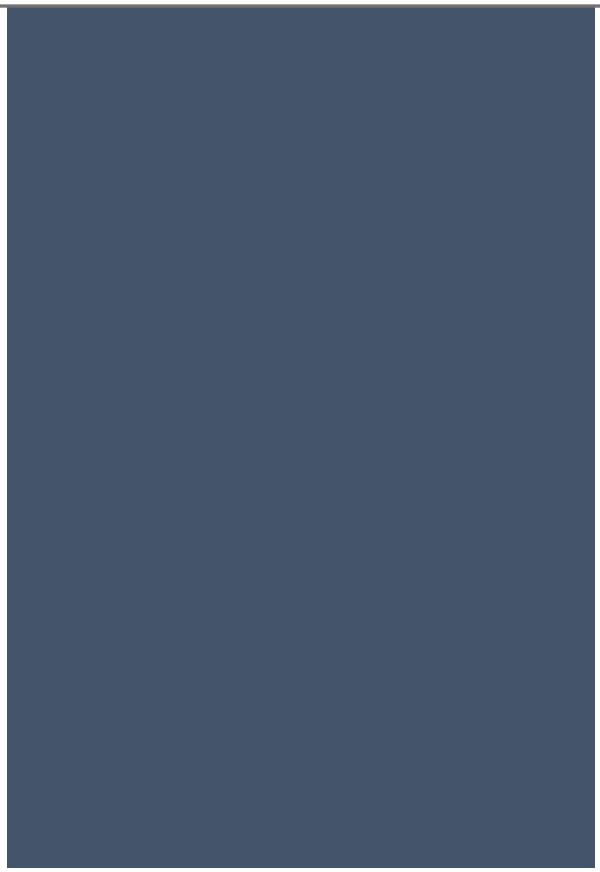

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ISLAMIC RITES AND CEREMONIES IN THE PANDEMIC EMERGENCY

BETWEEN PARALLEL LEGAL ORDERS

Alessandra Pera

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The essay investigates how some religious Islamic rules have been accommodated in front of the Covid emergency in some European countries and religious communities, highlighting the different and interconnected dimensions involved in this process of accommodation. The author uses the word country, having regard to the state-territorial legal order; and the word religious community, referring to the Islamic rule of law-religion model, based on a personal law conception. In particular, after some conceptual definition on some peculiar issues involved (para. 1), the analysis goes through some rules on funeral rites and ceremonies (para. 2) and on the sacred pilgrimages (para. 3).
The conclusive remarks (para. 4) underline how the Covid 19's emergency has given a chance for forms of virtuous reasonable accommodation, looking forward areas of middle ground between parallel legal systems.

I. INTRODUCTION

In the last months I went back to some authors and books: Gabriel García Márquez, who wrote *Love in the Time of Cholera;* Axel Munthe, a Swedish doctor, who published his *Letters from a Mourning City*, describing his experience in Naples, in 1884 during the cholera epidemy. In both books the epidemy is the scenario for deeply human stories. Both invites the reader to reflect on how life can be lived during an epidemy, as witnesses of human suffering, as actors of helps to weakly and needy individuals. Also, *I promessi sposi* by Alessandro Manzoni (1827), offers a portrait of the black plague, which afflicted the north of Italy between 1629-1931. Albert Camus, in *The plague* (1947), throws us in the plague tragedy occurring in Algeria (1849), investigating about the fragile nature and condition of human beings. In times of cholera, plague and Covid 19, we all ask ourselves who are we, how do we live, what is the profound reason which can explain what's going on? While searching for answers, it emerges a strong need for care and, in particular, for care of poor and vulnerable people, which is a universal value common amongst many culture, religions and populations. Many existential questions come around, especially having regard to the social, cultural and political conditions of people, which should be taken into serious account, when discussing about health, because many different dynamics affect health and wellness of people. Any social factor can impact on health: family, education, work, home, infrastructure, religion and rites, etc.

The current global pandemic, which continues to spread within affected nations and infect people in many States, asks us to pay attention on how our personal and collective life, in its more ordinary dimensions, is changing.

Our behaviors are influenced, modified and regulated differently. The virus, with its ways of contagion, determines how we interact with family members, work colleagues, neighbors and believers in religious celebrations; how we avoid touching our faces, shaking hands and kissing each other; when we are "at a safe distance" from those around us. We rush to wash our hands and face, if someone coughs or sneezes near us. We have limited our travel by bus, train, ship and plane. We have moved or cancelled conferences, games, concerts, travels, business meetings, dinners, cruises holidays, movie nights, and even lessons in schools and universities, preferring virtual ways of meeting and teaching.

This brief overview investigates how some religious Islamic rules have been accommodated in front of the Covid emergency in some European and non-European countries and religious communities. I deliberately use the word country, having regard to the state-territorial legal order; and the word religious community, referring to the Islamic rule of law-religion system, based on a personal law conception.

In particular, after some conceptual definition, in order to give cardinal points of sharia doctrine on some peculiar issues involved (para.1), I will go through some rule on funeral rites and ceremonies (para. 2) and sacred pilgrimage (para. 3).

Generally speaking, Islamic religion and rules brought in Europe by migrants' communities demand for recognition in the legal systems of the European host countries. This leads the States to pay attention to the new rules, principle, private and public behaviors induced by social and immigration modern needs.

Among the various rules and behaviors, which seems to expand more and more, the most significant number of conflicts usually involves the Muslim ones, both because they constitute, almost in Europe, the majority of migrants, and because the institutions of the Islamic faith are sometimes discordant with the culture of the European rights.

European legal systems anyway all ensure religious freedom, the exercise of religious rights and recognize wide margins of autonomy and privacy to the different believers, within a framework of legal and social values shared by the countries following the western legal tradition.[31] Those legal and shared values constitute also many barriers to the reception of conflicting ethnic and religious

[31] On the concept of Western legal tradition, J. M. Merryman, *The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America* (1969), 2; according to the Author, *"A legal tradition, as the term implies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective"*. See also M.A. Glendon, M.W. Gordon, P.G. Carrozza (eds.), *Comparative Legal Traditions* (1994), 6, 8; P. Stein, J. Shand (eds.), *Legal Values in Western Society* (1974); Peter Stein, *Legal Insititution. The Development of Dispute Settlements* (1984); H. P. Glenn, *Legal Traditions of the World. Sustainable Diversity in Law,* (5th ed., 2014), 127 ff.; P. G. Monateri, "Black Gaius. A Quest for the Multicultural Origins of the Western Legal Tradition", 51 *Hastings Law Journal* (2000), 479, 555; A. Somma, "Giochi senza Frontiere. Diritto Comparato e Tradizione Giuridica", 37 *Boletin Mexicano de Derecho Comparado* (2004), 169, 205.

models.

