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## JUDICIAL EQUITY AND THE “MILD” ETHNICISATION OF ITALIAN LAW

by

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# JUDICIAL EQUITY

## AND THE “MILD” ETHNICISATION OF ITALIAN LAW

by

Raffaele Aveta♦

### **Abstract:**

The article examines the recent changes occurred in the Italian legal framework, after the bursting of ethnic and multicultural factors. In particular, the reflection is focused on the action of the judicial power, which, when called upon to resolve a wide range of practical disputes, has demonstrated a remarkable aptitude for recognising the “thought of difference” in the regulation of inter-subjective relationships. This hermeneutic procedure has indeed turned out to be a valuable instrument in reinterpreting traditional legal categories and transcending the mechanical application of private international law, plugging normative gaps.

In the Italian system it is possible to identify three main ways in which culturally-sourced law enters the judicial system: the subjectivisation of the *regula iuris*; the commixture/linking of institutes and/or legal categories; and the valorisation of extra-normative elements. The relationship between these channels of communication is particularly complex and does not follow a general rule, inasmuch as the relative constitutive factors often overlap, giving way to a variegated record of case histories. These different means of communication seem to be informed by a single principle, general in character, capable of acting as a fluidifying agent in the choice of the solution most fitting to each individual case: the principle of reasonable equity. The approach and encounter between equity and reasonableness generates a structure of interpretative solutions which are suitable for the resolution of the many issues in pluralistic society within the unity of the system. The analysed case laws are illustrative of this tendency and lay the foundations for the construction of a full-blown model for the governance of multiculturalism in Italy. Thanks to its proper qualities, this model is distinguished from those of other European nations and contributes to a process of “mild ethnicisation” of the Italian judicial system.

*Key words:* multiculturalism - immigration law - judicial equity – equity – ethnicisation - italian law - immigration - principle of reasonableness - public order – repudiation - family law – islam - cultural defense - equality of treatment – minorities - cultural rights - intercultural democracy - human rights

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1. Introduction 2. The subjectivisation of the *regula iuris* 3. The co-mingling / linking of institutions or legal categories 4. The evaluation of extra-normative elements 5. The misguided understanding of justice 6. The reasonableness of distinctive criteria 7. Equality of treatment between co-nationals and foreigners 8. The grounded “creolisation” built into the Italian model and the role of comparative law

## Introduction

1. In recent years Europe has seen a significant rise in immigration from outside the EU. Men and women coming from diverse geographic and sociocultural contexts have brought to European society customs and habits different from those of the majority of the existing population. The eruption of new cultural factors onto a homogeneous scene underpinned by “shared and undisputed fundamental values”<sup>1</sup> drawn from the western tradition has generated significant changes in many aspects of social life. In certain areas, from the economy to culture, multicultural and multi-ethnic co-existence has formed the basis for valid reforms and has offered opportunities for reflection, enriching the European spirit of the new millennium. However, it has also provoked conflicts and opened up debates to which there are no easy answers, giving “new content to ancient questions of political and legal theory”.<sup>2</sup>

The legal world has become a sensitive interpreter of these tensions, not only as a result of certain special legislative measures on issues related to multiculturalism, but also thanks to the actions of the judiciary which, when called upon to resolve a wide range of practical disputes, has demonstrated a remarkable aptitude for recognising the “philosophy of difference”<sup>3</sup> in the regulation of inter-subjective relationships. This hermeneutic procedure has indeed turned out to be a valuable instrument in reinterpreting traditional legal categories and transcending the mechanical application of private international law, plugging normative gaps.

In the Italian system it is possible to identify three main ways in which culturally-sourced law enters the judicial system: the subjectivisation of the *regula iuris*; the commixture/linking of institutes and/or legal categories; and the valorisation of extra-normative elements.<sup>4</sup> The relationship between these channels of communication is particularly complex and does not follow a general rule, inasmuch as the relative

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1 F. Belvisi, *Società multiculturale, diritti, Costituzione. Una prospettiva realista*, CLUEB, 2000, p. 10.

2 See A. Facchi, *I diritti nell'Europa multiculturale. Pluralismo normativo ed immigrazione*, Editori Laterza, 2001, p. V. The author lists some of the most obvious issues under discussion: “from nationality to forms of political participation, from ownership and the guarantee of fundamental rights to the relationship between minorities and majority, between community and individual, between universalism and relativism, between positive law and traditional or religious norms”.

3 “Philosophy of difference” defines that which, starting from the feminist currents at various levels and in different areas reassessed the identities of minority groups.

4 This tool is used mostly by the judges of the Court of Justice and the ECHR, but often with different outcomes when dealing with issues of identity. Observance of established mechanisms of interpretation and the need to reach compromises among different state guidelines sometimes prevents the High Courts of Europe from having complete freedom to manoeuvre.

constitutive factors often overlap, giving way to a variegated record of case histories. There is no lack of cases and rulings in which it is possible to note the use of all these infiltrating mechanisms running alongside the rights of immigrant populations.

These different means of communication seem to be informed by a single principle, general in character, capable of acting as a fluidifying agent in the choice of the solution most fitting to each individual case: the principle of reasonable equity. The approach and encounter between equity and reasonableness, both understood in a non-technical sense with reference to the equal balancing of interests and to their intrinsic justifiability, generates a structure of interpretative solutions which are suitable for the resolution of the many issues in pluralistic society within the unity of the system.

The cases illustrated in the following pages are illustrative of this tendency, and lay the foundations for the construction of a full-blown model for the governance of Italian multiculturalism. Thanks to its proper qualities, this model is distinguished from those of other European nations and contributes to a process of “mild ethnicisation” of the local judicial system, according to a pattern which currently appears decidedly to provide an alternative to the legislative power, but which in the medium- to long-term should influence “public policies” and the substance of parliamentary measures.

The many judgments handed down by the Italian courts on the reasonableness of distinctive criteria among co-nationals and foreigners confirm the presence in the Italian judicial framework of a principle of reasonable equity, by nature able to induce, through its pervasiveness, a phenomenon of judicial circulation among like-minded sectors.

2. The first analytical factor relative to the subjectivisation of the *regula iuris* has the greatest capacity to intersect with others while still maintaining its autonomy and individuality provided by the traditional “individualisation” in the law applied in a judiciary system inspired by Roman law. According to the classic dynamic of a trial, giving value to the specific elements of each particular case constitutes an ineluctable operational element in the hermeneutic method. The application of general rules to the multiplicity of cases suggested by normal practice passes for a subsumption of the concrete case under the abstract one, through the reconstruction of the event which is the object of judgement and of the qualifying elements of the action proposed by the parties. This procedure of “concretising” the law takes on new connotations in the resolution of problematic cases thrown up by cultural pluralism. The retrospective judgement on the constitutive facts of substantive law or on the fact of the crime is strongly conditioned by the analysis of those people who have some significance within the trial and by the identification of their individual profile.

Respect for individuals and for “culturally characterised” groups introduces into the logic of the trial a factor which could influence (much more than in the past) the assessment of facts and their legal status. Examples drawn from legal reports in recent years show many court cases in which judges, unable to

apply private international law, or not having precise criteria for linkage with foreign laws or practices, base the *ratio* of the defendant on the connotations of the person being addressed, while judgement based on factual matters is relegated to a complementary role.

The reversal of the fact-subject relationship, or attenuation of its traditional pattern, allows the court to reconstruct normative facts according to equitable profiles, which take into due account personal factors and identities of those involved in the trial.

The story of a young Rom woman is emblematic in this regard: she was discovered begging with her underage child.

The Italian Supreme Court has had recourse to subjective analysis in order to understand which law to apply, relegating the crime contested by the judge of first instance and by the Naples Court of Appeal from enslavement to domestic abuse<sup>5</sup>

The inability to reconstruct an objective element for a crime under article 600 of the penal code<sup>6</sup> (hereafter c.p.) in the reconstruction made by the Supreme Court leads to the identification of some causes of subjective exclusion: the parent-child relationship, the subject's ethnic community of origin and/or her conditions of economic marginality, the temporary nature of the begging from which are also evidenced considerations about the personality of the defendant. The judges assume in particular that begging restricted to certain hours of the day does not constitute "so complete a denial of the freedom and human dignity of the child as to suggest that it is in a state of complete servitude."

A probabilistic hypothesis also covers the possibility that the mother, after begging, "in the remainder of the day (...) takes care of her children, trying to adequately meet their needs and allows them to play and meet other children". The parental relationship seems to strengthen this argument, distinguishing the behaviour of the mother who (for reasons of cultural or economic hardship) is engaged in begging with the help of a child "from the conduct of those who buy a child or toddler and continuously use him/her for begging, collecting" their earnings, neglecting their needs and desires and using them "basically as a res from which maximum economic advantage should be gained".

The Court continues, in an *obiter dictum* which is not irrelevant to the proceedings, by saying that the boundary between the legitimate use of parental authority and its abuse appears rather tenuous in cases where "the demand for charity is a condition of traditional life deeply rooted in culture and mentality" of some ethnic communities, such as Rom people<sup>7</sup>. However, those who drafted the ruling indicate that

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<sup>5</sup> Court of Cassation, judgment no. 44516 of November 26 2008, Penal sect. V.

<sup>6</sup> See art. 600 c.p.: "*Chiunque esercita su una persona poteri corrispondenti a quelli del diritto di proprietà ovvero chiunque riduce o mantiene una persona in uno stato di soggezione continuativa, costringendola a prestazioni lavorative o sessuali ovvero all'accattonaggio o comunque a prestazioni che ne comportino lo sfruttamento, è punito con la reclusione da otto a venti anni. La riduzione o il mantenimento nello stato di soggezione ha luogo quando la condotta è attuata mediante violenza, minaccia, inganno, abuso di autorità o approfittamento di una situazione di inferiorità fisica o psichica o di una situazione di necessità, o mediante la promessa o la dazione di somme di denaro o di altri vantaggi a chi ha autorità sulla persona (...)*".

<sup>7</sup> Probably the judgment of the Court of Appeal would be been equally rejected, also without recurring to cultural factors. However, the use of such elements is noteworthy and is indicative of a trend which is taking place. In fact the cases, where the Italian courts firmly makes the rule subjective, are even more frequent. There are a lot of examples. A case which has

even in the case of culturally motivated conduct, criminal prosecution is unavoidable where it “jeopardizes fundamental rights guaranteed” by the Constitutional Charter. This mode of interpretation, based on the subjectivisation of the law, seems to be driven by the desire fairly to balance individual and social needs. Further, this approach makes it possible to avoid, (as with others issued in similar cases by the Italian courts) “an exasperated criminalization of the conduct of adults, whose condition is already well marked by social and economic marginality”<sup>8</sup> while simultaneously anchoring behaviour considered deviant for children, within the framework of domestic abuse.

