Facing diversity: Islamic marriages and human rights[1]

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Abstract

This paper aims to analyze the challenges of facing diversity when it comes to Islamic marriages and human rights. The qualification of rights as universal has been questioned in the Islamic world because it reflects only the Western concept of human rights. Despite the codification of positive law norms, in some Islamic tradition countries, there are still difficulties in recognizing a set of universally recognized positive rights. In terms of co-existence between secular and religious law, it is fundamental for religious norms to be aligned with the international legal order in general and the protection of human rights in particular. Nonetheless, when addressing these issues, it is assumed that the logic of clash of civilizations serves as a deterrent to any effort toward understanding and seeking common solutions.

Keywords: *Islam, marriage, human rights, codification, modernization of family law*

Introduction

The qualification of rights as universal has been questioned in the Islamic world because it reflects only the Western concept of human rights (Cilardo, A. 2006). The discussion on the concept of human rights in Islamic countries is essential

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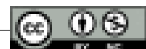
when considering its impact on matrimonial relations: from the choice of a partner to the expression of consent, to the rights and duties of spouses and to the *filiation* relationship (Pasquale, L. 1995). Unlike Western declarations that emphasize human rights, Islamic declarations emphasize the duties of humans in relation to their rights (Cilardo, A. 2002:126). The reservations of Islamic countries regarding some provisions of the Universal Declaration of Human Rights express the different theological-confessional concept of human rights in Islam. Some authors argue that "when it comes to universality of human rights, the debate *secularism versus religion or culture* is somewhat artificial, as many principles of international human rights law coincide very clearly with religious principles" (Andrews, P. 2003: 613-614).

After a series of meetings initiated by the UN between legal experts from Saudi Arabia and European jurists - to define the compatibility of human rights with the *Shari'a* - Saudi Arabia refused to sign the 1948 Declaration of Human Rights because it was considered in conflict with *Shari'a*, stating that: "The denial by our state does not imply indifference to the objectives that these documents aim to pursue, namely the dignity of man; rather, it means the firm will to protect, guarantee, and safeguard the dignity of man [...] by virtue of the Islamic dogma revealed by God and not by legislation inspired by materialistic considerations and therefore subject to continuous changes". (Pacini, A. 1998: 8).

Islamic legal scholarship identifies two different types of actions: one between man and God (*ibadat*), the other between man and man (*mu'amalat*). (Berger, 2018). Ontological equality and functional inequality coexist as there is a distinction between the human value of the individual and their social function. The discourse on human rights today is not so much tied to the intrinsic nature of Islam but rather to the historical-political context that surrounds and determines it. The role recognized today for women in Muslim countries varies within each country depending on social class and place of residence. Furthermore - and this is the determining factor - political will prevails over the religious sphere, either promoting or hindering the recognition of human rights. There are examples of individual countries in this regard, both of policies promoting human rights (the enactment of the Tunisian Personal Status Code in 1956) and of policies of regression (the Algerian Family Code).

Codification of human rights in Islam: historical overview

The codification of human rights in Islam began, albeit in its early stages, with the Kuwait Conference on Human Rights in Islam in 1980. The emphasis is placed on the fact that human rights (Article 42 of the document expressly recognizes *the*



pioneering role played by Islam in their promotion) are considered *divine gifts based on the provisions of Shari'a and Islamic religion*, and not mere *natural rights*. Their codification represents *a solid foundation for the effective exercise of human rights and fundamental freedoms and for safeguarding these rights from any attempt at violation* (Cilardo, A. 2002).

The second attempt at an Islamic declaration on the theme of human rights is the Declaration of Human Rights in Islam in 1990. In contrast to the first, this one used purely legal terminology, making it formally not dissimilar to the United Nations Declaration of 1948. This latter declaration also represents a theoretical statement, not expressly providing for any instrument of ratification or formal accession by Islamic countries. From a content perspective, the Organization of Islamic Cooperation (OIC) Declaration follows the same conservative theological line as the previous one; the subject of the rights referred to is the believing Muslim.

The reference to Islamic law is even more explicit when establishing the different rights and duties of spouses. In fact, Article 6 states: "Woman is equal to man in dignity; her rights are equivalent to her duties. She enjoys civil rights, is responsible for her economic independence, and has the right to retain her maiden name and family ties. The husband has the duty to support the family and is responsible for its protection." This second Islamic declaration on human rights follows the same conservative line as the first one.

