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STRATEGIES AND LIMITS OF DIVERSITY ACCOMMODATION
(PLAYING FOOTBALL AND CRICKET IN THE SAME PARK)

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1. Introduction.

When I was a child, in Italy during the 70s, everybody spoke Italian at school. Mothers stayed at home raising their children and wives had to live where their husbands decided to, as provided for by the civil code¹.

Divorce had just been legalized², abortion was still a crime³.

Football was by and large the most popular sport and witnesses testifying in courts had to swear to God that they were telling the truth, even if they were atheists⁴.

Today, school canteens provide healthy food, accommodating both religious and philosophical needs; 46,9% of women are employed⁵ and immigrants are 7,5% of the Italian population⁶.

Football is still the most popular sport, but on Sundays in my home town's park you don't see only football teams: there are also cricket players and they come from Pakistan.

It is quite a new and different society, where the very idea of accommodation takes the spotlight, even if it is still difficult to translate this word (accommodation) into Italian.

This is not only the case of Italy, since many different European countries are experiencing new challenges due to social changes and, consequently, to cultural and

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¹ Female employment rate during the 70s was low, see the survey reported by ISTAT, *Statistiche storiche dell'Italia 1861-1975*, Roma, 1976. Moreover: article 144 of the 1942 Italian civil code provided that wives had to live wherever their husbands decided to move («Il marito è il capo della famiglia; la moglie segue la condizione civile di lui, ne assume il cognome ed è obbligata ad accompagnarlo dovunque egli crede opportuno fissare la sua residenza.» [emphasis added]) It was exactly the same as article 133 of the previous 1865 civil code; see M. PINI, A.L. BUONADONNA, B. DE FILIPPIS, P. RICCI, B. SCHETTINI, *Il mantenimento per il coniuge e per i figli nella separazione e nel divorzio*, Padova, 2009, p. 4. In 1975 family law was reformed (see law 19.05.1975, n. 151) and article 144 was changed: today both partners have to agree on decisions regarding family life, including where to live.

² Divorce law was passed in 1970 (law 01.12.1970, n. 898).

³ Till 1978 abortion was a crime, as provided by article 546 of the criminal code, punishing both the consenting woman, as well as the person performing abortion. These provisions were repealed in 1978 when abortion was legalized (22.05.1978, law n. 194).

⁴ Before 1979 witnesses had to take an oath swearing “to God” and its refusal was a crime, even if it was claimed by a person not believing in any God at all. In 1979 the Italian Constitutional court deemed such provisions unconstitutional, overruling its previous decisions that had excluded atheism from the constitutional protection of religion.

⁵ See ISTAT (NATIONAL INSTITUTE OF STATISTICS) press release *Occupati e disoccupati* (www.istat.it, last visited 31 October 2012).

⁶ See the report *Caritas migrantes* (www.dossierimmigrazione.it, last visited 31 October 2012).

religious pluralism when groups, or individuals (or even both) are asking for legal recognition, raising the issue of accommodation.

Accommodation has become a central issue not only in academic discourse, but also in case law, since more and more courts have to deal with the legal protection of cultural and religious diversity. Some cases challenge the very basic principles of the Western legal tradition like equality or self-determination as, for example, ritual practices like female genital mutilation or, more generally, practices injuring physical integrity, with particular regard to children⁷. In these cases problems are relatively unambiguous (even if they are not undisputed), since there is a clear perception of both “the diversity” asking for recognition, coming from ethnic origin, and of the values at stakes, dealing with fundamental rights.

But limits and strategies of accommodation come out also when daily life is at stake: it is not by chance that dressing, holy days and religious symbols play a leading role in the dialogue between law and identities. It is in everyday life that newcomers perceive the existence of cultural assumptions staying behind legal rules (otherwise thought of as neutral or even “natural”) and that diversity comes out: when religion prevents people to eat some food served in working places or schools’ canteens, when they discover that some kind of their ethnic clothing is forbidden at work, or when someone has to go to school during his own religious holidays.

As a consequence lawmakers and, more frequently, courts are coping – today as never before – with disputes concerning the displaying of religious symbols (e.g. crucifix, veil), choices regarding food (vegetarian, *kosher*, *halal*, etc.) and religious holy days deciding where, when and how they should be accommodated, with special attention to places where living together is not a choice like hospitals, prisons or, to some extent (e.g. when they are not denominational), schools.

Courts – more than parliaments – are increasingly requested to deal with the definition of “culture” or “religion”, reaching the difficult task of establishing the boundaries in a process of “legalization of identities”.

From a more general point of view, “identity” is a key concept in contemporary constitutional discourse, by way of a dialogue where every subject is required to firstly define itself.

This is particularly true for national legal systems which have to shape their “borders”, when defining to what extent the participation in international or supranational organizations may affect their constitutional identity: it is not by chance that the concept of *Verfassungsidentität* as an expression of the eternity clause comes out when the *BVerGE* deals with the limits to EU integration after the entry in force of the Lisbon Treaty, explicitly defining some basic features which cannot be changed without loosing a constitutional identity⁸.

⁷ See for example art. 24 par. 3 of the *Unicef Convention on the Rights of the Child* (adopted by General Assembly resolution 44/25 of 20 November 1989): «(3) States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.» See also J. TOBIN, *The International Obligation to Abolish Traditional Practices Harmful to Children's Health: What Does It Mean and Require of States?*, in *Human Rights Law Review*, 2009, 9, 3.

⁸ See *BVerfGE*, 2 BvE 2/08 vom 30.6.2009 at 339: «The primacy of application of European law remains, even with the entry into force of the Treaty of Lisbon, a concept conferred under an international treaty, i.e. a derived concept which will have legal effect in Germany only with the order to apply the law given by the Act Approving the Treaty of Lisbon. This derivative connection is not altered by the fact that the

National legal systems are also required to define their *Verfassungsidentität*, not only when they look beyond their borders, but also when a dialogue takes place with different social realities, asking for legal recognition: even this inside dimension makes legal systems define their basic features, in a less explicit but nevertheless important way. Courts are the main actors of this process of identity definition: it is basically on a case-by-case approach that the relation between cultural assumptions and legal norms comes out, making clear to what extent legal rules can be applied to “new” cultural identities. When this is not possible, since the link between a certain cultural assumption and a legal rule is an expression of one of those basic features defining the legal system, the *Verfassungsidentität* comes out.

Even Parliaments may intervene in this debate, but with a more general approach and not on a case-by-case one, which sometimes seems to be an instrument suitable to define exclusion, more than inclusion. The recent French *loi interdisant la dissimulation du visage dans l'espace public*, which was promptly renamed “*loi anti-burqua*” by the media, may be a possible example: according to the French Parliament, this symbol was to be banned as being in contrast with two basic constitutional principles: dignity and security⁹.

It should be remembered, that the definition of identities – in a broad sense – is a central topic in social sciences, but there is an important difference: legal definition entails specific consequences, since members of a “legally relevant group” may enjoy specific rights.

This is a crucial point, which goes beyond the relationship between law and identities asking for recognition and gets to the core of the mutual interaction, between legal systems and social changes.

On the one hand, social changes impose to deal with the topic of identity, forcing courts and parliaments to face and – most of all – to identify and disclose the (sometimes hidden) cultural assumptions that lie behind existing legal rules, understanding how they should be considered with respect to the constitutional framework.

concept of primacy of application is not explicitly provided for in the treaties but was developed in the early phase of European integration in the case law of the Court of Justice by means of interpretation. It is a consequence of the continuing sovereignty of the Member States that in any case in the clear absence of a constitutive order to apply the law, the inapplicability of such a legal instrument to Germany is established by the Federal Constitutional Court. Such determination must also be made if, within or outside the sovereign powers conferred, these powers are exercised with the consequent effect on Germany of a violation of its constitutional identity, which is inviolable under Article 79.3 of the Basic Law and is also respected by European treaty law, namely Article 4.2 first sentence Lisbon TEU.». See also art. 4 of the TUE, referring to member States' national identities: «The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State».

⁹ See *loi* n. 2010-1192 adopted the 11 October 2010 *interdisant la dissimulation du visage dans l'espace public*, in JO n. 237, 12 October 2010, p. 18344 and its *dossier législatif* on the website of the *Assemblée nationale* (http://www.assemblee-nationale.fr/13/dossiers/dissimulation_visage_espace_public.asp).

Just to give an example: universities in Rome and Moscow will probably operate on different academic calendars, providing holidays during Catholic or Orthodox Christmas. This is clearly a religious assumption, but are we dealing with traditional customs, constitutional values or organizational standards? The possibility of negotiating these issues between majority and minorities greatly depends on the answer(s) to this question.