Thus an equitable model takes shape, which is sensitive to social issues and is a substantial shift in the way criminal cases are considered under article 572 c.p.<sup>9</sup>, reintroducing under the concept of abuse “any action or lack of action that causes extensive suffering and distress to children”<sup>10</sup>, regardless of the perception of the victim and of the intentions of those involved in their exploitation.<sup>11</sup>

The failure to analyse these two factors allows the relevant previous case law to be superseded,<sup>12</sup> avoiding the temptation to justify practices and behaviours that, although inspired by a different “perception of family morality”,<sup>13</sup> affect the proper physical and psychological development of

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aroused a lot of clamour in the public opinion is that concerning the incident of the young Fatima, hit and maltreated by his relatives of Islamic faith for her behaviour considered not pursuant with the precepts of her family. The Court of Cassation, in this case, has confirmed the absolution of the respondent on the element ascertained by the Court of Appeal, “it did not subsist the entire proof that the violent behaviours were habitual (...) to the detriment of the daughter, but the proof of just three episodes in the space of the life. Moreover, these were all justified by the girl’s behaviours, which were considered improper and thus not expressing the necessary requirement of “will, overcoming and content”. The connection established between the violent behaviour and the worthiness, differently arguable, of the daughter’s behaviours seems questionable at least. This kind of subjectivist justification is not found, for example, in a following judgment of the Cassation, which has considered configurable the maltreatment offence in family, even in cases where “the harmful acts” have been alternated with periods of normality. In all probability, in the first judgment the Islamic familiar context has played a relevant role in the discharge of the respondents. For an analysis of the judgments: Court of Cassation, judgment no. 31510 of 2 October 2007, Penal sect. V; Court of Cassation, judgment no. 26571 of 27 June 2008, Penal sect. VI. A wary doctrine warns against a little cautious use of cultural factors by the judges and queries if this genre of reflections has “any utility or it is not a stone thrown into a quite enough muddy pond”. On this point see: A. Simoni, *La qualificazione giuridica della mendacità dei minori rom tra diritto e politica*, in *Diritto, immigrazione e cittadinanza*, 2009, I, p. 99.

8 For a reconstruction of other relevant cases see M. Bouchard, *Dalla famiglia tradizionale a quella multietnica e multiculturale: maltrattamenti ed infanzia abusata in dimensione domestica*, in *Diritto, immigrazione e cittadinanza*, 2000, I, p. 19.

<sup>9</sup> See art. 572 c.p: “*Chiunque, fuori dei casi indicati nell'articolo precedente, maltratta una persona della famiglia, o un minore degli anni quattordici, o una persona sottoposta alla sua autorità, o a lui affidata per ragione di educazione, istruzione, cura, vigilanza o custodia, o per l'esercizio di una professione o di un'arte, è punito con la reclusione da uno a cinque anni (...)*”.

10 See the text of the judgment of the Court of Appeal, ruling no. 44516 of November 26 2008, Penal sect. V.

11 Previously, the Supreme Court identified as essential elements for the configuration of the crime of mistreatment “that the victim suffers an attack on her or his moral, cultural heritage, (...) the feeling of being unjustly harassed physically and morally which results in (...) a state of suffering resulting in humiliation, suffering, distress and feeling hated (...) an attack on moral heritage caused by vexatious intent or an attitude of contempt”. See: the Court of Cassation, no. 11376 of 7 October 1992, Penal sect. I in *Giurisprudenza italiana*, 1993, II, p. 582.

12 The progressive toughening of Supreme Court’s position on the exploitation of children in a multicultural context clearly emerges when recent judgments nos. 44516 of 2008 and 3419 of 30 January 2007 are compared. In the latter it is clearly stated that “offense against property protected by art. 572 c.p. comes about when the victim is caused to suffer (...). As to the subjective element, a specific purpose for the conduct of the offender is not required, only sufficient awareness and wilfulness such as to determine that the victim is in a state habitual and continuous suffering”. These elements are deliberately neglected in ruling no. 44516 of 2008.

13 P. Morozzo della Rocca, *Stato di abbandono, ordine pubblico ed esercizi di multiculturalismo giudiziario*, in *Minori e Giustizia*, 2006, I, p. 7.

children.<sup>14</sup> The solution identified in ruling no. 44516 highlights how giving value to individual elements brings about the emergence of equitable interpretations which can adjust the regulatory framework to the real, subjective facts to be found in the case, without undermining the foundations of the system and while incorporating cultural facts into the choice of law suitable to the case in question.

3. Another way for the insertion of ethnocultural legal elements into the framework of Italian law is the *reductio ad unum* between legal categories of different origins. The phenomenon becomes very real when a judge is faced with case studies in which different legal orders interact and overlap. In the pursuit of applicable substantive law, the courts use connective criteria developed by private international law unless they determine to situations which conflict with the basic principles of the legal system. The article 16 of Law no. 218/95 rules on the inapplicability of foreign laws “if their effects are contrary to public order”.

The difficulty of defining this concept, its content and its limits, is revealed as a central issue in multicultural contexts where “networks of legality”<sup>15</sup> conflict in their definitions of what is right, and situations of incompatibility/conflict between regulatory systems emerge with increasing frequency.<sup>16</sup>

In these circumstances, reference to traditional national legal schemata proves to be an effective tool of persuasion capable of leading the *quaestio iuris* and “eccentricity” of foreign models into the framework of state legislation. The adoption of this mode of interpretation, which is suitable for more frequent use within civil law, allows the re-definition of the same co-ordinates of the concept of public order and a limitation of the cases in which it can operate.

Some recent rulings in case law relating to matters “of an Islamic nature falling under national law”<sup>17</sup> confirm this adoption and bear witness to a cognitive process which is gradually moving away from a purely formalistic approach to the characterization of foreign institutions, and is adopting a method of “pragmatic” assessment of non-native legal categories, inspired by equitable considerations which can mitigate the impact on public order and redirect possible conflicts into the prevalent regulatory framework. The objective of ensuring the protection of the “vulnerable”, primarily women and

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14 In the Italian system there have been decisions of this type which have aroused lively debate in public and in the text books. There is well known ruling made by the court of Turin, which released the parents charged with the abuse of young Romanian gypsies who had been used for begging. The judge did not consider the case relevant to article 572 c.p. given that inducement to beg is not proof of abuse when “this happens in a context of family harmony and affection, in the absence of physical violence and in the moral framework of a joint effort for survival”, so that - continues the Judge - “the child may well live through the begging without the suffering that the very idea of [begging] causes the average Italian citizen to imagine. The text of the judgment can be read in *Minori e Giustizia*, 1998, II, p. 165.

15 The expression is used by B. de Sousa Santos, *Toward a New Legal Common Sense*, Butterworths, 2002, p. 437, who identifies in legal pluralism and in interlegality one of the characteristics of our age where “a multiplicity of networks of law (...) require” individuals “to make constant transitions and transgressions.”

16 On the concept of public order and its latest applications see: P. Lotti, *L'ordine pubblico internazionale. La globalizzazione del diritto privato ed i limiti di operatività degli istituti giuridici di origine estera*, Giuffrè, 2005.

17 R. Clerici, *La compatibilità del diritto di famiglia musulmano con l'ordine pubblico internazionale*, in *Famiglia e Diritto*, 2009, II, p. 198.

children is driving these guidelines which will ensure “a degree of freedom within reasonable limits for the continuity of the personal status of individuals”<sup>18</sup> and support the possible co-mingling of regulations.

In the case of a Moroccan *Kafalah*, for example, the analysis of the motivations within ruling no. 19734,<sup>19</sup> by which the Supreme Court<sup>20</sup> considered the institution of Islam to be a relevant factor for the purposes of reuniting families, shows not only an openness to a different cultural model, but also the willingness to ground it in the overall regulatory structure. In this particular case, given its exceptional nature, the Administration<sup>21</sup> had ruled out any possibility of analogous extension of article 29 of Legislative Decree no. 286/98.<sup>22</sup> In order to overcome this ruling, the Supreme Court judges could have appealed to international law and, in particular, to the New York Convention on the Rights of the Child, which recognises the *kafalah* as an adequate mechanism for the protection of abandoned children.<sup>23</sup> The legitimisation offered by article 20 would contend the automatic recognition of the relationship between *makfull* and *kafil* in the Italian legal system without need for further investigation.<sup>24</sup> Moreover and by the same token, adherence to the Hague Convention of October 5<sup>th</sup> 1961 requires Italy to recognize and apply “measures to protect minors in their country of residence”,<sup>25</sup> except in cases where they are contrary to public order.

This kind of contrast must be “clear and deep enough to undermine the principles that govern the state itself, without issues of mere detail being allowed to become prominent”.<sup>26</sup> The essence of the *kafalah*, which “meets the need to provide a family which is recognized as suitable for abandoned children,

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18 See, R. Clerici, *La compatibilità del diritto di famiglia*, op. cit., p. 201.

19 This is the most recent judgment passed by the Supreme Court on *kafalah* following ruling no. 7472 of March 20 2008, with identical content. Recently the Court of Brescia (Decree of August 3, 2009) annulled the decision to refuse an entry visa for family reunification as requested by a legally residing foreigner for her nephew (or grandchild) entrusted to her under the *kafalah* act.

20 Supreme Court ruling no. 19734 of July 17 2008, Civil sect. I.

21 In this case it was the Ministry of Foreign Affairs.

22 Art. 29 of Legislative Decree no. 286/98 extends family reunification to the following relationships only: parent-child, adoption, fostering and guardianship.

23 Article 20, para. 3 which states: “1. Every child temporarily or permanently deprived of his/her family environment, or who, in its own interest, cannot be left in that environment, is entitled to special protection and assistance from the State. 2. Member States provide for such a child substitutive protection, in accordance with their national legislation. 3. Such substitutive protection may be expressed particularly by means of accommodation in a family, by *kafalah* of Islamic law, by adoption, or if necessary by placement in suitable children's institutions. In selecting one of these solutions full account will be taken of the need for some continuity in the child's education as well as his/her ethnic, religious, cultural and linguistic origin”.

24 See for example the Juvenile Court of Reggio Calabria, judgment October 10, 2006, in *Famiglia e minori*, 2006, II, p. 86.

25 See: M. Orlandi, *La kafalah di diritto islamico e il diritto al ricongiungimento familiare: un interessante pronuncia del Tribunale di Biella*, in *Il diritto di Famiglie e delle Persone*, 2007, IV, p. 1860, which adheres to the analysis made by the Court of Biella in its ruling of April 26, 2007 that “the Convention in question, to have been fully implemented and translated into domestic law, finds for Italy the application of *erga omnes*, or irrespective of the foreign State's agreement”. The ruling can be read in *Il diritto di Famiglie e delle Persone*, 2007, IV, p. 1823. Against the application of the Hague Convention of 1961 given that “Morocco is not a party to this Convention”, see: R. Clerici, *La compatibilità del diritto di famiglia*, op. cit., p. 209, footnote 112.

26 Court of Biella, judgment of April 26, 2007, in *Il diritto di Famiglie e delle Persone*, 2007, IV, p. 1824.

without creating legitimate parent-child ties<sup>27</sup> and the checks guaranteed by Moroccan law on the suitability of the *kafil* and the interests of the child<sup>28</sup> should “exclude, in the abstract and in essence, the possibility that the *kafalah* can be considered an institution in conflict with domestic public order”.<sup>29</sup>

The adequacy of the *kafalah* as a substitute means of protection for abandoned children finds additional backing in the Hague Convention of 19<sup>th</sup> October 1996 on co-operation in matters of parental responsibility and the protection of minors. This Convention, “applicable to article 3, paragraph e) on measures relating to “*le placement de l’enfant dans une famille d’accueil ou dans un établissement, ou son recueil légal par kafalah ou par une institution analogue*”,<sup>30</sup> although not yet mandatory for Italy<sup>31</sup> requires, “as a matter of international law, not to preserve conduct contrary to it.”

The reference to international treaties and a not formalistic reading of the rules on family reunification<sup>32</sup> could have allowed the Supreme Court to fully absorb the importance placed by the pursuant on the unsuitability of *kafalah* compared to other state institutions.<sup>33</sup>

The reconstruction made by the Supreme Court is, however, internal to the legal system and seems to underpin a clear desire to apply a “normalization” to the institution of Islam within the Italian legal system, identifying similarities with the mechanisms provided by national laws regarding child protection.

