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The courts and the code Legal osmosis between religion and law in the cultural framework of civil law systems ****

SUMMARY: 1. The value of religious law in modern (and secular) states - 2. Religious rules and individual choices in Europe - 3. Religious law and the fields in which it can operate effectively - 4. The rules of religious courts in civil legal systems - 4.1 ..The direct referral to religious laws - 4.2. The pronounces of religious courts and its importance for faithful - 5. The development of Religious Arbitration Courts in Italy - 6. Does religious jurisdiction another side of religious freedom?

1 - The value of religious law in modern (and secular) states

Religion is embodied in every modern legal system, including those who have tried to exclude it from their rules. Religion is incorporated also in daily practices of the people of many world regions, from the Middle East through Africa to Europe, from Latin America to North America and Asia.

In effect "Modern law and religion are essential sociopolitical phenomena that have in common some veiled elements. Both aspire to constitute, or at least to frame, human consciousness and behavior in all spheres of private and public life. Accordingly, modern law and religion are complementary, contradictory and simultaneous sources of rule-making, adjudication and execution".¹

So, despite the assumption of secularism of the public sphere, the relationship between religion and law is still present in the daily practice of interpreters of civil law systems. Religious rules apply sometimes directly

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¹ G. BARZILAI, *Introduction*, in AA. VV., *Law and Religion*, edited by G. Barzilai, Ashgate, Burlington, 2007, p. 11.



through the activity of religious courts, sometimes indirectly through a religiously oriented application of civil legal rules.

This swinging defines the “osmotic” process this paper tries to clarify.

Directly, the religious affiliation leads the faithful to summon religious courts and to accept as binding their judgements.

In this case, the religious courts produce norms that have their source directly in the religious legal tradition, in so doing “religion as law”.

The relationship between religion and law is complex, and the influence of religious ideas on legal traditions is undeniable. Religious beliefs constitute central elements of the values that shape the rules, principles, rights, obligations, and institutions governing societies².

The law and social norms of societies have deep ties to the various religions of the world. Without religious values, it would be difficult to claim that we could still view legal systems in the same light.

It is not difficult to show how discrete religious traditions contribute to evolving legal traditions.

As the graph below shows, the influence of religion on legal systems is particularly evident in the eastern countries.

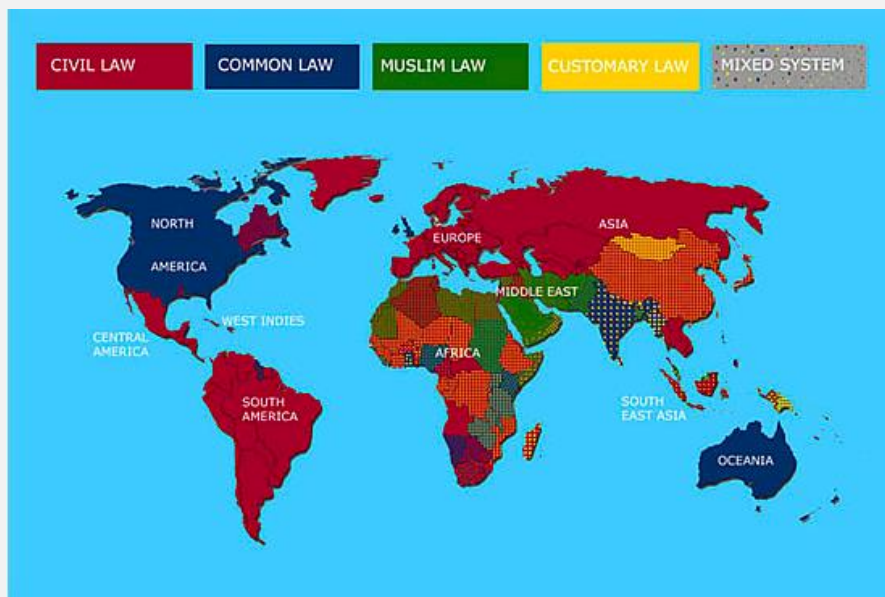


Fig. 1 – Source: www.nyulawglobal.org

² Religion contributes to maintain social order. According to Durkheim, religion plays an important role in legitimizing and reinforcing society’s values and norms. Cfr. É. DURKHEIM, *The elementary forms of religious life*, Oxford University Press, Oxford, 2001, who affirm, in this book: “If religion generated everything that is essential in society, this is because the idea of society is the soul of religion”.