On the other hand, law might be considered itself as an instrument of social change, since the concept of identity has much to do with the idea of recognition: when legal systems dialogue with groups, these latter play the role of stakeholders. This may happen in different ways, through the recognition of minority rights like, for example, the right to use a different language for linguistic minorities or the right to a certain territorial autonomy for some groups. Sometimes cultural accommodation goes even further, as legal systems provide for “special rights”, for example creating exceptions, this being the case of Sikhs campaigning and obtaining a statutory exemption for not having to wear a helmet while on a motorcycle in the United Kingdom¹⁰.

Another example is to be found in anti-discrimination law, covering some grounds (sex, language, ethnicity, age, or what else?) and not others (sexual orientation, for instance), thus leading to the definition of some legally relevant identities while others are (still) denied the same status¹¹. This explains why the same group may struggle to be considered on religious grounds in some legal systems, or as an ethnic group in some others, depending on the legal consequences of these definitions¹².

Being a legally relevant group reinforces not only self-consciousness, but also other people (the majority)’s perception that, somehow or another, there is an identity to deal with. From this perspective, not only the law recognizes identities, but it also contributes to reinforcing their belief of actually *being* a group.

Cultural assumptions of legal rules may differ by importance, depending on the values at stake and it is important to understand which ones are to be considered essential and why. It is a complex and difficult way to definition, but it is unavoidable, for an abstract ideal of justice (and fairness) but also from a very pragmatic and practical point of view: to gain respect of legal rules. Law enforcement is not only based on power, it is also based on social agreement, and the one without the other simply does not work. This is why the debate on accommodation deeply affects legal systems regarding, as it does, the definition and the participation by stakeholders, which is absolutely crucial to the sense of belonging by all social actors to a common framework of shared legal values.

This paper will consider legal accommodation’s strategies through a three stage analysis which looks (1) at the starting point of accommodation, than (2) at the ability of legal systems to fulfil the intended goals and (3) at the limits of accommodation.

¹⁰ See *infra* par. 2.

¹¹ See for example L. FABIANO, *Le categorie sensibili dell’eguaglianza negli Stati Uniti d’America*, Torino, 2009, *passim* and R. TONIATTI, *La tutela dell’eguaglianza negli Stati uniti: dalla Costituzione colour blind alla colour conscious Constitution*, *ivi*, p. IV ff.

¹² See *infra* par. 2.

2. Starting point of accommodation: *know thyself* (majority is a majority).

Legal systems define relevant identities on a number of occasions, for example when setting the standards for a discrimination to be considered as unfair, which may differ from country to country. In the past, for example, this was an explanation for British Muslims claiming to be an ethnic group and not a religious one, since the *Race Relations Act* (1976) provided «color, race, nationality or ethnic or national origins» as possible grounds of discrimination¹³. This was a vain attempt, as by no means they were considered as an ethnicity by judicial interpretation¹⁴.

The same statute induced Sikh and Jewish to successfully claim they were an ethnic group, while similar attempts by Rastafarians failed¹⁵, since the firsts two complied with the judicial definition of ethnic group provided by the well-known case *Mandla v. Dowell Lee*, while the seconds did not¹⁶. New grounds were provided in 2003 by the implementation of some EU directives, namely religion or belief, sexual orientation and disability, consequently re-shaping groups' strategies¹⁷.

¹³ See sec. 3 of the *Race Relations Act* (1976): «In this Act, unless the context otherwise requires, racial grounds means any of the following grounds, namely colour, race, nationality, or ethnic or national origins».

¹⁴ See C.J. ROSS, *Accommodating Children's Religious Expression in Public Schools: A Comparative Analysis of the Veils and other Symbols in Western Democracies*, in M. ALBERTSON FINEMAN, K. WORTHINGTON (eds.), *What is Right for Children*, Surrey, 2009, p. 299: «On the other hand, as Muslims are regarded as a religious group but not an ethnicity, they have thus far been denied special protection under the Race Relations Act, and must rely instead on claims to religious freedom».

¹⁵ See for example the cases quoted by B. HEPPLER, P. CHOUDHURY, *Tackling Religious Discrimination: practical implications for policy-makers and legislators*, Home Office Research Study, 2001, p. 3.

¹⁶ See *Mandla v Dowell Lee* (House of Lords [1983] 2 AC 548), where the House of Lords considered Sikhs as being an ethnic group, according to this definition: «For a group to constitute an ethnic group in the sense of the Act of 1976, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant (3) either a common geographical origin, or descent from a small number of common ancestors (4) a common language, not necessarily peculiar to the group (5) a common literature peculiar to the group (6) a common religion different from that of neighbouring groups or from the general community surrounding it (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say the inhabitants shortly after the Norman conquest) and their conquerors might both be ethnic groups.» See also C. PICCOCCHI, *L'ordinamento britannico tra identità e diritti differenziati. Prime considerazioni*, in A. TORRE, L. VOLPE (eds.), *La costituzione britannica/The British Constitution*, Atti del convegno dell'Associazione di diritto pubblico comparato ed europeo, Bari, Università degli studi, 29-30 maggio 2003, G. Giappichelli ed., Bari, vol. 2, 2005, p. 1285.

¹⁷ The implementation of EU anti-discrimination Directives, anyway, improved only in part the protection of Muslims, see AA. VV., *OSI/EUMAP Report 2004: Muslims in the UK: Policies for Engaged Citizens*, Budapest, 2005, p. 77: «This gap between the nature of the protection extended to different types of religious minorities has been partially filled by the implementation of EU-wide legislation that prohibits religious discrimination in employment and training and that directly covers Muslims. As a result of these regulations, Muslims are protected from discrimination in employment and working conditions, including dismissals and pay; vocational guidance and training; and membership of, and involvement in,

Similarly, in US case law, some vegans defined themselves as a religious group: it may be reasonably supposed that First Amendment protection of «free exercise of religion» was not alien to these attempts, considering that a “personal philosophy” does not enjoy the same constitutional protection¹⁸.

In many cases, not only legally relevant identities are entitled to rights, but they also enjoy “special” rights, this being the case of “exceptions” to legal rules, created in favour of individuals or groups, by reason of their cultural or religious identity. A classical example may be found in the already mentioned UK statutory exemption from wearing a helmet on motorcycle or at work, instead of the Sikh turban which is religiously mandated¹⁹. Moreover, sec. 139 of the Criminal Justice Act (1988) provided for a defence for having articles with blade or point in public place if the person charged proved that they were «(b) for religious reasons; or (c) as part of any national costume.» This provision was aimed at another symbol to be worn by Sikhs, *Kirpan*, which is a knife²⁰.

In this case “the diversity” asking for recognition is easily perceived, coming from a precise ethnic origin and manifesting itself in very distinctive symbols. But this is not always the case, since cultural diversity might be slightly perceived, without such a marked distinctiveness. This may be the case of conscientious objection, which is another example of statutory exemption created by reason of a wide notion of cultural diversity, mainly dealing with an *interiore homine* dimension²¹.

Enjoying rights (special rights) as a group reinforces the idea of actually *being* an identity both on the side of its members (self-perception) as well as of other people (external perception), therefore the importance of law becomes evident in the struggles

employers’ or workers’ organisations or professional bodies – for example, trade unions and professional bodies, like the Law Society or British Medical Association. However, unlike Sikhs and Jews, Muslims are not directly protected from discrimination in the following areas: social protection, including social security and health care; education; goods and services available to the public, including housing; and social advantages, such as housing benefits, student maintenance grants and loans, or bus passes for senior citizens.» (in www.fairuk.org). More generally, see D. STRAZZARI, *Discriminazione razziale e diritto. Un’indagine comparata per un modello “europeo” dell’antidiscriminazione*, Padova, 2008.

¹⁸ See, for example, the cases considered by S. SOIFER, *Vegan Discrimination: An Emerging And Difficult Dilemma Discussing Anti-Discrimination Law In The US*, in *Loyola of Los Angeles Law Review*, 2004, 36, p.1709 ss.

¹⁹ In the UK legal system Sikhs were granted the right to wear turbans instead of helmets on motorcycles (*Road Traffic Act* 1988, Section 16(2)) or at work (*Employment Act* of 1989).

²⁰ It is also interesting to mention article 25 of the Indian constitution: «Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.»; whose explanations explicitly refer to Sikhs, providing that «The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.» (see the website of the Ministry of law and justice <http://lawmin.nic.in/> last visited 31 October 2012). In this case, anyway, Sikhs are explicitly considered as a religious group and not as an ethnic one.

²¹ This example refers only to statutory recognition of conscientious objection, without considering the debate regarding *contra legem* conscientious objection.

for recognition²². The social perception of what identities are and what identities want to be recognized as, is clearly supported by the beginning of a dialogue between legal systems and identities to be considered as stakeholders, regardless of the fact that they are citizens or newcomers.

