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The relationship between religious law and modern legal systems The case of religious jurisdictions

Abstract

Despite the assumption that the public sphere is secular, a relationship between religion and law is still present in the daily practice of interpreters of civil law systems. Religious affiliation often leads the faithful to involve religious courts in the resolution of disputes, and to accept their judgements as binding. Religious courts, of course, produce norms that have their source directly in the religious legal tradition. The legacy of religion is also evident in the terminology of many civil code institutions (family, guardianship, inheritance, endowments). They simultaneously represent objects of public and religious laws. In fact, religions ask their faithful to follow behaviors characterized by commonly shared social values. Religious rules sometimes apply directly through the activity of religious courts, sometimes indirectly through a religiously-oriented application of civil legal rules. This oscillation describes an “osmotic” process that may contribute to promoting the “quality” of religious freedom.

Keywords: religious law; religious courts; legal systems; religion and law; religious freedom.

1. Religion and Modern Civil Law Systems

Religion is embodied in every modern legal system, including those that have tried to exclude it from their legal rules. Religion is also incorporated in the daily practices of 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 unseen 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

Despite the assumption of the 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

¹ Barzilai (2007, 11). Religion plays an important part in culture, even though western societies are often considered to be secular. Religion is a link to the past and has in many ways influenced values and set the stage for today’s society. As society goes through changes, so does religion. People’s actions and thoughts are affected by the communities they live in, and the different beliefs and attitudes they encounter.

religiously-oriented application of civil legal rules. This oscillation defines the “osmotic” process this paper tries to clarify.

Directly, religious affiliation often leads the faithful to involve religious courts in the resolution of disputes, and to accept their judgements as binding. In these cases, the religious courts produce norms that have their sources directly in religious legal traditions, thereby operating in the context of “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 light³. It is not difficult to show how discrete religious traditions contribute to evolving legal traditions. As the graph and the list below show, the influence of religion on legal systems is particularly evident in eastern countries.

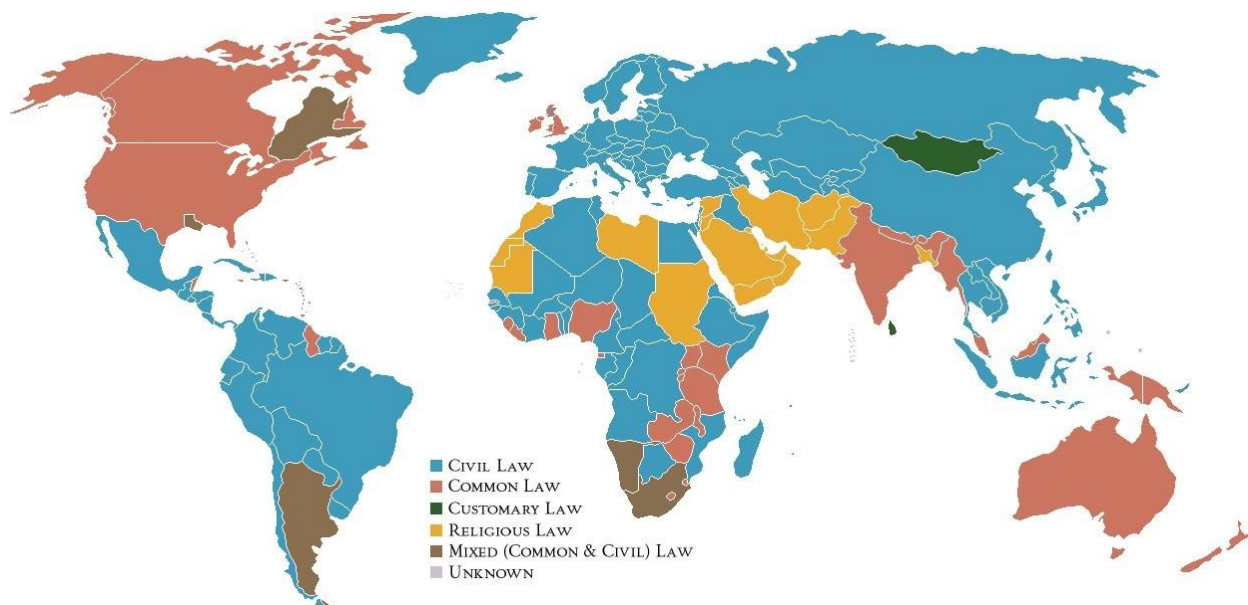


Fig.1: Source: *Wikipedia*

² Religion contributes to the maintaining of social order. According to Durkheim, religion plays an important role in legitimizing and reinforcing society’s values and norms: “If religion generated everything that is essential in society, this is because the idea of society is the soul of religion”. Durkheim (2001)

