs will increase the flow of funds from for-profit investors to ventures with a socially beneficial purpose[22].

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19. As explained by Robert Lang, chief executive officer of the Mary Elizabeth and Gordon B. Mannweiler Foundation and a strong proponent of L3Cs, "Marcus Owens, who has collaborated with Robert Lang on designing the L3C and who earlier in his career was the head of the Exempt Organization Division at the IRS, came up with a simple but elegant way of making the L3C an attractive vehicle for private foundations' PRIs." Thomas A. Kelley, *Law and Choice of Entity on the Social Enterprise Frontier* 41 (2009), available at http://ssrn.com/abstract=1372313 (last visited March 25, 2019).

20. See *id.* at 41 ("His idea was to draft model legislation – which he hoped would be adopted in at least one state – that closely tracked the language of the PRI requirements laid out in Section 4944(c) of the Internal Revenue Code").

21. See *id.* at 21 ("Alternatively, a foundation considering a PRI could reduce its risk by seeking a private letter ruling from the IRS, which in effect would act as pre-approval").

22. See *id.* at 42 n. 182 ("According to Lang and Owens, the long-term solution would be to create and market L3C securities. According to Lang, if substantial brokerage houses of solid reputation could be convinced to package and market L3C securities, it is possible that primary and secondary markets would evolve and that those wishing to invest in hybrid social ventures – particularly private foundations looking to engage in PRIs – could work through those brokers to pick and choose appropriate investments. Those securities could be bonds, membership units, convertibles, options, loans, or whatever could be sold alone or as part of a package. An added benefit would arise from the due diligence these brokers would perform, which would provide added assurance to investors that the L3C investments were reasonably likely to achieve their multiple bottom line goals").

Since the first L3C statute was enacted in Vermont, ten other states have followed with their own L3C legislation[23]. All the statutes that have so far been adopted require the same four key requirements as in Vermont: (1) the entity must further the accomplishment of a charitable or educational purpose within the meaning of IRC § 170(c)(2)(B), (2) the entity would not have been formed but for its relationship to the accomplishment of a charitable or educational purpose, (3) neither the production of income nor the appreciation of property is a significant purpose of the entity, and (4) the entity has no political or legislative purpose within the meaning of IRC § 170(c)(2)(D)[24]. As discussed above, these requirements are intended to satisfy the PRI requirements under IRC § 4944(c).

In addition, all of the eleven states or Native American tribes that have passed L3C legislation have done so by simply supplementing their existing LLC statutes. This implies that the L3C is a subset of the LLC. Accordingly, an L3C should be treated as a pass-through entity for income tax purposes, provided that it does not elect to be treated as a corporation[25]. Similarly to the LLC, the L3C provides its members with limited liability protection against the actions and debts of the business. Likewise, L3C membership is open – there being no statutory limitations – to foundations, for-profit entities, public charities, and individuals, among others. Also, private foundations investing in an L3C can, in principle, retain as much control over the management of the L3C as they desire[26]. Finally, an L3C formed in any state that has passed L3C legislation qualifies to do business in all 50 states.

At the same time, certain differences in the current L3C legislation can be noted. In some states, such as Vermont and Utah, the charitable or educational purpose requirement for an L3C is contained in the definitional section of the state's limited liability company act, and no specific language is required to be included in an L3C's articles

23. See Monson-Rosen, *Companies with Purpose* (cited in note 2).

24. See Brewer and Rhim, *Using the "L3C" for Program-Related Investments* at 17 (cited in note 4).

25. See Monson-Rosen, *Companies with Purpose* (cited in note 2).

26. See Elizabeth Schmidt, *Vermont's Social Hybrid Pioneers: Early Observations and Questions to Ponder,* 35 Vermont Law Review 163, 169 (2010).

of organization[27]. Conversely, in other states, such as Michigan, the charitable or educational purpose together with the prohibition on lobbying and political campaign activity must be expressly stated in an L3C's articles of organization[28]. The latter option may probably be more appealing to the IRS, since the articles of organization are a public document whereas the operating agreement is not.

Moreover, the L3C statutes of some states, like Illinois, limit eligibility to charitable or educational purposes of a social nature[29]. Some promoters of L3Cs have argued that the range of purposes should be expanded so as to include religious, scientific and literary organizations, or even organizations for the prevention of cruelty against children or animals or the promotion of national or international amateur sports competitions[30]. In any event, most promoters of the L3C tend to agree that its charitable purpose needs to outweigh the entity's profit motive[31].

4. *Survey*

In light of the legislative developments discussed above, a hypothesis was formed that, the L3C having become available, a growing number of PRIs would be made available from foundations to newly created L3Cs. After all, according to some promoters of the L3C, a growing number of foundations have started to make PRI investments through this new business entity[32].

27. See J. William Callison and Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures,* 35 Vermont Law Review 273, 284 (2010).

28. See Mich. Comp. Laws § 450.4102(2)(m).

29. See 805 ILCS 180/1-26(a).

30. See Field, *Another Reason to Become an L3C* (cited in note 1).

31. See *id.*

32. See *id.* ("[O]ver the last few years, more [foundations] have been getting their feet wet. The Gates Foundation set up a $100 million PRI fund several years ago, for example").

In order to test such hypothesis, a survey was conducted[33] using the following questions:

1) In what state is your L3C organized?
2) In which states do you primarily operate?
3) How did you initially raise capital for your business? Check all that apply (owners' personal funds, third party financing, grants, PRIs, other (specify)).
4) Have you ever received PRIs?
5) Are you actively seeking PRIs or grants?
6) Who are your owners-members? Check all that apply (individuals, corporations, partnerships, trusts, private foundations, other tax-exempt organizations, other (specify)).
7) On average, how much revenue in US dollars does your entity generate during the year (income less expenses)?[34]
8) How is your L3C currently taxed (partnership, sole proprietorship, corporation, other (specify))?
9) If you received funding through PRIs, do you report annually on your expenses to foundations? What are those reporting requirements?
10) Did your organization ever apply for Section 501(c)(3) status?

4.1. *Survey Results*

Question 1 (states where L3Cs were organized):

- Michigan: 47 percent;
- Illinois: 20 percent;
- Vermont: 13 percent;
- Maine, Utah, and Wyoming: 7 percent.

33. This survey was conducted by the authors of this article in February 2014 through SurveyMonkey, using a list of existing L3Cs compiled from data available on the website of Americans for Community Development found at http://www.intersectorl3c.com. A total of 596 entities were surveyed; of these, 16 percent responded, 7 percent opted out, and 2 percent bounced the survey.

34. The available choices were: "less than $5,000"; "between $5,000 and $10,000"; "between $10,000 and $50,000"; "between $50,000 and $100,000"; and "more than $100,000".

Question 2 (states where entities primarily operate):
- Michigan: 47 percent;
- Illinois: 20 percent;
- Maine: 13 percent;
- Utah, Wyoming, and nationally: 7 percent.

Question 3 (how L3Cs raised initial capital):
- Owners' personal funds: 86 percent;
- Third-party financing: 29 percent;
- Grants: 43 percent;
- Program-related investments: 7 percent.

7 percent of the respondents received PRIs (question 4). 40 percent of the respondents were actively seeking PRIs (question 5).

Question 6 (ownership composition):
- Corporations: none;
- Individuals: all;
- Partnerships: 14 percent;
- Trusts, private foundations, and other exempt entities: 7 percent.

Question 7 (net revenue generated annually):
- Less than $5,000: 40 percent;
- Between $5,000 and $10,000: 7 percent;
- Between $10,000 and $50,000: 27 percent;
- Between $50,000 and $100,000: 7 percent;
- More than $100,000: 20 percent.

Question 8 (tax treatment of L3Cs):
- Partnerships: 31 percent;
- Corporations: 31 percent;
- Sole proprietorships: 39 percent.

No respondent had reporting requirements for PRIs or grants (question 9).

Only 7 percent of responding L3Cs filed for tax-exempt status (question 10).

4.2. *Survey Analysis*

While originally hypothesized that, the L3C having become available, a growing number of PRIs would be made available from foundations to newly created L3Cs, the survey results established that only 7 percent of surveyed L3Cs received PRIs. At the same time, the finding that 40 percent of survey respondents are actively seeking PRIs strongly indicates that L3Cs are aware of such funding opportunities and are confident in their efforts.

Furthermore, the noticeable similarity between the percentage of PRI-receiving L3Cs (7 percent) and that of L3Cs having private foundations as their owners (7 percent) strongly suggests that foundations making PRI investments are likely to require accountability from L3Cs; this may take the form of direct control, and perhaps even voting control, over a newly-formed L3C by the investing foundation. The importance of private foundations in this regard cannot be understated. In fact, all of the PRIs received by surveyed L3Cs were from entities of this type. This may lend support to the idea that a combination of greater flexibility in investment decisions and less bureaucracy enables private foundations to make more purpose-related investments[35].

Another interesting finding is that, while L3Cs are designed by statute as "low-profit" entities, 20 percent of surveyed L3Cs generated annual net profits in excess of $100,000. Here it should be noted that there has not been any official guidance aimed at defining the meaning of "low-profit" for the purposes of L3C legislation.

Finally, L3Cs are drafted as a subset of LLCs and as such, they should be as flexible in the choice of its form for tax purposes as any LLC. According to the survey, only 31 percent of L3Cs chose taxable corporate form and all of the others have opted to choose some form of a pass-through entity.

35. See Field, *Another Reason to Become an L3C* (cited in note 1).

5. *Tax Uncertainty of PRIs and Future Developments*

After reviewing the survey results, it appears that foundations are still very nervous to make PRI investments. As has been noted, "Foundations have dragged their feet in trying PRIs ... because they fear the IRS won't approve of the move"[36]. After all, the Internal Revenue Service still has not released any guidance as to whether PRI investments made through an L3C will automatically qualify as a proper tax-exempt investment.

5.1. *Social Impact Investing*

"Social impact investing" is commonly understood as investing for the purpose of achieving positive social results[37]. PRIs, as a form of venture capital investment, are used for social impact investing[38]. An early user of PRIs to this end was the Ford Foundation. Ford-funded PRIs, characterized by great accountability[39], have typically consisted of low-cost loans, loan guarantees, and equity investments[40]. Such PRI investments do not only provide capital to the newly-created businesses, but also allow L3Cs to gain access to new conventional funding in the future, such as mainstream banks[41].

5.2. *Mission-Related Investments*

Mission-related investments (MRIs) can be used by foundations alongside PRIs, but they tend to be even riskier for the purposes of satisfying statutory tax exemption requirements[42]. They are investments made with the clear intention of meaningfully contribute to the accomplishment of a foundation's philanthropic mission[43]. Unlike

36. *Id.*
37. See Lang and Martin, *DAFs, PRIs, L3Cs* at 18 (cited in note 9).
38. See *id.* at 19.
39. See *id.*
40. See *id.*
41. See *id.*
42. See *id.*
43. See *id.*

PRIs, MRIs are not statutorily prescribed and have no consensus definition[44].

5.3. *Donor-Advised Funds*

Donor-advised funds (DAFs) are a way for individuals to create an investment vehicle similar to private foundations, but without the administrative or reporting burdens of a foundation[45]. DAFs are statutorily prescribed and IRS has a simple guide to DAFs[46]. Contributions to DAFs are treated as contributions to a public charity, so donors have some advantage over private foundations[47]. The ability of a DAF to operate like a private foundation makes it a perfect vehicle for making social impact investments, including PRIs.

