RELIGIOUS COURTS, TRIBUNALS AND COUNCILS IN PREDOMINANTLY SECULAR STATES:

THEIR ROLE IN MALTA, AND ENGLAND AND WALES

Ibtisam Sadegh

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University of Malta
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University of Malta
L-Università ta' Malta

ANNEX D

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ABSTRACT

In today's globalised world, cultural diversity has become a fact to which Euro-American societies must respond. A particular challenge is presented by the kind of legal pluralism that has arisen as a result of the activities of individuals and groups within these societies. These have developed their own legal norms based on their religious beliefs and resulting in a situation of 'inter-legality', where numerous legal systems co-exist and overlap within the same state borders.

This thesis aims to explore how 'predominantly secular' states should respond to religious legal systems, that are constantly competing with state law. It develops and tests the hypothesis that embracing a particular kind of multiculturalist policy is the most appropriate way to respond to religious/cultural diversity. It is proposed that such states should facilitate diverse cultural and religious groups to operate their religious courts, tribunals or councils within the overarching context of the state. If this policy were to be followed, these adjudicative bodies would themselves have an incentive to respect human rights and gender equality in their decisions in order to ensure that they could be recognised and enforced by the state courts.

The thesis evaluates which model of legal recognition of such religious courts, tribunals and councils is most appropriate to achieve the above-mentioned aims; particularly by contrasting the different modalities of recognition in different case studies: the Jewish Beth Din, the Muslim Arbitration Tribunal and the Islamic Sharia Councils in England and Wales, and the Ecclesiastical Tribunal in Malta. It concludes that the English model is preferable due inter alia, to the limited and a posteriori character of the recognition it provides and the way it places the onus equally on both the secular and the religious courts to work towards mutual recognition of their respective decisions.

Key Words:

Multiculturalism
Legal Pluralism
Jewish Beth Din
Islamic Sharia Council
Ecclesiastical Tribunal

In the Name of God, the Most Gracious, the Most Merciful

Dedicated To

My Parents

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Malta:

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Constitution of Malta, Constitution of the Laws of Malta.

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Marriage Act, Chapter 255 of the Laws of Malta.

Other:

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Halpern v Halpern (No 2) [2006] EWHC 1728 (Comm).

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Patrick Calleja vs. L-Avukat Dott. Tonio Azzopardi et. Court of Appeal (8 November 2004).

Simon Grech vs. Angela Borg, Civil Court, First Hall (16 July 1996).

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Stand for the teacher and honor his rank
for a teacher is almost as a prophet,
Do you know of someone nobler
than he who nurtures minds and hearts,
You encompass all, the Best Teacher...

Ahmed Shawqi, known as the Prince of Poets, in these abovementioned verses from his beautiful Arabic poem entitled ‘Stand for the Teacher’, embraces my gratitude towards my tutor, Dr. David Zammit. I thank him warm-heartedly for his guidance and support throughout the thesis. I am indebted to him, as without him this thesis could not have been possible.

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INTRODUCTION

In February of 2008, the Archbishop of Canterbury, Rowan Williams, sparked off a heated public debate on the relationship between religion and law, specifically on the role played by religious courts, councils and tribunals within England and Wales, when commenting that the adoption of Islamic law (Sharia) within the English legal system 'seems unavoidable'.[1] Furthermore, Williams explored the diverse means by which state legal systems can 'recognise Sharia'.[2]

Since the Archbishop's comments, the media has paid increasing attention to the religious laws invoked by minority groups and the roles played by religious courts, tribunals and councils in England and Wales. Although England and Wales are widely acknowledged as multicultural societies, the media harshly criticised the Archbishop's comments on the recognition of Sharia. However, in agreement with the Archbishop, Lord Phillips commented on the controversy and suggested that English law should indeed recognise certain elements of Sharia.[3]

The core of the controversy focused on the notion that Sharia law and its sources might cover not only civil law, but also several matters under the realm of criminal law. However, both the proposals of the Archbishop and those of Lord Phillips were based on the possible role of Sharia Councils as a mechanism of alternative dispute resolution, mainly in regards to the settlement of commercial or matrimonial disputes between Muslim litigants.

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[1] 'In Full: Rowan William Interview' (BBC News, 11 February 2008) <http://news.bbc.co.uk/2/hi/uk_news/7239283.stm> accessed 22 May 2013.
[2] Rowan Williams, 'Civil and Religious Law in England: A Religious Perspective' (Lecture at the Royal Courts of Justice, 2008) <http://rowanwilliams.archbishopofcanterbury.org/articles.php/1137/> accessed 22 May 2013.
[3] Lord Phillips, 'Equality before the Law' [Speech at East London Muslim Centre, 3 July 2008] <http://www.judiciary.gov.uk/media/media-releases/2008/1208> accessed 22 May 2013.

Furthermore, the former chairperson of the Bar Council, Stephan Hockman, was reported to have made similar suggestions, albeit not as public as the Archbishop or Lord Phillips. He recommended that members of parliament and legal figures should plan how to include certain elements of Sharia law within the legal system of England and Wales to improve the relationship between religious groups and to boost national security.[4] Hockman was reportedly quoted, that considering the 'substantial Muslim population (in England and Wales), it is vital that we look at ways to integrate Muslim culture into our traditions. Otherwise, we will find that there is a significant section of our society, which is increasingly alienated, with very dangerous results'.[5]

The thesis contributes to the debate about hybrid legal systems through an evaluation of the advantages and disadvantages of different models of recognising and incorporating such religious courts,[6] within mixed, albeit predominantly secular legal systems. The expression 'predominantly secular' underlines what Maltese and English states have in common which distinguishes them on the one hand from avowedly theocratic states and on the other hand from states like France where the ideology of laicite is hegemonic. This is admittedly a very broad category and includes most of the world's states, however this expression is not being proposed as an analytical term, but simply as a practical label which stresses that: a. secularisation is a process and b. Secularism is an ideology with many different permutations.[7]

This study investigates the different juridical models of co-existence between secular and religious courts: the Jewish Beth Din, the Muslim Arbitration Tribunal (MAT) and Islamic Sharia Councils in England and Wales and the Ecclesiastical Tribunal in Malta. This follows Hoebel and Llewellyn recommendations that the

[4] Jon Swaine, 'Sharia Law should be Introduced into Legal System, says Leading Barrister' *The Telegraph* (UK, 26 November 2008).
[5] ibid.
[6] For the purpose of the thesis, references to 'religious courts' should be considered to include religious tribunals and councils.
[7] This issue is discussed further in section 1.1.1.

best means of studying law-related data, is by an examination of the 'trouble-case method'; that is law is best revealed through analyses of adjudicated cases and bodies.[8]

Chapter One, 'Contextualising the Investigation', aims to present the central thesis hypothesis that religious courts can play a critical role in promoting respect for human rights and gender equality, provided that they are incorporated within state legal systems in a manner which increases and does not restrict the options of the litigants. The chapter examines criticisms of the thesis hypothesis based on secularist ideals and on fears that multiculturalism, in all senses of the word, jeopardises human rights and gender equality. Chapter One evaluates the thesis hypothesis from the standpoint of legal pluralist theories and concludes with recommendations aimed at identifying the goals, which should ideally be attained through a model of recognition of religious adjudicative bodies.

The following chapters evaluate the different modalities of recognition of such religious courts within predominantly secular legal systems by examining the jurisdiction and procedures, specifically in relation to the case studies, and focusing on the recognition and enforcement of their decisions. The specific objective is to assess how the Maltese legal system should recognise the decisions of Islamic or Jewish authorities in Malta, either by following the Maltese model of Ecclesiastical Tribunal or by following the model utilised in England.[9]

Chapter Two, 'The Beth Din in England and Wales – Informal Legal Pluralism', examines the history of the Jewish community and the Jewish court, Beth Din, in England. Furthermore, the chapter examines the jurisdiction and procedure of the Beth Din, and the recognition and enforcement of its decisions by the secular courts, insofar as these can be construed as private adjudicative bodies to which

[8] Karl Llewellyn and Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (UOOP 1983).
[9] Since England and Wales have the same legal system, for the purpose of the thesis, references solely to England should be considered to include Wales.

the litigants have voluntarily agreed to submit their case and insofar as their decisions can be understood as compatible with the underlying values of British secular law.

Chapter Three, ‘The Muslim Arbitration Tribunal and Sharia Council in England and Wales – Informal Legal Pluralism’, follows the same structure as the previous chapter and examines the history of the Muslim community, the MAT and the Islamic Sharia Council in England. The jurisdiction and procedure adopted by the MAT and Sharia Councils are outlined. This chapter examines the process for recognising the MAT’s and the Sharia Council’s decisions and their enforcement by the secular courts.

Chapter Four, 'The Ecclesiastical Tribunal in Malta – Formal Legal Pluralism’, explores the consequences of the incorporation and the formal statutorily defined role of the Ecclesiastical Tribunal within the Maltese legal system. Initially, the inquiry focuses on defining and clarifying the contours of this role, particularly on the Ecclesiastical Tribunal’s dominant role in relation to marriage annulment. The inquiry then expands to encompass the effects that the formal recognition of canonical marriage and the a priori recognition of the Ecclesiastical Tribunal and its decisions have upon the secular courts, the litigants and individuals from minority groups in Malta. In order to explore how members of minority groupings experience and perceive this system of formal legal pluralism, a series of semi-structured interviews were conducted with individuals who celebrated an Islamic marriage, which was not recognised by the Maltese legal system, to examine whether the Maltese model caters for the sensibilities of members of other religious groupings.

The thesis aims to shed light on the different models of recognition of religious courts in order to determine the advantages and disadvantages and the scope of each model, to conclude by identifying what is in the author's opinion, the most appropriate model for predominantly secular states and to examine whether an adoption of the English system or an extension of the Maltese system is preferable

to cater for other religions in Malta. The comparison between the Beth Din, MAT and Sharia Councils in England and Wales, and the Ecclesiastical Tribunal in Malta is based on and limited to the following:

1. The case study provides different modes of articulation of different religious courts within predominantly secular states and therefore to provide such a comparison, it was most helpful to focus on systems, which are different/contrasting although still within a predominantly secular, European context.

2. The comparison focuses on procedural and jurisdictional issues and consequently, the kind of co-existence reached between state and religious courts and not on the effects of 'religious law' itself on 'state law'.

3. The thesis is not meant to be an exercise primarily an anthropology or political science:
   a. The review of theories of cultural co-existence is meant to justify a particular kind of legal analyses, which is based on the premise that certain conditions are more congenial for cultural and religious norms to change and develop than others and not to present an exhaustive and definitive description of the state of the field,

   b. Issues concerning the different structures of the religious organisations fall outside the scope of the thesis, although it is based on the hypothesis that ultimately even the most inflexible religious structure tends to change and develop over time and given the appropriate conditions. Thus although this thesis does try to define what some of these conditions might be, further exploration of this issue as such would fall outside the scope of a law thesis.

As a Muslim living in a country where Islam is a minority, the vision underlying the Archbishop's speech and further comments that it instigated, intrigued me, in

particular because as a law student I am thought to think of ‘law’ as being centralised and state-centred. On researching this area further for my personal interest, I was highly intrigued by the fact that in the English legal system there had been already many developments in this regard. Out of this grew the agenda, which is perceived throughout the thesis, based on the fundamental question that continues to be core of numerous debates: how can religious and secular courts co-relate?

For the record, I consider myself to be a defender of minority, women and human rights, and have always striven to maintain an objective and broadly liberal stance. Writing this thesis has been a process of discovery. The original starting point of this thesis was to consider whether the same protection that Maltese law gives to Roman Catholicism and Ecclesiastical tribunals should be extended to other religions of minority groups in Malta and their religious adjudicative bodies. As a result of the investigation carried out in the thesis the opposite conclusion was reached, the model adopted in England appears as better-suited for Malta.

CHAPTER ONE: CONTEXTUALISING THE INVESTIGATION

1. Introduction

Awareness of cultural diversity has become widespread and most countries, if not all, are culturally diverse; a phenomenon which has been increased by globalisation and facilitated by global communication and transportation. The diversity within every country is often linked with numerous conflicts between minorities and majorities that clash over various distinct issues ranging from language rights to educational curricula, from freedom of expression to freedom of religion. Whereas without doubt there is greater acknowledgement of cultural diversity in every country, this awareness in no way guarantees that it is valued, pursued or tolerated. Cultural diversity, being a fact of contemporary life should not be ignored but responded to and recognised by modern legal systems. Laws that ignore this fact, even if they appear to be objective, secular and impartial, are often perceived as biased and ethnocentric[10] from the standpoint of minority groups within that society.[11]

The first section of this chapter shall explore objections by opponents of a multicultural society who often connect the development of multicultural societies and state recognition of cultural differences to terrorist attacks, breaches of human rights and gender equality.[12] Multicultural policies and minority rights are thus criticised for creating a barrier to assimilation, and a secularising agenda is usually proposed as the key to a peaceful state.

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[10] Ethnocentrism is an anthropological term, which 'was introduced into anthropology by Sumner to refer to the habit or tendency to judge or interpret other cultures according to the criteria of one's own culture'. Charlotte Seymour-Smith, *Macmillan Dictionary of Anthropology* (MP 1986) 97.

[11] Vide section 1.1.1 for the example of the controversy on banning Islamic headscarves in France.

[12] Glen Woiceshyn, 'Multiculturalism Breeds Terrorism' (Capitalism Magazine, 24 June 2006) <http://capitalismmagazine.com/2006/06/multiculturalism-breeds-terrorism/> accessed 22 May 2013.

Often 'Western' opponents of multiculturalism in all its meanings, stigmatise religious minorities, particularly Muslims, as being incapable of integrating and committing to liberal democratic values. The Islamic religion is instead portrayed as incompatible with secular Europe and the 'Western' understanding of human rights, and more specifically as breaching gender equality.[13] By contrast, the thesis proposes that embracing cultural diversity could be the best answer to conflicts of law, culture and religion. If by a liberal political agenda a state which self-identifies as secular nevertheless facilitates the expression of diverse cultures and religions, it is likely that such minority groups will themselves have an incentive to preserve this multicultural consensus, and thus to promote human rights and gender equality.

The focus will then shift to the role of law within a culturally diverse society by exploring the developments in legal theory, particularly those theorists who advocate in favour of legal pluralism, in the form of coexistence of state law with other kinds of law within the same society. Legal pluralists have long claimed that law is not a self-contained object in the hands of a sovereign power, and not all phenomena related to law have their source in government.[14] Thus this section challenges the assumption that law is merely a product of the state and instead argues that it is necessary to openly acknowledge that a single society can host multiple legal systems in addition to that established by the state. Rather than limiting the debate about legal pluralism to the possibility of a universal definition of law, this section shall discuss the practical issue of what is the best legal solution to cater for the different normative rules and expectations of different groups within the state.

The third section aims to evaluate the claim that religiously-defined groups and communities which exist within modern states which are usually described as secular, should be allowed where possible, to have distinct religious courts, which

[13] Vide section 1.1.
[14] Vide section 1.2.

can be incorporated within the state legal system, in a manner which does not restrict, but rather increases the options of the litigants. The central argument is that religious courts could play a crucial role in promoting respect for minority rights, and human rights more generally. Furthermore, this section argues that the roles of these religious courts are essential to bridge the gap between 'religious laws' and the 'state laws'.

1.1 Cultural Diversity and Multiculturalism

Multiculturalism can be divided into two different meanings: as a political theory and/or as a description of the cultural diversity, which has within today's globalised era become a fact of the contemporary life. As Kevin Bloor observes:

> [M]ulticulturalism can be used in both a descriptive sense and a prescriptive sense. In terms of the former, multiculturalism describes the growing diversity and multiple identities that have come to characterise the era we live in... The prescriptive sense of the term relates to those political parties and movements who wish to advance what they perceive to be the merits of multiculturalism.[15]

Therefore, for the purpose of the thesis, cultural diversity shall be used to refer to multiculturalism in its purely descriptive interpretation, which describes the cultural diversity which is a fact of contemporary life and which should be recognised and responded to within modern legal systems. The term multiculturalism will be used to refer to the prescriptive sense, implying a political programme and/or theory about the management of cultural diversity.

1.1.1 Minority Religions v. Secularism

The concept of secularism has many dimensions, and its implications can be perceived from many different angles, including inter alia, social, economic, political, and cultural ones. Secularism per se is a kind of world-view, which also

[15] Kevin Bloor, The Definitive Guide to Political Ideologies (AuthorHouse 2010) 272.

functions as a political doctrine or ideology and which 'comes in multiple historical forms, in terms of different normative models of legal-constitutional separation of the secular state and religion, or in terms of the different types of cognitive differentiation between science, philosophy and theology, or in terms of the different models of practical differentiation between law, morality, and religion etc'. [16] The anthropologist Talal Asad has observed that secularism itself presupposes a prior concept of secularity, which operates as a kind of modern epistemic category, for constructing and imagining a realm of reality which is not religious and is 'related to the major premises of modernity, democracy and equality'.[17]

The historical process by which the "religious" and "secular" spheres have come to be developed and distinguished from one another is usually called "secularization" and forms a standard component of major theories in social science about the development of the modern world, such that: 'the core of the theory – the understanding of secularization as a single process of differentiation of the various institutional spheres or sub-systems of modern societies, understood as the paradigmatic and defining characteristic of processes of modernization—remains relatively uncontested in the social sciences'.[18] Thus in numerous cultures, law originally formed part of religion. However, with secularization numerous states started a gradual change to separate law and religion.[19] In fact, today most 'Western' states proudly define themselves as secular or predominantly secular states.

Early versions of secularism aimed at eliminating the dominance of religion within human affairs, and its replacement by means of a man-made system of morality developed on a purely rational basis 'dictated by social exigencies, totally

[16] José Casanova, 'Rethinking Secularism: Secular, secularizations and secularisms' (SSRC, 2007) <http://blogs.ssrc.org/tif/2007/10/25/secular-secularizations-secularisms/>
[17] Abdalhakim Andersson, 'Discourses of the secular: Thinking about language and law in the modern age' (MFAS) <http://themuslimfaculty.org/1-discourses-secular>
[18] Casanova (n 16)
[19] Charles Taylor, *A Secular Age* (Belknap Harvard 2007).

uninfluenced by religious biases and intimidation'.[20] Nevertheless, eventually secularism evolved into a movement concerned with marginalising and completely excluding religion from public life. For instance, in France, religion was fought against by state-enforced *laïcitè*. Since 1905, secularism in France was based on the strict separation of the state and the Catholic Church, which led to a restricted presence of religion in the public sphere. However, today it also according to certain commentators[21] aims to expel religion even from the private sphere.[22]

For the purpose of the thesis, the prototypical agenda of secularism is taken to be what will be termed 'absolute' secularism, which refers to the ideal of complete separation between law and religion, such that the legal system neither promotes a religious nor anti-religious agenda. Therefore, for the purpose of the thesis the state of 'absolute' secularism is one that represents absolute neutrality.

Opponents of multiculturalist policies claim that the development of 'secular law' is one of the greatest achievements of modern civilization; while extending recognition to 'religious laws' of minority groups undermines the integrity of the state and the unified character of the state's legal system. However, a major flaw in this claim is uncovered by Talal Asad's analysis, which shows how 'European secularism' presupposed a specific post-Reformation understanding of the concept of 'religion' and a specific post-Enlightenment understanding of 'the state'.[23] Furthermore, Asad explains that the notion of secular citizenship owes much to the notion of individual agency as developed in Protestant theology.[24] According to Asad, the secular 'is a concept that brings together certain behaviors, knowledge, and sensibilities in modern life'.[25] This implies that the European ideology of

[20] Mohammed Ben-Yunusa, 'Secularism and Religion' in Tarek Mitri (ed), *Religion, Law and Society: A Christian-Muslim Discussion* (WCC Publications 1995) 82.
[21] Olivia Roy, *Secularism Confronts Islam* (Geroge Holoch Jr tr, CUP 2007).
[22] From a Muslim perspective, this process may sometimes be perceived as one where the French "secularist" Left has allied with the Christian Right in a war against Islam.
[23] Talal Asad, *Formations of the Secular Christianity, Islam, Modernity* (SUP, 2003)
[24] Robert H Lavenda and Emily A Schultz, *Anthropology: What Does it Mean to be Human?* (2 Edn, OUP, 2011)
[25] Asad (n 23) 25.

secularism only fits specifically nineteenth century versions of Christianity and the state, and it cannot be applied to other religions in the context of the modern state without being simultaneously anachronistic and ethnocentric. Thus, it would appear to be incompatible with Islamic religious traditions, which:

> are rooted in orthopraxy (correct practice) and cultivation of correct practice depends on one's embeddedness within a community of like-minded practitioners. When successful, such orthopraxy is understood to produce "the virtue of faithfulness, [which is] an unquestioning habit of obedience'. Faithfulness is a disposition that has to be cultivated like any other, and that links one to others who are faithful, through mutual trust and responsibility". Religious orthopraxy of this kind can only be sustained by faithful practitioners whose entire way of life is informed by, and acts to reinforce, these unquestioning habits of obedience. If this is the case, then such forms of orthopraxy would appear to be incompatible with secularism.[26]

It would thus appear that the level of "absolute secularism" aspired by France through such policies as the prohibition on the wearing of headscarves in public places can never be perceived by Muslims as neutral and non-discriminatory, precisely because:

> For many Muslim minorities (though by no means all) being Muslim is more than simply belonging to an individual faith whose private integrity needs to be publicly respected by the force of law and being able to participate in the public domain as equal citizens. It is more than the cultural identity recognized by the liberal democratic state. It is being able to live as autonomous individuals in a collective life that extends beyond national borders.[27]

In this context, such 'absolute' secularism is always perceived to have a hidden agenda, whether composed of the beliefs of the dominant culture or an active anti-religious opposition.[28] Moreover, outside of France, militant laïcitè is perceived as 'offensive, excessive and even undemocratic, since it violates individual freedom'.[29]

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[26] Robert H Lavenda and Emily A Schultz, *Anthropology: What Does it Mean to be Human?* (2 Edn, OUP, 2011), Asad (n 23) 90.
[27] Asad (n 23) 180.
[28] Harold Joseph Berman, *The Interaction of Law and Religion* (Abingdon Press 1974).
[29] Roy (n 21) preface.

Another author who has drawn attention to the historically and culturally specific way in which key terms such as “law” and “religion” are often understood is Harold Berman. He observes that originally, many legal scholars considered the definition of ‘law’ to be that of a structure of rules that are the ultimate source of the will or the policy laid down by the legislators; law was identified with the official rules enforced by the state and which have ‘rational consistency’. By contrast, the definition of religion was that of a system of practices, beliefs focused on the worship of the supernatural.

Harold Berman criticises the rigidity of these traditional definitions of law and religion as being too rigid, and claims that law is not only a body of rules, but also includes processes of legislating, adjudicating, administering and negotiating. According to Berman, law is ‘a living process of allocating rights and duties and thereby resolving conflicts and creating channels of cooperating’,[30] whilst religion includes people’s collective manifest concern on the meaning and ultimate purpose of life. According to Berman, religion ‘is a shared intuition of and commitment to transcendent values’.[31] Although law and religion are two different dimensions, the interaction between law and religion is not simply that of two related social institutions, but that of dialectically inter-dependent dimensions. A better understanding of this relationship requires further research into the meaning of ‘law’; although one can observe a change into a wider meaning to ‘law’.[32]

Current debates in Europe seem to be more focused on opposing law and religion, and reflect the efforts by many governments to achieve ‘absolute’ secularism by separating law and religion, rather than emphasising their dialectical interdependence.[33] ‘Absolute’ secularism is a fictitious ideal because the too radical separation of religion and law is unrealistic. This argument is mainly based on the idea that Charles Taylor develops, that it is impossible to have a fully

[30] Berman (n 28) 24.
[31] ibid.
[32] The definition of law and what it entails in the legal plurality of today’s society shall be further discussed under section 1.2, ‘the role of law’.
[33] Asad (n 23).

secular society because even when the state attempts to completely secularise the public sphere, it will inevitably be developing a new kind of civil religion in the process.[34] For instance, with respect to how religion is a dimension of law, Berman observes, that in all modern legal systems, law and religion share certain elements, namely ritual, tradition, authority and moral universality.[35] These are all religious elements of law that are often dismissed and ignored by contemporary legal scholars in pursuit of 'absolute' secularism.

