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POLITICAL PARTICIPATION AND REPRESENTATION OF THE MUSLIM POPULATION IN EUROPE^{***}

Leonardo Lage – Maria Chiara Locchi

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The article deals with the topic of political participation and representation of Muslim communities in European democracies as a relevant aspect of the multiple transformations generated by the increasing cultural and religious diversity in European political and legal systems. The question is addressed by both a Western and Islamic legal perspective: with respect to the first one, by outlining some political and legal factors that are likely to affect the active presence of European Muslims in the political arena and identifying some main rationales that could allow for restrictions and prohibitions against this presence in consolidated democracies; as for the second one, by discussing the notion of fiqh al-aqalliyat (“fiqh for minorities”) and exploring the different views on political participation of Muslim communities in Europe.

INTRODUCTION

The impact of the increasing cultural and religious diversity on European immigration countries’ political and legal systems has long been a hot topic of both public debate and academic reflections. Within the legal doctrine, in particular, the focus is mostly on investigating the actually crucial role played by (constitutional, supranational and international) courts in responding to the claims of historically marginalized minorities and groups in multicultural societies, while the transformation of political participation and representation in European pluralistic and multicultural democracies turns out to be an aspect comparatively less addressed by law scholars. It is true that the concrete and case-by-case judicial approach proves in many ways to be the most suitable for addressing the controversial issues relating to cultural and religious accommodation, filling the gaps too often left by legislators in dealing with the many questions raised by super-diversity¹. The retreat of democratic politics from the regulation of critical aspects of coexistence in super-

* The paper has been selected and reviewed by the Scientific Committee of the Conference "Costruendo un vocabolario minimo dell’interculturalità con approccio interdisciplinare”, held on May 19, 2021 via Zoom platform, within the research activities of the PRIN 2017 “From Legal Pluralism to the Intercultural State. Personal Law, Exceptions to General Rules and Imperative Limits in the European Legal Space” (PI–prof. Lucio Pegoraro–CUP J34I19004200001).

** The paper is the result of discussions and shared reflections between the two authors; however, sections 1, 2, 3 are attributed to Maria Chiara Locchi, while sections 4 and 5 are attributed to Leonardo Lage.

¹ S. Vertovec, *Super-diversity and its implications*, Ethnic and Racial Studies, 6, 1024-1054 (2007).

diverse societies, however, does not justify the little scholarly attention paid to the tensions and conflicts which have been affecting fundamental legal principles and categories – such as “democracy”, “political representation”, “pluralism”, “citizenship” – for some time now. These tensions and conflicts appear to be mostly fueled by the presence of Islam in the public space and, under the conditions that will be explored, in the political arena of European immigration countries, where the process of secularization was expected to have definitively relegated religion to the private sphere. Instead, there are relevant signs of a renewed centrality of religion in politics, and Islam is undoubtedly the privileged reference of both minority (religiously oriented) groups and, with a reactive stance, right-wing populist parties invoking Christian values as a marker of European identity. Nevertheless, trying to detect the multifaceted character of “Islam in Europe” proves to be a challenging task – in general terms and, even more, in relation to the issue of political participation and representation.

In order to increase the knowledge on such an articulated set of questions we’ll start with an overview of “European Islam”’s many declinations in order to shed light on some factors that affect its complexity (section 1). In the following paragraphs the issue of Islamic communities’ political participation and representation will be addressed by identifying the main political and legal factors that affect the active presence of Muslims in the political arena of European democracies (section 2) as well as analyzing some main rationales that may legitimately justify restrictions, in constitutional States devoted to democratic principles and liberties, to the Islamic presence at the political level (section 3). The article also highlights the debate surrounding the notion of *fiqh al-aqalliyat* (section 4) and its occurrence in Islamic views on political participation of Muslims in the West (section 5).

I. WHAT WE TALK ABOUT WHEN WE TALK ABOUT “EUROPEAN ISLAM”

As of mid-2016 the Pew Research Center estimated the Muslim population in Europe (to this end including the United Kingdom, Norway and Switzerland) at 25.8 million (4.9% of the overall population), a number that has increased since 2010 (when it was 19.5 million - 3.8%) and is expected to further risen by the 2050, even with a “zero migration” scenario (to 7.4%)².

² Pew Research Center, *Europe’s Growing Muslim Population*, November 29, 2017, <https://www.pewforum.org/2017/11/29/europes-growing-muslim-population/>.

Providing a comprehensive picture of this population of almost 30 million people proves to be impossible since the highly differentiated features of European Islam prevents the identification of unitary trends; in fact, not only the origins of the presence of Muslim communities in European countries are marked by relevant differences (in terms of the time of their creation and the geographical areas of origin of the population), but the complex processes of interactions and reciprocal adaptations with ethnic and religious majority population as well as with the legal and political institutions of European States have also contributed to increase this diversity³. The inner plurality of European Islam, which stands for a fluid and “porous” conception of cultural and religious identity, is also reflected by the syncretism of theological doctrines and religious practices: as Zahalka effectively remarks, European Muslims «might pray at a mosque with a *salafi* imam, seek the answers to their questions from *wasati* leaning religious adjudicators, and read *sala* literature, all while imitating the general, non-Muslim population in their everyday lives»⁴. As we shall see, the issue of political participation and representation of European Muslims in EU constitutional States is not an exception to this variegated picture, to the extent that most “Muslims” in sociological terms⁵ «do not take active roles in debates about Islam, do not always highlight that dimension of their identity in their everyday lives»⁶.

Trying to comprehend the complexity of European Islam requires to start from its definition itself, which has been developed by a plurality of Muslim thinkers: while Hashas argues that «European Islam is possible theologically and politically», to the extent that “Islamic” theological and theoretical concepts are reinterpreted and recontextualized in “European” politics and societies⁷, Cesari hopes that the concept could mean the «symbolic integration of the Islamic heritage and cultural practices within different European national cultures without endangering the basic principle of equality between citizens»⁸.

The distinctive feature of European Islam is being a “minority Islam”, in terms of Muslim communities residing in non-Islamic countries. This very “fact”, and its consequences in relation to the application of Islamic law on a personal (rather than territorial) basis, has been differently conceptualized by those Muslim intellectuals who have been reflecting on

³ See the monographic issue of *Oasis*, 28 (2018), dedicated to *Musulmani d'Europa. Tra locale e global* and, in particular, J. S. Nielsen, *L'Islam europeo. Tendenze e prospettive*.

⁴ I. Zahalka, *Shari'a in the Modern Era. Muslim Minorities Jurisprudence* 139 (2016).

⁵ That is to say people whose cultural and religious background is related to the Islamic tradition, even if they are not actual “practicing believers”.

⁶ J. R. Bowen, *Can Islam be French? Pluralism and Pragmatism in a Secularist State*, 11 (2010).

⁷ M. Hashas, *The Idea of European Islam. Religion, Ethics, Politics and Perpetual Modernity*, 3 (2019).

⁸ J. Cesari, *Conclusion: Is There a European Islam?*, in J. Cesari (ed.), *The Oxford Handbook of European Islam*, 805 (2015).

the relationship between European Muslim communities and State institutions and, in particular, on the role of Islam in the public and political space of European States⁹. To name only a few of the most influential Muslim thinkers who have contributed to this debate in recent years, and without intending to be exhaustive, their diverse positions range from Bassam Tibi's secularized "Euro-Islam" (which rejects Islamism and embraces "cultural modernity" as based on secularization of politics, endorsement of individual human rights and pluralism¹⁰), to Tariq Ramadan's quest for a "radical reform" aimed at, among other aspects, considering Europe as a "space of testimony" (*dār al-shahāda* – where Muslims have to live their faith publicly and are allowed to enjoy the rights to found their own organizations and to autonomous representation, within a conception that reconciles «loyalty to one's faith and conscience» and «loyalty to one's country»¹¹), including Tareq Oubrou's focus on the need for a "geotheology" as a theology that considers (geographical and temporal) "local" conditions in order to develop a situated version of living Islam and gets to relativize and "ethnicize" Islamic law itself (*shari'a de minorité*)¹².

The issue of Islam's accommodation to secular and liberal European States has been also addressed, within the theoretical context of European Islam, by a rather different perspective, that of *fiqh al-aqalliyat* ("fiqh for the minorities" – see *infra*, section 5). Even if the scope of this "minority Islamic jurisprudence" is still the integration of Muslims into Western societies (and, to this end, a special attention is given to Muslims' full and active political participation), the paradigm employed is that of "religious minority", which implies the idea of preserving and potentially reinforcing identity without specifically engaging in the establishment of a "European Islam"¹³.

European Muslim communities thus appear highly differentiated with regard to their organization, public discourse as well as typology and extension of their demands to the

⁹ For a thorough analysis of the extent to the contribution of European Islamic theology to the debates related to secular-liberal democracies of Western Europe see M. Hashas, *The Idea of European Islam*, cit.

¹⁰ See, in particular, B. Tibi, *The Challenge of Fundamentalism: Political Islam and the New World Disorder* (1998) and Id., *Political Islam, World Politics and Europe* (2008).

¹¹ T. Ramadan, *To be a European Muslim*, 172 (1999). According to this view «Implementing the Shari'a, for a Muslim citizen or resident in Europe, is explicitly to respect the constitutional and legal framework in the country in which he is a citizen [...] the Shari'a requires honest citizenship within the frame of reference constituted by the positive law of the European country concerned», *ibidem*.

¹² L. Babes, T. Oubrou, *Loi d'Allah, loi des hommes: liberté, égalité et femmes en islam*, 95 (2002); T. Oubrou, *Un imam en colère: intégration, laïcité, violences* (2012).

¹³ M.S. Berger, *A Brief History of Islam in Europe: Thirteen Centuries of Creed, Conflict and Coexistence*, 211 (2014): «Among Muslims it is a matter of debate whether they are to perceive and organize themselves as a religious minority (as is argued by the prominent Muslim cleric shaykh Qaradawi) or as European citizens with a distinctive Islamic identity (as is argued by the equally prominent Muslim intellectual Tariq Ramadan)». Ramadan expressly rejected the "minority" paradigm by considering that «the minority concept is inoperative: there is no such thing as 'minority citizenship'. They (Muslims) must therefore overcome this 'minority' mindset and fully participate in society on an equal footing with the 'majority'», T. Ramadan, *What I believe*, 58 (2009).

State. This differentiation, as we already observed, surely depends on their internal debate on the conditions and characteristics of a possible adaptation of Islamic principles and rules to the specific and local context in which Muslims are a minority population¹⁴, but it is also affected by the various models of State-religion relationships in Europe.