The increasing circulation and diffusion of the heterogeneous religious and legal models imported into Europe by immigrants, especially by those of Islamic faith, has started to create relevant issues, especially because of the differences between the peculiar Islamic schools and doctrines. Since - mainly as regards the personal status of Muslims - Islamic law does not accept the separation between law and religion, which on the contrary characterizes all Western legal systems, it is easy to guess that interpersonal relationships are the most affected by the influence of the religious requirements. The progressive increase in the number of immigrants in Europe has begun to generate significant impact on the structure and functioning of the legal systems of European countries, and in the medium term it will likely imply a change of both.

That comfortable charm of the absoluteness,[32] embodied in the image of a legal system based on a national society which is compact, homogeneous and internally undifferentiated, has been replaced by a diversified society, in which is felt a need to assess whether - and to what extent - Western legal systems can give space to the peculiarities of individuals belonging to minority religions and cultures bearers of autonomous values. It is therefore crucial to understand whether the recognition of such cultures can, in some way, put national identity into crisis, undermining the principle of the validity of general rules applicable to all citizens.

Such a transformation requires consequently a change in the approach to the theme in Western legal systems, that are called today, not only to take into account these new structures of personal relationships, but especially to give answers to the requests for recognition and protection coming from the individuals involved in such relationships.

It has been shown that after an initial phase of isolation aimed at finding a job, immigrants arriving in Europe tend to join to their own communities, by ensuring that immigration turns from "individual" to "family and community". This stabilization of immigrants, resulting in the formation of families and communities, feeds the tendency to re-create the institutions of the communities of origin in a foreign land, to apply both the traditional rules and practices, thus making the foreign community bearer of new and/or traditional legal models.

Liberal versions of multiculturalism suggest the need to adopt legal solutions to the recognition and support of minority groups, thus the recognition of cultural or collective rights, which must meet though certain limitations and precautions to protect the freedom of individuals within groups.

Immigration inevitably leads to a change in the character of the host society, since immigrants, though ready for the dialogue and the acceptance of the regulations of the country where they have decided to settle down, will never give up their form of cultural life, i.e. their rules.

In relation to possible conflicts between the rules of the indigenous community and those of the hosted one, situations may arise in which the conflict can be easily solved through spontaneous

[32] R. Bartoli, "Multiculturalismo: Disincanto o Disorientamento del Diritto?", in G.A. De Francesco, C. Piemontese, E. Venafro (eds.), *Religione e Religioni: Prospettive di Tutela, Tutela delle Libertà* (2007), 94.

adaptation mechanisms on the part of migrant communities. There are cases, however, where the intervention of the state law is essential.

What has happened, in times of Covid 19 in Europe, is that forms of accommodation and adaptation have occurred, overpassing the difficulties which arise from the peculiarity that Islamic people are part of a certain community in which the rule of law coincides with the religious one, so religion become the model of social control and organization of the group.[33]

The Islamic legal system can be ascribed to the *rule of religion* model, where there is a substantial coincidence between the religious rules and the law norms, which are substantiated in both Sharia and its sources (*Quran, Sunna, Umma, Igma, Qiyas*…).[34]

Sharia is the way shown by God that believers are called to follow. It consists of all the precepts and rules of conduct, which the good Muslim must obey to and on the basis of which the Muslims are judged both by the members of their community and by God. The Sharia's system is based on the precepts revealed by God to men in order to discipline their behavior.[35]

According to Menski the Islamic immigrants live the second phase of adaptation, in which operates a new hybrid law, a form of legal pluralism in action[36]: at this stage, they understand that the domestic system is the dominant one, but do not wish to abandon their traditions. In this way, they are becoming – once again in Menski's words – *"skilled legal navigators of pluralism, rather than assimilated monoculturalists*".[37]

This inherent and profound feature, which constitutes the very essence of the Islamic legal tradition, along with many other elements,[38] must be the starting point for the rest of this analysis,

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[33] On the classification into legal families based on the distinction between *rule of law*, *rule of religion/tradition* and *rule of politics*, conceived as instruments of social control, see U. Mattei, P. G. Monateri, *Introduzione Breve al Diritto Comparato* (1997), 51,79.

[34] For an overview of the sources of Islamic law, M. Hashim Kamali, "Source, Nature and Objectives of Sharia", 33 *The Islamic Quarterly* (1989), 223; N. J. Coulson, *A history of Islamic Law* (1964); Hamid Rez Kusha, *The Sacred Law of Islam* (2002), 13, 50; F. Rahman, *Islam* (1979), 30, 42; J. Burtonm, *The Sources of Islamic Law. Islamic Theories of Abrogation* (1990), 1, 14; H. P. Glenn, *supra* note 2, 182, 186. In the Italian literature, see A. Gambaro, R. Sacco, *Sistemi Giuridici Comparati* (1996), 464 ff.; G. Vercellin, *Istituzioni di Diritto Musulmano* (2002); M. Papa, A. Lorenzo, *Sharia. La Legge Sacra dell'Islam* (2014).

[35] There is a vast literature on the concepts of religion and law revealed. For an historical analysis, N. J. Coulson, *supra* note 4 (1964); N. J. Coulson, "Islamic Law", in J.D.M. Derrett (ed.), *An Introduction to Legal Systems* (1968); Maxime Rodison, *Muhammad* (2002), 73 ff.; Malise Rothven, *Islam in the World* (1984), 85, 87; K. Amstrong, *Islam. A Short History* (2000), 3, 23; W. B. Hallaq, *Shari'a: Theory, Practice, Transformation* (2005); Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (2003), 20, refers to the gradual nature of revelation; Bernard G. Weiss, *The Spirit of Islamic law* (1998), 25,30. In the Italian literature, A. Gambaro, R. Sacco, *supra* note 4, 461 ff. and the bibliography cited therein.

[36] W. F. Menski, "Law, Religion and Culture in Multicultural Britain", in R. Mehdi et al. (eds.), *Law and Religion in Multicultural Societies* (2008), 83 ff.; W. F. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2006), 301.

[37] W. F. Menski, *supra* note 6, (2006), 302.

[38] On the complexity of the items, information, attitudes and concepts, produced by history and coming from the past and, therefore, present, that make a legal tradition, see the metaphor proposed by Glenn by recourse to the figure of the *bran-tub*, H. P. Glenn, *supra* note 2, 13, ff.; on the historicity of the tradition and the importance of the past, see also A. W. B. Simpson, *Invitation to Law* (1988), 23; on the idea of tradition as something passing almost physically from one person to another and from one generation to another, following the idea of the Latin *traditio brevi manu*, see Hans Georg Gadamer, *Truth and Method* (1988), 131; as set of ideas aware and transmitted in time, see Mark Salber Phillips, Gordon Schochet (eds.), *Questions of Tradition* (2004), XI; see also the concept proposed by John Merrymen as explained *supra* note 1.

which aims at focusing its attention on the way religious law competes with the State and secular law. It is a model based on the fusion between religious and legal rule, where concepts, categories and precepts derived from the law of God, which is at the same time a guide for religious and social behaviors, for both the spiritual and temporal life.

Different institutions, Mosques and Councils implement a form of social control based on the rule of religion, which has therefore a place in the Western context that, for centuries, has known the separation between Church and State, between legal rule and religious rule, since it is based on the principle of laity, understood in two different accepted meanings,[39] which will be described very briefly.