5.4. *Future of L3Cs*

As described earlier, L3Cs are flexible entities that merge together the profit motive and the need for social impact investing. Specifically, PRIs can be used to give L3Cs that necessary venture capital to start its operations and become self-sustainable. PRIs can be made by private or public foundations or by DAFs. L3Cs create a perfect investment vehicle for foundations to make better investments than grants. Private foundations make grants to qualified tax exempt public charities. However, foundations can make PRI investments to private, for-profit enterprises[48]. Yet, as the survey shows, there is still much work to be done to make L3Cs a recognized vehicle for PRI investments. Many are optimistic that over time, L3Cs will become the primary vehicle for impact investing[49].

44. See *id.*
45. See Lang and Martin, *DAFs, PRIs, L3Cs* at 20 (cited in note 9).
46. See *id.*
47. See *id.*
48. See *id.*
49. See *id.*

Kaizen: Responsabilità sociale d'impresa nel diritto giapponese

Emil Mazzoleni*

Abstract: L'obiettivo di questo lavoro è studiare come la nozione di responsabilità sociale d'impresa possa essere adattata al sistema legale in cui opera. Questa ricerca sarà condotta attraverso l'analisi storica di un caso esemplare, il concetto giapponese di responsabilità sociale d'impresa. La tesi proposta è la seguente: il concetto giapponese di responsabilità sociale delle imprese concilia la tradizione confuciana delle relazioni sociali con il concetto occidentale di etica imprenditoriale.

Parole chiave: Responsabilità sociale d'impresa; diritto giapponese; *Kaizen*; tradizione confuciana; etica d'impresa.

Abstract: *The purpose of this paper is to study how the idea of corporate social responsibility can be adapted to the legal system in which it operates. This research will be conducted through the historical analysis of a prime example, the Japanese concept of corporate social responsibility. My proposed thesis is the following: the Japanese concept of corporate social responsibility fits the Confucian tradition of social relations with the Western concept of enterprise ethics.*

Keywords: *Corporate social responsibility; Japanese law;* Kaizen*; Confucian tradition; enterprise ethics.*

Sommario: 1. Introduzione. – 2. La responsabilità sociale d'impresa nel periodo Meiji (1868–1912). – 3. La responsabilità sociale d'impresa nel periodo Taishō (1912–1926). – 4. La responsabilità sociale d'impresa nel periodo Shōwa (1926–1991). – 5. La responsabilità sociale d'impresa nel periodo Heisei. – 6. Conclusione.

1. *Introduzione*

L'espressione "responsabilità sociale d'impresa"[1] evoca un complesso dibattito filosofico inerente ai rapporti tra etica ed economia. Ogni impresa è, infatti, connotata da profili non solo economici[2] e giuridici[3], ma anche istituzionali e sociali. Per profilo istituzionale di un'impresa commerciale[4] si intende quella rete di contratti interni ed esterni ad essa che la vincolano al rispetto di impegni gerarchicamente

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* Emil Mazzoleni, laureato in Giurisprudenza presso l'Università di Pavia e in Scienze sociali presso lo IUSS di Pavia, dottore di ricerca in Scienze giuridiche presso il Dipartimento Cesare Beccaria dell'Università di Milano, svolge le funzioni di segretario del Centro di Ricerca Dipartimentale di Studi sulla Simbolica Giuridica presso il Dipartimento di Giurisprudenza dell'Università di Pavia e lavora all'Avvocatura civica del Comune di Milano. Tra le sue pubblicazioni più recenti, *Il diritto nella fiaba popolare europea* (FrancoAngeli, Milano, 2016).

1. Ecco la traduzione dell'espressione "responsabilità sociale d'impresa" in quindici diverse lingue: in inglese "*corporate social responsibility*"; in tedesco "*unternehmerische Gesellschaftsverantwortung*"; in francese "*responsabilité sociale des entreprises*"; in castigliano "*responsabilidad social corporativa*"; in olandese "*maatschappelijk verantwoord ondernemen*"; in ceco "*společenská odpovědnost firem*"; in slovacco "*spoločensky zodpovedné podnikanie*"; in polacco "*społeczna odpowiedzialność biznesu*"; in svedese "*företags samhällsansvar*"; in norvegese "*bedriftens samfunnsansvar*"; in sloveno "*družbena odgovornost podjetij*"; in estone "*ettevõtte ühiskondlik vastutus*"; in russo "*korporativnaya sotsial'naya otvetstvennost'*" (Корпоративная социальная ответственность); in cinese "*qǐyè shèhuì de zérèn*" (企業の社会的責任); in giapponese "*kigyō shiyakuwai sekinin*" (企業社會責任).

2. «Sono redditi d'impresa quelli che derivano dall'esercizio di imprese commerciali. Per esercizio di imprese commerciali si intende l'esercizio per professione abituale, ancorché non esclusiva, delle attività indicate nell'art. 2195 c.c., e delle attività [d'impresa agricola] che eccedono i limiti ... stabiliti [dalla legge], anche se non organizzate in forma d'impresa»: art. 55, d.P.R. 22 dicembre 1986, n. 917.

3. Il codice civile italiano non definisce cosa sia l'impresa, ma si limita a dare la nozione di imprenditore (art. 2082 c.c.).

4. Le disposizioni della legge che fanno riferimento alle attività e alle imprese commerciali si applicano, se non risulta diversamente, alle imprese che esercitano attività (i) industriale diretta alla produzione di beni o di servizi; (ii) intermediaria nella

superiori alla mera ricerca del profitto[5]. Oltre a una dimensione istituzionale, l'impresa riveste inevitabilmente anche un profilo sociale: essa costituisce una federazione di interessi fortemente interconnessa con l'ambiente in cui opera, un intreccio di vite ineluttabilmente legate al suo destino.

Questa considerazione integrale dell'agire d'impresa – che non separa economia ed etica, ma anzi le tratta come strettamente connesse – appartiene pienamente a una tradizione continentale europea e italiana. È una storia che inizia con il proto-capitalismo delle città rinascimentali ed arriva fino alle concezioni d'impresa proprie dell'istituzionalismo o delle teorie partecipative, passando per l'esaltazione delle virtù civiche, lo storicismo filosofico e la dottrina sociale della Chiesa[6].

Nel linguaggio giuridico, con le espressioni "responsabilità sociale d'impresa" o "impresa socialmente responsabile" ci si riferisce dunque a categorie concettuali non nuove al pensiero sociale, ma reinterpretate dal giurista in una prospettiva inedita: nascono così il principio di sussidiarietà orizzontale, la regolazione privata degli interessi pubblici, la nozione di *soft law*.

È comunque vero che alcune di quelle che sogliono individuarsi come caratteristiche di *soft law* si prestano a evidenziare le peculiarità della normativa della responsabilità sociale d'impresa: l'incertezza del confine tra il piano "giuridico" e quello "sociale", "etico-morale" o meramente "fattuale"; la mancanza di un nesso immediato tra comando/divieto e sanzione; l'accento posto più sull'effettività che sulla validità, sul consenso più che sul comando, sulla volontarietà più che sulla vincolatività, sulla persuasione più che sulla coercizione[7].

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circolazione dei beni; (iii) di trasporto per terra, per acqua o per aria; (iv) bancaria o assicurativa; (v) ausiliaria delle precedenti (art. 2195, commi 1 e 2, c.c.).

5. Celebre è il caso della Norddeutscher Lloyd, una società che all'inizio dello scorso secolo si occupava di gestire la navigazione sul Reno e per la quale lo scopo di garantire la navigabilità del fiume era considerato prioritario persino a quello di distribuire un utile ai propri azionisti: si veda Alberto Asquini, *I battelli del Reno*, in *Rivista delle società*, 1959, IV, pp. 617 ss.

6. Si veda Giampaolo Azzoni, *L'azienda etica: L'impresa come protagonista di una storia che le persone desidererebbero sentire*, in Marco Minghetti e Fabiana Cutrano (a cura di), *Le nuove frontiere della cultura d'impresa: Manifesto dello* humanistic management, Etas, Milano, 2004, p. 178.

7. Si veda Marco Ferraresi, *Responsabilità sociale dell'impresa e diritto del lavoro*, Cedam, Padova, 2012, p. 15.

L'istituto della responsabilità sociale d'impresa realizza perciò un peculiare connubio tra la dimensione etica e la natura giuridica dell'impresa, in quanto concreta manifestazione della volontà aziendale di gestire direttamente le problematiche sociali che emergono nell'esercizio delle proprie attività. La nozione di responsabilità sociale d'impresa si sviluppa perciò in un contesto culturale ed accademico in cui sempre più spesso si richiede ad un'impresa di rispondere alle aspettative economiche, ambientali, sociali non solo davanti ai propri portatori di azioni (*shareholders*) ma anche davanti ai propri portatori di interesse (*stakeholders*)[8]. Questa tesi – nota con il nome di "teoria degli *stakeholder*" – è stata formulata dal filosofo statunitense Robert Edward Freeman[9], sebbene un'anticipazione di tali concetti sia comunque rintracciabile nel metodo della scomposizione dei parametri elaborato dall'economista italiano Giancarlo Pallavicini[10].

Alla teoria degli *stakeholder* di Freeman si contrappone la cosiddetta teoria degli *shareholder* del Premio Nobel per l'economia Milton Friedman, sintetizzabile nel celebre adagio «business of business is business»[11]. Secondo Friedman, infatti, in un'economia di mercato l'unica forma di responsabilità sociale d'impresa concepibile è quella di utilizzare le proprie risorse ed impegnarsi in attività volte ad incrementare i profitti rimanendo all'interno delle regole del gioco; in altri termini «impegnarsi in una concorrenza aperta e libera, senza inganno e senza frode»[12].

Al centro del dibattito sulla *corporate social responsibility* vi sono quindi due teorie etiche concorrenti: la teoria degli *shareholder* e la teoria degli *stakeholder*. Le due concezioni non sono interamente incompatibili, anzi esse spesso porteranno, nella pratica, a risultati simili. Infatti, se si considera la redditività di lungo periodo, allora vi è una

8. L'insieme degli *stakeholder* si suddivide in gruppi di interesse interni (i clienti, i fornitori, i finanziatori, i dipendenti) e in gruppi di interesse esterni (le comunità locali, i residenti di aree limitrofe, le generazioni future, enti governativi).

9. Si veda R. Edward Freeman, *Strategic Management: A Stakeholder Approach*, Pitman, Boston, 1984, p. 117.

10. Si veda Giancarlo Pallavicini, *Strutture integrate nel sistema distributivo italiano*, Giuffrè, Milano, 1968, p. 53.

11. Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits* (*The New York Times Magazine*, 13 settembre 1970).

12. Milton Friedman, *Capitalism and Freedom*, University of Chicago Press, Chicago, 1962, p. 127.

maggiore probabilità che in termini di comportamento manageriale le due tesi coincidano. Ciò che distingue in definitiva la posizione di Friedman da quella di Freeman è la motivazione che porta il manager a considerare gli interessi degli *stakeholder*: il manager che seguirà la teoria di Friedman tratterà bene gli *stakeholder* allo scopo di ricavare un profitto, mentre colui che abbraccerà la tesi di Freeman lo farà perché è la cosa giusta da fare. Paradossalmente, trattare in modo corretto gli *stakeholder* non solo è moralmente giusto, ma alla fine può essere anche più redditizio[13].