But religious ideas influence legal system not only in Islamic societies but in western societies as well.

In the civil legal tradition, there is also an indirect “role” of religion in the civil code norms, that is a continuous information swap among religious rules and the law. It depends on cultural tradition and also on the role of canon law in the history of many European countries.

For example, the description of “marriage” in many European civil codes is very similar to the canon law one.

Similarly, another form of influence depends on the religious values mentioned in the Constitutions of many countries. It means that religious concepts are basic elements of the public legal order.

FOR EXAMPLE

- ❖ Italian Constitution (artt. 3, 7, 8, 19, 20);
- ❖ German Constitution (artt. 3, 4);
- ❖ Spanish Constitution (artt. 14, 16);
- ❖ Greek Constitution (artt. 3, 5);
- ❖ European Declaration Human Rights (art. 9).

In addition, some fundamental principles have a religious substratum. For example: the principle of equality is attributable to Christian Jewish mindset, which for the first time affirmed the equality of all human beings³.

In the European prospective, religious elements may be recognized in the Union’s constitutional values and public morality⁴. The Preamble to the Lisbon Treaty portrays democracy and respect for individual rights as the ultimate good to which Europe’s cultural, religious and humanist influences have contributed.

“Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law”⁵.

³ Cfr. **S.A. LAKOFF**, *Christianity and Equality*, in **AA. VV.**, *Equality*, edited by J.R. Pennock and J.W. Chapman, Atherton Press, New York, 1967, pp. 115-133; **E. RACKMAN**, *Judaism and Equality*, in **AA. VV.**, *Equality*, cit., p. 154 ss.

⁴ Cfr. **R. MCCREA**, *The Recognition of Religion within the Constitutional and Political Order of the European Union*, in *LEQS*, 9, 2009, who recognized the role of religion in lawmaking of EU institutions.

⁵ Cfr. Preamble of Lisbon treaty (available on www.lisbon-treaty.org).



The religious influences are recognized in their instrumental capacity as contributors to the emergence of values such as respect for individual rights, democracy, equality.

Respecting the secular nature of institutions, modern legal systems pay attention to religions.

2 - Religious rules and individual choices in Europe

Religious rules represent a cultural “strength” in their ability to influence faithful choices⁶. In fact, research has demonstrated that religions are able to influence a range of their adherents’ everyday-life choices including free-time activities, which vehicles to buy, pets to adopt or the housing to live in⁷.

Religious affiliation, also, influences the personal choices of individuals. The chart below, in fact, shows the perceptiveness of people who find it important to hold a religious service in some of the most important moments of life, such as birth, marriage and death.

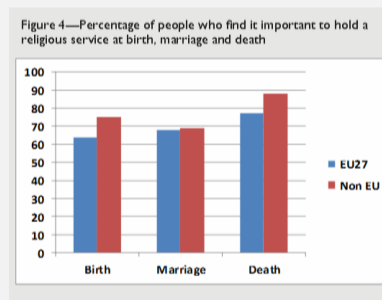


Fig. 2 – Source: www.europeanmission.redcliffe.ac.uk

⁶ Cfr. A. FUCCILLO, F. SORVILLO, L. DECIMO, *Diritto e religioni nelle scelte alimentari*, in *Stato, Chiese e pluralismo confessionale*, Online Review (www.statoechiese.it), n. 18/2016, pp. 27 ss.

