EQUALITY OR DIFFERENCE? EUROPEAN LEGAL EXPERIENCES AND THEIR INFLUENCE ON ITALIAN BILLS ON FEMALE CIRCUMCISION

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The new Italian law against female circumcision is the product of a long period of study of the legislation of other European countries on the subject. It represents an important contribution to the updating of the laws on Human Rights and multiethnic societies in Western countries.

The Italian parliament, with the consensus of almost the entire political world, has recently issued a law against female circumcision (DL 414 / Senato della Repubblica, April 8, 2003). An identical consensus was expressed within the Islamic community and some Islamic publications have also emphasized that no passage in the Koran makes any mention of female circumcision and that religion can be no excuse for a barbaric act. The law was finally approved after a long and animated discussion on the possibility of reconciling Human Rights policy with the respect for different cultural identities. The problem was also discussed at the congress on" Human Rights and different cultural identities", held in Naples at the end of January 2003, promoted by the University of Malta, in cooperation with the Università Federico II of Naples and under the auspices of the EU.

The law reads:

> *"The law provides for a punishment of imprisonment for a period lasting from 6 to 12 years, which period is increased by a third if the victim of the practise was a minor." This punishment is incurred in all cases of: "violence against a person directed at the genital organs and consisting of*

> *sexual mutilations and injuries which are inflicted without any therapeutic necessity in order to condition the sexual functioning of the victim." Finally: "If female circumcision has been carried out abroad by an Italian resident, the latter is still subject to the abovementioned sanctions."*

Such a law, which privileges a strategic rather than a pragmatic approach, ranges Italy among the most legally advanced countries, such as the UK, Sweden and Norway, which promulgate specific laws against female circumcision. In Sweden, the first country to enact and enforce a law against female circumcision, the latter is considered a criminal offence even if consent has been expressed by the victim. The law, as amended in 1998, provides for the same penalty even if the crime is committed in a country where the case is subject to prosecution.

The case under discussion is a significant issue within the framework of European law which now faces the problems stemming from globalisation and multiethnic societies. Advanced democracies are currently going through complex political-constitutional transition phases, within the general framework of a crisis of the Nation-State and, in particular, of the euro-continental state (HELD, 1999). On the other hand, on a wider global scale, a complex change in identity processes and community affiliation is occurring in consequence of processes of de-territorialisation and economic integration (PAPASTERGIADIS, 2000). Western culture has experienced "cultural relativism" since the beginning of sea travels and the subsequent first confrontations between different civilizations. Nowadays the problem is magnified because of the growing awareness that those very cultural horizons where relativism is rooted are now uncertain. In the words of an acute "observer" of the German crisis of the 1920s: "*Everything sways*" (TROELTSCH, 1922). The problem concerns all western countries, Europe in particular and above all the Euro-Mediterranean area, where the main religious, political and juridical traditions of the world (common law, civil law, Islamic law) find themselves confronted with one another.

We shall demonstrate here that the problems of the present multi-ethnic society put European juridical systems through a severe test at their very epistemological roots. We shall see how the conflict, nowadays seemingly inevitable, between Human Rights policy and

the respect for different cultural identities may actually be reconsidered through a paradigm shift: i.e. a reconsideration of these same cultural "roots". We will then briefly survey the present situation in Europe, and in particular, we shall consider the problem of Islamic community integration.

The Muslim community is the largest non-native religious community in the West, including Europe. In Italy, for instance, Islam is the second largest religious community. Moreover, Islamic culture –and this has been well attested in our historical memory since the High Middle Ages – represents an example of socio-political recognition, stemming from a long history of relationships between European and Islamic civilization. These have consisted of "rivalries" (LEWIS, 1990), but also of "fruitful friendship" (CARDINI, 1990) – in a reciprocal self-reflection, where each defined itself and the other, as either an enemy, or a privileged counterpart.

