Chapter 10
Shari'a Law in Catholic Italy: A Non-agnostic Model of Accommodation

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Abstract The Italian Constitution and its interpretation by the Constitutional Court have led to the development of a model of accommodation of religious practices that seeks to balance a commitment to promoting religious pluralism whilst, at the same time, maintaining the neutrality of state institutions. What is distinctive about this *quasi*-neutral constitutional stance is the commitment to reduce the discrepancies between the legal and religious effects of key life decisions. I call this stance 'positive secularism.' In this essay, I would like to show that, thus far, positive secularism has been particularly effective in accommodating the demands of Muslim immigrants. For instance, some aspects of the *Shari'a* law, such as marriage and divorce (including some effects of unilateral divorce), are already recognized by Italian international private law. The second stage for the accommodation of *Shari'a* law in Italy is likely to be the recognition of Islam as one of Italy's official religions.

10.1 Introduction

Discussing the application of *Shari'a* law in Italy might appear counterintuitive. The Italian state is perceived by many commentators as the home of the Catholic faith. Lamb, for instance, in his article *When Human Rights Have Gone too Far: Religious Tradition and Equality in Lautsi v. Italy*, suggests that the atheist beliefs of Finnish passport holder Mrs. Lautsi should not find accommodation in Italy where Catholicism has a leading role (Lamb, 2011, 752). Whilst a large proportion of the Italian population, that is 87 per cent, (Eurispes, 2011, sec. 52), describe themselves as Catholics, the Republic is secular and it is committed to granting equal freedom to all religions (Italian Constitution 1948 article 8 (1)).

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A. Possamai et al. (eds.), *The Sociology of Shari'a*, Boundaries of Religious Freedom: Regulating Religion in Diverse Societies,
https://doi.org/10.1007/978-3-031-27188-5_10

The state's commitment to neutrality is mediated by a positive constitutional obligation towards fostering individual public activities (article 3) in "which individuals develop their personalities" (article 2). In addition, the Constitution imposes a duty on the state to protect all residents from religious discrimination (article 19) and, perhaps as a corollary, a negative obligation not to be the entity that imposes special limitations on religious groups (article 20).

There are many implications arising from the constitutional regime of the freedom of religion. However, in terms of the main theme of this essay, the most significant implications relate to the positive commitment to treating all religious communities in Italy as equally free (article 8 (1)) and autonomous (article 8 (2)).

> 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. (Senato della Republica, 2007: 5)

In the area of religious freedom, the Italian Constitution might appear to be 'over drafted.' For instance, the institutional autonomy of a religious group, explicitly granted by article 20, could have been logically deduced from article 8 (2). Freedoms, such as the one relating to manifesting religious beliefs, are normally granted to all. There are historical reasons for such a qualification, which I will discuss in detail later. At this point, it is important to note that, in 1948, the Constitutional Commission inherited a series of discriminatory policies against non-Catholics from the disbanded Fascist regime; policies that were antithetical to a liberal constitutional system.

Consequently, the Constitutional Commission, by drafting a series of articles that, in effect, repealed the Fascist sectarian legislation (Constitutional Court 1957, 1958), laid the groundwork for a pluralistic legal system with which to promote the integration of the demands from both the theist and secular public spheres (Italian Constitution 1948, article 8). Through this process, rather than promoting secularism *per se*, state institutions strive to be independent referees. Perhaps one of the clearest renderings of this stance can be seen in McGoldrick's analysis of the Italian accommodation of religious claims. She explains that Italian institutions strive for a distinctive type of secularism that she calls 'positive.' She defines it in a concise narrative as "a *secular* view of a lay public sphere as the only solution to ensuring *genuine equality* between members of majority and minority churches, agnostics, atheists or non-theists and eliminating religious and anti-religious tensions" (McGoldrick, 2011: 454, emphasis added). In short, the Italian Constitution is designed to protect the public sphere from outright domination by either its theist or its secular communities.

All secular constitutions rely on the idea of a lay public sphere and on a separation of the public and private spheres (Sajó, 2008: 607). Yet positive secularism explicitly acknowledges the limits of the enlightenment movement within constitutional law. Pluralism, as a legal concept, demands the recognition of diversity and the acceptance of a dialogue that transforms a multitude of legal orders, and a

plurality of perceptions of the *good life* as represented by such a multitude, into procedures aimed at accommodating concurring rights. Concurring rights are granted to all. For example, the right given to parents to choose the type of education that they want for their children. However, they might generate competing claims over public resources. The multiplicity of calls for the recognition of individual rights makes it inappropriate and impractical for a state to favour one group over the other, leading instead to an open-ended dialogue in which institutions are, by default, receptive to all demands (Breda, 2013).

Shachar provides one of the most articulate analyses of the benefits and the shortfalls of these types of arrangements (Shachar, 2001: 63–85). For instance, the recognition of a self-regulatory regime for a community might prove to be a 'buzzword' for accepting discriminatory policies, especially against women. The dilemma concerns how we integrate and retain liberal values and systems in the face of an alien and sometimes extremely non-liberal culture that wishes to retain its own laws when in a 'foreign' land. Sajó, for instance, explicitly considered the concessions required in pluralist secular legal systems as Trojan horses, bringing unverified religious claims into the citadel of liberal values by making use of the narrative of western-style rights (Sajó, 2008: 607).