⁷ Cfr. N. DELENER, *Religious contrasts in consumer decision behavior patterns: Their dimensions and marketing implications*, in *European Journal of Marketing*, 28, 1994, p. 36 ss.; C. PETTINGER, M. HOLDSWORTH, M. GERBER, *Psycho-social influence on food choice in Southern France and Central England*, in *Appetite*, 42, 2004, p. 307 ss.; S. MENNEL, A. MURCOTT, A.H. VANOOTTERLOO, *The sociology of food: Eating, Diet and Culture*, Sage Publications L.t.d., London, 1992; J.B. STEENKAMP, *Food consumption behavior*, in *European Advances in Consumer Research*, 1, 1993, p. 401 ss.; A. STEPTOE, T.M. POLLARD, *Development of a measure of the motives underlying the selection of food: The food choice questionnaire*, in *Appetite*, 25, 1995, p. 267 ss.; B. SHATENSTEIN, P. GHADIRIAN, *Influences on diet, health behaviours and their outcome in select ethnocultural and religious groups*, in *Nutrition*, 14, 1998, p. 223 ss.; E.H. ASP, *Factors influencing food decision made by individual consumers*, 24, 1999, p. 287 ss.; R.D. BLACKWELL, P.W. MINIARD, J.F. ENGEL, *Consumer Behaviour*, Hancourt Inc., Orlando, 2001.



3 - Religious law and the fields in which it can operate effectively

In such a context, people can respect their religious rules as juridical rules. Everyone can follow his/her religious affiliation being at the same time faithful and citizen. This particular status leads to the continuous osmotic process between state and religious orders. In this regard, it is possible affirm that “religion as law”.

In Western world, actually there is significant influence of religious rules in many fields as family law, inheritance law but also is important in contract and obligation law⁸. The interpretation of many legal institutions depends on religious tradition⁹.

Here, it is important stress the point that the legal interpretation makes some differences. The linguistic construction of many civil law codes is embedded in religiosity. Indirectly, the legacy of religion is evident in the terminology of many civil code institutions.

Many legal institution such ad family, contract and corporation are based on concepts that have religious substrate (solidarity, good faith, cooperation). The concept of family solidarity, for example, traditionally belongs to the “baggage” of religions. Each religion promotes and protects family solidarity, but interprets it according to its own principles. According to the doctrine of the Catholic Church, the principle of solidarity is a direct necessity for human and Christian fraternity; for the Muslim religion, the principle of solidarity is contained in verse 8.63 of the Qur'an which states “If you had spent all that in the earth, you could not have brought their hearts together; But Allah brought them together. Indeed, He is Exalted in Might and Wise”. In Italy, catholic religion has favored the introduction in the civil law system of instruments to support weaker subjects, such as food allowance.

Therefore, in order to understand the exact meaning of each legal institutions is compulsory to refer to the cultural and “religious *status*” of each person.

⁸ For an interdisciplinary legal research on the principal religious system that influence secular law or are incorporated as a regime in Eastern world, see **M.J. RAISCH**, *Religious Legal Systems in Comparative Law - A Guide to Introductory Research*, in www.nyulawglobal.org, April 2017.

⁹ According to **G. RIPERT**, *La règle morale dans les obligations civiles*, LGDJ, Paris, 1949, any fundamental principles and rules of the French Civil Code, even those in the obligation law, have been derived from Christian values. In his famous tractate, he affirms: “A jurist should not forget the law must apply itself to a human society founded on Christian morality”.



4 - The rules of religious courts in civil legal systems

Actually, in that (civil law) systems, jurisdiction is a power reserved to the state. But we must interrogate ourselves if it is possible to applicate religious law in that context. There are two possible ways to achieve this goal:

1. in the rare cases of **direct referral** to religious laws by the civil courts;
2. the state, in rare cases, **reserve the jurisdiction** in certain matters directly to religious courts.

4.1 - The direct referral to religious laws

Many Muslim in Europe tend to find practical solutions that will help them to organize their lives in according with their religious rules and the instances of European legal orders.

This situation favors in Europe the development of extrajudicial forms of dispute resolution or of the case of direct application of religious rules by the national courts.

