

“Law as religion, religion as law”

The Hebrew University of Jerusalem – Faculty of
Law

June 5-7, 2017 - Jerusalem

The Courts and the Code. Legal osmosis between religion and law in the cultural framework of civil law systems

PhD. Professor Antonio Fucillo

Coauthors: PhD. Prof. Livia Saporito, PhD. Francesco Sorvillo, PhDs Ludovica Decimo

Università degli Studi della Campania -

Luigi Vanvitelli (Italy)

Department of Law



UNIVERSITÀ DEGLI STUDI DELLA CAMPANIA
LUIGI VANVITELLI

DIPARTIMENTO DI GIURISPRUDENZA

dir.ecclesiasticosun@gmail.com; fucilloantonio@gmail.com

HOW EFFECTIVELY IT IS EXERCISED RELIGIOUS FREEDOM?

Only through the right to... or through other legal
institutions

The Court and the Codes

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 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”, but it raises specific questions:

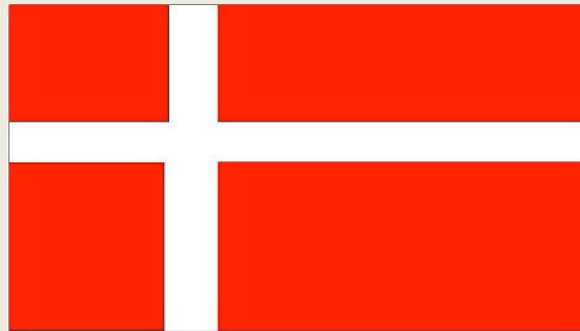
WHAT IS THE VALUE OF RELIGIOUS LAW IN
MODERN (AND SECULAR) STATES?

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 traditions...

Symbolical
connection
between
states and
religions



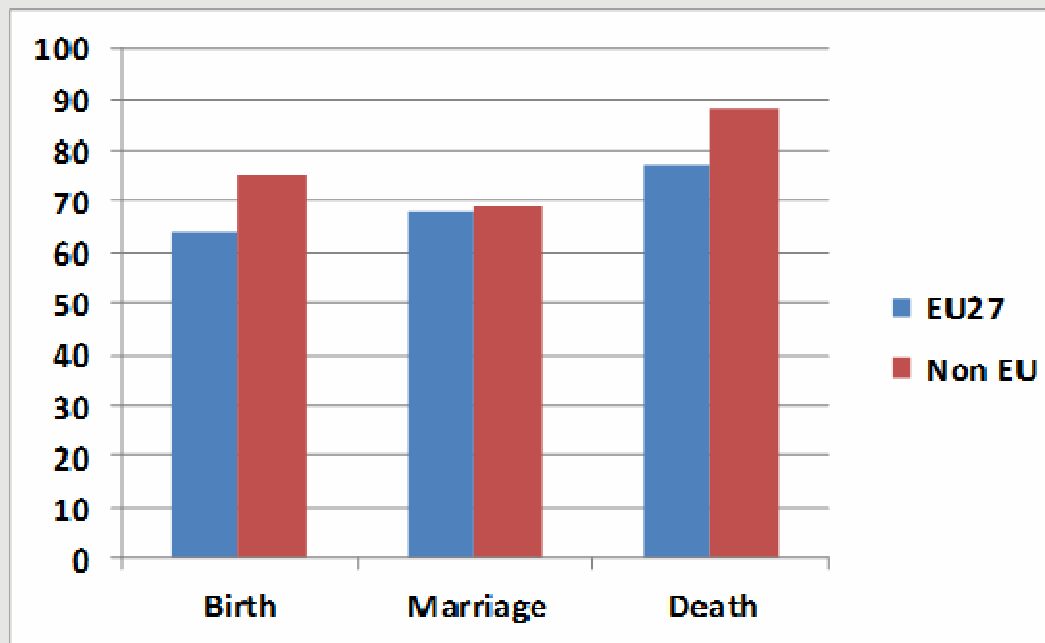
Swedish Crown



... and also on the role of canon law in the history of many European countries. Let's take the example of the definition of "Marriage": the civil code description is very similar to the canon law definition.

Religious Rules and Personal Choices in Europe






Figure 4—Percentage of people who find it important to hold a religious service at birth, marriage and death



Similarly, another form of influence depends on the religious values mentioned in the Constitutions. of many countries. It means that religious concepts are basic element of the public legal order. Respecting the secular nature of institutions, modern legal systems pay attention to religions.

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).

WHAT ARE THE FIELDS IN WHICH RELIGIOUS
LAW CAN OPERATE EFFECTIVELY?

In western world actually there is important influence of religious rules in many fields as in **family law**, **inheritance law** but also is important in **contract and obligation law**.