Dal punto di vista prettamente normativo, nel 2001 l'Unione Europea ha recepito il concetto di responsabilità sociale d'impresa, elaborandone una precisa definizione giuridica in un *Libro verde* della Commissione così formulata: «Responsabilità sociale d'impresa è l'integrazione volontaria delle preoccupazioni sociali ed ecologiche delle imprese nelle loro operazioni commerciali e nei loro rapporti con le parti interessate»[14].

Si tratta di una definizione di indubbia autorevolezza sia per l'organo da cui promana, sia per il tipo di atto in cui è stata inserita[15]. Anche per questa duplice ragione, tale nozione è stata recepita non soltanto dalla dottrina, ma anche da diverse leggi regionali[16] e, da ultimo, dallo stesso legislatore nazionale, al fine di individuare le prassi meritevoli di istituzioni pubbliche[17].

Il presente lavoro si propone di esaminare come la nozione di responsabilità sociale d'impresa possa adattarsi al sistema giuridico in cui si trova ad operare; tale indagine sarà condotta tramite l'analisi storica di un caso esemplare: la declinazione di questo concetto nell'ordinamento giapponese.

La dottrina confuciana ha notevolmente influito nella formazione dell'odierna cultura giuridica nipponica con risvolti di grande interesse

13. Si veda Emilio D'Orazio, *Introduzione*, in *Notizie di Politeia*, 2003, XIX, 72, p. 23.

14. Commissione delle Comunità europee, *Promuovere un quadro europeo per la responsabilità sociale delle imprese*, libro verde, COM/2001/0366 def., p. 7, § 20.

15. Un "libro verde" è un documento giuridico che – seppur non vincolante – mostra una forte valenza programmatica.

16. Si pensi, a titolo meramente esemplificativo, all'art. 19 l. reg. Liguria 13 agosto 2007, n. 31.

17. Si veda l'art. 2, comma 1, lettera f, d.lgs. 9 aprile 2008, n. 81.

per la comprensione dell'istituto[18]. La dimensione etica dell'impresa è stata, infatti, incentivata da un tratto tipico della tradizione giuridica del Sol Levante: l'antiformalismo, ossia la diffidenza dei giapponesi verso la legislazione, il contenzioso e la contrattazione formali.

Tuttavia, il ruolo della filosofia confuciana non va sopravvalutato: l'oggettiva complessità dell'accesso alle fonti dirette in lingua ha comportato un'adesione piuttosto acritica della maggior parte dei comparatisti a tesi invero dissonanti, aprendo la strada a luoghi comuni inverosimili ancora oggi assai diffusi in dottrina. Ciononostante, è pur vero che in ogni leggenda permane un pizzico di verità; l'esiguità del numero di giudici e avvocati rispetto ad altri paesi industrializzati dimostra una tensione culturale innata nella popolazione giapponese, tendente alla soluzione informale delle controversie piuttosto che a quella giudiziale[19].

L'avversione nipponica al formalismo giuridico può spiegarsi con un'indagine sociologica volta all'analisi dei fenomeni giuridici giapponesi alla luce delle categorie del pensiero confuciano[20]. L'uomo corretto, secondo questo pensiero, si attiene ai riti e comprende gli obblighi derivanti dalla propria posizione sociale; pertanto lo status sociale ascrive all'individuo una serie di doveri e prerogative e dalla reciproca interazione di tali attribuzioni la società trae il complesso delle regole per vivere in un equilibrio armonico[21]. La responsabilità sociale d'impresa giapponese deve rileggersi usufruendo della prospettiva confuciana: l'impresa diviene dunque portatrice di doveri etici nei confronti dei propri *stakeholder*, al fine di garantire l'armonia della società nella sua interezza[22].

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18. Si veda Yukio Yanagida et al., *Law and Investment in Japan: Cases and Materials*, Harvard University Press, Cambridge (Mass.), 1994, p. 239.

19. In Giappone le controversie formali sono socialmente sentite come sconvenienti in quanto sinonimo di incapacità di gestire i rapporti sociali; tuttavia questa non può essere l'unica spiegazione alla base della bassa litigiosità nipponica: occorre, infatti, tener conto delle forti barriere legislative volte a ridurre al minimo il numero e la durata dei processi.

20. Si veda Paolo Beonio Brocchieri et al., *Capire il Giappone*, FrancoAngeli, Milano, 1999, p. 74.

21. Si veda Emil Mazzoleni, *Dovere deontico e dovere anankastico in giapponese*, in *Rivista internazionale di filosofia del diritto*, 2013, XC, p. 247.

22. Si veda Andrea Ortolani, *Il* giri *e la questione della mentalità giuridica giapponese*, in *Rivista di diritto civile*, 2009, LV, p. 378.

È stato osservato come il sistema distributivo giapponese, contrariamente a quanto accade negli altri paesi industrializzati, dipende molto più dalle relazioni umane tra i vari operatori economici e questo comporta una più massiccia influenza di fattori non economici, come quelli sociali e culturali, legati agli usi e alle abitudini radicate tra la popolazione giapponese[23].

In Giappone sembra perciò emergere una percezione "debole" del diritto, nella quale la legge in senso formale cede, anche nell'applicazione pratica, al substrato tradizionale, basato su norme di comportamento etiche. Questa attitudine può essere fatta risalire alla tradizionale divisione in gruppi della società giapponese, caratterizzata da due peculiarità: la natura gerarchica e l'armonia che contraddistinguono le relazioni tra i membri della collettività[24].

Secondo la dottrina di Confucio – per la quale il valore fondamentale è l'armonia tra i singoli e l'intera comunità – il conflitto, che cristallizza un momento di turbamento della vita sociale, deve essere preferibilmente ricomposto attraverso la ricerca volontaria di un compromesso tra i diversi interessi di parte[25]. Questa tendenza alla mediazione si è consolidata nel dopoguerra con l'introduzione nella legislazione giuslavoristica giapponese di innovativi istituti conciliativi di origine nordamericana[26]. La mediazione, detta *chotei* (調停)[27], trova oggi in Giappone una vasta applicazione anche nelle controversie in materia di consumo. L'utilizzo della mediazione anche nelle controversie tra imprese e consumatori rappresenta un ulteriore indice della peculiare concezione nipponica della responsabilità sociale

23. Si veda Chiara Gallese, *Come fare affari in Giappone*: *Introduzione al diritto commerciale giapponese*, Cerebro, Milano, 2012, p. 52.

24. Si veda Giorgio Fabio Colombo, *Oltre il paradigma della società senza liti*: *La risoluzione extra-giudiziale delle controversie in Giappone*, Cedam, Padova, 2011, p. 48.

25. Secondo le teorie confuciane, la conciliazione si fonda sempre su un criterio morale, dal quale derivano regole di comportamento: si riteneva, infatti, disonorevole citare in giudizio senza aver prima tentato di giungere ad un accordo.

26. Si veda Alessandro Nascosi, *Il tentativo obbligatorio di conciliazione stragiudiziale nelle controversie di lavoro*, Giuffrè, Milano, 2007, p. 211.

27. La conciliazione civile è amministrata in Giappone da un apposito collegio, formato da un giudice e due avvocati nominati dalla *Saikō-Saibansho* (最高裁判所) (Corte suprema), il quale, sentite le parti, avanza una concreta proposta di soluzione amichevole della controversia: tale proposta, se accettata da entrambe le parti, diviene immediatamente esecutiva.

d'impresa, in relazione alla quale i consumatori sono sempre considerati a pieno titolo parti integranti del gruppo sociale a cui fa capo un'azienda giapponese[28].

Per meglio illustrare questa tesi, il testo del presente lavoro si incentrerà sull'analisi degli aspetti giuridici ed aziendalistici della responsabilità sociale d'impresa nel diritto giapponese, con una ripartizione di tali elementi negli ultimi tre periodi storici che connotano la tradizionale suddivisione storiografica nipponica.

2. *La responsabilità sociale d'impresa nel periodo Meiji (1868–1912)*

La *kigyō shiyakuwai sekinin* (企業社會責任)[29] è oggigiorno una tematica assai sentita nelle società commerciali giapponesi: fin dal 2003 molte imprese si sono, infatti, dotate di un reparto aziendale incaricato di monitorare l'impatto sociale della propria attività produttiva.

Ciononostante, il concetto di responsabilità sociale d'impresa nel diritto giapponese è molto più arcaico e trae le sue radici nella rapida industrializzazione avvenuta durante il periodo Meiji[30]. Quest'epoca fu decisiva nell'evoluzione politica, economica e sociale del Giappone: l'adozione del sistema codicistico occidentale, infatti, consentì al Paese una rapida modernizzazione.

Fulcro dell'evoluzione non solo giuridica, ma anche culturale dell'epoca Meiji fu l'adozione della prima costituzione, un *kenpō* (憲法) in senso moderno: il *Kenpō Meiji*, promulgato l'11 febbraio 1889 ed entrato in vigore il 29 novembre dello stesso anno. Questo innovativo testo giuridico presentava, infatti, per la prima volta una sezione dedicata ai diritti e ai doveri dei soggetti, sebbene limitata a soli quindici articoli[31].

28. Si veda Kyoko Fukukawa (a cura di), *Corporate Social Responsibility and Local Community in Asia*, Routledge, New York, 2014, p. 54.

29. In questo saggio le espressioni giapponesi sono traslitterate secondo il sistema Hepburn.

30. Il periodo Meiji (1868–1912), letteralmente "periodo del regno illuminato", è il nome con cui in Giappone si indica il periodo di 45 anni di regno dell'imperatore Mutsuhito, a fronte della restituzione dei poteri sovrani all'imperatore da parte dell'ultimo *shogun* Yoshinobu Tokugawa, sconfitto dell'alleanza Satcho, tra Saigō Takamori, del feudo di Satsuma, e Kido Takayoshi, del feudo di Chōshū.

31. In particolare erano già garantiti: l'eguale diritto di nomina a svolgere funzioni pubbliche (art. 19); la libertà di domicilio (art. 22); il diritto a non essere

Proprio in questo contesto storico iniziarono a delinearsi le prime relazioni tra impresa e società: la Restaurazione Meiji comportò infatti l'abolizione dello shogunato e la riapertura dei rapporti commerciali con i paesi occidentali. In questo periodo, molti politici nipponici iniziarono a vedere nella responsabilità sociale d'impresa un mezzo attraverso cui velocizzare il più possibile il processo di modernizzazione del Giappone. Lo shock psicologico causato della fine dell'isolazionismo che aveva caratterizzato il periodo Edo[32], e il conseguente collasso dello shogunato ad opera del commodoro statunitense Matthew Perry[33], convinsero infatti molte imprese giapponesi che soltanto lo sviluppo di una dimensione etica nei rapporti commerciali avrebbe garantito un'effettiva concorrenza con le imprese occidentali nei traffici transnazionali.

Principale fautore di questa tendenza fu Eichi Shibusawa (Chiaraijima 1840-1931), considerato dagli storici come «il fondatore del capitalismo giapponese»[34]: egli contribuì non solo alla costituzione della Borsa di Tokyo[35], ma anche alla redazione dello primo *shōhō* (codice di commercio giapponese)[36]. Durante il suo mandato come ministro delle finanze, Shibusawa sostenne – per la prima volta in terra nipponica – l'idea per cui l'economia non dovesse essere scissa dall'etica: il

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arbitrariamente arrestato, detenuto, processato o punito (art. 23); il diritto di proprietà personale (art. 27); la libertà di credo religioso (art. 28); la libertà di parola, scrittura, stampa, riunione e associazione (art. 29); il diritto di petizione (art. 30).