This dialogue takes different forms, depending on the issues at stake and the strategies of accommodation adopted by different legal systems and it may also differ considering the history of a country, being likely that countries with a colonial past will be more familiar with the concept of cultural personal status. For example, this was the case of the French legal system, dealing with Overseas Departments and Territories populations: the Constitution provides for the possibility (not the obligation) of retaining their personal civil status unless they voluntarily renounce it²³. This article has sparked a wide debate, providing constitutional basis for the recognition of religious and traditional customs possibly or potentially contrary to some fundamental rights. For example, practices like polygamy, repudiation or the different status of illegitimate children are perceived as being contrary to equality²⁴. As a consequence, the *Conseil constitutionnel* had to cope with criticism, stating that art. 75 protects only the existence of personal status, but not its possible contents²⁵.

Of course the debate about rules and exceptions – when rules are fundamental rights and exceptions are traditional/religious customs – is still open, but the existence of a precise constitutional ground for cultural and religious diversity recognition is not a minor detail.

²² It is M. DIANI speaking in terms of the two components of social identity as «self definition and external definition» in M. DIANI, R. EYERMAN (eds.), *Studying Collective Action*, Newbury Park, 1992, p. 122.

²³ See art. 75 of the French Constitution: «Citizens of the Republic who do not have ordinary civil status, the sole status referred to in Article 34, shall retain their personal status until such time as they have renounced the same», in the website of the *Assemblée nationale* (<http://www.assemblee-nationale.fr>).

²⁴ See *infra*.

²⁵ See *Conseil constitutionnel*, decision n. 2003-474, 17 July 2003, *considérant* 28 and 29: «(28) Considérant, en premier lieu, qu'aux termes du Préambule de la Constitution de 1958: "Le peuple français proclame solennellement son attachement aux Droits de l'homme et aux principes de la souveraineté nationale tels qu'ils ont été définis par la Déclaration de 1789, confirmée et complétée par le préambule de la Constitution de 1946". En vertu de ces principes et de celui de la libre détermination des peuples, la République offre aux territoires d'outre-mer qui manifestent la volonté d'y adhérer des institutions nouvelles fondées sur l'idéal commun de liberté, d'égalité et de fraternité et conçues en vue de leur évolution démocratique; que l'article 1er de la Constitution proclame: "La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion. Elle respecte toutes les croyances. Son organisation est décentralisée"; qu'aux termes de l'article 72-3 de la Constitution: "La République reconnaît, au sein du peuple français, les populations d'outre-mer, dans un idéal commun de liberté, d'égalité et de fraternité"; qu'enfin l'article 75 dispose: "Les citoyens de la République qui n'ont pas le statut civil de droit commun, seul visé à l'article 34, conservent leur statut personnel tant qu'ils n'y ont pas renoncé"; (29) Considérant qu'il résulte de la combinaison de ces dispositions que les citoyens de la République qui conservent leur statut personnel jouissent des droits et libertés de valeur constitutionnelle attachés à la qualité de citoyen français et sont soumis aux mêmes obligations; qu'en rappelant ce principe par la disposition critiquée, le législateur n'a pas méconnu l'article 75 de la Constitution; que, dès lors qu'il ne remettait pas en cause l'existence même du statut civil de droit local, il pouvait adopter des dispositions de nature à en faire évoluer les règles dans le but de les rendre compatibles avec les principes et droits constitutionnellement protégés; (...)).».

On the contrary, unlike the case of France, some other countries were unaccustomed and than less prepared to face problems brought by immigration, being rather an emigration land during the most part of last century and this may be the case of Italy. The 1948 Constitution explicitly refers to minority groups at article 6 of the Constitution, dealing with linguistic minorities, even if it is significant to notice, that the Italian constituent assembly chose not to mention the Italian language at all²⁶.

A definition came out in a 1999 statute, regulating historic linguistic minorities, whose article one stated: «Italian is the official language of Italy»²⁷.

Despite the possible different approaches to multiculturalism, it is possible to find a *fil rouge* among different countries, disregarding their starting point (the possible historical attitudes towards multiculturalism) and rather looking at results. One of the main consequences of the legal dialogue between law and cultures claiming recognition is that the majority starts to see itself as a part – the greater, but *one* part – of society.

It is not by case that immigration has sparked a massive debate on religious symbols: in some European countries, for examples, headscarves and turbans were part of a quite new social setting, as well as the request of building minarets besides European romanesque and baroque churches²⁸. Nevertheless, the real change was that looking at turbans and headscarves the majority started to *see* crucifix, realizing how often they were displayed in tribunals, hospitals and public schools.

In 2009 – for instance – Italy was condemned by the European Court of Human Rights [*hereinafter: ECtHR*] for displaying crucifix in public schools, contravening art. 8 of the European Convention on Human Rights. On that occasion, the Strasbourg Court remembered that this is a religious symbol (not a cultural one, as said by some Italian courts, *see infra*) and that it is only one out of many religious symbols²⁹. A wide debate followed and the decision was successfully petitioned by the Italian government and consequently reversed by the *Grand Chamber* in 2011³⁰.

Public opinion split on this topic, as the position expressed by the Italian government was representative only of a part of society while, on the other side, many “truly Italians” completely supported the ECtHR decision, finding for the first time legal protection of their non-Christian status, regardless of ethnic origin.

²⁶ Otherwise, article 12 of the Constitution explicitly mentions the Italian flag; see F. CORTESE, *La disciplina della bandiera come principio fondamentale: appunti di studio sull'art. 12 della Costituzione italiana*, in C. CASONATO (ed.), *Lezioni sui principi fondamentali della Costituzione*, Torino, 2010, p. 361.

²⁷ See law 15.12.1999, n. 482, *Norme in materia di tutela delle minoranze linguistiche storiche*, art. 1: «La lingua ufficiale della Repubblica é l'italiano. La Repubblica, che valorizza il patrimonio linguistico e culturale della lingua italiana, promuove altresì la valorizzazione delle lingue e delle culture tutelate dalla presente legge.» A similar statement had been included in the constitutional laws providing for a special status of the autonomous Regions of Trentino-Alto Adige/Südtirol (see art. 99 of *D.P.R. 31.08.1972, n. 670 Statuto Speciale per la Regione Trentino-Alto Adige*) having linguistic minorities on its territory. Some bills are currently pending in Parliament to amend the Italian Constitution, recognizing Italian as the official language of the Republic.

²⁸ For example, a referendum was recently held in Switzerland to ban new minarets: it was approved by 57,5% of voters; see *Les Suisses votent massivement l'interdiction de nouveaux minarets*, in *Le monde*, 18.12.09.

²⁹ See ECtHR, 2nd section, *Lautsi v. Italy*, Application No. 30814/06, 3 November 2009.

³⁰ See ECtHR, *Grand Chamber*, *Lautsi v. Italy*, Application no. 30814/06, 18 March 2011.

The possibility of cultural dissent among citizens themselves takes us back to the idea of the majority being *a part* (even the larger one) of society and not society itself as a whole. It is not by chance, for example, that when school canteens take on board religious food accommodation, often vegetarians benefit from different menus, since religious diversity opens the door to different attitudes towards food, even the ones based on a “philosophical” ground, namely vegetarianism.

The Italian judicial background of these ECtHR’s decisions was quite significant, since both the Constitutional court and the *Consiglio di Stato* had been asked to rule on this issue, but the first refused to hear the case, on procedural ground since rules providing the displaying were not contained in a source having the legal force of a parliamentary statute³¹. The *Consiglio di Stato* declined to invalidate these same legal rules, defining the crucifix as a cultural symbol more than a religious one, expressing a kind of national civil identity³². Curiously, this reasoning was not dissimilar to that of the US Supreme Court in *Allegheny County v. Greater Pittsburgh ACLU*, deciding on the displaying of a crèche and of a menorah by a municipality in Pittsburgh. According to the majority of the Court, the crèche was an inherently religious symbol, thus representing an unlawful endorsement of Christian religion³³. It is interesting to see that the Supreme Court’s judges dissented on the nature of the menorah: the minority supported the idea it was a religious symbol, while even the concurring opinions split, considering important the combined displaying of this symbol with a Christmas tree and «a sign bearing the mayor’s name and containing text declaring the city’s “salute to liberty”», but diverging on the nature of the menorah in itself and in that particular setting.

Both the Italian *Consiglio di Stato* and the US Supreme Court provided for a possible solution of multicultural dialogue, but they seem far from reaching the first step of accommodation, which deals with an unavoidable starting point (know *thyself*) of a dialogue where every subject is required to firstly define itself.

³¹ In Italy, there is no judicial review of government regulations, as it is only provided for statutes.

³² See decision n. 556/2006 of the Italian *Consiglio di Stato* (in www.giustizia-amministrativa.it last visited 31 October 2012).