Another reason for describing the ideology of 'absolute' secularism as an unreliasable myth is that there often appears to be a hidden agenda any policy attempting to achieve this degree of secularisation. Modern states, especially 'Western' ones generally claim they are independent from reflecting any religious belief or ideology, whilst their state law reflects either the beliefs of the dominant culture, which usually has religious roots or an anti-religious agenda. A secular state might suppress minority religions, in favour of majority religions behind the mask of promoting 'true' secularism, either when the state opposes a specific religion or promotes an anti-religious agenda. As Mohammed Ben-Yunusa points out, attempts to exclude religious influence from the laws can be motivated by an 'active opposition to [religion]. When [this] occurs, secularism becomes a religion of its own'.[36]

The attempt to reach a high level of secularisation, for instance by banishing religion completely from the public sphere, as can be observed in relation to France banning Islamic headscarves from state schools, leaves undesirable effects. States are only permitted to limit religious practices in International Law, if it is deemed necessary either because such practice is deemed to prejudice public safety; or, when such religious practice infringes others' rights; or, when such prohibition serves as a legitimate educational function. Therefore, the law in France

[34] Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Jane Marie Todd tr, HUP 2011).
[35] Berman (n 28).
[36] ibid.

banning headscarves is an unwarranted infringement on the freedom to religion, because like 'Sikh turbans, Jewish skullcaps and large Christian crosses... they do not pose a threat' to any of the stipulated grounds for limiting religious practices in International Law. Furthermore, for many Muslims who wear headscarves, it is not merely a religious expression but a religious obligation.[37]

The attempt to fulfill this programme of 'absolute' secularism leaves undesirable effects of breaching the freedom of religion and expression of individuals and whole minority groups. Therefore, one must question the desirability and the necessity of 'absolute' secularism as an agenda. For instance, is it necessary in order to have an 'absolutely' secular state, to banish all Christian symbols and holy feasts from the public sphere - considering how rooted they are in Maltese and English history? Furthermore, on the same argument, how necessary is it to prohibit Muslim schoolgirls from wearing headscarves? The trend of supporting and arguing in favour of 'absolute' secularism may cause marginalisation of religious people, including their presence and voice from the public sphere – regrettably, even when the aim is otherwise, this is often the final result achieved.[38]

Today it is commonly agreed, that ideally modern democracies should be secular, but debate stands as to the level and extent of this secularism. The thesis assumes that ideally a culturally diverse society should promote a more flexible form of secularism than France does. It is a fact that modern 'Western' societies contain a plurality of faith groups, and therefore, secularism should aim to permit all the diverse cultures to live freely together within the same culturally diverse state. Secularism is better understood as a principle where no single ideology, or religious view is allowed to predominate in the public sphere. A predominantly secular state should still be profoundly respectful of religion; otherwise, it would be

[37] Human Rights Watch, 'France: Headscarf Ban Violates Religious Freedom' (New York, 27 February 2004) <http://www.hrw.org/news/2004/02/26/france-headscarf-ban-violates-religious-freedom> accessed 22 May 2013.
[38] Gauri Van Gulik, 'Headscarves: The Wrong Battle' (HRW, 2009) <http://www.hrw.org/news/2009/03/14/headscarves-wrong-battle> accessed 22 May 2013.

siding with unbelief against belief, which would be contrary to the stated objective of secularism.

In the light of this analysis, France emerges as an example of a state where the ideological aim of “absolute secularism” is pursued vigorously. By contrast, Malta as discussed in Chapter Four is definitely closer to theocratic end of the spectrum, although even here it is argued that the secular element is coming increasingly to the fore. England would appear to occupy an intermediate position between these two cases.

In conclusion, the ideology of complete separation between law and religion, termed for the purpose of the thesis as ‘absolute’ secularism, as militantly insisted on in France, leaves negative effects, which undermine individuals’ and groups’ freedoms, related to religion. On the other hand, secularism is a positive programme where it serves to permit and reinforce freedom of religion, expression, conscience and the right to religious association, as established in predominantly secular states like Malta and England; this being a modern, flexible form of secularism.

1.1.2 Multiculturalism and Minority Rights v. Human Rights and Feminism

This section presents and takes issue with critics of multiculturalism, as a political programme, who state that such multiculturalism and minority rights lead to human rights violations. More specifically, it addresses feminist criticism that the recognition of minority rights amounts to allowing minority groups to disrespect and breach the gender equality. On the contrary, the thesis claims that human rights and gender equality are not necessarily incompatible with minority rights and that a certain kind of prescriptive multiculturalism can actually promote human rights.

Will Kymlicka contributed to the debate on multiculturalism and minority rights, by arguing that multiculturalism promotes liberal values. Kymlicka’s theory of

multiculturalism is informed by his understanding of liberalism as being primarily based on autonomy.[39] Kymlicka views the autonomy of the individual as a value, which can only be promoted from within a particular cultural context, and which therefore presupposes a variety of cultures in order to be exercised. From this, Kymlicka concludes that there are good liberal reasons for promoting multiculturalism. He argues that minority groups have their own 'societal cultures', which provide 'members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres'.[40] According to Kymlicka mere toleration of different minority groups does not suffice to treat all members of minority groups as equal citizens, because toleration provides no real recognition and protection to minority groups.

Kymlicka points out that minority groups need to be provided with recognition and furthermore 'group-differentiated rights' aimed at accommodating these group differences.[41] He provides various examples of these group-differentiated rights and explores how they could be effective in order to allow minority groups and their individual members the right to practice their distinctive religion. For instance, group-differentiated rights could be the granting of rights or the exemptions from laws that are generally applicable. An example is allowing Muslim employees to stop from work in prayer time, as a right that employers must grant.

This approach has given rise to various critical responses. For instance, Susan Moller Okin in the article 'Is Multiculturalism Bad for Women?' brings forward her concerns that group rights are discriminating against women, and that multiculturalism and feminism are 'in tension', sometimes even in opposition. Okin explains that this is mainly because many minority cultures oppress their members and often, socialise the oppressed members to a situation where the oppressed

[39] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (OUP 1995).
[40] ibid 89.
[41] ibid.

member – usually, women - accept without question, their designated cultural status.[42]

Okin's argument is that in the context of liberal states, when special rights are claimed by religious or cultural groups - whether to be exercised as a group or the individual members – attention must be given to the status of women within that religion or culture. Okin maintains that although Kymlicka's support to group-differentiated rights only offers limited recognition to such cultural rights, and although he explicitly objects to granting such rights to groups that overtly practice sex discrimination, Kymlicka fails to acknowledge that 'culturally endorsed practices that are oppressive to women can often remain hidden in the private or domestic sphere'.[43]

Okin's objections are also echoed by multiculturalists, who claim that the methods used by 'Western' states to eliminate gender discrimination, oppress women from minority groups and breach their freedom to associate with any minority groups they want to. For instance, the controversy in France regarding headscarves in public schools was justified by feminists by referring to the objective of liberating women from (male) oppression. However, Gauri Van Gulik in her cogent article 'Headscarves: the Wrong battle', concludes that '[t]hese objectives are not met by excluding women who make a choice to cover their hair'.[44] Van Gulik concluded from research she participated in that was conducted in Germany, that the 'ban (of headscarves) serves to exclude, rather than include.'[45] Van Gulik adds that many of the women who were interviewed for the purpose of the research 'felt alienated by the bans, even though some had lived in Germany for decades or even their entire lives. Some left their home state or left Germany altogether, some took prolonged leaves, and some highly trained teachers left the profession'.[46]

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[42] Susan Muller Okin, 'Is Multiculturalism Bad for Women?' (PUP 1999) 7.
[43] ibid 23.
[44] Van Gulik (n 38).
[45] ibid.
[46] ibid.

According to Okin, minority group rights and special rights as suggested by Kymlicka, 'may well exacerbate the problem concerning within-group inequalities'.[47] Okin stipulates that special rights for minority cultural groups is not in the best interests of women within that culture - even if it benefits the men. This debate on minority cultural groups and group-differentiated rights revolves mainly around the definitions of 'culture' adopted by different interlocutors. According to Okin, the solution for girls and women forming part of a minority culture which does not value gender equality, is that the 'culture into which they were born were either to become extinct… or, preferably, to be encouraged to alter itself so as to reinforce the equality of women - at least to the degree to which this is upheld in the majority culture'.[48] This solution suggested by Okin, is based on a particular understanding of 'culture', as part of the traditional understanding of culture, in terms of co-existing internally homogenous and externally bounded ethnic communities.

The traditional view of culture, portrays 'culture' with specific main features: (i) the idea that culture is a bounded entity, like a billiard-ball; individuals stand either in one culture or in another culture – no one stands in between cultures. (ii) That culture has certain defined characteristics, like a checklist as to what that particular culture represents. (iii) That culture is internally homogenous; within a culture, there are no diverse ideas between its individual components. (iv) That culture is thought of as unchanging because it is either self-reproducing or in balanced equilibrium.[49] (V) That cultural identities are non-relational; one's cultural identity remains the same in whichever context.

However, culture has changed considerably, making this understanding of culture largely outdated. This is mainly due to the existing plurality and hybridity of cultures within a multicultural society. The new view of culture is that 'cultures' are no longer

[47] Okin (n 42).
[48] ibid.
[49] Susan Wright, *The Politicization of 'Culture'* (1998) 14(1) Anthropology Today 7. <http://www.jstor.org/stable/2783092> accessed 22 May 2013.

considered distinct, self-contained wholes. Considering that the world is a cosmopolitan whole, characterised by cultural hybridity, Jeremy Waldron in agreement with Charles Taylor, points out that although having a cultural meaning is necessary, 'we do not need homogenous cultural frameworks'.[50]

In Chapter Four, by means of interviews conducted with spouses who celebrated Islamic marriages and are resident in Malta, this new understanding of culture is specifically examined in its applicability to religion, which can no longer be defined as homogenous. The cultural/religious hybridity is very evident when the spouses give their own interpretation to what marriage is, which is heavily influenced by the different cultural backgrounds of the spouses, who each appear to be generating their own definitions and understandings of what constitutes marriage and showing how anachronistic is the view of culture which informs Okin's account.

On this matter, Seyla Benhabib critisises the sweeping generalisations with which Okin criticised all minority cultures as being patriarchal. Benhabib argues that 'the milliant insensitivity showed in [Okin's] depiction of many religious practices among Orthodox Jewish and Muslim groups, raised hackles'.[51] Furthermore, Benhabib critisises Okin's understanding of culture as a unified structure of meaning. Behabib argues, that using the traditional view of culture, Okin 'map[s] cultures onto nation-states and onto continents. No differentiations are made between cultural traditions, peoples, territories, and political structures'.[52]

In agreement with Benhabib, the thesis highlights the importance of modifying the understanding of culture before criticising multiculturalism and that it is also necessary that advocates for multiculturalism allow more space for members of minorities to renegotiate their cultural identities, which will change and develop through the multicultural encounters within a democratic plural society. In line with

[50] Jeremy Waldron, 'The Cosmopolitan Alternative' in Will Kymlicka (ed), *The Rights of Minority Cultures* (OUP 1995) 108.
[51] Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (PUP 2002) 100.
[52] ibid 103.

the modern understanding that the context of culture is relational and constantly being renegotiated, the thesis argues that adopting multiculturalist policies will allow more space for minority group members to express their identities. This is likely to lead the minority culture to develop in ways, which are more compatible with human rights as identified by the dominant culture.

Kymlicka agrees with the idea that culture is not a self-contained whole. However, he maintains that individuals still identify with such an (imaginary) entity and feel they belong to a distinct societal culture, which they wish to preserve. Therefore, whilst Kymlicka agrees that cultures are in fact overlapping and interactive, the justifications he provides for group-differentiated rights to protect minority cultural groups, as already discussed, continue to hold even in a more cosmopolitan view of culture. Mainly, this is because the aim of group-differentiated rights is not just toleration, but allowing individual members of minority groups the possibility to resume their religious practices should they want to, and this includes allowing them to maintain their own distinct understandings of culture.

This thesis is based on a way of understanding religious beliefs and practices, which draws upon key insights developed in this discussion on multiculturalism. In particular it is inspired by the claims that there can be tremendous variety in the content and meaning of beliefs and practices, which characterise the 'same' culture. Furthermore that these beliefs and practices can change over time and are influenced by the way the groups which uphold them are treated by the 'majority' and dominant groups. In the same way, it is argued, many religious beliefs and practices are also cultural and can also change, at least insofar as their interpretation is concerned. Such a view of religion as part of culture is also present in the traditional definitions of culture in anthropology, such as Edward Tylor:

> The complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as member of society.[53]

[53] Roger M Keesing and Andrew J Strathern, *Cultural Anthropology: A Contemporary Perspective* (3 Edn.,1997 Wadsworth Publishing) 15.

It should be observed that while a total identification of religion with culture is contested within most religions, the existence of an area of overlap between the two is all that is necessary to support the hypothesis that is being developed here.[54] This overlap is very clear in the era of globalisation, there is a variety in the interpretation of and adherence to religious practice, reliant on the cultural context and on the numerous variations particular to each religion. For example, Jessica Platt, demonstrates how Muslim cultures themselves, give diverse reasons for the religious ritual of female circumcision.[55] Platt concludes that the solution is not prohibiting female circumcision, but suggests that the international community challenges to grasp a better understanding of female circumcision whilst 'Africans must become more aware of the alternatives to the practice'. [56] According to Platt, the correlation of the two events will result to a 'balance between protecting religious beliefs and promoting human rights'.[57] This illustrates the importance of exploring in depth, within each particular culture, the complexity of inter-relationships between law and religion.

1.2 The Role of Law

For better or for worse, religion has been an important historical source for many legal concepts, rules and institutions. Consequently, when studying law, religion is a dimension of life that must be taken into account. Arguing for the contemporary relevance of religious adjudicative bodies raises questions concerning their relationship to the state centred, formal legal system. As John Witte Jr. observes:

> religious communities themselves have legal systems; Halacha within Judaism, Sharia within Islam, canon law and ecclesiastic discipline within Christianity. These are massive non-profit organisations, global in their sweep, that have internal mechanisms of law that need to be

[54] This overlap is more or less similar to that between religion and law which Berman discusses (vide n 28).
[55] Jessica A Platt, *Female Circumcision: Religious Practice v. Human Rights Violation* (2002) 3 RJLR1.
[56] ibid 30.
[57] ibid.

> understood… the relationship between them and state-law… the religious freedom claims that those individuals and groups make on the strength of their religious convictions and religious institutional apparatus, and [one] must understand how to broker the inevitable tension one has between different religious communities understanding of law, or their own particular legal system, between each other and with the state.[58]

As this quotation makes clear, extending recognition to such religious adjudicative bodies might appear to be a gratuitous concession to multiculturalism that threatens to undermine the integrity of the state and the centralised and secular character of its legal system. This section explores the developments in legal theory, which in addition to human rights scholarship, make this project imaginable and credible in the first place. Therefore, it is necessary to review the school of legal thought which argues that the coexistence of state law with other kinds of law within the same society, far from being an exceptional and aberrant situation, actually represents the normal state for most legal systems throughout the world.

Most contemporary legal scholars have come to accept that the world consists of competing hybrid legal spaces, where individuals are potentially regulated by multiple legal or quasi-legal regimes.[59] Communities usually use official sanctions and formal legal processes to impose their norms - the state and courts as familiar to legal scholars – but most of these communities, while formally subject to the state legal system, also articulate and abide by norms, which are not necessarily developed and enforced by state institutions. As a minimum, all human societies possess law if not in the form of institutions, in the form of norms, and such legal norms are heavily influenced by religious norms inter alia. This section argues, that when people consider religious norms to be binding upon them, religious norms transform into law.

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[58] Harry Kreisler, Interview with John Witte, Director of the Centre for the Study of Law and Religion at Emory University (Conversations with History, 11 August 2011) <http://www.youtube.com/watch?v=W5glYC_topE> accessed 22 May 2013.
[59] Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (CUP 2012).

Legal pluralism also provides tools for analysing this reality by documenting and understanding this nexus between law, culture and religion. Legal pluralism departs from the study of law as state centred and moves towards understanding law as emerging from the social contexts where it operates. Sally Engle Merry defines legal pluralism 'as a situation in which two or more legal systems co-exist in the same social field'.[60] This definition recognises the existence and operation of plural and increasingly de-territorialised legal orders and challenges the traditional understanding of 'law'.

In the nineteenth century, Eugen Ehrlich had already challenged the traditional definition of law, distinguishing between 'positive laws', that are those state norms that have official enforcement and 'living law'.[61] According to Ehrlich, law is synonymous with normativity[62] and is found everywhere 'ordering and upholding every human association'.[63] For Ehrlich, social norms – and hence religious norms, which fall within Ehrlich's definition of social norms - are living laws, and regardless of whether they have been recognised by the state, they are not merely a source of law but law itself.

The definition of law, established by Bronislaw Malinowski, is the first to strongly associate 'law' with the core of social control. According to Malinowski, law should be defined 'by function and not by form'[64] because there are numerous societies that do not have a centralised institution that creates, adjudicates and enforces the law. Nevertheless, this does not convey that such communities do not have rules that 'are felt and regarded as the obligations of one person and the rightful claims

[60] Sally Engle Merry, *Legal Pluralism* (1988) 22(5) L & Soc'y Rev 869, 870.
[61] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Walter Moll tr, 4th edn, HUP 2009) 24.
[62] Baudouin Dupret, *Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Re-specification* (2007) 1 EJLS 1.
[63] Ehrlich (n 61) 25.
[64] Bronislaw Malinowski, 'Introduction' in Herbert Ian Hogbin, *Law and Order in Polynesia: A Study of Primitive Legal Studies* [2nd edn, Shoe String Press 1961] xiii.

of another'.[65] Therefore, Malinowski agrees that law exists wherever reciprocal rights and duties are found, and the enforcement component of law is contained within the relationship itself rather than necessarily imposed by outside agencies, such as the state.

Leopold Pospisil agrees that there are as many legal systems as there are functioning subgroups. Pospisil proclaims that no human society possesses one consistent legal system; 'every functioning subgroup of a society regulates the relations of its members by its own legal system'. [66] Individuals are subject to numerous, different legal systems, all of which they are a member of. Pospisil labels religious norms as law because they possess all the necessary attributes to fall within this category: sanctions, *obligatio*, intention of universal applications and authority.

Although there may be conflicts between the diverse cultures and subsystems and the state law, this does not exclude that just as cultural diversity is a fact so too is legal pluralism. Incorporating religious courts within secular systems, as this thesis recommends, might provide a solution to the conflict between the two, and at times the state might even concede to religious norms. John Griffiths claims that legal centralism is a 'myth, an ideal, a claim, an illusion',[67] and adds to this debate by defining the different models of legal pluralism operating within 'Western' societies, in terms of 'weak' and 'strong' legal pluralism.

Weak legal pluralism, is generally defined from the standpoint of legal centralism, where the state has the ultimate power and to decide whether to recognise or ignore the multiple existing bodies of law. Whilst strong legal pluralism 'refers to the normative heterogeneity attendant upon the fact that social action always takes

[65] Bronislaw Malinowski, *Crime and Custom in Savage Society* [first published 1926, Routledge 2002] 55.
[66] Leopold Pospisil, *Legal Levels and Multiplicity of Legal Systems in Human Societies* (1967) 11(1) JCR 2.
[67] John Griffiths, *What is Legal Pluralism?* (1986) 24 J Legal Plur 1, 4.

place in a context of multiple, overlapping 'semi-autonomous social fields'.[68] Griffiths' strong legal pluralism recognises various orderings central to the individuals' lives but which do not emerge from the official dictates of governing bodies, but out of the collision and intermixing of all the legal systems contained within the social body.

Tamanaha points out that there are numerous weaknesses in the definitions proposed by legal theorists, such as Ehrlich's definition that every form of social control is law, and Griffiths' theory that 'all social control is more or less legal'.[69] Although Tamanaha argues non-state norms are the most important norms, he criticises the wide definition of 'law' because 'lived norms are qualitatively different from norms recognised and applied by legal institutions because the latter involves 'positivising' the norms, that is, the norms become 'legal' norms when they are recognised as such by legal actors'.[70] Baudouin Dupret adds, that the dividing line is mainly between law as recognised by people and other moralities and norms as recognised by people, rather than between lived norms and positivised norms.[71]

Although Merry endorses the concept of legal pluralism, she too criticises the wide usage of the term 'law' to include religious norms, and asks, 'where do we stop speaking of law and find ourselves describing social life? Is it useful to call all of these forms of ordering law?'[72] According to Tamanaha and Merry, when law is considered synonymous with social norms, legal pluralists create an ambiguity because 'once legal centralism has been vanquished, calling all forms of ordering that are not state law by the name law confounds the analyses'.[73]

Tamanaha and Dupret advocate that the concept of law is based on the misguided

[68] ibid.
[69] Brian Z. Tamanaha, *The Folly of the Social Scientific Concept of Legal Pluralism* (1993) 20(2) L & Soc'y Rev 192.
[70] ibid 208.
[71] Dupret (n 62).
[72] Merry (n 60) 878.
[73] ibid.

belief that law comprises a fundamental category. Law depends on the common usages of people within the social arena;[74] 'law is what people consider as law',[75] thereby making the very concept of law free of presuppositions. The power and social relationships between different claimants, is responsible for which laws are accepted and enforced. Nevertheless, within the definition proposed by Tamanaha and Dupret, one can still possibly conclude that religious norms are law, however, rather than an automatic transition as suggested by Ehrlich, a norm is law when complied with by a community, which considers such religious norms to be the law. It is the urge possessed by the people and communities at large to comply by the law, rather than State recognition, which is relevant to decide upon what falls under the definition of law.

A further possible response to Tamanaha and Dupret's criticism to the wide definition of 'law' is that ultimately, definitions fall into the realm of philosophy because they are not matters of proof or disproof, right or wrong but rather definitions should only be evaluated by standards of practical utility.[76] Clifford Geertz points out, 'words are keys to understanding the social institutions and cultural formations that surround them and give them meaning'.[77] It is unfortunate when legal theorists give 'definitions' their main importance and fail to analyse further.

Boaventura de Sousa Santos maintains, that the post-modern concept of law revolves around legal pluralism; not the traditional definition of legal pluralism where separate entities coexist within the same political space but the concept of different legal spaces interpenetrated and mixed in the minds of the people.[78] In Chapter Four, the key findings of the interviews conducted with Maltese residents

[74] Brian Z. Tamanaha, *A Non-Essentialist Version of Legal-pluralism* (2000) 27 J L & Soc'y 296, 314.
[75] Dupret (n 62).
[76] James M. Donovan, *Legal Anthropology: An Introduction* (AltaMira Press 2008).
[77] Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* [3rd edn, Basic Books 1985).
[78] Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law* (1987) 14(3) J Law & Soc'y 279.

who celebrated an Islamic marriage shall illustrate that even in Malta, people live in a society of inter-legality with continuous intersections of different legal orders.

Sousa Santos maintains that law comprises standards and procedures, which are justifiable in groups, because they contribute 'to the creation and prevention of disputes and their settlement through an argumentative discourse, coupled with the threat of force'.[79] According to Sousa Santos' definition, religious norms are laws when they relate to the prevention of disputes and which establish procedures for dispute settlements, together with a back up of sanctions. Such sanctions could simply be an after-life consequence, example the litigants fear hell.

Ehrlich's study focuses on the differences between the rules of law, as introduced and enforced by the state, and the rules which are de facto followed by ordinary people in the course of their everyday life: the 'gap problem'.[80] Numerous legal theorists refer to this as the 'gap problem'. Gurvitch among other legal theorists preaches that there should be no difference between law in the books and law in action; that is, there is a necessity of integrating the inside view with the view from the outside.[81] Although the manner to do this is often debated, this gap proves that state law is dysfunctional. According to Ehrlich, when positive law fails to reflect social norms and preserve social order, it loses its superior entitlement.[82] Therefore, it would have to surrender or share the title with living laws that do satisfy the criteria or as argued by the thesis, there requires legal bridges between the official state law and the informal strong legal pluralism.

The immanent level of religious diversity, with individuals representing an extraordinary number of faiths within one state, may be one reason for the 'gap problem', however one must question whether what Ehrlich defines as a problem is

[79] Boaventura de Sousa Santos, *Toward a New Common Sense; Law, Science and Politics in the Paradigmatic Transition* (Routledge 1995) 114-115.
[80] Ehrlich (n 61).
[81] Reza Banakar, *Integrating Reciprocal Perspectives: On Georges Gurvitch's Theory of Immediate Jural Experience* (2001) 16(1) Can JL & Soc 67.
[82] Ehrlich (n 61).

indeed an issue in the first place? Legal Pluralism like cultural diversity itself is a fact, which cannot be avoided; on the contrary, it should be pursued. Therefore, far from being an exceptional and aberrant situation, legal pluralism represents the normal state for most legal systems throughout the world. The solution to the 'gap problem' is primarily that all diverse cultures learn to live together on the basis of shared common grounds, and the state legal system treats all uniformly, appreciating the normative diversity.