The maelstrom generated by the debate over the boundaries of liberalism will not be discussed in this essay. However, it is reasonably clear that the dilemma of how to accommodate these types of 'Trojan horses' into the stables of modern democracy has so far escaped a normative answer (Viellechner, 2009: 596). For instance, an aprioristic exclusion of all religious claims from the constitutional system would make liberal democracy an oxymoron (Rosenfeld, 2008: 2333; Sajó, 2008: 613). Even countries such as the USA and France, which are committed to a robust separation between the secular/public and possibly theistic private spheres, accept that the separation is merely conceptual. Government policies in both France and the USA do accommodate theistic demands by recognizing, for instance, religious festivities and by tolerating religious references during school activities (Rosenfeld, 2008: 2348; Sajó, 2008: 610). Rosenfeld, in his analysis of the US constitutional system, prefers to use the term 'areligious' to acknowledge both the substantive protection that is in place to allow for the manifestation of religious beliefs, and the state's commitment to the non-endorsement of theistic views (Rosenfeld, 2008: 2334). Developing this point, the Italian constitutional stance might be described as one of the manifestations of secularism, rather than as a distinctive approach to it.

However, the distinctive element of positive secularism in the 1948 Italian Constitution concerns the development of the legal framework to allow religious groups to form a joint-governance agreement without the imposition of a pro-religion (or pro-secular) constitutional stance being placed upon it (Croce, 2009). These joint-governance agreements regulate the partnership between state institutions and religious groups. It is also important to note that Italian institutions do not promote or discourage such agreements. Having a constitutional norm such as article 8 that allows state institutions to form a governance regulation for religious communities, independently of their size or creed, makes the Italian legal system particularly open to religious pluralism. It is this distinctive openness, inserted in

the constitutional fabric of Italian law, that qualifies the Italian secularism as 'positive.' Positive secularism is not, therefore, a Panglossian attempt to find a normative response to the challenges of accommodating both liberalism and pluralism into the constitution.

Positive secularism is a distinctive pragmatic constitutional stance that has resulted from the Italian historical experience. A similar pragmatic approach to religious freedom, with a due margin of equivocation concerning any parallelism, has been found in the small-scale empirical analyses of the Australian universities' policy towards the use of chaplaincy facilities (Brakenreg & Possamai, 2009). Distinctive of the Italian constitutional regime of religious freedom is, however, a positive commitment in terms of state institutions engaging religious groups that want to obtain official recognition. The recognition does not affect the freedoms that are recognized by the constitution. Rather, such recognition is a manifestation of the obligation to promote all associations that contribute to the formation of individual personalities (Casucelli, 2000). For instance, recognized faith institutions, including religious tribunals, can act as autonomous agencies, and their policies, including religious tribunal decisions, are automatically recognized by Italian law.

In other words, the recognition process set out in the Italian Constitution is not part of a 'carrot or stick' approach to the freedom of religion. It does not seek to disguise the state's policy of control over religious associations with some pragmatic benefits. It is reasonably clear that the Italian Constitution has set up a framework to enable religious groups to regulate their partnership with state institutions (Casucelli, 2000). The positive secularism upheld in the Italian Constitution aims at reducing the gap between religious communities and the state. The policies that derive from such a principle provide for a genuine climate of joint governance.

This essay aims to describe the effects of positive secularism in the growing number of Italian Islamic communities. Firstly, I will explain that positive secularism has set a distinctive policy of inclusion, in which the judiciary has transferred the effect of relationships, within the limit of reasonableness, based on *Shari'a* law. Secondly, I will report on the progress of the recognition of Islam as an official Italian religion.

However, before I develop my analysis, a series of issues have to be dealt with as preliminary debates. Firstly, what we call *Shari'a* law is a complex and multifaceted system of rules that changes in relation to the legal system within which it has been given effect. In other words, the implementation of *Shari'a* law marriage might be different in Iran and in Morocco. Yet, on a general level, *Shari'a* law is drawn from four sources: the Qur'an, the *Sunna,* the *Jina* and the *Qiyas* (Kamali, 2008, 23). The Qur'an and the *Sunna* are the main sources of *Shari'a* law and their verses are a direct manifestation of the divinity held within the texts. A series of interpretative methods (*usul al-fiqh*) are adopted to distil normative rules from the verses of the Qur'an (Kamali, 2008, 117). Different theological schools adopt dissimilar interpretative methods and that, in turn, creates a multiplicity of variations in *Shari'a* law.

Secondly, at present, one of the most prolific channels for the introduction of *Shari'a* law in Italy has been via the judicial recognition of legal relationships (based on foreign legislation and overseas judicial practice) by the Italian Court.