³³ See *Allegheny County v. Greater Pittsburgh ACLU*. *Allegheny County v. Greater Pittsburgh ACLU*, 492 US 573 (1989). The majority opinion stated: «When viewed in its overall context, the creche display violates the Establishment Clause. The creche angel’s words endorse a patently Christian message: Glory to God for the birth of Jesus Christ. (...) Although the government may acknowledge Christmas as a cultural phenomenon, it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus. (...) the menorah display does not have the prohibited effect of endorsing religion, given its “particular physical setting”. Its combined display with a Christmas tree and a sign saluting liberty does not impermissibly endorse both the Christian and Jewish faiths, but simply recognizes that both Christmas and Chanukah are part of the same winter holiday season, which has attained a secular status in our society. The widely accepted view of the Christmas tree as the preeminent secular symbol of the Christmas season emphasizes this point. The tree, moreover, by virtue of its size and central position in the display, is clearly the predominant element, and the placement of the menorah beside it is readily understood as simply a recognition that Christmas is not the only traditional way of celebrating the season. The absence of a more secular alternative to the menorah negates the inference of endorsement. Similarly, the presence of the mayor’s sign confirms that, in the particular context, the government’s association with a religious symbol does not represent sponsorship of religious beliefs, but simply a recognition of cultural diversity. Given all these considerations, it is not sufficiently likely that a reasonable observer would view the combined display as an endorsement or disapproval of his individual religious choices».

Both the decisions, in fact seemed to deny rather than defining the religious significance of the displaying, pretending it to be neutral: it follows that negotiation is not required, since there is no need for accommodation³⁴.

Why the understanding of majority as *a majority* is so important in the legal perspective? The answer to this question has not only to do with a theoretical framework, but is needed in order to correctly identify problems and solutions.

If certain values, including a way of living, are part of legal rules, it is crucial to clarify their role: sometimes there is a “legal culture”, expressing fundamental values that cannot be renounced without changing the legal system itself, like personal liberty, personal autonomy and human dignity are some of them.

Some other times there is a “shared culture” expressing common habits, i.e. the way of life of the majority: religious holidays, food and clothing being some examples. These second values are negotiable, while the first ones are not; as majority perceive itself as a part of society and not as the whole of society, it becomes evident that cultural assumptions of legal rules might be more than one, and some compromise becomes possible.

On the contrary, sometimes the debate on multiculturalism seems to be based on an all-or-nothing idea, where all claims are considered on the same level: from clothing to unilateral divorce, from female mutilation to religious holidays.

If fundamental values are not at stake, it may be possible to think of a *cohabitation* of different cultural assumptions lying behind the same legal rules, meaning that it is not necessary to provide for different rights, each one presupposing different assumptions, but that different cultural realities enjoy the same rights, without any need for accommodation.

It is often said that accommodation means differentiation, as if “special rights” were essential to coping with cultural diversity. Sometimes this is true, when minority rights, rights of exemption and exceptions to the rights of the majority are the only possible result of negotiation between majority and minorities and an alternative strategy is not feasible. Conscientious objection and the Sikh’s exemption from wearing helmets are two examples, as in those cases it is hard to imagine a possible compromise: inevitably accommodation entails “special” rights, as the only alternative to statutory exception is to consider those claiming it not worthy of protection.

But let’s consider the question of the headscarf of some Muslim women: as said, it appeared in different European countries especially due to waves of immigration. This is an expression of religion, but does it really need “special rights”?

It seems to me that there is a constitutional right at stake and this is self determination: this classical liberal liberty would provide protection for women not intending to wear headscarves, as well as for women claiming the right to express their Muslim identity and therefore practice their freedom of religion.

³⁴ Similar cases arose in European countries other than Italy, ruling the displaying of crucifixes in public schools. See, for example, in Germany (BVerfGE 93, 1, 1995, 1087/91), in Spain (*Asociación Cultural Escuela Laica de Valladolid c. Junta de Castilla y León*, Juzgado n. 2, Valladolid, n. 288/2008) or in Swiss (*Comune di Cadro c. Guido Bernasconi e Tribunale amministrativo del Cantone Ticino*, BGE 116 Ia 252 S. 253, 1990).

It is important to state that it is not “the right to wear the veil” we are speaking about, but a right to (religious) self-determination, which provides the same protection, regardless of the specific symbols at stake.

The debate on limits and strategies of accommodation is often shaped by comparing two competing views: one providing a theoretical basis for individual universal rights, and another promoting groups’ rights³⁵. This debate is not inescapable, for in many cases it is enough to *see* cultural assumptions behind rights, separating the ones from the others – when possible – and providing for accommodation – when reasonable.

It is important to understand when accommodation is needed (and possible) and when there is nothing to negotiate, simply including new cultural assumptions under the same legal rules. If diversity is understood only as an exception, it has to be remembered that exceptions do not make any sense without a rule, as well as without a majority one would be unable to tell what minorities are. This rule-exception relation identifies cultural diversity only with accommodation, freezing the definition of cultural and religious groups as “something different from”, disregarding their dignity – and, consequently, their responsibility – of legitimately being considered as social actors.

3. Second step: reaching the goals.

The first step of accommodation (*know thyself*), is aimed at identifying the cultural assumptions staying behind legal rules, in order to understand if a negotiation is possible and desirable or if it is worthless, since different ways of life are to be regulated by the same norms.

Otherwise, when “culture” goes straight to the core of the basic features of legal systems, there is no room for accommodation and protection of fundamental values is to be seen as the main goal. It is important to clearly identify the goals even in the case of a no-accommodation choice, to verify the coherence between problems to be coped with and the given solutions.

Two examples explain this principle: the first one dealing with French regulation of religious symbols in relation to the concept of secularism and the second one regarding legal regulation of polygamy.

3.1 First example: headscarves in public places.

The first article of the 1958 French Constitution provides for a protection of *laïcité*, defining the French Republic as being «*indivisible, laïque, démocratique et sociale*». As it is well known, secularism may describe different possible attitudes towards religion; in France it entails clear separation, despite the collaboration model of countries like Italy and Spain, providing for possible agreements between the state and religious groups³⁶.

The protection of the value of *laïcité* has explicitly prompted the French Parliament to appoint a commission in 2003, with the aim to enhance a reflection on State secularism.

³⁵ There is a wider debate, concerning also universalism and communitarism see e.g. the well-known *Multicultural Citizenship: A Liberal Theory of Minority Rights* by W. KYMLICKA, Oxford, 1995.

³⁶ See for example G. DE VERGOTTINI, *Diritto costituzionale comparato*, 2011, p. 477 ff.

The work of the commission resulted in the promulgation of the so called “*loi Stasi*”, regulating religious symbols at public schools³⁷.

This law banned the displaying of ostensible religious symbols, not enforcing – and this is not a secondary detail – the prohibition of any symbols, but only of the clearly perceptible ones.

It might be worthy of notice that this ban does not affect all religions equally, since it is possible to have a small crucifix at neck, while it is impossible to wear a small *kipphah*, or try to hide a small turban or a little veil. This let the law wide open to criticism, involving possible indirect discrimination effects, but it must be remembered that the background of the *loi Stasi* traced back to the *affaire* of Creil, where two Muslim school girls had been expelled for wearing headscarves, and to similar episodes that followed. Had the law aimed at Muslim religious symbols only, might it be argued that the fundamental principle of equality was at stake, assuming that headscarves are to be considered as a symbol of women’s submission.

In this perspective, the legal ban on religious symbols would find its justification in the protection of equality between men and women, which is not negotiable, but the no-accommodation choice is to be considered as reasonable if strategies and goals were coherent, in other words if the law would provide a real protection of the values at stake. Even taking for granted the starting point – the equation between headscarves and inequality – which otherwise is still controversial, it might be interesting to consider the assessment of the *loi Stasi*. After the approval of the law, in fact, the Department for education was asked to report upon the law in its first year of application. The report was published in July 2005 and it clearly showed that the law mostly affected Muslim veils, rather than other religious symbols. Of the 639 cases referred to disciplinary committees, two regarded *grandes croix*, eleven regarded Sikh turbans and 626 regarded headscarves.

In 96 cases school girls opted for alternative measure, preferring not to face the committee: some of them went to private schools, while someone else preferred to (or had to) quit the school. Fifty students decided to attend online lessons at CNED (*Centre national d’enseignement à distance*).

Forty seven were expelled, because of their refusal to take off turbans (3 cases) and headscarves (44 cases) and 21 of them decided to attend the CNED³⁸.

It might be inferred, that the disappearance of “ostensive” religious symbols from schools reached the goal of protecting the *laïcité*, but if one considered also equality, it would be difficult to sense how quitting school should contribute to self autonomy of girls.