³ Human rights had strong religious connotations. Sometimes human rights are even seen as originating from religious sources. Maoz (2004, 678) derives basic principles of human rights from the sources of Judaism. The central notion of human dignity is seen as the translation of the biblical idea that man is created in the image of God, as stated in Genesis 1:26-27. Already the biblical context makes clear that this approach to human dignity points in the direction of equal dignity for men and women, De Blois (2010, 109).

COUNTRY	RELIGIOUS SYSTEMS	AREAS OF LAW AFFECTED
Afghanistan	Islamic state; Shari'a (Hanafi school) for Sunnis; Shia for that community.	Personal relations, inheritance, criminal law, some aspects of land tenure
Algeria	Islamic law, Maliki school (custom of Medina prevails) prevails over Hadith); history of French code influence.	Personal law, criminal law and procedure.
Andorra	Canon law when custom silent.	Family law, domestic relationships
Bahrain	Shari'a, w. British common law as applied in India; Sunni schools apply to Shi'ite unless both parties of that sect.	Personal relationships, non-commercial.
Indonesia	Islam as practiced by Muslims and Hindu-influenced Java.	Matrimonial law, inheritance and religious foundations (waqf).
Iran	Islamic Republic under Shiite Shari'a law.	Civil, penal, financial, administrative, military and other public laws must conform to Islam.
Iraq	Shia are majority; Sunni apply many schools.	Const. Article (2): 1st - Islam is the official religion of the state and is a basic source of legislation: (a) No law can be passed that contradicts the undisputed rules of Islam.
Israel	Jewish law, Islamic law, Canon law for each.	Personal status and family law.
Morocco	Islamic civil code universal.	Personal, criminal law.
Myanmar	Buddhist law after repression, Theravada school.	Marriage, personal status, succession.
Taiwan	Confucian and legalist traditions.	All laws incorporate traditional Chinese norms.

Fig. 2: Source: *Hauser Global Law School Program, New York University School of Law*

Religious ideas not only influence legal systems in Islamic societies or Eastern countries, but in Western societies as well. In the civil legal tradition, there is an indirect “role” of religion in the civil code norms, that functions as a kind of continuous “information exchange” between religious rules and the law. How this operates depends on the various cultural traditions and also on the role of canon law in the history of individual European countries. For example, the description of the

institution of marriage in many European civil codes is very similar to that of canon law. Similarly, another form of influence can be seen in the religious values mentioned in the Constitutions of many countries.⁴ The preamble of the Irish Constitution defines its ultimate scope and source of legitimacy in explicitly religious terms:

*“In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,
We, the people of Éire,
Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ,
Who sustained our fathers through centuries of trial,
Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,
And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,
Do hereby adopt, enact, and give to ourselves this Constitution.”*

Religious concepts can here be seen to be basic elements of the public legal order. In addition, some fundamental principles underpinning the law have a religious substratum. For example: the principle of equality is attributable to the Christian and Jewish traditions, which for the first time affirmed the equality of all human beings⁵. From a European perspective, religious elements may be recognized in the Union’s constitutional values and public morality⁶. The Preamble to the Lisbon Treaty, for example, 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...⁷

Religious influences are recognized in their instrumental capacity as contributors to the emergence of values such as respect for individual rights, democracy, and equality. Despite the secular nature of state institutions, modern legal systems are inevitably influenced by their historic ties with religions.

2. Religious Factor and Individual Behavior

Religious rules represent a cultural “strength” in their ability to influence the choices of the faithful⁸. In fact, research has demonstrated that religions are able to influence a range of their adherents’

⁴ Examples include the Italian Constitution, Articles. 3, 7, 8, 19, 2; the German Constitution, Articles 3, 4; the Spanish Constitution, Articles 14, 16; the Greek Constitution, Articles 3, 5.

⁵ Lakoff (1967, 115-133); Rackman (1967, 154).

⁶ McCrea (2012), who recognized the role of religion in lawmaking of EU institutions.