In France, for example, the fundamental principle of secularism, in its “militant” version (*laïcité de combat*), has been interpreted as implying, on the one hand, that the State does not recognize any religion and must be neutral towards all religions and, on the other hand, that no one can use his religious creed in order to overcome the common norms governing the relationship between public authorities and individuals¹⁵. The focus on the *assimilation* to the Republican values results in the active opposition to (the alleged) Muslims’ tendency to communalism, in terms of creating their own Islam-based associations (such as mosques or schools) and following religious values and rules instead of (or even in addition to) State law. The 2021 “law strengthening the respect for the principles of the Republic”¹⁶ is the last piece, on the State side, of the complex *puissance* of French model of Muslims’ integration: by reconnecting with the 1905 law on the separation between Churches and the State, the Bill aims to be «un élément structurant de la stratégie gouvernementale pour lutter contre le séparatisme et les atteintes à la citoyenneté» and to foster individual emancipation against identity essentialism¹⁷. If Islam is not expressly mentioned in the Bill, the *Exposé des motifs* identifies the threat represented by the «insidieux mais puissant entrisme communautariste» which is «pour l’essentiel d’inspiration islamiste» as the «manifestation d’un projet politique conscient, théorisé, politico-religieux, dont l’ambition est de faire prévaloir des normes religieuses sur la loi commune que nous nous sommes librement donnée». Some observers have been criticizing the illiberal character, or at least the “quasi-religious” nature, of such a radical anti-communitarist position¹⁸, which undoubtedly makes it more difficult, for practicing French Muslims, navigating «between two spatially distinct realms of

¹⁴ The difficulty of taking a position on the very controversial issue of “creative” interpretation of scriptures, so as to derive general principles from specific rules given in scriptures and adapt them to the local context and present time, appears to be higher in those countries where the public expression of cultural and religious identity is stigmatized, if not prohibited.

¹⁵ Dec. 2004-505 of the French Constitutional Council, 19 Novembre 2004, par. 18. Nevertheless, as a liberal and democratic constitutional State, France protects religious freedom as a fundamental right, under both national constitutional and international provisions.

¹⁶ Loi n° 2021-1109 du 24 août 2021 confortant le respect des principes de la République.

¹⁷ *Compte rendu du Conseil des ministres du 9 décembre 2020*, [Communiqué de presse du Conseil des ministres du 9 décembre 2020](#). The Bill is organized around two main axes: first of all, it aims to guarantee the respect for the Republic’s laws and principles in all those areas exposed to the risk of separatist influence; secondly, it aims to update the system of organization of worship resulting from the 1905 Law.

¹⁸ See, among others, F. Khosrokhavar, *Le débat censuré*, Orient XXI, 5 novembre 2020, <https://orientxxi.info/magazine/le-debat-censure,4262>

justification: a transnational one, based on the norms and traditions of Islam, and a national one, based on the civic values of France»¹⁹. The issue of political participation has been also debated in the context of this legislative process: in March 2021 the Senate had amended the text introducing an explicit, and highly controversial, ban on “communitarian lists”²⁰; the ban wasn’t included in the final draft of the *loi*, whose Art. 35-1 forbids to hold political meetings as well as to display, distribute or disseminate electoral propaganda in facilities normally used as a place of worship.

The British model of State-religion relationship and integration of diverse communities, as is well known, is based on a profoundly different approach, which may be framed as “pluralist” or “multicultural” to the extent that it tries to promote an open and inclusive citizenship while enforcing cultural rights of minority groups. If, in a first stage, multiculturalist policies could be politically explained with liberal elites feeling guilty about colonialism, the communitarian approach in accommodating cultural and religious diversities of the population with migrant background has been consolidating over time. The British legal system can thus be viewed as oriented to both eliminating *de facto* discriminations by ensuring equal opportunities and taking ethnic, cultural and religious differences into account²¹. Cultural rights and equal opportunities for minority communities, in particular, have been mostly developed at the local level, thanks to the crucial contribution of ethnic-based associations; religious and ethnic-based organizations, sometimes in collaboration with local authorities, have successfully lobbied for “positive actions” in order to help members of under-represented groups to overcome disadvantages in competing with other applicants, e.g. for the purpose of recruitment, both in the public and private sector, or in accessing social care²². The British experience has been therefore marked by a relevant presence of minority groups in civil society and political arena; Muslims have been politically active since their arrival in Britain, back in the 19th century,

¹⁹ J.R. Bowen, cit., p. 6-7: « France contains a tension, if not a contradiction, between its Republican political model and the way religion minded citizens organize their lives. In the ideal world of Republican France, everyone develops similar values and orientations by participating in public institutions, starting from their education in state schools. This direct, sustained contact between the state and the individual underwrites the dual capacity to live together and to deliberate in rational fashion, because everyone lives and reasons starting from the same first principles. On this view, intermediate institutions such as voluntary associations, private schools, and religious practices are to be discouraged, lest they nourish divergent values and create social divisions».

²⁰ The *listes communautaires* are framed with regard to one or more candidates having made public statements contrary to the principles of national sovereignty, democracy or secularism in order to support the demands of a “portion” of the people based on the ethnicity or religious affiliation.

²¹ A. Rinella, *La shari'a in Occidente. Giurisdizioni e diritto islamico: Regno Unito, Canada e Stati Uniti d'America*, 73-74 and 177 ff. (2021).

²² See C. Joppke, *Immigration and the Nation-State: The United States, Germany, and Great Britain*, 208 ff. (1999), and Id., *Is multiculturalism dead?*, 127 ff. (2017).

even if their political engagement has risen as a reaction to growing Islamophobia in 1988-1989 (after the *The Satanic Verses* affair) and more recently after 9/11 and the ‘War on Terror’²³.

Germany and Italy are, for their part, characterized by yet another different migration history and integration policies.

In Germany the “differentialist turn” of the 1980’s and 1990’s deeply questioned the concept of “assimilation”, with all its burdensome legacy in terms of “forced germanization”. On the side of the citizenship’s acquisition, in 2000 the nationality law was reformed by relaxing the “right of blood” (*ius sanguinis*) in favor of the “right of birthplace” (*ius soli*) and allowing, albeit in exceptional circumstances, dual citizenship; as for integration policies, the communitarian approach implemented within the *Gastarbeiter* model has proved to be functional to a “detached tolerance” and institutionalized separation between nationals and immigrants. The *focus* of cultural and religious minorities’ integration policies was on social rights, and in particular on school (with the introduction of a specific curriculum on immigrants’ language and religion of origin) and social welfare (engaging immigrants’ associations and communities, including Muslim ones, to provide for social benefits)²⁴. The increasing visibility of Islam and its place in German civil society and public space, especially from the 1990’s, led to a growing identification with Islam among immigrants themselves: from this perspective, «the growing interest of Muslims in becoming members of political parties and contributing to the media as well as the developing influence of Islamic associations in public life can be interpreted as an increasing naturalization of Islam in German society»²⁵.

The Italian approach to the integration of Muslims is hardly correspondent to a real model: the Italian “non-strategy”, based on a non-aggressive version of secularism, quite paradoxically has allowed Muslim migrants to integrate themselves into society in a relatively natural way. Accordingly, while in many European countries second or third

²³ T. Peace, *Muslims and Political Participation in Britain*, xv (2015).

²⁴ A. Rinella, cit., 70-71.

²⁵ G. Nordbruch, *Germany: Migration, Islam and National Identity*, 11 (2011). These developments haven’t occurred without resistance, as demonstrated by public debates on the (alleged) threat to German “lead culture” (“*Leitkultur*”), “Christian-Occidental culture” (“*christlich-abendländische Kultur*”) or “Judea-Christian civilisation” (“*Jüdisch-christliche Zivilisation*”) posed by cultural and religious minorities’ practices and demands. The focus on “*Leitkultur*” has been at the heart of the reflections of one of the most important European Muslim intellectuals, the already cited Bassam Tibi: in his 1998 book *Europa ohne Identität (Europe without identity)*, he defined the concept in terms of what are commonly called “Western values”, framing it as a *European*, rather than German, “*Leitkultur*” and identifying as its building blocks the values of modernity, democracy, secularism, the Enlightenment, human rights and civil society (B. Tibi, *Europa ohne Identität*, 154 (2000)).

generation Muslims, by holding national citizenship of a EU State, may refuse to feel part of the society in which they grew up, in Italy the children of Muslim migrants, born in the 1990's, are asking to be recognized as an integral part of the society in which they live and, more precisely, to be recognized as "citizens of Islamic faith"²⁶. The absence of harsh conflicts with State institutions in the integration process of Muslim migrants, on the other hand, does not automatically mean the dilution of their religious identity, which, on the contrary, can be mobilized as a resource for civic and social action, thus investing public space and contributing to change it²⁷. While in recent years the activism of the various associations aiming at representing the Italian Muslim community has led to the intensification of the institutional dialogue with the State, political participation and representation does not seem to have undergone any significant development²⁸. In fact, the existing scholarship on Italian Muslims suggests that, even though they are more involved with political activities than they were two decades ago²⁹, their political participation remains «surprisingly limited»: Italian Muslim communities remain less engaged compared to Muslims in France and the UK and face strong and growing anti-Muslim sentiment, without their political activism leading to a notable impact in national politics³⁰.

Lastly, the variegated picture of European Islam is also related to the different ways of its "institutionalization", an articulated concept that encompasses the plurality of political and institutional "actors" aiming at representing Muslim communities' interests and demands³¹. These different instruments and subjects may range from "Muslim public actors" freely

²⁶ B. Conti, *L'Islam in Italia, tra comunità e cittadinanza*, in *Oasis*, 28, 67 (2018).

²⁷ M. Brignone, *L'Islam in Italia, tra partecipazione civica e reti transnazionali*, in *Quaderni di diritto e politica ecclesiastica*, 1, 18 (2019).

²⁸ In 2017 an "Islamic constituent (assembly)" (*Costituente islamica*) has been instituted, in order not to act as a political party but to represent Italian Muslims as an "ente esponenziale" (a representative body aiming at protecting collective interests); as of March 2021, however, the *Costituente islamica* does not seem to be operational. In 2020 the creation of a new Islamic electoral list, the *Nuova Italia*, was announced: the new political movement, based in Magenta (in the metropolitan area of Milan), is expected to run for the 2022 administrative elections.

²⁹ For example, protests and non-electoral means of participation, voting and running for office, building Muslim civic and political organizations (such as the UCOII – Union of Islamic Organizations and Communities in Italy; the COREIS – Islamic Religious Community; the GMI – Young Muslims of Italy; the ASMI – Association of Muslim Women in Italy).

³⁰ J. Pupcenoks, *The Difficulties of Italian Muslim Political Mobilization: Anti-Muslim Sentiment and Internal Fragmentation*, in *Journal of Muslim Minority Affairs*, 2, 233-249 (2021). The main challenges to participation, in particular, are represented by the extremely negative popular opinion of Islam and discrimination against Muslim as well as by great internal fragmentation within the Italian Muslim communities themselves.