The first is attributable to the concept of rule of law, as used in modern comparative law's theories, following which the systems governed by the rule of law have experienced two important divorces: the first between law and politics, so that the time for political decisions or government ones (macro-choices) is separated from that of the legal technical choices (micro-choices); the second between law and tradition or religion, so that the rule of law and the jurist need not a sacred or traditional legitimacy, the one to be considered binding and the other to have the authority required to exercise its functions.[40]

In the second accepted meaning of the principle of laity,[41] a "truly lay" State cannot impose the dictates of a particular moral, albeit largely dominant, over any citizen. The lay State does not own any of the possible conceptions of "good" or of "good life", but it creates the conditions and sets the rules on the basis of which all these ideas can grow and communicate with each other. The lay State, in short, builds the "neutral" field where individuals, agencies, associations, etc., can freely interact. Actually, to build this "empty space" is not itself a neutral choice, because it is an evaluatively connoted option in favor of the fundamental principles of freedom of conscience, autonomy and individual responsibility, which are embodied in both the formal and material Constitutions of many States.[42] This choice can therefore be characterized as "neutral" only under

[39] For a brilliant and exhaustive analysis of the different meanings of *rule of law* and laity in comparative Italian literature see Luigi Moccia, "Glossario per uno Studio della Common Law", in Peter Stein, John Shand, *I Valori Giuridici della Civiltà Occidentale* (1981), 458. The reference is to the Italian translation of P. Stein, J. Shand (eds.), *Legal Values in Western Society* (1974), where Moccia quotes, among others, to the studies of Albert Venn Dicey, *Introduction to the Study of the Constitution,* (9th ed. 1956), 183, ff. Dicey identifies three meanings properly attributable to the expression *rule of law*: firstly as *"the guarantee of freedom of the single individual and its goods (…)"*, in this sense *"rule of law is opposed to any system of government based on the exercise by the authority - whatever it is – of wide, arbitrary or discretionary restrictive powers"*; the second meaning is based on the idea of *"equal subjection of all, both private and public authorities, to the common law of the realm, applied by the ordinary courts of justice"*; the third is based on the fact that in the English experience *"the general principles of the Constitution (such as the right to personal freedom, or the right to public assembly) are (…) the result of judicial decisions determining the rights of private individuals in the single particular cases brought before the courts; while in many foreign legal systems the protection (whatever it may be) given to individual rights results, or at least seems to result, from the general principles of the constitution"*.

[40] U. Mattei, P. G. Monateri, *supra* note 3, 66-70; A. Gambaro, "Il Successo del Giurista", 5 *Foro It*. (1983), 85, 93.

[41] For such interpretation of the principle of laity, see V. Villa, "Alcune Osservazioni sulla Nozione di Laicità", in *Quaderni Laici*. *Supplemento*. *Le due Italie* (2010), 183, 193.

[42] See G. Marini, "La Giuridificazione della Persona. Ideologie e Tecniche dei Diritti della Personalità", 1 *Riv*. *Dir*. *Civ*. (2006), 359, ff.; Giorgio Resta, *Autonomia Privata e Diritti della Personalità* (2005).

this specific profile, and because none of the ethical concepts or visions of the world that are available in that context is privileged; but it is not "intrinsically neutral", as it is founded on the values of freedom and autonomy of the person, which are also guaranteed by the Constitutions of many States and represent a common heritage of the Western legal tradition.

The principles of the rule of law and of laity is intended as the best guarantee of respect for cultural and religious diversity. By calling to adopt national and international sources of law, which enshrine the prohibition of racial and religious discrimination, admitted the existence and legitimacy of parallel legal and religious systems.

In States where Sharia is not the law of the territory it is possible to identify two different ways to pose the relationship between State law and Islamic law: the first guarantees the Islamic law the formal status of Muslim law; the second, dominant in the Western States, is characterized by the exclusivity of the State sources of law and by the denial of personal statuses. The approach varies depending on how the sources of law are organized and on how the legal formants[43] weight on the structure of the single system. The non-State law can be recognized, but there is a certain resistance to acknowledge the religious right in peculiar "hard cases".

For what concern the relationship between parallel legal orders, the territorial one and the personal-Islamic one, during the Covid 19' emergency, it is important to underline that the State law, government decrees, laws or other sources, have all their main fundamental reason in protecting public health and people lives, which are considered everywhere paramount value and rights, both in state constitutions (where existing) and in fundamental rights international Charters, on one hand, and in religious thoughts and texts, on the other hand. Thus, some emergency measures are justified because of the protection of values which are shared by the western legal tradition and the Islamic one and considered superior in comparison to religious freedoms.

II. Sharia Funeral Rites in time of Corona Virus in Europe

The Grand Mufti of Bosnia Herzegovina, Husein Kavazović, has issued a *fatwa* on the rites on how to clean and dress up the dead *(Ghusl Mayyit)* and the subsequent funeral prayer *(Janazah)* in cases of infectious disease.

The *fatwa* is a pronouncement by an expert, the *mufti*, who is a sort of jurisconsult. It (the *fatwa*) has the nature of an authoritative assertion, coming from a person to whom the community recognizes a leader function, who possesses the useful knowledge and analytical ability to interpret the sacred sources.[44] The *mufti's* activities and the production and collections of *fatwas* are the most effective

[43] On the concept of legal formant, see R. Sacco, "Legal Formants: A Dynamic Approach to Comparative Law", 39 *Am. Journ. Comp. Law* (1991), 343, 401.

[44] W. B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (2001), 199, ff.; W. B. Hallaq, "From Fatwas to Furu: Growth and Change in Islamic Substantive Law", 1 *Islamic Law and Soc*. (1994), 29. In particular, on the importance of fatwahs in the shi'ite tradition, see Muhammad Khalid Masud et al. (eds.), *Islamic Legal Interpretation: Mufties and their Fatwas* (1996); Norman Calder, *Islamic Jurisprudence in the Classical Era* (2010), 92, 160.

means of brining vast amounts of law to bear on highly particular cases and hard situations.[45] *Fatwas* are object of collections and of systematic incorporation into the doctrinal works, called *furu*, in a continuous going on process. Thus, Islamic religious and law rules can hold their primary sources subject to the interpretative power of the later sources, to the explanation of the *Quran* and the *Sunna*,[46] as determined by *ijma*.[47]

Generally speaking, a *fatwa* become stronger, more persuasive and binding, if there is on it the general consent of the community, which is called *Umma*.

To be clearer, many scholarly writings has showed the importance of *fatwas* in legal change, and how their incorporation into doctrinal law was and is something which took and takes place through centuries, giving room for human development. But this, according to the leading form of the Islamic tradition, could occur only through consensus (*my People will never agree on error*)[48] and not through on-going individual effort.[49] This consensus can be, at first, doctrinal and, afterword, more generalized and communitarian.