The directive of the “judge of the laws” (i.e. the constitutional judge) in the 2003 judgments nos. 198 and 295 is primarily about the protection of children as the supposed main interest, compared “to the defence of national territory and the containment of immigration”.<sup>34</sup> With that in mind, the judges point out that a ruling which excludes *kafalah* as a protocol for reuniting families would “penalise (...) all children from Arab countries, illegitimate, orphaned or otherwise in a state of neglect for whom (...) it

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<sup>27</sup> Court of Biella, *ibid*, p. 1825.

<sup>28</sup> Moroccan law on *kafalah* provides for the Judge to oversee compliance with the interests of the child. Inspections by the Authority find no conflict with public order. According to the Supreme Court there is still room for doubt about the compatibility of Islam with Italian law only in cases where “*kafalah* is used exclusively for negotiation in the absence of any monitoring from the authorities on the suitability of the trustee and the reality for the need to entrust”. On the distinction between judicial and consensual *kafalah* see: R. Gelli, *La Kafalah tra esigenze di tutela del minore e rischi di aggiramento della disciplina dell’immigrazione*, in *Famiglia e diritto*, 2008, VII, p. 679.

<sup>29</sup> Court of Appeal of Florence, Decree of February 2, 2007, in *Diritto, immigrazione e cittadinanza*, 2007, IV, p. 139. In this case, the Florentine Court emphasized that ratification by Italy, like Morocco, according to the New York Convention, excludes conflict with domestic public order. The potential paradox is highlighted in the textbooks: A. Vanzan e L. Miazzi, *Kafala e protezione del minore in Italia*, in *Diritto, immigrazione e cittadinanza*, 2004, II, p. 82; recently see: J. Long, *La Kafala: un risorsa sociale per i bambini e per le famiglie di religione islamica in Italia?*, in *Minori e giustizia*, 2007, II, p. 171.

<sup>30</sup> Art. 3 para. e of the Hague Convention of 19 October 1996. The quotation is taken from the Court of Biella, *cit.*, p. 1826.

<sup>31</sup> The Convention signed by Italy and not yet ratified, is “intended to come into force in our system following the decision of the European Union Council of June 5, 2008 authorizing certain Member States to ratify the Convention.” See R. Clerici, *La compatibilità del diritto di famiglia*, *op. cit.*, p. 207.

<sup>32</sup> For a detailed reconstruction of the relevant case law see the ruling of the Court of Biella, *cit.* p. 1814.

<sup>33</sup> The Administration maintains that *kafalah* can lead to none of the relationships in art. 29 of Legislative Decree no. 286/98 (of parentage, custody, adoption and guardianship), given “its purely negotiatory nature”.

<sup>34</sup> The Court rules out the circumvention of immigration laws given the “complex and multifaceted process of authorisation which (prior to the consular authority authorising the one-stop shop for immigration and visa issue) concludes with the issuing of residence permits for family reasons.” On this point see: R. Gelli, *La Kafalah tra esigenze di tutela*, *op. cit.*, p. 680.

represents the only institutionalised form of protection provided by Islamic law”.<sup>35</sup> The *vulnus* on the principle of equality provides further evidence which can ensure adequate coverage of subsequent constitutional reasoning on the legal status of *kafalah*, located halfway between custody and adoption.

Further, the analogous extensibility of the rules laid down in article 29 of the Consolidation Act on immigration is necessary for the identification of typical characteristics of different institutions. Judges point out that the *kafalah*, shares with the national fostering system the absence of a legitimizing and other effects on the child’s civil status; it also has, in common with Italian adoption law, a stability-giving characteristic inasmuch as “(although revoking is permitted), it extends until the child reaches adulthood”.<sup>36</sup>

References and analogies in a pattern of debate and discussion have promoted compatibility between regulatory systems and dispelled the uncertainties and doubts that the Supreme Court had expressed a few years before in ruling no. 21395,<sup>37</sup> whose substantial scope - expressly remarked upon by judges - was limited to the particular trial<sup>38</sup> underlining *kafalah*’s elements of similarity and contiguity with pre-adoptive custody.

This further appeal to juridical categories which are well-known in the national tradition turns out to be a valuable source of complementarity which can forefront the needs of minors and “the substance of institutes over legal form via which these needs become apparent”<sup>39</sup> Comparative research remains, however, limited to the legal functions of the examined legal particles, regardless of their characterization and place in the context of the general principles of their respective laws. Further, the Supreme Court, unlike other European courts,<sup>40</sup> shows a total disregard for the verification of the compatibility of *kafalah* with the structural principles of family law procedure,<sup>41</sup> which constitute in several other countries, conversely, an insurmountable obstacle to the recognition of Islam where the reuniting of families is concerned.

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<sup>35</sup> Supreme Court, ruling no. 19734 of July 17, 2008, Civil sect. I.

<sup>36</sup> Supreme Court, *ibid*.

<sup>37</sup> Supreme Court ruling no. 21395 of November 4, 2005, Civil sect. I.

<sup>38</sup> On the express intention of minimizing the extent of ruling no. 21395 see: L. Miazzi, *Riconosciuta la funzione dell’istituto a protezione del minore*, in *Guida al diritto*, V, 2008, p. 45.

<sup>39</sup> Court of Biella, cit. 1822. M. Orlandi stresses the need to assert a fundamental approach in the comparison between institutions, *La kafalah di diritto islamico*, p. 1854, he writes “given the importance of children’s rights which are at stake, a particularly rigid approach does not seem useful, nor is the formal verification of the exact correspondence between national and foreign institutes; it seems more appropriate to solidly test whether the foreign institutions produce substantially similar effects to ours.” In executing this check there are errors and contradictions such as the assimilation of *kafalah* to adoption or pre-adoptive custody.

<sup>40</sup> With reference to the views emerging in various European countries see: MC. Foblets and A. Dundes Renteln, *Multicultural Jurisprudence*, Oxford and Portland Oregon, 2009; R.D. Grillo (et al.), *Legal Practice and Cultural diversity*, Ashgate, 2009; S. Aldeeb and A. Bonomi, *Le droit musulman de la famille et des successions à l’épreuve des ordres juridiques occidentaux*, Schulthess Polygraphischer Verlag, 1999.

<sup>41</sup> Amongst the relevant principles equality between spouses plays a central role. The vulnerability of the principle of equality between spouses is obvious when considering that the husband has the power to decide the establishment of *kafalah* for their children.

Indifference to this analysis allows a fair solution to be reached which can incorporate into state tradition a family model<sup>42</sup> of affection and solidarity for children from Arab countries who live in difficult conditions.

The recognition, made recently by the Cagliari Court of Appeal, of a divorce ruling made in Egypt under Islamic repudiation<sup>43</sup> law is based on the same assumptions of equality and “decontextualised comparison”. The procedure, known as *talaq*,<sup>44</sup> which allows the husband to unilaterally dissolve the marriage<sup>45</sup> and symbolises the “discomfort that certain Islamic institutions feel towards western social conscience”,<sup>46</sup> was declared effective within Italian law through the compression of the concept of public order.<sup>47</sup>

The notion, put forward to protect the complex of values “that characterise the fundamental ethical and social structure of the national community in a given time in history”<sup>48</sup> must - according to the Cagliari judges - be reduced to “its core,” “to the principles that are really inderogable and fundamental”<sup>49</sup> to the legal system.<sup>50</sup>

This core content cannot disregard the assertion of the essential rights of defence, as required by article 65 of Law 218/95. In the case here under review, the Court of Appeal emphasizes that repudiation ensures a safeguarding of the adversarial principle since, under Egyptian law, *talaq* does not qualify as “simply a monitoring process, in which the plaintiff is limited to express - in a purely assertive manner - his claim of dissolution, but is structured as a complex procedure, “in which the possibility for the wife to intervene ensures the irreversible dissolution (...) of the sharing of lives and affection between spouses, and regulates the economic rights”<sup>51</sup> of women.

Given these considerations, no element of conflict with public order arises in the Court, whose scope overrides the fulfilment of the requirements “of Egyptian law for the validity and irrevocability of the divorce”.<sup>52</sup>

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<sup>42</sup> The traceability of *kafalah* within the family model has been recently highlighted by R. Gelli, *La Kafala di diritto islamico: prospettive di riconoscimento nell'ordinamento islamico*, in *Famiglia e diritto*, 2005, I, p. 62.

<sup>43</sup> Court of Appeal of Cagliari, ruling no. 198 of May 16, 2008. The ruling is available on [www.immigrazione.it](http://www.immigrazione.it).

<sup>44</sup> In Egypt the procedure of *talaq* is regulated by law no. 125/1920 and subsequent amendments.

<sup>45</sup> For a reconstruction of *talaq* in the Islamic legal system see: F. Castro, *Il modello islamico*, Giappichelli, 2007.

<sup>46</sup> C. Campiglio, *Il diritto di famiglia islamico nella prassi italiana*, in *Riv. di diritto internazionale privato e processuale*, 2008, I, p. 43.

<sup>47</sup> The ruling seems particularly innovative. Previous Italian case law has in fact always ruled out the validity of a repudiation occurring abroad because it is contrary to public order. For an appraisal of relevant judgments see C. Campiglio, *Il diritto di famiglia islamico nella prassi italiana*, op. cit., p. 64.

<sup>48</sup> The public order which the court refers to is international public order, as distinguished from internal public order. For a discussion of the concepts see: F. Angelici, *Ordine pubblico e integrazione costituzionale europea*, Cedam, 2007 e P. Lotti, *L'ordine pubblico internazionale*, op. cit..

<sup>49</sup> The quotation in this judgment is taken from the Court of Appeal of Cagliari, cit.

<sup>50</sup> The Court highlights that “under art. 10 of the Hague Convention of June 1, 1970, which applies in this case, the State Party may refuse to recognise a divorce or separation only if they are manifestly incompatible with public order.”

<sup>51</sup> The quotation in this judgment is taken from the Court of Appeal of Cagliari, cit.

<sup>52</sup> Court of Appeal of Cagliari, judgment no. 198 of May 16, 2008, para. 2.8.

Even the detailed description of the procedure of *talaq* seems designed with the objective of pointing out the similarities and analogies with the typical elements of a dissolution of marriage in the Italian system, noting, for example, the parallels between the effects of the repudiation declared only once by the pursuant and in the absence of his wife, with the “separation of bodies under western law”.<sup>53</sup>

As with the *kafalah*, judges tend, in their reconstructions, to apply a “normalization” of Islam, abstracting it from all the general principles governing the law of “the *forum*” and giving substance to the concept of public order.

The legal system unanimously places in that category all “fundamental principles of the (...) Constitution or other rules which, while finding no place in it, nevertheless meet the need for basic and universal protection of human rights” or which govern the “regulatory order such that breaking them results in overturning the basic values of the entire regulatory structure”.<sup>54</sup> This judicial process is very much in contrast with the silence of the Court on the compatibility of *talaq* with the principles of equality and non-discrimination “between the sexes and between spouses, which are derived from (...) the Constitution and numerous international instruments”.<sup>55</sup> The Court of Cagliari’s referral to the *khola*, which, under Egyptian law grants the wife the right unilaterally to dissolve her marriage, even without the consent of her husband, cannot be considered sufficient for the purposes of compliance with the principle of equality between the sexes. The procedure actually appears very different from the *talaq* and in any case infringes the rights of women<sup>56</sup> and violates “the principle which forbids the dissolution of marriage on the initiative of a free and unmotivated spouse”<sup>57</sup> present in the Italian legal system.