⁷ Preamble of Lisbon treaty (available at www.lisbon-treaty.org)

everyday life choices including free-time activities, which vehicles to purchase, pets to adopt, or housing to live in⁹.

Religious affiliation also influences the personal or private choices of individuals. The chart below demonstrates the perceptions of people who find it important to hold a religious service for some of the most important life events, such as birth, marriage and death.

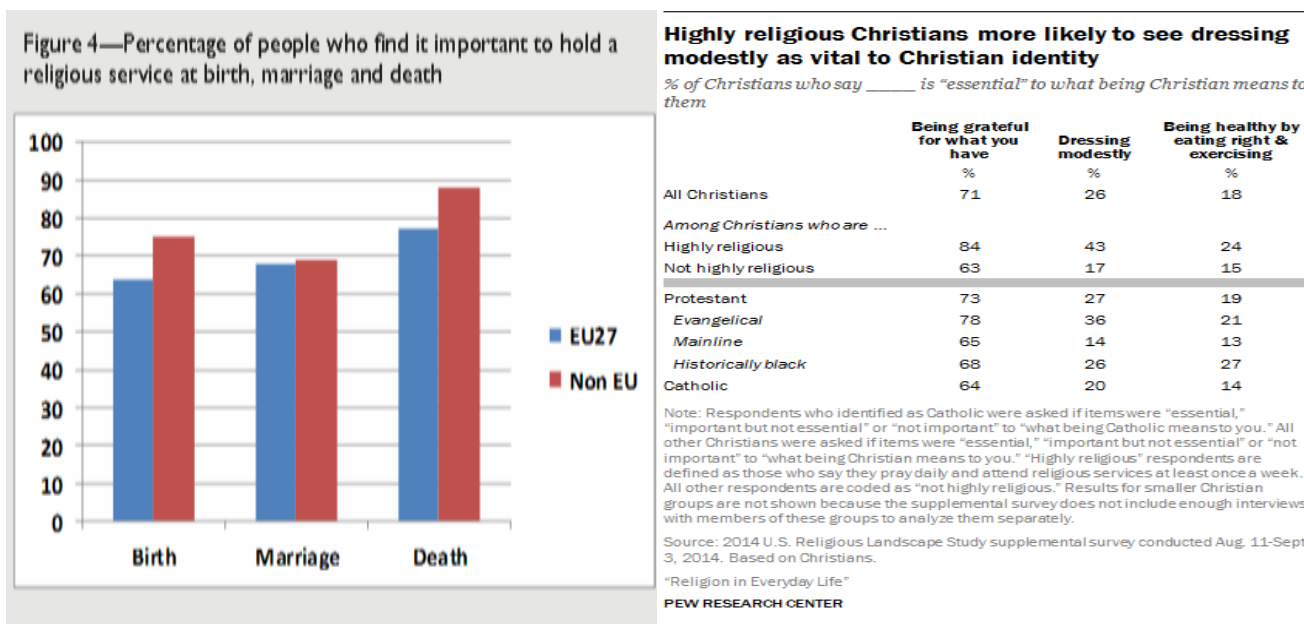


Fig. 3: Source: www.europeanmission.redcliffe.ac.uk

Fig. 4: Source: Pew Research Center

As the last chart shows, fully 43% of highly religious Christians say dressing modestly is crucial to their Christian identity. About a quarter of Christians overall (26%) say dressing modestly is essential to what it means to be a Christian. Religion is a worldview, a set of ideas and beliefs of conscience about the nature of the world, that for many people shapes all of their moral, economic, social, and personal affairs and choices. Religion has become increasingly private and individual, shaped by interactions between the human subject, his or her culture, and his or her conscience¹⁰.

3. The Osmotic Process Between Religion and Law

In such a context, people can respect their religious rules as juridical rules. Everyone can follow his/her religious affiliation simultaneously being faithful and a good citizen. This particular status

⁸ Fuccillo, Sorvillo, Decimo (2016, 27).

⁹ Delener (1994,36); Pettinger, Holdsworth, Gerber (2004, 307); Mennel, Murcott, Vanootterloo (1992); Steptoe, Pollard (1995, 267); Shatenstein, Ghadirian (1998, 203); Asp (1999, 287); Blackwell, Miniard, Engel (2001).

¹⁰ Kessler (2005).

leads to a continuous osmotic process between state and religious orders. In this regard, it is possible view “religion as law”.