In particular, the *fatwa* here mentioned has been recognized and has received the assent of the EULEMA (European Muslim Leaders' Majlis), which is the Council of European Muslim leaders and has been proposed to the attention of some European governments, such as Germany, UK, Ireland, Portugal, Slovenia, Denmark, Lithuania and Norway.

Another assent has been formulated by a Council held in the University of Al-Azhar, in Cairo, and by the Muslim Council of Britain (MCB).[50]

According to the *fatwa*, in the case of death from a serious infectious disease, the *Tayammum* (dry ablution)'s rules should be applied instead of the *Ghusl* (wet ablution with water)'s ones and moreover the person who celebrate the rite has the duty to wear personal protective equipment (gloves, masks and sterile coverall). In the event that the deceased arrives in the purification building in a mortuary sack or coffin, to avoid the spreading of the infection, the deceased must not be removed from the latter. The mortuary sack and coffin can no longer be opened. The funeral

[45] See H. Patrick Glenn, *supra* note 2, 189.

[46] Sunna literally means the path taken or trodden by the Prophet himself. The content of the Sunna is found in *hadith*, or tradition, which are statement transmitted in a continuous chain of communication by the Prophet himself to present adherents to the tradition to other and successive ones, at first orally and then in written forms. A hadith necessarily contains two parts: the normative statement and, as proof of its legitimacy, the chain (*isnad*) of the transmission, which it has followed. See M. Ali Maulana, *A manual of hadith* (1977); M. G. Simms Hodgson, *Venture of Islam* (1974), 64; A. Rahman I. Doi, *Shari'ah: The Islamic Law* (1984), 24, ff.

[47] *Ijma* is doctrinal consensus and is the third level of the pyramid of Islamic sources of law, after the Quran and the Sunna. It is constituted by a common religious conviction, "*but commonality, or consensus, id difficult to establish and, once established, may resist its own dissolution"*, according to H. P. Glenn, *supra* note 2, 185. In fact, consensus presupposes debate and discussion and after that a widespread agreement in the community of reference, in order to avoid long-standing division within the Islamic doctrine. Such objective is not obvious, especially if we think to different Islam schools of thought. See M. Hashim Kamali, *supra* note 5 (2003), 240.

[48] S. Ibn Majah, from his collection of Hadiith, 'Fitan' section. On line at https://ahadith.co.uk/ibnmajah.php, retrieved 20 April 2020.

[49] See H.P. Glenn, *ibid* (2014), 201.

[50] See the Comunità Religiosa Islamica Italiana (COREIS) institutional web site, https://www.coreis.it/international/articolo/preghiere-islamiche-durante-la-pandemia-e-disposizioni-per-onorare-la-sepoltura-in-europa/., retrieved 20 April 2020.

prayer must be carried out according to the rules given by the official government institutions regarding public meetings, and the prayer will be carried out only by a single imam and family members.

In Italy, the D. Lgs. n.19, 25th March 2020, systematizes the different and numerous measures that the government entered in force between February and March, in order to contrast the wide spreading of the epidemy. In particular, art. 1 gives to the Prime Minister the power to enact specific measure through future decrees.

Letters g) and h) of that art. 1 provide specifically on religious ceremonies ad rites, compressing the religious freedom to different extents: g) limitation or suspension of manifestations or initiatives of various nature, events and any form of meeting in public or private places, even with cultural, playing, sports, fun and religious aim; h) suspension of civil and religious ceremonies, limitations in the access to religious places.

Coherently, the guide lines adopted by the Centro Islamico Culturale d'Italia (CICI) of the Mosque of Rome indicate that, whereas the sanitary circumstances and the public health cannot consent neither the cleaning rites with water or the *tayammum*, it is possible to proceed only laying the shroud on the deceased, even if the dead is wearing other dresses.[51]

The COREIS (Comunità Religiosa Islamica Italiana) has complied with the rules enacted by the Italian Government on the prohibition of celebrating funerals. Thus, in order to avoid people crowd, it has indicated to its believers to organize only a small funeral prayer, at the presence of one imam and one member of the family, respecting the security distances between people and adopting all the precautional measures provided by the Italian law to avoid contagion. The ritual ceremony with family and friends will take place in a future moment, after the end of the epidemic restrictive measures.

Generally speaking, it is relevant to clear that the rituals rules on mortuary toilettes, ablution and bandage of the dead are intended to purify the dead, to preserve her the way to Allah and paradise.

For what concern the ablution of the victim's body, the COREIS has suggested to its community to suspend the *Ghusl* (wet ablution with water) and the bandage of the body with the shroud (*kaffan*), substituting these with the dry ablution and by a specific bag for dead, inviting the Italian Institutions to consent to those symbolic acts, even in the complying of the security measures adopted by the state-lay's authorities.

In France, The Haut Conseil de la Santé Publique (HCSP) issued an opinion, on the 18th of February, on the management of the body of a deceased patient infected with Covid-19, according to which the body of the deceased is potentially contaminating, and standard precautions must be

[51] See the institutional Facebook pages at https://www.facebook.com/pages/Moschea-di-Roma/157011067650854?fref=pb&hc_location=profile_browser&rf=143085269041507; and at https://www.facebook.com/centroislamicoculturale/, retrieved 20 April 2020.

applied when handling it.[52]

Considering that in principle the risk of contamination is the same in a deceased patient as in the living patient, the HCPS recommends to funeral staff, that the body, previously wrapped in a hermetically sealed watertight cover and then covered with a sheet, is transferred to the death room; the cover must remain closed; standard precautions are applied when handling the cover; the body is placed in a simple coffin that the definitive closing of the coffin be carried out without delay; no act of thanatopraxis (body conservation care) can be performed.

The decree of the 15th of March 2020 stated that places of worship are allowed to remain open, but any gathering or meeting of more than 20 people within them was prohibited until the 15th of April 2020, with the exception of funeral ceremonies. This has been prorogated until the emergency is still in.

The Conseil Français du Culte Musulman (CFCM), on the 17th of March, has confirmed its consent to the same arguments arising from the above mentioned *fatwa,* issuing an opinion relating to the taking in charge of the body of a deceased Muslim patient infected with the coronavirus (Covid-19),[53] setting out what Muslim law allows or does not allow in these circumstances, both in terms of mortuary toilets and prayer to the deceased (*salat janaza*).

Even in France, the management of the bodies of deceased and uninfected people with coronavirus continues to take place under normal conditions. However, the safety and prevention instructions regarding gatherings must be observed. Thus, with the suspension of mortuary toilets and the adaptation of Islamic funeral rites to the coronavirus epidemic.[54]

With regard to the bodies of people who died because of Coronavirus, it should be noted that the protocol recommended by the HCSP leaves very little room for intervention by funeral personnel before the coffin of the deceased. In fact, many manipulations, such as wearing a protective suit and removing it, require training and the execution of precise protocols. These recommendations in no way oppose the provisions of Muslim law, which, while respecting the dignity of the deceased, naturally give priority to the health of the living.