Thus the value judgment on how *talaq* conforms to the criterion of public order turns out to be extremely weak, highly decontextualised, and can be justified solely on considerations of equity concerning the situation of married couples (both remarried) and the children of the pursuant. The concern over avoiding “lame” situations, even those not emerging directly from the text of the

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<sup>53</sup> In both cases the marriage continues and its effects still remain suspended.

<sup>54</sup> The citation in this judgment is from: Supreme Court ruling no. 22332 November 26, 2004, sect.: work. For a complete overview of the case law on this point see: E. de Feis and F. Tomaseo, *Contrarietà all’ordine pubblico del divieto islamico di riconoscere figli naturali*, in *Famiglia e diritto*, 2007, XII, p. 1118.

<sup>55</sup> R. Clerici, *La compatibilità del diritto di famiglia*, op. cit., p. 202. A. Sinagra also points out the contrast: *Ripudio-divorzio islamico ed ordine pubblico italiano*, in *Il diritto di Famiglia e delle Persone*, 2007, I, p. 163. Respect for the principles of moral and legal equality between spouses has been used by Italian case law in other situations of conflict with Islamic law, as, for example, in the case of polygamy. On the not always happy results produced by this approach to the rights of polygamous women see: C. Campiglio, *Matrimonio poligamico e ripudio nell’esperienza giuridica dell’occidente europeo*, in *Riv. di diritto internazionale privato e processuale*, 1990, I, p. 63.

<sup>56</sup> In this case, the woman has no right to reconsider and “the husband must return the dowry and other gifts that she had offered and is not entitled to any gifts of consolation, as happens in the case of *talaq*” See: A. Barbu, *Compatibilità del ripudio-divorzio islamico e ordine pubblico italiano*, on [www.immigrazione.it](http://www.immigrazione.it). What distinguishes the two institutions is mainly the lack of motivation, while under *talaq*, the husband can dissolve the marriage without any explanation, for women dissolution is possible only in specific cases.

<sup>57</sup> R. Clerici, *La compatibilità del diritto di famiglia*, op. cit., p. 202.

judgment, may have encouraged judges to allow the Egyptian decision on divorce to be transcribed (through a reductive interpretation of the concept of public order) into the register of the civil State.<sup>58</sup>

This approach undoubtedly opens an effective conduit between standards from different legal systems, but its replicability in the long term will in many cases depend on the ability of judges to find a reasonable balance between the need to promote the acceptance of a non-prejudicial vision of foreign institutions and the protection of individual rights.

4. The appeal to equity or rather to a fair balance between conflicting legal dynamics and values can lead to promoting the use of meta-judicial elements, traditionally unrelated to judicial decisions, in the judicial process.<sup>59</sup>

Sociological analysis, legal anthropology, ethnology, psychology and the history of religions are just some of the new disciplines that figure as complementary criteria in the formation of *ratio decidendi*; they often also figure as tools for giving direction and decision making.<sup>60</sup>

This sometimes fruitful, often extremely dangerous contamination finds its basis in the recognized and widespread need to preserve the cultural identity of individuals or, in the case of a crime being committed, in the opportunity to take into account (when imposing sanctions) of the influence on the subject of his/her original ethnocultural context.

Respect for the principle of equality does require the reconstruction of individual and collective profiles of the individual in order to give substance to the notion of equality.<sup>61</sup> This approach, popular in European courts, frequently results in the singling out of different legal *status* differentiated on an ethnocultural basis, with identification of fundamental “declinable” rights and the construction of pockets of unequal law which produce dangerous gaps in the legal framework. Promoting meta-judicial elements is in most cases the necessary logical precursor for these transformations. An interpretative trend, though difficult to reduce to a set uniform pattern, seems directed by a common ideological basis

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<sup>58</sup> On the possible consequences of rejecting the application see: A. Barbu, *Compatibilità del ripudio-divorzio islamico*, op. cit., footnote 12.

<sup>59</sup> See: A. Facchi, op. cit, p. VII, who emphasizes that “the legal community is increasingly finding itself involved in cases in which they must deal with the compatibility between standards and behaviour of religious or community origin and governing legal regulations. It is no coincidence that the science of law, while maintaining the boundaries attaching to its methodological tradition, is extending its interests to phenomena outside state law, which until recently were left to sociologists of law, in order to search for concrete solutions to deal with the current social/legislative mix”.

<sup>60</sup> It is a process that has some affinity with extra-systemic interpretation.

<sup>61</sup> A. Bernardi, *Modelli penali e società multiculturali*, Giappichelli, 2006, p. 41, appropriately highlights that “at national and international level, there seems to be a juridically founded process of coexistence through acceptance of details, through which what might be called ‘the culture of diversity’ or at least ‘the idea of tolerance’ becomes progressively stronger”. Testifying to this are articles 3, 6, 19, 21 of our Constitution, articles 8, 9, 10 11, 14 of the European Convention on Human Rights and art. 2 of Protocol 1 thereof, articles 10 & 20-26 of the Charter of Fundamental Rights proclaimed in Nice”. Through these laws, continues Bernardi, a kind of “right to diversity” gains substance, which tends to permeate of its own accord the very principle of equality”. On the idea of a genuine right to cultural identity, see the recent: C. Ricci, *Diritti fondamentali, multiculturalismo e diritto alla diversità culturale: appunti a margine della Convenzione Unesco sulla protezione e promozione della diversità culturale*, in *Riv. I diritti dell’Uomo: cronache e battaglie*, 2007, I, p. 49.

which identifies, in its quest for equality, the teleological horizon of the solutions devised at jurisdictional level. This search for equality brings about different results, sometimes in line with fundamental rights, more often in conflict “with the principles and values accepted by international and domestic sources of law”.<sup>62</sup>

An interesting example of the first case is provided by a recent ruling in the Court of Cremona which acquitted an Indian Sikh of the alleged crime of unlawful possession of a weapon and potentially harmful objects<sup>63</sup>: he had left his home with a traditional dagger used in the *kirpan*<sup>64</sup> ritual. In order to maintain an appropriate balance between the need for public safety and religious freedom, the Court has to evaluate the merit of the defendant’s behaviour in light of the precepts and symbols present in the Sikh religion.

The obligation for the followers of Sikhism to wear the *kirpan* as a symbol of resistance to evil makes this conduct not punishable, insofar as it is considered lawful because it is a peculiar manifestation “communicative of religious identity”<sup>65</sup>. The principle is then established that carrying in public an implement which in theory could be harmful to people, may not be considered an accessory to a crime if it constitutes a symbol which is religious in nature.

Article 19 of the Constitution which recognises “everyone’s right to profess her or his faith freely in any form, individually or collectively, to promote it and to carry out its practices in private or in public, provided that the rituals are not contrary to good custom”, guarantees, according to judges, an adequate regulatory support to the proposed solution; this is confirmed by the provisions of article 18 of the Universal Declaration of Human Rights<sup>66</sup> and article 9 of the law ratifying the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>67</sup>

In support of its line of argument, the Court of Cremona also cites ruling no. 30322, *Multani v. Commission scolaire Marguerite-Bourgeois*,<sup>68</sup> pronounced by the Supreme Court of Canada which, addressing a similar issue, came to the conclusion that “the carrying of the *kirpan* within schools is considered as

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<sup>62</sup> A. Bernardi, *Modelli penali*, op. cit., p. 43. The author refers to “radical forms of recognition” of cultural otherness “which could trigger dangerous reactions of social rejection” and a dangerous legal conflict with human rights.

<sup>63</sup> The offence comes under art. 4 of Law no. 110/1975.

<sup>64</sup> Court of Cremona, ruling of February 19, 2009. For an initial comment on the ruling see: G. Gatta, in *Osservatorio di diritto e processo penale*, in *Corriere del Merito*, 2009, IV, p. 399.

<sup>65</sup> Court of Cremona, cit.

<sup>66</sup> Art. 18 of the Universal Declaration of Human Rights states that: “Everyone has the right to freedom of thought, conscience and religion, this right includes the freedom to change religion or belief, and freedom of expression alone or in community, in public and private, to manifest one’s religion or belief in teaching, practice, worship and observance of rites”.

<sup>67</sup> Art. 9 of the ECHR states: “1. Everyone has the right to freedom of thought, conscience and religion; this right includes the freedom to change religion or thought, as well as the freedom to manifest one’s religion or thoughts individually or collectively, in public or in private, through worship, teaching, practices and performance of rituals. 2. Freedom to manifest one’s religion or thought cannot be subject to additional restrictions beyond those required by law and are necessary in a democratic society for public safety, protection of public order, health or public morals or the protection of the rights and freedoms of others.” The full text of the Convention can be read at: [www.unhcr.it](http://www.unhcr.it).

<sup>68</sup> For a review of this case see: F. Astengo, *La Corte Suprema del Canada afferma il diritto di portare a scuola il coltello dei sikh*, at [www.associazionedeicostituzionalisti.it](http://www.associazionedeicostituzionalisti.it). The judgment may be viewed at: <http://csc.lexum.unmontreal.ca/en/2006/2006scc6/2006scc6.html>.

per se allowable (surprisingly), showing how, in order to restrict a right protected by the Charter, the threat must be present and real (and not based on mere dislike or concern) and that the means chosen to limit it are proportionate to the pursued objective”.<sup>69</sup>

The Italian judge highlights the way in which the Canadian solution “is based on the symbolic nature of the Sikhs’ dagger, also stressing the background of the fundamental Canadian value of multiculturalism”.<sup>70</sup> Respect for this sociological and philosophical theory (now part of the broad heritage of Western democracies) seems to permeate the subsequent statements of the judge who, in an *obiter dictum* worthy of particular interest, broadens the explanatory potential of the judgment well beyond the bounds of this case. Criminal unlawfulness within incriminating conduct is, for example, excluded, even in (hypothetical) cases where the object in question falls within the framework of article 699, paragraph 2 of the c.p. (illegal carrying of weapons), on the premise that the right guaranteed by article 19 of the Constitution is exercised under article 51 c.p. as a cause of justification.<sup>71</sup>

This potential ruling is perplexing because it appears to depict an exoneration based on exercising a right to “unlawful acts of a cultural nature”<sup>72</sup> that sets recognition of the so called cultural defences as standard. Unconditionally accepting cultural defences, something which has clearly grown alongside the importance of giving value to extra-normative factors in judicial reasoning, is undoubtedly the most dangerous result of multiculturalism. In the Anglo-Saxon world, where the theories were first developed,<sup>73</sup> the use of cultural exemption has generated quite a few practical issues of application.

The possibility of envisaging special treatments on an ethnocultural basis defines a clear divergence of legal systems which has serious consequences for their practical effect and stability. The circulation of cultural defences in continental Europe has given rise to the same difficulties. Their use in law, often without prior and proper doctrinal input, has encouraged offhand use and allowed the emergence of debatable solutions where the extra-normative, cultural element has caused all other technical and legal considerations to be overridden.

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<sup>69</sup> Court of Cremona, judgment of February 19, 2009. The citation of foreign criminal judgments, which is particularly innovative in the Italian legal landscape, is a direct consequence of the clash between constitutional rights, a conflict that fuels the possible duplicity inherent in the rules, forcing the court to resort not only to extra-normative measures, but also extra-systemic reasoning. For a discussion of the dissemination of extra-systemic reasoning in recent jurisprudence, see: S. Bartole, *Il ricorso al diritto comparato in tema di diritti umani, fra vincoli giuridici e mediazioni culturali*, in *Diritti umani e diritto internazionale*, 2007, II, p. 229; A. Lollini, *La circolazione degli argomenti: metodo comparato e parametri extrasistemici nella giurisprudenza costituzionale sudafricana*, in *Diritto pubblico comparato ed europeo*, 2007, I, p. 479.