32. Il periodo Edo (1603–1867), detto anche periodo Tokugawa dal nome dello *shogun* allora più influente, è la quarta e ultima fase del feudalesimo giapponese; esso prende il nome dall'antica denominazione dell'attuale capitale Tokyo.

33. Matthew Perry approdò sulle coste giapponesi con quattro navi da guerra dette in seguito *kurofune* (黒船), cioè "navi nere", e costrinse lo *shogun* a firmare il trattato di pace e amicizia tra Stati Uniti e Giappone del 1854.

34. Satoshi Sasaki, *Nihon no sengo kigyōkashi* [*Storia degli imprenditori del dopoguerra in Giappone*], Yūhikaku, Tokyo, 2001, p. 23.

35. Il *Tokyo Kabushiki Torihikijo* (東京株式取引所) aprì il 15 maggio 1878 alla presenza del ministro Ōkuma Shigenobu.

36. Il codice di commercio giapponese, ancora oggi testo normativo autonomo rispetto al codice civile (diversamente dal sistema giuridico italiano), fu fortemente influenzato dal diritto commerciale prussiano; tuttavia sarebbe sbagliato considerarlo una mera copia dell'*Allgemeines Deutsches Handelsgesetzbuch*: se nella struttura ricalca il modello tedesco, nei contenuti appare prevalente il modello francese (analogamente al codice di commercio italiano del 1882). Cfr. Kenzo Takayanagi, *A General Survey of the History of the Japanese Commercial Law*, Japan Council of the Institute of Pacific Relations, Tokyo, 1931, p. 33.

profitto privato non poteva prescindere dall'interesse pubblico all'equità negli affari[37].

A tal fine Shibusawa propose l'adozione nelle nascenti imprese giapponesi di *rinri kōryō* (倫理綱領), preludio degli attuali codici etici. Ciononostante, a differenza dei codici etici delle odierne società commerciali, i *rinri kōryō*, basandosi sui dettami del confucianesimo, dedicavano ampio e predominante spazio ai doveri e riconoscevano un numero esiguo di diritti, il cui godimento poteva peraltro essere discrezionalmente limitato da fonti ordinarie[38]. La cultura giuridica nipponica, alla stregua di quella cinese, è stata infatti per secoli priva della nozione di diritto soggettivo: i cittadini orientavano le loro scelte di vita non sulla base di diritti disponibili, bensì sulla base di doveri etici[39].

3. *La responsabilità sociale d'impresa nel periodo Taishō (1912–1926)*

Il successivo periodo Taishō (1912–1926) fu caratterizzato dall'avvio di un processo di democratizzazione del paese. Alcuni studiosi fanno, infatti, riferimento al periodo precedente alla seconda guerra mondiale, detto "Democrazia Taishō", caratterizzato da una maggiore vivibilità e azione dei partiti politici e da una generale fioritura di idee democratiche, controbilanciate, però – e talora rese vane – da una generale tendenza alla reazione e al conservatorismo[40].

Dopo il Rinnovamento Meiji, la politica del paese era infatti riuscita a consolidare un sistema equilibrato di partiti politici fortemente basato sul compromesso che garantì anni di stabilità e alternanza delle

37. Si veda Hiroyuki Odagiri e Akira Goto, *Technology and Industrial Development in Japan: Building Capabilities by Learning, Innovation, and Public Policy*, Oxford University Press, Oxford, 1996, p. 17.

38. Si veda Noel Williams, *The Right to Life in Japan*, Routledge, London, 1997, p. 10.

39. Il termine giapponese *kenri* (権利) fu coniato dal linguista Fukuzawa Yukichi, accostando gli ideogrammi (*kanji*) di "potere" (*ken*) e "ragione" (*ri*). Termini alternativi come *seiritsu* e *tsūgi*, basati sulla traduzione (dall'olandese) del termine *regt*, caddero presto in disuso. Cfr. Emil Mazzoleni, *Il nome giapponese del diritto*, in *Rivista internazionale di filosofia del diritto*, 2015, XCII, pp. 339 ss.

40. Si veda Francesco Gatti, *Storia del Giappone contemporaneo*, Bruno Mondadori, Milano, 2002, p. 52.

maggiori forze partitiche sul controllo dei seggi alla *kokkai*[41]. Questa fase politica si interruppe bruscamente con la scalata ai vertici del potere della classe militare, culminata con l'assassinio dello *shushō* Inukai Tsuyoshi, nell'incidente del 15 maggio 1932. Questo episodio fu l'ultimo di una serie di attentati che coinvolsero anche i vertici del mondo finanziario nipponico, frutto di diffuse tensioni sociali conseguenti al crescente divario tra ricchi e poveri.

Una soluzione ai problemi sociali che dilaniavano il paese fu avanzata da Koyata Iwasaki, leader di Mitsubishi Zaibatsu che elaborò, per la prima volta in Giappone, un credo aziendale[42]. Il testo *The Spirit of Mitsubishi*: *The Three Principles*, noto in giapponese come *Sankoryo*[43], così recita:

> Shoki Hoko: chikyū kankyō no iji ni mo kōken shinagara, shakai, ryōhō monogokoro yutaka ni suru tame ni doryoku shite imasu. Shoji Komei: seijitsu katsu kōsei ni gyōmu o suikō tōmei-sei to kōkai-sei no gensoku o iji suru. Ritsugyo Boeki: subete no hōkatsu-tekina gurōbaruna shiten nimotozuite, jigyō o tenkai shimasu [Responsabilità aziendale verso la società: sforzatevi di arricchire la società, sia materialmente che spiritualmente, e contribuire alla conservazione dell'ambiente globale. Integrità e correttezza: mantenete fermi i principi di trasparenza e di apertura e svolgete ogni attività con integrità e correttezza. Internazionalizzazione: espandete il volume degli affari, basandovi su una prospettiva globale][44].

41. Con il termine giapponese *Kokkai* (国会) ci si riferisce alla Dieta imperiale, composta dalla *Shūgiin* (衆議院), cioè la Camera dei rappresentanti, e la *Sangiin* (参議院), cioè la Camera dei consiglieri.

42. Giampaolo Azzoni, prendendo in considerazione il *Credo* della Johnson & Johnson, ne analizza la forza rispetto al diritto: da una parte maggiore, dato il carattere quasi religioso assunto dall'appartenenza all'impresa, ma dall'altra minore, in virtù della loro non giustiziabilità giudiziale. Cfr. Giampaolo Azzoni, *Religioni aziendali*, in *Sociologia del diritto*, 2004, XXXI, 2, pp. 181 ss., riedito come Id., *Religioni aziendali: Il caso del "Credo" di Johnson & Johnson*, in Piercarlo Maggiolini (a cura di), *Ciò che è bene per la società è bene per l'impresa*: *Una rivisitazione di teorie e prassi della Responsabilità Sociale d'Impresa*, FrancoAngeli, Milano, 2012, pp. 325 ss.

43. Dopo Mitsubishi Motors, adottarono un proprio "credo" anche Canon, Honda, Sony e Sanyo.

44. Traduzione dell'autore da Koyata Iwasaki, *Sankoryo*, disponibile all'indirizzo http://www.mitsubishi.com/j/history/principle.html (visitato il 25 marzo 2019).

4. *La responsabilità sociale d'impresa nel periodo Shōwa (1926–1991)*

Dopo la Seconda Guerra Mondiale, l'economia giapponese fu pesantemente influenzata dalle decisioni adottate dal *General Headquarters of the Allied Powers*. Sebbene molte famiglie a capo di *zaibatsu*[45] collaborarono con gli Stati Uniti d'America nella ricostruzione, molti manager furono allontanati dalla vita pubblica a fronte dell'adozione di *hōritsu* (法律)[46] in materia di conflitto d'interessi e libera concorrenza. Questa legislazione antimonopolistica permise inoltre la diffusione in Giappone della piccola e media impresa, già prevista dallo *shōhō* ma mai attuata nella prassi. Parallelamente, si intensificarono gli scambi culturali con gli Stati Uniti. L'influenza anglosassone in terra nipponica non si limitò all'esportazione di istituti giuridici ma anche alla riproduzione di modelli economici, compresa la *corporate social responsibility*.

Il tema della responsabilità sociale d'impresa verso i lavoratori si impose, in particolare, con la nascita dei movimenti sindacali. Le prime proteste promosse dal sindacato Toyota riuscirono ad ottenere addirittura le dimissioni di Kiichiro Toyoda, fondatore di Toyota Motors. Dopo questa esperienza, molte aziende giapponesi adottarono non solo una politica di cooperazione tra capitale e lavoro, ma anche molteplici forme di responsabilità sociale d'impresa nel diritto del lavoro: dai primi contratti collettivi alla regolamentazione dell'uso dei marchi sociali, dalle procedure di certificazione ai codici di condotta, fino ai *multistakeholder forum*[47].

Nel 1956, la *Keizai Dōyūkai* (associazione giapponese di dirigenti aziendali) rilasciò una dichiarazione ufficiale sulla responsabilità sociale per i dirigenti aziendali, suggerendo ai propri membri di considerare la società come un'istituzione sociale e i dirigenti aziendali non più come amministratori dei soci, bensì come amministratori della società in cui le loro imprese operavano. Proprio in questo documento,

45. *Zaibatsu* (財閥) è un termine giapponese per indicare concentrazioni industriali e finanziarie.

46. Si riscontra nel termine giapponese *hōritsu* la stessa polisemia caratterizzante l'inglese *law*: cfr. Amedeo Giovanni Conte, *Res ex nomine*, Editoriale Scientifica, Napoli, 2009, p. 39.

47. Si veda Karel van Wolferen, *The Enigma of Japanese Power: People and Politics in a Stateless Nation*, Vintage Books, New York, 1990, p. 77.

denominato *Keieisha no shakaiteki sekinin no jikaku to jissen* (*Consapevolezza e prassi della responsabilità sociale degli imprenditori*) comparve per la prima volta l'espressione "*kigyō shiyakuwai sekinin*"[48]. Più precisamente, nel documento la responsabilità sociale d'impresa venne così definita: «L'obiettivo della responsabilità sociale per i dirigenti aziendali è sviluppare l'economia in armonia con la società, separando la proprietà degli impianti dalla gestione aziendale»[49].

I prodotti *made in Japan*, di basso costo ma d'alto livello qualitativo, cominciarono dunque a invadere i mercati esteri, trasformando un paese agricolo nella terza potenza economica mondiale. Due sono le principali ragioni di tale inaspettato successo: da una parte la migrazione interna di molti giovani dalle comunità rurali alle città, con conseguente aumento generalizzato del benessere sociale; dall'altra i tipici fenomeni connessi all'inurbamento, quali l'abbandono della famiglia tradizionale o un inedito individualismo[50].

La crescita economica degli anni Sessanta migliorò indubbiamente lo standard di vita in tutta la società giapponese, ma ebbe il risultato di ridurre il senso della collettività e ampliare l'individualismo. Molta gente raggiunse indipendenza, acquisendo un alto grado di consapevolezza politica e di coinvolgimento attivo nei problemi sociali, ma per molti l'individualismo coincise con un maggior interesse per il perseguimento dei propri piaceri[51].