The Arab Charter on Human Rights of 1994, drafted by the Committee on Human Rights of the League of Arab States, represents a departure from the earlier documents. Unlike the previous ones, this document does not contain any direct reference to Islam or Islamic religious law. The primacy of citizenship over any other affiliation is evident in Article 2, which guarantees every person under the jurisdiction of one of the contracting states "the enjoyment of all rights and freedoms established by this Charter without distinction of race, color, sex, language, religion, or opinion."

While the previous declarations referred to the traditional doctrine that the source of power is God and the administration of this power belongs to God's messenger on Earth, the Arab Charter, in Article 19, solemnly states that: "The people are the source of power." The law referred to in the Charter is the civil law of the state (*qanun*) rather than Islamic religious law (*Shari'a*). The Charter establishes the primacy of civil law over religious law and asserts the absolute equality of all citizens. In the absence of more explicit references, some authors believe that there has been a tacit reference to Islamic law for family law matters concerning Muslims and to the norms of their personal status for those belonging to other religions. An innovative element is Article 40 of the Charter, which provides for a monitoring mechanism (the Committee of Experts on Human Rights) to oversee the incorporation of the Charter's provisions into the legal systems of individual states through the ratification process.

These Islamic documents legitimize principles enshrined in non-Muslim-derived acts, also creating a connection with the values of the Islamic tradition. Therefore, the reinterpretation of universally accepted human rights principles in the light of *Shari'a* principles has given these documents a wholly original character (Angioi, S. 1996: 27). The concept of "equality of rights" should be understood considering the roles and functions of spouses within the family; this is why they are considered not equal but "equivalent".

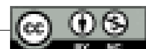
The Charter of 1994 was revised in May 2004 to align its provisions with international standards on human rights. The most significant change from the previous version is the affirmation of the principle of universality of rights. Furthermore, while in the 1994 Charter, the Cairo Declaration and international documents are considered on an equal base, in the 2004 version, contracting states "reaffirm" the principles of United Nations documents while merely "taking into account" the Cairo Declaration (Tramontana, F. 2005).

Important innovations concern marital matters. Article 3 obliges states to adopt all necessary measures to ensure effective equality and equal opportunities between men and women in the exercise of the listed rights. While Article 2 of the 1994 version prohibited sex-based discrimination, Article 3 of the 2004 version states that "men and women are equal in dignity, rights, and duties." Article 30 commits states to prohibit all forms of violence within the family, especially against women and children. Article 33 of the 2004 version explicitly states that "there can be no marriage without the free and full consent of the spouses". Article 29, which governs the citizenship of children, leaves significant discretion to the national legislator, who may adopt the measures they deem most appropriate in accordance with their nationality laws. Article 43 prohibits states from reducing the legal protections granted under other international treaties.

However, the 2004 version of the Charter was criticized for not establishing the equality of spouses, leaving it to the legislator to guarantee rights and duties in marriage and at the time of its dissolution. Furthermore, it did not address the right to marry without restrictions based on race, nationality, or religion. This right must be exercised according to existing rules (Article 33). The main criticism was related to the absence of mechanisms for practical implementation of the Charter. National legislators are given broad discretion, so much will depend on the interpretation given to individual provisions[3].

There is a current trend toward a more modern interpretation of Islam to reconcile the classical view of Islam with human rights. Some reformist Arab

3 In 2009, the Arab Human Rights Committee, was established to monitor and oversee compliance with the Charter. The Statute of the Arab Court of Human Rights was approved by the Ministerial Council of the League of Arab States on 7 September 2014. There has been much criticism by civil society organizations of the Statute, which call for states not to ratify it until it is comprehensively amended, in https://unimelb.libguides.com/c.php?g=928011&p=6704321



intellectuals believe it is possible to promote a "finalist" interpretation of the *Holy Qur'an* as a method to renew Muslim culture (Pacini, A. 1998), considering the historical context in which it was revealed. Once the real intention of the *Holy Qur'an* regarding that context is understood, it would be possible to creatively reform it considering current circumstances. The concerns on the compatibility of the *Shari'a* with European Convention of Human Rights have concluded on the need for reconciling the various positions and create bridges of understanding between Sharia law and the Convention (Gutiérrez, 2019: 16). Thus, it is necessary to explore possible points of concordance and disagreement between different concepts of human rights to identify a common "hard core" of values, which can be reached through different paths.