<sup>70</sup> Court of Cremona, ruling of February 19, 2009. For the latest on the theory relating to Canadian multiculturalism: G. Gentili, *La dottrina canadese in tema di diritti*, in *Diritto pubblico comparato ed europeo*, 2008, IV, p. 1872.

<sup>71</sup> The Court of Vicenza by Decree of January 28, 2009 also acquitted an Indian Sikh who left his home with a dagger used in ritual: he had been charged with carrying objects intended to offend or carrying illegal weapons. In this case the G.I.P. closed the prosecution without “placing emphasis on the religious reason for carrying the *kirpan* dagger, but excluding it from classification as a weapon since it has no blade”

<sup>72</sup> A. Bernardi, *Modelli penali*, op. cit., p. 117.

<sup>73</sup> On this point see the important essay by A. Dundes Renteln, *The Cultural Defense*, Oxford University Press, 2005.

5. In Italy the acceptance of cultural defences is a very limited phenomenon, although there have been cases in which the analysis of extra-normative factors has favoured solutions “based on an attitude of great and extraordinary sympathy for certain offenses caused by cultural factors”. There are some well-known judgments from the Courts of Turin, Venice and Naples on female circumcision, begging and abandoned children based on the Courts’ beliefs concerning acquittal or disculpation on extra-legal grounds linked to the ethnic and cultural background of the accused.<sup>74</sup>

There is a tendency to the “equitable clemency”, which, in some measures taken by the Italian courts, is openly expressed. In a decision taken by the Court of Genoa in November 2003 the author points out for example that: “in regard to crimes against the family, while parties who, by nationality and therefore by culture, religion, education and underlying values come from institutional and social contexts which are quite different from those of the host State jurisdiction to which they are subject, it is appropriate for the judge to raise questions over the possible influence of this background data on deeds committed in Italy; this in order to complete her/his knowledge of the objective and subjective elements that form the basis of her/his decision.”<sup>75</sup> Such a shareable logical premise must, however, be properly pondered in order to prevent a misguided sense of justice from leading to the validation of practices and actions which, while having a defined cultural pattern, are not justifiable within the established regulatory framework. There are cases where the equitable powers of judges become elements of instability in the legal system, causing social conflict and complicating the development of legal mechanisms and values between indigenous and immigrant populations. In this sense, for example, it seems difficult to accept the ruling given by the Justice of the Peace in L’Aquila, condemning the behaviour of an Egyptian (Muslim) who had beaten and threatened an acquaintance who had taken advantage of his absence to talk with his wife.<sup>76</sup> In applying sanctions, the judge confirms that “s/he cannot ignore the personality of the accused, influenced by the culture of his place of origin (Cairo), and therefore that s/he can cite provocation as mitigation.”

The granting of extenuating circumstances on the basis of a vague cultural disposition in the absence of a genuine cultural offense<sup>77</sup> constitutes an excessive emphasis on equity, which legitimizes offensive conduct which infringes personal rights and disproportionately broadens the scope of relevant factors in the proceedings. The general preventive function of criminal law turns out to be extremely weakened, and the principle of equality becomes distorted, laying the foundations for rendering

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<sup>74</sup> For a framework of the relevant case law see: F. Basile, *Immigrazione e reati “culturalmente motivati”*, CUEM, 2008.

<sup>75</sup> For the full text of the judgment and a brief comment see: S. Sergio, *Il credo religioso va tenuto presente per le attenuanti generiche*, in *Diritto e giustizia*, 2004, XI, p. 89 e ss.

<sup>76</sup> L’Aquila Justice of the Peace, July 1, 2008, unpublished. From the findings of the proceedings it seems that the accused had complained about the misconduct of the assaulted person “who had entered his house when he was not there the day before (...)”.

<sup>77</sup> On the reconstruction of the elements necessary to identify a cultural offense see: C. De Maglie, *Società multiculturale e diritto penale. La Cultural defense*, in *Studi in onore di Giorgio Marinucci*, Giuffrè, 2006, p. 226.

vulnerable other areas of basic, individual self-interest such as the right not to have one's body impinged upon.

Compared to artificial rights created by the system, it may appear easier to understand the attitude of bias towards ethnic minorities, or more generally, immigrants. An example of this is clearly shown in ruling no. 44048/08 of the Supreme Court which acquitted a Macedonian citizen accused of aiding and abetting illegal immigration by smuggling his twelve year old daughter into Italy.<sup>78</sup>

The Supreme Court did not consider the act to be a crime as it believed that the immigrant had acted out of necessity, to avoid abandoning his daughter in their country of origin.<sup>79</sup> This judgment is worth analysing because, while not directly involving the incriminated individuals' cultural profiles, it clearly shows two phenomena which are significant in relation to the subject of the investigation.

The first is about the mutation of the intrinsic characteristics of legal categories in the structuring of legal rights on a subjective basis, while the second involves the sensitive theme of the gradual assertion of rights which would otherwise be punishable, depending on the various individuals involved. With reference to the first phenomenon it can be observed how, in the case under review, the concept in article 54 c.p.<sup>80</sup> is used in ways which alter its traditional characteristics. Further, the case is relevant to some essential points which are also defined in article 2045 of the Civil Code: the "need to save one's self or others from real danger of serious personal harm", the unintentional nature of the alleged harmful event and its inevitability.

These last two items are difficult to trace in this case where the immigrant (although constrained by precarious economic conditions) voluntarily chose to leave his country of origin in a situation which can only potentially be described as inevitable. The transformation of "necessity" from the category of involuntary inevitability, the real scope of which should be established to protect all those individuals involved in court proceedings, to the category of abstract possibility, represents a significant innovation and a substantial alteration of a traditional legal *species*. This is one of many examples of flexible adaptation of Italian law to the variety of cases imposed by immigration law, a solution that unfailingly gives rise to doubts and misgivings. The "equitable clemency" has become, in the case under review, an instrument which can not only circumvent the rules for the protection and safeguarding of national borders, but above all which can determine different treatment for a crime, according to whether it is committed by co-nationals or by foreign immigrants. Abetting illegal immigration is thus no longer a

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<sup>78</sup> Supreme Court ruling no. 44048 of November 26, 2008, Penal sect. I. The Macedonian citizen had already been acquitted by the Court of Trieste in 2007, but the prosecutor had appealed on the assumption that the father could have avoided the psychological damage to the child with "the decision to remain in Macedonia or leave his wife and child in the country of origin pending a new application for family reunification". For comment on ruling no. 44048 see: N. Folla, *Introdurre nello Stato il minore, in assenza di autorizzazione, non integra favoreggiamento dell'ingresso illegale se sussiste lo stato di necessità*, in *Famiglia e diritto*, 2009, IV, p. 366.

<sup>79</sup> The foreigner, with a regular job in Italy, had already been reunited with his wife and with one of his two children.

<sup>80</sup> Art. 54 c.p. establishes that "people are unpunishable, who are forced to commit a crime by the need to save themselves or others from danger of serious harm, danger that is not self-inflicted or otherwise avoidable, provided that the deed is commensurate with the danger (...)".

neutral fact: it loses its repressive character to become a case with subjective and humanitarian overtones. The alteration of the lawmakers' intentions is unequivocal, even if it has been brought on by the aim of escaping a literal interpretation of the regulatory apparatus which is overly burdensome to the foreign immigrant.<sup>81</sup>

In the same way, there are also many cases of preferential treatment based on extra-normative elements, non technical in character, such as in the doings described by the Supreme Court in 2001 ruling no. 42289 where a non-European witness's failure to report a rape is justified by her being one of a group of foreign nationals in a country which is not always friendly towards them".<sup>82</sup> This mode of judicial reasoning, regardless of the case under review, is very dangerous because it appears to be based on the firm conviction that different rights and duties may derive from different sets of values, even in situations negatively affecting the fundamental rights of the individual.

6. The Italian Supreme Court seems to be fully aware of the risks associated with the ongoing attribution of value to extra-normative elements in judicial reasoning and, in recent court rulings, it has ruled out the possibility of placing emphasis on the different connotations of individual agents in cases involving violence and abuse of authority in family relationships.

While cultural motives in particular are coming under analytical scrutiny in court, they are nevertheless subordinate to individual rights: any form of legal inequality between foreign nationals and immigrants is being rejected. The Supreme Court has made it clear that, especially in cases which have relevance to the constitution "the ethical and social traditions of those who are present on State-controlled soil (...) can only be practised only outside the ambit of influence of the penal system."<sup>83</sup>

Ruling no. 46300, December 2008, clearly and precisely reconstructs this directive and offers interesting ideas for a discussion aimed at understanding how Italian multiculturalism is taking shape with regard not only to criminal law but also to matters relating to civil law and private international law.<sup>84</sup> The case concerns a North African Muslim citizen, accused of abuse, kidnap, rape and violation of his family assistance obligations. The accused, in going to the Supreme Court, gave only one reason for escaping punishment: a violation of article 606, paragraph 1, section e of the c.p., given that the judge had

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<sup>81</sup> P. Morozzo della Rocca, *Il diritto dell'immigrazione ed i malintesi sensi (degli obblighi) dell'integrazione*, in *Corriere Giuridico*, 2009, IV, p. 443, stresses "(...) if found guilty of the alleged crime, not only would the law impose a prison judgment on the parent, but, because of a questionable but sometimes implemented administrative practice, the revocation or refusal of the request for renewal of a residence permit may also be enforced under the combined provisions of art. 4, paragraph 3 and art. 5, paragraphs 4 and 5 of the Consolidation Act on immigration; the subsequent expulsion of the foreigner would result in very serious consequences for him/her and the family".

<sup>82</sup> Supreme Court ruling no. 42289 of November 26, 2001, Penal sect. III.

<sup>83</sup> Supreme Court ruling no. 179, May 29, 2009, Penal sect. VI. In this ruling, the Supreme Court reiterated that, especially in family matters, the principle of "compulsory use of criminal law: whereby those who are on State-controlled soil, whether co-nationals or foreigners, are bound by it" must always prevail.

<sup>84</sup> Supreme Court ruling no. 46300 December 16, 2008, Penal sect. VI.

“concluded penal proceedings on the basis of value assessments which were exclusively based on an ethnocentric bias, lacking in any motivation”<sup>85</sup> relating to the subjective element of the alleged offenses. The applicant considers in particular that his conduct should be seen “within the context of the concept of family which is typical of the social group to which he belongs” and should be disculpated, based on the notions that he, as a “citizen of the Muslim religion, has of family life and marital powers due to him as head of the household”.<sup>85</sup>

The Supreme Court does not accept a defence based on the principle laid down in article 5 c.p. which, even when read with the interpretation dictated by the Constitutional Court, cannot be affected by special considerations and perceptions based on the merits or demerits of individual conduct. The Court also emphasises that the role of “cultural mediator that doctrine attaches to criminal judges” cannot be called upon in court and that “it can never be implemented outside of or against the rules which, in our system, set limits of permitted conduct”.