This review of the literature on legal pluralism brings out two important points:

(i) regardless of its impacts on legal theory, legal pluralism is a fact which cannot be denied and which must be responded to,

(ii) religious norms constitute a subset of the kinds of norms which all theories of legal pluralism consider as legal. This leads to the conclusion that the non-recognition of religious courts by the state does not mean that members of religiously defined groups will not apply religious laws in their lives. The corollary is that the recognition by the state of religious courts will not create a parallel legal system either. This is because, according to the legal pluralists:

    a. such parallel legal systems exist anyway regardless of state recognition, and

    b. state recognition of religious courts may create a bridge between official law and unofficial norms, helping to unify the system in the way Ehrlich recommends.

Moreover this review has also helped to develop key analytical distinction, which will be referred to throughout this thesis in order to properly describe the socio-legal context within which each model of state recognition of religious courts operates. Central to this analysis will be Griffith's distinction between the kind of 'weak' legal pluralism, which characterises situations where the state officially

recognises competing bodies of non-state law and the 'strong' legal pluralism, which characterises social norms, which are not considered as legal by the state but are so by particular social groups.

1.3 The Role of Religious Courts, Tribunals and Councils

As aforementioned, individuals of any religious belief who live within a secularised society are constantly faced with legal plurality and what Sousa Santos describes as inter-legality. Individuals and communities both navigate between conflicting normative demands, which they feel obliged to observe. Today, the past expectation that minority groups should culturally assimilate is considered oppressive by members of these groups and following Kymlicka's suggestion for group-differentiated rights, 'Western' countries seek new policies to respond to persisting cultural differences. The suitable policy depends on the context. For instance, in countries like Malta, where the state supports religious education and Catholic symbols in public, it may be harder for the state to resist to demands for extending that state recognition to other minority religions.

Chandran Kukathas approach to multiculturalism is similar to that of Kymlicka's: that is, an attempt to strike the appropriate balance between the claims of individuals and the interests of the minority community. Kukathas like Kymlicka, maintains that individuals 'wish to live according to the practices of their own cultural communities', a wish which must be respected.[83] However, Kukathas adds that this is not because 'culture has the right to be preserved but because individuals should be free to associate: to form communities and to live by the terms of those associations'.[84] Kukathas argues that the most fundamental principle of a free society is the freedom of association; the individual must have the right to leave that cultural community. For this freedom to be satisfied, similar to Kymlicka's argument, there must be a choice of diverse cultures within the society.

[83] Chandran Kukathas, *Are there any cultural Rights?* (1992) 20(1) Political Theory 105, 116.
[84] ibid.

Kukathas provides a major criticism to Kymlicka's support for group-differentiated rights, arguing that there are only individual rights; there are no group rights. The state risks undermining individual rights of association and oversteps its role, if it grants minority groups special protection. The state is not obligated to ensure 'cultural integration', but is limited to a 'politics of indifference' towards minority groups.[85] Kukathas believes that toleration/indifference must be to the extent that all minority cultural groups - even when 'Westerners' consider them to be illiberal - have the right to practise their cultures and beliefs freely within a liberal society.

The main concern that human rights activists and feminists have vis-à-vis Kukathas' approach is his strong commitment to multiculturalism, which produces a situation where if a minority group or any of its members, do not value toleration or freedom, such group or particular member, may limit and restrict the others. Therefore, if the state practices Kukathas' proposed politics of indifference, it is likely that minority groups practice inner discrimination against their members, whilst the state would have no authority to interfere in such associations.

The thesis argues that minority groups are more likely to develop in a manner which is respectful of human rights if they are not suppressed, but instead treated respectfully by the dominant culture, with full recognition of cultural rights. If in a culturally diverse society, the dominant culture recognises cultural and minority rights, the minority groups are given an opportunity to construct their own means of checks and balances. That is, if the dominant culture recognises cultural rights, it is likely that minority groups would have an incentive to cooperate with the state legal system. Furthermore, by means of religious courts, tribunals or councils, minority groups are likely to safeguard human rights and gender equality - both internally within the religious group and externally in society.

[85] Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (OUP 2003).

However, disagreeing with Kukathas' argument, the state should not be indifferent to intra-minority discrimination. The state should give the religious court the opportunity to settle disputes by means of the religion and religious sources it operates with, but contrary to Kukathas' suggestion, the state should develop its own means of control. This could be done, by refusing to enforce decisions that fail to observe human rights, gender inequality or any regulations promulgated by the state to ensure fairness and impartiality.

Religious courts are the key to bridging the gap between, on the one hand the religion and the religious sources they operate with and on the other, the state legal system of the state they function in. John Bowen demonstrates this after studying the archives of two Indonesian town courts. Bowen analyses how judges sitting in religious courts changed their ways of reaching decisions on inheritance claims when faced with conflicts between customary and religious legal norms.[86] These judges employed creative legal devices in town courts to resolve differences between Islam and local social norms, and 'consistently referred to broader cultural values of agreement and fairness'.[87] According to Bowen, this shift was because of 'the combination of political centralization, increased legitimacy of Islamic courts, and judges' perceptions of a more individualized society'.[88]

Furthermore, the thesis is based on the hypothesis that a flexible system, which recognises different religious courts on a case-by-case basis according to their decisions, rather than a priori recognition of religious law by the state, is preferable. This draws upon the experience of the British colonial courts in India. In India, the acknowledgement of colonial legal pluralism was introduced in the form of both, 'indigenous law', which colonial adjudicative bodies often staffed by both native and colonial judges were expected to apply, and the colonially-drafted codifications of native legislation, known as 'Anglo-Muhammodan law'. The latter included the

[86] John R. Bowen*, Consensus and Suspicion: Judicial Reasoning and Social Change in an Indonesian Society 1960-1994* (2000) 34(1) J Law Soc'y 97.
[87] ibid 97.
[88] ibid.

codification of criminal and civil law based on the rigid interpretation of Islam and Islamic practices.

The colonial state brought forward a different fixity to 'Muslim' and 'Mohammodan', because every individual was in theory linked to a state-enforced religion. Similar to the legal codification of 'culture', the colonial state brought about a situation where litigants were forced to fall under a specific state-defined 'religion' and gave no possibility of recognising hybridity. The introduction of Anglo-Muhammodan laws also proved to be problematic precisely because it shifted Islamic laws too much in a 'Western' codified direction resulting to rigid text-based law. Moreover, custom was strongly limited as a source, because 'custom operated against the general presumption in favour of Anglo-Muhammodan law, so its applicability was strictly circumscribed'.[89]

Anglo-Muhammodan jurisprudence developed on the original conviction that 'Islam was a matter of religious law, of a more or less inflexible nature, which [was] of equal relevance to all Muslims regardless of their cultures and histories'.[90] However, the British colonial courts addressed this problem of rigidity, by injecting the necessary flexibility and judges sought solutions to cases where women were at a disadvantage. The colonial judges had 'their own chivalric imperialist agenda' of defending Muslim wives, mainly utilising the Islamic obligation of payment of dower by the husband if he wants to divorce his wife.[91] Therefore the development of British colonial courts, served to bring Islamic law closer to the 'Western' concepts of freedoms and gender equality, while it appealed to members of minority groups because it served to develop Islamic law from within, rather than seeking to impose 'Western' Common Law upon them.

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[89] Michael R. Anderson, 'Islamic Law and the Colonial Encounter in British India' in Arnold, David and Peter Robb (eds), *Institutions and Ideologies: A SOAS South Asia Reader* (Curzon Press 1993) 181.
[90] Ibid 189.
[91] Mitra J. Shirafi, *The Semi-Autonomous Judge in Colonial India: Chivalric Imperialism Meets Anglo-Islamic Dower and Divorce Law* (2010) 46(1) IESHR 57.

1.4 Conclusion

Jewish and Muslim communities, together with their religious courts are usually too quickly labeled as discriminatory towards their members, and are often stigmatised for lacking the 'Western' values of liberalism. However, as argued throughout this chapter, legal hybridity and cultural diversity are facts of the contemporary life and in response the recognition of minority groups and their religious courts is likely to result in minority groups wanting to cooperate with the state legal system in promoting and safeguarding human rights and gender equality. Whereas oppression by the dominant culture upon minority groups is likely to create the opposite results.

To examine this hypothesis further, following Hoebel and Llewellyn's recommendations on methods of analyses, the next chapters shall evaluate different models of state recognition and incorporation of religious courts, to outline the advantages and disadvantages of each model. This chapter has provided the following criteria for assessing the suitability of each model:

1. There should be no official, a priori recognition of religious texts, laws or sources and no official, a priori recognition of religious courts, tribunals or councils.

2. There should be formal recognition of the decisions and of the religious court, tribunal or council only after certain criteria are observed;

    a. Human rights and gender equality must be respected.

    b. Both parties should voluntarily agree and consent to submit to the jurisdiction of the religious court, tribunal or council – failing to respond or to object is considered to be submission.

3. The state legal system should respond to legal pluralism without creating a sense of discrimination in favour of one side or the other.

4. The state legal system should create a dialogue between the religious courts, tribunals or councils and the state courts so that no side dominates the other.

On these recommendations, the next chapters shall determine whether the suitable model is the unofficial and privatised means of resolving commercial and matrimonial disputes emerging within the Jewish and Muslim communities in England or that followed by the Maltese state when recognising judgements on matrimonial annulments the formal Ecclesiastical Tribunal in Malta.

CHAPTER TWO: THE BETH DIN COURTS IN ENGLAND AND WALES – INFORMAL LEGAL PLURALISM

2. Introduction

This chapter examines the scope of the activities of the Beth Din in England and Wales, as an informal means of dispute resolution, by an overview of how the procedure adopted by the Beth Din, is impacted by the law of the state English legal system. This is mainly because only those decisions that do not breach the state legal norms are recognised by the English secular courts. The state courts recognise the Beth Din's decisions if the necessary requirements established under state legislation are satisfied.

The first section gives a short historical account of Judaism in England, and a general overview of the existence of the Jewish community and Beth Din. The second section explores the jurisdiction and procedure of the Beth Din in relation to arbitration, divorce and its role in mediation. The third section examines the enforcement of the Beth Din's arbitration awards and religious rulings by state courts. The fourth section addresses apprehensions over the compatibility of the Beth Din's decisions with English law, particularly due to the concern albeit the potential emergence of a parallel legal system.

2.1 Judaism in England and Wales

2.1.1 Jewish Community

The first substantial Jewish community in England is believed to have come from Normandy around 1066 with William the Conqueror.[92] Subsequent to the 'blood libels' and Edward I subjecting Jews to a special tax, Jewish life in England was

[92] 'Q&A: Jews in Britain' (BBC News, 13 June 2006) <http://news.bbc.co.uk/2/hi/uk_news/5076900.stm> accessed 22 May 2013.

abruptly terminated when the Edict of Expulsion, issued on the 18th July 1290, resulted in the expulsion of the Jewish population from Britain.

In the 17th century, records show that Jews returned to England in large numbers. It is alleged that the Rabbi who had led the petition for the return of the Jews in England, agued that it is necessary that Jews are in every country before the Messiah to return to the world. In 1656, the first synagogue opened and only fifty years later, the Chief Rabbi's office came into being. Subsequently, the first Beth Din was established to provide religious authority for the Jewish community in England.

In the 2011 Census for England organised by the office for National Statistics, it resulted that there are over 260,000 who profess to be Jewish; an increase of 1.3% from the previous census held exactly a decade before. The 2011 Census reveals that the Jewish population is quite static representing circa 0.5% of the population of England and Wales.[93]

2.1.2 Jewish Law: Halacha

Judaism is considered as a religion of law, allowing three related but autonomous institutions to enforce law by inflicting sanctions: God, the court and the temple.[94] Although Halacha is often translated as Jewish Law, a literal translation of this Hebrew term is 'the way of walking'. Halacha is the collective set of religious rules and laws, which guide Jewish people in their religious practices and beliefs, and includes principles of proper Jewish conduct and guidance in numerous aspects of their daily lives. Therefore, Halacha comprehends all aspects of the human life – both corporeal and spiritual.

[93] UK Consensus Statistics (ONS, 27 March 2011) <http://www.ons.gov.uk/ons/guide-method/census/2011/index.html> accessed 22 May 2013
[94] Jacob Neusner and Tamara Sonn, *Comparing Religions Through Law* (Routledge 1999) 104.

Within Judaism, there are three main sources of Halacha; the Torah, the laws established by the rabbis and the long-standing customs. The Classical Rabbinic Judaism divides Torah into two categories: the Written, which Jews believe transcended directly from God as dictated to Moses, specifically the first five books of the Hebrew Bible, and the Oral, the generations of oral transmission of interpretations by ancient Jewish scholars which after centuries was compiled into the written form in the Talmud. Significant importance is given to the practical application of the unchangeable 613 mitzvoth, which are commandments, the message and content of which varies in each branch of Judaism. Nevertheless, these commandments are generally believed by Jews to have descended from God and are entrenched in the written Torah, as subsequently developed through numerous discussions in classical rabbinic literature, especially the Talmud.

The main branches within Judaism – Orthodox, Masorti, Reform and Liberal - vary in their interpretation and observation of Jewish law and each have their own rabbinic authority. This illustrates the plurality of sources within the monolithic religion of Judaism. Furthermore, while it is generally acknowledged that Halacha is undergoing continuous development, it is largely argued that Judaism and the Jewish law itself continue to remain the same, whilst the explanation or extension of the original law, which was given by God to Moses on Mount Sinai, continues to develop. Therefore, this further emphasises the importance that the Beth Din is flexible, in order to develop and adopt the necessary understanding of Halacha as suitable for the case before it.

2.1.3 The Beth Din

Literally translated, Beth Din means ‘house of law or judgement’. There are no exact figures concerning how many such courts exist today in England. Furthermore, there is no centralised Beth Din; each of the main branches within Judaism has its own Beth Din in England, which caters for Jews who associate themselves with that branch. Therefore, this allows each branch the possibility to

decide on which school of law to apply, allowing flexibility in the procedure and furthermore giving litigants a choice. The Masorti, Reform and Liberal movements, run distinct Beth Din which 'span from the traditional to the progressive both in their practices and attitude to Jewish law', representing circa a third of the Jews in England.[95]

There are other courts belonging to the Orthodox tradition. The London Beth Din is the largest department of the United Synagogue,[96] which is instituted by an Act of Parliament [97] and incorporates the complete spectrum of facilities within the Orthodox community such as ritual baths, schools and cemeteries. The synagogues grouped under the authority of the United Synagogue, recognise the office of the Chief Rabbi. The decision to focus on the London Beth Din, is motivated by the fact that the Orthodox London Beth Din represents the largest number of Jews in England.

The London Beth Din's activities cover multiple aspects of the Orthodox community, such as, religious conversions, burial practices, regulations on the Jewish dietary and medical ethics. However, the thesis focuses on the Beth Din's role as an arbitrator such as in commercial disputes, and when the Beth Din issues divorce certificates, because this is when the Beth Din acts as a court as understood by 'Western' legal scholars. According to the London Beth Din, in recent years the importance of their role has increased because of a substantial decline of Jews in England, which resulted in a decline in local Battei Din.[98]

[95] 'The Beth Din: Jewish Courts in the UK' (The Centre of Social Cohesion, London 2009) 4-5.
[96] United Synagogue is the main organisation grouping of Orthodox synagogues in England and Wales.
[97] Jewish United Synagogues Act 1870.
[98] The US, London Beth Din: Court of Chief Rabbi (2008) <http://www.theus.org.uk/the_united_synagogue/the_london_beth_din/about_us> accessed 22 May 2013.

2.2 Jurisdiction and Procedure of the Beth Din

The Beth Din offers the Jewish community two distinct services: Arbitration on civil disputes based on Jewish law and rulings on religious issues.

2.2.1 The Role of the Beth Din as an Arbitrator

When there is the possibility of settling the dispute before the Beth Din, Judaism prohibits Jews from taking their disputes before state courts. Jonathan Greenwood, a solicitor with many Jewish clients commented that Orthodox businessmen often settle their commercial disputes before the Beth Din because '[t]hey believe it is a religious obligation to go there rather than the state courts. But it is also usually quicker and cheaper'.[99] David Frei, Registrar of the London Beth Din points out that arbitration has numerous advantages compared to state courts; the Beth Din is cheaper, quicker because of less case backlog, and the whole process is confidential.

The Beth Din offers civil arbitration under the Arbitration Act 1996 as an alternative mechanism to settling disputes instead of a court action and which subject to certain limitations, the state courts must recognise and enforce the awards granted by the arbitrator.[100] The Act retains the common law stand and restricts the disputes that may be settled by arbitration to civil disputes only; family and criminal disputes exceed the scope of the Act.

The Beth Din rules 'on its own substantive jurisdiction'.[101] Therefore, it provides a 'forum for arbitration' according to the 'interpretations of its associated synagogues

[99]Innes Bowen, 'The End of One Law for All?' (BBC News, 28 November 2006) <http://news.bbc.co.uk/2/hi/uk_news/magazine/6190080.stm> accessed 22 May 2013.
[100] The Arbitration Act applies in absolute to England and Wales, and extends to Northern Ireland except to some provisions of Part II. Merely three articles extend to Scotland. Arbitration Act 1996.
[101] ibid, Article 30.

and members of the wider Jewish communities'.[102] Since the arbitral tribunal is self-regulatory, it must oversee that it is properly constituted according to Halacha and furthermore, it must ensure that an arbitration agreement is validly drafted and signed as requested by the Act before subsequently deciding the dispute according to Jewish law.

Frei has pointed out that there is no special qualification to function as an arbitrator; '[a]ll you need is parties to agree that you should be the referee in their dispute'.[103] Prior to the commencement of the hearing, because arbitration is a consensual process, it is necessary that the parties write and sign the arbitration agreement, which stipulates that they agree that the Beth Din has jurisdiction upon the issue. The arbitration agreement, which symbolises the parties' consent to settle the dispute through arbitration, must include a reference to the applicable law, which depends on what the parties agree is applicable to their dispute. The applicable law is not necessarily English law, as the Arbitration Act enables the parties to settle the dispute by 'other considerations'.[104] Therefore, litigants may agree that the applicable law is not a state law;[105] an agreement between the litigants that the Beth Din has jurisdiction, presumes that the case shall be determined according to Jewish law.

Former Judge, Gerald Butler, confirms that although religious courts such as the Beth Din can suitably function, the parties must 'freely and voluntarily agree to the jurisdiction.'[106] The fact that the parties must voluntarily submit to the jurisdiction of the Beth Din is an essential key factor. David Frei asserted that '[t]here's no compulsion (to find redress before the Beth Din)…We (the Beth Din) can't drag people in off the streets'.[107] Unlike state courts, the Beth Din cannot coerce

[102] 'The Beth Din: Jewish Courts in the UK' (n 95) 6.
[103] ibid 7.
[104] Arbitration Act 1996, Article 46.
[105] Vide Halpern v Halpern (No 2) [2006] EWHC 1728 (Comm).
[106] Innes Bowen (n 99).
[107] Nick Tarry, 'Religious Courts Already in Use' (BBC News, 7 February 2008) <http://news.bbc.co.uk/2/hi/uk_news/7233040.stm> accessed 22 May 2013.

anybody to consent nor can it issue sanctions. Moreover, the Arbitration Act does not provide the Beth Din with any form of jurisdiction over individuals or entities that do not directly and voluntarily agree to be a party to the arbitration agreement. The Beth Din may invite third parties to produce documents or to submit testimony, however the acceptance of such invitation depends on the discretion of the third party.[108]

The Arbitration Act contains 'general principles' applicable to arbitration, mainly stipulating the necessity that disputes are resolved fairly by an impartial tribunal, without unnecessary delay or expenses.[109] The Judge, known as 'Dayan', is obliged to recuse himself in any circumstances that are likely to affect impartiality, whether due to bias, personal or financial interest in the outcome of the arbitration or due to any past or present relationship with any of the parties.

When the parties sign an arbitration agreement, they are then bound to attempt to resolve their dispute outside the courtroom. The Arbitration Act protects the agreement, stipulating that if an agreement is signed, than state courts shall stay any legal proceedings, 'so far as they concern that matter'.[110] This highlights that although arbitration is of voluntary nature because it requires the parties' consent, once the parties sign the arbitration agreement, the parties must honour the agreement and the state courts are bound to stay proceedings.[111]

2.2.2 Religious Divorce by the Beth Din

In addition to the capacity of the Beth Din to sit as an arbitrator, the Beth Din rules and offers guidance on numerous religious matters, which affect members of the Jewish communities in England, including the designation of religious holidays, and burial practices, and administers religious services offered by the synagogue for its

[108] 'The Beth Din: Jewish Courts in the UK' (n 95).
[109] Arbitration Act 1996, Article 1(c).
[110] ibid Article 9.
[111] Re AI and MT (2013) EWHC 100 (Fam).

members, such as circumcision specialists and the ritual slaughtering of animals according to Jewish dietary rules. Nevertheless, the two most common religious rulings that the Beth Din deals with are conversions to Judaism and religious divorce.

The thesis focuses on the Beth Din's role in delivering rulings on religious divorce. This is because most applications brought before the Beth Din relate to matrimonial disputes, in particular applications for divorce and secondly because this is good basis for comparison with the Ecclesiastical Tribunal in Malta, which rules on the termination of marriage by annulment. For a religious Jewish marriage, celebrated in a synagogue in England, to be considered as legally valid and to have civil effects, it must be registered with the state. The Synagogue itself employs a civil 'Registrar of Marriages' who holds the duty of ensuring that all marriages celebrated in the synagogue are also registered as a civil marriage.[112] This illustrates the desire of the Jewish community to have its religious marriages recognised.

Nevertheless, there is an important distinction between religious and civil divorce. A Jewish divorce, known as Get, cannot be considered as a substitute for a civil divorce because the religious rulings of the Beth Din are limited to personal issues of faith and the individual's private status. While a declaration of divorce by the Beth Din has no affect on the individual's legal status, a civil divorce does not suffice for a Jewish person to remarry according to Jewish law; a Jewish divorce certificate is essentially required for the previous marriage to be dissolved.

In its role of granting religious rulings on divorce, the Beth Din functions as a witness; the Beth Din supervises the husband in writing the Get and supervises the transmission of the Get to the wife to ensure that the numerous detailed requirements under Halacha law are accurately observed. Therefore role of the Beth Din is not that of dissolving the marriage itself, but witnessing that the

[112] 'The Beth Din: Jewish Courts in the UK' (n 95) 9.

dissolution of the Jewish marriage is obtained with the full and free consent of both the parties to the marriage.

Frei claims that Jewish couples seek religious divorce because they feel it is a religious obligation to preserve their sense of honour within the Jewish community.[113] Only a person who celebrated a Jewish marriage requires a Get in order to divorce, but because cohabiting is under Jewish law considered as valid evidence of marriage, it is common that a Get is sought in respect of failed cohabitations between two Jewish parties, although they are not formally married.[114]

The procedure for a Get initiates on the request of any one of the parties to a Jewish marriage by means of an application to the Beth Din. The application must include information on both the applicant and the spouse, together enclosed with a copy of the Ketuba, that is the Jewish Marriage Certificate, and a copy of the Civil Divorce Decree, in the case where the parties have already obtained a civil divorce from the state courts. Although the Beth Din is not bound by the state courts' decisions, when the parties have obtained a civil divorce it is likely that the procedure before the Beth Din will be speedier, perhaps because of the reduced hope that the parties will reconcile. Furthermore, this illustrates the desirability of the Beth Din operating in close collaboration with the state courts to bridge the gap between the religious and state legal systems.