The interpretation of many legal institutions depends on religious tradition. Religious values are worthy in many declarations of rights.

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.

This is Religion as Law.

Here, I would like to stress the fact that the legal interpretation makes some differences. To demonstrate this look at...

- ➔ **linguistic construction;**
- ➔ the inner meaning and function of the “**principles**” of law in the civil legal theory;
- ➔ the **role of religious courts** in those legal systems.

.

Linguistic construction of many civil law codes

Indirectly, the legacy of religion is evident in the terminology of many civil code institutions

Family → Solidarity
Contract → Good Faith
Corporation → Cooperation

All these words have a substrate of religious concepts

The meaning of principles of civil law legal institutions

“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.” (G. Barzilai)

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.

The rules of religious courts in civil legal systems

Actually in that (civil law) systems, jurisdiction is a power reserved to the state.

Is it possible to applicate religious law in that context?

There are two possible ways to achieve this goal:

- ✓ in rare cases of direct referral to religious laws;
- ✓ the state, in rare cases, reserve the jurisdiction in certain matters directly to religious courts.

Example of cases of direct referral to religious laws

● **Dutch Hoge Raad (Supreme Court) on January 22, 1982** → In a divorce request 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 law. 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*).

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.

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

Example of cases of direct referral to religious laws

● A case of direct application of religious law in the jurisprudence of civil law systems is offered by **Tribunal of Milano**, 05.10.1990 (Italy). It "recognized" a divorce pronouncement of the rabbinic court in Rome, concerning a "Jewish" marriage between a Jewish woman of citizenship Italian and a Jew with dual Italian and Israeli citizenship - and therefore considered "foreigner" by Italian law - who had sought and obtained the "divorce" from "The rabbinic court in Rome under Israeli law"

Also in common law systems there are some particular cases:

● **Uddin c. Choudry** → The English court, in a divorce case, based his pronouncement on a MAT opinion. This case demonstrates the existence of a true intersection between Islamic and English law.

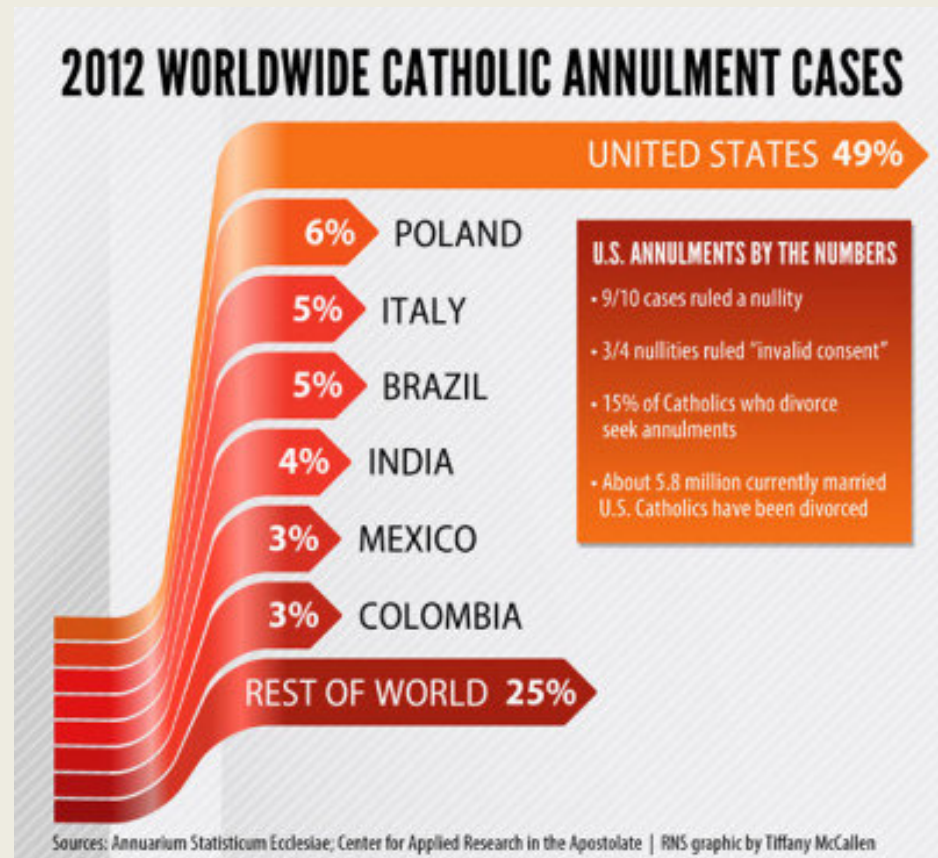
The state reserve the jurisdiction in certain matters directly to religious courts: examples

In Italy and in Spain works specially 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.