The reference to fundamental rights under articles 2 and 3 of the Constitution is - in the opinion of the Supreme Court - an “impassable barrier against the introduction into civil society, either in law or in fact, of habits, customs and practices, which are antithetical to the history of the results achieved over the centuries in terms of the affirmation of inviolable, individual rights, whether the individual be a co-national or a foreigner”. Quite apart from statements of principle, the drafters of judgment no. 46300 are at pains to suggest a tripartite schema intended for general use in cases of cultural or culturally-oriented crimes: (i) “looking after victims’ rights” regardless “of whether or not they consent to the violation of rights considered to be inappropriate to them”, (ii) “guarantees to the accused (..) in the search for truth and in applying the law” and finally (iii) “a personalised conviction (...) with sanctions to be sought and identified in accordance with the principle of the legality of judgments”.

This wording allows for the adjustment of a punitive response to the specific needs of individual cases within a spirit of equity which has its grounding in the system produced by article 25 of the Constitution and with reference to a “case by case”, “situation by situation” form of justice, described in the ruling as the “natural task of the judge”. The individualisation of the judgment should nevertheless not be completely separated from an examination of the individual agent, including a possible assessment of extra-legal factors, while still remaining within the legislative system.

Achieving a balance between the objectivity of the laws and the subjectivity of the case is a matter for the judge’s estimation, who must apply his/her equitable powers in a reasonable manner. Two very recent court decisions on the new crime of illegal entry and residence within the state seem to take inspiration from these premises, which testify to the penetration and diffusion within the Italian judicial system of a complex system of equity based on an individualisation of the law and gradualisation in its application, according to right reason. This system forms the basis not only of cases where Italian law is

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<sup>85</sup> Ibid.

adapted to or in response to ethno-cultural law, but also constitutes a central mechanism in cases where there seem to be possibilities of inequality in law between individuals, classes or groups. Precisely by following this hermeneutic practice, a Justice of the Peace in Recco decided s/he should not apply the provisions of article 10 bis of Legislative Decree no. 286/98<sup>86</sup> to an illegal immigrant “because of lack of substance”<sup>87</sup> and because of the subjective conditions of the accused who was found to have no criminal record (...) and who was engaged in a legal, albeit irregular activity.” The Ligurian judge in question based his reconstruction on article 34 of Legislative Decree no. 274/2000 which allows for the non-application of penal action when, “with regard to the interests to be considered, the little substance in the damages, or in the danger arising from it, as well as its rarity and the level of guilt” do not appear to legitimise the handing down of the usual sanction.<sup>88</sup> The arguments raised allow for the identification of a reasonable solution within the legal apparatus and on the basis of elements within the case, (i.e. an examination of the facts and the damages or the danger incurred) and subjective considerations.<sup>89</sup> Following the same line of reasoning, the Criminal Court of Pesaro also criticized the rule which places penal importance on the status of irregular migration, and asked the Constitutional Court to rule on its legality.

The fact underlying the Pesaro judge’s action is the absolute inability to locate justifying elements, with a “legal-constitutional rationale”,<sup>90</sup> in the innovation brought in by Law no. 94/2009 which, overriding the previously-established model of administrative expulsion<sup>91</sup>, criminalises an individual situation beyond the committing of material acts. The reasoning is very simple: “the indiscriminate imposition of penal sanctions on foreigners who remain illegally on State-controlled soil arbitrarily assumes that they

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<sup>86</sup> The new crime of illegal entry and residence in the territory of the Italian Republic was introduced by art. 1, c. 16 a) of Law no. 94/2009, published in the Official Gazette no. 170 of 24/07/2009.

<sup>87</sup> The quotations are from unpublished judgment given by Justice of the Peace of Recco, September 2009.

<sup>88</sup> Many authoritative commentators have stressed the danger that, by handing over the new offense under art. 10 bis of Legislative Decree no. 286/98 to the jurisdiction of a Justice of the Peace, the honorary character of the judiciary may be distorted and placed in conflict with its “conciliatory nature” and setting up “a subsystem of sanctions not consistent with general principles of law and with fewer guarantees than the established system for the crimes of illegal detention which are subject to the knowledge of the court”. The quotation is from a letter sent by the Head of State to the Chairman of the Cabinet (Prime Minister) and the Presidents of the Chambers during the promulgation of the law on “Measures relating to public safety”. The full text of the letter can be found at: [www.federalismi.it](http://www.federalismi.it).

<sup>89</sup> Equity is defined as a choice between rules within the system, rather than as an abstraction within a single rule of the best solution to the given case.

<sup>90</sup> Court of Pesaro, Penal sect. order of August 31, 2009, p. 7. The text of the ordinance is from [www.immigrazione.it](http://www.immigrazione.it).

<sup>91</sup> In an appeal a few days before the approval of new rule 22, prominent jurists pointed out, among other things, how the introduction of the crime of illegal entry and residence within the state constitutes an unnecessary criminalization of a subjective situation which poses no real danger, whose “sphere of application (...) is designed to overlap completely with that of the administrative penalty, which shows the complete irrationality of this new crime”. The full text of the appeal can be read on: [www.giuristidemocratici.it](http://www.giuristidemocratici.it). The magistrate of Pesaro has also argued the futility of criminal sanctions provided by art. 10 bis of Legislative Decree no. 286/98 destined to remain “practically devoid of specific effects against the majority of irregular immigrants, since almost no one would be able to pay the heavy fines envisaged, from 5,000 to 10.000 Euros, or to usefully pay the penalties commensurate with such sums”.

all pose a danger to society” in open violation of articles 3 and 27 of the Constitution which, conversely, require a concrete ascertainment of criminal responsibility with reference to the individual.<sup>92</sup> The principle of reasonableness in its many expressions “(rationality of purpose, adequacy of means to ends, proportionality, and substantial respect for the basic values of the Constitution)”<sup>93</sup> is being blatantly violated. The only effect with any degree of rationality that the Pesaro judge manages to identify in the new law is the radical exclusion of any form of solidarity with the immigrants, around whom a curtain of indifference and hostility has been raised. Further, the expectation of penal sanctions brings with it the notion of “complicity in crime under article 110 c.p. for all those who express towards the “illegal immigrant” real and factual solidarity by receiving and helping her/him to find food and lodging and to engage in activities for her/his subsistence”<sup>94</sup> and entails the legal obligation to report matters to the authorities for any public official or for people working in the service of the public who, because of their role or in the course of their duties, become aware of an immigrant’s irregular status.<sup>95</sup>

Having identified these premises, the Court points out how this law affects society, changing it from one “which welcomes” to one “which excludes”<sup>96</sup> certainly endangering “the basic principle of human and social solidarity which the Constitution, by contrast, holds as a primary value to achieve and promote”.<sup>97</sup>

The reference to solidarity as a legal value in the text of the ordinance seems, in truth, rather vague, referring rather to an abstract principle founded in natural law and identifiable in the duty of every human being to receive and help, with good grace, “poor persons in dire need”.<sup>98</sup> The tendency towards natural law seems also to account for the Pesaro judge’s thinking regarding the compatibility of article 10bis with principles concerning immigration which are widely recognised at an international level.

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<sup>92</sup> Besides which, the Constitutional Court ruled out, in the same ruling no. 78 in 2007, that “the non-possession of a qualifying title allowing residence in the territory of the state” may in itself be “symptomatic (...) of a particular social dangerousness.”

<sup>93</sup> Court of Pesaro, cit., p. 10

<sup>94</sup> Ibid. The Court of Pesaro notes, cit., 7, how contravention with a fine, though ineffective for illegal immigrants, is however “very effective against all the other” regular citizens or foreigners.

<sup>95</sup> The obligation to report arises under the requirements of articles 361 and 362 c.p.. Health and education professionals are excluded from the list of persons required to report illegal immigrants. However, the Court of Pesaro cit, 8, points out that such exemptions “relate only to restricted areas of life and are not sufficient to give illegal immigrants real security in terms of access to these services, as this would still imply that their status would come to the surface and be visible. The many formalities, such as the obligation to declare place of residence to the PS when a young illegal immigrant is hosted by a boarding school, for example, are tantamount to the crime being reported”.

<sup>96</sup> The court describes the perverse effects of the new incriminatory law in social relations, highlighting the danger of the spread of the “popular mentality of strong hostility to any kind of diversity”.

<sup>97</sup> Court of Pesaro, cit., p. 8.

<sup>98</sup> A universal value that can be grounded, the Court of Pesaro points out, in both secular and religious values. Court of Pesaro, cit., p. 7.

The judge, after having shown how international acts and conventions identify a migrant, even one who has not been regularised, as a subject worthy “of the utmost respect in her or his quest for more humane living conditions (...) who will certainly have to submit to the laws of individual states, intended to verify if his or her actual immigration is legalisable, but who cannot be considered, by definition, a criminal”,<sup>99</sup> postulates the existence “of an absolute birthright, that a citizen of the world has, to share with all other men and women ownership of the land and the right to enjoy it for a free and dignified existence”.<sup>100</sup>

The reference to this primal right is accompanied by quotations from several extra-normative texts, by a statement from the UN High Commissioner for Human Rights<sup>101</sup> by an appeal from famous personalities and religious and lay charities and even by a passage from the Gospel of Matthew which reports the words of Christ.<sup>102</sup>

This type of referencing, which often comes up in judgments of the European Court of Human Rights<sup>103</sup> and U.S. federal courts,<sup>104</sup> is something absolutely new to the Italian law scene, in which judges rarely resort to such a quantity and quality of extrajudicial factors to support their constructions.

The need to demonstrate the unfoundedness of legal categories on the basis of ethnicity is probably what leads judges to make use of cases and extra-normative references.

However, it is conceivable that the reference to an extra-systemic reasonableness, linked to natural rights, or taken from factors external to the law books, could be the start of a broader interpretative trend, which Italian judges will look to in order to resolve cases brought about by ethnocultural rights or which involve weak or otherwise disadvantaged individuals, such as, precisely, immigrants.<sup>105</sup>

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<sup>99</sup> Court of Pesaro, cit., p. 7. The court considers the criminalization of migrants to be excessive, stressing that “the international conventions and laws of the states generally try to reserve regulatory and administrative sanctions for the stage of attempted immigration and the investigation of its acceptability, because they are more suited to ‘mildly’ governing what is a highly complex global phenomenon, itself an expression and a consequence of, the poverty and oppression that is widespread in large parts of the world, the cause of which is often traceable through history to former colonial states and, more recently, the neo-colonial system of economic exploitation of poor countries”.

<sup>100</sup> Court of Pesaro, cit., p. 9.

<sup>101</sup> The Pesaro judge, with reference to the right of every human being to seek, even in countries other than her/his own, food and decent living conditions, cites the words of the High Commissioner for refugees who on June 18, 2008, after approval by the European directive on rejections and ejections declared: “it is time to grant the same benefits to those who live with the threat of extreme poverty, hunger and disease, especially epidemics; dangers which they have the right to try to escape”. Court of Pesaro, cit., p. 9.

<sup>102</sup> This is the summary of a document which refers to the Church’s social doctrine, based on the words of Christ: “I was a stranger and you took me in” (Matthew 25, 35). The relevance of elements of a religious nature in judicial decisions must be properly contained so as not to endanger the lengthy process of secularization and secularism achieved by the European legal systems.

<sup>103</sup> For example, there are many extra-judicial references, within the judgments of the European Court of Human Rights on the subject of immigration.

<sup>104</sup> The most interesting sections in this regard are undoubtedly those relating to affirmative action and discrimination against homosexuals.