The Dutch legal system admits various way of applying religious law. The direct application of religious law is through the activity of national court¹⁰. One of most frequent case proposed to Dutch courts is the "chained wife". This is the situation of a Muslim or Jewish woman who cannot get divorced from her husband, because he refuses to collaborate. In a divorce case, a woman requested that her husband be ordered by the court to cooperate in a procedure before a rabbinical court in order to procure a divorce in accordance with Jewish law¹¹. The Supreme Court tried to reduce the problem to a balancing of interests within the framework of the law on unlawful conduct (tort). The Supreme Court referred the case to the Court of Appeal in The Hague, which ordered the man to cooperate under threat of a judicially imposed penalty (*dwangsom*)¹². An expert in the field of Jewish law also remarked that the compliance of the man with the order of the court to procure a get under the threat of an imposed penalty would result in a forced get (get me'oesa'), which, according to Jewish law, is invalid. Therefore the Beth Din would not cooperate.

¹⁰ Informally, the faithful can act in accordance with religious law and appeal to the religious authorities, provided this does not conflict with Dutch law.

¹¹ Dutch Hoge Raad (Supreme Court) decision of January 22, 1982.

¹² S. RUTTEN, *Applying Shari'a to Family Law Issues in Netherlands*, in AA. VV., *Applying Shari'a in the West: Facts, Fears and the Future of Islamic Rules on Family Relations in The West*, edited by M.S. Berger, Leiden University Press, Leiden, 2013, pp. 97-102.



In Belgium there was a particular case of Islamic Shari'ah direct application (Belgium Shari'ah Courts)¹³.

A case of direct application of religious law in the jurisprudence of civil law systems is offered by Tribunal of Milano, October five 1990 (Italy). The case concerns Jewish husband and wife who contracted marriage in Israel and who ask for a divorce certificated before the Rabbinic Court of Rome, which grants them the laws of the State of Israel¹⁴.

Through the activity of national courts, the Spanish legal system adapts its family law to the needs of Muslim faithful¹⁵.

In Germany, the application of Islamic law can occur in two different ways, both limited by public order. The first level of application is through recourse to private international law. The second way is through the "optional civil law"¹⁶ (a very common example is marriage contracts). In three cases, the Supreme Federal Court has pronounced on the validity of contract of *mahr*¹⁷. In general, German jurisprudence is characterized by continuing referrals to Islamic law.

In France, Islamic rules only produce legal effects when they are not contrary to public order and *lois de police*¹⁸. The concept of public policy has inspired the French courts on repudiations¹⁹.

Also in common law systems, there are some particular cases. The English court, in a divorce case, based his pronouncement on a MAT

¹³ S. KERN, *Shari'a Law Grows with Impunity in Denmark and elsewhere in Europe* (in www.thecuttingedge.com) October 2011.

¹⁴ A. VALLETTA, *Delibabilità delle sentenze in materia matrimoniale delle confessioni religiose diverse dalla cattolica tra ordine pubblico e prospettive interculturali*, in *Ius Missionale*, 2015.

¹⁵ M. ROHE, *Reasons for the Application of Shari'a in the West*, in AA. VV., *Applying Shari'a in the West*, cit., p. 38 ss.

¹⁶ In matters exclusively concerning the private interests of the parties involved, these parties are entitled to create and to arrange their legal relations according to their preferences. Legal rules regulating such matters are "optional" within a certain framework. Cfr. M. ROHE, *Reasons for the Application of Shari'a*, cit., pp. 38 ss.; M. ROHE, *Islamic Law in German Courts*, in *Hawwa*, 2003, 1, pp. 46-59.

¹⁷ BGH, decision of January 28, 1987; BGH, decision of October 14, 1988, BGH, decision of December 9, 2009. Cfr. N. YASSARI, *Understanding and Use of Islamic Family Law Rules in German Courts: the example of Mahr*, in AA. VV., *Applying Shari'a in the West*, cit., pp. 171-175.

¹⁸ C. HOCHART, *La reconnaissance du statut personnel des musulmans en France. Question sensible*, PUF, Paris, 1998, p. 279.

¹⁹ M.C. NAJM, *Le sort des répudiations musulmanes dans l'ordre juridique français. Droit e idéologie(s)*, in *Droit et cultures*, 2010, pp. 209-229.

opinion. This case demonstrates the existence of a true intersection between Islamic and English law²⁰.