In the Western world today, religious rules have a significant impact in many areas that touch on personal matters such as family law and inheritance law, but they also exert important influence in more general legal fields such as contract and obligation law¹¹. The interpretation of many legal institutions depends on religious traditions¹².

Here, it is important to stress the point that legal interpretation has an effect on the relationship between religion and law. The linguistic construction of many civil law codes is embedded in religiosity. Indirectly, the legacy of religion is evident in the terminology used in many civil code institutions.

Many legal institutions such as family, contract and corporation law are based on concepts that have religious substrates (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.

Highly religious most likely to have volunteered in past week					Highly religious most likely to have donated to poor in past week	
	Volunteered in past week	Mainly through church	Not mainly through church	Other/don't know	No, did not volunteer in past week	Don't know/refused
	%	%	%	%	%	%
Total	33	10	22	1	67	*=100
Among those who are ...						
Highly religious	45	23	20	2	55	*
Not highly religious	28	4	23	*	72	*
All affiliated	35	12	22	1	65	*
Christian	34	12	21	1	65	*
Protestant	36	13	22	1	64	*
Evangelical	37	15	21	1	63	*
Mainline	35	10	24	1	65	*
Historically black	32	11	20	1	68	*
Catholic	29	9	20	1	71	*
Non-Christian faiths	36	6	29	1	64	*
Jewish	39	7	31	1	61	*
Unaffiliated	27	2	24	*	73	*
Atheist/agnostic	28	1	27	*	72	*
Nothing in particular	26	3	23	*	74	*

Highly religious most likely to have donated to poor in past week	
	Yes
	%
Total	48
Among those who are ...	
Highly religious	65
Not highly religious	41
All affiliated	52
Christian	52
Protestant	53
Evangelical	55
Mainline	49
Historically black	52
Catholic	49
Non-Christian faiths	56
Jewish	54
Unaffiliated	31
Atheist/agnostic	28
Nothing in particular	34

Note: “Highly religious” respondents are defined as those who say they pray daily and attend religious services at least once a week. All other respondents are coded as “not highly religious.” See topline for results for Orthodox Christians, Mormons, Jehovah’s Witnesses, Muslims, Buddhists and Hindus on this question.

Source: 2014 U.S. Religious Landscape Study, conducted June 4-Sept. 30, 2014. Figures may not add to 100% and nested figures may not add to subtotals indicated due to rounding.

“Religion in Everyday Life”
PEW RESEARCH CENTER

Note: “Highly religious” respondents are defined as those who say they pray daily and attend religious services at least once a week. All other respondents are coded as “not highly religious.” Results for smaller religious groups are not shown because the supplemental survey does not include enough interviews with members of these groups to analyze them separately.

Source: 2014 U.S. Religious Landscape Study supplemental survey conducted Aug. 11-Sept. 3, 2014.

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Fig. 5: Source: Pew Research Center

¹¹ For an interdisciplinary legal approach to the principal religious systems that influence secular law or are incorporated as a regime in Eastern world, see Raisch (2017).

¹² According to Ripert (1949), any fundamental principles and rules of the French Civil Code, even those in the law of obligations, 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”.

In Islam, the principle of solidarity is highlighted in verse 8.63 of the Qur'an which states, "If you had spent all that is in the earth, you could not have brought their hearts together; But Allah brought them together. Indeed, He is Exalted in Might and Wise." The principle of solidarity is also present in the Catholic religion. In Italy, it has favored the introduction of legal instruments to support weaker subjects, such as bringing a food allowance into the civil law system. Religious principles influence the legal systems and assume the function of "suggestions" for legal norms. Therefore, in order to understand the exact meaning of each legal institution, it is necessary to refer to the cultural and "religious status" of the people involved.