> It is a common misconception that in civil law countries, such as Italy, precedents do not have general value. In legal practices, the doctrine of the stare decisis only marginally differentiates between common law systems. For instance, Italian judges are also obliged to provide consistent decisions (the so-called horizontal effect of the doctrine of the binding precedent) and to comply with the jurisprudence of the final appellate courts *(*Croce, 2006*;* Fon & Parisi, 2006*).*

Thirdly, some commentators describe the Italian regime of the state–church relationship as 'mixed' (Doe, 2011, 224). They are perhaps confused by analyses such as those of Lamb (2011), which depict Catholicism as being the *de facto* established church in Italy. The term 'mixed system' might indeed help to differentiate the Italian Constitution agreements from the constitutionally entrenched separation between state and church, such as the one derived from the First Amendment of the US Constitution (1791), and the practice of adopting an established church, such as the one adopted in England.

Such a qualification is, however, misleading, since it might convince readers to believe that state and church institutions in Italy have 'mixed functions' (like, for example, the role of Anglican bishops in the House of Lords) or, even worse, that Catholics manage state institutions as their own fiefdoms. Whilst members of religious groups are encouraged to participate in public life, state institutions are secular. The secular stance of the Constitution was made explicit by the jurisprudence of the Constitutional Court (1989). In addition, a large population of Catholics does not translate into an outright domination of the country's legal system by either its theist or its secular communities (Croce, 2009).

For instance, in the last two decades, a series of political parties have been created to convey Christian values, but in the last decade these new parties have never managed to collect more than 1.3% of the votes in national elections (Ministero dell'Interno, 2012). Without getting involved in the minefield of Italian politics, it is sufficient to say that all political parties that referenced Catholic values have not elected one single MPs for a decade. More importantly there is no indication of the 'political colonization' of the judiciary or of the legal system.

Additionally, the reasons for adopting positive secularism as the template for the state–church relationship are historical, but their effects are a distinctive process of the recognition of multiculturalism that might serve the growing community of Italian Muslims. The present constitutional norms that regulate and protect the freedom of religion are the result of two centuries of institutional dialogue between the state and the Vatican. The integration began with the unilateral recognition of Catholicism as a state religion (article 1 of the Statuto Albertino 1848), but, in the eighteenth century, disputes over boundaries were the proxy of open antagonism between the state and the Catholic Church. For instance, from 1870 to 1929, Italy and the Vatican State were officially at war, the Italian royal family was excommunicated and, after 1865, the Civil Code excluded the validity of religious marriages (Breda, 2013).

Two international treaties—the Lateran Agreement of 1929 and its later Revision of 1988—between the Vatican and the Italian government normalized the constitutional relationship between the Republic and Catholics (Croce, 2009). The Lateran

Agreement recognizes the Vatican as an international entity and the Catholic Church as an independent institution within the Italian Republic. For instance, Catholic tribunals are not subjected to jurisdictional reviews by state jurisdictions. The Concordat and its Revision also set the procedures for the automatic recognition of key religious institutions (e.g., marriage) and the civil validity of some decisions taken by cannon law tribunals (e.g., decisions that void marriages).

It appears that the Italian legal system has somehow "learned from the high and the low of the State–Vatican dialogues" (Croce, 2009). For instance, the post 1865 historical attempt to separate the state from the church had a disproportionate effect on the private life of individuals in areas such as marriage and filiation. These general effects of ideological separation, as well as pluralism, are well explained elsewhere and we do not need to dwell on them here (Shachar, 2001, 132). However, in Italy, they had the effect of creating a divide between the social expectations of many Italians who, for instance, wanted to get married in church, and the legal implications of their choices.

The 1929 Lateran Agreement between the Vatican and the Fascist government again swung the position of the Italian monarchy in favour of the Vatican, and Catholicism became the established religion. In 1948, the role of the Catholic Church in Italy was reviewed once more by the Constitutional Commission. Religious minorities such as the Protestants and the Jews, who were discriminated against by the Fascists, requested the same freedom for all faiths. The Constitutional Convention, however, could not alter the terms of an international treaty such as the Lateran Agreement, which granted a series of privileges to Catholics. The solution in the constitutional text combined acuity with empathy: it established a mechanism for allowing all non-Catholics to access the privileges that were granted to Catholics by the Fascist regime. This has beneficial implication for Italian minority religious groups including Islamic communities.

10.2 *Shari'a* Law and Italian International Private Law

In this section, I will highlight the most obvious evidence of these regimes. This can be found in Italian international private law. International private law regulates how the Italian legal system introduces the effects of foreign relationships into Italian law. For instance, international private law includes the adjudication concerning which law to apply to international commercial relations in which one of the parties is a foreign company. It is a system of norms based on a statutory prescription (Act n. 218 1995). However, perhaps due to the large variety of the overseas relationships covered by Act n. 218, it was natural that international private law included a series of reported cases.

In the past two decades, a large quota of immigrants arrived from countries with a large population of Muslims. The immigration flow towards Italy started in the late 1980s, and slowly increased until the 2008 economic crisis (Calvanese, 2011). Presently, the Istituto Nazionale di Statistica reports that there are over five million

resident immigrants and over a million of those immigrants are originally from countries with a large population of Muslims: Morocco, Albania, and Pakistan (Istat, 2021).