³¹ For a taxonomy «on the basis of the approach used by state or promotion of these bodies» see S. Silvestri, *Public policies towards Muslims and the institutionalization of 'Moderate Islam' in Europe. Some critical reflections*, in A. Triandafyllidou (ed.), *Muslims in 21st Century Europe*, 51 (2010).

active within Muslim communities in European countries³² and associations spread out from a strong civil society mobilization³³ to Islamic representative bodies and/or forums for dialogue aiming at consulting with the State on matters affecting Muslim communities³⁴ and organizations institutionally linked to migrants' countries of origin³⁵.

II. POLITICAL AND LEGAL ISSUES AFFECTING EUROPEAN MUSLIMS' PARTICIPATION AND REPRESENTATION

Classic academic studies on political participation of migrant background communities in Western democracies have been highlighting the plurality of channels for migrant and minority participation and representation; Miller's analysis, for example, which dates back to 1981, identifies the following five main ways: «homeland influence», in terms of the involvement of migrants in the political affairs of their native societies, which proves to be of potential political significance also to receiving countries; «extra-parliamentary opposition» performed by engaging protest rallies, hunger and rent strikes, petitioning,

³² Bowen identifies different types of "Islamic public actors", «each with specific claims to legitimacy and specific bases in social institutions, particularly religious schools, mosques (imams), and Islamic associations», since the traditional Islamic institutions that define specific authorities (such as *muftis*, *'ulamā*, and *faqīhs*) are «virtually absent from Europe», J. R. Bowen, cit., 24.

³³ The CEM (Council of European Muslims), based in Brussels, for example, defines itself as a «cultural organization», «the largest Islamic organization in Europe», bringing together hundreds of varied associations with the aim of «publicising Islam, inspiring and supporting Europe's Muslims to practise the rituals of their faith, and participate effectively in the varied aspects of life, within a frame of moderate understanding and a reformist, innovating approach». For a critical analysis of the CEM see G. Spanò, *Islamic activism: between representation and representativeness. Two case studies in Europe*, in *Revista General de Derecho Público Comparado*, 29, 1-31 (2021).

³⁴ In the 1980's and 1990's many European governments (e.g. France, the Netherlands, Belgium and Germany) tried to find ways to organize Muslim representation: although these attempts were not always successful, they had the benefit of being a good learning experience for both government and Muslim groups. According to S. Cherribi, *Islam and Politics in Europe*, in J.L. Esposito, E. El-Din Shahin (eds.), *Oxford Handbook of Islam and Politics*, 285 (2013), while «governments understood the difficulty in one representative body for all Muslims because of their diversity», «Muslim groups understood the logic of governments». See, for example, the *Conseil français du culte musulman*, the *Comisión Islámica de España*, the *Deutschen Islam Konferenz*, the *Consiglio per le relazioni con l'Islam italiano*, the *Muslim Council of Britain*. There are also many critical voices pointing out how, when a top-down approach is followed by State institutions, Muslim communities' institutionalization processes end up undermining the original character of such organizations and contributing to create "artificial" institutions, see F. Fregossi, *L'Islam en Europe, entre dynamiques d'institutionnalisation, de reconnaissance et difficultés objectives d'organisation*, in *Religions, Droit et sociétés dans l'Europe Communautaire*, 91-117 (2000).

³⁵ See, for example, the interesting example of the Moroccan Council of '*Ulamā*' for Europe (and its Brussels-based local section - the European Council of Moroccan Ulema) as part of Moroccan "diaspora policies", F. Tamburini, *The Moroccan Council of 'ulamā' for Europe: the development of a "remarkable model" of Islam for Europe or just another form of state control on religion?*, in *Revista General de Derecho Público Comparado*, 29, 1-27 (2021).

picketing, etc., thanks to freedom of speech, press and assembly protected by Western constitutions; «ability to join unions and to vote and especially if given representation in union and factory elections», which allow foreign workers to influence questions of economic and social policy; participation, both direct and indirect, in «indigenous organizations» such as political parties, civil rights groups and religiously-affiliated organizations; «institutionalized consultation» of migrant and minority interests when interacting with public institutions at local, regional or national level³⁶.

The impact of Muslim communities on the politics of Western democracies, in terms of both political participation and representation, is proving to be just as multifaceted and needs to be appreciated by considering the many political and legal factors able to affect the quantitative and qualitative dimension of their active presence in the political arena³⁷.

Leaving aside the (purely political) question of a “Muslim vote”, namely the electoral behavior of European Muslims or immigrant citizens of Muslim origin³⁸, a first relevant aspect is the presence of “Muslim politicians” within European political parties, both secular and religiously oriented.

As for the formers, Muslim citizens may wish to join a political party whether they belong to groups or associations whose ideological orientation is closely linked to “political Islam” or not; in this last case they eventually may prefer not to declare their Islamic background and refuse to be identified as “Muslims” in the political arena³⁹. With respect to these situations, from a legal perspective, a problem may arise with regards to the possible religious discrimination, by political parties, against Muslim citizens, insofar as they may be, directly or indirectly, excluded or disadvantaged *as Muslims*.

As we shall see in the following paragraph, in consolidated democracies political parties’ statutes and internal regulations generally do not include restrictive clauses on the basis of ethnic or religious affiliation. In some countries this trend is strengthened by specific

³⁶ M.J. Miller, *Foreign Workers in Western Europe: An Emerging Political Force* (1981), and Id., *The Political Impact of Foreign Labor: A Re-evaluation of the Western European Experience*, in *The International Migration Review*, 1, 27-60 (1982).

³⁷ See V. Colombo, *Political Islam and Islam in politics in Europe*, in *European View*, 12, 143-144 (2013).

³⁸ Although some studies on the so-called “Muslim vote” have been already implemented in some EU countries, the question surely needs a more adequate and comprehensive investigation. In any case, in general terms, «thus far Muslim citizens have generally voted for traditional mainstream parties», M. Martiniello, *Political participation, mobilisation and representation of immigrants and their offspring in Europe*, in R. Bauböck, *Migration and Citizenship Legal Status, Rights and Political Participation*, 93 (2006).

³⁹ See M.S. Berger, *A Brief History of Islam in Europe*, cit., 211, who observes that generally «the representation of Muslims in political positions, like municipal councils, parliaments or government, is [...] often not on a religious ticket as ‘Muslim’, but on a political ticket such as socialist, liberal and even Christian Democrat».

legislative provisions, e.g. anti-discrimination law: in the UK, for example, although political parties enjoy a wide freedom in determining their organizational structure and internal functioning, the 2010 *Equality Act* represents a relevant source of limitations, also addressing those, within political parties, who provide a service or carry out a function⁴⁰. Anti-discrimination law primarily concerns political party's membership, which cannot be refused (or granted on less favorable terms) on the basis of a protected characteristic, such as religion. Other relevant aspects affected by the *Equality Act* are, on the one hand, the possibility for parties to undertake positive actions aimed at overcoming particular groups' under-representation within elected bodies and, on the other hand, data monitoring on candidates' "diversity". Even in light of these legal obligations, the main British parties have generally adopted internal codes of conduct binding MP's, party officials and members to the respect of equality of chances, diversity, and tolerance⁴¹.

Obviously, the lack of formal restrictive clauses on party membership does not automatically imply that Muslim citizens actually do have an effective space for political participation on equal terms: an example of this is the 2019 German debate on the speculation about the possibility of a Muslim chancellor in 2030, put forward, as a matter of fact, as little more than a joke during an interview by Ralph Brinkhaus, the CDU (Christian Democratic Union) parliamentary group leader. In response to the positive answer by Brinkhaus ("Why not, if they're a good politician, and they represent our values and our political views?"), the absolutely negative positions expressed by other important members of the party demonstrate how challenging, if not inadmissible, the idea of high-level Muslim political participation still proves to be⁴².

As for Islamic oriented parties, in several European immigration countries there are political parties and movements that aim to represent the interests of Muslim citizens and

⁴⁰ See, in particular, the *Equality Act's* sect. 101, 104 and 158, which prohibit discrimination based on age, disability, race, religion and belief, sex, sexual orientation, gender reassignment, pregnancy and maternity, marriage and civil partnership. The 1968 *Race Relations Act* did not extend to political parties, except in relation to the recruitment of employees or the supply of goods and services to the public (eg. through a club or bar). A first step forward was represented, already in 1976, by the *Race Relations Act*, which had extended the prohibition of racial discrimination to any association with more than 25 members, including non-profit associations, in relation to the behavior towards potential members and the provision of goods and services to members.

⁴¹ See the Appendix 9, dedicated to the *NEC Codes of Conduct*, of the *Labour Party Rule Book 2020* and the *Code of Conduct for Conservative Party Representatives*. The *Labour Muslim Network* (LMN) is an inclusive organisation which seeks to promote British Muslim engagement with the *Labour Party* and in the political process; in July 2021 the first Islamophobia code of conduct in the history of the *Labour Party* has been adopted, supplementing the aforementioned Appendix 9.

⁴² *A Muslim as German chancellor? CDU leader slammed for saying 'why not'*, Deutsche Welle, 07.03.2019, <https://www.dw.com/en/a-muslim-as-german-chancellor-cdu-leader-slammed-for-saying-why-not/a-47813302>.

residents; in some countries of Southern and Central-Eastern Europe (as Greece, Bulgaria, Romania) Islamic oriented parties are more likely to be connected to Turkish minorities. The very notion of “Islamic oriented parties” is actually quite challenging: it may be broadly defined starting from the notion of “religiously oriented parties” proposed by Ozzano and Cavatorta⁴³, and thus related to the indeed disputed concept of “political Islam” as «any political movement or doctrine that advocates the pertinence and legitimacy of giving public voice to Islamic values, interests, arguments, and preferences»⁴⁴. Understood in this broader sense, the catch-all term “Islamist”, associated to organizations, movements and political parties, is likely to be controversial as it potentially covers «any form of political activism or theorizing justified using an Islamic vocabulary [...]», with the effect of «tainting Muslim activism as inherently anti-democratic»⁴⁵. In light of these pitfalls, some authors prefer to refer to this notion with the aim of identifying a «distinctive form of Muslim politics» which is intended to establish an «Islamic political order in the sense of a state whose governmental principles, institutions, and legal system derive directly from the *shari'ah*»⁴⁶: it is quite clear that not all Islamic oriented parties are “Islamist” in this narrower sense. One of the major problems in referring to “political Islam”/Islamism” as umbrella terms is that they actually encompass practical expressions of what it may even be a common ideological matrix but inevitably is confronted with the variety of social and political (local) contexts. If this holds true for Islamic countries⁴⁷, it is even more the case for Western states, where Muslims often represent fewer than 5% of the population with

⁴³ The two Italian political scientists define “religiously oriented parties” as «political parties focusing significant sections of their manifestos on “religious values”, explicitly appealing to religious constituencies, and/or including significant religious factions», L. Ozzano, *The many faces of the political god: a typology of religiously oriented parties*, in *Democratization*, 5, 810 (2013).