Regarding elements of Muslim law, taking care of the funeral is a collective obligation (*fard kifâya*):[55] if part of the community takes care of it, the rest will be exempt. Thus, in cases of emergency and for extraordinary reasons, even only one Muslim can provide for it. In particular, for what concern the ablutions, the case of the mortuary washing of a deceased person who died from a contagious disease was exposed a few years ago with SARS. Scientists have responded to this subject based on the principles and foundations of Muslim law: if it is impossible to wash the body, then it could be

[52] Available on the institutional web site at https://www.hcsp.fr/explore.cgi/Accueil, retrieved 20 April 2020.

[53] See https://www.saphirnews.com/Coronavirus-que-dit-le-droit-musulman-sur-la-prise-en-charge-des-morts-d-une-epidemie_a26986.html?print=1., retrieved 20 April 2020.

[54] See https://www.saphirnews.com/Coronavirus-avec-la-suspension-des-toilettes-mortuaires-les-rites-funeraires-islamiques-s-adaptent-avec-l-epidemie., retrieved 20 April 2020.

[55] For the communitarian nature of the Islamic legal tradition and for the idea of collective obligation inside it, see H. Patrick Glenn, *supra* note 2, 203, 215.

used pouring water on it; if the water cannot be poured, dry ablutions (*tayammum*) must be made.
Some scholars admit also that *tayammum* is not a substitute for compulsory washing since washing is established for cleaning and not for ritual purity (*tahâra*). According to them, the deceased can be buried without washing or *tayammum*. Thus, if expert doctors prohibit contact with the deceased including washing and *tayammum*, it is possible to pray over the deceased directly without washing or *tayammum*. However, this exemption is consented to the limits of said necessity. Thus, expert doctors define the limits within which someone is allowed to wash the infected deceased. This is why the washing or *tayammum* exemption is not used until after taking into account the protective measures of the scrubbers in order to safeguard them from contracting the disease. Washers should also be experienced with precautionary measures and not take them lightly.
The HCSP, actually, recommends that the body be washed only in the room in which it was cared for, using disposable gloves without water. In other words, neither of the two forms of ablution under Muslim law (*ghusl* and *tayammum*) is possible in France. In this emergency situation, the ablutions lose their obligatory character.
Regarding the body bandage by a shroud, the HCSP recommends that the body be wrapped in a hermetically sealed watertight body cover. This cover can act as a shroud, since the purpose of the envelope is to safeguard the dignity of the deceased. The shroud can be placed on the cover which must never be opened.
Regarding the mortuary prayer (*salat janaz*a), it may take place directly in the cemetery, respecting the safety and instructions concerning gatherings and the maintenance of the deceased's body.
Prayer can be done, if the situation requires, on the grave after the burial. If the funeral prayer is organized in a mosque, it is advisable to privilege the mosques having an outside space and allowing there the access of the vehicle carrying the coffin. In this case too, the safety and instructions concerning gatherings must be observed. The coffin may remain in the vehicle.[56]
Another difficulty is added for the Muslim undertakers: that of not being able to respect the wishes of certain deceased to have their bodies repatriated to their countries of origin such as Algeria, Morocco, Tunisia, Turkey, because these countries have suspended air links from and to France for an indefinite period, unless they set up exceptional convoys.
Moreover, the prophetic tradition is to bury people in the area where they died and as quickly as possible (just after the funeral prayer). Thus, in France and in many other western countries, there already have Muslim cemeteries and Muslim squares. Consequently, it is unnecessary and inappropriate to repatriate the body to a country of origin, especially in these specific cases of pandemic and the difficulties caused.[57]
For the bodies of the deceased and uninfected with the coronavirus (Covid-19), their management

[56] See https://www.saphirnews.com/Coronavirus-que-dit-le-droit-musulman-sur-la-prise-en-charge-des-morts-d-une-epidemie_a26986.html?print=1 2/3, retrieved 20 April 2020.
[57] The CFCM opinion is available on the institutional website at https://www.cfcm-officiel.fr.

continues to take place under normal conditions. However, for the funeral prayer, it is necessary to respect the safety and prevention instructions concerning the gatherings in term of number of participants and space of more than one meter between each other.

In the context of an epidemic, the difficulty of ascertaining with sureness the absence of contamination by the coronavirus (Covid 19) obliges health personnel to take no risk for the life of funeral personnel and the family of the deceased. It was by applying this precautionary principle that hospitals made this decision, which has no other purpose than the protection of the living and which in no way clashes with the provisions of Muslim tradition in such a context. Respect for the dignity of the deceased and accompanying their bodies to their homes, as well as supporting their families during these difficult times, can be accomplished without endangering the lives of others. Also Mohammed Moussaoui, President of the CFCM, asked to his community to accept the measures adopted by the health authority, arguing that certain ritual provisions such as the mortuary toilet, the placing of the body of the deceased in a shroud and the mortuary prayer can be arranged taking into account the principle of the preservation of the life of the one who performs the funeral ritual. Mr. Moussaoui specifies that, in the Muslim tradition, the deceased in period of epidemic whose bodies are exempted from all mortuary toilet are *"raised to the rank of martyrs"*.

"The Prophet Muhammad wanted to bring the necessary comfort to families faced with the pain of mourning and the difficulties they may encounter in carrying out this rite", said the CFCM President, who asked the bereaved families *"to accept in the peace and serenity the measures taken by the health authorities and the health personnel of the State"*.[58]

The Islamic community has demonstrated to be aware of the dangers, to respect the barrier gestures and confinement, trying to accommodate their rules and their religious values with the emergency, respectfully and complying with lay-state's law rules. The sharia in such situations invites its community to wisdom, patience, discipline, benevolence and spiritual elevation, for the good of all. A communitarian approach has been shared by many mosques and institutions in Europe, who have decided to suspend the ritual toilets in the face of the serious health situation that all Europe is going through. The suspension has been generalized due to the impossibility of defining with certainty, for each case, the causes of death and, above all, because of the body protection measures today systematically imposed on health and funeral personnel. These measures, as exceptional as it is provisional, which aim to overcome the coronavirus pandemic, take into account the opinion of the Muslims Councils in different countries and the opinion of the most part of the imams, for whom the protection of the living (medical personnel, funeral agents and families) is in all superior. Thus, the consent of the Islamic community, *id est* the scholars' elites (imam, mufti, and institutions) is converging.

Islamic funeral rites in Europe seems to be oriented by an approach which aims at conciliation

[58] *Ibid*.

through adaptation. This is confirmed if we look at the hypothesis regarding the Ramadan.

The containment measures, which have begun on February and March to stop the spread of the coronavirus, are expected to last several weeks. They have disrupted Christian and Jewish religious holidays as well as, most likely, the beginning of Ramadan 1441/2020 during the months of April and May. In many European countries, as long as the confinement continues, all future religious celebrations must take place without assembly. This has been the case for Holy Week and Easter, which Christians had celebrated from the 6th of April to the 13th; for Passover, which the Jews had celebrated from the 9th of April to the 16th; and for the month of Ramadan, already begun on the 24th April. During this blessed period for Muslims, the mosques are normally very crowded in the evenings after the breaking of the fasting meal, and more particularly during the *Tarawih* prayers. It is of fundamental importance to encourage collectively to build intelligent strategies to better protect people, while continuing to rigorously observe the barrier gestures and the confinement rules in force.