On acknowledging receipt of the application, the Beth Din invites the spouses to attend at the Beth Din for preliminary interviews. Although the Beth Din presumes that the parties want to be interviewed separately, it encourages the parties to go together. The purpose of the interview is to ascertain the parties' details and for the Dayan to attempt to identify at an early stage, any problems that may arise during the process. After the preliminary interviews, a second session takes place for the

[113] ibid.
[114] If one of the parties is not Jewish, then a Get is not required.

writing of the Get. Although a Get can be applied for at any time after the marriage breakdown, including when the parties are still cohabiting, the Get itself cannot be written whilst the spouses live together. For the writing of the Get, the Beth Din provides the husband with writing materials which the husband passes on to the scribe, in order to follow the tradition where the scribe writes the Get on the husband's own materials.[115] The husband, before instructing the scribe, must indicate and prove his identity and must confirm that the Get is made out of his free will. Similar to a public deed, the Get is complete only after it has been witnessed and signed. The London Beth Din estimates that the complete process takes circa two hours, because the ink in which the Get is written must first dry.[116]

The presentation of the Get to the wife is done by the husband or in the event that the parties do not wish to meet, by the husband's representative, appointed by the Beth Din. On handing the Get to the wife, the wife is asked whether she is willing to receive the Get. Where her answer is positive, the husband or his representive, will recite a form of text at the request of the Dayan, which indicates that in his hands he has a Get which will be passed on to the wife, receipt of which shall free the parties from the marriage. After divorce, both parties are free to contemplate remarriage, however the wife can practice her right to remarry until the period of ninety-two days elapse and furthermore, a Cohen (a Hebrew priest) cannot marry a divorced woman.

However, there are instances where the result of the divorce case is unsatisfactory; where a party refuses to grant or to accept the divorce. The Beth Din cannot override the consent of the parties in the case where a spouse is unwilling to cooperate in the Get, because of the Beth Din's role as a witness. Numerous problems may arise in the other party's religious Jewish life in situations of unsatisfactory divorce cases, with different repercussions for a man whose wife

[115] The US, 'Divorce – FAQ' (2008) <http://www.theus.org.uk/the_united_synagogue/the_london_beth_din/divorce/faqs> accessed 22 May 2013.
[116] ibid.

refuses to accept a Get than those faced by a woman whose husband refuses to grant her a Get.

A man whose wife refuses to accept a Get is known as Agun, that is 'a chained man'. In the eyes of the Orthodox community an Agun will remain married and is therefore prohibited from remarrying in an Orthodox synagogue. However, if an Agun has a child outside the marriage, with a Jewish woman, the child would still be considered as Jewish according to Halacha, provided the mother of the child is not married at the time of conception.

On the other hand, a wife whose husband refuses to grant her divorce is known as an Agunah, 'a chained woman', and similar to an Agun, she continues to be considered married and is prohibited from remarrying in an Orthodox synagogue. She will be considered as adulterous, if she celebrates a civil marriage without the appropriate religious divorce document. Furthermore, a child born from any other partner, prior to obtaining a religious divorce document from the previous spouse will be considered a Mamzer - a religiously illegitimate child. After having 'illegitimate' children, the woman will continue to be prohibited from marrying her new partner; even in the future, notwithstanding that the divorce from previous spouse is subsequently obtained and that the new partner is Jewish. Furthermore, a Mamzer faces severe social and religious penalties because a Mamzer, together with any future descendants, is prohibited from marriage in accordance with Orthodox Jewish law and may only marry another Mamzer.

A woman whose husband refuses to grant her a Get is more disadvantaged than a man in the same situation. Consequently, this may have the unfortunate result where men are not interested in granting their wives a divorce, whilst the Beth Din has no power to grant a divorce independently of the husband's wishes, nor can it compel the husband to issue a divorce.[117] Furthermore, the husband could withhold the Get in an attempt to obtain a more favourable divorce settlement,

[117] 'The Beth Din: Jewish Courts in the UK' (n 95) 15.

under the knowledge that without a Get the wife is prohibited from having any legitimate Jewish children. The English legal system has provided a means for the Beth Din to aid the parties – mainly, women – whose spouse refuses to grant or accept a divorce, by the Divorce (Religious Marriages) Act 2002.

The Divorce Act stipulates that a person whose spouse refuses to grant or to receive a Get, can file an application before the state court handling the civil divorce, for an order preventing the court from making a Decree Absolute by staying or postponing proceedings, until both parties satisfied all the necessary requirements for them to dissolve their religious marriage. Therefore, the Divorce Act provides a safeguard against either party who may refuse to grant or receive a Get as a potential negotiating instrument.[118]

The Divorce Act establishes that in order to take advantage of the Act, a decree of civil divorce must have been granted but not yet absolute, and the spouses must: (a) have been married according to the usages of the Jews, or any other prescribed religious usages; and (b) co-operate for the marriage to be dissolved according the same usages.[119] These requirements specified in the Act, illustrate that although state law recognises the 'religious usages' under Judaism for marriage and divorce, it provides a general flexibility because it does not restrict what such usages may be. This provides the Beth Din with the possibility of changing its procedure (usages) and adopting new usages accordingly, whilst its litigants continue to qualify to take advantage of this Act of Parliament.

The Divorce Act may apply to any 'prescribed religious group'. It is at the discretion of the religious community itself to decide on whether the application of this Act to its litigants is desirable or not. To utilise the provisions of the Act, the religious group must ask the Lord Chancellor to prescribe the group for that purpose. To this day, the only religious group to put the Act into practice is the Jewish community.

[118] ibid.
[119] Divorce (Religious Marriages) Act 2002, Article 1.

The Act is only effective when the party refusing to consent to a religious divorce desires a civil divorce. Nevertheless, it illustrates that the English legal system provides this mechanism in an attempt to provide some protection to spouses where the religious law is unable to protect them. Furthermore, the very fact that the Jewish community requested that the Act be made applicable to its individual members, shows that the Jewish community and the Beth Din want to find ways to operate under the state legal system and want to safeguard its individual members' in cooperation with state courts.

2.2.3 Mediation

Although the Beth Din cannot involve itself in any distribution of matrimonial assets or custody of children because it falls outside its jurisdiction, individuals undergoing the process of a civil divorce may still consult with religious figures for advice. In mediation on ancillary relief or childcare provisions due to a divorce the Rabbi is acting as a spiritual guide, and the state courts may decide to refer to such mediation as a basis for discussion, however state courts are not bound to do so. In Al v. MT, with a reference to Al Khatib v. Masry,[120] it was pointed out that it is always in the interest of the parties to attempt to resolve their dispute by mediation, even in financial and child-care disputes, which fall outside the scope of arbitration.

2.3 Enforcement

According to the Arbitration Act, subsequent to an arbitration agreement, an arbitral award is 'final and binding'.[121] The state courts shall enforce the Beth Din's awards under state law of contract. However, this is subject to certain limitations:

[120] 'there is no case, however conflicted, which is not potentially open to successful mediation, even if mediation has not been attempted or has failed during the trial process', Al Khatib v Masry [2004] EWCA Civ 1353 [2002] 1 FLR 381 para 17.
[121] Arbitration Act 1996, Article 58.

a. Ultra Vires awards

The jurisdiction of the Beth Din is restricted to civil disputes. Therefore, the Beth Din cannot stray into criminal matters and has limited application under family law. For instance, the Beth Din has no power to imprison and it would be in breach of criminal law should it enforce such a punishment. Furthermore, religious rulings are not in themselves legally binding, but merely religiously and morally binding. Nevertheless, although non-binding, mediation or advice sought from a religious source, may be referred to and even considered spontaneously by the state courts.

AI v. MT served as the first case where a state family court deferred to the Beth Din. In this case, the parties agreed to settle their disputes and negotiate on all aspects of their marriage breakdown before the New York Beth Din.[122] In the arbitration agreement, the parties agreed to be bound by the Beth Din's decisions. The High Court acknowledged, that given the importance that the Beth Din has in England, the parties should at least attempt undergoing arbitration. Therefore, it decided to indefinitely stay proceedings;

> it was an integral aspect of the process of arbitration that it took place under the auspices of the Beth Din. It was a profound belief held by both parties, and their respective extended families, that the marriage which had been solemnised in accordance with the tenets of their faith should be dissolved within those tenets.[123]

Nevertheless, the High Court pointed out that while it is appropriate for state courts to respect cultural practices and religious beliefs including those of Orthodox Jews, the clause in the arbitration agreement determining that the decision of the Beth Din was binding concerning issues arising out of the marriage, including welfare and upbringing of the children, was unlawful. The High Court pointed out that the state courts could not be bound in advance by the Beth Din's decision. However, the court pointed out that it is always in the best interests of parties and children, to

[122] Re AI and MT (2013) EWHC 100 (Fam).
[123] ibid para 33.

seek to resolve disputes by agreement where possible. Therefore, after the High Court had sought information on the procedure that is adopted by the Beth Din to resolve such disputes, particularly an assurance that the children's welfare was a priority, it decided not to intervene. The court willfully endorsed the process of a non-binding arbitration before the Beth Din and added that the Beth Din's decision will 'carry considerable weight with the court'.[124]

The High Court further justified its decision to stay proceedings on the Family Procedure Rules 2010, which state that in family proceedings the overriding objective is that the case is dealt with justly. Therefore, that inter alia the procedure is expeditious, fair, in proportion to the facts and complexity of the issues and saving expenses. These rules establish a duty upon the court to encourage and facilitate the litigants to use alternative dispute resolution procedure where the court considers it appropriate.[125] To satisfy its obligations under these rules, the state court may adjourn the proceedings indefinitely, at any stage.[126]

Subsequently, the High Court stayed the proceedings indefinitely whilst the parties underwent a Jewish divorce before the New York Beth Din. The latter gave its arbitral decision incorporating decisions on all the relevant issues, including financial and child-related. After an examination of the Beth Din's decision, the High Court determined that the Beth Din's decision was binding because the process was 'fair and proportionate', manifestly in the interest of the children's welfare and the parties' devout beliefs had been respected. The outcome whilst achieved by a process rooted in the Jewish culture to which the family belongs was in keeping with English law.[127] The only condition that Justice Baker established *pendente lite*, was that the 'father' would grant his wife a Get.[128]

b. Awards contrary to public policy

[124] ibid para 15.
[125] Family Procedure Rules 2010, Rule 1.4.
[126] ibid Rule 3.
[127]ibid para 37.
[128] Richard Alleyne, 'Sharia Divorces could be Allowed after Legal Ruling', *The Telegraph* (UK, 1 February 2013).

State courts cannot enforce awards that are contrary to public policy. Soleimany v. Soleimany confirmed that public policy is a limitation to enforcement.[129] In this case, there was a financial dispute between the parties, a Jewish father and son, both Iranian merchants, who contravening Iranian revenue laws and export controls, exported Persian carpets. The dispute went for arbitration before the Beth Din and the latter decided that the illegality of the export contract was considered irrelevant under Jewish law, however the subsequent state English Court of Appeal, refused to enforce the Beth Din's arbitral award, because the award was contrary to public policy since the underlying contract was illegal. Nevertheless, the court commented that the award by the Beth Din was 'a valid agreement', because of public policy state courts are forbidden from enforcing illegal contracts.[130]

Lord Justice Waller, pointed out certain questions, which in his opinion the reviewing court should take into consideration where an arbitral tribunal has given an award without finding that there was illegality;[131]

> an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should inquire further to some extent. Is there evidence on the other side to the contrary? Has the Arbitrator expressly found that the underlying contract was not illegal? Or is it a fair inference that he did reach that conclusion? Is there anything to suggest that the arbitrator was incompetent to conduct such an inquiry? May there have been collusion or bad faith, so as to procure an award despite illegality?[132]

The Lord Justice explained that only where the reviewing court finds prima facie evidence of illegality must it either conduct a preliminary inquiry so as to determine whether to give 'full faith and credit' to the Beth Din's award or to conduct an in-

[129] Soleimany v Soleimany [1998] APP.L.R. 02/19.
[130] Gillian Douglas and others, *Social Cohesion and Civil Law: Marriage, Divorce and Religious Courts* (Cardiff University, June 2011).
[131] Jacob Grierson, *Court Review of Awards on Public Policy Grounds: A Recent Decision of the English Commercial Court Throws Light on the Position under the English Arbitration Act 1996* (2009) 24(1) Mealey's International Arbitration Report 1.
[132] Soleimany case (n 135) para 51.

depth trial to examine further the illegality.[133] The difficulty mainly lies on whether the preliminary inquiry should involve reviewing afresh the evidence that was submitted to the arbitral tribunal or whether to only review the previous review of the arbitral tribunal.[134] Waller's proposal is not that the secular courts conduct a full-scale trial in the first instance. Therefore, this judgement illustrates the amount of credibility given by the secular courts to the Beth Din as an arbitration tribunal, mainly because it proposes that review of new evidence should only be undertaken in rare cases of high suspicion of illegality. If secular courts were to hear the conducts a full-scale trial for each action for enforcement of an arbitration award of the Beth Din, the secular courts would weaken the power of the Beth Din.

Another case where the court examined whether the decision of the Beth Din was in breach of public policy is Kohn v. Wagschal and Ors. The Court of Appeal decided that it would uphold the award granted by the London Beth Din on the destination of shares of an intestate estate. The court upheld the award asserting 'that there is no public policy which requires this court not to enforce that award'. [135]

c. An appeal from the arbitration award

An appeal from an arbitration award is limited to cases where the arbitral tribunal either concludes that the Beth Din did not possess 'substantive jurisdiction' to decide the claim,[136] or to cases where the appeal is founded on a 'serious irregularity affecting the tribunal, the proceedings or the award'.[137]

The grounds of 'serious irregularity' are defined under article 68(2) of the Arbitration Act. They include inter alia, cases where the tribunal surpasses its powers, or acts impartial by failing to obey the rules of audi alteram partem,[138] or

[133] ibid.
[134] Grierson (n 131).
[135] Kohn v Wagschal and Ors [2007] EWCA Civ. 1022, para 18.
[136] The Arbitration Act, Article 67(1).
[137] ibid Article 68(1).
[138] ibid Article 33.

where it adopts irregular proceedings, or cases where the award is uncertain, ambiguous or obtained by fraud. [139]

When an application has been filed challenging an award given by the Beth Din on lack of substantive jurisdiction, the decision of the secular court may be a confirmation of the award; variation; or it may set the award aside. If it is proven that there is a serious irregularity affecting the proceedings followed by the Beth Din or its award, the secular court may remit the award to the Beth Din for reconsideration; it may set the award aside; or, declare it to be of no effect.[140] The secular court's decision may affect the award either wholly or partly.

2.4 Recognition of the Beth Din

Referring to the Beth Din as 'Jewish courts' is ambiguous because although the Beth Din enjoys some recognition by means of the recognition and enforcement of its decisions, the Beth Din is not a legal court. David Frei, commented that it is often mistakenly assumed that England recognises the Beth Din under the Arbitration Act. However, everyone has the right to resolve civil disputes by arbitration. Therefore, Frei comments that '[n]obody gave [the Beth Din] that right. Nobody sat down and said the Beth Din is recognised.' [141] There is no formal a priori recognition of the Beth Din and in none of the Beth Din's role does it constitute as a parallel legal system from the standpoint of the official English law; neither in arbitration cases nor in any religious rulings is the Beth Din formally recognised as a legal court. The Beth Din is an informal mechanism for resolving disputes.

In 2008, English Parliamentary Secretary of Justice commented that religious courts are today well established in dealing with personal disputes and in fact individual members of religious communities may seek to settle disputes before

[139] ibid Article 68(2).
[140] ibid Article 68(3).
[141] 'The Beth Din: Jewish Courts in the UK' (n 95) 12.

them, but 'religious courts are always subservient to the established family courts of England and Wales'.[142]

The decisions of the religious courts, are subject to the national secular law and the secular courts will not recognise them or their decisions where they breach national law; even if they act as arbitrators under the Arbitration Act. However, the fact that there is no a priori recognition of neither the Beth Din nor its decision, provides the Beth Din with the necessary incentive to issue decisions which do not clash with secular English law; therefore, decisions that necessarily safeguard human rights and gender equality.

2.5 Conclusion

In arbitration agreements the Beth Din facilitates arbitration by taking the role of arbitrator where its jurisdiction depends heavily on the parties, who must both consent and submit to its jurisdiction by signing an arbitration agreement according to the Arbitration Act. In AI v. MT, the court cited Archbishop Rowan Williams' 2008 lecture stating that 'citizenship in a secular society should not necessitate the abandoning of religious discipline, any more than religious discipline should deprive one of access to liberties secured by the law of the land, to the common benefits of secular citizenship'.[143] Justice Baker in this case acknowledged that it is integral to the religious beliefs of the parties, that there first is an attempt to resolve the dispute through the process of arbitration by the Beth Din. The future consequences of this case shall be examined, however this illustrates that the secular courts and the Beth Din reached a common ground which is that the welfare of children is a priority. This is a landmark judgement where the secular

[142] English Parliamentary Under-Secretary of States, Ministry of Justice Bridget Prentice, 'Matrimonial Proceedings: Religion' (House of Commons Written Answers, 23 October 2008) Column 560W <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm081023/text/81023w0020.htm> accessed 22 May 2013.

[143] ibid para 35 ; Rowan Williams, 'Civil and Religious Law in England: A Religious Perspective' (Lecture at the Royal Courts of Justice, 2008) <http://rowanwilliams.archbishopofcanterbury.org/articles.php/1137/> accessed 22 May 2013.

courts stayed proceedings indefinitely and subsequently even enforced the Beth Din's decision, after the necessary checks and balances.

Instead of being a priori recognised as a formal legal court, the Beth Din depends on the secular courts to enforce its decisions on a case-to-case basis. The Divorce (Religious Marriages) Act 2002 is often misinterpreted as an illustration of the state providing a priori legal recognition to the Beth Din, but in practice the Divorce Act only asserts that the Beth Din is a religious authority.[144] Nevertheless, the Arbitration Act and the Divorce Act are two statutes, which illustrate how the Beth Din modified its own procedure for its decisions to be recognised and enforced under the English legal system. A clear example of this is the fact that the Beth Din will use a procedure provided for by the secular law under Divorce Act, which requires it to cooperate with the secular courts, in order to safeguard women's rights.

Despite not being formally recognised as a court in the English legal system, the Beth Din's rulings have routinely been upheld by the secular English legal system. The fate of these awards, although they are to be legally enforced by English law, strongly depend on the formal civil courts, even if made within the parameters of the Arbitration Act. This however provides the Beth Din with the incentive of assuring that its decisions are reasonable, that they do not conflict with English public policy and that they protect the human rights of both the disputing parties, because otherwise enforceability of the rulings would be threatened. Furthermore, due to the lack of recognition of the religious law, texts and sources, the Beth Din is flexible, and can change its procedural rules and determine the applicable interpretation of Halacha on a case-by-case basis.

[144] 'The Beth Din: Jewish Courts in the UK' (n 95) 16.

Chapter Three: The Muslim Arbitration Tribunal and Sharia Councils in England and Wales – Informal Legal Pluralism

3. Introduction

This Chapter examines the scope of the activities of the Muslim Arbitration Tribunal (MAT) and Sharia Councils in England and Wales, by an overview of the way the tribunal and councils are set up and operate, and by exploring the Muslim communities' attempts to obtain some recognition by the establishment of the MAT.

The first section gives a historical account of Islam in England, and a general overview of the Sharia Councils and MAT within the English legal system. The second section explores the jurisdiction and procedure of the MAT and Sharia Councils in relation to arbitration and religious divorce, respectively. This section shall also explore the Sharia Councils' role in mediation in contrast to the Beth Din. The third section shall examine the enforcement of the Sharia Councils' religious rulings and the MAT's arbitrary awards by the Civil Courts. The fourth section addresses the legality of Sharia councils and apprehensions over the compatibility of their decisions with English law.

3.1 Islam in England and Wales

3.1.1 The Muslim Community

Although it is generally assumed that Islam in England is a recent phenomenon, there has been contact between English and Muslim communities for many centuries. The first substantial waves of Muslims arriving to Britain were sailors recruited from India, which explains why the first Muslim communities, which date

back around 300 years, were located near British ports.[145] The first mosque to be recorded in Britain was located in Cardiff, Wales in 1860.

Today's British Muslim community is mainly composed of people who immigrated over the last fifty years, or their descendants. In the 1980s Britain's large Muslim community, which for some decades had remained unnoticed became suddenly visible mainly due to controversies involving the headscarf worn by female Muslim students, the Rushdie affair and the Gulf War that initiated huge media interest.[146]

The 2011 Census in England and Wales, which included around 25 million households, revealed that almost three million individuals identified themselves as being Muslims; that is 4.8% of the population, in contrast to the previous census in 2001 where Muslims comprised only 3% of the population.[147]

There is no definitive information as to the precise number of institutions that apply Muslim legal norms in England today. However a report issued by Civitas, an independent research organisation, examined online sites which publicise Fatwas[148] and determined that there are approximately 85 Islamic institutions operating in England and Wales, which include, inter alia, thirteen tribunals operating under the network headquartered by the Islamic Sharia Council based in Leyton established in 1982; three tribunals run by the Association of Muslim Lawyers officially launched in 1995; and the MAT established in 2007.[149]

[145] 'History of Islam in the UK' (BBC religions, 7 September 2009) <http://www.bbc.co.uk/religion/religions/islam/history/uk_1.shtml> accessed 22 May 2013.
[146] Philip Lewis, *Islamic Britain: Religion, Politics and Identity among British Muslims; Bradford in the 1990s* (I. B. Tauris & Co 1994) abstract.
[147] UK Consensus Statistics (ONS, 27 March 2011) <http://www.ons.gov.uk/ons/guide-method/census/2011/index.html> accessed 23 May 2013.
[148] Fatwas are rulings and responses issued by the Sharia Council to questions on matters relating to Sharia law, raised by members of the public.
[149] Denis M. MacEoin and Neil Addison, *Sharia Law or One Law for All?* (Civitas 2009).

3.1.2 Islamic Law: Sharia

Islam like Judaism is a religion of law and practice, rather than pure dogma. Sharia law, like Halacha, is simultaneously 'a moral code, a field of abstract theological investigation, and a process of addressing the relationships and conflicts that may arise among the faithful'.[150] The literal translation of the term Sharia is 'the path to the water source',[151] which covers all Islamic religious laws that govern not only religious rituals, but also that govern the daily life of people who wish to live in accordance to Islam. Sharia deals with a range of areas, from personal matters such as hygiene, dieting, prayer and fasting, to areas addressed by secular law such as economics, politics, crime and international law.

The two primary sources of Sharia are the written text, the Quran that Muslims believe to be directly dictated by God through the Prophet Muhammed,[152] and the oral tradition, the Sunna that comprises collections and codifications of the practices and traditions of the prophet in reports known as hadith. Nevertheless, Sharia law is a sophisticated concept, because it comprises millennial jurisprudence and doctrine spanning from the Arabic Quran. It would be a mistake to blind oneself to the different interpretations that are provided to expressions of either the Quran or the Hadith, based on inter alia the different schools of thought, the jurists' interpretations and the relation between law and customs.[153] Therefore, Sharia law would be grossly caricatured if one disregards the plurality of its sources.

There is a growing tendency in 'Western' society to describe Muslims as potential terrorists, fundamentalist and suicide bombers, whilst the different denominations,

[150] Lawrence Rosen, *The Justice of Islam* (OUP 2000) ix.
[151] The water symbolising God.
[152] PBUH. The verses in the Quran that are strictly of legal content are mainly dealing with issues of Islamic Family Law particularly on Talaq. Javaid Rehman, *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq* (2007) 21 IJLF 108.
[153] Ahmed Souaiaia, *On The Sources Of Islamic Law And Practices* (2004) 20 JLR 1.

interpretations of the Quran and Sunna are often ignored.[154] Whereas the Quran is considered the source from which the infallible law of God has derived, the interpretation and the method of its application may vary. Sharia is divine in nature and unchallengeable, whilst Fiqh is the human interpretation of the laws by the different schools of thought, by religious leaders and scholars, and by rulings implemented by Islamic jurists, which leads to a plurality of variant understandings of Islam.

3.1.3 Sharia Councils

Sharia Councils operate in various towns and cities around England, mainly within mosques, although there are councils located in Muslim schools and even in cafés. Prior to the establishment of Sharia Councils, the Imams on their own initiative provided religious guidance to Muslim spouses on matters of family law, including settling marital disputes and issuing Muslim divorce certificates. Mohammed Naseem, Chairman of the Birmingham Sharia Council, claimed that before the formation of the Sharia Councils, the mosque Imams had to resolve family disputes whilst also performing other daily duties. This was inefficient because of time restraints, and mainly because the Imam is not versed in dealing with such issues.[155]

This is the situation in Malta in 2013, where the current Imam, Imam Mohammed el Sadi, has numerous traditional duties such as conducting Islamic Marriages, together with other duties such as attempting to mediate in family issues and issuing divorce certificates. This is time-consuming and reduces the necessary focus on the traditional duties of the Imam, such as that of leading the obligatory prayers of five times a day and sermons for Friday prayers.