4.2 - The pronounces of religious courts and its importance for faithful

Some European states reserve the jurisdiction in certain matters directly to religious courts.

In Italy and in Spain works especially ecclesiastical courts that have the jurisdiction upon canonic marriage. These courts apply canon law, but their judgements have power in the state legal system.

In this way an ecclesiastic jurisdiction operate with full power. This jurisdiction has recently been confirmed by Italian Supreme Court, in respect to of the importance given to the ecclesiastic courts.

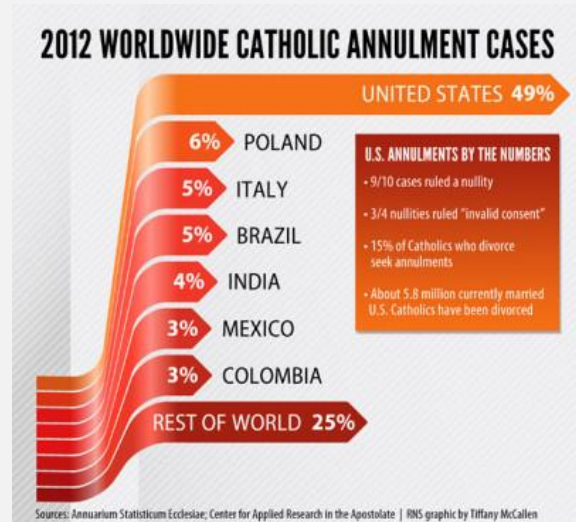


Fig. 3 – Source: *Annuarium Statisticum Ecclesiae*, Center for Applied Research in the Apostolate

More recently, many civil law systems are testing the possibility to turn to arbitration courts. This happen in many fields, such as family law, business law and contract law.

This is the evidence that people prefer to solve their private affairs using the religious arbitration courts.

²⁰ Uddin v Choudhury & Ors, 2009. On these topics, see **G. DOUGLAS, N. DOE, R. SANDBERG, S. GILLIAT-RAY, A. KHAN**, *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts*, Cardiff University, Cardiff, 2011.



In some common-law states, many religious arbitration courts work²¹. They operate enforcing religious rules at the same time of civil norms.

“There is no reason why principles of Sharia Law, or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution”

Lord Phillips of Worth Matravers (then Lord Chief Justice of England and Wales) during his speech “Equality Before the Law”²².

In England, the MAT (Muslim Arbitration Tribunal), established in 2007 by the Sheikh Faizul Aktab Siddiqui, operates for commercial disputes and mosques disputes, under the Arbitration Act 1996. Its arbitral awards may be enforced by state courts. The other matters of competence of MAT are Islamic divorce, family disputes, forced marriages, inheritance and Islamic wills. To comply with the requirements of the Arbitration Act 1996, the MAT has adopted its own regulation that defining the procedure²³.

The ISC (Islamic Sharia Council) is another organization that operate in England on these matter Islamic divorce, family disputes, forced marriages, inheritance and Islamic wills. It provides other “social” services such as marriage counselling, trails of drug detoxification, intergenerational conflicts.

These organizations apply a hybrid right, called “Angrezi shariat”, in which are mixed: a) different interpretations of Islamic law; b) customs and traditions of ethnic communities; c) English law²⁴.

In this way, they produce a hybrid system between religion and state.

²¹ For the exposition of religious arbitration in USA, see **A.M. BAKER**, *A higher authority: judicial review of religious arbitration*, in *Vermont Law Review*, vol. 37. For the debate on the introduction of *Shari’ah Council* in England, see **G. DOUGLAS**, **N. DOE**, **R. SANDBERG**, **S. GILLIAT-RAY**, **A. KHAN**, *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts*, cit.; **R. WILLIAMS**, *Civil and religious law in England: A religious perspective*, in **AA. VV.**, *Islam in English law: Rights, responsibilities and the role of Sharia*, edited by R. Griffith-Jones, Cambridge University Press, Cambridge, 2013; **F. SONA**, *Giustizia religiosa e islām. Il caso degli Shari’ah Councils nel Regno Unito*, in *Stato, Chiese e pluralismo confessionale*, cit., n. 34 del 2016; **A. MAROTTA**, *Il diritto musulmano in Occidente: Corti islamiche nel confronto tra democrazia e Shari’ā*, in *Heliopolis. Culture: Civiltà Politica*, n. 2/2013.