III. A GAZE A LITTLE BIT FARER AWAY: HAJJ AND UMRAH PILGRIMAGES

Even where the rule of religion is the law for all, or for nearly all, the Kingdom's Minister of Hajj and Umrah, Mr. Mohammad Saleh bin Taher Benten, said that Saudi Arabia was ready to receive and serve pilgrims at any time, but that the priority is currently placed for everyone's safety, so that Muslims around the world must be patient and delay their plans for the Hajj and Umrah pilgrimages.[59]

In times of Covid 19, Saudi Arabia, to fight the spread of the pandemic contagion, suspended all prayers in the outer courtyards of the Two Holy Mosques in Mecca and Medina and stopped all nationals and residents from visiting those sacred places.[60]

The Hajj pilgrimage to Mecca is one of Islam's five pillars, which all Muslims, who are economically and physically able, must comply with, at least once in their lifetime. Unfortunately, and probably, the next one, which is scheduled for end of July2020, will be cancelled.

In the last decades, because of an easier free movement of people, a certain rising prosperity and availability of airplane's travel, the number of pilgrims has increased remarkably. In order to manage the massive flow of believers, since the end of the '80s, the Saudi's authorities introduced a quota system, assigning to each country one visa per thousand inhabitants.[61]

This means that pilgrims, who managed to obtain a hajj visa for 2020, may have waited decades for it. Moreover, it is customary for Muslims to postpone the hajj until they are ready to take leave of '*al-dunya*' (worldly concerns), so that, looking forward to meeting Allah, many elderly believers have spent their life savings money for their pilgrimage to Mecca. For those elderly Muslims, the

[59] See https://english.alarabiya.net/en/News/gulf/2020/04/01/Saudi-Arabia-urges-countries-to-defer-Hajj-Umrah-plans-amid-coronavirus-Minister.html, retrieved 21 April 2020.

[60] See https://english.alarabiya.net/en/News/middle-east/2020/02/27/Saudi-Arabia-suspends-entry-for-Umrah-pilgrimage-due-to-coronavirus, retrieved 21 April 2020.

[61] Some countries distribute the quota of hajj visa through a lottery system, while others organize waiting lists.

cancellation of the 2020's hajj increases the risk of dying before, both, complying with their duty and making the wish come true.

Moreover, if the pandemic causes enormous anxiety amongst religious and non-religious people in the all world, it has to be said that for Muslims this feeling is aggravated by a peculiar interpretation of a hadith, according to which *"The Hour (Day of Judgment) will not be established until the Hajj (to the Ka'ba) is abandoned"*.[62] In other words, the possible cancellation of the hajj is a sign that the world is coming to an end. Such interpretation is neglected, however, by scholars who attempt to distinguish incidental cancellation of the hajj for health reasons from the abandonment of the hajj by the community of the believers, which will determine the end of the Islamic tradition.[63]

Moreover, the historical analysis shows us some precedents of hajj pilgrimage's cancellations. A documented and famous one was in the tenth century, when a religious sect, the Qarmatians, sacked Mecca in 930 CE and banned hajj for several years.

Other epidemics accidents, such as cholera and typhus, have occurred and involved also pilgrims in Mecca. The cholera outbreak in 1865 killed 15,000 of the 90,000 pilgrims and, even if indirectly, the pilgrims contributed to the spreading of cholera to Europe, in particular through the "Indian route". As a reaction, the British and the Dutch colonial regimes imposed sanitary rules for the journey, exercising their power and sovereignty: the steamships, where the pilgrims were traveling to the hajj were to have tops to shield the upper deck pilgrims against the sun; Western-educated doctors were on board to monitor and treat pilgrims; all arriving pilgrims were cleaned in Lysol at quarantine stations at the entry port of Jeddah, on Kamaran Island and at al-Tor in the Sinai Peninsula. The colonial regimes were controlling also the religious ritual and this interference was highly unpopular among pilgrims. Colonial sanitary control was really pervasive: the Dutch kept comprehensive reports of their health interventions on Kamaran Island. Such sanitary strategy gave them also the chance to avoid the spreading out of civil unrest and anti-Western Islamic movements.

More recently, Islamic authorities have reformed certain hajj rites, expanding the time slot during which the stoning rite should be carried out and permitting believers to perform the sacrificial rite by proxy. Unfortunately, suggestions to expand the hajj season in order to limit the number of pilgrims who are simultaneously present in Mecca have so far been rejected.

IV. CONCLUSIVE REMARKS

This brief overview, without any claim for completeness, have had the intention to show how, within the course of the past few months, the pandemic has upturned daily lives and challenged

[62] Narrated by Shu'ba, The Prophet said: *"The Hour (Day of Judgment) will not be established until the Hajj (to the Ka'ba) is abandoned"* Sahih Bukhari.

[63] For the end of a legal tradition see H. P. Glenn, *supra* note 2, 33, 39. Other scholars underlines that it was narrated by Abu Said Al-Khudri, The Prophet said: *"The people will continue performing the Hajj and 'Umra to the Ka'ba even after the appearance of Gog and Magog"* Sahih Bukhari.

self-evident truths. It is too early to assess how societies and cultures will consequently be reshaped, but probably it could be a chance for intercultural and religious dialogue, accommodation and adaptation, a chance to look for common-middle-grounds between parallel legal systems.

The idea of a *reasonable accommodation* becomes the legal argument to achieve a form of legal pluralism that enhances respect for religious and cultural diversity, and enables individuals to fully practice their faith, even when the legal rule coincides with the religious precept, but respecting the constitutional framework and the founding principles of the State legal system.

Therefore, as mentioned above, the Islamic communities within States in the western area try to maintain their culture and protect their tradition and identity, building a *"home away from home"* a "*desh pardesh*", through the application of Muslim law, or, however, *"overarching meta-norm approximating to the rule of law"*.[64]

The analysis leads us to address the issue of parallel legal systems: the first is the expression of a cultural and religious minority, who poses and manifests itself as a true *legal order*, albeit being a minority, with its strong component of identity, of normativity, and its need for conservation of the legal tradition, of the dogmatic categories and its own rules; the second is the state system, organized according to the principle of territoriality of the law, which hosts the minority.

The historical analysis shows that this is not a new phenomenon, neither for the western legal systems or for Islamic ones. For the first, just think of the competition between *ius civile* and *ius gentium* in Roman times,[65] the barbaric concept of *waregang*[66] or the legal pluralism in medieval Europe;[67] for the second, reference can be made to the system of the *millet*, during the Ottoman Empire.[68]

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[64] D. McGoldrick, "Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws", 9 *Human Rights Law Review* (2009), 605. The author believes that this is because to live according to the Sharia is not simply a matter of adhering to its precepts, but also and above all it is a psychological and behavioral individual attitude.