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[154] Wasif Shadid & Pieter S. van Koningsveld, *Religious Freedom and the Neutrality of the State: The Position of Islam in the European Union* (Peeters 2002) 174.
[155] Samia Bano, 'Islamic Family Arbitration, Justice and Human Rights in Britain' (2007) 10(1) LGD <http://www.go.warwick.ac.uk/elj/lgd/2007_1/bano> accessed 22 May 2013.

Sharia Councils are closely connected to mosques, mainly due to their shared aims and objectives. Usually, each Sharia Council is closely aligned with a particular mosque, and in fact, because of this close relationship between mosques and Sharia Councils, each council adopts a different administrative and procedure accordingly. The relationship between different mosques and Sharia Councils demonstrates the 'establishment, regulation and legitimacy of these bodies within local Muslim communities',[156] and further illustrates the plural character of Sharia law.

Samia Bano argues that although there is a close relationship between Sharia Councils and mosques, there are two key differences; firstly, that Sharia Councils, unlike mosques, are not subject to public body regulation and therefore are not obliged to disclose any information on either their organisational structure or their financial status. Secondly, mosques in Britain are mainly organised on the basis of ethnic and kinship adherence, and hence reflect accordingly the needs of specific groups of Muslims; whereas Sharia Councils aim to cater to the needs of all Muslims irrespective of their ethnic, racial or national backgrounds.[157]

3.1.4 The Muslim Arbitration Tribunal (MAT)

The main distinction between the MAT and Sharia Councils, is that the MAT is governed by the procedural rules established in the English Arbitration Act 1996, whilst all Sharia Councils have existed for numerous years without being governed by any secular procedural rules; although Sharia Councils' rulings may only be enforced as arbitral awards. Therefore, the prevailing objective of the MAT is to provide the Muslim community with a means of alternative dispute resolution which can be recognised officially by the secular courts, while securing that the proceedings and its decisions are also settled in accordance to the Quranic

[156] ibid.
[157] ibid.

instructions and prophetic practice, as determined by the recognised schools of Islamic law and customs.

The formation of the MAT in 2007 illustrates the attempt of Muslim Communities to enforce their decisions under secular law. This demonstrates that the incentives provided by secular law are successful, because the MAT must ensure that the criteria established in the Arbitration Act are safeguarded, for the MAT's awards to be subsequently recognised and enforced by secular courts.

3.2 Jurisdiction and Procedure of the MAT and Sharia Councils

Both the MAT and all Islamic Sharia Councils claim that their awards, verdicts and rulings are not based on a single school of thought, but derive from the main schools of Sharia law - Hanafi, Maliki, Shafi and Hanbali – including other sources from the Sunni tradition, such as Hadith.[158] In general, the MAT and Sharia Councils serve as alternative fora for resolving disputes, mainly as a means of settling any commercial, marital or financial disputes that may arise between Muslims. They do this not only by applying Muslim legal and ethical principles, but also by taking into consideration the cultural norms of local communities.

The English legal system does not recognise Islam and Sharia law, texts or any of its sources. Parliamentary Under-Secretary of State, Ministry of Justice Bridget Prentice in 2008, said that 'Shari'a law has no jurisdiction in England and Wales and (England has) no intention [of] chang[ing] this position'.[159] Nevertheless, this non a priori recognition serves advantageous to Sharia Councils and MAT because it allows them to interpret Sharia law by examining multiple opinions from different schools of Islamic jurisprudence and taking into consideration customs, cultural norms and other sources before concluding on the interpretation it will adopt for the case before it. The Sharia Councils and the MAT would not have this flexibility to interpret the Quran and Sunni tradition on a case by case basis, had Sharia been a

[158] ibid.
[159] House of Commons Written Answers (n 142).

priori recognised to form part of the formal legal system of England, particularly if a rigid understanding of Sharia law was to be codified like Anglo-Mohommodan law in colonial India.[160] Furthermore, a priori formal recognition of the Islamic adjudicative body will cause rigidity if it is covered by the doctrine of precedent of the common law system.

The main matters that the MAT regulates include inter alia, forced marriages, domestic violence, family and inheritance disputes, commercial and debt disputes, and mosque disputes. Like secular arbitration tribunals, child custody and criminal matters exceed the jurisdiction of the MAT and if a request is made before the MAT on a matter that falls outside of its jurisdiction, the MAT will refer the applicants to the formal civil courts or any other suitable body, according to the matter under debate.

On the other hand, Sharia Councils have operated for decades, predominantly dealing with Islamic family and personal law, mediation and issuing Islamic divorce certificates. Additionally, the councils provide advice, rulings and guidance on numerous questions that may be addressed to them by the general public or secular courts. Whenever a party makes an application on an issue relating to Muslim daily life the Council issues a fatwa. In England, where secular courts request, Sharia Councils are responsible for producing expert reports. Therefore, the secular courts rely on the Sharia Councils on matters relating to Muslim customs, family law and/or the Muslim community, solicitors and councils.[161]

3.2.1 The Role of the MAT as an arbitrator

The MAT carries out arbitration sessions where it adopts the role of an arbitrator, in which both lawyers and religious scholars may participate. The requirements that are stipulated under the Arbitration Act, and which are obligatory for the MAT to

[160] Anderson (n 89).
[161] Douglas (n 130).

have jurisdiction over the MAT dispute, have already been dealt with in detail in Chapter Two. Firstly, the MAT must ensure that it is properly constituted according to the procedural rules it lays down which must not breach the obligations laid down in the Act. Secondly, it must ensure that an arbitration agreement has been validly drafted and signed by the parties as requested by the Act and finally, the MAT has the obligation of deciding appropriately the dispute which has been submitted to arbitration, in accordance with Sharia law but without breaching the English secular law. The procedure must be quick, unbiased and efficient. The MAT members have the responsibility of ensuring that the procedure safeguards the interests of the parties to the proceedings and the wider public interest.[162]

The Arbitration Act allows an arbitral tribunal to function by means of its own procedural rules, and therefore the MAT accompany the rules in the Arbitration Act with more detailed procedural rules covering most aspects of the hearing. The request for the MAT to hear the dispute, must be in writing, signed and must include information such as the grounds for the case and information on the parties, attached with any relevant decisions against which the applicant is aggrieved, any relevant documents and a list of witnesses.[163] In itself, this clause clearly points out that the procedural rules of the MAT are largely modeled on those of the secular arbitration tribunals.

Further examples are the rules that the party that asserts any fact, has the onus to prove that fact, and that the standard of proof required by the MAT is based on a balance of probabilities, and that where there are two or more cases pending between the same parties, the MAT may decide to hear all the cases together. This is either because they share a common question of law or fact; or, if the decisions or actions regard persons who are members of the same family; or where the MAT has any other valid reason to do so.[164]

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[162] 'Procedure Rules of Muslim Arbitration Tribunal', Muslim Arbitration Tribunal <http://www.matribunal.com/procedure_rules.html> accessed 22 May 2013.
[163] ibid Article 2.
[164] ibid Article 6.

After the written request for hearing has been properly made, the MAT serves each party with a notification of the date, time and place that the MAT fixes for the hearing. The MAT allows the parties to have representation and like Maltese secular tribunals, this is not limited to legal representation; any other individual may represent a party, irrespective of whether the representative is legally qualified.[165] It is in the discretion of the parties, to decide whether to have a representative before the tribunal. Nevertheless, in complex cases the MAT recommends that the parties do seek legal advice and representation.

To arrive at a final decision, the MAT may consider its previous decisions, however precedent does not bind the Tribunal and it is left to the tribunal's discretion how to decide the case. The MAT would not have this flexibility if it were formally recognised as its previous decisions would most probably be covered by the doctrine of precedent under the common law system. Furthermore, the MAT's Procedural Rules stipulate that to arrive at a final decision, in addition to the recognised Schools of Islamic Sacred Law, it must take into account the laws of England.[166] This illustrates that motivated by the enforcement of its decisions, the MAT ensures that its decisions do not breach the secular law.

When the MAT reaches a final decision, the Tribunal must, not later than 14 days from the termination of the hearing, serve every party with the final decision and the reasons for reaching such a decision. The MAT does not provide for an appeal from its decisions but its Procedural Rules stipulate that this does not limit the parties from applying for judicial review as entrenched in the Arbitration Act.[167]

The Arbitration and Mediation (Equality) Services Bill, is a recent Bill which proposes new provisions on arbitration and mediation services; provisions on gender equality within such services; provisions for the protection of victims of

[165] ibid Article 13.
[166] ibid Article 8.
[167] ibid Article 23.

domestic abuse and for connected purposes.[168] Among its many proposals, the Bill recommends the inclusion of further provisions in the Equality Act 2010, mainly a new sub-section in article 29 on equality when providing services, to include that the parties must have equal treatment when receiving services relating to arbitration. The Bill adds emphasis that 'discrimination, harassment or victimisation on grounds of sex' are strongly prohibited during arbitration and mediation.[169] Furthermore, the Bill suggests the inclusion of a non-exhaustive definition of what 'discrimination on grounds of sex' may include, inter alia, rules stating that the evidence provided by one gender is more important; or the assumption that one gender has less property rights. A similar article is proposed for the Arbitration Act.

It is easily argued that the new Bill is mainly aimed at the MAT and Sharia Councils, in fact the supporting documentation and the cases cited invariably mention Muslims and the Islamic adjudicative bodies in England. Nevertheless, there is no religiously-specific wording. Therefore, the Bill should apply to all religious courts. Nevertheless, these new possible amendments might provide an added incentive for the religious courts to ensure that their decisions safeguard human rights and gender equality, in return for enforcement of their decisions; or, one may argue that the Bill, if passed and enacted into legislation, might provoke a negative reaction from members of the British Muslim community. Further research on this Bill is necessary to examine whether the amendments would be welcomed or whether they would alienate the British Muslim community.

In England, forced marriages recently provoked numerous debates; primarily due to the fact that Government studies show that the high figures of marriages which resulted to be forced marriages, were predominantly recorded to be between a British or Asian person, and a person from the Indian Sub-Continent. In the MAT's report 'Liberation From Forced Marriages', the ever-growing numbers of forced marriages is described by the MAT as a crisis within the Muslim community, which

[168] Arbitration and Mediation (Equality) Services Bill 2013.
[169] ibid Article 1(2).

was ignored for the past two decades. The English parliament has addressed this problem recently, by introducing the Forced Marriage (Civil Protection) Act 2007, which attempts to resolve the issue of forced marriages, by allowing third parties and even persons who secure the leave of the court, to apply for a forced marriage protection order.[170] In the report produced by the MAT, the tribunal proposed other effective means of tackling the problem of forced marriages as the Forced Marriage Act alone is insufficient.[171]

The proposal suggests that British citizens sponsoring a foreign spouse to settle in the UK, will be invited by voluntary submission by the MAT to give oral testimony that the marriage was entered into of their own free consent. If the MAT is satisfied that the marriage is entered into with full consent, the British citizen could use the declaration made before the tribunal to support the application of the foreign spouse to settle in the UK. If the tribunal is dissatisfied or fears forced/coerced marriage, the MAT shall refer to state courts for a Forced Marriage Protection Order.[172] The proposals by the MAT are interesting because it demonstrates the MAT's desire to cooperate with the state courts, in a fight against forced marriages.

3.2.2 Religious Divorce by the Sharia Councils

The Sharia Council is widely acknowledged as an authoritative body in regards to Islamic law. Since the largest and oldest Sharia council in England, is in Leyton, East London, this section describes the procedure adopted by this Council. The focus is, therefore, on the Sunni tradition, which is the central juristic tradition in Islam. Nevertheless, Sharia Councils determine disputes independently according to their own procedure, because there is no hierarchical order of the Sharia

[170] Forced Marriage (Civil Protection) Act 2007
[171] 'Muslim Arbitration Tribunal Report: Liberation From Forced Marriages' (MAT, 2008) 9 <http://www.matribunal.com/downloads/MAT%20Forced%20Marriage%20Report.pdf> accessed 22 May 2013.
[172] ibid 13.

Councils and furthermore this is only possible because Sharia law and its sources are not a priori recognised by the state legal system.

Marriage law in England is not entirely equal for all religions, because while Christian marriage in a church and a Jewish marriage in a synagogue are recognised and the ceremonies satisfy the civil registration obligations, a Muslim marriage in a mosque is currently not recognised. The Sharia Councils are in charge of issuing Islamic divorce certificates. In fact, the Sharia Councils' main role within the British Muslim community is mostly related to matrimonial disputes, mainly concerning divorce; 95% are related to matrimonial problems faced by Muslims and the other 5% relate to Islamic injunctions (fatwa) on daily life issues.[173] The Sharia Councils also have other vital functions such as mediation between spouses.

Marriage in Islam is considered as a civil contract, which attaches to the parties rights and responsibilities, important for humanity's welfare. Despite acknowledging that marriage is sacred, Islam recognises the right of divorce in cases where the marital relationship is poisoned to a degree where a peaceful home life becomes impossible. The majority of applications for divorce are from women seeking a divorce from their husbands.[174] The procedure adopted by the Leyton Sharia Council varies according to the gender of the applicant seeking divorce. Unlike the Beth Din, which stands as a witness in Jewish divorce cases, the Shariah Council has the power to dissolve an Islamic marriage without the husband's consent, where this is deemed necessary for the benefit of the wife or the children. Therefore contrary to the stereotype that Islam is patriarchal, Sharia Councils provide women with the possibility of divorce where it deems that it is necessary. The aid of the Sharia Councils to women is of great importance in this regard. Restricting Sharia Councils from operating would be restricting the rights of women to divorce under Islam.

[173] The Islamic Sharia Council, 'Services' <http://www.islamic-sharia.org/2.html> accessed 22 May 2013.
[174] ibid.

Prior to the divorce proceedings, regardless of who is the applicant, whether the husband or the wife, the parties are offered a Family Support Service, which is a preliminary meeting with two staff members who must determine an initial opinion on whether it is possible that the parties reach reconciliation. If the parties continue to insist on the termination of the Islamic marriage, the case is then brought before the Sharia Council. The council must be satisfied that there are valid grounds for declaring the marriage over, based on the evidence submitted by the applicant and in the light of any conflicting evidence from the other spouse. The following procedures of divorce from an Islamic marriage, vary according to gender;

1. *Men seeking divorce – Talaq*

There are three forms of 'Talaq' for men, literally translated as 'freeing or undoing the knot'.[175] All of the different forms legally terminate the marriage and differ between them according to the number of times that the word 'Talaq' is pronounced. Where the husband declares 'Talaq' three times at one go, the spouses are prohibited from remarrying. Although according to many jurists this form of Talaq is valid, it is generally loathed because it is against the spirit of Sharia law, which favours the attempt of reconciliation prior to a divorce. In fact, a husband who follows this course in divorce is considered as an offender of Islam.
Another form is where the husband makes one pronouncement of 'Talaq'. The husband can only pronounce this divorce when the woman is not passing through the period of menses, and there is a waiting period of three months until the divorce is finalised. This waiting period is to ensure that there is no further possibility of reconciliation and to avoid any issues of paternity if the wife is pregnant. The Sharia Council encourages Muslim men to ask for arbitration, in the hope that reconciliation may be reached between the spouses. Nevertheless, if all efforts fail and the husband continues to believe that a harmonious marriage with his wife is no longer possible, he can either divorce his spouse verbally or in

[175] Hisham M. Ramadan, *Understanding Islamic Law: From Classical to Contemporary* (AltaMira Press, 2006) 120.

writing. If a civil divorce has been obtained, it is considered as further proof of irreparable marriage breakdown.

Divorce proceedings before the Sharia Council are initiated by an application, together with the requested documentation. The Sharia Council will check and process all the information and documents in confidentiality and if all requirements are satisfied it will register the application. After the Sharia Council has registered the application, the council will issue a written 'Talaq' to the husband and after the husband signs it before two witnesses, the Sharia Council notifies the wife by means of a letter on the address that the husband illustrates on the application.

The letter informs the wife, that she has a total period of thirty days in which to respond. The Council also asks the husband to verify that the full amount of dower (mahr) agreed upon at time of marriage has been duly paid in full. At any stage until finalising the divorce, the husband can change his mind either verbally or physically, by having an intimate relationship with his wife. On the other hand, if the divorce is finalised, the spouses must immediately stop living together in the matrimonial home. The Sharia Council, on finalisation of the divorce, will issue two original copies of the Islamic divorce: one is sent to the wife with the dower amount and one copy is forwarded to the applicant.

2. Women seeking divorce – Khula

The right of women to initiate divorce is known as Khula, literally translated as 'the putting off or taking off a thing'. Khula is like Talaq, but depends upon the agreement that the husband agrees to the divorce, provided his wife either abandons her right to the dower or if paid, returns the amount of the dower to the husband. Therefore, in Talaq, the husband must still give the dower, whilst in Khula the wife does not take the dower.

To initiate the procedure, the wife must fill in an application form and attach the reasons for seeking divorce. The Sharia Council will initiate the process and inform the husband that his wife has approached the council for Khula, stipulating a period within which the husband can send a reply. If the husband fails to reply, the Sharia Council will issue a second letter and a third letter, if necessary. Where the husband responds to any of the letters, a joint meeting between the spouses with a Sharia Council representative will be organised. On the other hand, if the husband fails to answer to all of the letters sent, and fails to appear before the council, the next stage is for the wife to go to a panel meeting, who will then determine whether to issue a divorce certificate.

If the applicant and her husband have also celebrated a civil marriage, the Sharia Council usually requests that the wife initiates proceedings to obtain a civil divorce. When the Civil Court grants the final divorce decree, it is likely that the Sharia Council will proceed quicker in granting the wife divorce, because the council is aware that the marriage is considered to be over for the state and hence, prolonging its Islamic dimensions would be futile.[176] This illustrates that the Sharia Council wants to work in a way, that rather than clashing with, complements the proceedings of the civil courts.

The role of the Sharia Council is important to safeguard the rights of women, both in Talaq and in Khula. In Talaq, the council safeguards the right of the wife to be heard and to putting forward her opinion. Furthermore, the council protects the wife's right of dower in Islam and may issue the wife with a divorce certificate where it deems fit. Without the Sharia Council, the wife would not have any other remedy to receive divorce from her Islamic marriage. It is often argued that the religious courts undermine gender inequality, however, Bowen explains that whilst all monotheistic religions discriminate regarding women, religious courts like the Sharia Councils are a response to this and mitigate the effects of the

[176] John R. Bowen, *How Could English Courts Recognize Shariah?* (2010) 7 U St. Thomas LJ 411 <http://ir.stthomas.edu/ustlj/vol7/iss3/3> accessed 22 May 2013.

discrimination.[177] Sharia Councils prove to be necessary to bridge the gap between religion and religious sources, and the state law.

3.2.3 Mediation

The Sharia Council provides the parties with the opportunity of resolving their issues by mediation. As explained previously, in the divorce procedure before the Sharia Council, there is a mandatory mediation stage. The Sharia Council stresses that divorce has a negative stigma in society especially when there are children involved.[178] Therefore, divorce is a last resort. Islam and religious scholars attach great importance to mediation, and hence, in a divorce process, mediation is a religious obligation and a moral duty to preserve the sanctity of Muslim families. Any decisions by the Sharia Council, which fall outside the jurisdiction of arbitration, such as decisions on children's custody, are considered to fall under mediation.

Furthermore, although the state courts are not bound by any mediation decisions of the Sharia Council, albeit the state courts might refer to them. The Sharia Council welcomed the landmark judgement of AI v. MT, discussed in detail in Chapter Two, where the secular family court recognised and enforced the non-binding arbitration decision of the New York Beth Din. It is speculated that following this judgement the state courts will have a more positive approach towards the decisions and mediation outcomes of religious courts in England, and therefore the Sharia Councils will enjoy more a pasteriori recognition from the state courts.[179]

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[177] John Bowen, 'Panorama's exposé of sharia councils didn't tell the full story', *The Guardian* (UK, 26 April 2013).
[178] Interview by Samia Bano in *Islamic Family Arbitration, Justice and Human Rights in Britain* [2007] Law, Social Justice & Global Development Journal (LGD).
[179] Alleyne (n 134).

3.3 Enforcement

Since the MAT operates within the English legal framework, under the Arbitration Act, all of its determinations may be enforced through the existing means of enforcement by the state courts. This does not impede the MAT from ensuring that its decisions conform both with Islam and state law. The Muslim community is offered an opportunity of settling its disputes in accordance with Islam, knowing that the outcome determined will subsequently be enforceable. However, the state legal force of the arbitral award by the MAT rests entirely on the contractual agreement between the parties, even where Islamic arguments played a practical role in moving the parties towards an agreement.

The chairperson of the MAT, Sheikh Faiz-ul-Aqtab Siddiqi has commented that because the MAT follows the same process as state arbitration tribunals, its 'decisions are binding in English law. Unless our decisions are unreasonable, they are recognised by the High Court'.[180] The Arbitration Act includes other reasons for which the decision of an arbitration tribunal may be ignored, further discussed under Chapter Two, which provides the MAT with the incentive of safeguarding the rights of the parties' under state law.

There are several examples of decisions of religious courts being enforced under the Arbitration Act but most examples are decisions of the Beth Din,[181] with very few examples in respect of Islamic Tribunals and Councils. This could primarily be because the Sharia Councils are reluctant to frame their decisions as arbitration agreements. For instance, in the case Al-Midani v. Al-Midani a dispute arose between the parties over the validity of a will that had been negotiated with the parties before the Leyton Sharia Council.[182] The High Court did not enforce the

[180] Innes Bowen, 'The End of One Law for All?' (BBC News, 28 November 2006) <http://news.bbc.co.uk/2/hi/uk_news/magazine/6190080.stm> accessed 22 May 2013.
[181] Examples include Kohn v Wagschal and Ors (n 135), Re AI and MT (n 111), Al Khatib v Masry (n 120).
[182] Al-Midani v. Al-Midani [1999] CRC 904.

final decision claiming that the parties had not agreed to arbitration before the Sharia Council, since there was no drafting and signing of arbitration agreements. Nevertheless, the High Court pointed out that this does not mean that an Islamic court or tribunal cannot operate under the Arbitration Act.

The fact that an arbitration agreement is needed for enforcement, serves as an incentive for the Sharia Councils to adopt a procedure whereby all the parties freely consent to the jurisdiction of that religious court, tribunal or council. In fact, subsequent to Al-Midani v. Al-Midani, the Muslim Community formed the MAT which as a tribunal operates under the Arbitration Act.

3.4 Recognition of the MAT and Sharia Councils

John Bowen reports that the MAT is highly valued and has earned official recognition from the Charity Commission for England - a government body responsible for ensuring that religious institutions function smoothly.[183] The Charity Commission has approached the MAT requesting assistance in resolving disputes over the administration of mosques. The MAT hears disputes, which arise within the mosques.

Lord Phillips, in his speech in East London Muslim Centre, observed that 'there is no reason why Sharia principles, or any other religious code, should not be the basis for mediation or other forms of alternative dispute resolution'.[184] He pointed out that in England there is a misconception on what Sharia law requires; there is a general 'belief that Sharia is only about mandating sanctions such as flogging, stoning, the cutting off of hands, or death for those who fail to comply with the law'.[185] This stigma of Sharia law is 'coloured by violent extremists who invoke it, perversely, to justify terrorist atrocities such as suicide bombing', which is contrary

[183] John R. Bowen (n 176)
[184] Lord Phillips (n 3).
[185] ibid.

to Islamic principles.[186] Lord Phillips added, that as English law stands today, it is already permissible for parties in England to agree to seek to settle their dispute under rules other than English law.

As already discussed in Chapter Two, official recognition for the MAT and the Beth Din is unnecessary, because they operate under the existing legislation, namely the Arbitration Act. Critics of the MAT often fail to recognise that both parties must agree and sign an arbitration agreement for the MAT to have actual jurisdiction over the dispute. The MAT complies fully with the Act and therefore it operates within English law, and not as an alternative legal system as critics and the media might suggest. The MAT must consider English law. Its decisions must be both in accordance with Sharia principles and not conflicting with the rights guaranteed in English law.

The Islamic Sharia Councils' fatwas are not recognised as binding on the state courts and Islamic divorces dissolve Islamic marriages, but do not affect the status of any coexistent civil marriage. The civil contract of marriage will continue to be binding. However, Bridget Prentice pointed out that where the Sharia Council assumes the role of an arbitrator within the scope of the Arbitration Act, the decision could be recognised and enforced. If the parties wish that the decision of the Sharia council be recognised by the 'English authorities, they are at liberty to draft a consent order embodying the terms of the agreement and submit it to an English court'.[187] Therefore, whilst the Sharia Councils are not officially and a priori recognised, the Sharia Councils' decisions, like the MATs', may be recognised provided the decision does not breach state law.