²² **N. PHILLIPS**, *Equal before the law Civil and religious law in England: A religious perspective*, in **AA. VV.**, *Islam in English law: Rights, responsibilities and the role of Sharia*, cit., pp. 286-293.

²³ Available on website www.mattribunal.com.

²⁴ **D. PEARL**, **W. MENSKI**, *Muslim family law*, Sweet&Maxwell, London, 1998; **AA. VV.**, *Shari’ah in the West*, edited by R. Ahdar, N. Aroney, Oxford University Press, Oxford, 2010.



The faithful believes these courts are more reliable than the others, because they apply religious principles. For these reasons parties recourse to religious courts.

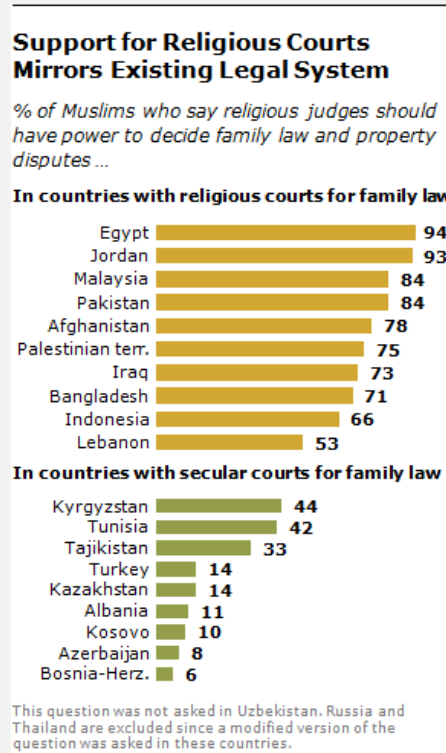


Fig. 4 – Source: *Pew Research Center*

In fact, religions ask their faithfuls to follow behaviors characterized by commonly shared social values. Therefore, faithfuls may consider the obligations of religious rules as they were rules of states, though living according to religions sometimes clashes with the secular address of contemporary states. There is a shared idea that religious institutions (Exp. religious court) are trustworthy.