[65] See A. Schiavone, *Ius. L'Invenzione del Diritto in Occidente* (2005), 123, ff.; and also G. Lombardi, *Ricerche in tema di ius gentium* (1946); Id., *Sul concetto di ius gentium* (1947); M. Talamanca, "Ius gentium da Adriano ai Severi", in E. Dovere (ed.), *La Codificazione del Diritto dall'Antico al Moderno* (1998), 191.

[66] In the Edict of Rotari the *waregang* is the stranger, who enjoys a regular statute within the realm, and is protected by the sovereign (*sub scuto potestatis nostrae*). Such status should relate to the legal condition that any foreigner acquires the moment it arrives in the kingdom of the Lombards, regardless of the reasons. See G. Princi Braccini, "Waregang (Rotari 367): Straniero sotto il Mundio Regio?", 18 *Filologia Mediolatina. Studies in Medieval Latin Texts and Transmission. Rivista della Fondazione Ezio Franceschini* (2011), 109, 124.

[67] On the theme of legal pluralism at the time of *ius commune*, see J. M. Merryman, *supra* note 1; P. G. Monateri, *supra* note 1, 490, ff.; U. Mattei, P. G. Monateri, *supra* note 4, 47, ff.; H. P. Glenn, "La Tradition Juridique Nationale", 55 *Revue Internationale de Droit Comparé* (2003), 263, ff.; B. Markesinis, *The Gradual Convergence. Foreign Ideas, Foreign Influences, and the English Law on the Eve of the 21st Century* (1994); G. Gorla, "La Communis Opinio Totius Orbis", in M. Cappelletti, *New Perspectives for a Common Law of Europe* (1978), 45, ff.; G. Gorla, L. Moccia, "A Revisiting of the Comparison between Continental Law and English Law (16th to 19th century)" 2 *Journal of legal History* (1981), 143, ff.; M. Lupoi, *Alle Radici del Mondo Giuridico Europeo* (1994), A. Watson, *Roman law and comparative law* (1991).

[68] The term *millet* means religious denomination. The reference is to the legal status recognized to some non-Muslim religious communities residing in the territory of the Ottoman Empire and to the system of administrative government of these communities. This is an evolution of the *dhimma*. On the territory of the Empire resided many non-Muslim communities: Christians, Jews, Yazidis, Zoroastrians. They all were under the Islamic law, for which the unbelievers had a less favorable legal treatment. The Christian and Jewish communities (People of the Book), unlike the other, were not persecuted. Their status was, in fact, of *dhimmi* (protected), they did not participate in the city government and could be exempted from military service by paying a tax (*jizya*); they also paid a land tax (*kharaj*). Notwithstanding these distinctions directly deriving from Sharia, the Ottoman Empire recognized non-Muslim

The examples could be many, but, for the sake of brevity, those mentioned above are enough to show that the historical perspective allows us to better understand that *minority legal orders* are constant elements in the civil and legal life of a given community.

Today, however, the context in which the dialogue, the contrapuntal exchange, takes shape is significantly different. Certainly, even migration flows are not historically a novelty,[69] but there is a significant change in the attitudes of social management of diversity. The scale and intensity of the global movement of people have both become more severe. The flows follow, more than in the past, a movement from non-western into western, so the Western legal systems have to deal with the issues that arise from the diversity of these minority legal orders.

The question is understanding to what extent the state system can tolerate the principle of personality of law and the Muslim minority legal order and to what extent can Islamic law authorize the adhesion of Muslims to a non-Islamic law.

It has been pointed out how they adhere to local state law while continuing to maintain an Islamic identity[70]. However, in these contexts, those who hold power within the minority legal order often manage to impose models and solutions, which, when selected by an authority (such as the Sharia or Muslims' Councils, Islamic Centres, Imams, Mufti…) considered legitimate by the great majority of the community to which it belongs, gain the dignity of regulatory discipline, of legal (and religious) rules able to bound behaviors. This would open the way for the transformation of a social minority into a political minority.[71]

Within the multicultural society, which therefore have complex characters, multiple standards coexist belonging to different legal systems that can ignore, neutralize or clash each other. In the West and in the global world, the religious law challenges the state and secular monopoly of law and the systems of religious communities compete with the State one.

The idea to consent them to exercise their power and competences inside the boundaries of the state legal systems, and of its fundamental values and laws, gives the chance to exercise a certain degree of control on their decisions.

A limit to the recognition could be identified where human rights are understood as a shared set of

religious communities as a "nation" (*millet*); the head of each community coincided with the religious leader, who exercised both religious and secular functions (Patriarch for Christians; Chief Rabbi of Constantinople for the Jews). Once the religious leader had received confirmation of his investiture by the Sultan, he could exercise its functions and, within certain limits, the *millet* was politically and legally autonomous. In fact, he collected taxes, dispensed justice in matters of family and civil law in general; he represented his community before the Sultan and his administration. See A, Hourani, *A history of the Arab Peoples* (1991), 21; H. Patrick Glenn, *supra* note 2, 54, 225.

[69] Many scholars speak of new diaspora and of cyclical transhumances, H. P. Glenn, *ibid*., 107, ff.; and specifically of Islamic diaspora *ibid*., 366, ff.

[70] On the obligation to obey the local law, as enshrined in the Sharia, see Tariq Ramadan, *Western Muslims and the future of Islam* (2004), 95, 96. Such obligation is declined differently by the various Sharia schools according to D. Pearl, W. F. Menski, *Muslim Family Law* (3rd ed., 1998), 2, 65. See also H. P. Glenn, *On Common Laws* (2005), 134; R. Aluffi Beck-Peccoz, "Cittadinanza ed Appartenenza Religiosa nel Diritto Internazionale Privato. Il Caso dei Paesi Arabi", 9 *Teoria Politica* (1993), 97.

[71] F. Colom Gonzales, "Entre el Credo y la Ley. Procesos de Integralidad en el Pluralismo Jurìdico de Base Religiosa", 157 *Revista de Estudios Politicos* (2012), 83, 103.

landmarks that can help the dialogue between the competing authorities.[72] If a common ground is not found on human rights, it appears, in fact, difficult to deal with the discussion related to multiculturalism.

Clearly these phenomena imply far-reaching social changes, are reflected in the legal world and give rise to inter-sectorial processes.[73] In fact, globalization has led to the thinning of boundaries and de-territorializing in various fields of social life including law and religion. In spite of this and because of its nature, law cannot cease to be the instrument to find answers to the needs of a community, albeit changing, multi-faceted and ever changing.

This model accepts a certain degree of cultural and religious diversity, which can be expressed in the public space, providing the compliance with State law and the rules established by the democratic method.

State intervention towards immigrants should not be directed to assimilation, but rather to the respect for ethnic specificity and to the recognition of ethnic and religious groups and their institutionalization.