Islamic settlements, as they are known in the West, are of two types: the first is the so-called "Islamic citadel", the second is the "diffusion" (ALLIEVI, 2002). In the first case, Islamic people concentrate heavily in a single area. In this case, membership of the community need not be openly declared, as it is self-evident. The Islamic citadel settlement is typical of industrial towns, where specific functions coincide with the allocation-occupation of a specific area. Functional areas, in an industrial town, tend to coincide with boundaries in physical space. Conversely, in post-industrial society, spatial boundaries constitute an "option". "Settling" is tantamount to "diffusion".

Identities are therefore determined by the many communicative opportunities afforded by the urban texture; living in a Muslin town is no proof of Islamism but Islamic identity is asserted through communicative exchanges. The "diffusion" model, which is rapidly taking root in Italy, seems to suit this "Islamic culture" perfectly. The occupation of areas, a typical Islamic tendency, is therefore strengthened and somehow modified. The Islamic community experiences dislocation as an opportunity for multi-dimensional expansion. Muslims not only adopt the western principle of freedom of worship, but also profit from the many opportunities provided by post-industrial towns for expression and communication, as well as for participation, confrontation and confirmation of their own identity. From this point of view, also on a family basis, being a Muslim is not something to be taken for granted but rather a

convinced, deliberate choice whether more or less definitive, to follow the teaching of the Koran. As a result, the sense of national identity is profoundly altered. A young immigrant, whose family comes from Morocco, is much more inclined to consider himself as a Muslim rather than as a Moroccan. Looked at more closely, this might also appear as a re-appropriation of historical identity. In the Islamic area, nation-states, with the rare exception of Turkey and to some extent, Egypt, do not posses a strong autochthonous tradition, but are mostly a result of western initiatives.

Initially, the Islamic associative experience is characterized by multi-ethnic and non-national features (VIATIKITOS, 1993). A further difference is the new relationship with the religious authority, which is direct and no longer mediated by the clan, and precisely because of this directness, can openly question the observance to Islam. Moreover, legitimacy being questionable, the religious authority must accept the risk of being contested on "ideological" grounds with reference to Islamic values and ideals, also concerning its capacity to safeguard the interests of the community. The risk also applies to the law, since in Islam no straightforward separation exists between law and religion. Obviously, as the Muslim community does not, in western countries, possess legal means to punish offenders, the exercise of authority may depend solely upon the charisma of the Community Leader, on his capacity to interact with the authorities of the host country to defend the interests of the community.

In this light, relationships with the judicial system of the host country are very likely to be ambivalent. On one hand, this system guarantees freedom and provides an opportunity for the community to expand and at least make its presence recognised. On the other hand, this very system of regulations, based as it is exclusively on the freedom of conscience, may also be perceived as a threat to the integrity of the community itself. This ambivalence itself hosts another ambiguity: the western secular state is experienced as a stimulus to a deeper awareness of Muslim identity. Precisely because a system of positive laws to safeguard the Islamic identity does not exist a deeper awareness and wider participation is therefore necessitated. Moreover, the permissiveness of the secular State may also be interpreted as a threat to Islamic identity and as a demonstration that a confrontation with the West is irreversible. In general, now that cultural identity is seen more and more as a social

construct rather than as an unchangeable vested right, this holds with even greater force for the Islamic community in the West. From this point of view, Islam is defying western society on two grounds: on the one hand, it is seen as culturally ethnocentric, and on the other, it interprets Western tolerance as a denial of Islamic identity and values.

The question now arises of how European judicial systems will react to these processes of integration. The term "juridical philosophy" would probably be more suitable than "judicial system", in that it is not specific law systems which are put to the test, but the very conceptual structures and behaviours which give rise to the laws. To this end, it is important to consider how the two basic models (BELLUCCI, 2001), the English Common Law and the "civil law", the core of the French system, have reacted.