As to whether Sharia Councils are creating new forms of governance under English law, Bano points out, that Sharia Councils clearly illustrate a change in the social and legal order for Muslims living within 'Western' democratic societies.

[186] ibid.
[187] House of Commons Written Answers (n 142).

However, state law continues to maintain hegemony on issues of power, control and the administration of justice in society.[188] Today due to the freedom to practice religious principles in public, society evidently reflects various legal orders operating within the same sphere, which at times challenge the often-assumed centrality of state law.

Bowen reports that the Sharia Councils are aware of the existing collaboration between the Beth Din and the state family courts by the Divorce (Religious Marriages) Act 2002, discussed in Chapter Two of the thesis.[189] The Divorce Act is currently not applicable to Sharia Councils, because as Lord Hunt reports, there was no application from any Islamic group requesting such recognition'. [190] Therefore, although this Act is applicable to all religious groups in England, no other religious group other than the Beth Din, has taken the initiative to apply to take advantage of it.

Nevertheless, Bowen claims that for some Sharia Councils 'the passage of the law suggests that English courts someday might recognise their actions as having legal effect, and this idea leads them to value steps that would bring their own procedures closer to those followed by civil judges.' Therefore, it motivates the Sharia Council to bridge the gap between religious law and the state law, and hence to protect human rights and gender equality.

3.5 Conclusion

The MAT operates under the Arbitration Act, and therefore its decisions should not normally be contested because the tribunal follows the regulations established by the state legal system. If not, the civil courts will abstain from enforcing its decisions. On the other hand the Sharia Councils, determine their own procedures

[188] Samia Bano, *Islamic Family Arbitration, Justice and Human Rights in Britain* [2007] Law, Social Justice & Global Development Journal (LGD).
[189] John Bowen (n 176).
[190] House of Commons Written Answers (n 142).

and also, must abide by the state law if they wish their decisions to be enforced by the secular courts. Therefore, this produces a situation where both Sharia Councils and the MAT have an incentive to ensure that their decisions and arbitral awards respectively, are not in breach of the freedoms and rights established by secular law.

Furthermore, because the procedures established by Sharia Councils are not officially recognised by the English legal system, it is possible for the Sharia Councils to change the procedure adopted, simply by developing consensus on a particular issue. Bowen for instance, gives the example of the procedure of proving how long the parties were separated for before the commencement of divorce proceedings.[191] This change in procedure is to ensure that the spouses are serious on the divorce. The Sharia Council justifies the change in rule, claiming that it has the duty to establish a single, clear rule when faced with multiple opinions from different schools of Islamic jurisprudence. This is possible only because of the flexibility the Sharia Councils possess, which is due to Sharia law, Sharia Councils and the procedures adopted not being a priori recognised.[192]

When applying and interpreting Sharia law, the MAT and Sharia Councils review differing opinions emanating from the different sources of Islamic law, and then determine their own rule as a workable compromise, which is likely to be compatible with the secular law of the state where they are functioning. It is only when it is compatible, that their decisions are recognised and enforced by secular courts.

[191] John R. Bowen (n 176).
[192] ibid.

CHAPTER FOUR: THE ECCLESIASTICAL TRIBUNAL IN MALTA – FORMAL LEGAL PLURALISM

4. Introduction

This chapter examines the scope of the activities of the Ecclesiastical Tribunal in Malta, through an overview of its formal position within the Maltese court system. It focuses on the automatic civil effects of the decisions of the Ecclesiastical Tribunal and its leading, superseding role in relation to marriage annulment, and examines the impact this situation, understood as an example of what Griffiths calls 'weak legal pluralism'[193] has on social attitudes towards and understandings of marriage law.

The first section reviews the role of Roman Catholicism in Maltese law and explains how Malta can be described as a "predominantly secular" state. Furthermore, this section contrasts the automatic recognition of Canonical marriages in Maltese legislation to the lack of recognition by Maltese law of other religious marriages celebrated in Malta. The second section provides a general overview of the role of the Ecclesiastical Tribunal in the Maltese legal system; focusing on the enforcement of the Ecclesiastical Tribunal's decisions and the consequent civil effects of declarations of annulment made by the tribunal. The third section reviews the Maltese civil jurisprudence relating to marriage annulment in order to discuss the impact of the dominant role of the Ecclesiastical courts. This section argues that this dominance, also based on the codification of religious norms within state law, restricts the ability to develop both the state law and the religious norms. The final section explores the social impact of these trends by outlining key findings from interviews conducted with Maltese people or their spouses who live in Malta and have celebrated an Islamic marriage, which the state fails to recognise.

[193] Griffiths (n 67)

4.1 Roman Catholicism in Malta

The first seeds of Christianity in Malta are often accredited to Saint Paul's shipwreck upon the Maltese Archipelago circa 60AD. While this may or may not be the case, it is clear that the Christian religion has played an important role throughout Malta's history and that Christianity remains the dominant religion within the Maltese islands, with Roman Catholicism being the predominant denomination.[194]

4.1.1 Is Malta a Theocracy or a "Predominantly Secular" State?

Article 2 of the Constitution of Malta establishes that:

(a) The religion of Malta is the Roman Catholic Apostolic Religion.

(b) The authorities of the Roman Catholic Apostolic Church have the duty and the right to teach which principles are right and which are wrong.[195]

This article has given rise to various controversies concerning the extent to which Malta can be defined as a secular state. Some argue that the existence of this article turns Catholicism into an official component of Maltese 'national identity' and tradition, because Maltese culture to this day is heavily based on Roman Catholicism. Others argue that this article is merely a descriptive statement pointing to the religion of the majority of the Maltese citizens. Nevertheless, there are compelling arguments for the complete exclusion of this Article from the Constitution on the basis that it grants a superior role to one particular

[194] A survey carried out by the Catholic Church in 2005 showed that 52.6% of the population of the Maltese islands attended Sunday mass <http://www.discern-malta.org/research_pdfs/census_2005.pdf> accessed 22 May 2013.
'On the three islands of the Maltese archipelago (Malta, Gozo, and Comino) there are 365 Catholic churches; the parish church is the architectural and geographic focal point of every Maltese town and village'.. Andrea Bettetini, *Religion and the Secular State in Malta* (ICLRS, 2010) 493 <http://www.iclrs.org/content/blurb/files/Malta.pdf> accessed 22 May 2013.

[195] Constitution of Malta, Constitution of the Laws of Malta, Article 2.

denomination over the others, and hence undermines equality before the law, to the detriment of cultural and religious pluralism.

Article 2(c) adds that 'religious teaching of the Roman Catholic Apostolic Faith shall be provided in all state schools as part of compulsory education'.[196] Although this article has not been repealed and still forms part of the Constitution of Malta, Maltese governments acknowledge that the Maltese society is increasingly multicultural and in line with Kymlicka's suggestion of group-differentiated rights, school children are allowed to be exempted from 'Religion' classes and examinations, should their religion be other than Roman Catholicism.[197]

Moreover, the Constitution of Malta stipulates that 'every person in Malta is entitled to the fundamental rights and freedoms of the individual',[198] which include the right to freedom of conscience. Furthermore, Article 40 specifically provides for freedom of religion, advocating that: '[a]ll persons in Malta shall have full freedom of conscience and enjoy the free exercise of their respective mode of religious worship'.[199] Thus it is clear that while Catholicism figures prominently both within Maltese society and its legal system and perhaps, one may even argue that Malta follows the theocratic model, a cursory study of Maltese law and society illustrates that in some important respects it is a predominantly secular state and this secularist character is increasingly coming to the fore. Until 2011, Malta was one of the few states, along with the Vatican City and the Philippines, without a provision for civil divorce. However, after the referendum held in May 2011, Malta made a

[196] ibid.
[197] In an interview with the Head Mistress of Saint Paul's Bay primary school, the Head Mistress pointed out that due to the number of diverse nationalities and religions among the students, an adoption of Kukathas' politics of indifference would result in discrimination towards those who are not Roman Catholic. These children are exempted from attending the weekly mass. Interview with Head of School, St. Paul's Bay Primary School, David E. Zammit, *Consultative Assessment on the Integration of Third Country Nationals* (IOM 2012] 26 <http://integration-iom.com/wp-content/uploads/2012/11/IOM-Report-DZ-Definitive-2.pdf> accessed 22 May 2013.
[198] Constitution of Malta, Article 32.
[199] Ibid Article 40.

large step to prove itself “predominantly secular” by the introduction of Act XIV of 2011 which amended the Civil Code; lifting the ban on divorce in October 2011.[200]

4.1.2 Marriage in Maltese Legislation

Pre-1975, Canon Law regulated all marriages celebrated in Malta in cases where one of the spouses was a Catholic; therefore, civil marriage did not exist. The Code of Canon Law is promulgated by the Catholic Church and contains the essential components for a Canonical marriage. Indeed, a Catholic marriage must be celebrated according to the norms and formalities of Canon Law. In Malta, Canon law regulated not only the capacity to marry and the form, but also the substance and effects that the marriage would have.[201] Still pre-1975, in cases where both of the spouses belonged to a non-Catholic religion, Maltese law appears to have recognised the religious marriage and given full civil effects to it. Problems arose only in recognising mixed marriages where one of the parties was Catholic whilst the other was not.

A mixed marriage between a Catholic spouse and one from either a different religion or denomination was considered to be null and void, if not carried out according to the canonical form. This system restricted the freedom of religion and the right against discrimination of those who professed other religions, Catholics who lapsed from their faith, and those who did not profess any religious belief yet married a Catholic spouse.[202] Many used this to their advantage as it meant that they could dissolve their marriage bonds if the marriage had not been carried out in church by proving that unlike their spouses they had been baptized into the Catholic Church.[203]

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[200] Civil Code (Amendment) Act, 2011 (Act No. XIV of 2011).
[201] Giovanni Bonello, ‘Mixed Marriages in the Early British Period’, *The Times of Malta* (Malta, September 2012).
[202] Bettetini (n 194).
[203] Bonello (n 201).

This era ended with the introduction of civil marriage by means of the Marriage Act of 1975.[204] This introduced a new system where all religious marriages were equally non-recognised and spouses needed to celebrate a civil marriage for legal recognition and civil effects.

Between 1985 and 1995, the situation changed after a number of Concordats were agreed upon and signed between Malta and the Vatican,[205] dealing with a number of issues, among which is the agreement signed in 1993 aimed primarily at granting civil effect to: (1) canonical marriages and (2) decisions of the Ecclesiastical Authorities and Tribunal about the same canonical marriages.[206]

The 1993 Agreement stipulates under Article 1 that: 'Civil effects are recognised for marriages celebrated in Malta according to the canonical norms of the Catholic Church, from the moment of their celebration'.[207] However, it adds that this is provided that certain requirements under Civil law, such as the requirement of marriage banns having been published in terms of the Marriage Act, are satisfied. Nevertheless, this civil law itself is heavily based upon Canon law, with the requirements for a canonical and a civil marriage being similar, if not identical.

The Catholic Church preaches that the sacrament of marriage is brought into being through voluntary and deliberate exchange of consents between the parties: a man and a woman. Marriage is a permanent partnership, 'ordered by its nature to the good of the spouses and the procreation and education of offspring'.[208] The Marriage Act does not stipulate a definition of marriage, but implicitly relies upon

[204] Marriage Act, Chapter 255 Laws of Malta.
[205] David Pocklington, 'Church and State: Malta and Marriage' (Law & Religion UK, 26 March 2013) <http://www.lawandreligionuk.com/2013/03/26/church-and-state-malta-and-marriage/> accessed 22 May 2013.
[206] Agreement between the Holy See and the Republic of Malta on the Recognition of Civil Effects to Canonical Marriages and to the Decisions of the Ecclesiastical Authorities and Tribunals about the Same Marriages (3 February 1993) <http://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19930203_s-sede-malta_en.html> accessed 22 May 2013.
[207] ibid Article 1(1).
[208] Code of Canon Law, Canon 1055.

the definition of Canon law. Therefore, the perception that Maltese civil marriage is a completely separate and distinct kind of marriage from a church marriage is quite inaccurate. The formalities of a civil marriage are largely the same as those of a canonical marriage. Furthermore, the grounds of annulment of a civil marriage in terms of the Marriage Act, are similar to those under Canon law. Therefore, although the canonical and the civil marriage should be independent, in essence the two marriages are very similar in substance and also, in certain formal aspects, such as the requirement of the publishing of the marriage banns.[209]

The situation in Malta today is that, whereas a Catholic and a civil marriage produce the same effects under civil law, marriages celebrated in Malta according to non-Catholic religious formalities find no official recognition. Furthermore, Catholic marriage and canonical marriage may seem to be regulated in a distinct manner, but in reality, the two are practically identical when viewed from the standpoint of their essential elements. Despite this, and although Roman Catholicism is the constitutionally established religion of Malta, other faiths have been imported to Malta and some voluntarily embraced by various Maltese individuals. Roman Catholicism may be the chief religion in Malta but there is an ever-increasing diversity of religious beliefs and a growing number of non-believers. As section 5 of this chapter shall demonstrate, Maltese who profess a religion other than Roman Catholicism, sometimes accuse the Constitution of breaching their freedom of religion, primarily because Maltese marriage law fails to cater equally for all faiths by ignoring non-Catholic religious marriages.

4.2 The Ecclesiastical Tribunal

The Ecclesiastical Tribunal has a long history in Malta and is still considered to be the competent organ that administers justice to the members of the Catholic Church. In principle, its jurisdiction extends beyond declarations of matrimonial nullity; albeit this is the only case where its decisions are recognised to have civil

[209] Marriage Act, Article 7.

effects and therefore, the thesis focuses on this role of the tribunal to declare annulments. The modern Ecclesiastical Tribunal was introduced after the promulgation of the 1983 Code of Canon law. In regards to the procedures adopted by the Maltese Ecclesiastical Tribunal and its relationship with the state courts, these features must be noted:

a. How the Tribunal Asserts Jurisdiction over a Case:

The Agreement between Malta and the Holy See, stipulates that where one party has recourse to a Civil Court whilst the other party insists on having the marriage nullity claim considered by the Ecclesiastical Tribunal, the right of the latter party prevails.[210] Therefore, where one of the parties to a Canonical Marriage resorts to the Ecclesiastical Tribunal to resolve a matrimonial dispute or to request marriage annulment, the Ecclesiastical Tribunal supersedes the Civil Courts and the Ecclesiastical Tribunal is deemed fully competent to consider the case, irrespective of what the other spouse desires.

Subsequent to the registration of the claim before the Ecclesiastical Tribunal, the action is considered to have commenced and hence, the Civil Courts cease to have jurisdiction on the matter. If an action is pending before a state court for the declaration of marriage nullity, whilst the Ecclesiastical Tribunal accepted the petition by one of the spouses on the same issue, the Civil Court must 'suspend the hearing of the case before it'.[211] Furthermore, the Civil Court 'may not resume hearing the case and, in any case, shall not again be competent until the said case has, in accordance with the procedures of the Tribunal, been withdrawn from before the Tribunal or been declared abandoned'.[212]

[210] Bettetini (n 194).
[211] Marriage Act, Article 30.
[212] ibid.

In the case of Cassar vs. Deguara,[213] the state court confirmed the dominant position of the Ecclesiastical Tribunal and justified this on the basis that the parties freely chose and consented to the tribunal's jurisdiction by jointly consenting to marry according to the Catholic rite, and on the presumption that at the time of the action for annulment the marriage is valid. The court held that the spouses are presumed to have become 'one' upon marriage; therefore, the consent of one party to initiate proceedings for annulment before the ecclesiastical tribunal subsists for the two.

The court in this case not only upheld this position on the basis of the theory of the will of the parties, but also added that it does not violate human rights, specifically free trial rights. The courts implied that the choice of a Catholic marriage is simply a formal/procedural/ritual choice and not a substantial one. Therefore, in this judgement the substance of marriage was perceived as the same in both Catholic and Civil marriages.

b. The Process of Registering and Enforcing the Tribunal's Decisions:

Subsequent to the 1993 Concordat between Malta and the Vatican, decisions of the Ecclesiastical Tribunal have civil effects by registration of the decision before the state Court of Appeal. By the 1993 agreement between the Holy See and Malta, Malta recognises 'for all civil effects… the judgments of nullity and the decrees of ratification of nullity of marriage given by the ecclesiastical tribunals and which have become executive'.[214] Therefore, in conformity with the Concordat, any party or both of the parties, may make the declaration of nullity received from the Ecclesiastical Tribunal executive also in relation to the civil marriage, by registering the decision of the Ecclesiastical Tribunal in the Court of Appeal of the Civil Courts. These civil effects are recognised by filing a request affixed with an authentic copy of the tribunal declaration of nullity, including a 'declaration of its executivity

[213] Janice Cassar vs. Simon Deguara Civil Court, Constitutional Jurisdiction (25 March 2008).
[214] ibid Article 3.

according to canon law issued by the tribunal that has given the executive decision'.[215]

The court that allows registration of decisions delivered by the Ecclesiastical Tribunal in marriage annulment proceedings and orders that such decisions are granted civil effects is the Court of Appeal. Before the Court of Appeal grants civil effects to the declaration of nullity by the Ecclesiastical Tribunal, it must ensure that certain precise requirements laid down both under the 1993 agreement between the Holy See and Malta, and under the Marriage Act are satisfied. The Court of Appeal must ascertain that:

(1) the parties celebrated a canonical marriage,

(2) that the Ecclesiastical tribunal has the competence to judge the case in issue insofar as the marriage was celebrated according to the canonical form,

(3) that during the proceedings before the Ecclesiastical Tribunal, the parties were informed of their rights of action and of defense, and

(4) that there is no contrary *res judicata* judgment pronounced by the civil courts, based on the same grounds of nullity.[216]

Concerning marriages celebrated in Malta after 11th August 1975, the Court of Appeal must ensure that: (5) the act of marriage requested by Civil law was delivered or transmitted to the Public Registry. Once the declaration of nullity is registered, it will have the same effect as if the decision was one of the Civil Courts.

While the above seems to suggest that the Court of Appeal enjoys a broad discretion to review the Ecclesiastical Tribunal's decisions and to invalidate them for various reasons, the contrary is suggested by a more detailed consideration of the actual grounds listed in the law and the way they are applied in practice. In point of fact, the listed grounds are largely restricted to ascertaining whether on the

[215] ibid Article 5.
[216] 1993 Agreement between Holy See and Malta, Article 5; Marriage Act, Article 24(5).

face of the record, the Ecclesiastical Tribunal was truly competent to judge these cases of nullity.[217]

The one exception, which allows some ground of review, is the ground that requires that the parties were informed of their rights of action and of defense during the proceedings before the Ecclesiastical Tribunal in a manner compatible with the Constitution. However, even this falls short of a comprehensive guarantee that the judicial review of the Court of Appeal will ensure that the parties have a fair trial in the Ecclesiastical Tribunal's proceedings.

Apart from establishing the formal, grounds of review established, the procedure by which the state court grants civil effect to the Ecclesiastical Tribunal's judgment is generally rather perfunctory. The Court of Appeal will, in most cases, respond to an uncontested application by a party to register a declaration of nullity or validity of the marriage by proceeding to register the Ecclesiastical judgment in order to grant it civil effects. It is only in cases where there is contestation and/or the ground of review clearly appears from the face of the record that the Court of Appeal will review the proceedings and may refuse to register the Ecclesiastical court judgment.

For example, in Mifsud vs. Mifsud,[218] the Court refused to register a decision of the Ecclesiastical Tribunal declaring a church marriage null, despite the fact that the other party did not appear to contest it. The court held that the spouses had contracted a civil marriage eight years previously to the religious marriage they had managed to annul; which marriage the court declared was still valid in terms of Maltese civil law. Similarly, in Gatt vs. Gatt,[219] the Court refused to register an

[217] This appears to be the case on the grounds that 1) that the marriage was celebrated according to canon law, 2) because a contrary judgment of the civil tribunal does not exist and 3) because the church marriage, although celebrated after 1975, was also considered valid in terms of civil law because it was accompanied by a civil marriage.
[218] Joseph Mifsud vs. Mary Mifsud, Court of Appeal (11 November 2011).
[219] Martes sive Maria Teresa Gatt xebba Vigar vs. Joseph Gatt, Court of Appeal (25 February 2011).

Ecclesiastical Tribunal decision annulling a Church marriage because there was a preceding judgment of the Civil court upholding the validity of the marriage.

In Calleja vs. Azzopardi,[220] the Court of Appeal went so far as to refuse an application for registration of an Ecclesiastical Tribunal decision declaring a Church marriage null, despite the fact that the 'wife', who was absent and represented by curators did not object to the application. This was justified on grounds of public policy as the court held that the wife, who had been absent and whose location was unknown throughout the Ecclesiastical proceedings for annulment, could not possibly have been informed of her rights of action and defense in a manner compatible with her constitutionally protected rights. However, even this assertive stance by the Court of Appeal was justified by invoking the restricted grounds for review and by referring to the fact of the wife's absence, which did not need to be proved because it could not but be inferred from the fact that her interests were represented by court appointed curators.

c. The Effects of the Ecclesiastical Tribunal's Decision on the Civil Marriage

The declaration of the Ecclesiastical Tribunal, which has civil effects, will also affect the civil marriage. The 1993 agreement stipulates that the Court of Appeal is prohibited from re-examining the merits of the case once the Tribunal declares that the marriage is null and void, and this even with regards to the validity of the civil marriage. [221] Therefore, after the Court of Appeal gives civil effect to the Ecclesiastical Tribunal's declaration of marriage nullity, the jurisdiction of the state courts with regards to the civil marriage will be lost. When the declaration of marriage nullity is registered, the civil effects flowing from the recognition of the tribunal's decision are regulated by civil law.[222]

[220] Patrick Calleja vs. L-Avukat Dott. Tonio Azzopardi et. Court of Appeal (8 November 2004).
[221] 1993 Agreement between Holy See and Malta, Article 8.
[222] ibid Article 9.

A Second Additional Protocol agreed upon to ensure precise application and to avoid any future difficulties concerning the interpretation, provides that all decisions, including negative decisions of the Ecclesiastical Tribunal are to have civil effects. Article 1 of this Protocol stipulates that when there is no appeal from a judgment of the Ecclesiastical Tribunal which holds that the marriage in dispute is valid, or where there was an appeal in which the tribunal upheld the previous position, the Ecclesiastical tribunal's decision is recognised under Maltese law to be a *res judicata*.[223] Therefore, even when the decision of the Ecclesiastical Tribunal goes against the marriage nullity, the decision is recognised to have civil effects, preventing once again the state courts from examining the facts, and furthermore limiting the parties from initiating an action to annul their civil marriage before the civil courts. This is because the civil marriage will be considered valid, due to the judgment of the Ecclesiastical Tribunal.

Indeed, the Marriage Act confirms that when any decision of the Ecclesiastical Tribunal is appropriately registered, it has the same effects as if it were a *res judicata* judgment of the state courts.[224] Therefore the decision of the tribunal that the marriage is valid or void and null, limits the possibility of re-examination of that marriage on the same grounds by the civil courts. This is even when the re-examination is only being requested with regards to the civil marriage.

The effects that follow a declaration of nullity or marriage validity by the Ecclesiastical Tribunal are rather one-sided. Although either the Civil Courts or the Ecclesiastical Tribunal in Malta can pronounce an annulment; if the Ecclesiastical Tribunal annuls the marriage, the parties may re-marry either through a civil marriage or through the Catholic rite. By contrast if the parties initiate an action before the Civil Court instead of the Ecclesiastical Tribunal, the decision of annulling the civil marriage will in no way affect the validity or otherwise, of the canonical marriage.

[223] ibid Second Additional Protocol.
[224] Marriage Act, Article 23.

4.3 Civil Jurisprudence on Marriage Nullity

The previous sections of this chapter have served to identify certain distinctive features of the particular model for recognising religious courts as adopted by the Maltese legislator. In particular, because of the influence of the canonical understanding of marriage within Maltese civil law, the Ecclesiastical Tribunal substantially applies the same law as the civil courts on marriage annulment litigation. This serves to differentiate the Ecclesiastical Tribunal from the Beth Din and the MAT, where each apply a different law to that of the English state, and also helps to explain other features of the Maltese model.

It is clear that the Maltese legislator has been prepared to expressly recognise the Ecclesiastical Tribunals as competing with and even dominating over the Civil Courts. Therefore, again unlike the Beth Din and the MAT, it suffices to have the voluntary decision of one of the parties for the Ecclesiastical Tribunal to be legally recognised as having exclusive jurisdiction over the case and this will mean that any civil case for annulment between the same parties, even if filed prior to the action before the Ecclesiastical Tribunal, cannot resume unless the action before the tribunal has been withdrawn or abandoned.