⁴⁴ T. Lindholm, *The Strasbourg Court Dealing with Turkey and the Human Right to Freedom of Religion or Belief: An Assessment in Light of Leyla Şahin v. Turkey*, in W.C. Durham Jr, R. Torfs, D. Kirkham, C. Scott (eds.), *Islam, Europe and Emerging Legal Issues*, 162 (2012).

⁴⁵ S.H. Jones, *Islam and the Liberal State. National Identity and the Future of Muslim Britain*, 36 (2020).

⁴⁶ P. Mandaville, *Islam and Politics*, 73-74 (3rd ed. 2020), who stresses how Islamists greatly differ in methods and priorities: while many of them have taken the form of political parties and social movements seeking to achieve an Islamic political order «via political (electoral, legislative, power-sharing) or social (civil society, informal networking) means», radical Islamists combines «a vision of Islamic political order that rejects the legitimacy of the modern sovereign-state and seeks to establish a pan-Islamic polity or renewed caliphate» with «an emphasis on violent struggle (*jihad*) as a primary or even the exclusively legitimate method for the pursuit of political change», 345-346.

⁴⁷ J.M. Owen IV, *Confronting Political Islam. Six Lessons from the West's Past*, 47 (2015): « Islamists do share the general goal of making Sharia the actual positive law of their societies. But Islamists come in many different varieties. Some are Arab, others Persian or Pashtun or Bengali. Some are Sunni, others Shia. Some practice terrorism, others work through peaceful means. Some are nationalists, others internationalists or imperialists. Cutting across all of these groups are deep disagreements as to who has the right version of Sharia, and who gets to say so. And some Islamists regard other Islamists as enemies. Enmity between the Taliban and Iran's ruling regime is long-standing and deep. One of the Saudi dynasty's most lethal enemies is al-Qaeda. Both of these regard Iran as an enemy [...] ».

Islamist groups having to «adjust the purposes and goals of their movement to suit very different conditions»⁴⁸.

European Islamic oriented parties and movements are quite diversified in respect of ideological manifestos, political positioning and electoral performances: as for the latter aspect, while some of them have not yet participated in elections or never succeeded in elect their candidates⁴⁹, other parties have already elected their representatives at both the national and the local level⁵⁰.

A relevant example of parties that succeeded gaining legislative seats at the national level⁵¹ is the Dutch political movement *Denk*, founded in 2015 by two Dutch members of the House of Representatives of Turkish origin with the aim of representing Muslim immigrants against the radical positions of Geert Wilders'PVV (*Partij voor de Vrijheid*)⁵². At first *Denk* released a political manifesto proclaiming itself as a party aiming at promoting the interests of all immigrants, regardless of their ethnic or religious background, by focusing on four main goals: integration, social welfare, education and justice; nevertheless, already in 2016 *Denk* appears to have undertaken a process of radicalization, turning into a party increasingly consecrated to the interests of Muslim immigrants of Turkish descent, so much so that it has to come to be labelled as “pro-Erdogan”⁵³. Furthermore, the *Denk* case

⁴⁸ P. Mandaville, cit., 430-431, who mentions the examples of the *Muslim Brotherhood* and the *Jama'at-I Islami party* as having influenced, respectively, organizations such as the *Union des Organisations Islamique de France*, the *Islamische Gemeinschaft in Deutschland*, and the *Muslim Association of Britain* (the former) and the *Islamic Foundation* in Leicester, the *UK Islamic Mission*, and the *Islamic Forum Europe* (the latter). Today many younger Muslims are nevertheless not actively mobilized by this kind of political movements and parties, and are likely to find (both violent, like *Al-Qaeda* and *Isis*, and nonviolent, like *Hizb Ut-Tahrir*) radical Islam more attractive.

⁴⁹ E.g. the French *Parti égalité et justice* and *Français et Musulmans*; the *Neue Bewegung für die Zukunft* in Austria; the *Islamic Party of Britain*, active until 2006; the Spanish PRUNE – *Partido Renacimiento y Unión de España*, which in 2018 changed its name in *Partido Renacimiento y Unión de Europa*.

⁵⁰ An example of an Islamic oriented party currently represented at the local level is the German *Bündnis für Innovation und Gerechtigkeit*, whose representatives were elected in the city councils of Bonn, Frankfurt am Main, Wiesbaden and Offenbach. The Belgian ISLAM elected two representatives at the 2012 municipal elections (Anderlecht and Molenbeek-Saint-Jean, in the Brussels-Capital region), but failed in gaining local seats in 2018 elections; the French *Union des démocrates musulmans français* also gained one seat at the Bobigny's city council in 2012. In the Netherlands both *Islam Democraten* and *Nida* have their representatives at the city councils of The Hague and Rotterdam.

⁵¹ Denk elected three MPs at the Lower House in both the 2017 and 2021 elections. In 2005 also the British party RESPECT, a coalition of far left and Muslim political activists, won one legislative seat and came second in three other constituencies; although the party never presented itself as an “immigrant party” and the far left-wing was its dominant component, its voting base was concentrated in areas in London with large Muslim communities, see T. Peace, *All I'm Asking for Is for a Little Respect: Assessing the Performance of Britain's Most Successful Radical Left Party*, in *Parliamentary Affairs*, 2, 405-424 (2013).

⁵² M. Blankvoort, *Ethnic outbidding and the emergence of DENK in the Netherlands*, 10-01-2019, 18.

⁵³ M. Blankvoort, cit., who stresses that «DENK has received most of its votes from Muslim immigrants of which the largest group are immigrants of Turkish descent and the second largest group are Moroccan immigrants», 25. This is corroborated by S. Otjes, A. Krouwel, *Why do newcomers vote for a newcomer? Support for an immigrant party*, in *Journal of Ethnic and Migration Studies*, 7, 1161 (2019), who signal

has been studied as part of a broader trend of «re-articulation and contestation of anti-racist critique» which affects not only Dutch politics but, more generally, Western democracies' political arena; this re-articulation, in particular, implies a renovated role for religion in the public sphere, against earlier dominant theories about secularization as the definitive decline of religion in Western States⁵⁴. As political discourses on national identity enhances the role of religion, as well as other crucial issues such as culture and race, political parties like *Denk* may prove to be crucial actors by highlighting the positive contribution of ethnic and religious diversity in a debate that typically exclude minority religions like Islam.

In any case, in general terms the political impact and electoral performances of Islamic oriented parties in Europe are negatively assessed, especially due to their inadequacy of representing the highly heterogeneous (ethnic, religious, cultural, and linguistic) features of European Muslim communities; in this respect, their poor performances must be considered in light of these parties' inability to politically represent the complexity and fluidity of European Islam.

A second important issue affecting the effectiveness of Muslim communities' political participation is related to the recognition of both the right to join political parties and the right to vote to aliens, to the extent that in many European states Muslim population largely consists of migrants from Islamic countries. In this respect national legislation in Europe is varied, with more than half of EU countries (including some consolidated democracies like France, Germany and Italy) excluding non-European foreigners from the right to vote and to be elected, while their political rights, whenever granted, mostly concern local elections; on the other hand, migrants are generally allowed to participate in politics within movements, trade unions, political and religious associations⁵⁵.

A third point to be considered concerns more specifically political representation, with regards, for example, to electoral systems⁵⁶ and other legal mechanisms able to promote or

that DENK «does not appeal to voters without a migration background and its appeal is limited to what we defined here as the immigrant group, Muslims».

⁵⁴ S. Loukili, *Fighting Fire with Fire? "Muslim" Political Parties in the Netherlands Countering Right-Wing Populism in the City of Rotterdam*, in *Journal of Muslims in Europe*, 9, 26 (2020). On the Denk case see also A. Spektorowski, D. Elfersy, *From Multiculturalism to Democratic Discrimination. The Challenge of Islam and the Re-emergence of Europe's Nationalism*, 204-205 (2020).

⁵⁵ See J. Paffarini, C. Calvieri, *Los límites a los derecho políticos de los extranjeros. La experiencia italiana y europea en comparación*, in *Revista General de Derecho Público Comparado*, 29, 1-31 (2021). Martiniello points out that, although «in European literature on immigration, the thesis of the political quiescence or passivity of immigrants was the first to emerge and it was for a long time dominant [...] Many studies show that immigrants have always been active in those less conventional types of participation» (eg. trade union politics, associations and community organization). This suggests that «being politically passive is not always an indicator of general disinterest in politics. Passivity can sometimes be a form of resistance and defence», M. Martiniello, cit., 90 ff.

⁵⁶ The Muslim population is more represented in states that adopt proportional electoral systems than in those in which there is a majority system A.H. Sinno, *Muslim Underrepresentation in American Politics*,

ensure the election of Muslim candidates (so called “descriptive representation”⁵⁷). This term, as it is known, implies that political institutions, and especially legislative bodies, should proportionally reflect the social articulation of the different groups and communities by means of legal instruments such as reserved seats, decentralization, federalism (in addition to the already mentioned proportional electoral system). In Western Europe institutional mechanisms aiming at guaranteeing political participation and representation may operate for linguistic communities, but do not apply on the basis of race, ethnicity or religion⁵⁸, with the consequence that in European countries the “diversity” of parliaments is more the result of political dynamics concerning the effectiveness of minority members’ political participation and citizens’ free electoral choices. In this regard, it has been pointed out that the attitude towards political representation of religious and ethnic minorities varies across different countries on the basis of various elements related to political and legal culture, such as «prevailing repertoires of belonging and exclusion» and the «legal status of targeted policies for identity groups»: the different rates of success of minority candidates in the UK and France, for example, can be explained in terms of the differing conceptualization of the role of diversity in the public arena and the typologies of diversities worthy of legal protection⁵⁹.

The United Kingdom and the Netherlands are probably the European countries where Muslims are mostly integrated in the political arena, with their inclusion in «parties all along the full political spectrum from Christian Democrats to the communist parties and Greens

in A.H. Sinno (ed.), *Muslims in Western Politics*, 69 ff. (2009). Once political parties begin to compete for the “Muslim vote”, in fact, candidates of Islamic faith will have a better chance of being elected, to the extent that with proportional representation systems there are more parties than in majority systems and the majority of the parties will decide to place these candidates in a good position on the list in order to attract, or in any case not completely disperse, the minority vote, 84. In the period 2003-2006, the ten Dutch representatives of Muslim faith elected to the *Tweede Kamer* belonged to six different parties, while their seven successors, elected in 2006, belonged to five different parties.

