

The Cultural Impact of Islamic Mass Immigration on the Italian Legal System*

by E. Falletti, Lecturer in Private Comparative Law at Università Carlo Cattaneo-LIUC, Castellanza, Italy.

Email: efalletti (at) iuc.it

ABSTRACT

Although Italy has been a country with a strong tradition of emigration, only in the last twenty five years Italians have had to face the social, juridical and cultural problems related to high immigration hosted by this country. The majority of immigrants come from areas with Islamic religious tradition such as Northern and Central Africa and the Middle East. The cultural impact between the Italian Catholic tradition and the newcomers' faith and customs has been very strong, often problematic. The aim of this paper is to investigate the most relevant issues between the cultural and legal aspects of Islamic culture pertaining to immigrants living in Italy with the Italian legal system. The legal areas proposed for the investigation are related to self determination, personal integrity and family law, especially for analyzing the impact of cultural differences on public policies and social behaviour. The methodology used regards a comparative and a multidisciplinary approach.

KEY WORDS

Immigration – Religion – Law – Non-discrimination – Culture

1. Introduction: Immigration and Religion in Italy

Italy has seen an increase in migratory waves during last twenty years¹ reaching the estimated number of 5 and a half million people between foreigners and unregistered migrants as of January 1, 2014.² Among them the Islamic presence is growing. It is a certain fact, although recent³ and difficult to quantify.⁴ According to Pew Research Institute, Muslims in Italy in 2010 constituted 3.7% of the population, while the prospective growth for 2020 will quantify them at 4.9%.⁵ Institutional analysis divided data related to immigrants according to specific categories such as citizenship, work or health but not for religion. This is evident in the analysis of immigration flows or integration strategies carried out by the General Directorate of Immigration and Integration of the Italian Ministry of Labour and Social Policy. In these reports on foreign communities,⁶ there is no trace of religious issues such as the lack of appropriate worship places. Recalling the Swiss writer Max Frisch's words⁷ on the Italian immigration in Switzerland in the

* Provisional version of the paper discussed at the “International Conference on Religion and Equality” June 9-11, 2015, Bar-Ilan University, Faculty of Law.

1 Vincenzo Cesareo, “Vent'anni di migrazioni in Italia”, in V. Cesareo (ed.), *Fondazione ISMU: Ventesimo Rapporto sulle migrazioni: 1994-2014*, (2014), 7.

2 MIGRANTES, “XXIV Rapporto Migrazioni” 2014, retrieved 17 Oct. 2015, http://www.chiesacattolica.it/pls/cci_new_v3/v3_s2ew_consultazione.mostra_pagina?id_pagina=71522; Catherine Wihotl de Denden, *Atlante mondiale delle migrazioni*, (2012), 40.

3 Erminia Camassa, “Caratteristiche e modelli organizzativi dell'Islam italiano a livello locale: tra frammentarietà e mimetismo giuridico”, in C. Cardia, G. Dalla Torre (eds.) *Comunità islamiche in Italia: identità e forme giuridiche*, (2015), 123, 125.

4 Roberta Aluffi Beck-Pecoz, “Islam: unità e pluralità”, in S. Ferrari (ed.), *Musulmani in Italia*, (2000) 53.

5 Retrieved 17 Oct. 2015, http://www.globalreligiousfutures.org/countries/italy/religious_demography/#?affiliations_religion_id=0&affiliations_year=2020

6 See the reports on Moroccan, Tunisian, Egyptian, Pakistani communities of the Ministry of Labour and Social Policy available on <http://www.integrazionemigranti.gov.it/Attualita/IIpunto/Pagine/Focus-comunita-2014.aspx>, retrieved, 17 Oct. 2015.

7 See M. Mantovani, “Max Frisch. Cercavamo braccia, sono arrivati uomini”, (2012).

Sixties, "we wanted workers, but we got people" (*cercavamo braccia, sono arrivati uomini*), sociologists confirmed this perspective affirming that the Italian model of integration through labour has broken down because of the systematic and economic crisis.⁸ However, immigrant people recognizes themselves mainly through their religious identity. The analysis of the religious beliefs of immigrant communities is done not by public institutions, but by non-neutral ones such as Catholic organizations on immigration.⁹

Table 1: Non EU Citizens holding a residence permit, indicators of main citizenship, total and long term permits. Source: Istat on data of Italian Ministry of Interior

Country of citizenship	Total	%Women	% < 18 years	% Long term permits	1st Region
2014					
Morocco	524,775	44.1	30.3	65.3	Lombardy (24.1%)
Albania	502,546	47.8	27.1	68.9	Lombardy (21.0%)
China	320,794	48.9	26.0	40.4	Lombardy (21.5%)
Ukraine	233,794	79.9	8.9	53.6	Lombardy (21.4%)
Philippines	165,783	57.5	21.5	59.9	Lombardy (34.1%)
India	160,296	37.7	23.9	51.1	Lombardy (35.1%)
Moldova	150,021	67.1	17.4	47.5	Veneto (27.4%)
Egypt	135,284	29.5	31.7	57.0	Lombardy (67.8%)
Bangladesh	127,861	28.4	22.9	52.2	Lazio (27.2%)
Tunisia	122,354	36.5	30.4	68.4	Emilia Romagna (22.9%)
Other Countries	1,431,286	49.9	22.1	53.8	Lombardy (28.0%)
Total	3,874,236	49.3	24.1	54.3	Lombardy (26.5%)

Table No. 1 shows numbers and composition of the immigrant population in Italy in 2014: the nationalities are very varied, but looking at the table as a whole under the religious criterium, it could be noted that a huge number of immigrants come from Islamic countries. Indeed, among the first ten countries, there are five which are predominantly Muslim. The same source in its 2011 Report quantified the Muslim population at 1,505,000.¹⁰

During the migration emergency of Summer 2014, it was estimated that 120,000 asylum seekers arrived in Italy from Middle East, especially from Syria, and from Africa, especially from Lybia.¹¹

However, in the peninsula at the heart of the Mediterranean Sea where both the ancient Roman and Catholic cultures are still deeply rooted, the difference between "us" (Catholic and Western people) and "them" (Muslim and Eastern people) was strongly felt, especially in certain parts of Italy. There is a strong contrast between Northern and Southern Italy, as often happened in the history of this country. For instance, in the North autonomist parties oriented to preserve the traditional and catholic society against interculturalism¹² (such as Lega Nord, Liga Veneta, and so on) have a huge

8 Francesco Cancellato, "Bonomi: «I profughi sono i nuovi rom, capri espiatori della nostra società»", Retrieved 17 Oct. 2015, <http://www.linkiesta.it/aldo-bonomi-profughi-europa>

9 See the report "XXIV Rapporto Migrazione 2014. Migranti, attori di sviluppo", made by both MIGRANTES and CARITAS, Rereived 17 Oct. 2015, http://www.chiesacattolica.it/pls/cc_i_new_v3/v3_s2ew_consultazione.mostra_pagina?id_pagina=71522

10 See http://www.caritasitaliana.it/materiali/Pubblicazioni/libri_2011/dossier_immigrazione2011/scheda_religionie.pdf, retrieved 26 Sep. 2015

11 See <http://www.ismu.org/2015/09/aggiornamenti-emergenza-immigrazione-europa/>, Retrieved, 17 Oct. 2015.

12 Scholars are divided on the use of terms as "multiculturalism" and "interculturalism". On the one hand, multiculturalism is connected to "a situation where ethno-cultural religious minorities are, or are thought of, as

electoral strength.¹³ In the South of Italy, perhaps thanks to the long history of foreign domination and colonization, public opinion has proved less hostile to this issue.

But how did national authorities and politicians react to the massive presence of immigrants, especially North Africans? The political answer was a bit schizophrenic: at the beginning of XXI Century and following the ancestral principle of *ius sanguinis*, opposed to *ius soli*, the Italian Parliament recognized the right to vote at political elections to Italians abroad (both Italians who are resident abroad and Italians who are second or third generation descendants of the previous emigrants, although they could not speak the Italian language, according to the Constitutional law No 1 and 2 of 2000). However, the Parliament extended the period of time to obtain Italian citizenship: from 5 to 10 years (Law 91/1992) and after a first approach to the controversial issue of granting the right to vote in local elections to immigrants. However, after a long time of silence, at the moment the public debate is awakening. In fact both the House of Deputies (*Camera dei deputati*) and the Senate are discussing some bills introducing a sort of soft *ius soli*. The Parliament is discussing two types of citizenship¹⁴: 1. a citizen who was born in Italy to foreign parents at least one of whom is a holder of an EU residence permit for long-term residents¹⁵ (this is defined “*tempered ius soli*”); 2. if the foreign child was born in Italy or entered up to 12 years of age. The child has to attend and successfully complete a five-year study course, educational or professional (defined “*ius culturae*”).

This reform is open to criticism because it represents a restrictive solution under a social profile. On the one hand it benefits only the children of foreigners having long-term residence permit, which the European Union grants only to those who have a minimum income; on the other hand it links the grant of the citizenship only to students who pass their final exams.