Receiving the *Shari'a* principles in matrimonial regulations

The diversity of values on which each individual legal system is based impedes the free circulation of different matrimonial models (Ferrari, S. 2008: 377). Islamic marriage, both in the international - private and in the confessional sphere, cannot be attributed to a single category. It presents peculiarities that reflect in the first case the degree of reception of the *Shari'a* in the positive law of the individual states of Muslim tradition, and in the second, the influence of the thought of the various legal schools in each country.

If in Western democracies the relationship between civil law and religious law is addressed through reference to the principle of secularism and absolute respect for individual and collective religious freedom, in Islamic societies, religion acquires an overall relevance that is necessarily intertwined with temporal choices. The approach proposed to these diversities is the "intercultural" model, a new social synthesis that allows us to overcome the situation of mere co-presence to give rise to a process of mutual exchange (Donati, P. 2007).

Islam, due to its unique historical origin, played a crucial unifying role, establishing not only a single religious message but also a single law, "the Law" or the *Shari'a*. Its influence in contemporary legal systems has deep roots and reflects the relationship between the state and Islam, a relationship that can take different qualifications:

a) The state can be defined in the Constitution as an Islamic state.
b) It can indicate the Muslim religion as the state religion.
c) It may simply emphasize that the majority of the population is Muslim.

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Throughout history, there has been some resistance to codification in Muslim-majority countries, determined by the concern of making the law too rigid. This resistance led to unsuccessful codification efforts initiated under the Abbasid Caliphate. The first steps in the process of codifying *Shari'a* were taken by the Ottomans in the 16th century, when Sultan Suleiman I (1512-1520) issued a decree establishing the *Hanafi* school as the official and mandatory school of the Ottoman state. This rule of a single mandatory school, initially applied by the Ottomans in Egypt and subsequently in all Arab countries, represents the first step towards codification.

Over time, the application of *Abu Hanifa's* preferred opinion on matrimonial issues became restrictive, necessitating the codification of personal status laws. In 1916, two *Sunni* measures were enacted (El Alami D. Hinchcliffe, D. 1996: 35-37): a) the first allowed wives to request divorce if their husbands were absent and did not provide for their support; b) the second permitted divorce in cases of the husband's dangerous illness.

Personal status laws remained non codified until 1917 when the "Family Rights Law" was enacted, regulating marriage and divorce for Muslims, Christians, and Jews. This legislation aimed to abolish religious courts (which were not subject to state control) and codify family regulations in line with various religious practices.

After the dissolution of the Ottoman Empire, the evolution of law and justice in Arab countries occurred through a slow and gradual process. Efforts were made to reopen the door that scholars had declared closed in the early generations, that is, direct access to sources (Noja, S. 1968). Laws and codes were enacted based on the European model, where the *Shari'a* was no longer the sole but one of the sources of law. *Fiqh* regarding personal status emerged transformed, becoming the law of the state, changing or even abolishing some classical institutions.

The degree of the *Shari'a* reception in different countries can be divided into three simplified approaches (Musselli, L. 2007:38):

- States that, in pursuit of religious purity, largely refer to confessional regulations (e.g., Iran and Afghanistan).
- States that adopt a "modernized" version of the *Shari'a* by enacting special laws and codifying marriage norms (e.g., North African countries).
- States that follow a secular regulation (Turkey).

Following this three-fold classification, it is noted that Turkey takes a radical position due to its strong secular elements, while Saudi Arabia and Iran are classified as theocratic confessional countries. In an intermediate position, and therefore classified under the second category, are the North African countries.

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In Turkey, despite 99.8% of the population is Muslim, the legal system is entirely secularized. Religion is not only not mentioned in the Constitution, but the preamble firmly declares that there will be no interference between religion and the state, in accordance with the principles of secularism. Iran and Saudi Arabia are countries where the *Shari'a* is the only source of regulation, and religious authorities have the power to veto legislation. The key principle guiding the legal system in these countries is to reject any law contrary to Islam. In North African countries, the *Shari'a* is one of the sources of law, and there is a mixed (religious/ secular) judicial system. For example, in Egypt, whose Constitution recognizes *Shari'a* as the main source of law, *Shari'a* courts are integrated with a Western legal system, and a secular Supreme Court has the final say on personal status matters.