⁵⁷ The notion of “descriptive representation” was proposed by H. Pitkin, *The concept of representation* (1967), who opposed it to that of “substantive representation”, which instead refers to the effective influence of minorities on the political process: while descriptive representation can serve as a mechanism for obtaining substantial representation, the latter can also be achieved without the former.

⁵⁸ M.L. Krook, *European States and their Muslim Citizens: The Impact of Institutions on Perceptions and Boundaries*, in J.R. Bowen, C. Bertossi, J.W. Duyvendak, M.L. Krook (eds.), *European States and their Muslim Citizens. The Impact of Institutions on Perceptions and Boundaries*, 189 (2013). The Romanian case is worth mentioning in relation to the Art. 62.2 Const. (later implemented by the 1992 Romanian election law), which establishes special legislative seats for recognized minorities; according to R.F. King, C.G. Marian, *Minority Representation and Reserved Legislative Seats in Romania*, in *East European Politics and Societies*, 3, 566 (2012), «extensive minority representation immediately after 1989 was a symbol to the West indicating a commitment to human rights. It would imply a rejection of the nationalist chauvinism of the Ceausescu regime, promising recognition to wide range of ethnic voices». Currently reserved legislative seats for ethnic minorities groups are 17, among which there is 1 representative of the Democratic Union of Turkish-Muslim Tatars of Romania, a political party established in 1989 with the aim of representing the Tatar community.

⁵⁹ M.L. Krook cit., 192 ff.

(and even in the far right party LFP in the Netherlands)»⁶⁰. As has already been noted, however, the presence of Muslim politicians does not automatically imply a political engagement connected to that specific religious identity: in the UK, for example, «Muslim politicians do not only promote a limited range of ‘Muslim issues’ whilst in office, but also focus on a variety of other issues that resonate with their broader constituencies»⁶¹.

Therefore, the appreciation of parliaments’ religious “diversity” from a perspective which aims at considering also the substantive and effective minority representation proves to be problematic, not only because being Muslim does not necessarily means pursuing Islamic political goals⁶², but also, at an earlier stage, in relation to the collection of data on political representation of minorities. In fact, in many cases existing research does not focus specifically on religious identity, but rather on ethnic origin, and, furthermore, politicians and parliamentarians generally are not required to officially state their ethnicity; this means that data collected must be considered taking into account that not all “immigrants” or “black and minority ethnic” individuals, even when they come from Muslim majority countries, are actually Muslims⁶³. In any case, considering the ethnic minority background

⁶⁰ S. Cherribi, cit., 287. It is worth mentioning that the Mayor of London, Sadiq Khan, comes from a Sunni Muslim family of Pakistani origin.

⁶¹ See E. Kolpinskaya, *Muslims in Parliament: A Myth of Futility*, who discusses Muslim MPs, and E. Tatari, A. Yukleyen, *The Political Behaviour of Minority Councillors across London Boroughs: Comparing Tower Hamlets, Newham, and Hackney*, who focuses on Muslim councillors, in T. Peace, *Muslims and Political Participation in Britain*, cit.

⁶² In fact, as already noted, substantive representation – in terms of representatives acting «in the interest of the represented, in a manner responsive to them», H. Pitkin, cit., 109 – is something different from descriptive representation and the latter does not imply the former. Besides, there is still much room for debate on what substantive representation exactly entails and how to measure it: for example, «is it linked to certain activities in the legislative process and to actual policy outcomes [...], or do representatives also substantively represent when they speak on behalf of a marginalized group in the broader public sphere [...]? Where shall we look for representative acts – is one place/level of socio-political interaction more important, powerful, and meaningful to society, than another, and will it help us refine its definition and thus move forward? Moreover, does substantive representation of one marginalized group (for instance, women) have the same meaning as substantive representation of another group (for instance, ethnic or religious minorities), and if not, wherein lies the difference? How should we assess and measure the quality of substantive representation across social groups and political contexts? And, finally, why should we care: what makes substantive representation so important? Is there a link between the quality of substantive representation and the level and expression of equality within a country?», E. Rashkova, S. Erzeel, Abstract of the Panel “*Substantive Representation of Marginalised Groups: Re-Conceptualising, Measurement, and Implications for Representative Democracy*”, European Consortium for Political Research (ECPR), *The Joint Sessions of Workshops 2021*, 17-28 May 2021.

⁶³ See K. Bird, T. Saalfeld, A. M. Wüst (eds.), *The Political Representation of Immigrants and Minorities* (2010). In the UK the use of expressions such as BME (Black and minority ethnic) and BAME (Black, Asian and minority ethnic) has given rise to a lively debate on the appropriateness of the labels used in both institutional and academic context to talk about ethnic and cultural diversity. Recently the British Government has pointed out that it will no longer use the terms BAME or BME because «they include some groups and not others – for example, the UK’s ethnic minorities include White minorities and people with a Mixed ethnic background» and «the acronyms BAME and BME were not well understood in user research». Similarly, also the expression ‘people of colour’ has been overcome «as it does not include White minorities». See the section *Writing about ethnicity* in the Government website *Ethnicity facts and figures*, <https://www.ethnicity-facts-figures.service.gov.uk/style-guide/writing-about-ethnicity>.

of parliamentarians, a 2020 study reported that the UK has a comparatively higher percentage rate (65 MP's – 10% of the House of Commons) than that of other important European immigration countries such as Germany (58 – 8,2% of the German Federal Parliament) and France (35 – 6,4% of the National Assembly); however, «if the House of Commons reflected the UK population (14.4% ethnic minorities in 2019) there would be around 93»⁶⁴.

If, as we already observed, the Muslim population is more represented in those countries with a proportional electoral system than under a majority system, this is even truer for the election of Muslim women⁶⁵. Traditionally ethnic and religious minority women have undergone a specific disadvantage in terms of political participation and representation, due to the “multiple” jeopardy of intersectional discrimination⁶⁶. European States’ political and legal responses to this structural problem of under-representation largely differ depending on cultural ideologies as well as legal differences about discrimination laws and affirmative action policies⁶⁷.

III. WHAT LEGAL REGULATION FOR MUSLIMS’ PRESENCE IN THE POLITICAL ARENA?

The expression of Islamic religious affiliation in Western States’ political arena, regardless of whether it is a sectarian and anti-democratic manifestation of identity or not, is generally

⁶⁴ E. Uberoi, R. Lees, *Ethnic diversity in politics and public life*, 8 (2020). In Germany the reference is to the so-called “migration background” of parliamentarians, which is defined «as either not being born as a German citizen themselves or having a parent who was not». The 8,2% must be compared with the 22.5% of the total population with “migration background” in 2017, Mediendienst Integration, *58 MPs have a Migration Background*, October 2017, <https://mediendienst-integration.de/artikel/58-mps-have-a-migration-background.html>. In France it is not possible for public authorities to collect data on ethnicity, religion or race; the 6,4 percentage has been indicated in a report by the broadcaster France 24, see France 24, *Diversity gains ground in France's new-look National Assembly after vote*, 21/06/2017, <https://www.france24.com/en/20170621-france-diversity-gains-ground-new-look-national-assembly-after-legislative-election>.

⁶⁵ M.M. Hughes, *Electoral Systems and the Legislative Representation of Muslim Ethnic Minority Women in the West, 2000-2010*, in *Parliamentary Affairs*, 3, 1-21 (2016).

⁶⁶ V. Purdie-Vaughns, R.P. Eibach, *Intersectional invisibility: The distinctive advantages and disadvantages of multiple subordinate-group identities*, in *Sex Roles: A Journal of Research*, 5-6, 377-391 (2008).

⁶⁷ In France, for example, the Parliament adopted a law promoting an “equal access of women and men to electoral mandates and elective functions” in 2000, which obliges political parties to nominate 50% women candidates in most elections; however, the advocates of the law, although questioning the universalistic conception of French *citoyenneté*, (unsurprisingly) did not extend its reasoning to other minority categories, such as ethnic and religious groups (and, in particular, the female component within these groups), C. Raissiguier, *Reinventing the Republic: Gender, Migration and Citizenship in France*, 7 ff. (2010). On the other hand, parity has been considered to have activated, albeit unintentionally, the promotion of a more general “descriptive representation”, with the consequence that in the last years there has been a growing number of minority candidates, although they are usually placed in unwinnable seats.

perceived in negative terms. Restrictions and prohibitions of such political manifestations are frequently invoked in public discourse of consolidated democracies, with a view to preserving the public sphere's (supposed) neutrality from the (likewise supposed) disruptive effect of cultural and religious particularisms and, ultimately, to guaranteeing the conditions of democratic coexistence in pluralistic legal systems. In the field of political participation and representation, from this perspective, seems to be confirmed what Berger, more generally, observes with regard to the clash of values between "Islam" and "Europe", that is to say that such a clash «is not that European Muslims adhere to values that are prohibited by law – on the contrary, the political-legal values allow for diversity and liberty –, but by the religious-cultural objection that 'this is not how we do things here'»⁶⁸.

This call for a restrictive stance, on the other hand, must be carefully examined in the light of those principles and liberties which are protected by both international law⁶⁹ and democratic constitutionalism: the principle of democracy itself, as well as freedoms of expression, of thought, belief and religion, of assembly and association, do not allow to consider the ban of religious expressions from the political realm as a measure *per se* necessary, or even legitimate, in a democratic society.

Within the context of contemporary constitutionalism in Western countries, in particular, democratic principles and liberties mark the perimeter, continuously changing on the basis of constitutional interpretation, within which the manifestation of religious identity in the political arena can be considered legitimate and must be guaranteed at the same time. Restrictions and prohibitions against Islamic oriented parties, as well as other forms of Islamic presence at the political level, are therefore acceptable as many, proportionate, exceptions to the centrality of those principles and rights, and they will be legitimate to the extent that they prove to serve to the protection of other constitutional principles and interests (e.g. the principle of democracy itself and the integrity of the constitutional order; the principle of equality and prohibition of discrimination; the defense of national security and public order).

Comparative analysis of consolidated democracies' legal orders makes it possible to identify some main rationales at the basis of the adoption of restrictive measures.

The first one is related to the heterogenous set of principles, rules and institutions of "militant democracy", aimed at limiting or prohibiting anti-democratic and/or anti-system

⁶⁸ M.S. Berger, *A Brief History of Islam in Europe*, cit., 234.