This statutorily enshrined dominance of the tribunal is reflected in the highly restricted grounds for review of the Tribunal decision before registering it, where unlike the case with the Beth Din and the MAT, the state Court of Appeal is specifically prohibited from reviewing the merits of the religious tribunal decision. It is also reflected in the civil effects of the tribunal decisions which, as has been noted, are the same as a *res judicata* judgment of the Civil Court and which, unlike a Civil Court judgment of annulment, serve to annul both the civil and Canonical marriages.

This section explores the impact on Maltese civil jurisprudence on marriage annulment of these features of Maltese legislation relating to marriage and the

Ecclesiastical Tribunals. The working hypothesis is that by creating a kind of forced cohabitation between the Civil and the Ecclesiastical Tribunals, the 'Maltese model of recognition' has undermined the possibility that either the Civil Courts or the Ecclesiastical Tribunals could develop their own interpretations of the meaning of civil marriage independently of one another. In other words, by linking the civil and ecclesiastical courts so rigidly together, official Maltese legal pluralism has indirectly created a single unitary understanding of what marriage is; fossilising both the Civil and the Canon law provisions by preventing either of the relevant adjudicative bodies from developing new interpretations of the law.

A cursory glance at the relevant judgments easily provides examples of how the civil courts constantly feel the need to refer to canon law in order to interpret the analogous civil grounds of annulment. Thus in the recent case of A et. vs. Mifsud et. the Civil Court observed that 'since, as already stated, Article 19(1)(d) of Chapter 255 is rooted in the Code of Canon Law, reference is often made in our jurisprudence regarding cases of marriage annulment to the relevant canonical jurisprudence and authors'.[225]

Moreover, the impact of the Maltese model for recognition of the Ecclesiastical Tribunal's decisions in the civil jurisprudence can be clearly seen in the case of Mifsud vs. Mifsud where the Court of Appeal said that it would have been willing to register a decision of the Ecclesiastical Tribunal declaring a church marriage null so that this would also have annulled the civil marriage, had the two marriages been celebrated on the same date.[226] This tacit admission that the two marriages, civil and religious, have the same juridical nature echoes the legislative provisions.

Similarly in Gatt vs. Gatt, the Court of Appeal was not prepared to countenance the possibility that a previous Civil court judgment upholding the validity of a civil marriage could be followed by the registration of a subsequent Ecclesiastical

[225] A et. vs. Dr Cedric Mifsud et. Civil Court, Family Section (21 March 2013).
[226] Joseph Mifsud vs. Mary Mifsud, Court of Appeal (11 November 2011).

Tribunal decision declaring the religious marriage between the same parties null and void.[227] Against the possibility that the Civil law could accept that two parties simultaneously contracted a valid religious marriage and a null civil marriage, the Court invoked Article 24(5)(iii) of the Marriage Act, prohibiting the registration of the Ecclesiastical Tribunal decision in such cases and further held that:

> While it is true that the two jurisdictions (Civil and Canonical) are distinct and that no tribunal is forced to follow the doctrinal teaching that may be developed by the other, still the fact remains that between the parties there exists a contrary judgment which has become *res judicata*. The reasoning of the two courts in this case does not harmonise…. and the law intends that in a case such as this the judgment of the civil courts should prevail.[228]

Another case in point is Grech vs. Borg, where the Civil Court judge was unable to adapt to the case before him, because he was limited by the restrictive understanding of marriage, which was heavily based on Roman Catholicism and canon law.[229] This marriage annulment case highlights the link between Canon and Maltese civil law where marriage is concerned. In this case, the defendant gave her own interpretation of matrimonial fidelity, invoking and re-interpreting Catholic understandings.

The defendant explained in court how she had a relationship with the plaintiff and at the young age of eighteen moved in with him, because she loved him and shortly after, the plaintiff introduced her to prostitution and asked her to act as a prostitute when money was strained. Although she disliked being a prostitute, she did so for her lover to be content. Subsequent to marriage, her husband urged her to continue in prostitution in order to 'contribute to the family finances,' and for 'the good of the family'. The defendant continued in prostitution 'whenever her husband told her that this was necessary to help the family finances'.[230] Eventually, the

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[227] Martes sive Maria Teresa Gatt xebba Vigar vs. Joseph Gatt, Court of Appeal (25 February 2011).
[228] Ibid.
[229] Simon Grech vs. Angela Borg, Civil Court, First Hall, 16 July 1996.
[230] David E. Zammit, *The Case of the 'Faithful Prostitute:' Judicial creativity and family values in a Southern European Context* (Kluwer 2002) 1 FJR 10, 15.

husband started an extra-marital relationship and filed an action before the civil court to annul their marriage, claiming that the only reason for which he married the defendant, was to ensure that he did not lose any income that she brought from prostitution.

An issue arose in Civil Court regarding who of the parties was at fault for the marriage termination. The matter was of great concern to both parties, because the Marriage Act stipulates that 'the spouse who was responsible for the nullity of the marriage is bound to pay maintenance to the other spouse in good faith for a period of five years'.[231] In this case, the legal referee distinguished between moral and physical infidelity and established that because the defendant was credible with sincere intentions and had consented to the marriage in good faith, she thus could not be held responsible for the nullity of the marriage. The judge agreed with the legal referee's reasoning but failed to expressly rule on the matter of maintenance.[232]

In David Zammit's article 'The Case of the 'Faithful Prostitute*',* he explains how in this case, the fact that the judge considered the wife to be credible when narrating her understanding of marriage and that the judge was convinced that the defendant was indeed in good faith, showed that the judge had 're-interpreted the legal category of fidelity in marriage to imply that a prostitute following her marriage can nevertheless be faithful to husband'.[233] According to Zammit, the judges are likely to expand and narrow the interpretation of legal rules depending on the story told by the parties. The wife's story told from her perspective draws upon Christian understandings of matrimonial love as total commitment and surrender by each of the spouses to one another in order to reinforce her own understanding of fidelity. Zammit concludes that the Maltese legal system, because it appeals to more or less explicit Canonical principles, actually blends into and supports ordinary

[231] Marriage Act, Article 20(5).
[232] Simon Grech vs. Angela Borg, Civil Court, First Hall, 16 July 1996.
[233]Zammit (n 230).

people's efforts to use their understanding of Catholic morality as a basis for reinterpreting the official law.

It is true that in this case the judge in agreement with the legal referee concluded that the defendant was indeed in good faith and agreed that should the defendant's interpretation of 'marriage' and 'fidelity' be adopted, then the defendant would have to be considered to be faithful whilst acting as a prostitute. However, in disagreement with Zammit's conclusions, it is to be noted that the defendant lost the case, and therefore although the judge acknowledged that by her interpretation the defendant was faithful, the judge failed to validate her understanding in court. The defendant did not really manage to get her understanding of fidelity endorsed by the civil courts.

One factor which Zammit seems to have overlooked is that the official recognition granted to Canon law and the Ecclesiastical Tribunal by Maltese legislation might have acted as an obstacle to prevent the civil court from accepting the defendant's subjective understanding of fidelity and acting upon it. Therefore, although the judge was sympathetic towards the defendant and had indeed acknowledged that her understanding of marriage and fidelity were acceptable and 'in good faith,' ultimately the judge may still have understood himself to be limited as to which conception of marriage was to be adopted by the court. Whereas Zammit argues that the formal law is changing as a result of the new understanding of the Canon law concepts upheld by ordinary people, he fails to take note that the court's resistance to formally acknowledging this change could be attributed to the fossilization of the legal understanding of marriage and the dominant role of the Ecclesiastical tribunals.

4.4 The Social Impact of the Maltese Model for Religious Court Recognition

This section explores the way the Maltese model for recognising Religious Courts is perceived, experienced and responded to by ordinary people who are involved in

mixed marriages where at least one of the spouses is a Muslim. The aim is to examine how ordinary Muslims who are also Maltese nationals seek to construct their own definitions of marriage, as in the case of the 'Faithful Prostitute'; In this way, the social impact of Maltese Marriage law can be explored from the standpoint of a religious minority which does not enjoy the same recognition from the Maltese state of its marriage rules as the Catholic majority does.

For the purposes of this section, it was necessary to conduct four interviews with four spouses who celebrated their marriage in Malta, and who are Muslims. This study commenced in the context of a research project in 2012 of which a report was later compiled, entitled 'Consultative Assessment on the Integration of Third Country Nationals' [234] which aimed to conduct interviews with third country nationals, who have lived in Malta for a minimum of one year. Nevertheless, a new questionnaire oriented towards marriage and religion was developed and utilized for the interviews referred to in this thesis.

4.4.1 Methodology

The selection of interviewees was based primarily on whether they satisfied the following criteria:

1. Interviewee must have celebrated an Islamic marriage either in Malta, or if abroad, the Maltese State must not recognise that marriage.
2. Interviewee or interviewee's spouse must have been Maltese at the time when celebrating the religious marriage.
3. Interviewee must have also celebrated a civil marriage in Malta

These criteria essentially aimed to focus on Maltese nationals who celebrated a religious marriage that was not legally considered to have civil effects. These requirement aimed to ensure that the interviewees were persons who had

[234] David E. Zammit, *Consultative Assessment on the Integration of Third Country Nationals* (IOM 2012]. (IOM 2012] 26 <http://integration-iom.com/wp-content/uploads/2012/11/IOM-Report-DZ-Definitive-2.pdf> accessed 22 May 2013

celebrated both a religious and a civil marriage, such that only the latter was recognized by Maltese law.[235] Thus, the requirement that the interviewee must have celebrated an Islamic marriage is because Maltese law does not officially recognise a marriage celebrated in Malta, which is not Catholic. The interviews examine the effects that this lack of State recognition has on these individuals who profess a different religion to that established by the Maltese Constitution. The reason why this was the only religion covered by the interviews, is that after the dominant religion of Christians, mainly from the denomination of Roman Catholics, Islam is the second largest monolithic religion in Malta. Finally, the third requirement is that the interviewee or interviewee's spouse must have been Maltese at the time when celebrating the religious marriage, because the study is mainly aimed to examine the effect that the Maltese legal system has on Maltese themselves.

The research method was semi-structured interviews; because in this way interviewees were given the opportunity to share more information on their experiences when answering open-ended questions. Due to the nature of qualitative studies, each interview took a different length of time to be completed depending mainly on the interviewee's personality and the answers that the interviewee provided. Although there was a questionnaire prepared ahead of the interviews, the interviews per se were flexible in nature and therefore, the questions in the questionnaire were not asked in the particular order in which they were originally prepared and in each interview the order of questioning changed. As the interviews were semi-structured, some questions were spontaneously added in order to encourage the interviewee to continue sharing his or her experiences; whereas other questions were removed due to the direction the interview took and due to the relevant answers and information that the interviewees shared on their experiences. All the questions aimed to discuss major issues relevant to the thesis, mainly the interviewee's perceptions of: religion;

[235] The first requirement is designed to ensure that even if a religious marriage had been contracted abroad, it would still not be recognised in terms of Articles 18 and 33 of the Marriage Act.

marriage – both civil and religious marriage; termination of marriage – both annulment and divorce; and questions to discover the interviewee's opinion as to how law and the state affects religion, marriage and dispute settlement among spouses.

For the purpose of strict confidentiality, the interviewees' names have been changed, and each interviewee for the purpose of the thesis is referred to by another name that adequately reflects his or her personal background. Before each interview, the subject of the thesis was explained to the interviewees, who then signed a consent form recording that they freely agree to participate in this study. The four interviews were recorded; this was primarily to keep the interviewing at a flowing pace considering that the major issues discussed are of a private nature, and secondly, in order to make possible subsequent analyses and comparison between the opinions and experiences of each interviewee. This section, shall explore certain features that were observed, on the basis of the answers that the interviewees gave to the issues that were tackled during the interview.

4.4.2 Interviewees

The interviewees are divided into two males and two females with the ages ranging between forty and sixty. Two of the interviewees are married to each other; one of whom is the only native-born Maltese citizen from all four. From the remainder, two became Maltese citizens after having been married to a Maltese for more than 5 years, whilst another is still struggling to acquire citizenship on the same basis,.. The findings are presented in chronological order:

Interview One: Samia

The first interview was with forty-year-old Moroccan herewith named Samia. She came to Malta after being contacted by her Moroccan friend, who was married and living in Malta, informing her that a Maltese man – today, her husband – was

interested in getting to know her.[236] Samia's husband had converted to Islam many years earlier and had previously contracted both an Islamic and civil marriage with another woman. However, his first wife had abandoned him and left Malta. Although Samia's husband quickly received a divorce from the Mosque, it took a few years for him to receive an annulment from the Civil Courts. In the interview, Samia described the difficulties she faced in Malta including many incidents of discrimination that left obvious painful memories. Furthermore, throughout her life, Samia suffered numerous, unfortunate tragedies, details of which due to confidentiality and the scope of the thesis, will not be disclosed. Nevertheless, in general, Samia is an optimistic, talkative woman who describes her two children with great pride and her husband as 'a good man' because he is a family man.

A short period after Samia's arrival in Malta, the two celebrated an Islamic marriage. However, they were prohibited from signing a civil contract of marriage, because her husband had not yet received an annulment of his first marriage from the civil courts and therefore a second marriage under Maltese law would constitute the criminal offence of bigamy if conducted during the period when the previous marriage is still considered valid.[237] Therefore, Samia and her husband were unable to celebrate a civil marriage and although they were married in accordance with Islam, their marriage was not recognised under civil law. Samia describes her wedding before the Imam, in the one and only Mosque in Malta, as a very private ceremony, which included only a few of her husband's family members, and two witnesses.

The delay between the Islamic marriage and the civil marriage which Samia and her husband celebrated after Samia's husband received an annulment from his first civil marriage, that is after the birth of their first son, caused Samia serious consequences when she almost was deported. Samia recalls that whilst in hospital after the birth of their first child, the Maltese police went to talk to her and her

[236]Interview with Samia, housewife/part-time cleaner in a company (15 September 2012).
[237] Criminal Code, Chapter 9 of the Laws of Malta, Article 196.

husband, claiming that she must be deported with immediate effect because her tourist visa had expired years earlier. Samia said, ‘I cried and cried, I told them I did not know. I was married to a Maltese but they said no I was not, and then I told them my son has a Maltese father, and they said they must make tests to check. I was very afraid that they would send me back, alone, and keep my son in Malta’. Samia thought she was considered married in Malta because she had celebrated an Islamic marriage. It was only through this painful experience that she realised that Maltese state law does not recognise an Islamic marriage.

Samia and her husband could not celebrate a civil marriage at the time because her husband was still undergoing the procedure of annulment before the Civil Court of Malta. Nevertheless, Samia and her husband eventually celebrated a civil marriage after her husband was granted civil annulment. Nonetheless, Samia pointed out that both her husband and she, at the time were concerned about the consequences that they may encounter due to the lack of divorce under civil law; ‘I was very afraid about that. That example he leaves me and I cannot get civil divorce because in Malta no divorce at the time. And, I think he was afraid too.’ Nevertheless, Samia overcame her fears of divorce and did celebrate a civil marriage which she describes as ‘just the signing of an agreement, which meant [they] could apply for public housing to buy a house from the government’.

Samia made a great distinction between the two marriages; the Islamic marriage being ‘the real one’, whilst the civil marriage was mainly a convenience through which she could stay in Malta without worrying about visa, could apply for public housing and would eventually receive Maltese citizenship. For Samia the date of marriage is the Islamic marriage. According to Samia the Islamic marriage is the ‘real one. Everyone considered [them to be] married after [the] Islamic marriage, even his family’.

When asked whether she cohabited with her husband when first moving to Malta, Samia said, ‘of course not. I am Muslim. I cannot live with a man unless he is my

husband, my father or my brother'. Samia pointed out that when she first came to Malta she lived with her Moroccan friend who had moved to Malta many years earlier. It was subsequent to the religious marriage celebrated in Malta that Samia and her husband moved in together at first living with his family, then subsequently renting a house.

In general, Samia feels discriminated upon by the Maltese society and authority. When asked whether she finds any difficulties on practicing Islam in Malta, Samia answers 'Sometimes, because people stare at me because I wear scarf. Even for a job, this is a very very big problem… in general many of my friends tell me, it is very very difficult to find a job. People do not realise I speak Maltese, its very similar to Arabic. The Maltese are Arabs but they do not realise it. We are the same. On the bus, they sometimes say I stink or I am dirty, but I understand them'. Samia described that after a substantial sum of money was stolen from her home, the police spoke to Samia's husband in front of her father-in-law, and accused Samia of stealing the money to send to her family; 'They told him that maybe I took it to send to my family. They told him in front of his father'.

When asked her opinion on Maltese laws on marriage, Samia said, 'I think it is not fair that Islamic marriage is not considered as marriage. It is marriage. Allah will consider me married, and this is very important to me. But in hospital the police said no. But then I married with Maltese marriage, and still they said I am not Maltese. I had to wait five year'.

Interview Two: Ali

The second interview was with Ali, a forty-three year old Libyan who twenty-three years ago met his native-born Maltese wife at a nightclub in Malta.[238] Ali described how he happened to come to Malta, while waiting for a visa to go back to an Asian country where he was a university student, but due to issues in getting the visa and after visiting the Maltese university, he decided to further his study in accountancy

[238]Interview with Ali, Marketing Researcher (9 February 2013).

in Malta. Ali gave a detailed account of the first few months after the first encounter with his wife and the series of coincidences, which brought them together. Furthermore, Ali described with excitement the first meeting with his wife's parents – particularly, her mother – in terms of crossing a great divide between cultures.

Whilst Ali was not worried about his father-in-law, whom he describes as an easy-going man whose main concerns is his work as a farman, his mother-in-law 'is a very educated person, so she maybe had some worries at first, maybe i was going to change and force her daughter to wear the hijab, and put her in the home'. Ali explains that in his first meeting with his mother-in-law, he specifically asked her to discuss with him anything that was worrying her; 'I told her, tell me, everything whathever you want to say. Not cause I am Arab or Muslim you want to hide something from me. Tell me everything'. Ali pointed out that his aim was to discuss her worries on the Muslim lifestyle particulary headscarf because '[s]ometimes there is misinformation, you know what people are hearing about [Muslims and Arabs] is not always true'.

Ali emphasised, that when his university course came to an end, he and his wife had to decide whether to get married. As much as he wanted to stay in Malta, Ali pointed out that he would not breach Maltese legislation; 'I am not the type of person, who likes to break the law, the visa, you know. I don't like this. Either I stay with my dignity or I leave'. Therefore, Ali emphasises that all decisions where taken together and that their marriage is not a marriage of convenience to get Maltese citizenship because he did not mind the alternative, that of going back to Libya; 'I have my country there, and I am happy there. I have my family, my money, and I don't even come for money or working, it was not in my mind at the time. I was actually, getting money from Libya, and spending here. So I asked her what she thinks and she said yes, I will be very happy to get married'.

Ali continues to be Muslim, whilst his wife is officially Roman Catholic. Nevertheless, although she officially never converted to Islam, Ali remarks that 'she

is doing Ramadan, fasting… she taking care of Islamic religion for [our] children more than me, even trying to understand the Quran… she practice more Islam than Catholic'. Ali points out that his wife's reaction when learning further on Islam was that the two religions shared more similarities than differences; 'she told me, when I gave her books on Islam, she told me that more or less we are the same. The big difference is the salib. So if its a problem, we just put it aside. So now, she is more practicing Islamic religion; but I never force her and how she dress'.

Ali and his wife celebrated a civil marriage in Malta and subsequently an Islamic marriage in Libya. When asked why he did not celebrate his Islamic marriage in Malta, Ali explains 'in Libya they think that [in Malta there is] only marriage for Christians, so I did Islamic marriage in Libya'. Therefore, Ali felt the need to celebrate an Islamic marriage in Libya because any marriage in Malta, including a civil marriage is considered to be a Catholic marriage in Libya.

Unlike the other interviewees, Ali did not particularly distinguish between the different marriages. Ali describes the Islamic marriage, as a contract of love between the spouses, which initiates from the moment that the two mutually agree and freely consent to their marriage. Marriage, according to Ali, should not be based on formalities, but rather on the relationship and the substance of the relationship. In Ali's opinion the true marriage is the Islamic one and primarily because it is not based on form. According to Ali, a true Islamic marriage is based on the substance of the marriage itself; 'For me, what I believe as a Muslim, is that it does not have to be in front of Imam. Family friends, this is Islam'.

Furthermore, Ali describes his civil marriage celebrated in Malta, as a fusion of a civil and canonical marriage; 'I cannot get married by church, because I am Muslim. So we decided, the people who are working there (at the civil registry of civil unions), they will come there (to the venue of our wedding). They told us this was the first time, because usually people go to their office… we did it like it was in a church, our guests and us. They were sitting at table and we signed there with

the people all there it was the first time they had like this'. According to Ali, although the ceremony and the form of marriage are not important, the institution of marriage itself is fundamental in Islam. It is the couple's decision to get married that he considers marriage and not the external formalities. In his opinion 'Islam marriage is important, but not very different. Islam is the true marriage but like Maltese marriage we also sign'. Therefore, although in both civil and Islamic marriage there is a signing of a contract, it is the union of the couple's will to get married that is of essential value.

According to Ali, 'what they are doing here in Malta in the mosque, if you are Muslim and wanted to marry in the Muslim way, by law you are not supposed to do it here, so what they are doing, it is against the law'. Ali sees no space for legal pluralism in Malta. According to Ali, Islamic marriage in Malta is not recognised and hence illegal. This further explains his fusion of a civil marriage into partially 'a church wedding', to abide by what he considers to be Maltese legislation.

Ali's mother was not supportive of Ali's decision to marry a foreigner; 'she wanted me to marry a Libyan, and even after all these years my mum said that you are not married to a Libyan than you are still single.' Ali adds that the issue for his mother was not particularly personal against his wife, but rather the fact that he did not marry a 'Libyan woman and [have] a Libyan wedding', which is a seven-day celebration. This is another dimension of legal pluralism, where there are in the mind of the interviewee three different types of marriages in Libya; an Islamic marriage, a state law marriage, a Libyan marriage based on tradition and an infusion of all. When asked on the differences between a civil wedding in Malta and an Islamic marriage in Libya, Ali says that '[a]ctually as documentary wise its quite the same, we also had to sign. But, celebration wise its quite different, there example women and men are alone celebrating, whereas here together'. Therefore, Ali is distinguishes between the legal aspect of marriage being the signing of the contract, both from the parties consent to marry and from the celebrations of the marriage.

Although Ali's mother did not fully bless the wedding, his family always sends his wife presents. Ali feels 'very lucky, me and my wife, sometimes I hear of Maltese people married and they have many problems'. When asked about divorce, Ali remarks that the right of divorce is very important, 'not because you are playing with woman, but you know sometimes, if life is miserable then the only option sometimes is divorce'. Ali commented that the necessity of divorce in Malta was very visible, where the spouses 'are both miserable… they are living in hell inside their house and by law they cannot get divorce'.

Interview Three: Maria

The third and fourth interviews were conducted with the married couple: Maria and Omar, respectively on separate occasions.[239] Maria, a native-born Maltese, who lived and worked in Libya in her twenties. She was introduced to hear husband by Maltese friends that the two had in common. During Maria's stay in Libya, she and Omar shared a nine-year-long friendship. According to Maria, Omar had proposed only a few months after their first meeting, but she rejected the first proposal and it was only years later when the two grew fonder of each other that she agreed to marriage; 'every time I had off of work I used to meet him up and we grew closer'. After the termination of her employment in Libya, Maria returned to Malta where she celebrated an Islamic marriage and one month five days later a civil marriage.

Maria explained that she converted to Islam about three years before marriage, however, she points out that she 'practiced Islam long before [she] became Muslim' in an official manner. Maria pointed out that when she 'started to see the culture and his (her husband's) family, everyone so kind' she was attracted to learn more about Islam. Maria pointed out that she was still a Catholic when she started fasting the month of Ramadan; 'I became Muslim, because it seemed to me that not only is it a good religion, but also I had in mind that our relationship was going well, and I wanted to get married in the future to a Muslim man, so to me since I

[239] Interview with Maria, Learning Support Assistant (19 February 2013); Interview with Omar, Translator (10 March 2013).

was going to marry a Muslim man it felt we would be closer and can raise a better family if we had one religion'.