The general trend of replacing the *Shari'a* has seen two major exceptions. The first concerns family law, where generally the provisions of the *Shari'a* have continued to be applied (except for Turkey). The exception is represented by two categories of states that have not followed the general process of legal modernization but have claimed a stronger adherence to Islamic orthodoxy even on a legal level: very conservative Muslim-majority countries such as Saudi Arabia, Oman, and other Gulf States, where *Shari'a* still has a wide application.

Analyzing the reception of *Shari'a* in state law involves evaluation on four levels:

a) Recognition of Islam and the invocation of *Shari'a* principles in the Constitution.
b) Reception of *Shari'a* in substantive law.
c) Influence of classical law on personal status.
d) Judicial system.

a) At constitutional level, the evolution in Islamic states can be observed in two significant phases. The first phase spans from the end of World War I to the 1950s, characterized by the adoption of Constitutions inspired by Western models in various sovereign or protectorate states, including Pakistan, Iran, Egypt, Iraq, Syria, Lebanon, Transjordan, Morocco, Tunisia, and Libya. The second phase, which began in the 1950s (and is still ongoing), involves the rejection of Western models, the concentration of political power in the hands of national leaders often representing the armed forces, explicit reference to Islamic values, and, in Arab countries, the Arab nation.

The constitutional recognition of Islam as the state religion does not necessarily lead to significant consequences in the organization of power, as in Algeria, Tunisia, Egypt, Jordan, and Yemen. In other states, it implies a privileged status, as in Iran, Pakistan, and Saudi Arabia. Lebanon maintains an equidistant position from all religions, while in Turkey, the organization of power is constitutionally separated from Islamic religion.

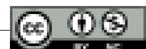
Some Constitutions declare Islam as the official religion of the country or state that *Shari'a* is one of the normative sources, or "the" normative source. For example, the Constitution of Saudi Arabia states that the primary source is the *Holy Qur'an* and the *Prophet's Sunnah* (traditions); Article 4 of the Iranian Constitution states that all laws must be based on Islamic principles; Article 227 of the Pakistani Constitution establishes that all laws must conform to Islamic prescriptions as per the *Holy Quran* and *Sunnah*, and no law conflicting with this principle can be enacted.

All Constitutions of North African countries declare Islam as the state religion: Article 2 of the Egyptian Constitution, Article 2 of the Algerian Constitution, Article 6 of the Moroccan Constitution, and Article 1 of the Tunisian Constitution. The constitutional models of Arab countries continue to be characterized by the internal division between Muslims and non-Muslims, with more pronounced consequences in conservative countries. The legal consequences of this division of society into Muslim and non-Muslim citizens vary from country to country.

- Some states have a unified legislative and judicial system for all citizens, though this doesn't always guarantee complete equality between believers and non-believers.
- Others lack a codified family law, and judges must refer to classical Islamic law, with all its contradictions.
- Still, others have specific legislation for Muslims based on different schools of thought.
- In some countries, there are different laws and jurisdictions for Muslims and non-Muslims.

b) Regarding the reception of the *Shari'a* within the legislative system, there are liberal systems where *Shari'a* is not considered a source of secular law, and conservative systems where *Shari'a* constitutes the primary (or nearly exclusive) source of law, directing the entire legal system. This ranges from the case of a secular Constitution (Turkey) to states where the *Holy Qur'an* is the paramount constitutional and normative source, to others that consider it one of the sources of legislation.

In the 19th century, the Ottoman Empire began to follow the Western example by introducing new codes for civil, commercial, and criminal matters, officially codifying much of the "laws" in Arab countries. After World War II, with the exception of Turkey, other countries adopted hybrid legislative systems that applied classical Islamic law with significant influences from European legal codes. The process of adopting foreign legal models, known as legal acculturation (the transformation of a legal system on a large scale due to contact with different systems),



is still ongoing and represents the quest for balance between "fundamentalism" and modernization (Castro, F. 2007: 115-116). Positive legislation in modern legal systems has reduced the strength and supremacy of *Shari'a*, limiting it more and more to a moral, ethical-religious norm without competent judicial bodies for its direct application.

b) As for Personal Status Laws, this is the area where *Shari'a* continues to exert a significant influence in almost all Muslim countries. The rules governing matrimonial issues constitute the essential core of Islamic law. These rules are not derived from civil codes but constitute separate texts. The "personal" nature of these laws does not refer to private international law (related to issues of state and personal capacity), but rather to the personal application of this group of rules. Personal Status Laws regulate marriage, personal and financial relationships between spouses, parenthood and related maintenance obligations, guardianship, donations and successions.