However, Muslim immigrant communities have immediate needs closely connected with their religion or with their family life which have to follow Italian law. This article is focused on religious freedom and the availability of an appropriate place for the celebration of prayer, of self-determination and physical integrity of women, on the kafalah, polygamy and repudiation, checking what cultural and legal influence these issues have on the Italian legal system.

2. Freedom of religion and expression of cultural identity:

2.1. The cases of mosques

This issue considers the requests made by local Islamic communities to build a mosque. Many communities pray in premises not adequate such as garages or storehouses.¹⁶ In the Italian political debate often this issue represents a real struggle among politicians, local administrators, Italian people and Muslim believers. The *Legga Nord* and the far-right parties stood a strong opposition to granting the administrative permissions by local authorities for Mosque buildings or other proper public spaces allowing Muslim believers to celebrate prayers and religious holidays.¹⁷

rather distinct communities, and where public policy encourages this distinctiveness”. On the other hand interculturalism is “sympathetic and respectful towards ethno-cultural religious minorities, and helpful with selected measures targeted at disadvantaged situations, yet it also aims at ensuring commitment to the values, history and traditions of the host nation. This may include the use of integration policies and efforts to water down excessive distinctiveness or segregation, for example in urban concentrations of minority groups” (Michael Emerson, “Summary and Conclusions”, in Michael Emerson, *Interculturalism: Europe and its Muslims in Search of Sound Societal Models*, (2011) 3).

13 Mario G. Losano, “Rivoluzione nel Mediterraneo: verso un Islam democratico? Il problema della libertà di religione”, in *Quaderni Laici, L'Islam in Occidente*, (2013) 17, 25.

14 Approved by the House of Representatives on Oct. 13 2015, http://www.camera.it/leg17/1132?shadow_primapagina=4970, Retrieved 17 Oct. 2015.

15 Barbara De Mozzi, Nuove misure legislative in materia di immigrazione, *Lavoro nella Giur.*, (2007) 681.

16 Cons. Stato Sez. IV, 27 October 2011, No. 5778, Luigi Carbone, Renata Vicario, “Cambio di destinazione d'uso per la creazione di luoghi di culto”, *Giornale Dir. Amm.*, (2012) I, 85.

17 Roberto Bin, “Balilla al potere?” *Forum di Quaderni Costituzionali*, (2008) 1-2; Alberto Roccella, “L'edilizia di

Two recent events represent properly the complex relations between Muslims, Catholics, public authorities, and laicity. The first one concerns the Biennale of Contemporary Art 2015 in Venice. Iceland chose the deconsecrated and private owned Church of Santa Maria della Misericordia for the exhibit entitled "The Mosque", created by a well-known artist, Christoph Buechel. As has been noted "*Venice served as a crossroads between East and West and is infused with Middle Eastern architectural influences*".¹⁸ The declared aim of this project was to testify this heritage, promoting both religious tolerance and freedom of expression.¹⁹ However, both ecclesiastic and civil authorities objected, because the former did not authorize the church use²⁰ and the latter closed the mosque for security concerns and because it "is not art".²¹ The second event concerns an Islamic themed conference hosted in the Turin Town Hall. The Mayor of Turin authorized the arrangement with carpets of a room of the historical building, seat of the City Council, for the *ṣalāt*, the mandatory prayer.²² Two *Lega Nord* municipal councillors opposed this initiative taking away the carpets, but the Turin public prosecutor cited them for infringement of the Law 25 June 1993, No. 205 (Measures against racial, ethnic and religious discrimination).²³ Other councillors claimed the laicity of this institution,²⁴ demanding the removal of all crucifixes in the Town Hall. Article 8 of the Italian Constitution states that "*Religious confessions other than the Catholic one have the right to organise themselves in accordance with their own statutes, provided that these statutes are not in conflict with Italian law*". However, according to the Italian Constitution and laws, it could be noted that some *Sharia* provisions are illegal, mainly the different legal treatment between men and women especially in family, inheritance and marriage law.²⁵ Nevertheless the Constitution recognizes a right, and does not impose an obligation²⁶ to establish an accordance with the Italian State. Representative of religious confessions agreed accordances,²⁷ but the Italian Islamic community is very fragmented.²⁸ Despite the significant presence of the Muslim communities resident in Italy, negotiations for the conclusion of an accordance have not begun.²⁹

culto islamica. Contro la tirannia della maggioranza", *Urbanistica e appalti* (2014) 347-349.

18 Colleen Barry, "Venice police shut down mosque-inside-church exhibit", 24 May 2015, Retrieved 26 Sep. 2015 http://www.timesofisrael.com/venice-police-shut-down-mosque-inside-church-exhibit/?fb_comment_id=831139343645553_831182943641193#f2d0e406540e838

19 Randy Kennedy, "Mosque Installed at Venice Biennale Tests City's Tolerance", *New York Times*, 6 May 2015.

20 Venezia Today, "Il patriarca boccia la "moschea": «Errore, non siamo stati coinvolti»", 8 May 2015, retrieved 26 Sep. 2015 <http://www.veneziatoday.it/cronaca/patriarca-boccia-moschea-misericordia-venezia.html>

21 The Associated Press, "Venice Police Close Iceland's Bienalle Mosque, Deemed 'Not Art'", 24 May 2015, retrieved 17 Oct. 2015 <http://www.haaretz.com/life/arts-leisure/1.657886>

22 Gabriele Guccione, "Sala di culto in Comune per il convegno islamico, leghisti portano via il tappeto di preghiera. La sala preghiera allestita in Comune", *La Repubblica Torino*, 28 July 2015,

23 Giuseppe Guccione, "Moschea" smantellata in Comune a Torino, indagati i due leghisti del blitz: "Discriminazione religiosa", *La Repubblica Torino*, 31 July 2015.

24 Comune di Torino: Sarà battaglia per il crocifisso, *Nuova Società*, 30 July 2015,

25 Patrizia Palermo, "Parità coniugale e famiglia multiculturale in Italia", *Famiglia e Diritto*, (2011) 628.

26 Giuseppe Della Torre, "Considerazione sulla condizione giuridica dell'Islam in Italia", in C. Cardia, G. Dalla Torre (eds.) *Comunità Islamiche in Italia. Identità e forme giuridiche*, (2015), 29, 37.

27 These accordances are: Law 11 August 1984, No. 449, related to the accordance with the Waldesian Church; Law 22 November 1988, No. 516, related to the accordance with the Seventh-day Adventist Church; Law 22 November 1988, No. 517, related to the Accordance with the Evangelical Christian Churches Assemblies of God in Italy; Law 8 March 1989, No. 101, related to the Accordance with the Alliance of Jews Communities in Italy; Law 12 April 1995, No. 116, related with the Evangelical Reformed Baptist Churches in Italy; Law 29 November 1995, No. 520 related to the accordance with the Lutheran Evangelical Church in Italy; Law 30 July 2012, No. 126, related to the accordance with the Greek Orthodox Archdiocese of Italy and Malta and Exarchate of Southern Europe; Law 30 July 2012, No. 127 related to the accordance with The Church of Jesus Christ of Latter-day Saints, and Law 30 July 2012, No. 128, related to the accordance with the Apostolic Church in Italy.

28 Giuseppe Della Torre, *supra*, n.26, 42

29 Gianluca Paolo Parolin, "Edilizia di culto e legislazione regionale nella giurisprudenza costituzionale: dalla sentenza 195/1993 alla sentenza 346/2002", *Giur. It.*, 2003, 2; Paolo Di Motoli, "I conflitti nell'Islam organizzato in Italia", in *Quaderni Laici, L'Islam in Occidente*, 2013, 54; Renzo Guolo, "La rappresentanza dell'Islam italiano e la questione delle intese", in S. Ferrari (ed.), *Musulmani in Italia*, cit., 67.

The obstacles preventing a resolution of the matter are varied. The most relevant of these is the absence of an institutional reference that can properly undertake negotiations, since Islam is a religion devoid of hierarchy, and this aspect reflects the varied souls of Islam. Furthermore, the approach of Italian institutions to Islam has been biased, to say the least. Indeed, Italian institutions, especially the Ministry of Interior, created specific advisory bodies to deal with the Islamic presence in Italy as a public security issue,³⁰ especially after the terrorist attacks of the mid-2000s. At the same time, the Ministry of Interior established advisory councils for the preparation of statements of purposes³¹ (*dichiarazione di intenti*) oriented to facilitate the integration of Islamic immigrants in the Italian society and settle on compatibility perspective between Islamic belief and “non-negotiable” values stated by the Italian law. Neither of these approaches has led to significant results.