Another important point is that courts intervention in the definition of religious symbols would become complicated, supposing there were different schools of thought about symbols to be considered as “ritually fit”: how should the courts decide which trend is truly representative of the religion under discussion? In this case judicial adjudication

³⁷ The *Commission de reflexion sur l’application du principe de laïcité dans la republique* was named “*commission Stasi*” as it was chaired by the politician Bernard Stasi; its report was issued on 11 December 2003 (see <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf>).

³⁸ See the report *Application de la loi du 15 mars 2004 sur le port des signes religieux ostensibles dans les établissements d’enseignement publics*, July 2005 (in the website <http://lesrapports.ladocumentationfrancaise.fr/BRP/064000177/0000.pdf> last visited 31 October 2012).

would identify *the* religious stakeholders, but on what basis since religious representativeness is not based on democratic legitimacy criteria. The choice of the most representative religious tendency seems quite complicated, if we consider this starting point, and judicial interpretation may be perceived as interfering as much as the lack of legal recognition.

Thus, dealing with religion is a very complicated issue, since the law has to contend with the definition of religious creed, which is a wide concept, sometimes mixing ethnic and anthropological elements. French courts may be asked to define symbols, not in relation to religions with the largest nationwide presence, but to “creeds” in between culture and ethnicity, as it occurred in the “bandana case”.

In 2007, in fact, the French *Conseil d’Etat* was asked to decide if a “bandana” should be considered as an ostensible religious symbol, since a Muslim girl wear it in place of her religious headscarf. The *Conseil* stated that this was a forbidden symbol, also taking into account the persistent refusal of the girl and of her family to take the bandana off. This was not an uncontroversial decision, as the bandana is a piece of fabric generally considered as a fashion accessory, but the subjective relevance of this object to the Muslim girl was prevailing, according to the opinion of the *Conseil*³⁹.

Moreover, it should be underlined that the *Conseil* itself considered the possible alternative to education at school, reminding that art. L. 131-2 provides for home-schooling⁴⁰. In this perspective, the *laïcité* would be granted by letting school education to Muslim family? It may sound like a pyrrhic victory.

Similarly, another religious issue proved to be very controversial, when some legal systems tried to regulate *kosher* or *halal* food, to prevent consumers’ fraud. These laws proved to be rather ineffective, when some religious authorities split on which food requirements were to be deemed fit for consumption. This was a purely religious issue, but the law could not disregard the definition of proper *kosher* or *halal* food, since the concept of “fraud” in itself depended on religious grounds. Otherwise, it was clear that it was very difficult for legal systems to choose among different religious stakeholders, entailing only one group’s view and thus giving “the” legal definition of religiously disputed norms⁴¹.

³⁹ See *Le port d’un bandana ou d’un turban sikh dans un établissement scolaire Conclusions sur Conseil d’Etat, 5 décembre 2007, M. et Mme Ghazal, req. n° 295671, M. Singh et autres, req. n. 285394*, (R. Keller, *Maître des requêtes au Conseil d’Etat, commissaire du gouvernement*): «Vous savez que le bandana est une pièce de tissu carrée ou triangulaire, qui peut couvrir la tête, mais que l’on peut aussi nouer autour du poignet, ou encore autour du cou comme une écharpe. Le mot viendrait de l’hindi bandhana, qui signifie «attacher». Lorsqu’il est porté sur la tête, le bandana – contrairement au voile islamique traditionnel – ne couvre pas le front, les oreilles et le cou, et il est noué au-dessus de la nuque. Le bandana est également porté par des sportifs - des joueurs de tennis par exemple - ou encore par des personnes qui souhaitent dissimuler une calvitie. C’est aussi, tout simplement, un accessoire apprécié de certaines jeunes filles pour des raisons pratiques ou esthétiques.», in *RFDA*, 2008, p. 529.

⁴⁰ See article L. 131-2 of the code de l’éducation : «L’instruction obligatoire peut être donnée soit dans les établissements ou écoles publics ou privés, soit dans les familles par les parents, ou l’un d’entre eux, ou toute personne de leur choix. Un service public de l’enseignement à distance est organisé notamment pour assurer l’instruction des enfants qui ne peuvent être scolarisés dans une école ou dans un établissement scolaire».

⁴¹ See the French and US cases reported in C. PICIOCCHI, *La libertà terapeutica come diritto culturale*, Padova, 2006, p. 80 and A. M. RABELLO, P. LERNER, *The Prohibition of Ritual Slaughtering (Kosher Shechita and Halal) and Freedom of Religion of Minorities*, in *Journal of Law and Religion*, 22, 1,

In conclusion, legal systems should be aware that regulating religious practices is like to enter new territories: you need a good map and you must have very clearly in mind where you want to go; otherwise, with no predetermined destination even the compass is useless.

3.2 Second example: the ban of polygamy.

Polygamy is banned in the majority of western countries, being considered as a practice disregarding equality between men and women⁴². If this statement proves to be true, the goals of this no-accommodation choice would be uncontroversial and a possible debate would entail only adequacy of strategies aimed at protecting women (and children).

Yet, some judicial decisions possibly called into question the justification of this prohibition, identifying a cultural reason for polygamy's rejection by many legal systems.

For example, it's hardly surprising that in 1886 an English Court refused to uphold the validity of a Mormon marriage celebrated in Utah, on the basis that «marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of others»⁴³. But – maybe a little more surprisingly – in 1992 the European Commission of human rights did not rule against the UK for preventing family reunification in case of polygamous marriages. The Commission relied on the aim of the English provisions, namely: «(...) the preservation of the Christian based monogamous culture dominant in that country.», consequently falling within the scope of the protection of art. 8 par. 2 of the European Convention on Human Rights («morals or the rights and freedom of others»)⁴⁴.

It might be argued that Christian identity of marriage can be considered a fundamental value, as well as equality between men and women, but it is more likely that the first one rather than the second one would be negotiated, being more “cultural” than “legal”.

2006/2007, p. 1 (it has been translated into Italian: *Il divieto di macellazione rituale (schechit  kosher e halal) e la libert  religiosa delle minoranze*, Padova, 2010).

⁴² See for example the *European Parliament resolution on women's immigration: the role and place of immigrant women in the European Union* (2006/2010(INI)): «(...) 35. Urges the Member States which have not done so to ensure that effective and deterrent penalties apply under their criminal codes to all forms of violence against women and children, particularly forced marriage, polygamy, so-called crimes of honour and female genital mutilation, and to increase the awareness of police and judicial authorities of those issues; 36. Notes with concern that polygamous marriages have been recognised as legal in Member States, even though polygamy is prohibited; calls on the Member States to ensure that the illegality of polygamy is upheld; urges the Commission to consider including a ban on polygamous marriages in its current proposal for introducing rules concerning applicable law in matrimonial matters (...)».

⁴³ See *Hyde v. Hyde and Woodmansee* (1886) L.R. 1 P. & D. 130.

⁴⁴ See *RB v. UK* (1992), application no. 19628/92; commented by P. SHAH, *Legal Pluralism in Conflict*, London, 2005, p. 117: «It therefore appears that the UK government may have attempted to justify restrictions on polygamy in Strasbourg on the basis of the dominance of monogamy as underpinned by Christian norms. I do not, however, have information about what was meant by the ‘protection of moral and of rights and freedoms of others’ in this context. It nevertheless seems, on the bases of the above case law, that the European human rights fora may not be prepared to countenance complaints against restrictions on polygamously married spouses, whether in the immigration or in any other field. This case law of the Commission obviously assumes importance at the domestic level subsequent to the Human Rights Act 1998».

Moreover, the no-accommodation choice showed vulnerability even considering only the gender equality issue, since some husbands tried to use it instrumentally for avoiding the legal consequence of the dissolution of marriage⁴⁵.

It is interesting to notice that different legal systems adopted very similar strategies, for example taking in charge the social welfare of the second, or third wives and, most of all, of their children. Even in *Hyde v. Hyde*, dating back to 1866, the court stressed that the denial of the validity of a polygamous marriage in the UK did not entail «the rights of successions or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves»⁴⁶.

A century later, a not dissimilar reasoning was employed by the Italian Court of Cassation, stressing the importance of a clear distinction between the validity of marriage and its legal consequences⁴⁷. In that case, the “potentially polygamous” nature of a marriage, which had been celebrated in Somalia between an Italian man and a Somali woman, did not affect the inheritance rights of the widow and her child, after the death of the husband, as it had been argued by the children from the previous marriage of the man⁴⁸.

The concept of family is rapidly changing and, once more, ethnic and religious diversities are only part of a wider problem: for example, unmarried couples and same-sex couple are claiming for marriage rights in different contexts like housing, adoption, procreation and so on. From a legal point of view, sometimes the “families” taking a loan may be different from the “families” undergoing assisted medical reproduction, as well as the “families” adopting a child may be different from the “families” to the extent of inheritance⁴⁹.