The phenomenon of Personal Status Laws reflects the principle that the law applicable to individuals within a single state organization is not uniform for all but refers to specific regulations based on the individual's characteristics. The *Shari'a* is applied to Muslims by Muslim judges, while non-Muslims are governed by their own rights administered by their respective religious judges. The term "Personal Status" is retained even after the unification of applicable law within the territory. Then, codified Islamic law is applied, in whole or in part, to all citizens as the sole law of the state.

c) At judicial level, a dual system of religious courts and civil ones, is common in many Middle Eastern and African countries (Noja, S. 1968). With the exception of Saudi Arabia and Iran, where *Shari'a* is almost entirely applied, religious courts typically deal with family and personal matters, while other matters are subject to different sources of law and fall under secular courts. In Middle Eastern countries, for example, Lebanon has both "state" courts and religious ones, having jurisdiction over private law issues like marriage, deaths, and inheritance.

The process of *modernization in family law* (Fico, I. 1996: 180-181) has achieved significant results only in very recent times[4]. Jordan was the first among Arab countries to adopt a Family Law Code in 1947, which replaced the Ottoman law previously in force. This was later replaced in 1976 by a new Personal Status Law. In North African countries, Tunisia adopted its own Personal Status Code in 1956, introducing substantial innovations, including the abolition of polygamy and

[4] Three areas can be distinguished: a) the countries of the Arab East and Egypt of *Hanafi* influence (the official school of the Ottoman Empire); b) the North African countries of the *Malichite* tradition; c) Somalia and Yemen, where *Shafi* law predominates.

repudiation. Morocco also approved a similar set of laws called the *Mudawwana* between 1957 and 1958. However, Libya and Algeria decided to pass similar laws only in 1984.

In the North African context, Egypt is the only country that has not adopted a comprehensive code in this area. The legislature has only intervened in specific areas, avoiding the repeal of *Shari'a* norms, which still remain in force, albeit with some more advanced aspects due to reforms introduced by President Sadat. The situation is different in Lebanon, where the Ottoman law of 1917 is still in force. This law applies only to *Sunni* Muslims, while other religious communities in the country are subject to their own laws and the jurisdiction of their respective religious courts.

With the exception of Turkey, where the Swiss Family Code plays a prominent role in the legal system, we can distinguish between countries where family law is the national law adopted by the legislature, such as Egypt, Morocco, and Tunisia, and countries where family law is subject to the control of religious authorities, such as Bahrain and Lebanon. In the former, the marriage rules set by the legislature are rearrangements of the *Shari'a* prescriptions. In the latter, family matters are not under the jurisdiction of the state but of religious authorities, who have jurisdiction over all issues related to the personal status of Muslims. Lebanon has always been a unique case in the Arab world, characterized as a secularized multi-confessional state with seventeen recognized religious communities, granting complete autonomy to religious authorities to decide on family matters.

It has been emphasized that the common religious background characterizes Islamic family law in all Muslim countries. However, an equally important factor in the evolution of law, especially family law, is tradition. The flexibility and adaptability of Islamic law to different environments, through reference to local customs - which enjoys wide recognition unless it is clearly contrary to fundamental legal principles - have allowed it to develop in vast regions of the world.

The process that has led to the predominance of state law is now considered irreversible in all contexts where the process of codification has begun and is developing. On the other hand, it is evident that this process must continually face the influence and symbolic legitimacy that *Shari'a* holds in Islam, an influence that persists despite the modernization of the law in many countries. This influence concerns important issues, such as the condition of women, the universal human rights, and freedom of conscience, particularly in the context of family law, where challenges related to women's status and human rights are prominent.