⁶⁹ On the tensions raised by absolute bans on religious oriented political parties with respect to the main International human rights conventions see J. Temperman, *State-Religion Relationships and Human Rights Law. Towards a Right to Religiously Neutral Governance*, 320-321 (2010).

political movements and parties⁷⁰. The defense from internal and external threats can refer both to the adoption of consolidated instruments of militant, or defensive, democracy (as in the German case⁷¹), and to the protection of the State's interest in contrasting any support activity, even tacit, of terrorism (e.g. in Spain⁷²). The most ancient constitutions do not generally include a specific constitutional discipline for the protection of democracy and such constitutional silence is suitable to opposite interpretations with regard to the legitimacy of any restrictions to the freedom of political association; in several cases constitutional norms are worded rather ambiguously and their «insidious formulas» often refer to legislators for the repression of abuses⁷³. Constitutional and legislative restrictions related to militant democracy – which may consist in the loss of tax benefits or the exclusion from public funding, up to the actual dissolution – might be enforced insofar as the Islamic oriented movement or party pursues an anti-constitutional ideology, or the very appeal of

⁷⁰ Constitutional and legislative provisions aimed at restricting freedoms of expression and political association in "protected democracies" are extremely varied. As for the object of the protection, in particular, there are not only restrictions designed to defend "ideological integrity", in terms of those values and principles which lie at the foundation of democratic and pluralistic constitutional orders, but also norms that protect "territorial integrity" and other principles and values considered to be "fundamental" (such as the peaceful coexistence between peoples, secularism, political pluralism and the rule of law, prohibition of the incitement to racial, national, ethnic or religious hatred, others' rights and freedoms of others, etc.). On the notion of "protected democracy" see A. Di Giovine (a cura di), *Democrazie protette e protezione della democrazia* (2005); J.-W. Müller, *Militant Democracy*, in M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, 1253 ff. (2012); L. Pegoraro, *Para una clasificación "ductil" de "democracia militante"*, in *Revista vasca de administración pública*, 2, 191 ff. (2013); A. Sajó (ed.), *Militant Democracy*, Utrecht 2014; S. Tyulkina, *Militant Democracy: Undemocratic Political Parties and Beyond* (2015).

⁷¹ See the art 21 of the German Basic Law, specifically dedicated to "protect democracy" in terms of the obligation for political parties to intra-party democracy and the legal regime of sanctions against anti-democratic parties. There are also several other constitutional provisions related to the German system of militant democracy, such as Artt. 9, 10 par. 2 and 11 par. 2, 18, 20 par. 4. On the recent trends in the enforcement of Art. 21 by the *Bundesverfassungsgericht* see A. Gatti, *Il Parteiverbot e la nuova incostituzionalità a geometria variabile nell'ordinamento tedesco*, in *Rivista AIC*, 3, 5 (2017). E. Caterina, *La metamorfosi della "democrazia militante" in Germania. Appunti sulla sentenza NPD del Tribunale Costituzionale Federale e sulla successiva revisione dell'art. 21 della Legge Fondamentale*, in *Diritto Pubblico Comparato ed Europeo*, 1 (2018). The Art. 21 of the Basic Law has been invoked so far twice in the 1950's, resulting in the dissolution of the Socialist Reich Party (in 1952) and the Communist Party of Germany (in 1956). As for Islamic political movements, in 2012 the German Ministry of Interior proscribed the activities of *Hizb Ut-Tahrir* since its activities were directed against the principle of international understanding and their leaders advocated the use of violence as a means to achieve their political goals; this decision, however, has been issued on the basis of sect. 15 § 1 and 18 § 2 of the Law on Associations since the organization wasn't labelled as a "a political party" but rather as an association, albeit religiously oriented, pursuing political objectives.

⁷² See the *Ley Orgánica 6/2002 de Partidos Políticos*, which provides for an *ex post* control on political parties' activities by the *Sala Especial* of the Supreme Court. Such a control can result in a declaration of illegality in the event that the conditions established by the Criminal Code in relation to "illicit associations" are verified (Article 10.2.a) and if the party seeks to deteriorate or destroy the system of rights and freedoms, or to eliminate the democratic system (Articles 7, 8 and 10.2.b). From 2002 to date there have been six cases of both declaration of illegality and refusal of registration and they all concerned parties linked to the Basque terrorist organization ETA (*Euskadi Ta Askatasuna*).

⁷³ See L. Pegoraro, cit., 212.

values and principles related to a religious belief is qualified as contrary to the constitutional system, and is deemed to represent an actual and effective threat to the democratic order. Considering that Islamic oriented political movements and parties in Europe, as we already noted, are definitely small and generally have a poor electoral performance, the implementation of such restrictions and prohibitions, as a matter of fact, would not be so much aimed at avoiding an actual danger to the democratic order, but rather, and problematically, at denying radical parties «the forum of institutional expression, the legitimacy, and the aura of respectability that is naturally granted to political parties in modern democracy»⁷⁴.

One of the major trends in Western democracies after September 11th is undoubtedly focused on the restriction of Islamic movements and parties, considered to be threats to the integrity of the democratic-constitutional order and to internal security. What seems to be taking place, in this respect, is a shift in the meaning of militant democracy that may be appreciated under at least two aspects: on the one hand, Western states tend to use militant democracy legal mechanisms in order to take a “militant” position with respect to the exercise of religious freedom, insofar as religion, and especially Islam, is considered to fuel that threat⁷⁵; on the other hand, measures to contrast international terrorism and to protect public security are gradually being drawn into the sphere of militant democracy (although the two areas do not overlap in principle, in fact, anti-terrorism legislation can also consist in preventive measures that severely limit the constitutional freedoms of expression, association and religion).

A second rationale for restrictions is related to the prohibition of incitement to hatred on the behalf of religion, or for other reasons based on religious arguments.

In consolidated democracies political parties and, more generally, associations enjoy the freedom to pursue their own goals and carry out their own activities by using, among other things, religious arguments and resources; restrictions aimed at prohibiting hate speech, in this context, can raise compatibility issues with respect to the constitutional and international provisions in defense of freedom of expression and association. In light of the fundamental character of freedom of expression enjoyed by members of political parties

⁷⁴ G. Bligh, *Defending Democracy: A New Understanding of the Party-Banning Phenomenon*, in *Vanderbilt Journal of Transnational Law*, 46, 1365 (2013), which believes there has been a transition, in terms of bans on political parties, from a “Weimar paradigm” (characterized by the ban on parties that seek to abolish the democratic order itself, preventing such parties from coming to power and implementing its own anti-democratic program) to a “paradigm of legitimacy”, in terms of the will of the State to deprive extremist parties of the “space” (which means resources and legitimacy) to express themselves in the political arena.

⁷⁵ See P. Macklem, *Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe*, in *SSRN Electronic Journal*, 20 August 2010, 2 ff.

and, more generally, by anyone who contributes to public debate in pluralistic democracies, the general tendency, especially in case law, is in fact to circumscribe legislative restrictions of religious hate speech to situations where incitement is likely to produce violent events in the near future. In the same democratic contexts, however, the constitutional protection of freedom of expression in relation to hate speech is highly diversified and both legislators and courts, even within the same legal system, express changing orientations over time. In Europe the general approach appears to be based, firstly, on the explicit identification of the limits to freedom of expression and, secondly and consequently, on the balancing of freedom of expression with other conflicting rights and interests⁷⁶.

A third rationale concerns prohibition of discrimination on religious grounds, or on other grounds but for religious reasons, with respect to party membership, internal organization and division of power and nomination of candidates. Restrictive measures, for example, could affect the possibility for actors other than individuals (e.g., trade unions or other types of associations, including religious ones) to participate in forming political parties; or, as for party membership and access to internal party positions, the freedom to determine access requirements related to religion (e.g., based on religious affiliation, or on other grounds but on the basis of religious arguments)⁷⁷.

The adoption of such restrictive measures proves to be problematic in consolidated democracies, where internal party organization and procedures are not generally regulated in detail by state norms and are rather discretionally determined by parties. In fact, those who form an association (whether it be a religious association or a political party) can, in principle, decide who to admit to membership, excluding those who do not share certain ideals and beliefs. This does not mean, however, that there are no limits: even if no specific restrictions are envisaged, a ban is generally considered to be in force for political parties

⁷⁶ For a comparative study on the limits to the freedom of expression in relation to religious hate speech see C. Cianitto, Cristiana, *Quando la parola ferisce. Blasfemia e incitamento all'odio religioso nella società contemporanea* (2016).

⁷⁷ The case of the Dutch Reformed Orthodox Party (SGP - *Staatkundig Gereformeerde Partij*) has proved to be an interesting test in Europe. On the basis of a rigorous interpretation of the Bible, women were barred from joining the party as well as standing as candidates on the party lists; a group of associations and NGOs for the protection of human rights and against gender discrimination filed an appeal for breaching international and constitutional prohibition of discrimination and women's right to political participation, bringing the case to both the Council of State and the Supreme Court. The latter, in particular, held that women's rights not to be discriminated in their political rights had to prevail on party's ideological freedom, in light of the importance of the political and electoral domain: in fact, since the right to run for office and be elected is crucial for the functioning of democracy, it is unacceptable that political parties are allowed to determine candidate lists in violation of fundamental principles and citizens' political rights, even when their behavior rests on views and opinions based on a religious or philosophical belief. On the the SGP see B. Oomen, J. Guijt, M. Ploeg, *CEDAW, The Bible and the State of the Netherlands: the struggle over orthodox women's political participation and their responses*, in *Utrecht Law Review*, 2, 158-174 (2010).

to insert statutory clauses in express violation of fundamental values such as personality rights, dignity and freedom. The “amphibious” nature of political parties, as private associations with very relevant public tasks, explains why the judicial scrutiny of admission requirements is so narrow, even if the loss or reduction of public funding as a sanction, or at least a disincentive, for political parties in relation to the compliance with internal democracy constraints has become increasingly common⁷⁸. Therefore, in consolidated democracies political parties generally tend to avoid inserting membership conditions based on ethnic or religious affiliation in their statutes; however, the absence of clauses resulting in direct discrimination does not prevent certain categories of people (e.g. women, members of ethnic or religious minorities) from being indirectly discriminated. For this reason, exclusion criteria not strictly related to association’s or party’s purposes – such as gender, sexual orientation, ethnicity, religious identity – must be assessed very rigorously⁷⁹.