Uno dei fattori alla base della repentina crescita economica nipponica riposa nella diffusione del "modello Toyota" alla quasi totalità delle imprese giapponesi. Il "modello Toyota" è un meccanismo di produzione che si fonda sul concetto di "circolo di qualità", espresso in giapponese dal termine *kaizen* (改善), una parola composta dall'unione di due diversi vocaboli: *kai* (改), che significa "cambiamento, miglioramento", e *zen* (善), che significa "buono, migliore"; tale espressione

48. Si veda Noemi Lanna, *Le imprese giapponesi: I pionieri della responsabilità sociale*, in Marisa Siddivò (a cura di), *La responsabilità sociale di impresa in Asia: Le nuove sfide per l'internazionalizzazione*, Il Torcoliere, Napoli, 2009, p. 104.

49. Traduzione dell'autore da Takeo Hoshi e Anil Kashyap, *Corporate Financing and Governance in Japan: The Road to the Future*, MIT Press, Cambridge (Mass.)-London, 2001, p. 37.

50. Si veda Demise Nobuyuki, *Kigyō rinri nyūmon* [*Introduzione all'etica d'impresa*], Dobunkan, Tokyo, 2004, p. 10.

51. Si veda Daniela De Palma, *Il Giappone contemporaneo: Politica e società*, Carocci, Roma, 2008, p. 50.

è stata coniata da Masaaki Imai nel 1986 per descrivere la filosofia manageriale alla base del successo d'esportazione dei prodotti nipponici, di basso prezzo ma di alta qualità[52].

La strategia *kaizen* è quella del rinnovamento a piccoli passi, giorno dopo giorno, con continuità, in radicale contrapposizione a concetti di matrice squisitamente occidentale quali innovazione, rivoluzione e conflittualità. Le imprese giapponesi utilizzano prevalentemente meccanismi culturali informali per affrontare i problemi aziendali. La pianificazione e la gestione delle questioni strategiche sono sempre condotte attraverso squadre o piccoli comitati e non è mai eseguito alcun monitoraggio formale dei risultati di tali decisioni. La base del rinnovamento è quella di incoraggiare ogni persona ad apportare giorno per ogni giorno piccoli cambiamenti, il cui effetto complessivo comporta un processo di selezione e miglioramento dell'intera società[53]. I principi del *kaizen* possono essere sintetizzati con le seguenti cinque espressioni giapponesi:

i) *seiri* (ordine): l'eliminazione del superfluo;
ii) *seiton* (stabilizzazione): l'identificazione degli spazi essenziali sul posto di lavoro;
iii) *seiso* (pulizia): la regolare manutenzione delle attrezzature dopo ogni turno di lavoro;
iv) *seiketsu* (standardizzazione): l'uguaglianza e intercambiabilità di tutte le postazioni di lavoro riferibili ad una identica funzione;
v) *shitsuke* (sostenere): il mantenimento di una prassi, una volta stabilita.

La coniugazione della strategia *kaizen* d'impronta neoconfuciana con l'impostazione della responsabilità sociale d'impresa di matrice statunitense rappresenta dunque non solo un *unicum* di notevole rilevanza, ma anche un significativo fattore di influenza della cultura nipponica sul modo di fare impresa in Occidente[54].

52. Si veda Yasuhiro Monden, *Toyota Production System: An Integrated Approach to Just-in-Time*, 4ª ed., CRC Press, Boca Raton, 2012, p. 73.

53. Si veda Taiichi Ohno, *Toyota seisan hōshiki*, Diamond, Tokyo, 1978, trad. it. di Gabriele Polo, *Lo spirito Toyota: Il modello giapponese della qualità totale. E il suo prezzo*, Einaudi, Torino, 2004, p. 42.

54. In argomento, rinvio all'ampia letteratura in lingua giapponese sviluppatasi tra gli anni Settanta e Ottanta; per un accurato apparato bibliografico in merito rinvio a Masahiko Kawamura, *Nihon no kigyō shiyakuwai sekinin no keifu (sono ni): CSR no*

5. *La responsabilità sociale d'impresa nel periodo Heisei (1991–oggi)*

Dopo lo scoppio della bolla finanziaria (1991), molti scandali vennero alla luce. Per rispondere a questa crisi etica nella conduzione degli affari, la *Nippon Keidanren* (equivalente giapponese di Confindustria) pubblicò nel 1991 la prima *Kigyō kōdō kenshō*, una carta sui corretti comportamenti aziendali vincolante per tutte le imprese appartenenti all'associazione[55].

In Giappone, molte persone non fanno una distinzione tra "etica degli affari" e "rispetto", ma ogni termine è definito separatamente nel *Rinri hōrei junshu manejimento shisutemu kikaku* (*Ethics Compliance Management System Standard*), uno standard di conformità etica nella gestione degli affari, elaborato dal Business Ethics and Compliance Research Center (R-bec) dell'Università Reitaku. Tale modello prevede l'introduzione nelle aziende giapponesi non solo di codici e comitati etici, ma anche di sistemi di comunicazione più trasparenti e programmi etici di formazione manageriale[56].

A fronte dell'adozione nel 2001 da parte della Commissione europea di un *Libro verde* volto a promuovere un quadro europeo per la responsabilità sociale delle imprese, nel 2002 la *Keizai Dōyūkai* ha promosso uno studio sul concetto europeo di *corporate social responsibility*. Inoltre, nel 2003, la *Keizai Dōyūkai* ha pubblicato il quindicesimo *Libro bianco* sulla *kigyō shiyakuwai sekinin*: creare fiducia negli *stakeholder* e praticare un modello di sviluppo aziendale sostenibile diventano importanti quanto assicurare una stabile *corporate governante* e adeguati profitti per gli azionisti[57].

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uneri wa kigyō keiei no kachi tenkan he [*Genealogia della responsabilità sociale d'impresa in Giappone (parte seconda): La svolta della CSR verso una trasformazione dei valori di gestione aziendale*], 2005, disponibile all'indirizzo https://www.nli-research.co.jp/report/detail/id=36577?site=nli (visitato il 25 marzo 2019).

55. Si veda Nippon Keidanren, *Kigyō kōdō kenshō* (1991), disponibile all'indirizzo https://www.keidanren.or.jp/japanese/policy/1991/024.html (visitato il 25 marzo 2019).

56. Si veda Reitaku University - Business Ethics and Compliance Research Center, *Ethics Compliance Management System Standard* (2001), disponibile all'indirizzo https://www.reitaku-u.ac.jp/2009/04/02/51734 (visitato il 25 marzo 2019).

57. Si veda Keizai Dōyūkai, *"Market Evolution" and CSR Management: Toward Building Trust and Creating Sustainable Stakeholder Value*, 2003, disponibile all'indirizzo

Il saggio dottrinale sulla responsabilità sociale d'impresa giapponese più importante di questo periodo è quello pubblicato da Mizuho Nakamura, celebre studioso di economia aziendale e di etica degli affari in Giappone, fortemente influenzato dalla nozione europea di responsabilità sociale d'impresa. Secondo Mizuho Nakamura è necessario che in ogni azienda giapponese siano istituiti meccanismi di controllo della condotta dei *top manager*, i quali all'assunzione dell'incarico devono impegnarsi a garantire un preciso standard di responsabilità sociale d'impresa[58].

Il vero problema della responsabilità sociale d'impresa giapponese è tuttavia l'assenza di uno standard sostanziale uniforme a livello nazionale: sebbene i modelli procedurali siano gli stessi in ogni azienda, la responsabilità sociale è praticata in modo diverso a seconda dei rapporti relazionali.

In riferimento a tale problematica, Kanji Tanimoto ha sottolineato nei suoi studi l'integrazione strategica dei vari soggetti interessati nel sistema aziendale nipponico, dove la proprietà aziendale è sottoposta ad un continuo controllo attraverso la partecipazione degli *stakeholder* agli interessi dell'impresa. Ad esempio, i lavoratori sono incoraggiati ad identificare gli interessi delle loro aziende con i propri interessi personali. Gli stessi consumatori collaborano in questo senso con le aziende, in quanto la fidelizzazione si fonda perlopiù sul rispetto e sulla lealtà verso imprese che sono considerate non solo per i beni che producono, ma anche per la prosperità che generano nella società. Anche le piccole e medie imprese hanno sostenuto questo sistema, fornendo lavorazioni più economiche e operazioni flessibili in cambio di rapporti stabili con gli acquirenti. In breve, tutte le parti interessate – investitori, lavoratori, consumatori, fornitori e comunità – sono stati messi nell'ambito del controllo aziendale, creando una vera e propria micro-comunità strutturata sulla base dei legami dei singoli individui con il paradigma morale aziendale. Questo sistema ebbe successo finché l'economia fu prospera e l'ambito di integrazione si espanse nella società nipponica, ma entrò in crisi con lo scoppio della

https://www.doyukai.or.jp/en/policyproposals/2002/pdf/030326a.pdf (visitato il 25 marzo 2019).

58. Si veda Mizuho Nakamura, *Keiei gaku* [*Amministrazione aziendale*], Hakuto-Shobo, Tokyo, 2003, p. 9.

bolla finanziaria, poiché tale forma di responsabilità sociale d'impresa non funziona quando la portata dell'integrazione diminuisce o quando la società diventa più aperta a nuovi *input* dall'esterno, riducendo così la quota relativa alla parte integrata[59].

6. *Conclusione*

In conclusione, la responsabilità sociale d'impresa nel diritto giapponese si declina soltanto all'interno di specifiche comunità di interesse attentamente circoscritte, escludenti le minoranze, gli stranieri e vari altri individui ai margini della società. Questo peculiare approccio può essere spiegato, a mio avviso, alla luce dei canoni tradizionali dell'etica confuciana, la quale non solo enfatizza la lealtà dell'individuo al proprio gruppo sociale, ma dimostra anche il profondo senso del dovere della collettività di *stakeholder* nei confronti dell'azienda di riferimento, ribaltando così paradossalmente le fondamenta della responsabilità sociale d'impresa occidentale.

Questa caratterizzazione confuciana della responsabilità sociale d'impresa non deve tuttavia indurre il lettore alla falsa conclusione per cui il *soft law* sia un tratto esclusivo del pensiero giuridico nipponico in materia di etica aziendale; infatti, il carattere "*soft*" della *corporate social responsibility* (CSR) è proprio anche di imprese che operano nei paesi occidentali (si pensi, ad esempio, all'esperienza nei Paesi scandinavi[60] dove la cultura giuridica è più formalista di quella tradizionale giapponese).

Ciò non toglie che le norme "*soft*" della CSR si adattino bene alla realtà giapponese alla luce del suo carattere antiformalista. Le norme in materia di CSR sono "*soft*" per ragioni che vanno oltre le singole culture giuridiche e che sono in larga parte legate al fenomeno della internazionalizzazione dei mercati e della porosità dei confini nazionali a fronte di imprese sempre più globali, quali sono peraltro quelle giapponesi.

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59. Si veda Kanji Tanimoto, *Introduction: Japanese Approaches to CSR*, in *Journal of Corporate Citizenship*, 2014, XIV, 56, pp. 5–10.

60. Si veda Maria Gjølberg, *Explaining Regulatory Preferences: CSR, Soft Law, or Hard Law? Insights from a Survey of Nordic Pioneers in CSR*, in *Business and Politics*, 2011, XIII, 2, p. 27.