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Islamic marriages in the International and European legal framework

The challenges of meeting the needs of immigrants in Europe have involved experts in debates concerning the right to cultural identity in the context of family law (Buechler, 2012: 197). Since 1992, the European Commission on Human Rights ruled on the request of the Dutch authorities to issue a residence permit to the son of the first wife of a Moroccan (Campiglio, 2008: 45-46). He regularly resided in the Netherlands with his second Moroccan wife. The permit was denied by the local authorities as the right to family reunification was limited to a single wife and her children. The Commission, questioned on the violation of the right to respect for their family life pursuant to art. 8 ECHR, recognized the existence of an interference in the appellants' family life, but underlined the legitimacy of said interference pursuant article 8, paragraph 2, arguing that States enjoy broad freedom in immigration matters, so interference is not only in accordance with the law but also necessary in the context of immigration controls.

As per the right to family reunification, the preamble of Directive 2003/86/EC (recital 11) specified that: "respect for the values and principles recognized by the Member States, in particular where women's rights come into consideration (...) justifies that requests for family reunification relating to polygamous families may face restrictive measures". Member States are not required to recognize polygamous marriages, legally contracted in a third country, which may conflict with their domestic legal system. However, this does not affect the obligation to consider the best interests of the children born from such marriages[5].

Polygamous marriage and the recognition of repudiation as a valid form of divorce operated by some Member States, have been subject to the scrutiny of the Commission as well, which has specified that "the simple attribution of effects to certain legal statuses or to acts carried out according to the law of the State of origin, does not in itself implies a general compatibility between the *Shari'a* and the founding values of the European legal systems" (Benigni, 2008: 10). The attribution of such effects, moreover, can only take place in the application of rules of private international law or bilateral agreements.

The European Parliament condemns forced marriages and calls on Member States to ensure that polygamy is kept illegal. When questioned about the daily

[5] See Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, in https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0313:FIN:en:PDF

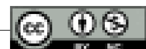
application of Koranic law within European territory, the Commission specified that "no decision issued by jurisdictions that have not been created according to the constitutional rules of the Member States can and must have legal value" (Benigni, 2008: 14). The duty of each State to monitor its own legal framework does not exclude the power of them to establish new special forms of jurisdiction or dispute settlement. However, accepting an institution or the legal effect of acts and conduct, in implementation of private international law, does not automatically imply acceptance of the *Shari'a*.

Recently, the relation between human rights, the *Shari'a* and "interpersonal law" in family matters, was questioned in the ECtHR case *Molla Sali v. Greece* (Application no. 20452/14). The ECHR unanimously held that there had been a violation of Article 14 read in conjunction with Article 1 of Protocol No. 1. With this regard, some authors have argued that *applying some of Sharia rules by individuals in the private sphere may be permissible as part of their freedom to observe the precepts of their religion, but it should not be endorsed or enforced by the state* (Brzozowski, 2018). Others have stressed out the challenging co-existence of secular and religious law as well as the exceptional recognition of direct application of religious law and jurisdiction (Koumpli, 2019).

Concluding remarks

In conclusion, from the examination of the concept of human rights in Islam within the institution of marriage, we can draw the following conclusions, albeit briefly:

a) The plurality of legal schools within Islam does not allow for a uniform classification of marriage regulations.
b) In some Muslim-majority countries, there is a trend to regulate matters that were traditionally considered religious affairs with their own legislative acts, thereby unifying and organizing state law in matters of marriage and family.
c) State law, once reorganized, deviates in several ways from classical Islamic law, as it considers essential and unavoidable needs of modern society, such as respect for certain fundamental human rights and the certainty of legal status.
d) Today, unlike the past, the formal source regulating family relationships is state law, highlighting the objective possibility of evolution and modification of codified norms. Examples of such evolution can be seen in areas like polygamy, divorce, and the changing role of women within the family.



Thus, family regulations are no longer exclusively governed by a religious law but are instead directly regulated by state law. This state law, in turn, takes the Islamic religious law as a reference model but deviates from it and adopts different solutions whenever it proves insufficient or inadequate for essential needs of a modern state. It is now to this state-derived family law, rooted in religious tradition, that scholars must refer to for a better understanding of related legal issues.

Despite the codification of positive law norms, in some Islamic tradition countries, there are still difficulties in recognizing a set of universally recognized positive rights. Nonetheless, when addressing these issues, it is assumed that the logic of clash of civilizations serves as a deterrent to any effort toward understanding and seeking common solutions. In terms of co-existence between secular and religious law, it is fundamental for religious norms to be aligned with the international legal order in general and the protection of human rights in particular.