Maria recounted a specific incident held before her marriage, which further distanced her from the Catholic Church. Maria had visited a Roman Catholic institution in Malta for further information on marrying a foreigner, but was thrown out without being given any opportunity for discussion. According to Maria, this is because Catholicism like Islam is a patriarchal religion, and therefore a woman must raise her children according to her husband's beliefs. Hence the priest was not interested in futilely discussing her marriage to a Muslim man; 'he considered me not to have a say as a woman, even if I stayed Catholic'. Maria also went to a religious seminary to study the differences between Islam and Catholicism; but she is of the opinion that 'there was no cooperation in helping [her] understand, I felt that both the Imam and the Priest were just saying that theirs was better'.

When asked to recount the day of her wedding, Maria immediately describes her Islamic marriage, which was celebrated at the mosque in Malta. She describes that it was an intimate celebration, and that although both her parents are Roman Catholics, they attended the ceremony. On the other hand, her civil marriage was also very intimate and because she and her husband -had already been cohabiting it was like a night out with friends, who in this case were also witnesses of their civil marriage. When asked whether there are any differences between the two ceremonies, Maria answered that both marriages are unions of two people, with the location being the prime distinction. However, when asked when she considered herself to be married, Maria answered that it was after her Islamic marriage. Nevertheless, Maria points out that the civil marriage 'is important for recognition'.

Maria acknowledges legal pluralism when commenting that 'without civil marriage for Malta, I would be considered as cohabiting and although in the eyes of God I am not, I wanted that my principles would be evident to the Maltese society'. Maria

pointed out at a later stage of the interview, that in Islam it is important that the couple is married before living together. However, her concern is obviously not only with Islam and the importance of not cohabiting, but also with the view of her by the Maltese society both from a moral standpoint and from a Catholic view of her as being a sinner should she cohabit before marriage.

When asked about the changes she would make to Maltese law, Maria answered that her main concern is that her children will not have any problems in getting married; 'I want equality between all religions and that my children will not have problems whoever they decide to marry, and whichever religion. Religions should not create separations, religions are there to create union. Between all the people, and even between couples'. Therefore, Maria's plea is both for freedom of religion and marriage celebrated in whichever religion. Maria attacks Malta as being theocratic; 'What I wish in the future, is that Malta is not recognised as Catholic, but as multicultural where everyone is accepted with his religion'.

Maria's advice in order to have a successful relationship between spouses of mixed nationalities or religions, is that the parties must compromise as to what religion, if any, will they raise their children. Maria suggests that not only will the could discuss the religion that they will raise the children in, but also that it will be written in contract form; a contract which will include 'what will they teach the children, are they ready to teach them both religions or maybe no religion and then the children will decide when they grow'. The latter option, once again shows Maria's sensitivity to the right of freedom of religion.

<u>Interview Four:</u> Omar

Omar is a sixty-years old male of Libyan nationality, who acquired Maltese nationality after marrying Maria, the third interviewee. Although Omar has lived in Malta for twenty-eight years, and has Maltese citizenship, he points out that 'everyone in Malta call [him] "the Libyan"'. When asked who had proposed, he

answers that ‘it was meant to be’, challenging the very idea that marriage is about a voluntary choice by individuals and invoking the power of destiny and God’s will as being dominant over all state and religious laws.

Omar claims that ‘the Maltese law only accepts marriages before the Church or the civil registry office’. He comments, ‘because I am Muslim, I cannot marry in the Church. I had to get married through Islamic procedure and then the civil registry’. According to Omar, the true marriage is the Islamic marriage even if not recognized by Maltese law, whilst the civil marriage is merely a formality. Omar made a distinction between the Canonical marriage and the civil marriage, and a greater distinction between the civil and religious marriage. Omar points out that although he finds Islamic marriage to be the most important, he respects a church marriage and in fact considers a church marriage to be more important that a civil marriage. In fact, he is of the opinion that ‘the church is the mosque of the Maltese’. According to Omar, a civil marriage is ‘only for the government papers, at the registry. Many foreigners do it just to stay in Malta’. Omar is also aware of the Libyan law on marriage, primarily because to marry a foreigner, he required a special permission from Libya.

Omar defined marriage as a utilitarian concept, an institute which exists for the common good; ‘Marriage is a permanent contract between two, a male and a female, committing themselves to create a family. This is necessary for a good society. A good society is based on families, and families are based on marriage’. Furthermore, when questioned on divorce, Omar explained it based on its relationship with marriage. According to Omar, although one ‘ marr(ies) for life, but there are some reasons where due to serious grounds, the marriage terminates and therefore Islam, because it values the institute of family, it allows the spouses to divorce and start a new family’.

Omar thinks that 'Malta as a country does not give much opportunity to foreigners. He feels very much discriminated against and recounts numerous incidents of discrimination against Muslims, Libyans and Arabs in general; 'unfortunately, in Malta the Maltese feel closer to European, and maybe now even more associating themselves with Europeans and trying to depart from their roots which is closer to the Arabs… When I go abroad, like in Germany, they tell me that Maltese are Africans. But, Maltese look down on Arabs'. Omar points out that from this standpoint Maltese are uneducated. It is to this lack of education that he attributes the blame for the fact that the Maltese state 'does not recognise Islamic marriage at all. I think for Maltese they think Islamic marriage is a joke'.

4.4.3 Key findings

As already explained, the purpose behind conducting the interviews with spouses who had conducted an Islamic marriage was to explore the way in which they experienced and responded to what was earlier called "the Maltese model for Marriage Recognition." One of the central findings is that this model, with its explicit and a priori state recognition of Catholic religious marriage and its concomitant refusal to recognise other kinds of religious marriages, seems to have stimulated unofficial practices and norms by which Islamic spouses give value and importance to the Islamic form of marriage. The interviewees insisted that the Islamic marriage they had conducted was the real marriage, by contrast to the civil marriage ceremony, which was described as just a formality necessary to achieve Maltese state recognition; thus inverting and calling into question the system codified by positive law which does not grant even minimal recognition to Islamic marriage. This connection between the "weak legal pluralism" of the state and the "strong legal pluralism"[240] which has developed unofficially was made particularly clear in the interviews with Samia and Omar. Both of these interviewees linked the lack of recognition of Muslim marriage to their experiences of discrimination within Maltese society.

[240] Vide chapter one, section 1.2 for an explanation of the terms "weak" and "strong" legal pluralism.

In this context the decision to enter into an Islamic marriage has to be seen as more than simply an attempt to legitimise their marriage in the eyes of other Muslims. It is a direct response on their part to a system, which seems to (a) give a privileged status to Catholic marriage and (b) conflate Civil and Canonical marriage. At the same time, the interviews showed that the legal pluralism encountered and constructed by these spouses is a bewildering variety of different levels and kinds of legality. Apart from respecting Maltese state laws by entering into a civil marriage, the legitimacy of a marriage had to be negotiated by taking into account the demands of Islamic law (the prohibition of extra-marital cohabitation), Libyan state law (which required an official permit to be issued to sanction a marriage), Maltese society (which tended to see a Church marriage as the only real one) and Libyan society (which emphasised the importance of a week of public festivities as an integral part of a marriage). As a result, interviewees adopted matrimonial strategies which sought to satisfy these different audiences by conforming to all these different levels and kinds of legality. For example, Ali's civil marriage by being held in a hotel was converted by him into "almost a church wedding" in his bid to have his marriage recognised by Maltese society, while his Islamic marriage was staged in Libya and accompanied by the customary Libyan festivities.

Furthermore, Ali and Maria appeared to internally resist a pluralised understanding of what marriage is by developing a contractual understanding of marriage as an institution which transcends all human laws, including religious ones and is based on the union of the wills of the spouses, which occurs at an internal psychological level and which cannot be captured by any external form or ritual. Thus, some of these spouses appear to have developed an understanding of marriage as something which takes place on an existential plane which goes beyond law and for which they alone are responsible before God. This clearly shows how legal pluralism in the strong sense of the word is developing in Malta in response to state laws, which only appear to sanction a form of weak legal pluralism for Catholics. In the process, spouses like Ali and Maria are asserting their control

over the true meaning of marriage in regard to both the Maltese state and the Islamic authorities.

4.5 Conclusion

This chapter has argued that the kind of recognition given by the Marriage Act to the Maltese Ecclesiastical Tribunals is so distinctive that it is best considered as a *sui generis* 'Maltese model of Recognition', characterized by the dominant position ascribed to the Ecclesiastical Tribunals and the *a priori* way that they are linked up to the Civil Courts. This model has been shown to hamper the efforts by both the civil and the religious courts to develop their own interpretations of the respective rules. In the final section, it has been shown how this situation is spurring ordinary Muslims living in Malta to develop their own understandings of marriage and to regulate their lives accordingly. Thus it can be observed how the formal, official, legal pluralism through which the Ecclesiastical Tribunals have been recognised is itself helping to stimulate the development of informal legal pluralism at the grass roots level, where ordinary people assert their own normative understandings of marriage. At the same time, these new understandings are unlikely to have much influence within the legal system, so long as key features of the existing system remain in place.

The interviews further provide evidence that the understanding of 'marriage' is not to be taken for granted as homogeneous. Although all the interviewees professed to be Muslims and consider themselves to form part of the Islamic community, the understanding of 'marriage' from one interviewee to another changed. This in itself provides evidence of the greater explanatory power of the new idea of 'culture' which was discussed in Chapter one, which provides a good framework for thinking about religion and marriage under religious law. Religion is not a fixed and unchanging set of rules and the understanding of marriage is not homogenous but changes according to the individual, time and place. It would appear that these Maltese Muslims, living within a majority Catholic society, occupy a social niche in

which there are important incentives to develop and change the way they understand Muslim marriage.

Finally, it should be noted that as an outcome of Malta's General Election held on 9th March 2013, the Labour Party won a majority of seats, with the party's leader Dr. Joseph Muscat taking the office of Prime Minister. On 11th April 2013 – only a month after the new government in parliament – The Times of Malta, reported that the new government approached the Vatican by writing to the Holy See, requesting discussion with a view of revising the 1992 Church-State agreement relating to marriage, so that the Civil Court would no longer be subordinate to the Ecclesiastical Tribunal.[241] In line with the principle of Secularity and separation between the Church and the State, the Government believes that the Civil Court must be supreme with regards to cases on marriage nullity.

The Archbishop of Malta, Archbishop Cremona in reply to the plea for discussion for an amendment of the current situation whereby the Ecclesiastical Tribunals are superior to the Civil Courts, was reported to reply that the Church was indeed available for such talks; 'Together we will see what is best for the Maltese population even with regard to civil marriage'.[242] Until the publishing of the Thesis, May 2013, no reply by the Vatican has been reported.

[241] 'Vatican invited to talk on Church-State deal: Government wants courts to rule on Church marriage cases', *The Times of Malta* (Malta, 11 April 2013).
[242] ibid.

5. CONCLUSION

Cultural diversity is a fact, and this suffices to indicate the necessity of adopting a system where minority groups with their religious and cultural rights, do not feel oppressed under the dominant culture. Chapter One established that the legal system should facilitate the possibility that members of minority groups settle their disputes before religious courts; for it is likely that they will bridge the gap between religious law and the state legal system whilst safeguarding human rights and gender equality. Similar to Bowen's study of Indonesian town courts whose judges solve disputes taking both customary and religious legal norms into consideration.[243]

To explore this further and to shine some light as to which model is best suited for a predominantly secular, multicultural state, the next three chapters of the thesis examined the Beth Din, the Muslim Arbitration Tribunal (MAT) and Sharia Councils in England, and the Ecclesiastical Tribunal in Malta.

5.1 Comparing Models

The most appropriate model for religious courts in predominantly secular states, should meet the recommendations established under Chapter One. After the study on religious courts in Malta and England, the following conclusions can be drawn:

1. There should be no official, a priori recognition of religious texts, laws or sources and no official, a priori recognition of religious courts, tribunals or councils.

A priori recognition of religious texts, laws or sources is dangerous because it fossilises religious law into one rigid interpretation which can be very problematic, as illustrated by the British colonial experience in India, with the codification of

[243] John R. Bowen*, Consensus and Suspicion: Judicial Reasoning and Social Change in an Indonesian Society 1960-1994* (2000) 34(1) J Law Soc'y 97.

Anglo-Mohammedan law discussed in Chapter One. Whilst in this case, the colonial courts found creative ways to interpret the religious law according to the cases before them, in Malta, the formal recognition of the Code of Canon law restricts the state judges to following only one particular religion or authority of interpretation of one religion, as evidenced by the faithful prostitute cases discussed in Chapter Four.

On the other hand, the English model allows the religious court to bridge the gap between religious laws and sources whilst safeguarding human rights and gender equality, which a strict interpretation of the religious laws may imperil. The Beth Din, MAT and Sharia Council have the possibility of interpreting the laws according to different schools of thought depending on each particular case. Furthermore, when there is no a priori recognition of the religious courts, there are no specific established procedural rules that they must adopt. Consequently, religious court may amend and adopt new procedural rules according to the different needs that may arise in the future, thus allowing development without unnecessary bureaucracy. For instance, Chapter Three provides an example of the Sharia Councils amending their own procedures and interpretations, justifying this because they must examine the different schools of thought before deciding what is most suitable for them.

From the study of the different models, it is concluded, that it is preferable to avoid this rigidity as it allows flexibility in interpretation of adapting to the case and allowing the judge to diverge where necessary and allowing flexibility for the religious court, tribunal or councils to amend its procedure if the necessity arises, all of which are lacking in the Maltese model.

2. There should be formal recognition of the decisions of the religious court, tribunal or council only after certain criteria are observed;

a. *human rights and gender equality must be respected.*

The state courts must avoid a priori blanket approval to whatever decision the religious court, tribunal or council emits, but should rather recognise the decisions of the religious adjudicative body only after it determinates that the decision does not breach human rights and gender equality. This envisages that the parties' rights must be safeguarded and that a fair hearing is provided.

The Maltese system guarantees that the Ecclesiastical tribunal's decision will subsequently have civil effects with very limited grounds on which to decide otherwise. Such grounds bind the state courts, and as illustrated by jurisprudence, the Court of Appeal attempts to express any objections it may have, against providing civil effect to the tribunal's decisions, through these restricted review grounds allowed. Furthermore, the Maltese model creates a situation where legal pluralism is fossilised, which consequently tends to prevent Catholic understanding of canon law from developing further because the church hierarchy is placed in an overly powerful position leading to a lack of responsiveness to new understandings of canon law developed by Catholics and creating resentment from believers in other religions, as evidenced by the interviews in Chapter Four.

England presents a contrasting model in Chapter Two and Three, where the state legal system creates more criteria and standards that the religious courts must adhere to in order to be recognised. It is recommended, that unlike the Maltese model, the religious courts' decisions should pass through a higher degree of scrutiny by the state courts, before they enforce the arbitral award or decision. Unlike Kukathas suggested 'politics of indifference,' the role of the state courts is essential to examine that the state laws are not being breached before enforcing the decision.

b. *both parties should voluntarily agree and consent to submit to the jurisdiction of the religious court, tribunal or council – failing to respond or to object is considered to be submission.*

The recognition of religious courts is limited to their decisions insofar as these can be construed as private adjudicative bodies to which the litigants have voluntarily agreed to submit their case and insofar as their decisions can be understood as compatible with the underlying values of state law. The Beth Din, MAT and Sharia Council require that both the litigants to a dispute agree that the religious court, tribunal or council has jurisdiction to arbitrate their dispute; otherwise, their decisions are not formally recognised as seen in Al-Midani v. Al-Midani discussed in Chapter Three. Therefore, the element of choice is available for both the parties to the dispute, as the parties must sign an arbitration agreement.

This system is preferable to the Maltese system because it caters for flexibility and the element of choice. In the Maltese model, if one of the spouses applies for annulment of the canonical marriage before the Ecclesiastical tribunal, the tribunal will have jurisdiction on the matter superseding the Civil Courts, even if the other party wishes otherwise, as in Cassar vs. Deguara, discussed further in Chapter Four. Furthermore, even if the other party objects to the Ecclesiastical Tribunal's jurisdiction, the decision of the tribunal will have an absolute impact on the civil marriage.

3. The state legal system should respond to legal pluralism without creating a sense of discrimination in favour of one side or the other.

The codification of dual marriage within the Maltese legal system is as a direct consequence generating greater pluralism at the grassroots level. This was proven in Chapter Four by the series of interviews conducted with Muslims in Malta, who celebrated an Islamic marriage that the state legal system fails to recognise. The system in England is more satisfactory from this perspective than the Maltese one,

because it does not select a particular privileged group for recognition. In the models examined in England, the internal relationship between the state, the particular religious communities and the way ordinary believers respond is more or less invariant across different religions.

In Malta, the fact that both Canon law and Ecclesiastical Tribunals are officially recognised a priori by the state (weak legal pluralism in Griffith's sense) means that ordinary believers have to create their own norms (leading to strong legal pluralism) in order to inject flexibility into the system to accommodate their own needs. This was observed both in the interviews conducted and in the faithful prostitute case in Chapter Four. Therefore, it seems that in reality, rather than expressing the legal pluralism within the state's legal system, the state system is fragmented and provoking more pluralism at a grass root level.

It is necessary that the legal system does not solely recognise one particular religious court, tribunal or council, not only because it creates resentment between religions, as evidenced by the interviews, but also because one cannot promote minority rights by only promoting the rights of one group. As Kymlicka points out, the desire to protect minority rights is very much motivated by the democratic problem; that ultimately democracy is not only protecting the rights of the majority but also those of the minority groups. Furthermore, from Kymlicka's liberal perspective discussed in Chapter One, it is necessary that the state recognises the individuals' right to choose. Therefore, to do so, the state must provide the individual with as much scope as possible for different choices and foster different religious traditions.

4. The state legal system should create a dialogue between the religious courts, tribunals or councils and the state courts so that no side dominates the other.

The Beth Din, MAT and Sharia Council are informal in England but at the same time, the state legal system encourages the state courts to recognise the religious

tribunals and their decisions, by means of the Arbitration Act and the Divorce (Religious Marriages) Act 2002, without them being formally recognised by the state. The model of England is one that creates an incentive for the Beth Din, MAT and Sharia councils to aspire to be recognised by the state, rather than taking it for granted that operating under a religion is equivalent to operating under divine truth. The Beth Din, MAT and Sharia council as discussed in Chapters Two and Three, have an incentive to think critically about their decisions, and hence an inducement that their decisions should conform to human rights.

On the contrary, the Maltese model automatically recognises the Ecclesiastical Tribunal's decision; with the latter not only affecting the civil courts by limiting them from hearing any future actions on the same matter, but also, superseding the Civil Courts. Therefore, there is little dialogue between the Ecclesiastical Tribunal and the state courts. The Ecclesiastical Tribunal decisions, as discussed in Chapter Four affect permanently both the canonical marriage and the civil marriage. Therefore, the Ecclesiastical Tribunal even steps beyond its terrain by deciding the fate of the civil marriage.

5.2 Concluding Remarks: Proposals for Malta

Based on the recommendations set out in the thesis, in order to ensure that culture and religion are not fossilised, and that both the religious courts, tribunals or councils and the state courts do not overly constrain one another, the preferred option is for the courts to utilise existing law in order to extend recognition to all the religious courts in Malta in so far as their decisions safeguard human rights and gender equality. The situation today is that not all religious courts share the same recognition and consequently there are plural parallel legal systems. It is suggested that as in the English system, religious courts could equally operate in Malta under state law, such as through the Maltese Arbitration Act.[244]

[244] Arbitration Act, Chapter 387 of the Laws of Malta.

However, the following are the main problems with using the Arbitration Act in this way:

(i) It refers to the Malta Arbitration Centre as the venue for arbitration. The centre oversees the arbitration procedure; and,

(ii) It excludes disputes concerning questions of personal civil status from the preview of arbitration, including those disputes relating to personal separation, divorce and annulment of marriage; although the spouses may arbitrate on division of property if the competent court approves of the arbitration agreement and the arbitrator to be appointed.[245] Therefore, although the limitation on arbitrating upon the civil marriage may be supported as a matter which must be decided upon by the Civil Court, one may argue it is unlikely that the state courts would allow for instance the Imam or Dayan in Malta to arbitrate on the division of property between the spouses on the ground that this goes against the public policy of Malta. Principally, this argument is based on the fact that Malta bases its public policy on canon law.[246] However, further research in this area is needed to examine this further.

Nevertheless, the Maltese model is likely to change or one can argue is already changing, primarily due to the introduction of the possibility of divorce from civil marriage in 2011. One cannot ignore the fact that with this development both legal and social change have come about, placing in question traditional understandings of Maltese marriage law as identical with canon law on marriage.

Another reason for claiming that Malta is taking the necessary initial steps to amend the current model is based on the legal change suggested by the current government to alter the relationship between state courts and the Ecclesiastical Tribunal, so that the state courts would have a superseding role in marriage

[245] Ibid Article 15(6)
[246] Bonello (n 201).

annulment, at least with regards to civil marriages.[247] Furthermore, in Malta it appears that a Bill is about to be published regulating civil unions. [248]

Nevertheless, although other religions have always existed in Malta, not only through migration and immigration, but also due to Maltese converting to other religions, they remain as yet ignored and the rights granted to religious minority groups still remain very limited. In consequence, these religious minority groups generate legal pluralism and furthermore, have their own religious bodies to regulate on religious marriages and their termination. It is therefore recommended that when these proposed legal changes are made, further research be conducted to understand better how they interact with and influence the cultural and legal hybridity of Malta.[249]

[247] 'Vatican Invited to Talk on Church-State Deal: Government Wants Courts to Rule on Church Marriage Cases', *The Times of Malta* (Malta, 11 April 2013).
[248] 'Civil Unions Bill in Parliament after the Summer Recess', *Times of Malta* (Malta, 6 June 2013).
[249] Sean Patrick and others, *A Happy Union? Malta's Legal Hybridty* (2012) 27 Tul Eur & Civ LF 165.

QUESTIONNAIRE USED IN THE INTERVIEWS

Status

1. Male or Female
2. Status:
3. How old are you?
4. How old is your spouse?
5. In which country were you born?
6. What is your nationality?
7. What is your Spouse's nationality?
8. What do you do?
9. What is your spouse's occupation?
10. How long have you/your spouse been living in Malta?
11. Why did you/your partner decide to come and live here?
12. What is your religion? What religion is your Spouse?
13. Do you find any difficulties practicing your religion in Malta?
14. How/when did you and your spouse meet?
15. How old were you?
16. How old was your spouse?
17. Was it your first relationship?

Matrimonial Strategies/Plans

18. Who proposed? How?
19. Were your parents involved in your decision to marry?
20. Did you have a long courtship before marriage proposal? Why?
21. Were your respective promises to marry one another formalised in any way? Ex. betrothal, meeting in-laws, buying a house together
22. Did you make a marriage contract? Explain.
23. How many years did you know your spouse before marriage?
24. Did you discuss about anything related to marriage with your spouse before getting married? Explain

25. Upon marriage did you and/or your spouse plan to continue to live in Malta in the future?
26. Did you have a civil marriage, a religious marriage or both?
27. How was your wedding? What plans were involved?
28. Did you experience any difficulties?

Marriage Ceremony & Aftermath

29. In case you married both by means of a Muslim and a Maltese civil ceremony; What is the difference between each ceremony?
30. Which was first?
31. How many years passed between each ceremony?
32. Could you explain why you did this?
33. When did you feel you were really married?
34. When did you start to live together with your spouse?
35. After getting married where did you live? in Malta/abroad?
36. Where is your place of residence?

Experience of Marrried Life

37. What were your expectations before getting married? Is married life like you imagined?
38. In general, do you feel happy with how everything turned out?
39. Do you regret any of the decisions you took when you were planning your married life together?
40. Did either spouse change his/her beliefs/identity before or following your marriage? Why?
41. How is your relationship with your parents / siblings?
42. How is your relationship with your in-laws?
43. How did your relatives react to you getting married?
44. Did your family give you any advice on marriage? On marrying a foreigner?
45. How is the relationship between your spouse and your parents / siblings / relatives? Do they like your spouse?

46. Do you have children? How many?
47. When did you have children?
48. Did you discuss children before marriage?
49. What religion are your children?

Discrimination – Legal Consciousness

50. Do you feel discriminated in Malta? If yes, in what way?
51. What do you think about divorce?
52. What do you think about annulment?
53. What do you think is the difference between divorce and annulment?
54. Do you feel that Maltese law grants adequate recognition to Muslim marriages?
55. Do you feel that Muslim marriages are recognised by Maltese society?
56. What changes would you like to see in the Maltese law on marriage?
57. Are there any points you wish to elaborate upon in relation to the above?
58. What advice would you give young Muslim &/or mixed couples who are thinking of making a future together in Malta?

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