IV. *FIQH AL-AQALLIYAT* (THE JURISPRUDENCE OF MUSLIM MINORITIES) AND THE REINTERPRETATION OF ISLAMIC TRADITION IN LIGHT OF MUSLIMS’ PRESENCE IN EUROPE

The previous sections of this work dealt mainly with the legal framework within national systems that concerns the political participation of Muslim minorities in European countries. While positive state law can either incentivize or constrain their ability to fully exercise political rights through electoral procedures and democratic representation (by regulating the conditions for acquiring citizenship and the creation of religiously oriented political parties and associations, for example, as the previous comparative analysis shows), Muslims’ attitudes towards their own Islamic background, on the one hand, and towards Western politics and legal systems, on the other, are also part of the set of social, cultural, political and legal conditions that enable them to participate effectively in the public sphere. Therefore, it is useful for the purposes of this article to consider the same issue from the perspective of Islamic law and, in particular, to discuss the notion of *fiqh al-aqalliyat*, as mentioned above (section 1).

⁷⁸ On the limitation of judicial scrutiny in light of the centrality of the freedom of association see F. Scuto, *Internal party democracy: constitutional profiles of a transition*, 134-135 (2017).

⁷⁹ See, with reference to the German experience, T. Spier, M. Klein, *Party membership in Germany: rather formal, therefore uncool?*, in E. Van Haute, A. Gauja (eds.), *Party Members and Activists*, 86 (2015), who point out that, «as parties are free to turn down membership applications without justification, it is possible to circumvent these limitations in individual decisions without officially excluding any social group».

From the sacredness of Islamic law derives its personal character⁸⁰, which contrasts with the principle of territoriality that governs the applicability of the law in Western nation-states. This aspect helps understand the extent to which Islamic law may be relevant to Muslim persons living in European countries nowadays. Recent public opinion in Western societies and, more specifically, in Europe regarding the applicability of Islamic legal norms in European jurisdictions has varied from the European Court of Human Rights' assertion that *shari'a* is fundamentally at odds with democracy⁸¹ to the speech by the Archbishop of Canterbury Rowan Williams in 2008 in which he sustained the possibility of accommodation between British and Islamic Law⁸². Overall, it is possible to observe expressions of opinion that treat Muslims' presence in Europe as if it were a problem because of an alleged contradiction between Islam and Western cultural and constitutional values⁸³, including democracy and gender equality. However, dealing with the sociological fact that Islam is part of the public space in Europe currently requires «a preliminary recognition that the high degree of fluidity, mutuality, and also reversibility of religious commitments among Muslims is, increasingly, not the exception but the rule in the fast changing religious and political field in Europe»⁸⁴.

Etymologically, the term *shari'a* means «the path or track by which camels were taken to water»⁸⁵. In Islam, it is the straight path revealed by God so that believers may achieve

⁸⁰ A. D'Emilia, *Scritti di diritto islamico*, edited by F. Castro, 57 (1976). In the same sense, see also F. Castro, *Il modello islamico*, 10 (2007).

⁸¹ European Court of Human Rights, Case of Refah Partisi (The Welfare Party) and Others v. Turkey (Grand Chamber, 13 February 2003), 39. See also M.C. Locchi, *La disciplina giuridica dei partiti a orientamento religioso*, 122 ff. (2018).

⁸² See R. Williams, *Civil and Religious Law in England: A Religious Perspective*, in *Ecclesiastical Law Journal*, 3, 262-282 (2008).

⁸³ For example, according to Armando Salvatore, «the presence of Muslims in Europe, in spite of the great variety of their political and religious orientations (also including various types and degrees of commitment to secular lifestyles and even to atheism), is often perceived by the majority cultures and public opinion leaders as a sectarian intrusion into an assumedly (though not really) solid politico-cultural body» (A. Salvatore, *Power and Authority within European Secularity: From the Enlightenment Critique of Religion to the Contemporary Presence of Islam*, in *The Muslim World*, 96, 554 (2006). Angelo Rinella, in turn, mentions European political parties' stances on Islam as examples of their aversion towards Islamic communities and their claims. According to the author, these parties exploit anti-Islamic sentiment in order to gain electoral support, justifying their position on the grounds of the alleged intolerant character of the Muslim religion and the discrimination against women (see A. Rinella, *La Shari'a in Europa: questioni di diritto comparato*, in *Diritto pubblico comparato ed europeo*, special volume, 639 (2019)).

⁸⁴ A. Salvatore, cit., 555. Maurizio Oliviero defines Islam as a «complex legal system», endowed with a complete and detailed legal order based on divine revelation (see M. Oliviero, *I paesi del mondo islamico*, in P. Carrozza, A. Di Giovine, G.F. Ferrari, *Diritto costituzionale comparato*, 599 (1, 2014). Similarly, H. Patrick Glenn describes the Islamic legal tradition as complex because of its epistemological ability to deal «with diversity, contradiction and demands for what is usually known as a factor of change» (H. P. Glenn, *Legal Traditions of the World*, 180 ff. and 367 (5a ed, 2014.)).

⁸⁵ S. G. Vesey-Fitzgerald, *Nature and sources of the Shari'a*, in M. Khadduri, H. J. Liebesny (eds.), *Law in the Middle East*, 86 (I, 1955).

salvation. For Wael B. Hallaq, the use of the English word “law” in reference to *shari‘a* is problematic by itself, because it tends «to project, if not superimpose, on the legal culture of Islam notions saturated with the conceptual specificity of nation-state law»⁸⁶. Although Islamic thought considers *shari‘a* a reflection of God’s will, both divine revelation and human reason converge to the institutionalization of Islam as a system of beliefs and norms that include an original legal order: “This dual identity of Islamic law is reflected in the two expressions *Shari‘ah* and *fiqh*”⁸⁷. The term *fiqh* represents the intellectual activity oriented towards the knowledge of divine will⁸⁸, based on revealed and “human” sources (the Quran, the *sunna* of the Prophet Muhammad, *ijma* and *qiyas*). According to Ibn Khaldun’s classic definition, *fiqh* (or jurisprudence, in the English translation of his work), “is the knowledge of the classification of the laws of God, which concern the actions of all responsible Muslims, as obligatory, forbidden, recommendable, disliked, or permissible”⁸⁹. Both *shari‘a* and *fiqh* comprise elements that Western legal traditions exclude from the realm of law, including the discipline of religious rituals.

Aside from this theoretical definition, differences in the social, cultural, political and legal backgrounds of Muslim migrants originating from North Africa, the Middle East, Iran, Central, South or Southeast Asia (for example), as well as second and third-generation Muslims born and raised in Europe⁹⁰, result in a plurality of needs, creeds and demands within the Muslim population that are neither homogenous nor consensual. In fact, Maurits S. Berger identifies at least three meanings that Muslims living in the West attribute to *shari‘a*, which do not always coincide with the scholarly description of Islamic law in its classical conformation. According to the author, «The first answer to what Muslims might mean by ‘shari‘a’ in a Western context is shari‘a as a slogan or an abstraction with a virtuous connotation. Shari‘a stands for ‘the law of God’, or ‘all that Muslims need’, and, effectively, for everything that is ‘good’ for Muslims»⁹¹. It is this abstract notion, he argues, that makes

⁸⁶ W.B. Hallaq, *Shari‘a: Theory, practice, transformations*, 2 (2009).

⁸⁷ M.H. Kamali, *Shar‘ah law: An introduction*, 40 (2008). Massimo Papa and Lorenzo Ascanio explain that both *shari‘a* and *fiqh* can be understood as synonyms of “Islamic law” (M. Papa, L. Ascanio, *Shari‘a*, 10-11 (2014)).

⁸⁸ Th.W. Juynboll, *Manuale di diritto musulmano secondo la dottrina della scuola sciafeita*, Italian edition, translated by G. Baviera, 14-15 (1916).

⁸⁹ Ibn Khaldūn, *The muqaddimah: An introduction to history*, translation by F. Rosenthal, edited by N.J. Dawood, 344-345 (2015).

⁹⁰ Massimo Papa emphasizes the differences between the first generation of Muslim migrants and their descendants, resulting in a religious practice that serve increasingly less as conservation of the original traditions of migrants (M. Papa, *Il fiqh al-aqalliyāt e il proselitismo islamico*, in Quaderni di diritto e politica ecclesiastica, (1), 165 (2020)).

⁹¹ M.S. Berger, *Introduction: Applying Shari‘a in the West*, in M.S. Berger (ed.), *Applying Shari‘a in the West: Facts, fears and the future of Islamic rules on Family relations in the West*, 9 (2013). See also A. Rinella, *La Shari‘a in Europa*, cit., 637 ff.

shari'a a powerful force for Muslims living in Western countries. Secondly, when Muslim persons ask for the application of *shari'a* or Islamic law in Western courts, they might be referring to the national law of their country of origin, not to the classical Islamic jurisprudence. Finally, it is possible to identify a commitment to living in accordance with *shari'a* limited to the fields of religious rules and practices (such as prayer and fasting, for example), family matters, financial transactions and social relations (in particular, gender relations)⁹².

Historically, there has been no frequent requests from Western Muslim communities for the integral and decontextualized application of *shari'a* norms. Instead, their effort seems to be an adaptation of Islamic dictates to European nation-states' law⁹³. One of such attempts has been the elaboration of *fiqh al-aqalliyat*, that is, the jurisprudence of Muslim minorities. One of the first Muslim religious figures to use this expression was Taha Jabir al-Alwani, who presided the *Fiqh* Council of North America. He defined it as follows:

«*Fiqh* of the minorities' [*Fiqh al-Aqalliyat*] is a specific discipline which takes into account the relationship between the religious ruling and the conditions of the community and the location where it exists. It is a *fiqh* that applies to a specific group of people living under particular conditions with special needs that may not be appropriate for other communities. Besides religious knowledge, practitioners of this *fiqh* will need a wider acquaintance with several social sciences disciplines, especially sociology, economics, political science and international relations».⁹⁴

Fiqh al-aqalliyat, therefore, is an effort of developing an Islamic jurisprudence specifically for Muslims living in countries where they constitute a religious minority, mainly through

⁹² M.S. Berger, *Introduction: Applying Shari'a in the West*, cit., 10-11.

⁹³ M. Papa, cit., 166. For Angelo Rinella, however, "I segnali della società islamica in Europa sono contraddittori. Da una parte si registra una propensione delle minoranze musulmane a adattarsi ai valori della società occidentale che li ospita e a nutrire una sostanziale fiducia nelle istituzioni nazionali; dall'altro, si registra anche una persistente cultura patriarcale e la pervasiva influenza di quegli orientamenti religiosi che propongono una lettura del Corano in contrapposizione alla cultura occidentale e ai valori liberali dei paesi europei. Naturalmente tutto ciò non fa che alimentare tra i cittadini europei i dubbi circa la reale volontà delle comunità islamiche di adattarsi al contesto valoriale e culturale nel quale sono inserite socialmente e politicamente. Eppure recenti indagini empiriche mostrano che sono assai numerosi i musulmani europei osservanti che ricercano l'armonia fra le tradizioni religiose e il contesto sociale nel quale vivono; così come sono assai numerosi anche i musulmani che non avvertono contraddizioni tra il proprio stile di vita di tipo occidentale e l'Islam" (A. Rinella, *La Shari'a in Europa*, cit., 652).