4. Religious Rules in Civil Legal Systems

Currently, in these (civil law) systems jurisdiction is a power reserved to the state. But we must ask if it is possible to apply religious law in these contexts. There are two possible ways this can occur: in the rare cases of direct referral to religious laws by the civil courts, or in cases where the state refers jurisdiction in certain matters directly to religious courts.

a) The direct referral to religious laws

Many Muslims in Europe, for example, tend to find practical solutions that will help them organize their lives in accordance with both their religious rules and the relevant European legal orders. In Europe, this situation favors the development of extrajudicial forms of dispute resolution, or of the direct application of religious rules by the national courts. The Dutch legal system, as a case in point, allows for various ways of applying religious law. Direct application of religious law takes place through the national court. One of most frequent cases arising in Dutch courts is the so-called phenomenon of 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 one divorce case, a Jewish 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.¹³ The Supreme Court tried to reduce the problem to a balancing of interests within the framework of the law on unlawful conduct (tort), and 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*).¹⁴ One expert in the field of Jewish law remarked that the compliance of the man with the order of the court to procure a *get* (Jewish divorce document) 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 a similar situation, a case of the direct application of religious law in the jurisprudence of civil law systems was adjudicated by the Court of Milan, October 5, 1990 (Italy). The case concerned a Jewish husband and wife who were married in Israel and who asked for a divorce certified by the Rabbinic Court of Rome, which grants the laws of the State of Israel¹⁵.

Cases of direct application can be found in several European countries:

¹³ Dutch Hoge Raad (Supreme Court) decision of January 22, 1982.

¹⁴ Rutten (2013, 97).

¹⁵ Valletta (2015).

- In Belgium, there was a particular case of the direct application of Islamic Sharī'ah (Belgium Sharī'ah Courts)¹⁶.
- Through the national courts, the Spanish legal system adapts its family law to the needs of the Muslim faithful¹⁷.
- 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”¹⁸ (a very common example is marriage contracts). In three cases, the Supreme Federal Court has pronounced the validity of a *mahr*¹⁹ contract. In general, German jurisprudence has many referrals to Islamic law.
- In France, Islamic rules only produce legal effects when they are not contrary to public order and *lois de police*²⁰. The concept of public policy has inspired the French courts in repudiations²¹.
- The English court, in a divorce case, based his pronouncement on a MAT (Muslim Arbitration Tribunal) opinion, demonstrating that common law systems also include application of religious law. This case demonstrates the existence of a true intersection between Islamic and English law²².

b) The pronouncements of religious courts and their importance for the faithful

Some European states reserve jurisdiction in certain matters directly to religious courts. In Italy and Spain in particular, ecclesiastical courts have jurisdiction over canonic marriage. Though these courts apply canon law, their judgements have power in the state legal system. In this way, an ecclesiastic jurisdiction operates with full power. This jurisdiction has recently been confirmed by the Italian Supreme Court, affirming the importance given to ecclesiastic courts²³.

Many civil law systems have recently been testing the possibility of turning to arbitration courts. This occurs in many fields, such as family law, business law, and contract law. This trend provides evidence that people prefer to solve their private affairs using religious arbitration courts.

In some common-law states, many religious arbitration courts handle disputes²⁴. They operate by enforcing religious rules concurrently with civil norms:

¹⁶ Kern (2011)

¹⁷ Rohe (2013, 28).

¹⁸ 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. Rohe (2013, 27); Rohe (2003, 46).

¹⁹ BGH, decision of January 28, 1987; BGH, decision of October 14, 1988, BGH, decision of December 9, 2009, Yassari (2013, 171).

²⁰ Hochart (1998, 279).

²¹ Najm (2010, 209).

²² Uddin v. Choudhury & Ors, 2009. On these topics, see Douglas, Doe, Sandberg, Gilliat-Ray, Khan (2011).

²³ Italian Supreme Court, 4 giugno 2012, n. 8926.

²⁴ For the exposition of religious arbitration in the US, see Baker (2012); G Douglas, Doe, Sandberg, Gilliat-Ray, Khan (2011); Williams (2013); Sona (2016); Marotta (2013).

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”²⁵.

In England, the MAT, established in 2007 by the Sheikh Faizul Aktab Siddiqui, resolves commercial disputes and mosques disputes, under the Arbitration Act 1996. Its arbitral awards may be enforced by state courts. Other matters of competence of the MAT include 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 defining the procedure²⁶. The ISC (Islamic Sharia Council) is another organization that operates in England on the matters of Islamic divorce, family disputes, forced marriages, inheritance and Islamic wills. It provides other “social” services such as marriage counselling, drug detoxification services, and the mediation of intergenerational conflicts.

These organizations apply a hybrid right, called “Angrezi shariat”, which combines a) different interpretations of Islamic law; b) customs and traditions of ethnic communities; c) English law²⁷. In this way, a hybrid system between religion and state is created. The faithful believe these courts are more reliable than the others, because they apply religious principles. For these reasons, these parties frequently make recourse to religious courts.