A large number of the family relations of such a large community of Muslims are based on *Shari'a* law and are recognized by Italian judges. For instance, Italian private law provides a *quasi*-automatic recognition of *Shari'a* marriages. The contract of marriage (*nikah*) is one of the few contracts clearly defined in *Shari'a* law. The contract might have different clauses in dissimilar cases, but a valid marriage presumes the legal capacity and the assent of both parties, a male tutor (*wail*) witnessing the free will of the woman, and a gift (*mahr*) (Welchman, 2011; Ferrante, 2017). The ceremony does not require the presence of an imam, and it is common for immigrants to get married in their consulate and then register their marriage in the city council's registry of marriages.

To have effect in Italian law, the marriage must be recorded in a registry at the city council where the newlyweds are resident. This is a requirement for all civil and religious marriages, and it has the consequence of setting a more favourable, by comparison with cohabiting couples, fiscal regime for married couples.

The registration of an overseas marriage at the city council is a non-inquisitive process. In the late 1980s and during the early stage of the mass immigration phenomenon some register keepers misinterpreted the requirement to check the compatibility of such marriages against the Italian public order. In practice, register keepers required evidence that neither of the parties were already married. The civil servants involved were made aware of this obligation through an internal memo sent by the Minister of Justice (n. 1/54/f63 (86)1395 1987). However, the administrative tribunals, including the Consiglio di Stato, were quick to consider the memo as illegitimate. The memo gave a public servant the discretion to refuse the registration of marriage certificates when these had been drafted in states that allowed polygamy without checking whether such impediment existed A very unusual power that could be easily abused. Order of 7 June 1988 solved the issue. The register keepers might check for the eventuality of recording a polygamous marriage, but their starting assumption is that the marriage was legal and that the parties do not have to prove their previously unmarried status (Campiglio, 2008: 57).

The possibility of legally recognizing a polygamous marriage (*Sura* 5: 5) was discussed by the Italian civil courts. Polygamy conflicts with the Italian public order, and the Minister of the Interior, in another explanatory memo (n. 599/443/1512756/A16/88 1988), instructed civil servants to refuse all visa applications based on marital relationships between a foreign Italian resident and an alien from countries such as Morocco, which recognized the validity of polygamous marriages. Similar stances can be found in other European states. For instance, France explicitly excludes the recognition of polygamy (Act n. 93-1027 1993) and, in cases where both immigrants are already resident within French territory, it imposes an obligation of non-cohabitation.

The limits of the register keeper prerogatives were also discussed in *P. A., P. P. v. S. N. I.* by the Corte di Cassazione (n. 1739 1999). The respondent in this case was Mrs. S. N. I., a Somali widow who had been married to an Italian citizen in Somalia.

After the death of her husband, his two daughters from a previous marriage (P. A., P. P.) challenged the compatibility of a Somali marriage with Italian public order. Specifically, the counsel for the two daughters argued that Somali law allows for polygamy and that the marriage should have been considered as incompatible with Italian public order (ex article 33 Preleggi in the Royal Decree n. 262 16 March 1942). The Tribunal of Lodi initially accepted the two daughters' argument (Decision 23 June 1988). However, the Court of Appeal of the Tribunal of Milan (Decision n. 916/1994) distinguished between the validity of a Somali marriage in Italy and its effects in terms of, for instance, inheritance law. The daughters appealed to the Corte di Cassazione. The Court rejected the appeal, and in an *obiter,* reminded the city council register keepers of their limited investigative role in evaluating the legitimacy of overseas marriages: "Albeit for information purposes only, it appears superfluous to add that this principle [the separation between effects and potential incompatibility of an overseas marriage] complies with the decision of Consiglio di Stato" (Corte di Cassazione n. 1739 1999, para. 6). The *obiter* is particularly significant, since seldom, by comparison to common law judges, does an Italian court use the prerogative to engage in an issue not raised by the parties, and that alone might give an indication of the court's frustration with civil servants who refuse to register overseas marriages (Ferrante, 2017).

More evidence of the effect of the policy of positive secularism is to be found in the Italian international private law practice of recognizing divorces and adoptions. The *Shari'a* regulation on divorce, as with other *Shari'a* law religious prescriptions, is susceptible to a variety of interpretations. However, and this can only be a very general analysis, married couples with at least one party wanting to have his or her marriage dissolved have three courses of action (Welchman, 2011, 6). The first method relies on a request to a judge (a *quadi*) to void the marriage. The second divorce procedure dissolves the contract of marriage by forming a new mutual agreement (*Sura* 2: 229). The third possibility is based on the unilateral decision of the husband using the 'formula of the triple *talaqs.*'

The insertion of the effects of the first two forms of divorce in Italian law is unproblematic and will not be discussed further. The stumbling block for Italian international private law has been the recognition of the unilateral divorce. In a series of decisions that spanned over six decades, the Corte di Cassazione has consistently confirmed the incompatibility of unilateral divorce with the Italian public order. In particular, courts have found it incompatible with their role to give effect to a process that might be humiliating for the dignity of women (Ferrante, 2017).