The French juridical system is based on the paradigm of "equality", namely that all legally relevant situations should be standardized and should follow a single procedure. Differences should be levelled out on the principle that all individuals are equal on the ground of their common rationality. The legislator is taken to have drawn up rules on the basis of a clear conceptual representation of universal human reality. It is a kind of rationalism which takes to extreme consequences the principle Weber regards as the basis of the modern juridical culture and that he thus exemplifies::

> *"any effectual (concrete) juridical decision is the application of an abstract juridical principle to the case in point"* (WEBER, 1922).

No rule is directed specifically at any particular community, the latter not being recognized as such. The "rationality" of the French system can provide responses which may seem coherent with the system but, this very coherence often sparks off a crisis of the system. Paradoxically, the egalitarian mechanism, when in contact with the changing realities which are typical of new social identities and community processes, gives rise to evident inequalities.

In 1991, the "Haut Conseil" expressed a position in favour of a "logic of equality" and against a "logic of minorities", that is, in favour of an absolute supremacy of individual rights and abstract laws over communal identities and concrete situations. However the experience of recent years has shown that the individualistic-rationalistic structure of the system cannot cope with the complex

differences of identities which characterize French society. A case in point is the case of female circumcision, where the system has changed its stance from a substantial legislative tolerance to a sudden severity. This happened in 1983 when the system found itself under the obligation to give this very tolerance legal status in the case of a woman from Brittany (not an African) who, presumably in a state of shock, had practised excision on her daughter. Up to that moment, excision had been regarded as a *délit* and so it was competence of the *Tribunal Correctionel*. On the other hand, in the above case, excision was considered a *crime*, thus more serious, and it was competence of the *Cour D'Assise*. From that case onwards, the French system did not tolerate excision – in any form – at all. This new attitude generated a debate among scholars and some of them asked for more tolerance. Nevertheless, in 1995, the *Haut Conseil* encouraged firmness by all public prosecutors (Bellucci, 2001).

Quite different is the situation in the UK, where a specific law *"the Prohibition of Female Circumcision Act"* was enacted in 1985. Before 1985, no legal action could be taken unless real intent to inflict serious injury could be proved. As cases proliferated, the intention to inflict injury could not be proved, and ethno-religious justifications were put forward; hence a specific law was deemed necessary. This Act provides for penal prosecution against anyone found guilty of practising female circumcision. Resuming what we said about Weber, it is possible to define the English system as more pragmatic than the French one, because the former is based on "casuistry" and not on "systematics". The paradigm of the Anglo-Saxon system is based on "difference" whereby, lacking a universal exhaustive representation of the problem, the lawmaker proceeds empirically and by approximation, without neglecting different experiences; thus recognizing the presence of different communities.

Italy has benefited from the European experiences and succeeded in reconciling the pragmatic European approach with its cultural and legal tradition. Italy is deeply concerned by the problem because of its position as a hinge-country in the Mediterranean area, a crossroads of the main migration flows and a mirror of the main geo-political tensions of the world. Much has still to be done to overcome old suspicions and rooted prejudices.

The end of the bi-polar order has revealed the existence of a wall which, although invisible, is no less solid than the Berlin wall. Instead of dividing Western from Eastern Europe it divides Southern from

Northern Mediterranean regions. On one side we find the national territorial states, whose origins date back to the end of the 15th century, on the other side, the "states without nation", which originated within the Islamic world through western initiatives. The raising of this "wall" began at just the same time as the Europeans were en-route to the establishment of national territorial states and was later strengthened by the industrial revolution. This "wall" divides the Mediterranean as regards religious, juridical, political, linguistic and economic matters, but the swelling migration flows will inevitably lead to its collapse as, in times of "de-territorialisation" and "multiple territorial affiliation," such a compact geo-political barrier is inconceivable.

Communication difficulties between the two worlds have been and still are evident in the attempt to reconcile the European juridical tradition and Islamic culture. Within this framework, the response of European juridical culture to the problems created by a multi-ethnic society is of paramount importance for Europe's future destiny, as might be expected at a time when a European Constitution is in the process of being drawn up and, in relation to this, a European "identity" must be defined.

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