Even if public registration of religious believers is not allowed, because it could be seen as an illegal collection of personal data, infringing many fundamental rights such as privacy and self-determination, among foreigners, Europeans and extra-Europeans resident in Italy, Muslims are estimated to be 33.1%³² of the whole number, i.e. about 1,775,484 people. Based on recent data in Italy almost 203 worship sites³³ appear available to Muslim believers, including 6 religious buildings qualified as mosques by both Islamic and Italian law³⁴, that means with a minaret and a dome³⁵, and nearly 200 Islamic cultural centers.³⁶ However the “Italian Islamic Committee” affirmed that, in 2010, worship places could amount to around 764 sites.³⁷ It is difficult to quantify the significance and just as difficult to verify sources, since there are no official sources about the number of Muslim believers, whether Italians or foreigners, in Italy. In this light, a political and legal discussion on construction of mosques and availability of proper places for worship is necessary. This issue considers two different problems: one issue regards the requests made by local Islamic communities to build a mosque. Many communities pray in premises not adequate such as garages or storehouses.³⁸ In the Italian political debate often this issue represents a real struggle between politicians, local administrators and Muslim believers. Then, this sensitive issue is transposed in front of administrative Courts with controversial results³⁹. The other issue is that Muslim believers are demanding for proper places for praying in public institutions, such as

30 See the *Consulta per l'Islam italiano* (Italian Islam Council) in 2005 and the *Comitato per l'Islam italiano* (Italian Islam Committee) in 2010. Both are advisory councils with members chosen by the Ministry of the Interior devoted to the representation of Italian Muslims and the definition of State policies on Islam. Both had mixed membership of experts and journalists. The Consulta and the Comitato was not meant to represent Italian Muslims, but to advise the Minister of religious issues (Marco Ventura, “Religion and Law in Italy”, (2011) 85; Luciano Musselli, “Diritto e religione in Italia ed in Europa. Dai concordati alla problematica islamica”, (2011), 234.

31 Charter of citizenship and integration values (*Carta dei valori della cittadinanza e dell'integrazione*, 2007), and Statement of purposes for the Italian Islamic federation (*Dichiarazione di intenti per la federazione dell'Islam Italiano*, 2008).

32 According to the IDOS 2014 Immigration report, foreigners living in Italy are 5,364,000, of which Muslim believers would be 1,775,484, but this is an hypothesis drawn by the author. Data source: Immigration in Italy at the beginning of 2014, 4, retrieved 17 Oct. 2015 http://www.dossierimmigrazione.it/docnews/file/2014_Sintesi%20IDOS.pdf

33 Data collected from it.wikipedia.org and from www.arab.it, a website linked with an Italian-Arabic translation service, both retrieved 17 Oct. 2015.

34 Francesca Oliosi, “La questione dei luoghi di culto islamici nell'ordinamento italiano: alla ricerca di un porto sicuro”, in *Comunità Islamiche in Italia*, cit. 175, 191. These mosques are established in Segrate, Rome, Palermo, Catania, Ravenna and Colle Val d'Elsa.

35 Comitato per l'Islam Italiano, Luoghi di culto islamici, Advisory opinion of 27 Jan. 2011, 2.

36 Pierangela Floris, “Comunità Islamiche e lacune normative. L'ente che non c'è: l'associazione con fine di religione e di culto”, in *Comunità Islamiche in Italia*, cit. 75-96; Rita Benigni, “Le organizzazioni musulmane a dimensione nazionale. Emersione del carattere culturale, rappresentatività di un Islam italiano”, *ibidem*, p. 97-121.

37 Comitato per l'Islam Italiano, Luoghi di culto islamici, Advisory opinion of January 27th 2011.

38 Cons. Stato Sez. IV, 27 Oct. 2011, No. 5778, Luigi Carbone, Renata Vicario, *supra* n. 16, 85; Francesca Oliosi, *supra* n. 34, 193.

39 TAR Lombardia, Brescia, 28 Dec. 13, No. 1176; TAR Lombardia, Milano, 16 Apr. 2015, No. 943.

universities⁴⁰, or workplaces, especially for management of production needs and religious provisions during Ramadan.⁴¹

The availability of buildings for the exercise of worship is an aspect of freedom of religion that local authorities such as regions and municipalities should ensure, regardless of the political orientation of the majority of the local governments. The specific regulation is related to the regional competence,⁴² while the municipalities must exercise their urban planning powers taking into account the need of the religious groups targeting areas for religious services and evaluating them in relation to the needs of their territory. Regional regulations can only influence urban and building issues, not the expression of freedom of religion.⁴³

About the incongruity of regional laws, some scholars talk of “*the variable geometry of the right to religious freedom*”.⁴⁴ In consequence of this mismatched regulatory approach, the majority of Muslim communities waive to build mosques or decent and stable worship places, legally and religiously qualified and this seems a subsequent choice of “self-marginalization”.

However, scholars observed a common aspect, namely that unsuitable places for worship services are preferred to hygienic and safe ones by Muslim communities⁴⁵. Different reasons are behind this fact, mainly: 1. a deep-rooted presence of the religious center in a certain area helped to create a community of believers linked to a stable worship place in the physical proximity with the believers living place; 2. basements and garages are available cheaply and immediately, without any bureaucratic process which is complex, expensive and takes a long time; 3. the lack of uniform rules, caused on the one hand by the absence of an Accordance, and on the other hand by the discretionality of the local administrative authorities⁴⁶.

2.2 *The case of veils and burqas*

One of the most sensitive issues concerns veil wearing in public places, such as in court or at school, by Muslim women. In Italy, there are no specific rules preventing access to courts or schools of women with their heads covered by a veil, and in fact there is no news of nuns who have been given similar treatment. On the contrary, in many courtrooms and other public buildings, the crucifix (the symbol of the Christian, specifically Catholic religion) is displayed despite the big debate in national and supranational Courts, as shown in the case *Lautsi v. Italy* of the European Court of Human Rights.⁴⁷ In that case, the ECtHR stated that there is a wide margin of appreciation in balancing the freedom of religion and laicism of the State.

Several European Countries are oriented to promote laws prohibiting women from wearing scarves hiding their hair or their face,⁴⁸ such as in France where the French Parliament approved the veil ban in schools according to the law 2004-228 of 15 March 2004, and the law 2010-1192 of 11 October 2010, which both ban veils in public spaces.⁴⁹ According to the Grand Chamber of the European Court of Human Rights, case *S.A.S. v. France*,⁵⁰ these laws do not infringe the freedom of

40 Ottavia Giustetti, “Università, studentessa musulmana chiede uno spazio per la preghiera”, *La Repubblica Torino*, 21 Nov. 2011.

41 Francesco Ricciardi Celsi, “Fattore religioso e lavoratori di religione islamica. Aspetti riguardanti la contrattazione collettiva e gli accordi sindacali”, *Comunità islamiche in Italia*, cit., 484; Cristiana Gamba, “Ramadan nel contratto di lavoro”, *Sole24Ore*, 25 Aug. 2009.

42 Francesca Oliosi, supra, n. 34, 187

43 Alberto Roccella, supra n. 17, 345.

44 Francesca Oliosi, supra n. 34, 188.

45 Francesca Oliosi, ibidem, 193.

46 Francesca Oliosi, ibidem.

47 European Court of Human Rights, 18 March 2011, *Lautsi and other v. Italy*, App. No. 30814/06.

48 Patrizia Palermo, “Islam e Shari’a: tra libertà e diritto alla diversità religiosa. Una sintesi sulle possibili prospettive europee di convergenza”, *Forum di Quaderni Costituzionali*, (2010) 4.

49 Patrick Cabanel, “La laicità francese, l’Islam e lo svelamento delle donne”, in *Quaderni laici. L’Islam in Occidente*, cit., 115-130.

50 European Court of Human Rights, 1 July 2014, *S.A.S. v. France*, App. No. 43835/11.

religion, because the ban could “be regarded as proportionate to the aim pursued, namely the preservation of the conditions of 'living together' as an element of the “protection of the rights and freedoms of others”⁵¹ According to regulators such rules could be justified both with the attempt to free women from a cultural and gender submission in contrast to tradition that Western legal systems and human rights protection overcame, and the need for public security and safe policies to recognize the faces of people who wear such clothing. However, in Italy the public debate on burqas and veils “has never reached the breadth and intensity of a real sociale debate”⁵²

In Italy using scarves and veils in ID card pictures is allowed by the Italian Home Office (circ.) No.4/1995 as long as the person's face remains uncovered for identification. Furthermore, Italian Home Office (circ.) 24 July 2000 stating that veils, chadors, and turbans are an essential part of personal clothes which persons usually wear and they concur, as a whole, to identify those who wear them, as long as they keep their face uncovered.⁵³ But niqabs and burqas are prohibited by both Article No. 85 R. D. No.733/1931 of the Laws on Public Safety which punishes anyone who goes around “masked in a public place”. Likewise, Article No. 5 of L.152/1975 punishes “the use of protective helmets, or of any other means to render difficult the recognition of a person, in a public place or a place open to the public, without justified reason”⁵⁴ Scholars affirm that the enforcement of both of these provisions has been rare and marginal always under the interpretation of Articles No 19 (freedom of religion) and 21 (freedom of speech) of the Italian Constitution.⁵⁵ However, some cases of mayoral ordinances banning burqa or veil masking woman's face in public places were published, mainly in Northern and Central Italy,⁵⁶ such as Azzano Decimo (2004 and 2009), Drezzo (2004), Alassio (2008), Varallo Sesia (2009), Peschiera Borromeo (2009), Fermignano (2009), Montegrotto (2010) and Cossato (2010). All these ordinances were promoted by Lega Nord⁵⁷ as part of their fight against multiculturalism through an ethnic and confessional populism⁵⁸ although the practice of wearing the burqas and niqabs dates back to a time before the advent of Islam. In reality it does not have and should be seen as having the character of a religious precept, since it seems representing a way of radical affirmation of identity, sometimes even resulting from the action of fundamentalists and extremists.⁵⁹ Most of these ordinances were annulled by prefects.⁶⁰ However, in other cases the Council of State (Consiglio di Stato), the supreme Italian administrative court, annulled the first mayoral ordinance.⁶¹ According to this decision, although Article No. 5 of Law No. 152/1975 prohibits, for safety reasons, the use of protective helmets, or any other means to impede the recognition of the person, in public places or open to the public, without justification, it is not applicable to burqa. Article No. 5 of Law No. 152/1975 is satisfied when in occasion of sensitive events the person wearing it undergoes personal identification removing the veil. A similar situation occurred to a woman wearing the burqa entering

51 European Court of Human Rights, *supra*; Eva Brems, “Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings”, 22 *J.L. & Pol'y* 517, 535 (2014); Giulia Bassetti, “Interculturalità, libertà religiosa, abbigliamento. La questione del burqa”, *Stato, Chiese e pluralismo confessionale*, 26, (2012).