The effect of not recognizing the unilateral divorce is a 'limping marriage' that is valid only in Italy. However, courts have shown some leniency in cases in which the effects of the unilateral divorce were desired by the woman. The Corte di Cassazione, for instance, recognized the effect of a first marriage in *Ministero dell' Interno v. M. J*., between two Moroccan divorcees, in which the former wife was resident and remarried in Italy (Corte di Cassazione n. 12169 2005). The first marriage was dissolved using the formula of the triple *talaqs*. One of the effects of a unilateral divorce under Moroccan law (*Moudawana*) was the curtailment of the mother's duty of care for the children born during the lapsed marriage. Following

the immigration of the ex-wife to Italy, the children were given in custody to a third person (Corte di Cassazione n. 12169 2005).

After remarrying in Italy, M. J. requested a series of visa applications for her children born during her first marriage. However, the visas were refused by the Italian Consulate in Rabat. The consulate justified its decision by referring to the Moroccan law (*Moudawana*) which, in this case, made the father the only parent legally responsible for the children of the lapsed marriage. M. J. appealed against the decision of the Consulate and the Tribunale di Perugia accepted her appeal (2004). The decision was appealed, again, by the Italian Ministry of the Interior. However, the Corte di Cassazione, in Decision n. 12169 (2005), rejected the appeal and allowed the children to join their mother in Italy.

An additional effect of the case was the possibility of the biological father's being able to ask for a family visa (to join his children), yet the most interesting aspect of the decision, and perhaps a sign of more to come, was the fact that a final appellate court had to recognize, implicitly, the validity of the Moroccan unilateral divorce (*Sura* 65: 1). Without the recognition of the validity of the unilateral divorce (based on the triple *talaqs* formula), the first husband would have been considered as still being married, and as a result, the court decision would have had the legal effect of accepting the existence of a polyandrous relationship in the Italian legal system.

Instead, the interest of the ex-wife is considered in instances in which not recognizing the unilateral divorce might have a further detrimental effect on her life, such as being prevented from remarrying in Italy or from taking custody of her children. In these cases, the tribunals of first instance tend to apply Italian law and grant a new Italian divorce to the wife (Campiglio, 2008: 66).

This case law analysis suggests that courts are willing to apply *Shari'a* law, and in cases in which its application might conflict with Italian public order, judges tend to look at the practical effects of their decision. For instance, a unilateral divorce, incompatible with the Italian public order, is inserted into Italian law to allow the woman to have custody of her children. Courts, also, have granted visas to cohabitant polygamous families to ensure the best possible education for the children.

Similar pragmatic analyses are taken by Italian courts that are asked to recognize the guardianship of minors (*Sura* 33). The guardianship of minors (*kafala*) requires one or more adults (*kafil*) to take responsibility for looking after a minor (*makfoll*). The *kafala* has no legal equivalent in Italian law and, as a result, Italian international private law has no rules for recognizing its effects. Once more, the courts have tried to mediate between the consequences of religious practices in an overseas jurisdiction and their legal effects under Italian law. In this case, the line of authority is set by the Tribunal of Trento that, with a decree, refused to transfer the effect of the *kafala* into Italian law (Decree of 11 March 1993). However, in the same sentence, the Tribunal, via decree, allowed the *kafil* couple to adopt their *makfoll*. The family law Tribunal of Bari reached a similar conclusion (Decree of 16 April 2004). A minor sought to join his guardian who lived in Italy, but his visa application was refused by the Italian Consulate in Morocco. The family law tribunal was deciding (as a preliminary issue under appeal against the refused visa) whether the *kafala*

could be considered as a base for recognized family relations. The Tribunal of Bari confirmed the lack of an equivalent of the *kafala* in Italian law, but in the same decision, added that a gap in the Italian law could not be sufficient reason for refusing the visa to a minor who wanted to live with his or her guardian. In other words, the court regarded the legality of the relationship in Morocco as a sufficient justification for granting a visa for family reasons (Pastena 2020).

This paper could continue to discuss more examples taken from case law. For instance, filiation might provide more evidence of Italian judicial practice. However, it is reasonably clear that the Italian judiciary has consistently tried to reduce the gap between the effects of key life decisions in legal systems that apply *Shari'a* law and the effects of those decisions in Italy. The reason for this stance might be found in the past (e.g. the state–Vatican interaction), but the result is a constitutional commitment to reducing the divide between religious life and civil society. This stance is upheld by the courts, even against government policies that have tried to use arguments based on the incompatibility of religious practice with public order to limit immigration.

10.3 Moving on: Islam as an Officially Recognized Religion

In the previous section, I explained that Muslim immigrants might have benefited from the judicial interpretation of Italian international private law. In particular, I argued that courts have, over the years, tried to reduce the divide between the effects of private decisions in the country of origin and the effects of such practices in Italy. However, the judicial accommodation of *Shari'a* law via the path of judicial recognition of the effect of an alien legal system is only a temporary solution. The special legal status granted to immigrants might not be passed on to the second generation of Muslims, and that might have the effect of key life choices for over a million individuals going unrecognized by Italian law (Guolo, 2000). The most likely solution to the problem is for the multitude of Islamic communities to ask for the recognition of Islam as an official religion. In this part of the essay, I discuss the process of recognition and how Islamic communities might benefit from it. I also explain some of the present difficulties.