⁴⁵ See for example *Hussein v. Hussein* [1982] 1 All ER 369 and the analysis of A. BRIGGS, *The International and Comparative Law Quarterly*, 32, 3, 1983, p. 737.

⁴⁶ Quotation by S. POULTER, *Hyde v. Hyde – A Reappraisal*, in *The International and Comparative Law Quarterly*, 1976, p. 477.

⁴⁷ See Court of cassation, dec. n. 1739/1999, in *Foro it.*, 1999, I, 1458: «Sia pure sinteticamente, ha richiamato, al riguardo, un autorevole indirizzo dottrinario, secondo cui occorre distinguere la regolamentazione del rapporto giuridico controverso dalla rilevazione dei suoi presupposti, la regolamentazione della questione principale da quella pregiudiziale o preliminare, con la conseguenza che la disciplina di tali presupposti o questioni, posta dall’ordinamento straniero, al pari del diritto o “status” che si presenta come acquisito rispetto alla situazione da accertare, costituiscono essenzialmente elementi interpretativi (ove a ciò occorra procedere) delle norme straniere richiamate dalle disposizioni di diritto internazionale privato per la soluzione del caso concreto e che, in quanto tali, non sono direttamente immessi nell’ordinamento interno: è stato affermato, così, che il figlio e la moglie del mussulmano poligamo sono comunque ammessi a succedere ai beni lasciati da costui in Italia e, ancora, che l’accertamento dell’esistenza di un matrimonio valido – o di una filiazione legittima – rappresenta questione preliminare rispetto a quella principale della devoluzione ereditaria e, non implicando un’inserzione nella “lex fori” delle norme straniere che ammettono la poligamia o vietano i matrimoni misti, non pone neppure un problema di compatibilità con l’ordine pubblico interno.» See L. DI GAETANO, *I diritti successori del coniuge superstite di un matrimonio poligamico. Questione preliminare e validità nel nostro ordinamento dell’unione poligamica*, in *Giust. civ.*, 1999, 10, p. 2695.

⁴⁸ See G. FERRANDO, *L’invalidità del matrimonio civile in generale*, in G. FERRANDO, A. QUERCI (eds.), *L’invalidità del matrimonio e il problema dei suoi effetti*, Milano, 2007, p. 98.

⁴⁹ See the debate about the “*famille électorale*” and the “*famille biologique*” reported in C. PICIOCCHI, *La disciplina giuridica della procreazione medicalmente assistita nell’ordinamento francese*, in *DPCE*, p. 107 ss.

These new areas are covered by courts' interpretation but also by Parliaments, saying by political choice. For example, in Italy in 2010 the Constitutional court ruled against same-sex marriage, stating that the definition of marriage was up to Parliament, being a political question⁵⁰. Nevertheless, some Italian laws dealing with family issues employ rather "neutral" terms as, for example, family violence provisions using the word "*convivente*" (common law spouse) without any reference to marriage or to the sex of the spouses⁵¹.

Yet again, different legal systems adopt similar approaches, making a distinction between marriage and its legal consequences, interfering only with the second ones but without changing the first.

It may be argued that Parliaments (and – to some extent – courts) are reluctant to venture into the symbolic significance evoked by these issues, without renouncing to the protection of the rights at stake: from this point of view, symbolical self-restraint does not prevent functional activism.

A similar phenomenon is observed in other States, as in Germany where all the wives of a same man enjoy welfare benefits, provided that marriage was legitimately contracted in their original State⁵². And something similar happened in France through the theory of "*ordre public atténué*", meaning – once again – that marriage status and marriage effects are two different things⁵³.

The same reasoning seems to be underpinned by Indian courts, with regard to the interpretation of Hindu Marriage Act, which in 1955 prohibited polygamy: even in this case, some legal consequences were considered to be granted to children and women⁵⁴.

⁵⁰ See Constitutional court, decision 15.04.2010, n. 138 (in www.giurcost.it, 31 October 2012).

⁵¹ See G. FERRANDO, above mentioned, p. 91.

⁵² See R. BENIGNI, *Identità culturale e regolazione dei rapporti di famiglia tra applicazioni giurisprudenziali e dettami normativi*, in www.statoecliese.it (2008): «Quanto accade in Italia è fenomeno già consolidato e ben più diffuso nei paesi europei di vecchia immigrazione. La Francia, il Belgio, la Germania, l'Inghilterra, riconoscono notoriamente come legittimi i figli nati da un uomo sposato più volte, nonché il matrimonio poligamico celebrato validamente secondo la *lex loci*, il quale consente l'acquisizione dei diritti successori, l'assistenza economica in caso di divorzio, o ancora, in Francia, il diritto al risarcimento da danno arrecato al marito da un terzo, in Germania l'estensione delle prestazioni del Servizio sanitario nazionale a tutte le mogli del lavoratore che paga i contributi, purché siano legittime per il paese di provenienza, ed infine, come di recente stabilito dal Governo inglese, l'ammissione del marito agli assegni familiari per ogni moglie "aggiuntiva"».

⁵³ See COMMISSION NATIONALE CONSULTATIVE DES DROITS DE L'HOMME, *Etude et propositions sur la polygamie en France*, 9 march 2006 (in www.cncdh.fr last visited 31 October 2012), p. 15 : «Certains effets sont ainsi reconnus en France aux mariages polygamiques. Il s'agit principalement de reconnaître les mêmes droits entre toutes les épouses et tous les enfants. Les secondes épouses et leurs enfants pourront ainsi se voir reconnaître des droits alimentaires et des droits successoraux, en cas du décès de l'époux. En revanche, l'ordre public ne permet pas que les effets d'un mariage polygamique soient opposables à la première épouse, si celle-ci est française».

⁵⁴ P. A. SHAH, *Attitudes to Polygamy in English Law*, in *International and Comparative Law Quarterly*, April 2003, p. 371: «Among South Asian states, from which a large proportion of ethnic minorities in Britain originate, various approaches to legal regulation have been attempted. Modern Hindu law in India, which covers Buddhists, Sikhs, and Jains too, goes furthest in this respect and potentially criminalises it. Under the Hindu Marriage Act 1955 a second marriage may also be declared void. This has not prevented Indian courts from recognising the legal consequences of polygamy, however, as the full enforcement of the statute law is seen as often leading to injustice for the women and children concerned».

All these strategies entail welfare rights and they drive the attention to another important aspect: the cost of accommodation, which is not only cultural or theoretical but, very pragmatically speaking, economic too.

Rights cost money and cultural rights do not constitute an exception.

For example, when legal systems acknowledge “special rights” creating exceptions for some groups, these is a kind of first-generation of cultural rights, as they are entailing negative liberties. Granting a negative exception, enhancing individual liberty, is one thing, while another is to allocate the costs of that liberty: in this second case we are speaking of second-generation rights.

For example, the right to wear a Sikh turban instead of a helmet on motorcycle does or does not entail the assumption of the economic consequence if an accident occurs? A critical analysis on a second generation of cultural rights has yet to be developed, still this is a very important issue, since deciding who is going to bear the costs of accommodation is a crucial point to the extent of accommodation itself⁵⁵.

Finally, the no-accommodation choice with regard to polygamy entails another risk, with regard to the effectiveness of the law, as it might be possible to circumvent the prohibition of polygamy, contracting one marriage under secular law and some others under religious norms⁵⁶.

⁵⁵ It is interesting to see, anyway, that the 1989 Employment Act (UK) takes into account the costs of the Exemption of Sikhs from requirements on construction sites, see c. 38: «(1) Any requirement to wear a safety helmet which (apart from this section) would, by virtue of any statutory provision or rule of law, be imposed on a Sikh who is on a construction site shall not apply to him at any time when he is wearing a turban. (2) Accordingly, where – (a) a Sikh who is on a construction site is for the time being wearing a turban, and (b) (apart from this section) any associated requirement would, by virtue of any statutory provision or rule of law, be imposed— (i) on the Sikh, or (ii) on any other person, in connection with the wearing by the Sikh of a safety helmet, that requirement shall not apply to the Sikh or (as the case may be) to that other person. (3) In subsection (2) “associated requirement” means any requirement (other than one falling within subsection (1)) which is related to or connected with the wearing, provision or maintenance of safety helmets. (4) It is hereby declared that, where a person does not comply with any requirement, being a requirement which for the time being does not apply to him by virtue of subsection (1) or (2) – (a) he shall not be liable in tort to any person in respect of any injury, loss or damage caused by his failure to comply with that requirement; and (b) in Scotland no action for reparation shall be brought against him by any person in respect of any such injury, loss or damage. (5) If a Sikh who is on a construction site – (a) does not comply with any requirement to wear a safety helmet, being a requirement which for the time being does not apply to him by virtue of subsection (1), and (b) in consequence of any act or omission of some other person sustains any injury, loss or damage which is to any extent attributable to the fact that he is not wearing a safety helmet in compliance with the requirement, that other person shall, if liable to the Sikh in tort (or, in Scotland, in an action for reparation), be so liable only to the extent that injury, loss or damage would have been sustained by the Sikh even if he had been wearing a safety helmet in compliance with the requirement. (6) Where – (a) the act or omission referred to in subsection (5) causes the death of the Sikh, and (b) the Sikh would have sustained some injury (other than loss of life) in consequence of the act or omission even if he had been wearing a safety helmet in compliance with the requirement in question, the amount of any damages which, by virtue of that subsection, are recoverable in tort (or, in Scotland, in an action for reparation) in respect of that injury shall not exceed the amount of any damages which would (apart from that subsection) be so recoverable in respect of the Sikh’s death. (...)».