52 Alessandro Ferrari, “A Besieged Right: Religious Freedom and the Italian War on the Burqa and the Niqab”, in A. Ferrari, S. Pastorelli (eds.), *The Burqa Affair Across Europe Between Public and Private Space*, (2013), 38.

53 Circ. Min. Int., 24 July 2000, No. 300.C/2000/3656/A/24.159/1^Div.

54 Alessandro Ferrari, *supra*, n.52, 39.

55 Settimio Carmignani Caridi, “Libertà di abbigliamento e velo islamico”, in S. Ferrari (ed.), *Musulmani in Italia*, cit., 227; Alessandro Ferrari, *supra*, n. 52, 41.

56 Mathias Möschel, “Law, Lawyers and Race: Critical Race Theory from the US to Europe”, (2014), 181 ss.

57 Maurizio Ambrosini, “We are against a multi-ethnic society’: policies of exclusion at the urban level in Italy”, *Ethnic and Racial Studies*, Volume 36, Issue 1, (2013), 136-155.

58 Vincenzo Pacillo, “La discriminazione nei rapporti tra Stato e confessioni religiose: il caso dell’”islamofobia””, in T. Casadei, (ed.), *Lessico delle discriminazioni tra società, diritto e istituzioni*, (2008), 100.

59 Umberto Zingales, “Il limite di compatibilità dei simboli religiosi negli spazi pubblici di una democrazia aperta: il caso del burqa e del niqab,” 2015, 3, retrieved 17 Oct. 2015 www.federalismi.it.

60 Mathias Möschel, *supra*, n. 56, 177.

61 Cons. Stato Sez. VI, 19 June 2008, No 3076.

a courtroom to be present at a trial for terrorism involving one of her relatives.⁶² When entering, she was asked to identify herself by removing the burqa. She did it in front of female police officers. Nevertheless she was sued for wearing a burqa in a public office.⁶³ The criminal court acquitted her because there is no explicit statutory provision criminalizing this behaviour in Italy.⁶⁴

Even though wearing veils or scarves is not prohibited in public places, the issue concerned also the discussion on the laicity of public schools. The theme of the secular state is strongly felt in Italy due to the influence of the Catholic Church in public life and its secularization never fully accomplished as clearly shown by the the aforementioned case Lautsi on displaying crucifixes in public schools.⁶⁵ This issue presents connection with both female pupils and teachers⁶⁶ wearing veils at schools. There are no published judiciary decisions, however the most recent and relevant case regarded an administrative order enacted by a school principal forbidding veils and scarves during classes.⁶⁷ According to reported local news, this provision was a general sanction after a fight among male students in which no female students were involved, even though the target were only female students. It should be noted that in this case the veil symbolized Islam itself, confusing between the identity symbol with the religious practice.⁶⁸ In fact, motivating his provision, the school principal explicitly referred to the violence in Middle East and the supposed consequent hostility of Italian students against Muslims and Arabs.⁶⁹ The “Garante regionale dei diritti della persona umana”, a special authority for the protection of rights of the Region of Friuli Venezia Giulia⁷⁰ with specific competence in case of discrimination, stated that this provision represents a discrimination and it is restrictive of the freedom of religion. According to this authority, the veil ban appears inconsistent with its declared aims of fighting racism, bullying and religious discrimination. Indeed, it is likely to further strengthen the Italian students' attitudes to stigma, prejudice and indifference towards Muslims and immigrant students coming from the Middle East.⁷¹

3. Right to personal integrity: The hidden practice of female genital mutilation (FGM)

This practice has existed since ancient times.⁷² It disappeared in the West because of the Christianity influence, opposing to any kind of body mutilation or circumcision,⁷³ but has remained alive, in the Middle East and found, indeed, an unexpected fertile ground in Islam,⁷⁴ spreading again to Western Europe trough immigration.⁷⁵ According to the World Health Organization, it concerns a procedure that intentionally alters or causes injury to the female genital organs for non-medical reasons. It has no health benefits for girls and women and it can cause severe bleeding and problems urinating, and later cysts, infections and infertility, as well as complications in childbirth and increased risk of

62 Mathias Möschel, supra, n. 56, 180.

63 Mathias Möschel, ibidem.

64 Trib. Cremona, 27 Nov. 2008.

65 Lorenza Carlassare, “Crocifisso: una Sentenza per l'Europa «NON laica»”, *Nuova Giur. Civ.*, (2011) 20291.

66 Nicola Colaiani, *Diritto pubblico delle religioni*, (2012), 219.

67 Elisa Michellut, “Pugno duro del preside: «Velo vietato in classe»”, 16 Feb. 2015, retrieved 17 Oct. 2015 <http://messengeroveneto.gelocal.it/udine/cronaca/2015/02/16/news/il-caso-nella-bassa-1.10876777>

68 Fabio Francario, “Pubblica amministrazione e multiculturalismo”, *Corriere Merito*, (2012) 7.

69 Elisa Michellut, supra, n. 67.

70 Friuli Venezia Giulia is a special administrative region. It has a specific legislation for minorities protection that is Article No. 3 of the Regional law 8 November 2013, No. 16 (Urgent measures for staff administration, and Amendment to the Regional Law No. 2/2000 in matter of regional organization).

71 Garante regionale dei diritti della persona, 17 febbraio 2015, p. 4.

72 Alessia Vitalone, “Mutilazione genitale femminile e diritti umani”, in *Giur. merito*, (2001) IV, 854-870.

73 Giovanni Del Missier, “Le mutilazioni genitali femminili”, *Medicina e morale*, (2000) 1097-1143.

74 Giuseppe Cassano, Francesco Patruno, “Mutilazioni genitali femminili”, *Famiglia e Diritto*, (2007) 2, 179;

Muhammad Munir, “Dissecting the claims of legitimization for the ritual of female circumcision or female genital mutilation (FGM)”, <http://ssrn.com/abstract=2284730>, (2013) 7, retrieved, 17 Oct. 2015.

75 UNPFA, “Demographic Perspectives on Female Genital Mutilation”, *United Nation Population Fund*, (2015) 7, retrieved 17 Oct. 2015 <http://www.unfpa.org/publications/demographic-perspectives-female-genital-mutilation>

newborn deaths.⁷⁶ One of the main problems is how to protect young girls from this violation of personal integrity, both physical and mental, since the majority of the victims are subjected to this practice without their informed consent.⁷⁷ Italian Constitution, Civil Code and European legal sources protect personal integrity and dignity banning FGM. Indeed, in the Italian legal system, each person that undergoes a treatment or a medical intervention on his or her body must manifest appropriately his or her consent to the treatment, in obedience to Articles No. 13 (right to freedom) and No. 32 (right to health) of the Constitution and the Article No. 5 of the Civil Code that forbids any actions on one's own body when causing permanent damage to physical integrity or when violating law, public order or public morality.⁷⁸

However, this perspective is strongly influenced by multiculturalism⁷⁹ and, consequently, the first approach to it, later refused, was a sort of mediation, proposed by institutional interventions that caused a heated debate, such as the proposal of the Commission on Bioethics of the Tuscany Region (*Commissione bioetica della Regione Toscana*), which issued an opinion about "Prevention of Female Genital Mutilation: legality, ethical and legal participation of doctors for practising an alternative rite" (*Prevenzione delle mutilazioni genitali femminili: liceità, etica, deontologica e giuridica della partecipazione dei medici alla pratica di un rito alternativo*) published on 9 March 2004. This proposal suggested to replace FGM with a "slight sunna", i.e. a small incision on the clitoris, merely symbolic of the newborn to ritually bring out a few drops of blood". According to the experts of the bioethical committee this "light version" of FGM could find acceptance "as an act compatible with Italian law and the ethics of health care workers, "provided that" it is an integral part of a comprehensive strategy aimed at overcoming all forms of female genital mutilation and manipulation".⁸⁰ Although compared to male circumcision, widely tolerated even in Western societies⁸¹ this proposal to medicalize the slight sunna was rejected firstly just by the associations of immigrant women, who appealed to the Maputo Protocol, adopted by the African Union on 11 July 2003. The purpose of this international document was the prohibition of each type of "medical or paramedical female genital mutilation and all other practices in order to eradicate them".⁸² Also the Italian National Bioethics Committee expressed its opposition, asking for the rejection of mutilation or injury of the human body for rituals and/or religious purposes.⁸³ After that, the Italian Parliament approved a special criminal law against such practices with Law 9th January 2006, No. 7.⁸⁴ Such provisions concern the prevention and prohibition of FGM. This law is focused on three fronts: 1. Information and education for immigrants, especially pregnant women; 2. training for teachers and health professionals; 3. Judicial repression through the introduction of specific criminal law. Indeed, a new article was introduced in the Criminal Code, No. 583 bis (Mutilation of female genital

76World Health Organization, *Female genital mutilation*, Fact sheet N°241, February 2014.