Official recognition is an *ad hoc* process that might have, depending on the needs of the religious community, different effects. In general, official recognition changes the relationship with the state in three different areas. The first group of consequences are internal ones that are based on the acceptance by the Italian state of the internal self-regulation of the religious community. The internal statute of the community becomes Italian law and might include an official recognition of the jurisdiction of religious tribunals. For instance, article 2 of the Adventist Church agreement set the exclusive jurisdictional competence of the religious tribunal in disputes that were internal to the Church and its institutions, such as schools and hospitals (Act n. 400 1988).

The second group of prerogatives is external in nature. The activities of the religious groups project their religious effect into civil society. Religious marriages and jurisdiction decisions might have a direct effect on Italian law. In addition, religious schools and universities managed by religious orders might grant recognized diplomas and degrees. The third group of potential consequences provides direct financial support to recognized faiths. Religious institutions have, for instance, a preferential fiscal regime and might also decide to collect a share of their members' taxes. For instance, the agreement between the state and the Italian Association of Hebrew Communities (Unione delle Comunità Ebraiche Italiane) asserts that all religious publications and all published material that disseminate religious beliefs are exempt from fiscal duties for published material (Act n. 101 1989, article 2 (2)). In addition, supporters of an officially recognized religious community might allocate a proportion of their taxes (0.08% of their income tax) to their chosen religion. The level of these resources might be increased substantially by the state.

In short, the effects of recognizing a religious community mean that it has a much higher degree of independence and financial support in comparison to a non-recognized faith. Eleven faith-based religious groups have demanded, and subsequently obtained, official recognition (Act n. 400 1988; Decree n. 303 1999): the Waldensian Evangelical Church, the World Assemblies of God Fellowship, the Evangelical Baptist Church, the Lutheran Baptist Church, the Apostolic Church, the Church of Jesus Christ of the Latter-Day Saints, the Adventist Church, the Greek Orthodox Archdiocese of Italy, Hebrew Communities of Italy, the Italian Buddhist Union, and the Italian Hinduist Union. Eight out of the eleven communities are Christian: the Waldensian Evangelical Church, the World Assemblies of God Fellowship, the Evangelical Baptist Church, the Lutheran Baptist Church, the Apostolic Church, the Church of Jesus Christ of the Latter-Day Saints, the Adventist Church and the Greek Orthodox Archdiocese of Italy.

The benefits for officially recognized faiths are substantial and the popularity of the process is justified. The possibility granted to a faith to have part of its internal constitution sanctioned by law is in sharp contrast with the regime of non-recognized religious communities. Those religious communities, such as Italian Muslims, are regulated by Statute n. 1159 (1929). Statute n. 1159 was drafted by the Fascist government, which had an open discriminatory agenda against non-Catholics. The Italian history of the racial law that discriminates against the Jewish communities preceded Fascism, and does not need to be further clarified here. It is important to remember that racial laws were the legal springboard for the Italian genocide against the Jews (Act n.1024 1939; Royal Decree n. 1728 1938). Perhaps it is less known that Fascism discriminated against all non-Catholic religious communities by imposing police control over their activities (Royal Decree n. 289 1930). Some religious communities, such as the Pentecostals, were banned outright *(Memo n. 600 1935), and religious associations, such as the Salvation Army, were put under police administration* (Spano, 2009).

Religious groups that were victims of Fascist discriminatory policies were particularly active contributors to the 1948 Constitutional Convention that drafted the Italian Constitution. In particular, the wording of article 8, which began the process

of official recognition for non-Catholic faiths, was the result of the contribution of Protestant communities (Long, 1990, 251–57). The wording of the article grants all religious communities (also including Catholics) the same level of freedom. In addition, the second comma of article 8 gives the prerogative to non-Catholic religious groups to obtain official recognition analogous to that obtained by the Catholic Church via international treaties between Italy and the Vatican state (Long, 1990, 257–60).

The process of recognition relies on a non-codified institutional praxis. The government is expected to delegate a commission to draft a concordat between the state and the religious groups. The commission is composed of a balanced number of representatives of the government (including members of civil society) and representatives of the community (selected by the religious group) that aspires to obtain official recognition.

The recognition process is voluntary and, in theory, non-inquisitive of the internal structure of the faith-based community. In practice, however, it requires an evaluation of the aims of the religious group (Act n. 1159 1929, article 2). The agreements are normally very clearly articulated documents and they might set specific prerogatives for the recognized church. For instance, article 2 of the Adventist Church agreement expressly excludes the jurisdiction of the Italian courts in religious and disciplinary matters decided by religious tribunals (Act n. 400 1988).