⁵⁶ See P. A. SHAH, above mentioned, p. 397: «However, it can be questioned whether the purported ban on polygamy either by prohibiting the contraction of more than one marriage in Britain or by preventing the admission of second wives achieves its actual abolition, assuming of course that this is itself desirable in all situations. (...) On the other hand, some Muslims have consciously preferred to keep, or have had to

This takes us back to the importance of involving groups in the political and legal discourse, enforcing their perception of actually being considered as social actors, in order to reach a wide understanding (if an agreement is not possible) of the values protected by legal rules.

The example of polygamy, anyway, makes clear that accommodation strategies are not a prerogative of the sole immigration discourse, especially when sensitive issues like family are at stake. Marriage is a concept completely embedded with national cultures and religious traditions, and cultural diversity comes into play from different perspectives, as proved by the wide debate about same-sex or unmarried couples.

Once again, different legal systems adopt similar strategies to find an accommodation without disregarding the (cultural and) legal definition of marriage since, for example, to some extent unmarried couples *are* a family, bearing in mind the legal consequences of this concept.

It is worth considering how some accommodation of polygamous marriages were to be found primarily in case law, but it is possible only to mention in passing this argument, since it entails the relation between Parliaments and courts, which is complex as they may differ to the extent of both goals and strategies.

But this is a wide topic, which goes far beyond accommodation's strategies.

4. Third step, the limits accommodation: why female mutilation cannot and must not be recognized.

One of the most discussed cultural practices is female genital mutilation: this denomination covers different customs aimed at preserving virginity of young women, at the expenses of their health, at least of the possibility of sexual pleasure⁵⁷.

This is not the only cultural practice involving human health since there are others as, for example, the rituals of passage attempting to physical integrity of children, which are part of some cultures⁵⁸.

The majority of states considers female mutilation as a crime and some criminal provisions are specifically aimed at punishing this practice. Some debates involve these criminal norms, as their application according to some commentators would be of little or no use. For example, in its first 10 years of application, the Italian crime of "female genital mutilation" mutilation seems to have been rarely used⁵⁹.

keep, certain legal acts 'within the community' so to speak, a situation in which the official legal position colludes by the pretence that only English law (or Scottish law) is being followed».

⁵⁷ See for example Global strategy to stop health-care providers from performing female genital mutilation, 2010 (WHO/RHR/10.9) and the other WHO (World Health Organization) reports on this topic (www.who.int).

⁵⁸ See, for example, the cases reported by S. POULTER, *Foreign Customs and the English Criminal Law*, in *The International and Comparative Law Quarterly*, 24, 1, 1975, p. 136. See also A.S. DIAMOND, P. LLOYD, *The Case of Mrs. Adesanya*, in *Rain*, 4, 1974, p. 2.

⁵⁹ Cfr. article 583-bis of the Italian criminal code: «Chiunque, in assenza di esigenze terapeutiche, cagiona una mutilazione degli organi genitali femminili è punito con la reclusione da quattro a dodici anni. Ai fini del presente articolo, si intendono come pratiche di mutilazione degli organi genitali femminili la clitoridectomia, l'escissione e l'infibulazione e qualsiasi altra pratica che cagioni effetti dello

The search for the instruments to be chosen to fit the purposes are maybe still on the road, nevertheless goals are clear: to ban this practice in order to protect some constitutional principles namely women's health and dignity and sex equality.

There have been some proposals of "symbolic genital cutting", as in the case of Firenze where a Somali doctor suggested that a pinprick – in hospital and with all appropriate measures – would balance ritual requirements with health protection of women. This proposal stirred debate, since it was perceived as a misinterpretation of the medical profession, providing for an act without any therapeutic purpose⁶⁰. For example, the ethical committee of Tuscany considered this proposal worthy of attention, but it expressed also concern with regard to the dignity of the medical profession. In any case, according to the committee, the purely ritual nature of this symbolic alternative practice would in any case prevent the welfare system to bear its cost⁶¹.

Again, this is a wider topic, involving possible considerations other than genital cutting, taking into account how for example another ritual practice, male circumcision, has raised similar criticism⁶². In Italy, for example, doctors performing circumcision might be asked to justify this operation in absence of any therapeutic need, when it is only ritually based; nevertheless, everyone performing a surgical operation (like circumcision is) without being a duly licensed practitioner would commit a crime⁶³.

Going even further, these debates revealed incertitude on the real nature of surgery in itself, which is still an unsolved problem at least in the Italian case law, the opinions ranging from surgical interventions as crimes justified by medical reason, to a *per se* legitimate activity, without the need of any defense⁶⁴.

stesso tipo. Chiunque, in assenza di esigenze terapeutiche, provoca, al fine di menomare le funzioni sessuali, lesioni agli organi genitali femminili diverse da quelle indicate al primo comma, da cui derivi una malattia nel corpo o nella mente, è punito con la reclusione da tre a sette anni. La pena è diminuita fino a due terzi se la lesione è di lieve entità. La pena è aumentata di un terzo quando le pratiche di cui al primo e al secondo comma sono commesse a danno di un minore ovvero se il fatto è commesso per fini di lucro. Le disposizioni del presente articolo si applicano altresì quando il fatto è commesso all'estero da cittadino italiano o da straniero residente in Italia, ovvero in danno di cittadino italiano o di straniero residente in Italia. In tal caso, il colpevole è punito a richiesta del Ministro della giustizia.» Physicians' license will be suspended as well at least for three years, as provided by the following article (583-ter).

⁶⁰ We are referring to the proposal of Dr. Abdulcadir, a Somali gynaecologist working at Careggi hospital in Florence and head of the regional entre for the prevention and therapy of female genital mutilations Florence. See F. TURONE, *Doctor proposes alternative to female genital mutilation*, in *British Medical Journal*, 2004, 328:247.

⁶¹ See the opinion of the Ethical committee of Tuscany, *Prevenzione delle Mutilazioni Genitali Femminili (MGF): liceità etica, deontologica e giuridica della partecipazione dei medici alla pratica di un rito alternativo*, 9 march 2004 (see the website <http://www.cesda.net/downloads/normative/CRB-3-04.pdf>, last visited 30 June 2010). It is worth remembering that some women associations opposed this proposal, see the debates reported in C. PASQUINELLI, *Infibulazione - il corpo violato*, Roma, 2007 *passim*.

⁶² See for example P. CATTORINI, *La professione medica oggi. Dilemmi etici*, in *Riv. it. med. leg.*, 2008, 6, p. 1205 ff.

⁶³ See art. 348 of the Italian criminal code punishing "unlicensed practice of profession" («Abusivo esercizio di una professione. Chiunque abusivamente esercita una professione, per la quale è richiesta una speciale abilitazione dello Stato, è punito con la reclusione fino a sei mesi o con la multa da euro 103 a euro 516»).

⁶⁴ See for example S. TORDINI CAGLI, *Profili penali del trattamento medico-chirurgico in assenza di consenso*, in *Resp. civ. e prev.*, 2009, 5, p. 1060.

But even disregarding all the theoretical and legal implications of a “symbolic” female mutilation, it is still clear that this attenuated practice would not entail any idea of accommodation, since it would not be aimed at permitting, but rather at eliminating – as far as possible – this custom.

The importance of the values at stake justify a no-accommodation choice as female mutilation affects with no doubts fundamental values but still, when legal systems decide to grant rights’ protection even at the expenses of the will of individuals, there is a risk, that we might indicate as “legal paternalism”.

It stands to reason that this possible objection is to be raised only if we are dealing with women, while genital cutting is generally practiced on young girls: by no means is this practice to be considered permissible when performed on children, since it cannot be considered as a choice, nevertheless it will affect their all life.

All the same, this is a question to be answered to understand the ban of these mutilations, even when requested by women: is this approach to be considered as paternalistic in opposition to personal autonomy?