Politicization of a Future International Investment Tribunal's Appointment and How to Avoid It

Lukas Florian Innerebner*

Abstract: In 1965, the World Bank promoted the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) with the aim of filtering any political and diplomatic influence out of international investment disputes. This aim was achieved by lending several features from commercial arbitration. Today, after a successful launch phase of the Convention's mechanism, the benefit of the current investor-state dispute settlement system is debated. Lack of legitimacy, interference with the States' right to regulate in the public interest and doubts about the arbitrator's impartiality are some examples of the most frequently-voiced concerns. Several different solutions, reaching from an investment court under the CETA for the EU-Canadian disputes to a truly multilateral court available to an open number of States, have been put forward. Most of the suggested roads leading out of the ISDS crisis provide for the es-tablishment of a standing court. Scholars primarily argue that those models bear to risk of a re-politicizing the controversies. This essay assesses, based on a comparative approach, whether the concern of re-politicization is justified. For such purpose, it focuses on the areas that are particu-larly threatened by a possible interference of the States' political powers: the appointment of the judges and their independence and impartiality requirements. The outcome of the analysis does not promise well for the future investment court. The experience of other standing courts and tribunals show that a certain degree of political influence cannot be excluded. It would rather seem that the States do not even wish to create a completely de-politicized system. In addition, as this study shows, an investment court could also widen the room for judges to introduce their political beliefs into the decision-making process.

Keywords: Investor-state dispute settlement; investment arbitration appeal mechanism; permanent investment court; composition and election; independence and impartiality.

1. *Background*[**]

Back in time, during the 19th and the first half of the 20th century, disputes between host states and foreign investors were highly politicized. Such disputes had thus often led to the exercise of diplomatic protection or, in the extreme case, to the use of force (so-called gunboat diplomacy) as there were no other peaceful remedies available. The stakeholders of foreign investments were at that time simply ill-equipped to handle conflicts concerning foreign investments[1].

Subsequently, in the 1960s, following several serious threats to world peace[2] and at the height of the decolonization phase, the World Bank promoted one of the most ambitious international instruments to settle investor-state disputes: the 1965 Washington Convention[3] which instituted the International Centre for Settlement of

* Lukas Florian Innerebner obtained his law degree from the University of Trento in 2014 and completed his LL.M. in International Dispute Settlement at the University of Geneva and the Graduate Institute of International and Development Studies in 2018. He currently works at Baker McKenzie Zurich and specializes in international commercial arbitration and litigation. Previously, he was an Associate at Legance in Rome.

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1. For a general historical overview see Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (Oxford University Press 2018).

2. Consider, for instance, the armed conflict between the United Kingdom and Egypt following the nationalization of the Suez Canal Company in 1956 or the dispute between France and Tunisia arising out of the Tunisian National Assembly's authorization to expropriate all foreign-owned land (approximately 300,000 hectares) in 1964.

3. The official name of the treaty is Convention on the Settlement of Investment Disputes between States and Nationals of Other States. It entered into force on October 14, 1966 and has been ratified by 154 contracting states.

Investment Disputes (ICSID). The Convention created a self-contained jurisdictional mechanism for the settlement of investor-state disputes based on international arbitration in the context of which an investor has *locus standi* to bring claims against the host state without the support or intervention of its home state[4]. The private party was thus granted with a direct access to an international dispute resolution mechanism with the possibility to participate on a procedurally equal footing against a state[5]. Ever since the Convention's purpose was to "insulate such disputes [between the state and the foreign investor] from the realm of politics and diplomacy"[6].

Boosted by the developed countries' wish to have their investors protected and the developing countries' need to attract private capital flows, ICSID soon became an essential institution for the resolution of disputes arising out of foreign investments. Indeed, hundreds of investment arbitrations were conducted under the auspices of the ICSID[7] and it is considered a powerful tool to depoliticize investment disputes, prohibiting contracting states from invoking diplomatic protection or bringing international claims[8]. According to the prevailing scholarly opinion, the major contribution of ICSID to investment arbitration – in terms of depoliticization – is preventing the powerful capital-exporting states from participating side by side with their

4. See Jeswald W. Salacuse, *The Law of Investment Treaties* 421 (Oxford University Press 2nd ed. 2015). See generally Piero Bernardini, *Investimento straniero e arbitrato*, 27 Rivista dell'arbitrato 673 (2017).

5. See generally Charity L. Goodman, *Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina*, 28 University of Pennsylvania Journal of International Law 449, 457 (2007).

6. ICSID, II-1 *History of the ICSID Convention* 242 (1968).

7. As of June 30, 2018, ICSID had registered 676 cases under the ICSID Convention and Additional Facility Rules. See ICSID, *The ICSID Caseload – Statistics (Issue 2018-2)* (2018), available at https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx (last visited March 25, 2019).

8. See David A. Soley*, ICSID Implementation: An Effective Alternative to International Conflict*, 19 The International Lawyer 521, 543 (1985). See also Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID Review 1, 5–13 (1986); Piero Bernardini, *Investment Arbitration under the ICSID Convention and BITs*, in Gerald Aksen et al. (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution:* Liber Amicorum *in Honour of Robert Briner* (ICC 2005).

citizens in the proceedings against host states[9]. In addition, it has been suggested that another depoliticizing effect of the ICSID proceedings is the separation of the law from its "socio-economic, cultural and political origins and ramifications"[10]. The response offered by ICSID was thus a modern approach to address the realities and requirements of the last several decades.

At present, despite the positive development of ICSID, investor-state dispute settlement (ISDS) is facing tough times[11]: there is a common consent that the current investment arbitration mechanism based upon the 1965 Washington Convention lacks arbitral neutrality, accountability and transparency[12]. In addition, arbitration investment awards ordering governments the payment of substantial compensation to foreign investors led to a controversial public debate on the legitimacy of the actual ISDS model. Major newspapers also labelled ISDS as obscure or secret trade courts and declared them a threat to national interest from the rich and powerful[13]. It has further been

9. See Ibironke T. Odumosu, *The Law and Politics of Engaging Resistance in Investment Dispute Settlement*, 26 Penn State International Law Review 251, 271 (2007).

10. *Id.*

11. See Cesare Trecroci and Rossella Sabia, *Ascesa e declino dell'*'Investor-State Arbitration'*, fra contrasto alla corruzione internazionale, regolazione dei mercati e '*Free Trade Agreements'*multilaterali*, 26 Rivista dell'arbitrato 165 (2016); Bernardini, *Investimento straniero e arbitrato* at 682–683 (cited in note 4).

12. See Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham Law Review 1521 (2005). For a detailed analysis of the backlash against the current ISDS system see Gabrielle Kaufmann-Kohler and Michele Potestà, *Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?*, CIDS report 10–15 (2016), available at https://www.cids.ch/conferences-research/projects/isds-project (last visited March 25, 2019); UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap* 2–4 (2013), available at https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=551 (last visited March 25, 2019).

13. See George Monbiot, *This Transatlantic Trade Deal Is a Full-Frontal Assault on Democracy* (The Guardian, November 4, 2013), available at https://www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy (last visited March 25, 2019); Claire Provost and Matt Kennard, *The Obscure Legal System That Lets Corporations Sue Countries* (The Guardian, June 10, 2015), available at https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid (last visited March 25, 2019); Kavaljit Singh, *ISDS Is Unsuited to Meet Today's Global Challenges* (Financial Times,

argued that an arbitral tribunal composed of private arbitrators and not elected or appointed by the community whose rights are affected by the decisions is not an appropriate setting: consent of the government is not the same as consent of the governed[14]. Most importantly, however, commentators have voiced for a number of years now unease about the current ISDS mechanism acting in conflict with the states' right to regulate in the public interest, including public health, public policy, safety, and the environment[15]. These difficulties of the current framework have been described as the first "growing pains" of a dispute resolution mechanism that is still in its infancy[16].

Many countries and NGOs thus emphasize the need for an in-depth reform in order to rebalance the shortcomings of the actual ISDS system. In this context, a division appeared evident between some states – the loyalists – that seem presently favouring incremental, bilateral reforms (for example Japan[17]) and other countries – the reformists – that openly advocate for a systemic and fundamental reform, for

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May 8, 2017), available at https://www.ft.com/content/ed08cd0c-2fea-11e7-9555-23ef563ecf9a (last visited March 25, 2019).

14. See Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 Vanderbilt Journal of Transnational Law 775, 782 (2008). But see David D. Caron, *Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy*, 32 Suffolk Transnational Law Journal 513, 520 (2008).

15. See OECD, "*Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, OECD Working Paper on International Investment, 2 (2004), available at https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf (last visited March 25, 2019); Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration*, 15 Journal of International Economic Law 223, 243 (2012); Catharine Titi, *The Right to Regulate in International Investment Law* 58 (Dike Verlag 2014); Vera Korzun, *The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs*, 50 Vanderbilt Journal of Transnational Law 355, 358 (2017).

16. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration* at 1523 (cited in note 12).

17. The United States were also originally labelled as loyalists. However, the latest declarations of U.S. Federal Government representatives document rather a general opposition to ISDS: see, for instance, Robert Lighthizer (United States Trade Representative), statements before the United States House Committee on Ways and Means (March 21, 2018), available at https://worldtradelaw.typepad.com/ielpblog/2018/03/brady-lighthizer-isds-exchange.html (last visited March 25, 2019).

instance with the creation of an international investment court and/or an appellate body (for example the European Union and Canada)[18].

The debate on the reform, however, has not been confined to a theoretical level. The European Union (EU) and Canada, for instance, adopted in the Comprehensive Economic and Trade Agreement (CETA) a bilateral investment court with a built-in appellate mechanism instead of the traditional ICSID mechanism. Most recently, the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) referred to the CETA investment court as an option to ensure a coherent and consistent ISDS regime: "A reform option could include, as envisaged by certain recent investment treaties, the creation of a court, established as a permanent international institution"[19].

However, the EU and Canada are already planning an upgrade of their CETA tribunal in the form of an investment forum open to a plurality of signing states. The two CETA parties already expressed their common will to "work expeditiously towards the creation of the Multilateral Investment Court"[20]. In September 2017, the European Commission also formulated a recommendation for a Council decision to open negotiations for a convention creating a multilateral tribunal for the settlement of investment disputes[21]. Many other models of international investment courts developed by reformist states are

18. See Anthea Roberts, *The Shifting Landscape of Investor-State Arbitration: Loyalists, Reformists, Revolutionaries and Undecideds* (EJIL:Talk!, June 15, 2017), available at https://www.ejiltalk.org/the-shifting-landscape-of-investor-state-arbitration-loyalists-reformists-revolutionaries-and-undecideds/ (last visited March 25, 2019); Anthea Roberts, *UNCITRAL and ISDS Reform: Pluralism and the Plurilateral Investment Court* (EJIL:Talk!, December 12, 2017), available at https://www.ejiltalk.org/uncitral-and-isds-reform-pluralism-and-the-plurilateral-investment-court/ (last visited March 25, 2019).

19. *Possible reform of investor-State dispute settlement (ISDS)*, Note by the Secretariat of the United Nations Commission on International Trade Law, 36th session (October 29–November 2, 2018), UN Doc. A/CN.9/WG.III/WP.149, para. 44.

20. *Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States*, available at http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf (last visited March 25, 2019).

21. See European Commission, *Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes*, COM/2017/493 final.

sculptured on the basis of a permanent adjudicatory body, similar to other already existing international tribunals[22].