The autonomy and legitimacy of such tribunals have been confirmed in *Montalti Urbano v. Unione Italiana delle Chiese Cristiane Avventiste Del 7 Giorno and Others* by the Corte di Cassazione (n. 5213 1994). Mr. Montalti was excluded from the Adventist Church because of internal disciplinary proceedings. He objected and sought a remedy in the civil courts. After a series of appeals, the case reached the Corte di Cassazione, which was asked whether the jurisdictional restrictions set by article 2 of the agreement between the Italian government and the Adventist Church were legitimate, and which concluded that "there are no doubts, therefore, that acts on disciplinary and spiritual issues by the Adventist Church cannot be altered by state institutions" (n. 5213 1994, para. 13). Consequently, religious tribunals, if they were granted such a prerogative in the joint agreement, have the final jurisdiction on their internal matters.

Given the extent of the benefits connected with official recognition, it appears odd that a community of over a million Muslims living in Italy has not acquired such a status. A series of draft proposals were made by different Islamic associations. For instance, in 1992, the Unione delle Comunità Islamiche d'Italia presented a draft agreement to the Italian government. In 1996, another draft was produced by the Associazione per l'Informazione sull'Islam in Italia-CO.RE.IS (Pacini, 2001, 21). Unfortunately, not one of the proposals managed to reach the level at which they could be considered by the Italian government. However, the bathos of failed recognition does not need to be followed by desperation.

The failure to reach an agreement with the Italian institutions is due to a series of legal and pragmatic reasons. Firstly, Islamic communities in Italy are not uniform and are not organized in a hierarchical structure. What we might call the Italian Muslim community is a complex puzzle of multiple and often overlapping

memberships that has so far resisted the idea of appointing a common representative to discuss the recognition of Islam. The effect of the internal pluralism of Islam is accentuated in countries such as Italy, where the bulk of Muslim communities are divided along ethnic lines (Pacini, 2001). Interestingly, external entities such as diplomatic representatives of some of the countries of origin of the Muslim immigrants might not have helped the dialogue between the groups. In a nutshell, the heterogeneity of the Italian Muslim community tends to slow the process of official recognition.

Secondly, the statutory framework for non-Catholic religions is based on Act n. 1159 (1929). Some of its most strict provisions were declared unconstitutional by the Constitutional Court. For instance, Act n. 1159 imposed a series of restrictions on non-Catholic public religious ceremonies. Non-Catholic religious ceremonies were to be authorized by the local chief constable (Royal Decree n. 773 1931, articles 17, 18, 25). In particular, Act n. 1159 entrusted the police with the prerogative of forbidding a religious gathering organized by a non-Catholic community that might be perceived as contrary to the public order.

The compatibility of such restrictions was taken on as an ancillary issue in a criminal case against an evangelical pastor, Mr. Umberto Lasco. Mr. Lasco celebrated a mass in a public space without the required authorization. The pastor was, in the first instance, sentenced by the local magistrate to 15 days imprisonment. However, Mr. Lasco appealed and the Tribunal of Locri accepted his submission (1955). The Crime Prosecution Service sought redress at the Corte di Cassazione, which considered the ancillary issue (proposed by Mr. Lasco) of the constitutional compatibility of article 3 of Act n. 1159 and its executive regulation in Royal Decree n. 773. The Constitutional Court accepted, with some qualifications, the argument submitted by Mr. Lasco's counsel and declared the restrictions on (non-Catholic) public religious ceremonies unconstitutional (1957).

After the 1957 Lasco case, the jurisprudence of the Constitutional Court continued to void specific restrictions on non-Catholic religious groups that were inherited from the Fascist regime. In 1959, for instance, the court declared unconstitutional the restriction on setting up and running a Pentecostal temple in the city of Crotone (Tribunal of Crotone 1957). In this instance, the ancillary constitutional issue was linked to a criminal charge brought against Mr. Rauti. Mr. Rauti refused to comply with a police order (ex article 2 and article 3 of Act n. 1159, and its executive regulation, Royal Decree n. 289 1930, articles 1, 2), which required all non-Catholic religious associations to ask for the authorization to open and run religious establishments. The Constitutional Court promptly declared the executive regulations unconstitutional.

The process of purging the law of the Italian Republic from its inherited illiberal regulations has been quite successful; however, non-Catholic associations which would like to be recognized by the Italian government are still required to have their internal constitution reviewed by the functionaries of the Minister of the Interior. The review has the aim of checking the compatibility of the religious association's internal constitution against Italian public order and common decency aspects (Act n. 1159 1929, article 2). The Islamic Association, based at the Grande Moschea di

Roma (the largest in Western Europe), is already registered by the Italian government; however, the other 700 Muslim groups have been slow to take up the opportunity of becoming officially acknowledged.

Official registration is a required step for official recognition. A recent analysis recorded over 700 Islamic places of worship, called *musallas*, and 3 mosques (Allievi, 2011). There are also practical limitations in terms of the public use of places of worship. For instance, some *musallas* have chosen to operate without gaining planning permission and have, subsequently, been closed down by administrative tribunals (e.g. Consiglio di Stato n. 4915 2010). State intervention in the administration of religious sites is unfortunate for different reasons, but perhaps this is more unappealing in Italy, since a recognized religious community would have the prerogative to derogate some of the local planning regulations (Botta, 2000).