Bibliography

Andrews, P. (2003). *Women's Human Rights and the Conversation Across Cultures,* Albany Law Review, New York Law School, vol. 67, pp. 609-616, in https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=2254&context=fac_articles_chapters , accessed on 10 Novembre 2019.

Angioi, S. (1996). "La tutela dei diritti della donna nel mondo islamico", in *I diritti dell'uomo,* vol. 3, pp. 22-32.

Benigni, R. (2008). *Identità culturale e regolazione dei rapporti di famiglia tra applicazioni giurisprudenziali e dettami normativi*, in www.statoechiese.it, accessed on 8 January 2019.

Berger, M. S. (2018). "Understanding Sharia in the West", *Journal of Law, Religion and State,* in https://brill.com/view/journals/jlrs/6/2-3/article-p236_236.xml?language=en, accessed on 10 January 2019.

Buechler, A. (2012). "Islamic family law in Europe? From dichotomies to discourse – or: beyond cultural and religious identity in family law", *International Journal of Law in Context*, 8,2 Cambridge University Press, pp. 196–210 , in https://www.ius.uzh.ch/dam/jcr:f7865ae7-17b3-4f0b-8d1a-5bf1a2230190/Buechler_IslamicFamilyLawinEurope.pdf accessed on 10 January 2019.

Castro, F. (2007). *Il modello islamico,* Torino: Giappichelli.

Cilardo, A. (2002). *Il diritto islamico e il sistema giuridico italiano. Le bozze di intesa tra la Repubblica italiana e le associazioni islamiche italiane*, Napoli: Edizioni Scientifiche Italiane.

El Alami, D., Hinchcliffe, D. (1996). *Islamic Marriage and Divorce Laws of the Arab World*, London: Kluwer Law International.

Ferrari, S. (2008). *La rilevanza interordinamentale del matrimonio, in Sistema giuridico canonico e rapporti interordinamentali* (a cura di) (ed.) RAAD D. E., Publicationes Université La Sagesse, Beyruth-Liban.

Fico, I. (1996). "Il matrimonio islamico presso i sunniti e la sua modernizzazione nei paesi arabi", in *Quad. scuola di spec. in dir. eccl. e can.*, n. 4, pp. 169-187.

Gutiérrez, A. (2019). "Compatibility of Sharia law with the European Convention on Human

Rights: can States Parties to the Convention be signatories of the 'Cairo Declaration'*?*", *Report (Doc. 13965) to the Committee on Legal Affairs and Human Rights, Parliamentary Assembly, Council of Europe*, in https://pace.coe.int/pdf/09e22e9b588902215ba761ac42c3913521598c4963098c1c4ca49c7f73346f35/doc.%2014787.pdf, accessed on 16 November 2019.

Koumpli, V. (2019). *Managing religious law in a secular state The case of the Muslims of western Thrace, on the occasion of the ECHR judgment in Molla Sali v Greece*, in https://www.constitutionalism.gr/wp-content/uploads/2019/04/2018-Koumpli-IACL-Molla-Salli.pdf, accessed on 20 November 2019.

Musselli, L. (2007). *"Islam, diritto e potere",* in *Il Politico*, Università degli Studi di Pavia, n. 2. pp. 37-61.

Noja, S. (1968). "La recente evoluzione del diritto nei paesi mussulmani del vicino oriente", in *Oriente Moderno,* n. 9-10, Roma, pp. 689 and following.

Pacini, A. (1998). *L'islam e il dibattito sui diritti dell'uomo*, Dossier mondo islamico 5, Torino: Fondazione Giovanni Agnelli.

Tramontana, F. (2005). *"La nuova carta araba dei diritti dell'uomo tra tradizione e innovazione",* in *Giurisprudenza costituzionale*, vol. 50, n. 2, pp. 1479-1509.

Brzozowski, W. (2018). "Is Islam Incompatible with European Identity?", *School of Law Research,* University of Milano-Bicocca, Paper No. 18-15, in https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3301195, accessed on 15 November 2019.

Decision of ECtHR - Case *Molla Sali v. Greece* (Application no. 20452/14).