In the same vein, the Geneva Center for International Dispute Settlement (CIDS) recently published a research paper, from the pen of Prof. Gabrielle Kaufmann-Kohler and Michele Potestà, that promotes "a truly multilateral dispute settlement system" with a single permanent investment tribunal "potentially competent to resolve investment disputes concerning as many states as would opt into it"[23] and an additional single appeal mechanism. According to the proposal, the new ISDS mechanism should be incorporated into existing investment treaties through a multilateral opt-in convention. The CIDS report was presented at UNCITRAL's annual session held in New York in July 2016 and considered in an official note by the UNCITRAL Secretariat[24].

The advanced-level discussion leads to the question whether the creation of a standing tribunal deciding the investment cases on an international level brings back, through the back door, a problem which is believed to have been eliminated: the politicization of investor-state disputes. Remarkably, already the past UNCITRAL discussions on the ISDS reform have been described as highly political by renowned scholars[25]. Therefore, one may legitimately fear that a future dispute resolution body will be further influenced either through the contracting states' inappropriate interference in the functioning of the tribunal or through a partisan behaviour of the judges.

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22. See Nicolette Butler and Surya Subedi, *The Future of International Investment Regulation: Towards a World Investment Organisation?*, 64 Netherlands International Law Review 43, 62 (2017); Catharine Titi, *The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead*, Transnational Dispute Management (January 2017), available at https://www.transnational-dispute-management.com/article.asp?key=2427 (last visited March 25, 2019).

23. Kaufmann-Kohler and Potestà, *Can the Mauritius Convention serve as a model* at 4 (cited in note 12).

24. *Settlement of commercial disputes: presentation of a research paper on the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration as a possible model for further reforms of investor-State dispute settlement*, Note by the Secretariat of the United Nations Commission on International Trade Law, 49th session (June 27–July 15, 2016), UN Doc. A/CN.9/890.

25. See Anthea Roberts, *UNCITRAL and ISDS Reform: Not Business as Usual* (EJIL:Talk!, December 11, 2017), available at https://www.ejiltalk.org/uncitral-and-isds-reform-not-business-as-usual/ (last visited March 25, 2019).

This essay examines thus the question whether such fear of re-politicization of ISDS is justified, with a particular focus on the judges' appointment procedure (2.1) as well as their independence (2.2) and impartiality (2.3) requirements. In order to provide a useful analysis and to point out feasible remedies, a comparative approach will be adopted together with a closer look at the *modus operandi* of already existing international or regional jurisdictional bodies.

2. *Does the Proposed Model of a Permanent Investment Tribunal Risk (Re-)Politicization?*

The underlying assumption of this study is that the future international investment tribunal will have the features of a standing adjudicative body, as opposed to an *ad hoc* body appointed as necessary on a case-by-case basis. The members of standing courts are pre-elected and filed cases are assigned to all or some of them. It seems thus legitimate to assume that the states cannot intervene directly in the decision-making process of the court. More likely, they would rather try to gain influence through the appointment of judges that would likely take into account the appointing states' policies when it comes to decide in one or the other way.

2.1. *Composition and Election of the Permanent Investment Tribunal*

The first instance tribunal provided under CETA (identical to the EU-Vietnam Free Trade Agreement) combines elements of traditional investor-state arbitration with judicial features[26]: there is a roster composed of fifteen members (five EU citizens, five Canadian citizens and five nationals of third countries)[27] who will hear cases on a rotation and random allocation basis[28]. The members, however, are

26. See generally August Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?: The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, 19 Journal of International Economic Law 761 (2016).

27. See CETA art. 8.27.

28. See Piero Bernardini, *Reforming Investor-State Dispute Settlement: The Need to Balance Both Parties' Interests*, 32 ICSID Review 38, 41–44 (2017).

nominated by the CETA Joint Committee comprising representatives of the EU and Canada[29]. Contrary to the present ISDS system where the investors have a voice in the appointment of the arbitral tribunal, the nomination of the roster will be completely decided by the states.

In the first place, the CETA appointment mechanism offers itself to being misused by the contracting states to nominate panellists who are sensitive to government priorities. In particular, one feature of CETA's first-instance tribunal catches the eye: the parties can no longer chose their own judges[30]. This change stands in opposition to the traditional arbitration-based approach according to which the parties should be at liberty to choose their own arbitral tribunal so that the controversy may be decided by "judges of their own choice"[31]. Moreover, the political dimension of the bargains and negotiations between the EU Member States as to the appointment of the judges could relegate to second place more important issues, such as competence and qualifications. Similar critiques were voiced with reference to the abandoned TTIP proposal that provided for an approach similar to the CETA's[32].

As an alternative to the bilateral CETA tribunal, the CIDS report argues that the appointment of the multilateral investment tribunal's roster should be decided by a body that is representative of the whole international community, such us the UN General Assembly. An additional consultation of business organizations would, claims the CIDS report, avoid a system of pure parte appointed arbitrators and mitigate the risk of shifting from the current commercial arbitration

29. See CETA art. 8.27 and 26.1.

30. See Bernardini, *Reforming Investor-State Dispute Settlement* at 47–48 (cited in note 28).

31. Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* 216 (Sweet & Maxwell 2004).

32. See Eduardo Zuleta, *The Challenges of Creating a Standing International Investment Court*, Transnational Dispute Management (January 2014), available at https://www.transnational-dispute-management.com/article.asp?key=2065 (last visited March 25, 2019); Emma Rose Bienvenu, *The EC's Proposal for a Permanent Investment Court System: Politics, Pitfalls, and Perils*, paper for the 2017 Penn JIL Online Symposium: International Investment Law (2017), available at http://pennjil.com/the-ecs-proposal-for-a-permanent-investment-court-system-politics-pitfalls-and-perils/ (last visited March 25, 2019).

inspired mechanism to an inter-state paradigm[33]. In an earlier position paper, the authors of the CIDS report suggested, in addition to a consultation with investors, the establishment of a roster of decision-makers. Moreover, the selection of the roster should be carried out by an advisory panel with the task of screening candidates in order to ensure the quality of the persons and the transparency of the process[34].

Overall, the scholars generally accept that the institution of a permanent multilateral investment tribunal would require the international community to enter into a multilateral agreement[35]. In order to preserve the functionality and the workability of the institution, it would however not be possible that every party to such treaty has its own representative sitting in the adjudicating panel. It would thus be necessary to find a selection mechanism that is acceptable to a majority of States and representative of their interests.

In this context, the first red flags from a politicization standpoint begin to turn up. It seems reasonable to suppose that capital-exporting countries have an interest in how a treaty is applied to the investors. This interest must however be considered in the light of the state's general foreign policy, which means that the investor's home state will not always support its own citizens[36]. It is thus not far-fetched to maintain that the governments would make their choices for the

33. See Kaufmann-Kohler and Potestà, *Can the Mauritius Convention serve as a model* at 61 (cited in note 12).

34. See Gabrielle Kaufmann-Kohler and Michele Potestà, *Challenges on the Road toward a Multilateral Investment Court*, 201 Columbia FDI Perspectives 2 (2017), available at https://academiccommons.columbia.edu/doi/10.7916/D8NV9VQQ (last visited March 25, 2019).

35. See Gus Van Harten, *A Case for an International Investment Court*, paper for the Inaugural Conference of the Society of International Economic Law (Geneva, July 15–17, 2008), available at https://works.bepress.com/gus_vanharten/96/ (last visited March 25, 2019); Zuleta, *The Challenges of Creating a Standing International Investment Court* (cited in note 32); European Commission, *Investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court*, concept paper (2015), available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (last visited March 25, 2019); Kaufmann-Kohler and Potestà, *Can the Mauritius Convention serve as a model* at 10–15 (cited in note 12); Butler and Subedi, *The Future of International Investment Regulation* at 57 (cited in note 22).

36. See Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 American Journal of International Law 179, 207 (2010).

judges sitting on the investment tribunal, taking into account the possibility to be a respondent in future proceedings[37]. The traditional capital-exporting countries Spain and Italy, for instance, have lately found themselves facing investment disputes following changes in regulatory structures for energy investment.

An extensive study, examining all the decisions rendered by the European Court of Human Rights (ECHR) between 1960 and 2006, concluded that contracting states to the European Convention on Human Rights regularly appoint judges that match their political views and meet the desired level of activism, rather than selecting judges for professional reasons[38]. The same finding holds true for the appointment of the World Trade Organization (WTO) Appellate Body's members: it has been reported that possible candidates regularly undergo extensive interviews with United States and EU officials for the assessment of their tendency to expansive judicial law-making[39].

Since international law remains blind to policy issues – due to the acceptance of sovereign equality of the states – it would be difficult, if not impossible, to apply an empirical test to the states' possible voting behaviour. However, the sole perception of a lack of impartiality could undermine the authority of the investment tribunal and investors could be reluctant to defer their disputes to the tribunal[40]. In fact, *BusinessEurope*, the biggest European business lobby group, has already expressed its disagreement to a purely state-appointed body[41].

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37. See European Federation for Investment Law and Arbitration, *Task force paper regarding the proposed International Court System (ICS)* (February 1, 2016 draft), available at https://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICS_proposal_1-2-2016.pdf (last visited March 25, 2019).

38. See generally Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 International Organization 669 (2007).

39. See Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 American Journal of International Law 247, 264 (2004).

40. *Id.*

41. See BusinessEurope, *Assessment of the European Commission's proposal on a new Investment Court System* 5 (October 23, 2015), available at https://www.businesseurope.eu/sites/buseur/files/media/position_papers/rex/2015-10-23_assessment_of_commission_proposal_on_a_new_investment_court_system.pdf (last visited March 25, 2019).

However, the alternative method suggested in the CIDS report – *i.e.* the appointment of the investment tribunal's judges by an assembly representing the states adhering to the new investment tribunal, similar to the International Court of Justice (ICJ)[42], the International Criminal Court[43], or the WTO Appellate Body – does not solve the politicization issue by looking closer. In fact, the election processes of standing international courts are subject to growing criticism, particularly for the so-called horse trading, that is, agreements and arrangements among states to support one another's candidates. Recently, the selection of international judges has been acknowledged as "complex and long processes involving campaigning, lobbying for candidates, and meetings between candidates and diplomatic representatives in order to secure or facilitate an election"[44].

As a remedy to such behaviour, the appointment procedure of the ECHR tried to deprive the governments of the complete control over the appointment of judges. Each contracting state has the right to submit a list of three candidates to the Parliamentary Assembly of the Council of Europe, which then elects one of the proposed judges[45]. Nevertheless, the Assembly usually votes the candidate preferred by the government[46]. As another example, the states establishing the International Criminal Court tried to find a remedy against election agreements, but it proved impossible to prohibit states from agreeing on appointments[47]. It is thus questionable if the states' bargaining could be effectively prevented in a process which is, like other elections, to a high level political.

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42. See Kaufmann-Kohler and Potestà, *Can the Mauritius Convention serve as a model* at 60 (cited in note 12).

43. See Zuleta, *The Challenges of Creating a Standing International Investment Court* at 9 (cited in note 32).

44. Gabrielle Kaufmann-Kohler and Michele Potestà, *The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards*, CIDS Supplemental Report 89 (2017), available at http://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf (last visited March 25, 2019).