77 Stefano Rossi, "Consenso informato", R. Sacco (ed). *Digesto delle discipline Privatistiche, Sezione Civile*, (2012) 177-215; Massimo Franzoni, "Dal consenso all'esercizio dell'attività medica all'autodeterminazione del paziente", *Resp. Civ.* (2012) 85-92; Alessandra Pioggia, "Consenso informato e rifiuto di cure: dal riconoscimento alla soddisfazione del diritto", *Giornale di diritto amministrativo* (2009), 267-277.

78 Maria Carmela Venuti, "Gli atti di disposizione del corpo", (2002).

79 Gianfranco Macrì, "Regole religiose e libertà dei singoli", G. Macrì, M. Parisi, U. Tozzi (eds), *Diritto civile e religioni*, (2013), 286; Gabriele Fornasari, "Mutilazioni genitali e pratiche rituali nel diritto penale", S. Canestrari, G. Ferrando, C.M. Mazzoni, S. Rodotà, P. Zatti, (eds.) *Il governo del corpo*, (2011) 715; Carmela Piemontese, "Disposizioni concernenti la prevenzione e il divieto delle pratiche di mutilazione genitale femminile", *Leg.pen.*, (2006), 293.

80Andrea Gentilomo, Antonella Piga, Alessandra Kustermann, "Mutilazioni genitali femminili: la risposta giudiziaria", *Riv. it. medicina legale* (2008), 13.

81 Comitato Nazionale di Bioetica, "La circoncisione: profili bioetici", (1998), 3.

82 Andrea Gentilomo, Antonella Piga, Alessandra Kustermann, supra n. 80. For a wide debate on this point, see: Emilio Santoro, "Una proposta scandalosa?" *Jura Gentium*, 2005, retrieved 17 Oct. 2015 <http://www.juragentium.org/forum/mg/sunna/it/santoro.htm>; Brunella Casalini, "Forum sulle mutilazioni genitali", *Jura Gentium*, retrieved 17 Oct. 2015, <http://www.juragentium.org/forum/mg/index.htm>

83 Comitato Nazionale di Bioetica, "Problemi bioetici in una società multi-etnica", (1998) 6.

84 Gianfranco Macrì, supra, n. 79, 287.

organs). Although policymakers chose to further protect the physical integrity of women against this practice, despite the supposed reasons of integration, especially if the victim is under subjection, it is very difficult for the authorities to enforce this new law because FGM is an issue which is rarely addressed.⁸⁵

4. Kafalah and adoption

According to Sura No. 33 of the Koran, adoption is not allowed in Sharia as a means of creating new filial bonds on the basis that it removes biological ties.⁸⁶ In Muslim States, with the exception of Turkey, Indonesia and Tunisia, kafalah is defined as a voluntary undertaking to provide for a child and take care of his or her welfare, education and protection without deleting the legal relationship with his or her family of origin.⁸⁷

Several immigrants arriving on Italian shores are children or minor aged, but statistics are unclear. On the one hand, according to an institutional report,⁸⁸ in August 2015 the number of unaccompanied immigrant minors was 8,944, of whom 22.1% come from Egypt, 12.7% from Albania, 10.7% from Eritrea, 9.7% from the Republic of the Gambia, 7.7% from Somalia, 4.8% from Nigeria, and so on. Regarding their age, 53.9% are 17 years old, 27.1%, are 16 y/o; 10.9% are 15 y/o; 7.7% are 14-7 y/o and 0.4% are 0-6 y/o. On the other hand, statistics of the NGO "Save the Children" stated that 7,357 unaccompanied minors arrived in Italy from 1 January 2015 until 15 August 2015.⁸⁹

According to Article 1, par. 2, D.P.C.M. No. 535/1999, an unaccompanied immigrant minor is defined as a non-Italian or other EU States national who has not applied for asylum, and who is present in Italy for whatever reason, without assistance or representation from his or her parents' or from any other adult that has legal responsibility for him or her in accordance with the Italian applicable law.⁹⁰

According to both Article 403 of the Civil Code and Article No. 33 of Legislative Decree No. 286/1998, when a foreign unaccompanied minor is discovered in the Country, he or she should be immediately taken into care and assisted by public authorities both by Juvenile Courts and municipal social services. Scholars are critical of this solution, because only the judiciary have the right to carry out a proper investigation about the immigrant minor and subsequently take proper care of the child with, for instance, a suitable family environment.⁹¹ In this context, courts have attempted to face the cases where minors are Islam believers through kafalah. This issue is related to the analysis of case law stated by Italian Courts.

At first, Italian courts refused to admit family reunifications through kafalah.⁹² because these are in violation of adoption law, which is mandatory in Italian legal system.⁹³ According to this

85 Andrea Gentilomo, Antonella Piga, Alessandra Kustermann, *supra* n. 80, 13.

86 Alice Diver, "A Law of Blood-ties - The 'Right' to Access Genetic Ancestry", (2014) 85; Maurizio Martinelli, "I rapporti di filiazione nell'ambito della famiglia islamica e in quella occidentale. L'istituto dell'adozione nell'ordinamento islamico e in quello italiano", in *Comunità islamiche in Italia*, cit., 389.

87 European Court of Human Rights, 4 October 2012, *Harroudj v. France*, App. No. 43631/09; Patrick Kinsch, *Harroudj v. France: Indications from the European Court of Human Rights on the Nature of Choice of Law Rules and "Their Potentially Discriminatory Effect"*, *Yearbook of Private International Law, Volume 15 (2013/2014)*, pp. 39-44; Faisal Kutty, *Islamic Law and Adoptions*, (2014), retrieved 17 Oct. 2015 <http://ssrn.com/abstract=2457066>

88 Ministry of Labour and Social Policies, Monitoring report about unaccompanied minors in Italy at 31 August 2015 retrieved 17 Oct. 2015 http://www.lavoro.gov.it/AreaSociale/Immigrazione/minori_stranieri/Pages/20140315_Dati-dei-minori-stranieri-non-accompagnati.aspx

89 http://www.savethechildren.it/IT/Tool/Press/All/IT/Tool/Press/Single?id_press=936&year=2015, retrieved 17 Oct. 2015.

90 Laura Carrera, "La condizione giuridica del minore straniero non accompagnato", *Famiglia e Diritto*, (2001) 447.

91 Paolo Morozzo della Rocca, "Affidamenti ex art. 2, L. 4 maggio 1983, n. 184 e minori stranieri non accompagnati", *Famiglia e Diritto*, (2007) 389.

92 Trib. Minorenni Trento, Dec., 11 Mar. 2002, *Riv. Dir. Internaz. Priv. e Proc.*, (2002) 1056.

93 App. Torino Decreto, 19 Nov. 2009, *Famiglia e Diritto*, (2010), 783.

interpretation, those who have the custody of the child are neither parents nor relatives, nor guardians, as the kafalah gives the foster parents powers and duties of custody, but does not grant protection, nor do they become legal representatives of the child.⁹⁴ Therefore, the children for whom the kafalah was requested were put up for adoption.⁹⁵ The main issue of this approach was to prevent the kafalah from becoming a means to bypass international adoption law.⁹⁶ More recently courts twisted their opinion about recognition of the admissibility of the effects of the kafalah, for the protection of the orphaned or abandoned child, into the Italian legal system. The recognition of this institution which had met a lot of resistance from Italian courts, now is deemed appropriate to protect children of North African or Muslim origins for the purposes of family reunification in accordance with Article No. 29 d. lgs. 286/1998. Furthermore, kafalah obtained special attention from the United Nations Convention for the Protection of Children's Rights. In this sense, Article No. 20 of the United Nations Convention includes kafalah among the desirable measures of protection of the child without his or her biological family, or when in his or her interest it is not appropriate that he or she should remain there. The Convention also indicates to the adhering States the need to prefer in practice the measures potentially adoptable allowing a "certain continuity in the child's environment, as well as his or her ethnic, religious, cultural and linguistic diversity."⁹⁷ Article No. 3 of the United Nations Convention for the Protection Children's Rights states the principle of the protection of the best interest of the child, which permeates the entire complex of juvenile law in European Union Countries. This principle recognizes the protection of the child's rights and, at the same time, it constitutes a general rigid clause allowing the court to assess the specific requisites of the situation before adopting the solution that in the court's opinion represents his or her best interest. Indeed, it has a strict connection with Article No. 24 of the Charter of the Fundamental Rights of the European Union which acknowledges as innovative the children's right to the quality of their affective relationship.⁹⁸ Indeed, the Italian Constitution protect it in Articles No. 2 (protection of fundamental rights) and Article No. 30 (duties of parents towards their children).⁹⁹