Culture cannot be considered regardless of the context where it does come from: the levels of protection of women’s rights, as well as their social role are not irrelevant to the understanding of these ritual practices as an attempt to their physical and psychical integrity, or as an expression of autonomy.

Legal systems cannot disregard the social and legal starting point of the ways of life asking for recognition: self determination is based on the concept of choice, but the idea of choice in itself is defined also by the possibilities enjoyed by individuals.

Maybe this is one of those few cases where it is worth mentioning human dignity: despite its assumed vagueness, the legal relevance of this concept becomes clearer when it is considered in the light of substantial equality.

With this respect, different national courts use dignity in order to assure minimal conditions of survival, for example in relation to housing. According to these decisions, equality is meaningless if – in the words of the Constitutional court of South Africa – it does not ensure dignity, in the sense that: «human beings are required to be treated as human beings»⁶⁵.

A practice embedded with sex inequality, coming from contexts where women do not enjoy a full human rights protection and irreparably injuring their physical integrity is unlikely to be a true request of personal autonomy.

It may be said, that this idea of sex equality and personal autonomy is embedded with Western legal and philosophical tradition and that it completely disregards the cultural dimension of the group to which the woman (or the child) belongs⁶⁶.

This may be true, but law cannot be socially blind, completely disregarding social and legal starting point of cultural practices: we may discuss about the best way to reach the

⁶⁵ See *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC), par. 83: «The Constitution will be worth infinitely less than its paper if the reasonableness of State action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the State (...) and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings».

⁶⁶ E. GRANDE, for example, reminds the opportunity of a «“cultural immersed” observation of African F.C. [female circumcision] practices» in *Hegemonic Human Rights and African Resistance: Female Circumcision in a Broader Comparative Perspective*, in *Global Jurist Frontiers*, 4, 2, 2004, p. 18.

protection of the values at stake (e.g. choosing criminal provisions or symbolic practices as mentioned before), but we cannot question the values themselves, since they get to the core of human rights: this is not paternalism, this is protection of basic constitutional rights.

And even if this argumentation would be rejected, it should be remembered that in the mutual relation and interactions between legal systems and different ways of life, law has the duty to recognize and to protect diversity, but sometimes law may contribute to impose or at least encourage cultural changes.

When the US Supreme Court repealed its previous “equal but separated doctrine” in *Brown v. Board of Education*, desegregation was still a controversial issue and the first black students entered schools thanks both to this landmark decision and thanks (in many cases) to armed escort⁶⁷.

And again, when some Constitutional court had to deal with ethical issues like, for example, ruling in favour of abortion, only a part of society welcomed their decisions, but Parliaments were encouraged – not to say forced – to take position⁶⁸.

Yet, sometimes it is still difficult to say when social changes are imposed or when they are acknowledged: for example, in 2003 a French law outlawed polygamy and repudiation in the Mayotte Island, denying personal status entailing these practices⁶⁹. According to a survey, 64% of the population 15 to 24 years old probably welcomed this decision, being contrary to polygamy, while the 51% aged 40 or over were in favour of this practice⁷⁰. As the ban affected only new generations, regarding persons reaching marriage age at least on January 2005, there was probably a compromise between imposition and acknowledgment of social changes⁷¹.

Anyway, when fundamental rights are at stake the no-accommodation choice is important to the extent of multicultural dialogue, since accommodation always deals with identity, even when it is denied. The no-choice accommodation, if it is intentional and it is not the random consequence of a false understanding of cultural assumption of legal norms, turns back to the first step of accommodation: *know thyself*.

When no-accommodation is a real choice, coming from the precise idea that in some cases negotiation is neither possible nor desirable, it is crucial to understand the basic features of the legal framework identities have to deal with. Besides, locating cultural assumptions offers the opportunity to identify them also in order to distinguish the ones entailing fundamental rights.

⁶⁷ See *Brown v Board of education of Topeka*, 347 U.S. 483 (1954).

⁶⁸ For example, ruling n. 27/1975 of the Italian Constitutional court paved the way to the adoption of law n. 194/1978, legitimising abortion. The interaction between courts and parliaments with regard to abortion was evident in the landmark case *Roe v. Wade* (410 U.S. 113 (1973)), where the Supreme Court acted as a law maker, regulating abortion.

⁶⁹ See *Loi de programme pour l'outre-mer*, n° 2003/660, 21 july 2003, article 52-2 : «Nul ne peut contacter un nouveau mariage avant la dissolution du ou des précédents. Le présent article n'est applicable qu'aux personnes accédant à l'âge requis pour se marier au 1er janvier 2005.»; and article 52-3: «Le mariage est dissous par le décès de l'un des conjoints ou le divorce ou la séparation judiciairement prononcée. La rupture unilatérale de la vie commune par l'un des époux est une cause de divorce. Les époux sont égaux dans les conditions et les effets de la dissolution du mariage. Cette disposition n'est applicable qu'aux personnes accédant à l'âge requis pour se marier au 1er janvier 2005».

⁷⁰ See G.A. CAVALIER, *L'égalité entre hommes et femmes au Cameroun*, in AA. VV., *Genre, inégalités et religion*, 2007, Paris, p. 158.

⁷¹ On the relation between anti-discrimination law and social changes see R. TONIATTI, above mentioned.

In any case, the no-accommodation choice needs to be justified, since negotiation is the possible result of a balance among the different rights at stakes: if cultural assumptions behind legal rules are only the expression of *a* way of life, cultural and religious diversity will be acknowledged, since there is nothing to balance at all.

On closer inspection, individuals and groups' claims require majorities to try (maybe for the first time) to wear someone else's shoes, trying to see the world through different eyes, understanding why some practices might seem odd in a certain context, while they are vital for someone else starting from different cultural starting point.

This is not a process of complete identification and that is why the limits of accommodation have much to do with the concept of identity, as the no-accommodation choice (stressing: *choice*) defines the basic features of majority.

Yet, both parts have to look to themselves, since self-consciousness is the starting point of every dialogue and this is true for majorities, but also for minorities, as well as for religious or cultural groups and individuals. In fact, the individuation of stakeholders seems to be a weak point in accommodation strategies, not only in the view of majorities opposing to or denying negotiation. Even groups claiming accommodation themselves have to deal with identity, their identity, discovering (maybe for the first time) that every group may experience disagreement.

The case of *kosher* and *halal* food was a clear example, as the main obstacle to the legal protection of religious food came from groups' dissent and not from some majority's resistance to accommodation.

In this sense, pluralism is an all or nothing issue: if you claim it you must be ready to accept it, even inside the group you represent (or you think to represent).

For example, resistance to specific agreement with Muslim communities in Italy is thought to be due also to the difficulties of understanding who should represent this group, thus the fragmentation of Muslim identities, also with reference to their different perspective on secular law and the State itself, are not alien to this situation⁷².

Not only accommodation has to do with the definition of identities, most of all it has to do with their own change. As far as struggles for legal recognition make it clear the need of an groups' internal negotiation to selecting the stakeholder more suit to obtain accommodation, it follows that identities are not monolithic and that every group may (and maybe should) experience dissent.

Inevitably, there will be relevant differences between the pre-accommodation identities and the post-accommodation ones: a sociological competence would be needed at this point, but even a lawyer might dare to argue that if this process of re-definition succeeds in putting aside the more intransigent component of both majority and minority, this might be a positive aspect.

⁷² See article 8 of the Italian Constitution: «All religious denominations are equally free before the law. Denominations other than Catholicism have the right to self-organisation according to their own statutes, provided these do not conflict with Italian law. Their relations with the State are regulated by law, based on agreements with their respective representatives.» (the English translation of the Italian Constitution is in the website of the Italian President of the Republic: www.quirinale.it). The drafting agreements proposed by three different Muslim associations are reported in *Quaderni di politica ecclesiastica*, 1993, 2 p. 561; *Idem*, 1996, 2, p. 536 and *Idem*, 1998, 2, p. 567.

5. Concluding: playing football and cricket in the same park.

Concluding: all the team sports seem to have much fun at Sunday in my town's park. Football players have a well-equipped football pitch, while probably the designers of the park would never have thought about the necessity of a cricket pitch in a small Italian town. Cricket players had to adapt another part of the field, with self-made wickets; nevertheless they seem to enjoy it.

Maybe in fifty years football will no more be the most popular sport and players will have to adapt some parts of parks with self-made goal posts, unless someone will provide for accommodation.

In this case a well grounded theory on accommodation strategies will prove useful for those (today) belonging to such a well equipped majority.

In any case, football players are not required to follow cricket rules or vice versa: they only have to decide where to play and how to share the park, respecting each others and, possibly, having fun.

** After I have finished writing this paper, I discovered that my town's cricket club had won the 2011 Italian Cricket Championship.*