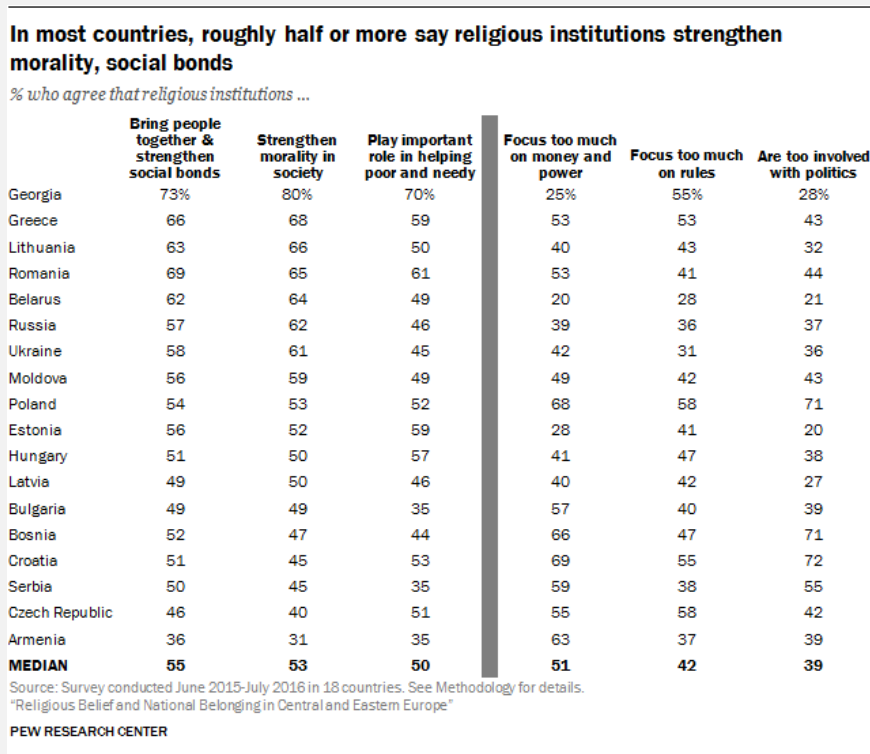


Fig. 5 – Source: *Pew Research Center*

More exactly, given that religion is the main cultural component of society, the faithful tries to enact the principles of religious rules choosing civil legal options that respect or enforce the principles of the religious law.

This need has encouraged the development of extra-judicial dispute resolution in Europe within the various religious communities.

5 - The development of Religious Arbitration Courts in Italy

In Italy by the legislative decree n. 28/2010 and by the law decree n. 132/2014 converted in law n. 162/2014, private bodies of civil and commercial mediation were introduced, as well as assisted negotiation bodies²⁵.

These arbitration courts have powers in some matters (right of inheritance, family law and commercial law). It is an innovation for the Italian legal system²⁶. Actually, these courts must decide the case by the

²⁵ About mediation and intercultural law, **P. CONSORTI**, *Conflitti, mediazione e diritto interculturale*, Pisa University Press, Pisa, 2013, especially pp. 157-239.

²⁶ For some data on civil mediation in Italy, see the report of the Italian Ministry of Justice entitled *Civil Mediation: statistics for the period January 1 – December 31, 2016*



written state law. However, there are some spaces to apply equity. This is the breaking point to introduce religious legal rules directly in the civil legal system. In the future, we can easily imagine religious arbitration courts will be preferred by citizens in order to achieve the religious goals. This is the way to delegate to private courts the solution of juridical issues belonging to the private own interest. In so doing, religious opinions influence which kind of court the person will choose.

6 - Does religious jurisdiction another side of religious freedom?

It's clear the importance of religious freedom in all modern legal systems. This fundamental human right must be regulated not just like an "empty declaration" but it must be filled by operating contents.

In this way, we collocate the space given to religious courts.

As a conclusion, we must exactly frame the space to give to religious courts in civil legal systems. In fact, religious believes are important for believers.

All jurists must work to improve the quantity but also the quality of religious freedom to give to everyone the right to be himself.

One senses a discomfort of sorts toward religions and the religious phenomenon in its entirety, having failed attempts to expel the religions from civil life. There are countless cases of religious discrimination to which the same legal systems are incapable of reacting. The laws that guarantee religious freedom do not always make this freedom fully operational. The great Western democracies with their apparently developed societies are not entirely immune from discriminatory practices. Such conducts are often justified as acts of defense of secularism²⁷.

All of these problems are the result of majority behaviors and not of a modern "intercultural secularism". The contemporary jurist must face these new challenges for the protection of religious freedom. The traditional defense of religious liberty is not enough in this perspective.

We need to increase the quality level of "religious freedom" through the provision of new and more effective legal instruments. For that reason, it is important to offer everyone equal opportunities.

(document available at the address <https://webstat.giustizia.it>). Instead, for a look on European perspective, see **G. BUFFONE**, *Mediazione e negoziazione assistita: i primi risultati e le prospettive di riforma. Sguardo all'Europa*, in *IlCaso.it*, November 2016.

²⁷ **A. FUCCILLO**, *Superare la sola eguaglianza formale: verso la libertà religiosa delle opportunità*, in **AA. VV.**, *Le proiezioni civili delle religioni tra libertà e bilateralità. Modelli di disciplina giuridica*, edited by A. Fuccillo, Editoriale Scientifica, Napoli, 2017, p. 59.



In so doing, the principle "*law as religion and religion as law*" also occurs.