The state reserve the jurisdiction in certain matters directly to religious courts: examples



More recently:
Many civil law systems are testing the possibility to turn to
arbitration courts.
This happen in many fields.

Examples



Family law
Business law
Contract law

Is this the evidence that people prefer to solve their private affairs
using the religious arbitration courts?

In some common law states, many religious arbitration courts work. They operate enforcing religious rules at the same time of civil norms. In this way they produce a hybrid system between religion and state.

“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”.

EXAMPLES



MAT

Muslim Arbitration Tribunal

(Available in England under the Arbitration Act 1996)

Matters of competence: islamic divorce; family disputes; forced marriages; commercial and civil arbitration; inheritance; islamic wills; mosque disputes.



ISC

Islamic Sharia Council

(Available in England under the Arbitration Act 1996)

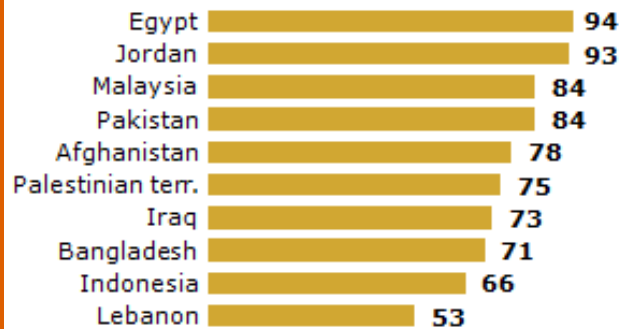
Matters of competence: Islamic divorce; family disputes; forced marriages; inheritance; Islamic wills.

Other “social” services: marriage counselling; trails of drug detoxification; intergenerational conflicts.

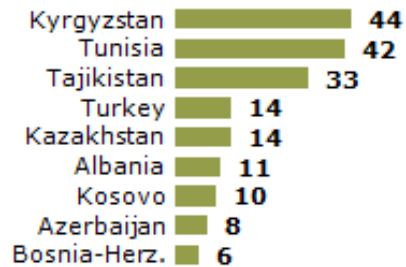
Support for Religious Courts Mirrors Existing Legal System

% of Muslims who say religious judges should have power to decide family law and property disputes...

In countries with religious courts for family law



In countries with secular courts for family law



This question was not asked in Uzbekistan, Russia and Thailand are excluded since a modified version of the question was asked in these countries.

PEW RESEARCH CENTER Q92a.

Why do parties recourse to religious courts?

The faithful believes these courts are more reliable than the others, because they apply religious principles.

← This is highlighted in a research carried out in a common law system.

In fact, religions ask their faithfuls to follow behaviors characterized by commonly shared social values. As a consequence, 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.

In most countries, roughly half or more say religious institutions strengthen morality, social bonds

% who agree that religious institutions ...

	Bring people together & strengthen social bonds	Strengthen morality in society	Play important role in helping poor and needy	Focus too much on money and power	Focus too much on rules	Are too involved with politics
Georgia	73%	80%	70%	25%	55%	28%
Greece	66	68	59	53	53	43
Lithuania	63	66	50	40	43	32
Romania	69	65	61	53	41	44
Belarus	62	64	49	20	28	21
Russia	57	62	46	39	36	37
Ukraine	58	61	45	42	31	36
Moldova	56	59	49	49	42	43
Poland	54	53	52	68	58	71
Estonia	56	52	59	28	41	20
Hungary	51	50	57	41	47	38
Latvia	49	50	46	40	42	27
Bulgaria	49	49	35	57	40	39
Bosnia	52	47	44	66	47	71
Croatia	51	45	53	69	55	72
Serbia	50	45	35	59	38	55
Czech Republic	46	40	51	55	58	42
Armenia	36	31	35	63	37	39
MEDIAN	55	53	50	51	42	39

Source: Survey conducted June 2015-July 2016 in 18 countries. See Methodology for details.
 "Religious Belief and National Belonging in Central and Eastern Europe"

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.

The application of religious norms in civil law systems: the case of Islamic law.

Germany: The application of Islamic law is limited by public order and occurs through the "optional civil law" (a very common example are marriage contracts). The jurisprudence of the German courts is characterized by continuous referrals to the shari'a.

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

In Italy private bodies of civil and commercial mediation were introduced, as well as assisted trading bodies.

- D.Lgs. 28/2010;
- D.L. 132/2014 converted by L. 162/2014.

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

IS THE 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.

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 secularism.

The contemporary jurist must face these new challenges for the protection of religious freedom. The traditional defence 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.

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