Individuals and groups, within the law, are free to organize themselves to keep their culture and their identity alive. In order to ensure the principle of substantive equality, an ethnic group is also recognized a differentiated legal treatment. For example, at the legislative level this model has resulted in the adoption of certain rules, which provide for exceptions, exemptions or special legal regimes when belonging to a particular ethnic group.

However, it is clear that the European debate on the integration of immigrants and on the conflict between the rules of the host country and those imported from ethnic minorities has developed different models.

In reconstructing the reference standards of a community, a scholar should not limit to analyze the national legislation of her countries of origin, but much more often have to add the specificities resulting from the customs or from the religion of such ethnic affiliations.

The processes of sedimentation of power, which were determined also by separate jurisdictions, have often favored the disengagement from power and state authority, transferring it within the religious community and its leaders.[74] In particular, during the Covid emergency the converging directions of State authorities and Muslims religious leaders and institutions has been crucial and virtuous, ensuring that Muslim people in Europe can feel respectfully of their personal law following the State one.

Diverse societies are fragile and more exposed to inter-conflicts. Therefore, creating a common ground, whenever possible, is the only method for diverse societies to keep the peace. The commonality, here, is civic-based rather than a cultural-based, creating a framework of citizenship, where the common feature for all is the fact that we are all humankind. Three main pillars can be

[72] M. Ignatieff, *Human Right as Politics and Idolatry* (2003), 30.
[73] As observed by G. Marini, "Diritto e Politica. La Costruzione delle Tradizioni Giuridiche nell'Epoca della Globalizzazione", 1 *Polemos* (2010) 31, ff..
[74] See M. Ricca, *Oltre Babele, Codici per una Democrazia Interculturale* (2008), 504.

indicated: integral freedom, equality and solidarity. With the three principles of freedom for all; equality for all, and solidarity, citizenship is no longer confined to the typical definition and occupy a broader meaning.

Inclusive societies or decent societies[75] come as a respond for exclusive societies (indecent society): *"Beyond that level of citizenship individuals, groups and communities can live their religious or cultural particularities, with respect for the common platform for all as citizens of a common political complex".*[76]

Of course, there are fields of law where finding a common ground is hard, or even impossible, because the clash between diverging fundamental values and rights is irreconcilable.

It is worth to mention some western values, such us the moral and legal equality between men and women[77], the equal freedom and dignity of the spouses[78], self-determination and freedom of action of each individual, in all their life choices (health, work, friendships), and in particular in the marriage decision[79].

In addition, all Western legal systems show to join an exclusively monogamous model of union. None of the European legal systems allow exceptions to the monogamous model of family, even where both heterosexual or homosexual de facto unions are admitted, or where marriages between same-sex spouses are authorized. Bigamy and polygamy, in many European countries, remain a crime[80].

Most of the issues above mentioned originate from the close connection between legal, social and religious rules that characterizes Islams. Since - especially as regards the personal status of Muslims - Islamic law does not accept the separation between law and religion, which on the contrary characterizes all Western legal systems, it is easy to guess that family relationships are the most affected by the influence of the religious requirements. In particular, since the Qur'an itself rules explicitly and in detail these relationships, Islamic family law has most resisted the secularization and the modernist trends[81]. This is due to the fact that the institutions of Islamic

[75] A. Margalit, *The Decent Society* (1996).

[76] R. Pinxten, "Separation, Integration and Citizenship, reply to Glenn", 3 *Netherlands Journal of Legal Philosophy* (2006), 246.

[77] EHRC art. 23.

[78] EHRC Additional Protocol, VII art. 5.

[79] The right to marry is precisely recognized as a fundamental right enshrined in art. 12, ECHR7, which guarantees the freedom to marry, to both man and woman.

[80] As an example, in Italy bigamy is forbidden by art. 556 c.p., in Frence by art. 433-20 of the Code Penal. In particular, the EU Parliament has requested to the Member States to adopt measures that provide for effective and dissuasive sanctions against different forms of violence on women and children, such as forced marriage, polygamy, honor killings and mutilations. See Resolution of the European Parliament on Female Immigration: Role and Condition of Women Immigrants in the European Union. 2006/2010(INI) point 35, available at www.eur-lex.europa.eu. For a critical perspective on polygamic relationship and the law at the crossroad of diverse legal traditions, see Elisabetta Grande-Luca Pes (eds.), *Più cuori e una capanna* (2018).

[81] For an analysis of Islamic family law see D. Pearl, and W. Menski, *MuslimFamily Law*. London: Sweet & Maxwell, 1998;M. A. Anies, "Study of Muslim Woman and Family: A bibliography." *Journal of Comparative Family Studies* 20, 2 (1989): 263-274; F. Pahman, "The Controversy over the Muslim Family Law." *South Asian Politics and Religion.* Ed. Smith., D. E. Princeton: Princeton University Press, 1966. 414-427. In the Italian literature,R. Aluffi Beck Peccoz, *La modernizzazione del diritto di famiglia nei paesi arabi*. Milano: Giuffrè, 1990; V. Abagnara, *Il matrimonio nell'Islam*. Naples: Edizioni Scientifiche Italiane, 1996; A.A. Abu-Sahlieh, "*Il diritto di famiglia nel mondo arabo: tradizioni e sfide*". I musulmani nella società europea. Turin: Edizioni della Fondazione Agnelli, 1994.

family law are those most at odds with the values of Western culture, mainly for the obvious difference of treatment between the sexes, for the strong discrimination against women and the patriarchal setting of the family. For example, the right of a man to have up to four wives, to be able to divorce his wife for no reason, the ban for a Muslim woman to marry a non-Muslim man, the non-existence of age limits for marriage.

Personal status and family law appear to be significantly related to issues concerning multi ethnicity. In this field real legal irritants arise.

However, it should be clarified that they are sometimes accidental and unintended, and sometimes strategic and intentional, in order to protect the belonging legal tradition. In other words, some incidents of lack of communication serve to ensure supremacy and spaces to a certain religious or legal culture, either that of the minority legal order or that of the majority one, because each legal system in some matters considers some values or legal interests as essential to its legal tradition. So, in order to protect and promote such values, it identifies and applies instruments for *superiores* (or concurrent) *non recognoscere*, especially if its legal tradition is characterized by a high rate of normativity[82].

In the Western legal tradition these values are protected through the concept of unavailability of rights or statuses and the concept of public order[83], as well as though the limits of mandatory rules and morality, the principles of secularism, equality and rule of law, expression of those core values discussed above.

However, the content of the basic values, of the inalienable and non-negotiable rights within the different legal traditions varies, and each tradition recognizes some that others do not recognize, or it excludes some that others instead protect. On this land take place both the "contrapuntal exchanges" and the circulation of legal models.

[82] On the concept of normativity see H. P. Glenn, Legal Traditions of the World. Quoted. 365 et seq.
[83] On the role of public order, see A. Miranda, *Lo "stingimento" delle regole giuridiche tra diritti e limiti nell'era dei flussi migratori e della crisi delle nazioni*, in *Cardozo Electronical Law Bulletin*, 2018, pp. 19-23-24.