In a turning point decision for the legal recognition of kafalah in the Italian legal system, the Supreme Court of Cassation explicitly stated that

*"in Muslim law, any sexual relationship outside marriage is sanctioned by illegitimacy, and children born outside of wedlock are considered "not true children" [Surah XXXIII, verse 4]. However, the duty of brotherhood and solidarity which also urges the Koran [ibid, verse 5], is recognized to illegitimate, orphaned or abandoned children, through the kafalah, which is the 'single tool' for child protection. Kafalah allows the child, for whom it is not possible to attribute housing and assistance (hadana) of his or her legitimate family, because this does not exist, to be accepted by a married couple or even a single custodian (Kafil). These people undertake to maintain, educate and instruct the child as if he or she was their own, until the child comes of age. Indeed, the child (makful) does not become a member of the family that accepted him or her. Each country of the Islamic area has regulated the kafalah, in a more or less detailed pattern (...). In national law of Muslim countries, kafalah is granted with legal proceedings, or by agreement authorized by a judge, and to be requested by kafil of the competent authority, for acts of particular importance such as expatriation."*¹⁰⁰

According to this decision, a constitutional interpretation of Article No. 29 of the d. lgs 286/1998

94 Cass. civ. Sez. I, 4 Nov. 2005, No. 21395, CED Cassazione (2005).

95 Cass. civ. Sez. I, 4 Nov. 2005, No. 21395,

96 Cass. Civ. 23 Sep. 2011, No. 19450.

97 Paolo Morozzo della Rocca, "Uscio aperto, con porte socchiuse, per l'affidamento del minore mediante kafalah al cittadino italiano o europeo", *Corriere Giur.*, (2013) 1492.

98 Paolo Martinelli, Francesca Mazza Galanti, "Art. 24, Diritto del bambino", in G. Bisogni, G. Bronzini, V. Piccone (eds), *La Carta dei Diritti dell'Unione Europea. Casi e materiali*, Taranto, (2009) 303.

99 Cass. civ. Sez. I, 2 Feb. 2015, No. 1843, in *Nuova Giur. Civ.*, 2015, 7-8, 10707

100 Cass. Civ. 20 Mar. 2008, No. 7472, Joelle Long, "Sì al ricongiungimento familiare del minore affidato con kafalah", *Nuova Giur. Civ.*, (2008) 10; Elisa De Feis, "La kafalah islamica come strumento di tutela dei minori e presupposti del suo riconoscimento in Italia", *Famiglia e Diritto*, (2009) 481.

(regarding immigration law), the prevalence of the child protection, specifically of foreign minors, prevails over the territorial defense and containment of immigration.¹⁰¹ Indeed, between the Islamic kafalah and the Italian model of child custody, similarities have to prevail over differences, in consideration that both these institutions, unlike adoption, do not have legitimizing effects and do not affect the filiation status of the child. While the Italian model of legal custody has a temporary nature, the kafalah model is closer to adoption, even though it admits revocation, because it extends its effects until the adulthood of the child.¹⁰² On these legal grounds, the Supreme Court applies the principle of law, in that “the Islamic kafalah could act as a precondition for family reunification” according to Italian immigration law.

Recently, the Court of cassation changed its eurocentric view towards a foreign institute representing a multicultural approach of family law. It has been defined by scholars as “from the Westernization of kafalah to Orientalization of the best interest of the child.”¹⁰³ This perspective emphasizes that the legal transplant¹⁰⁴ of Islamic kafalah in the Western legal systems, whether compatible with the “*Western rhetoric of human rights*”¹⁰⁵ is done through private international law rules, more flexible than private law whose rigidity make the process of legal harmonization more difficult. The Court of Cassation stresses the functional elements of kafalah, worthy of protection, ensuring its effectiveness, and distinguishing it ontologically from adoption.¹⁰⁶ Indeed, the Court of Cassation states that the conventional kafalah, stipulated in some jurisdictions and inspired by the Koran, is an institution of family protection. It is designed to give the minor child more opportunities of growth and to improve his or her living condition. At the same time, it could safeguard the relationship between him or her and his or her parents. It is achieved through an agreement between the family of origin of the child and the host family. Kafalah has features in common with foster care under Italian law (*Affidamento*).¹⁰⁷ Since kafalah aims to achieve the best interest of the child, it does not come into conflict with public order and national and international laws ratified by Italian Parliament, such as the abovementioned Article 20 of the New York Convention on Children's Rights.¹⁰⁸ The effective protection of the best interest of the child is the keystone of judges' legal reasoning to overcome the limitation of intercultural issues in cases of unaccompanied or immigrant Islamic children.¹⁰⁹

5. Marriage and polygamy

5.1 Islamic Marriage

A distinction should be made between marriage celebrated according to Islamic law and polygamy.¹¹⁰ Unlike Western canonical legal tradition, which considers marriage as a sacrament,¹¹¹ in Islamic law marriage is a contract,¹¹² even though it is celebrated according to religious rules. In fact, marriage is a religious duty for a Muslim believer, unless he lacks the economic means to get

101 Cass. 17 Jul. 2008, No. 19734.

102 Cass. 20 Mar. 2008, No. 7472.

103 Maurizio Di Masi, “La Cassazione apre alla kafalah negoziale per garantire in concreto il best interest of the child”, *Nuova Giur. Civ.*, (2015) 10707.

104 Alan Watson, *Legal Transplants. An Approach to Comparative Law*, (1974); Mathias Siems, *Comparative Law*, (2014) 191.

105 Maria Rosaria Marella, “Critical family law”, *American University Journal of Gender Social Policy and Law* 19, no. 2 (2011) 740.

106 Maurizio Di Masi, supra n. 103, 10707.

107 Article No. 2 of Law 184/1983.

108 Cass. civ. Sez. I, 2 Feb. 2015, No. 1843, in *Nuova Giur. Civ.*, 2015, 10707.

109 Cass. civ. Sez. I, 2 Feb. 2015, n. 1843, in *Nuova Giur. Civ.*, (2015) 10707.

110 Nicola Colaianni, supra n. 66, 260; David Durisotto, “Poligamia e ordinamenti europei”, in *Comunità islamiche in Italia*, cit., 358.

111 Emily C. Sharpe, “Islamic Marriage Contracts as Simple Contracts Governed by Islamic Law: A Roadmap for U.S. Courts”, *14 Geo. J. Gender & L.* 189, 197 (2013).

112 Roberta Aluffi Beck Peccoz, “Il matrimonio nel diritto islamico”, in S. Ferrari, (Ed.), *Il matrimonio. Diritto ebraico, canonico e islamico: un commento alle fonti*, (2006) 184; Emily C. Sharpe, supra n. 113.

married.¹¹³ According to the Koran's Sura IV, 3 one single man may have up to four legitimate wives. However, religious marriages celebrated following the Islamic rite should not be confused with polygamy. Indeed, Italian judges distinguish the two entities allowing the transcription to Civil Registrars only to marriages celebrated abroad according to the religious rite if such marriages do not infringe the national public order or mandatory rules such as the prohibition of bigamy. The Italian Court of Cassation stated that the nature and purposes of marriage under Islamic law are not unlike those pertaining to marriage celebrated under the Italian law, as long as the marriage under transcription meets the formal and substantive requirements related to the civil status and the legal capacity of both spouses.¹¹⁴

5.2 Polygamy

Polygamy is a legal issue of complexity in the management of the intercultural society. It is formally strictly prohibited in the Italian system and also by the European Union, but it is likely present, even if submerged in the Italian social landscape. Two beliefs are widespread in Italian society: on one hand, that it pertains exclusively to Islamic culture, though the comparative law shows that it is not. And on the other hand, that it does not concern the Italian situation at all. Indeed, polygamy is linked to the religions of the Book, although it has almost disappeared.¹¹⁵ For instance, the Supreme Court of British Columbia rejected the claim of unconstitutionality of the specific provision of the Canadian Criminal Code sued by a group of members of a Christian fundamentalist sect affirming that this prohibition violated the right to profess their religion. The Canadian court stated that not only is monogamy one of the founding values of the civilization of the Western legal tradition, but that polygamy is also detrimental to the human rights of women and children, because it is considered a form of violence, and it can cause emotional disorders¹¹⁶. Even the European Court of Human Rights recognized that each State Party to the European Convention of Human Rights and Fundamental Freedoms

may legitimately prevent the application within its jurisdiction of private-law rules of religious inspiration prejudicial to public order and the values of democracy for Convention purposes (such as rules permitting discrimination based on the gender of the parties concerned, as in polygamy and privileges for the male sex in matters of divorce and succession)¹¹⁷

Scholars pointed out that the principle of absolute monogamy is widely shared, even if explicitly stated, in Italy and in other Western Countries as well. For instance, the Articles No. 3 and 29 of the Italian Constitution recognized to both spouses to be treated equally and according to human dignity.¹¹⁸ Polygamy itself contains the “germ of inequality” and it deeply affects the values acquired in Western democratic societies,¹¹⁹ which serves the principle of absolute monogamy.¹²⁰ Therefore, polygamy is contrary to public order. However, the task of legal enforcement of the constitutional achievement of equal marriage is difficult one given the contrast with the patriarchal supremacy present in Islamic law, the reference for many foreign immigrants.¹²¹ Under this

113 Nicola Colaianni, *supra* n. 66, 261.

114 Cass. Civ., 2 Mar. 1999, No. 1739.

115 Francesca Rigotti, *Poligamia e diritti*, Jura Gentium, I (2005) 1, retrieve 26 Sep. 2015 <http://www.juragentium.org/topics/women/it/rigotti.htm>

116 British Columbia Supreme Court, 2011 BCSC 1588, Nov. 23, 2011

117 European Court of Human Right, Grand Chamber, 13 Feb. 2003, *Refah Partisi v. Turkey*, App. nos.: 41340/98.

118 Isabella Fusiello, “Poligamia e ricongiungimento familiare”, *Gli Stranieri*, (1995), 58; D. Durisotto, *supra* n. 110, 360. TAR Emilia Romagna, 14 Dec. 1994, No. 926.