<sup>105</sup> Even the inter-systemic link allows the Court to show the irrationality of the new legislation art. 10 bis which does not try to justify absence determined by just cause, governed instead by article. 14 para. 5 b of the Consolidation Act on immigration, generating an obvious “unequal treatment of persons charged with similar allegations”. See Court of Pesaro, cit., 10. Even the President of the Republic, in a letter to the President of the Cabinet and the Presidents of the Chambers during the promulgation of Law no. 94/2009 showed strong concern for “the fact that the new theory

7. The interesting judgment of the Pesaro judge documents the impossibility of drawing distinctions between individuals without reasonableness and encapsulates the trend in Italian law to temper and to prevent, thanks to this legal principle, the spread of irrational hypotheses of unequal law into the system. All the most recent and innovative juridical interventions running counter to discrimination against non-EU citizens have chosen reasonableness as a guiding criterion. The rooted, stable presence of this hermeneutic criterion in the framework of Italian law constitutes not only a barrier against the drift towards discrimination, which is increasingly widespread in legislative and administrative practices, but also, as is clear from the previous pages, a contributory factor in the construction of the physiognomy of Italian multiculturalism.

Some very recent examples of legal cases will confirm the spread into the system of various interpretation techniques based on reasonable equity thinking; these techniques could also be used in future to resolve legal issues posed by ethnic and cultural rights and to deal with legal regimes which are differentiated among individuals involved in court proceedings.

The driving forces which the Constitutional Court has expatiated on in recent years are characterised in particular by a great expansive force and an inherent predisposition towards extension by analogy.

The “judge of the laws” has thus selected measured reasonableness and “the weighty criterion of constitutional values”, thanks to its “meta-normative nature (...) and its empirically pivotal role in any principle: it is as if this figure were an integral, structural part of any such principle”.<sup>106</sup>

These features enable the Court to use its reasonableness and its subprincipals,<sup>107</sup> both independently and in connection “with a positive procedural instrument”<sup>108</sup> to interpret the law in a developmental mode and to meet the needs of differentiation which are imposed by modern society.<sup>109</sup>

Regarding equality between co-nationals and foreigners, the principle in question is frequently expounded in the assessment of equality or in the prospect of a *tertium comparationis*, i.e., in “comparison

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of undue detention does not try to justify absence determined by just cause” maintaining that such unjustified absence is hardly compatible with the jurisprudence of the Constitutional Court (Case no. 5 / 2004 and no. 22/2007). On this point see: De Napoli, *La L. 94/09 e il reato di immigrazione clandestina: implicazioni giuridiche e potenziali risvolti nel campo sociale*, in [www.immigrazione.it](http://www.immigrazione.it).

<sup>106</sup> M. Cariglia, *L'operatività del principio di ragionevolezza nella giurisprudenza costituzionale*, in *La ragionevolezza nel diritto*, M. La Torre A. Sword (ed.), Giuffrè, 2002, p. 198. The author gives reasonableness a central role in maintaining a proper balance between the powers of the state, abandoning Montesquieu's thesis and embracing “that of Neustadt who considers the power of the State, alone and executed by three bodies, each required to interact with the others, while respecting their autonomy, but with a view to and the ultimate purpose of achieving a properly functioning system”.

<sup>107</sup> On the constitutional elements of the canon of reasonableness see: F. Modugno, *La ragionevolezza nella giustizia costituzionale*, Editoriale Scientifica, 2007.

<sup>108</sup> Meaning a normogenetic function of the principle of reasonableness M. Cariglia, op. cit., p. 184.

<sup>109</sup> On this point M. Cariglia, op. cit., p. 199 writes: “Reasonableness summarizes and expresses (...) in the most effective way the Constitution's uniqueness, how it is ahead of society and politics, soliciting and promoting internal dynamics, but also demanding constant orientation towards more widely experienced needs”. Fulfilment of the need for legal certainty is safeguarded by the close relationship between reasonableness and reason.

with a similar (...) standard (...), so that where unlawfulness is claimed, there is a foil within the system and the unlawfulness has a functionality which carries a guarantee of internal coherence”.<sup>110</sup>

The phenomenon is similar to the one described in the preceding pages regarding the mixing and linkage of institutions and/or legal categories, where systematic rationality is a decisive factor in resolving the dispute. And finally there are cases in which the Court directly censures the “inherent irrationality” of contested measures.

This dual level of conceptual analysis, which foregrounds reasonableness both as an autonomous principle summarizing the ancient aspiration for equitable justice<sup>111</sup> and as a hermeneutic criterion of interpretation encompassing a variety of interpretative techniques, emerges clearly in decisions concerning the allocation of social benefits to non-EU immigrants.

Already in 2005 the Constitutional Court had to “make it clear that any differential treatment must meet criteria of reasonableness to be assessed in relation to the purposes and functions of the objective actually pursued by the legislator”.<sup>112</sup> In the case in question, the Court’s reasoning focused on a law local to the Lombardia Region, which recognized the right to free public transport for people who have become totally incapacitated because of civil reasons. This promotional measure expressly excluded foreign nationals residing in the region. The Court, in accepting the complaint of unconstitutionality raised by the Court of Prato, does not find within the contested regulatory structure “any specific, transparent and rational justifying cause such as to explain, on a constitutional level, the reasons given for the measure”.<sup>113</sup> Nationality is an altogether arbitrary criterion, inappropriate in establishing a correlation between “the positive condition of eligibility for the benefit (...) and other specific requirements (100% disability and residence) on which recognition of the condition depends and which define its *ratio* and function”.<sup>114</sup> The constitutional judge reverses the argument put forward by the

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<sup>110</sup> C.R. Riva, *Droga e immigrazione: il diritto penale ingiusto, i suoi giudici e i suoi studiosi*, in *Critica del diritto*, 2005, II, p. 229 identifies in the *tertium comparationis* an “internal anchor” that “permits the Court to counter accusations of excessive political discretion, because doing so simply extends a criterion which already exists, rather than basing it exclusively on principles external to subjective regulations”.

<sup>111</sup> An equitable justice with boundaries defined by constitutional values and their balance.

<sup>112</sup> See: A. Caligiuri, *L'accesso ai benefici di natura assistenziale dei cittadini extracomunitari soggiornanti in Italia*, in *Diritto, immigrazione e cittadinanza*, 2009, XI, p. 64.

<sup>113</sup> Constitutional Court ruling no. 432 of December 2, 2005, excludes not only the possibility of discriminating between Italian citizens and foreigners regarding the enjoyment of fundamental human rights, but imposes, even outside of that core, limits on the discretionary power of the legislature, which “is allowed to introduce different schemes regarding the treatment of individuals involved in court proceedings only in the presence of a case law which is not clearly irrational or, worse, arbitrary”. For comment on the judgment see: Arconzo G., *Il processo costituzionale, la ragionevolezza, l'illegittimità consequenziale. Note a margine della sentenza n. 432 del 2005*, in *Giurisprudenza italiana*, 2006, XII, p. 2253.

<sup>114</sup> Constitutional Court, *ibid.* On this point M. Cuniberti., *L'illegittimità costituzionale dell'esclusione dello straniero dalle prestazioni sociali previste dalla legislazione regionale*, in *Le Regioni*, 2006, II, p. 523, stresses that the Constitutional Court considers residence in the Lombardia region “a reasonable criterion for differentiation, in as much as it highlights the relationship between the individual and the territory within which s/he intends to exercise his/her right to move freely (...): the political link between the subject and the national community represented by nationality, does not, on the other hand, appear to be proportionate and appropriate to the purposes of the primary regulation, and thus reference to it in order to limit the number of recipients of the benefit, over and above the intentions that may have

Lombardia region's defence counsel and rules that choices made with regard to service provision, even when they go beyond "essential limits, whether these be for the right to health or benefits concerning civil or social rights, must be considered part of a reasonableness grouping. National state or religious laws may allow for regimes which are differentiated among particular individuals in court proceedings "only in the case of a normative suit which is not obviously irrational or, worse, arbitrary".<sup>115</sup>

The principle of reasonableness stands out from the classical canons of equality and is elevated in Court reasoning to an "objective canon of rationality within the system", capable of toning down and tempering the "disparities introduced by the legislator (...) whatever the nature of subjective situations involved".<sup>116</sup>

This form of interpretation is repeated in 2008 ruling no. 306 where the Constitutional Court declares the obvious irrationality of imposing a condition on "the provision of a carer benefit – eligibility for which consists of (...) total inability to work as well as the inability to walk independently or to carry out everyday essential tasks, the condition being that the beneficiary must carry a document showing her/his legal right to remain (...) in Italy and which shows, among other things, that he or she has an income".<sup>117</sup> Practices such as this contradict the aims of social security and welfare, which characterize the provision of welfare benefits; the only condition which can rationally be imposed on their provision is "that the foreigner's document confirming her/his legal right to be on Italian soil does not show that her/his stay is episodic or short-term". The Constitutional Court also speaks of "intrinsic unreasonableness" in its January 2009 ruling no. 11 which declares unlawful article 80, paragraph 19 of the 2001 Finance Act in the section where it states that "incapacitated foreigners need to be in possession of a temporary resident's permit and to have proof of income in order to benefit from a disability pension".<sup>118</sup> Once again, disparity of treatment seems worthy of censure because making the recognition of a pension benefit conditional on a (temporary) residence permit for which proof of income is a pre-requisite is in direct contradiction with the *ratio* of support underlying the pension benefit scheme and what is considered an Italian citizen's due, "for whom the benefit of a disability pension presupposes that s/he has not crossed a given threshold income".<sup>119</sup>

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inspired such reference (the real need for restraint in spending or rather, more or less openly discriminatory purposes), is objectively capable of producing a discriminatory effect".

<sup>115</sup> Constitutional Court, *ibid.*

<sup>116</sup> The quotations are taken from M. Cuniberti, *op. cit.*, p. 515.

<sup>117</sup> Constitutional Court ruling no. 306 of July 30, 2008. The appeal to the Constitutional Court concerned art. 80, c. 19th, of the Law of December 23, 2000, no. 388 and art. 9, c. 1st, of the Legislative Decree no. 286/98 as amended by art. 9, c. 1st of the Law of July 30, 2002, no. 189, later replaced by art. 1, c. 1, of the Legislative Decree of January 8, 2007, no. 3, covering art. 1 of the Law of February 11, 1980, no. 18.

<sup>118</sup> Constitutional Court ruling no. 11 of January 23, 2009.

<sup>119</sup> Constitutional Court decision, *ibid.* In this case the applicant, though residing in Italy with a valid (temporary) residence permit and although in possession of the requisite health and income conditions of Article. 12, para. 3 of Law no. 412/1991 and s.m.i., was found to be without a (temporary) residence card and the conditions needed to access a pension.

These patterns of thinking are aimed at identifying “the validating cornerstone of the legal edifice so as to keep checks on how it matches up not only to external parameters (constitutional provision) but also to an internal instance of plausibility or persuasiveness: the instance of reasonableness”.<sup>120</sup> They have been widely used even in lower courts in an assortment of cases which run from recognition of nationality/naturalisation to discrimination in allocating units of public housing.

Regarding these two areas in particular, a vision of reasonableness seems to be gaining ground as the meta-normative parameter of conforming to the idea of “justice” or equity, where the balance of interests drawn up by the legislator may be amended and revised.