45. ECHR art. 22.

46. See generally Voeten, *The Politics of International Judicial Appointments* (cited in note 38).

47. See Brandeis University - International Center for Ethics, Justice and Public Life, *Toward an International Rule of Law*, 2010 Brandeis Institute for International

The designation of an independent appointing authority could be another approach to avoid political inference in the election phase. Noted scholars have recently launched the idea to create an election system similar to that of the Caribbean Court of Justice, whose members are appointed by a commission composed of non-governmental representatives, such as presidents of supranational authorities, law professors, deans of law schools, and law or bar associations[48]. However, the creation of such a new body might be burdensome. Indeed, one may legitimately ask who could assume the appointing function among the already existing authorities. Although there are several options, none seems really appealing: the Chairman of the ICSID Administrative Council, an *ex officio* position of the President of the World Bank Group, is traditionally nominated by the United States as the largest shareholder of the Group. The Secretary General of ICSID is elected by the World Bank's Board of Directors, in which over 60 percent of the votes are exercised by directors from eleven major capital-exporting countries. The Secretary General of the Permanent Court of Arbitration is traditionally a Dutch diplomat. The International Chamber of Commerce describes itself as the "world business organization".[49] All in all, none of those duly international organizations has – *prima facie* – the independency characteristics one would associate with the function of appointing authority of a future investment court.

A possible solution to overcome the above highlighted shortfalls of the proposed appointment procedures could be the approach adopted under the COMESA Investment Agreement for state-state disputes[50] or the North American Free Trade Agreement (NAFTA)[51]. These treaties provide for a definition of minimum requirements for the election of a roster which is comprised by judges appointed *ex ante*

Judges report, 37 (2010), available at https://www.brandeis.edu/ethics/pdfs/internationaljustice/biij/BIIJ2010.pdf (last visited March 25, 2019).

48. See Kaufmann-Kohler and Potestà, *The Composition of a Multilateral Investment Court* at 89 (cited in note 44).

49. See Van Harten, *A Case for an International Investment Court* at 19 (cited in note 35).

50. See Investment Agreement for the COMESA Common Investment Area art. 30.

51. See NAFTA art. 2009.

by the treaty parties. Whereas under NAFTA it is still the parties' duty to select the panelists, the COMESA Investment Agreement goes one step further in stripping the contracting parties' autonomy away and provides that arbitrators are selected by the COMESA Secretariat, rather than by the disputing parties[52]. As an alternative, in order to avoid an over-empowerment of the Secretariat, one may consider a solution where the judges are assigned randomly to the dispute panels. The main drawback of a roster system is undeniably – assuming that the judges are not employed full-time – the necessity to provide for restrictions on the judges' professional activities when they are not sitting on a panel.

As to the duration of the office, it has been argued that judges with a life appointment or without the possibility to be re-elected may be more willing to adopt controversial decisions[53]. A life-time career, however, may not be helpful for the development of the international law and the investment tribunal[54]. A shorter term with the possibility of re-election would give the States the possibility to confirm only the judges with a satisfying record[55] .

An equal risk of politicization could derive from a possible re-election of the investment tribunal's judges. Even honourable and experienced judges feel a pressure when it comes to re-election and that they may tend to avoid controversial decisions[56].

A relatively long-term appointment without re-election could be a feasible solution to allow the adoption of progressive decisions, on one side, and to guarantee a rotation of the judges, on the other side. This approach is currently followed by the ECHR[57] and has been

52. See Investment Agreement for the COMESA Common Investment Area, annex A, art. 6.

53. See Zuleta, *The Challenges of Creating a Standing International Investment Court* at 8 (cited in note 32); Kaufmann-Kohler and Potestà, *Can the Mauritius Convention serve as a model* at 62 (cited in note 12).

54. See Brandeis University - International Center for Ethics, Justice and Public Life, *Toward an International Rule of Law* 38 n. 19 (cited in note 47).

55. See Kaufmann-Kohler and Potestà, *Can the Mauritius Convention serve as a model* 89 n. 5 (cited in note 12).

56. See Brandeis University - International Center for Ethics, Justice and Public Life, *Toward an International Rule of Law* at 37–38 (cited in note 47).

57. ECHR art. 23.

suggested by Institute of International law at its Rhodes session[58]. In recent years, however, (western) states seem to prefer a system based on a re-election mechanism: both the CETA[59] and the draft TTIP[60] provide for renewable appointments.

2.2. *Independence Requirement*

According to the prevailing scholarly opinion, a standing investment tribunal could provide appropriate responses to the criticism relating to the current ISDS system in terms of independence, conflict of interests and ethical standards[61].

The CETA, for instance, provides that the investment tribunal's judges shall be independent and "not ... affiliated with any government"[62]. At the same time, however, an explanatory note clarifies that "the fact that a person receives remuneration from a government does not in itself make that person ineligible"[63]. Doubts are justified as to whether government-appointed employees, officials or consultants can assume unbiased positions if the appointing state's interests are at stake[64]. To avoid the perception of lack of independence and apprehension of bias, it would thus be necessary to set high standards. The WTO Appellate Body, for instance, requires its judges to be "unaffiliated with any government"[65].

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58. Institute of International Law, *The Position of the International Judge*, resolution of the 2011 Rhodes session (September 9, 2011), art. 2(1), available at http://www.idi-iil.org/app/uploads/2017/06/2011_rhodes_06_en.pdf (last visited March 25, 2019).

59. CETA art. 8.27(2).

60. European Commission, Transatlantic Trade and Investment Partnership proposal (November 12, 2015), ch. II, sec. 3, art. 9(5), available at http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf (last visited March 25, 2019).

61. Zuleta, *The Challenges of Creating a Standing International Investment Court* at 9 (cited in note 32).

62. CETA art. 8.30(1). The TTIP draft of November 2015 (cited in note 60), for instance, required the members of the tribunal to be "independent beyond any doubt": ch. II, sec. 3, art. 9(5).

63. CETA art. 8.30(1) n. 12.

64. See generally Bienvenu (cited in note 32).

65. Agreement Establishing the World Trade Organization, annex II, art. 17(3).

Some well-known scholars claim that the judges very likely want to return home after their appointment expires[66]. This sheds light on another possible dilemma: will the judges support their home state's position at the end of the career in order to increase their chances for a future employment by their home states? Some scholars recommended, as a solution, to appoint only experienced judges at the end of their career for a non-renewable term[67].

Overall, there are many possible connections with the appointing state that may lead to (unconscious) bias and may (re-)introduce political considerations in the tribunal's mechanism. It is, however, questionable if the states really want to have completely independent judges deciding on the future investment cases.

2.3. *Impartiality Requirement*

Perhaps one of the harshest critics of the current ISDS mechanism is that arbitrators are biased in favour of their appointing party, either to increase the likelihood of future appointments or to gain a reputation as "reliable" arbitrator or because of their personal policy preferences[68].

On the other hand, it has also been suggested several times that judges of international tribunals vote in the interest of the electing state, rather than applying and enforcing the law in an unbiased manner[69]. In order to verify whether the criticism is justified, it may be appropriate to examine some empirical studies that have been conducted with reference to the voting behaviour of elected judges.

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66. See Brandeis University - International Center for Ethics, Justice and Public Life, *Toward an International Rule of Law* at 39 (cited in note 47); Cesare P.R. Romano, Karen J. Alter, and Yuval Shany (eds.), *The Oxford Handbook of International Adjudication* 625 (Oxford University Press 2014); William A. Schabas and Shannonbrooke Murphy, *Research Handbook on International Courts and Tribunals* 381 (Edward Elgar Publishing 2017).

67. See Brandeis University - International Center for Ethics, Justice and Public Life, *Toward an International Rule of Law* at 39 (cited in note 47).

68. See generally Catherine A. Rogers, *The Politics of International Investment Arbitration*, 12 Santa Clara Journal of International Law 223 (2013).

69. See generally Eric A. Posner and Miguel F.P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 The Journal of Legal Studies 599 (2005); Voeten, *The Politics of International Judicial Appointments* (cited in note 38).

From an analysis of the ICJ's decisions emerged, quite unsurprisingly, that judges are clearly partisan when their home state appears as a party. The judges vote in favour of their home states in approximately 90 percent of the cases, whereas they agree with the proposed decision in 50 percent of the cases if they have no relationship with the disputing parties[70].

Although this finding does not allow any statement related to the judges' voting behaviour when their home State is not involved in the dispute – and has thus limited importance – it emphasizes nevertheless an important aspect: it would be advisable to include in the statute of the investment tribunal a provision that allows rebalancing such a situation of bias. The statute could, for instance, provide that a judge of one of the parties' nationality shall not decide in the case[71] or that the parties should be given the possibility to choose an additional judge to be added to the bench in such a case[72].

Most importantly, the said study concludes that ICJ decisions are influenced by national bias even if the judges' home states are not involved: the judges assume a position in favour of countries that are similar – in terms of wealth, culture and political regime – to their home states or that are strategic partners of their home states[73].

Another analysis examined 4,488 decisions of the United States Courts of Appeals on politically sensitive issues like abortion, capital punishment, contracts clause, discrimination, campaign finance and the possibility to pierce the corporate veil[74]. The study confirms, first of all, that the judge's vote can be predicted by its party affiliation; secondly, that the judge's ideological position will be amplified if the other two members of the panel are related to another political party; and, thirdly, that the judge's ideological position will be dampened if there is no judge related to another political party sitting on the panel.

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70. See generally Posner and de Figueiredo, *Is the International Court of Justice Biased?* (cited in note 69).

71. See Statute of the International Court of Justice art. 31(1); Statute of the International Tribunal for the Law of the Sea art. 17(1).

72. See Statute of the International Court of Justice art. 31(2); Statute of the International Tribunal for the Law of the Sea art. 17(2).

73. See generally Posner and de Figueiredo, *Is the International Court of Justice Biased?* (cited in note 69).

74. Notably, the three-judge panels of the United States Courts of Appeals are appointed by the governing President of the United States.

This suggests that the panel composition has an important impact on the likely outcome of the appeal, which is a serious threat to the rule of law principle[75].

Although it has been highlighted that international investment arbitrators' decisions are also influenced by their policy views, educational background and professional experience[76], the above-cited research shows that the establishment of an investment tribunal would most likely not lead to an elimination of politically biased decisions.

3. *Conclusion*

On the basis of this research, it is very likely that a future investment tribunal would increase the level of politicization in investment disputes. All the above-outlined analysis dealing with the functioning and decision-making of already existing courts, as well as the proposed models for an investment tribunal, show that there is probably no remedy or solution to completely avoid depoliticization of the tribunal. States would have the possibility to exert a certain influence in the mechanism of a future investment court – the question is only whether they want to refrain from actually making use of such power. There would be various options to do so.

On the other hand, it has been recently suggested that a certain degree of politicization of ISDS is even desirable, for instance to better understand the background of the dispute[77]. Indeed, as Sir Hersch Lauterpacht held, "every international dispute is political"[78].

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75. See generally Cass R. Sunstein, David Schkade, and Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Virginia Law Review 301 (2004).

76. See Charles H. Brower II, *Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes*, in Karl P. Sauvant (ed.), *Yearbook on International Investment Law & Policy 2008-2009* 347 (Oxford University Press 2009). See also, generally, Michael Waibel and Yanhui Wu, *Are Arbitrators Political? Evidence from International Investment Arbitration*, working paper (2011), available at https://www.researchgate.net/publication/256023521_Are_Arbitrators_Political (last visited March 25, 2019).

77. See Daniel Kelemen, *Selection, Appointment, and Legitimacy: A Political Perspective*, in Michal Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedure to the European Courts* 245 (Oxford University Press 2015).

78. See Hersch Lauterpacht, *The Function of Law in the International Community* 161 (Oxford University Press 2011).

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