119 Nicola Colaianni, *supra* n. 66, 262.

120 David Durisotto, *supra* n. 110, 358; Nicola Colaianni, *supra* n. 66, 262

121 Andrea Galoppini, “Il ripudio e la sua rilevanza nell'ordinamento italiano”. *Dir. Famiglia* (2005), 969; Cristina Campiglio, “Matrimonio poligamico e ripudio nell'esperienza giuridica dell'Occidente europeo”, *Riv. dir. int. priv. e proc.*, (1990), 906-907; Ferruccio Pastore, “Famiglie immigrate e diritti occidentali: il diritto di famiglia musulmano in Francia e in Italia”, *Riv. dir. Int.*, (1993) 105.

perspective, the law has to protect the weakest parts of the polygamous marriage, normally the other wives and their children.¹²² In fact, their presence could be hidden from the eyes of the authorities and the society in which the immigrant families live. Indeed, considering a polygamous marriage “*tamquam non esset*”, inexistent, wives and children would be deprived of any right or claim to the husband.¹²³ In this regard, some scholars stated that the need to protect fundamental individual rights, especially the right to equality, tends to interpret the public order concept more flexibly in order to recognize some effects to polygamous marriage in favour of the weak spouse and balance the legal position between the parties.¹²⁴ The empirical experience reported only a few cases published. The first one is related to social security issues,¹²⁵ and the second one to family benefits.¹²⁶ In both cases the INPS (Istituto Nazionale della Previdenza Sociale, Italian Social Welfare Institution) recognized the benefits only to the spouse that could demonstrate his or her status according to the Italian law, without specifying the sex of the spouse.

The third case reports that the prohibition of polygamy has the effect of preventing the acceptance of an application for family reunification even if coming from someone other than the spouse. In this case, the reunification application had been made by a son on behalf of his mother, whose spouse, already living in Italy, had previously proposed a similar instance on behalf of another wife. In application of the aforementioned principle the Supreme Court upheld the appeal, excluding the need to prove that the child had acted on behalf of the father.¹²⁷

Conversely, in less recent times, when the migration had not yet reached such an imposing impact on Italian society and on the legal system, an isolated decision of a merit court favored the interests of minor children living in a polygamous group over the protection of public order. In fact, in 2001, the Court of Appeal of Torino¹²⁸ granted family reunification under Article No. 1 of D. Lgs. 286 / 1998 stating that the purpose was not to approve of the polygamous union, but to protect the interest of the children not to be separated from their parents. Scholars criticized this approach, defining it as an “inexhaustible source of problems for all persons involved”,¹²⁹ a sort of “monogamous family with polygamous appendices.”¹³⁰

In any case, Italian criminal law establishes a specific criminal offence: the crime of bigamy, stated by Article No. 556 of the Criminal Code.

The crime of bigamy protects the interest of the Italian state to guarantee the legal family founded on monogamous marriage.¹³¹ The fact that the marriage was celebrated in Italy or abroad is irrelevant for the configuration of bigamy. This offence punishes the person, already married, who has married another person abroad, without any reference to the nationality of the spouse, or the ‘ignorance of the civil law’.¹³² However, there is an isolated opinion of 2003, when the Court of First Instance of Bologna¹³³ stated that polygamous marriages celebrated abroad by foreign citizens did not constitute the crime of bigamy, because such marriages had no civil effects for the Italian legal system.

122 David Durisotto, *supra* n. 112, 263.

123 David Durisotto, *ibidem*.

124 Patrizia Palermo, “Parità coniugale e famiglia multiculturale in Italia”, *Dir. Famiglia*, (2012), 1879; David Durisotto, *ibidem*.

125 Circ. INPS 22 July 1992, No. 190, <http://www.inps.it/circolari/Circolare%20numero%20190%20del%2022-7-1992.htm>

126 Tribunale Arezzo, 14 Aug. 2009, reported by David Durisotto, *supra* n. 112.

127 Cass. Civ. Sez. VI -, 28 Feb. 2013, No. 4984; Antonella Batà, Angelo Spirito, “Il rilascio del visto d'ingresso”, *Famiglia e diritto*, 2013, 5, 504.

128 C. App. Torino, 18 Ap. 2001, *Dir. Famiglia*, (2001), 1492; David Durisotto, *supra* n. 110, 377.

129 Mario Ricca, “Oltre Babele. Codici per una democrazia interculturale”, (2008), 335.

130 Mario Ricca, *ibidem*.

131 Cass. pen. Sez. VI, 4 Dec. 2008, No. 331

132 Cass. pen. Sez. VI, 13 Dec. 2006, No. 9743 (rv. 235912)

133 Trib. Bologna, 12 March 2003, *Quad. dir. Pol. Eccl.* (2004), 775; Emanuele Calò, “I riflessi dell'immigrazione islamica sul diritto di famiglia”, *Famiglia e Diritto*, (2009) 85.

5.3 Forced marriages

Forced marriages, especially involving child brides, are a severe problem in several countries, and an increasing issue among immigrant communities¹³⁴. This issue emerges in Italian headlines¹³⁵, but there are no specific published case law. Indeed, Italian law provides no specific rules against forced marriage, even though according to Article No. 84, par. 2, of the Civil Code, spouses have to declare their own free and independent will to marry each other, and spouses of age between 16 and 18 years old have to claim a specific judicial emancipation¹³⁶. Otherwise, forced marriage involving a child bride is different from emancipation of a teenage spouse. Firstly, the latter is authorized by a judge; secondly, both prospective spouses remain free to marry or not, and thirdly forced marriages concern a very young girl, in puberty age, involved in a situation of submission. Despite its lacking of specific legal instruments, Italy ratified the Convention of Istanbul¹³⁷, entitled “*Council of Europe Convention on preventing and combating violence against women and domestic violence*”¹³⁸. Article 37 of the Convention of Istanbul established that “*Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of forcing an adult or a child to enter into a marriage is criminalised*”, both in national or international cases. However, this disposition is rather bland and, therefore, ineffective, since the Convention left to the Contracting States the discretion on legislative measures to criminalise the intentional act of forcing an adult or a child to marry. Indeed, regarding the family reunification law of a third-country national, the European Court of Justice affirmed to be in conformity with EU law the provision of national law under which the sponsor and his/her spouse must have reached the age of 21 by the date on which the application for family reunification is lodged¹³⁹. According to the European Court of Justice,

the minimum age fixed by the Member States by virtue of Article 4(5) of Directive 2003/86 ultimately corresponds with the age at which, according to the Member State concerned, a person is presumed to have acquired sufficient maturity not only to refuse to enter into a forced marriage but also to choose voluntarily to move to a different country with his or her spouse, in order to lead a family life with him or her there and to become integrated there¹⁴⁰.

While this measure does not undermine the purpose of preventing forced marriage, however it should neither prevent the exercise of the right to family reunification nor render it excessively difficult.

5.4 Inheritance law

Islamic law states that the widow, or the widows, of a deceased husband inherits 1/8 of his assets, if they have children, no matter how many widows there may be.¹⁴¹ Conversely, regardless of the presence of a will, or whether the surviving spouse is the husband or the wife, Italian inheritance

134 United Nation General Assembly, Resolution adopted by the General Assembly 69/XX. Child, Early and Forced Marriage, Nov. 14 2014.

135 Giorgia Serughetti, Maria Grazia Ruggerini, Maria Rosa Lotti, Maura Misiti, Maria Virgilio, “Il matrimonio forzato in Italia: conoscere, riflettere, proporre come costruire una stima del numero delle donne e bambine vittime in Italia di matrimoni forzati e quali interventi avviare”, 2014, 65. Retrieved 17 Oct. 2015, <http://www.pariopportunita.gov.it/index.php/archivio-notizie/2473-il-matrimonio-forzato-in-italia-conoscere-riflettere-proporre>

136 Maria Dossetti, “Il diritto del minore a costruire una sua famiglia” in Alfredo C. Moro (ed.) *Manuale di diritto minorile*, 2014, 317.