The reason for avoiding the review of ex article 2 (Act n. 1159 1929), which would have granted a legal personality and all the benefits to a non-recognized faith, is a matter of speculation, yet there are a series of factors that might help us to understand the reticence of some Muslim communities.

For instance, most of the practising Italian Muslims are immigrants. The regulatory framework that dealt with the first waves of Muslim immigrants (and which was still operative in the 1980s) was set in articles 142–149 of the Regio Decreto n. 773 (1931), also known as Testo Unico delle Leggi di Pubblica Sicurezza (hereafter TULPS). The articles were again redesigned during the Fascist regime, and they set a series of strict limitations on travel, residency and the employment of foreigners (Calvanese, 2011: 47).

Even a cursory reading of TULPS reveals the signs of the police regime that gave birth to it. For instance, the few foreigners who already had a visa before entering the country had three days to request a local ‘resident permit’ from the police constabulary (article 142). Landlords (or lease holders who might be relatives and were themselves immigrants) hosting foreigners had only 48 hours to notify the local constabulary (article 147). Employers were also affected by the regulation. They were obliged to inform the police of the nationality of their workforce, and in case of dismissal, to inform the same constabulary of the ‘probable destination’ of the non-Italian citizen (article 146). Revoking the resident permit was the most common sanction for the violation of any of the above statutory dispositions (article 148). In brief, foreigners were heavily monitored administrative license holders rather than right bearers.

Long before the reforms of the 1990s, the statutory provisions (and their sanctions) might have given rise to a question of constitutional compatibility. Yet, in practice, the norms regarding foreigners were widely ignored by all concerned. Administrative inefficiency played a part in making TULPS ineffective. The administrative unit within the police constabulary charged with the task of authorizing foreign residency was unprepared to cope with mass immigration. It was common for foreigners to wait for months for resident permits which allowed them to work, forcing them into areas of illegal residency and perhaps illegal activities.

On a pragmatic level, administrative inefficiency mediated a draconian regulatory system. During the 1990s, a series of reforms was intended to change the plight

of the foreigners in Italy from precarious administrative license holders to 'rights bearers' (Act n. 28 1990; Act n. 286 1998). In particular, Legge n. 286 (25/07/1998) organized all the new statutory measures together in a codification called the Testo Unico delle Disposizioni Concernenti la Disciplina dell'Immigrazione e Norme sulla Condizione dello Straniero (hereafter TU). Firstly, the TU introduced a rationalization of the work visas. Secondly, it established an electronic database of all foreigners who explicitly asked to work in Italy. Thirdly, it streamlined the immigration procedures and integration (Nascinbene, 2000).

However, in the decade that followed the approval of the TU, there were few signs that Italy had moved away from the police regime for its immigrants. Some of the negative aspects of TULPS outlived the reforms. For instance, the TU maintained many of the restrictions of the resident permit system designed for all immigrants, and the measures that were aimed at creating a more appealing environment for immigrants by fostering integration and intercultural exchange remained unapplied (Act n. 40 1998, article 36).

In short, the image of obstreperous Muslim immigrants depicted by the Italian media is very much a hollow one. Muslim immigrants are particularly wary of public attention and of Italian public officials (Calvanese, 2011). It might take some time to see many Muslim religious associations accepting the scrutiny of Italian institutions. It is also difficult to imagine that delicate theological (and culturally entrenched) differences might be quickly ironed out to allow for the appointment of a religious representative. However, heterogeneous religions such as Judaism and the group of Protestant communities have managed to obtain official recognition. For instance, the Jewish communities, after a long process of negotiation, managed to find in Unione delle Comunità Ebraiche Italiane a common referent. The process chosen by the Unione delle Comunità Ebraiche is particularly significant. *Act* n. 101 (1989), which recognized the association, included an official simultaneous acknowledgment of the over 20 independent Jewish communities that were at the time represented by the Unione (1989).

Islamic communities might also follow the path set by Protestant communities and try to sign an ad hoc agreement with the government (Casucelli, 2000, 100). The Grande Moschea di Roma, which has already had its internal constitution recognized via the review set in article 2 of Act n. 1159, might, for instance, seek the official recognition of its community. Having one of the communities recognized might open the door to other Islamic religious groups. For instance, the Waldesian Community was the harbinger of the wave of requests for official recognition. Other Protestant religious groups, such as the Adventists quickly followed the path set by the Waldesians. It is a matter of speculation as to what might happen with the Islamic community, and forecasting official recognition carries with it the risk of being a Pangloss. Yet, there are signs that a recognition of a community such as the one represented by the Grande Moschea might be the beginning of a wave of demands for recognition (Ferrari, 2000).

More difficult, perhaps, is to reduce the mistrust of the Italian institutions held by many immigrants who directly experienced the effect of the 1930s police state. However, it is hard to envisage that a fast-growing Islamic community might