In the first case, for example, the Veneto Regional Administrative Court accepts an appeal by a Moroccan national who had been denied the granting of Italian nationality, emphasizing how “there is no base in reasonableness and experience for confirming, as the contested measure does, that in 2005 a person might not be completely reliable in terms of public order and civil life, just because, twelve years earlier, he had exhibited a behaviour which had since been decriminalised by the lawmakers, and which therefore was of limited social significance”.<sup>121</sup>

The reasoning adopted by the Administration seems to run counter to the logic of the system<sup>122</sup> and the concept of reasonableness as a fair and rational compromise between conflicting judicial bodies which could be uncovered in the case in question. Compliance with an external justification which is extra-normative in character seems also to be at the forefront in the recent issue of constitutional legitimacy raised by the Lombardy Regional Administrative Court<sup>123</sup> in relation to article 40, paragraph 6, of the d.lgs. dated July 25, 1998, which confirms that, by possessing a temporary residence card or a temporary residence permit lasting at least two years, a foreigner has the pre-requisites allowing her or him access to a unit of public housing.<sup>124</sup> The Administrative Court, while not expressing any “a priori opposition to the laying down of limits in granting particular benefits to non-EU citizens, nevertheless stresses that the criterion allowing a two-year permit seems to be unreasonable because “it is tied to extrinsic circumstances dependent on the discretionary assessments of the Police authority which issues the said permits”. The granting of two-year temporary residence permits is often for reasons related to

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<sup>120</sup> F. Modugno, *op. cit.*, p. 12.

<sup>121</sup> Regional Administrative Court of Veneto, sect. III, ruling no. 3694, 26 November 2008.

<sup>122</sup> Reasonableness is often invoked to reconcile situations that appear conflicting from a logical point of view. Recently, for example, the Regional Administrative Court of Lombardy declared a decision of the Regional Government of Lombardy unlawful in that it excludes from economic contributions granted to families with three or more children those foreigners who do not possess a (temporary) residence card or a long term EU permit on the assumption that “it seems totally unreasonable that to claim an economic benefit usually meant for the least well-off requires a minimum income which in connection with obtaining a residence card cannot be less than the annual social allowance (article 9 of Legislative Decree no. 286/98), thereby making the extent of support provided less incisive, or even completely useless”.

<sup>123</sup> Regional Administrative Court of Lombardia no. 188 of February 9, 2009.

<sup>124</sup> These criteria have been taken from local and regional acts governing the delivery of grants for payment of residential rents.

the contingent labour market -as highlighted by the judge - without any connection to the requirement of staying in Italy over time and on a regular basis.

The adoption of this discriminatory element appears to be irrational and lends itself to unjust disparity of treatment, in violation of article 3 of the Constitution.<sup>125</sup>

In attributing importance to elements which turn out to be arbitrary with regard to the purpose of the social security system, or to be unjustified with regard to requirements linked to the guarantee of public order,<sup>126</sup> all the cases so far described contradict not only the internal logic of the system but also the need for social and material justice, which summarizes the logic of constitutional values and is reflected in the principle of reasonableness. This organising criterion “composes the needs of the actual case, proving to be a particularly effective tool”<sup>127</sup> to meet the needs of differentiation which have emerged in pluralistic society and which insist that the legal system be applied with reasonable equity.

The presence of this principle can lead towards “a mild ethnicisation”, or a gradual transformation of the national juridical framework. The interpretive operations which use reasonable equity as a guiding criterion indeed demonstrate a high capacity to respond to issues identified with minorities, without undermining the fundamental principles of the system. In this sense, the compression of the concept of public order emerges as one of the main implements which the judiciary turns to in order to integrate foreign institutions into the state system. This hermeneutic form finds adequate support in the so called “decontextualised comparison”, which is able to extract from a head-on comparison between laws the *ratio* underlying them and to identify the possible principles of connection between legal systems.

This “maieutic” operation, which is not risk-free, can dispel the prejudicial vision of foreign law and get down to the deep reasons which govern the regulation of individual matters. Within a civil law context, this *modus operandi* may turn out to be essential in the identification of similarities between institutions which, though nominally different, technically perform the same essential function. The functionalist approach, suitably yoked to an investigation of the individual aspects of the people involved, avoids solutions which may lead to unjust disparities in treatment between individuals and has the edge on the rediscovery of natural law as a unifying factor between legal expressions from different geographical and cultural origins.

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<sup>125</sup> The Regional Administrative Court highlights that “the often volatile nature of employment, especially for immigrant workers, means that they often lose a stable job and after a period of unemployment must accept temporary employment even after years of living in Italy” and thus, highlights the Court, “it could be possible (...) for a non-EU citizen, recently arrived in Italy, to acquire from the Quaestor a biennial permit, given a genuine offer of work, while the same decision might not be taken in the case of an immigrant who has lived within our territory for ten years”.

<sup>126</sup> As in the case drafted in relation to the refusal of citizenship.

<sup>127</sup> M. Cariglia, *op. cit.*, p. 195.

Recourse to law which find its legitimisation in the equity of the natural order may, in its logic and its aims,<sup>128</sup> become a privileged channel of communication for the identification of a core of “non-negotiable” principles which can be used to bring about the creolisation of the system<sup>129</sup> and at the same time block the road to “eccentric” solutions which are not adequately covered by the fundamental principles protected by the constitutional Charter.

In this light, the widespread presence of the reasonableness principle within the Italian juridical system facilitates the passage<sup>130</sup> towards equitable solutions allowing for the co-presence of needs and wants relative to minority identities and the need for self-preservation felt by the receiving society.

This constitutes a capacity for mediation, which will have to temper excessive individualisation of the system and abuse of extra-judicial materials in judicial decisions but which will not be allowed to ignore an investigation of the individual profiles of people under examination or an analysis of their actual relations with their original and their receiving communities. This investigation must consider the complexity of value characteristics and experiences adopted and undergone by people in the context of immigration, with the aim of leading the clash of norms and values away from an ideological context and into a more tangible one, one which is in many ways more objective, made up of concrete facts, people and interests.<sup>131</sup>

8. The need to respond to questions posed by intercultural democracy, the necessity of avoiding a distortion of the traditional undertones in juridical systems and the urgency of measuring current transformations so that adjustments may be made, if necessary, in their direction and in how they are undertaken, all of these lead with renewed interest to an examination of the comparison between juridical systems, seen as an investigative tool. Bringing foreign materials to bear and comparing them with the realities of individual rulings is a practice which has been gaining in vigour in recent years in

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<sup>128</sup> Natural law as discussed here is not based on transcendent elements, but is rather a self-evident set of rules that apply universally, as inherent to human reason. The future of European multiculturalism will be played out on the way in which these laws pan out, laws which Grotius called “*dictamen recte rationis*”.

<sup>129</sup> The application of the concept of creolisation to cultural diversity and to the scale of globalization was introduced by the Swedish anthropologist Ulf Hannerz. On this point see: U. Hannerz, *La diversità culturale*, 2001, Il Mulino.

<sup>130</sup> The spread of the principle of reasonableness is a precursor to the explicit reference to natural law in judicial decisions.

<sup>131</sup> Thus, for example, the institution of polygamy in Muslim jurisdiction works as the legal transposition of a religious precept (or a different set of interpersonal relationships), just like monogamy in European countries. A truly secular state should avoid taking a position on this eminently ethical dispute and grant legal protection to both family models. The problem exists today with particular emphasis on family reunification after Directive 2003/86/EC, which prohibits the reunification of polygamous families and even minors with another spouse (no matter if the first or second wife). (This is) a ruling contrary to the basic principles of European legal culture on family law and art. 3 of the New York Convention on the Rights of the Child, whose only effect is to “not deter or combat polygamy, but to suppress any heavy interference with their development and family relationships which are already in place without this being desired by or being beneficial to any of the subjects of those reports”. See the in-depth essay of P. Morozzo della Rocca, *Il diritto all'unità familiare in Europa, tra “allargamento” dei confini e “restringimento” dei diritti*, in *Diritto, immigrazione e cittadinanza*, 2004, I, p. 71.

both national and supranational courts, as unprecedented juridical issues loom large and as the need arises to “seek ulterior, new meanings to be given to texts adopted some time ago”.<sup>132</sup>

In a European context, the phenomena of system integration favour this osmosis-like process which is heavily accelerated in the conflict of values typical of a multicultural society. Inserting a value element into a uniform regulatory context which was essentially conceived for the resolution of conflicts of interest, gives rise to widespread uncertainty which may be newly reflected in factors deriving from a comparative experience.

The use of this methodology is often to be found in the practices of the Court of Justice and the European Court of Human Rights. The former has developed the concept of “European constitutional heritage” and the latter the concept of “common ground”. Reference to the laws of individual national states has nevertheless not thus far permitted the European courts to play a “forward-moving balance” role in the definition of controversies posed by multiculturalism. The reasons for this inability to guide and renew European law have to be sought, in part, in the ways in which foreign materials are used; this use often amounts to the mere conservation of the *status quo ante*. Resorting to references to sources which are not directly connected to the relevant legal system is actually an ancient phenomenon which underwent a remarkable expansion in the age of the great tribunals. Whereas at that time legal experts surveyed decisions (*decisiones*) handed down by European *auctoritas* and chose those which could support solutions appropriate to specific cases,<sup>133</sup> the model proposed by the Strasbourg and Luxembourg Courts is substantially different from the custom in vogue between the 16th and 17<sup>th</sup> centuries.

The phenomenon of circularity in laws originating in EU-wide systems and in the CEDU is based on a quantitative criterion; European judges often choose a solution which, under comparative scrutiny, is in the mainstream of European states. This mechanism can lead to a prioritisation of motivations which have a greater political consensus, to the detriment of the efficiency and efficacy of the proposed solution.<sup>134</sup>

This choice is rather short-sighted choice because the sensitive webs of problems suggested by the meeting of different cultures are not at all likely to be resolved by recourse to quantitative-accounting methods; they require the development of a guiding model, based on balanced solutions picked out

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<sup>132</sup> S. Bartole, *Il ricorso al diritto comparato*, op. cit., p. 231. Even in preparatory work on legal texts, reference to foreign materials is increasingly frequent.

<sup>133</sup> For more depth on this see: M. Fioravanti (ed.), *Lo stato moderno in Europa. Istituzioni e diritto*, Laterza, 2002; A. Cavanna, *Storia del diritto moderno in Europa. Le fonti e il pensiero giuridico*, Giuffrè, 1982. On the role of major Tribunals in the European process of sub specie interpretationis unification see the important study by G. Gorla, *Diritto comparato e diritto comune europeo*, Giuffrè, 1981.

<sup>134</sup> In this *humus*, debatable judgments were worked out, such as those issued by the ECHR in the field of religious symbols. With reference to the European Court of Human Rights and in the context of multicultural society, one school of thought emphasizes the need for a “tighter European control, reducing the extent to which the Member States of the Convention are taken into account, because this is about laying the foundations, forming an ample basis for ‘normalized’ coexistence in Europe between people of different cultures”. On this point see: V. Cuccia *La manifestazione delle convinzioni religiose nella giurisprudenza della Corte europea dei diritti dell’uomo*, in *La comunità internazionale*, 2006, III, p. 576.

from among those which have been best established at national level or created *ad hoc* in order to resolve specific questions.

Comparative law should guide this procedure, which can amplify the High Courts' authority and contribute to the construction of an authentic intercultural democracy, based on the "right to not be equal" and on the "duty to respect all forms of diversity which do not imply the denial of other diversities".

The Italian judicial model seems to have been oriented towards this founding schema which draws nourishment from a vision of the possible existence of a "mild law", which could regulate a multicultural society via the creation of flexible laws, outline or "narrative" laws, as Jayme would have it, which "tend to be structured as rules of compatibility between cultures and values rather than as a rule of definitive prevalence and of the imposition of only one of the positions in play".<sup>135</sup>

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<sup>135</sup> S. Rodotà, *Repertorio di fine secolo*, Laterza, 1992, p. 161.