137 “Legge 27 giugno 2013, n. 77, Ratifica ed esecuzione della Convenzione del Consiglio d'Europa sulla prevenzione e la lotta contro la violenza nei confronti delle donne e la violenza domestica, fatta a Istanbul l'11 maggio 2011”.

138 Retrieved on 27 Sep. 2015, <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&NT=210>

139 Court of Justice of the European Union, C-338/13, July 17th 2014, Marjan Noorzia v. Bundesministerin für Inneres

140 Court of Justice of the European Union, C-338/13, July 17th 2014, Marjan Noorzia v. Bundesministerin für Inneres

141 Emanuele Calò, supra n. 133; Giorgio Conetti, “La successione del musulmano poligamo”, *Studium Iuris*, (1997), 247.

law reserves shares of the deceased's estates to him or her in competition with children or ancestors.¹⁴² Additionally, the Italian courts consistently stated that the application of foreign law on succession can not deprive heirs from the protection guaranteed by Italian inheritance law to spouses according to non discrimination and equality principles. The children will receive their share of the estate in equal parts, as a disparity between males and females is contrary to Italian public order¹⁴³.

6. Repudiation

According to Islamic law, repudiation (*talaq*) is a form of marriage dissolution pronounced by the husband to his wife. The husband should say the term “*talaq*” and he unequivocally has to express his intention to end his marital authority to his wife¹⁴⁴. Repudiation can be irrevocable (*bid'a*) or revocable (*raj'a*). The wife is obliged to observe three months after divorce before she can remarry. During this time the husband could retract the repudiation and resume cohabitation. Instead, spending three months without the husband's revocation, the marriage is dissolved. The *talaq* can be repeated for no more than three times, otherwise it becomes definitive¹⁴⁵.

Repudiation is contrary to Italian internal legal public order because it discriminates spouses, because only the husband is allowed to repudiate the wife. It clearly violates the principles of conjugal equality and solidarity, seriously undermining the right of defense of the wife. Indeed, it abstracts from any check on the actual disappearance of “ *affectio coniugalis*” and on the possibility of a reconciliation. Furthermore, the act of repudiation does not contain any rule on alimony for the spouse and the children¹⁴⁶. So, the repudiation obtained abroad cannot be transcribed in the Italian civil register, and if it is transcribed, it must be cleared by the Registrar¹⁴⁷.

While the husband is allowed to easily repudiate his wife, the wife is granted the faculty to file for divorce. Indeed, wives claim for divorce more than husbands¹⁴⁸. Scholars observe that in Italian law the dissolution of marriage is not really bound to the loss of the conjugal life, but to the unanimous will of the spouses to end their marriage. Italian courts¹⁴⁹ constantly refused to recognize effects to repudiations affirmed abroad, because they are discriminatory for wives and for the absence of judicial review.¹⁵⁰ Otherwise, courts are more open to the recognition of divorces which occurred in Islamic countries.¹⁵¹

7. Conclusion

The analysis shows that the proposed Islamic cultural impact of immigration on the Italian legal system remains submerged, in order to avoid the possible disturbance of the apparent unity of the internal legal system as a whole. On the one hand, the Italian legal system, except for rare cases like *kafalah*, seems to stifle the special protection of those involved in situations of intercultural nature, while on the other hand, Islamic believers apparently prefer to remain concealed, without any significant claim of representation or recognition.

However, there are critical situations that the Italian legal system must face. Many of these issues

142 Italian Civil Code Articles No. 536, 540, 549, 551, 557.

143 Emanuele Calò, *supra* n. 133, Giorgio Conetti, *supra* n. 141.

144 Emanuele Calò, *ibidem*; Andrea Galoppini, “Il ripudio e la sua rilevanza nell'ordinamento italiano”, *Dir. Fam.*, (2005, 982); Maria D'Arienzo, “Diritto di famiglia islamico e ordinamento giuridico italiano”, in *Dir. Fam.*, 2004, 189 ss.; Cristina Campiglio, “Famiglia e diritto islamico. Profili internazionale-privatistici”, in *Musulmani in Italia*, *cit.*, 183 .

145 Emanuele Calò, *supra* n. 133.

146 App. Turin, 9 Mar. 2006.

147 App. Turin, 9 Mar. 2006, Patrizia Palermo, “Parità coniugale e famiglia multiculturale in Italia”, *Famiglia e Diritto*, (2011) 628; Roberta Clerici, La compatibilità del diritto di famiglia musulmano con l'ordine pubblico internazionale, *Famiglia e Diritto*, (2009), 197.

148 Maria D'Arienzo, *supra* n. 144.

149 Cass. 24 Jun. 1996, No. 5832.

150 Cristina Campiglio, *supra* n. 144.

151 Cristina Campiglio, *supra* n. 144, 184.

are related with the protection of the fundamental rights of women and their role within the family and society in their life choices. Actually, in Western societies, and Italy among them, there is an apparent contradiction: on the one hand women are free to live in the way they deem more appropriate, and on the other hand, there are situations where immigrant groups are strengthening ties with their cultural traditions and roots to affirm their identity. In these contexts girls and young women represent the weak link. Indeed there are reports of ill-treatment and punishments up to the most extreme acts such as murder, by male figures, such as the fathers, brothers or husbands, against daughters, sisters and wives who try to choose freely themselves by refusing an arranged marriage, or trying to fit into Western society attending school or looking for a job or simply wearing western clothes. Local press has reported several cases¹⁵² and also scholars have treated the issue¹⁵³.

The main risk of interculturalism in Western societies is the fragmentation of the legal system, namely the creation of a religious legal system within the immigrant communities. Indeed, it could be possible that the communities themselves govern individual rights and family law issues following the Sharia law by Islamic courts¹⁵⁴. Although the Italian experience does not show published cases, the experience in other European countries, such as the United Kingdom, France and Germany, demonstrates that this is the very true test for the protection of fundamental rights in Western societies, particularly related to Muslim migrants who migrated to Europe fairly recently. In fact they are carriers of Muslim legal culture who are “in the process of adapting to legal culture of the majority population”¹⁵⁵

Additionally, it would better to identify the anti-discrimination aspects of these matters in institutional and judicial spheres. In fact, the treatment of immigration, and therefore its definition, is ethnocentric, focusing attention on the origin of the person, i.e. his or her past, and not on his or her needs or their future in the country where they are living. That view is proved by the definition of “second-generation immigrants” attributed to immigrants' children¹⁵⁶, that transcends their growth and education and, consequently, their identity as members of such country.

In this sense, there is a necessity for a change to clearer and more accessible rules on citizenship, in order to have an integrated society. Indeed, there is a “right to integration”, but there also exists a “duty to integrate” for migrants in the society that welcomes them. It involves adaptation to the rules of law both in theory, following the constitutional principles of the country, and in practice through their spontaneous enforcement.

152 Massimiliano Peggio, “Gli nasce una femmina, ripudia la moglie”, *La Stampa*, 26 Nov. 2011; Antonella Beccaria, “Le impongono il matrimonio, minorenne pachistana tenta il suicidio”, *Il Fatto Quotidiano*, 23 Jul. 2011; *Rifiuta il matrimonio combinato. Lite in famiglia, padre uccide la moglie*, *Corriere della Sera*, 3 Oct. 2010; Nunzia Vallini, “Uccisa perchè non voleva sposare un cugino”, *Corriere della sera*, 14 Aug. 2006.

153 Valentina Masarone, “L’incidenza del fattore culturale sul sistema penale tra scelte politico-criminali ed implicazioni dommatiche”, *Dir. Pen. e Processo*, (2014), 1237; Natalina Folla, “Violenza sessuale e maltrattamenti in famiglia influenzati dal fattore culturale: reato “culturalmente orientato” o regressione dei diritti civili?”, *Famiglia e Diritto*, (2010) 400; Fabio Basile, “Immigrazione e reati culturalmente motivati. Il diritto penale nelle società multiculturali”, *Stato, Chiese e pluralismo confessionale*, (2010) 2.

154 Renzo Guolo, “La Sharia in Italia. Il diritto parallelo nelle comunità islamiche”, in *Dir. Imm. Citt.* (2009), 15, Patrizia Palermo, supra n. 124.

155 Åse B. Grødeland, William L. Miller, “European Legal Culture in Transition”, (2015), 505.

156 Giorgia Papavero, “Minori e seconde generazioni”, Fondazione ISMU, 2014, 7-8, Retrieved 27 Sep. 2015, http://www.ismu.org/wp-content/uploads/2015/06/Minori-e-seconde-generazioni_aprile-2015_sito.pdf; Vincenzo Cesareo, “Introduzione”, Fondazione ISMU, *Alunni con cittadinanza non italiana tra difficoltà e successi. Rapporto nazionale A. S. 2013/2014*, 2015, 2. Retrieved 17 Oct. 2015 http://www.istruzione.it/allegati/2015/Rapporto_alunni_cittadinanza_non_italiana_2013_14.pdf.