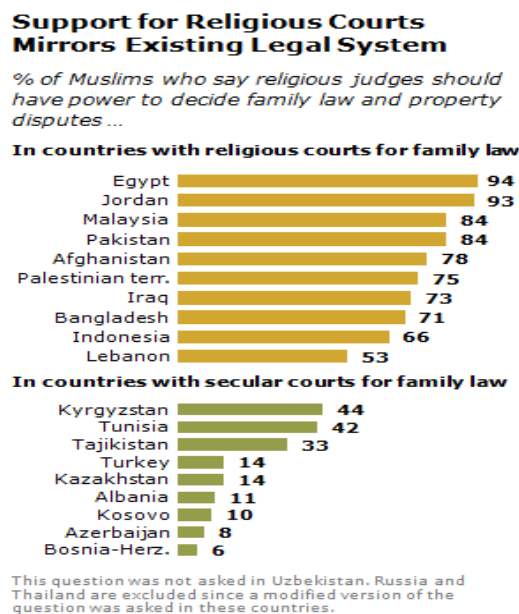


Fig. 6: Source: *Pew Research Center*

²⁵ Phillips (2013, 286).

²⁶ Available at <http://www.mattribunal.com>.

²⁷ Pearl, Menski (1998).

In fact, religions ask their faithful to follow behaviors characterized by commonly shared social values. Therefore, the faithful may consider the obligations of religious rules as if they were state rules, even if living according to religious prescriptions sometimes clashes with the secular expectations of contemporary states. There is an oft-shared idea that religious institutions (particularly religious courts) are trustworthy. More precisely, given that religion can be a strongly influential cultural factor, the faithful try to enact the principles of religious rules by choosing civil legal options that respect or enforce the principles of religious law.

This need has encouraged the development of extra-judicial dispute resolution in Europe within the various religious communities. In Italy by legislative decree n. 28/2010 and by law decree n. 132/2014 converted into law n. 162/2014, private bodies of civil and commercial mediation were introduced, as well as assisting negotiation bodies²⁸. 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. At present, these courts must decide cases with reference to codified state law. However, there is some room to for maneuvering within these confines, and this may offer a path for introducing religious legal rules directly into civil legal system. It is not difficult to imagine a future in which religious arbitration courts are preferred by citizens in order to achieve the religious goals. In this way, private interest juridical issues can be delegated to private courts. In this scenario, religious background/preferences influence which kind of court the person will choose.

5. Religious Jurisdiction as a Promotional Instrument for Religious Freedom

The importance of religious freedom in all modern legal systems is becoming increasingly clear. This fundamental human right must be regulated not just as an “empty declaration” but rather as an approach that is substantiated by operational practices. Herein may lie an important role for religious courts. Indeed, the need to give space to religious courts in civil legal systems is supported by the demonstrated importance of religious beliefs for believers. Religion, directly or indirectly, is one of the most important elements in the lives of many individuals. The religious factor often contributes to the construction of human identity and directs the daily life choices of individuals. Religious rules acquire a perceived value for the faithful, as do the rules of the legal system. Thus, it is necessary to offer “opportunities” for everyone to live according to his/her own religious faith, and simultaneously in harmony with the fundamental principles of the coexisting legal systems. In this regard, religious jurisdiction may be a possible promotional and protective element for the religious factor. Modern legal systems and jurists should work to improve not only the quantity but also the quality of religious freedom, if everyone is to be given the right to be him/herself.

At the same time, there seems to be a general discomfort of sorts toward religions and the religious phenomenon in its entirety, perhaps related to the apparent failure to expel the religious from civil life that has sometimes seemed to be a prerequisite of secular states. And yet, there are countless cases of religious discrimination to which the same legal systems are incapable of reacting.

²⁸ Regarding mediation and intercultural law, see Consorti (2013, 157).

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 behaviors are often justified as acts in defense of secularism²⁹. These problems, however, are the result of majority-mindset behavior, rather than of a modern “intercultural secularism” that treats the populous as one. If religious freedom is to be protected, the contemporary jurist must face these new challenges. The traditional defense of religious liberty is not enough from this perspective. We need to increase the quality of “religious freedom” through the provision of new and more effective legal instruments, if equal opportunity is to become a reality.

²⁹ Fuccillo (2017, 59).

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