⁹⁴ T.J. Al-Alwani, *Toward a fiqh for minorities: Some reflections*, 3 (2003).

the issuance of legal opinions (sing. *fatwa*; pl. *fatawa*)⁹⁵. Massimo Papa classifies the discourses on *fiqh al-aqalliyat* into three lines of thought: the first, “puritan-literalist”, is characterized by supporters of a literalist reading of Islamic texts, regardless of the social context; the second, which the author calls “conservative”, has the University of Al-Azhar, in Egypt, as its main reference and sustains that Muslims in Western societies need special rules that exempt the application of Islamic law for reasons of necessity and contingency; finally, the third strand of *fiqh al-aqalliyat* is “innovative”, whose leaders were Taha Jabir al-Alwani (previously mentioned) and Yusuf al-Qaradawi, who became president of the European Council for Fatwa and Research (ECFR)⁹⁶.

In fact, the ECFR, founded in 1997, represents «the institutionalization of collective *ijtihad*» and «the institutionalization of collective *fatwa* bodies»⁹⁷ in Europe. It is, according to Alexandre Caeiro’s definition, «a transnational institution committed to the elaboration of a Muslim jurisprudence for minorities (*fiqh al-aqalliyāt*) through the production and dissemination of fatwas for Muslims living in Europe»⁹⁸, although its membership remains exclusively male and Sunni, predominantly ethnically Arab and ideologically close to *wasatiyya*, an approach to Islamic law championed by al-Qaradawi⁹⁹. Caeiro, describing the production of *fatawa* by the ECFR, points to «an underlying tension between, on the one

⁹⁵ In Islamic legal history and tradition, *mufti* is the jurist or scholar of law who issues a legal opinion (most frequently, on the rule applicable to a certain case). For the definition and historical usages of *fatawa*, see E. Tyan, *Judicial organization*, in M. Khadduri, H.J. Liebesny (eds.), *Law in the Middle East*, 248 ff. (1, 1955), and K.S. Vikør, *Between God and the Sultan: A history of Islamic law*, 141 ff. (2005). As the latter explains, “the most common type of *fatwa* over the centuries is the judicial one, a *fatwa* that is given on the basis of a case before the courts [...]. Such a *fatwa* has a standard form: a ‘questioner’ (*mustaftī*) puts a problem that is before the court to the *mufti*. The question must be put in an abstract form, ‘if such and such is the case, what is the law on such a matter?’ The *mufti* will then answer, ‘in that case, the law is so-and-so’” (*ivi*, 142-143).

⁹⁶ M. Papa, *cit.*, 167-168.

⁹⁷ A. Caeiro, *The making of the fatwa: The production of legal expertise in Europe*, in Archives de sciences sociales des religions, 56, 81-100 (2011); Id., *The power of European fatwas: The minority fiqh Project and the making of an Islamic counterpublic*, in International Journal of Middle East Studies, 3, 435-449 (2010). The author provides a full account of the production of *fatawa* at the European Council for Fatwa and Research, relying on data collected through observation of its sessions, as well relevant academic literature on the subject. See also M. Rohe, *Islamic law in Western Europe*, in A.M. Emon, R. Ahmed (eds.), *The Oxford Handbook of Islamic Law*, 740 ff. (2018).

⁹⁸ A. Caeiro, *The power of European fatwas*, *cit.*, 435.

⁹⁹ For an explanation about *wasatiyya*, see U. Shavit, *Sharī‘a and Muslim minorities: The wasatī and salafī approaches to fiqh al-aqalliyāt al-Muslima*, 16 ff. (2015) in particular: “*Wasatiyya* [...] is an approach to Islamic law and, more broadly, a call to reform Muslim societies. This approach has been led, systemized, institutionalized, and popularized by the Egyptian-born Yūsuf al-Qaradāwī (b. 1926), a graduate of al-Azhar and a former member of the Muslim Brothers. [...] al-Qaradāwī’s scholarship is characterized by an attempt to cross the factionalism of the Brothers and appeal to wider audiences. The *wasatiyya* approach calls for adapting religious laws to changing times and circumstances in a way that would make the lives of Muslims easier and Islam more attractive. It promotes the objective of *al-taysīr fī al-fatwā wal-tabshīr fī al-da‘wa*—facilitation in issuing religious laws and proselytizing by gentle means and in a gradualist manner. Application of this objective emphasizes the supremacy of the Quran to all other sources and the need for a contextual reading of its verses, promotes cross *madhhab* search, and broadly and flexibly utilizes the mechanism of determining *maṣlaḥa*”.

hand, the attempt to reconcile traditional Islamic norms with the dominant practices of the mainstream host society and, on the other hand, a reiteration of the Islamic tradition's contemporary relevance»¹⁰⁰. During deliberative sessions of the ECFR, members «engage in a hierarchization of textual authorities, weighing different interests and establishing priorities – in other words, they set about construction, each time anew, what Qaradawi calls a *fiqh* of balances and priorities (*fiqh al-muwaḥḥanat wa fiqh al-awlawiyyat*)»¹⁰¹. In addition,

«Given the strong emphasis placed by the leadership of the ECFR on conformity with the Law, part of the task is to issue fatwas that stay within the limits of the laws of the different European states. Furthermore, since the fatwa must not 'destabilize' the society [...], the production of a *pan-European fatwa* also requires an assessment of the shifting moods of European audiences regarding public religion in general, and Islam in particular. In other words, the fatwa must gauge the boundaries of acceptable religious discourses at each moment and across European countries in order to be able to serve 'the interests of Muslims' and 'the interests of the societies they live in'»¹⁰².

However, as we already mentioned (see *supra*, section 1), the project of *fiqh al-aqalliyat* for Muslims in non-Muslim majority countries, in particular in Europe, faces the opposition of leading Muslim scholars and activists, who argue that Muslim persons are an integral part of European societies, and therefore should not isolate themselves by adopting the status of a minority. They should instead engage actively in the political process with the purpose of contributing to the common good and establishing a culture of entrenchment, while at the same time preserving their Muslim identity¹⁰³. As an example, for Tariq Ramadan, «Toutes les lois qui protègent la vie et la dignité humaine, promeuvent la justice et l'égalité, imposent le respect de la nature, etc. sont *ma charia* appliquée dans *ma* société, même si celle-ci n'est pas majoritairement musulmane ou que ces lois n'ont pas été pensées et

¹⁰⁰ A. Caeiro, *The power of European fatwas*, cit., 436. This tension, according to the author, reveals itself through the reading of ECFR's *fatawa*, particularly because of the oscillation between the emphasis on the powerlessness of Muslims in Europe and on their moral responsibility: "The former founds a regime of exceptions that suspend traditional Islamic norms through concepts such as 'necessity' and emphasizes on the need to abide by European laws. The latter purposively ignores the context (or minimizes its importance) in order to consolidate a Muslim identity rendered fragile – in the eyes of the muftis – by deep pressures towards assimilation" (*ibidem*).

¹⁰¹ A. Caeiro, *The making of the fatwa*, cit., 94.

¹⁰² *Ivi*, 95.

¹⁰³ M. Rohe, *Islamic law in Western Europe*, cit., 742-743.

produit par des savants musulmans»¹⁰⁴. Other challenge comes from some of the *salafis'* criticism, since that, for them, living in non-Muslim majority societies is unacceptable, except for the purpose of proselytization. In fact, «They stress the universality of Islamic laws and thus reject, in principle though not always in practice, the accommodation of decisions to the unique conditions of Muslim minorities or the issuance of concessions as a means to enhance proselytization»¹⁰⁵.

The debate surrounding the applicability of Islamic law in Europe, especially in consolidated democracies, and the idea of *fiqh al-aqalliyat* seems to confirm Armando Salvatore's assertion that the process of redefinition of Muslim traditions in Europe tends to remain conflicted and multi-leveled. It is possible, as he sustains, that the consolidation of social and political agency does not derive from the hybridization of predefined Western and Islamic norms, «but rather reflect original and complex forms of interaction cutting through 'majority' and 'minority' political cultures»¹⁰⁶.

V. ISLAMIC VIEWS ON POLITICAL PARTICIPATION OF MUSLIM MINORITIES IN EUROPE

As previously discussed, Muslim scholars issue *fatawa* in order to produce and disseminate legal opinions on issues concerning Islamic law and its application in a variety of settings, including where Muslims are a religious and political minority. These texts contain a normative point of view about what constitutes "a good Muslim life", and therefore reveal possible interpretations of specific subjects or legal matters from an Islamic perspective.

One such issue is the political participation of Muslims in European nation-states – if it is permissible under the normative framework of *shari'a* and for which reasons. A previous study distinguished between religious authorities from the Islamic world and from the Western world, adding a third and residual type of religious authority, «for instance by bringing together religious authorities from Europe and the Muslim world into one collective body»¹⁰⁷, which includes the European Council for Fatwa and Research. Studying

¹⁰⁴ T. Ramadan, 2009, 86, quoted in F. Frégosi, *Usages sociaux de la référence à la charia chez les musulmans d'Europe*, in B. Dupret (ed.), *La charia aujourd'hui. Usages de la référence au droit islamique*, 74 (2012). In the same sense, see T. Ramadan, *Western Muslims and the future of Islam*, Oxford 2004, 224-225. For an account of Tariq Ramadan's position and its differences in comparison to the notion of *fiqh al-aqalliyat*, see also M. Papa, cit., 172 ff.

¹⁰⁵ U. Shavit, cit., 79.

¹⁰⁶ A. Salvatore, cit., 557.

¹⁰⁷ W. Shadid, P.S. van Koningsveld, *Religious Authorities of Muslims in the West: Their Views on Political Participation*, in W. Shadid, P.S. van Koningsveld (eds.), *Intercultural Relations and Religious Authorities: Muslims in the European Union*, 151 (2002).

the content of legal opinions that these authorities had issued, the authors found different answers and justifications for the question of political participation of Muslims in the West. For example, regarding the positions of scholars from the Islamic world, they present two opinions: the first had been written by Jadd al-Haqq Ali Jadd al-Haqq, the late Shaykh of Al-Azhar. When asked if it was permissible for a Muslim to join a Danish secular or Christian political party in order to take part in an election for local councils or national assemblies, the religious scholar allowed political participation «on the condition that this does not touch upon the creed of Islam or the fundamental interests of Muslims»¹⁰⁸. The second is al-Qaradawi's, for whom political participation is a duty for Muslims in the West. If faced with a political party or candidate who holds hostile ideas against Muslims, the latter should choose in accordance with “the jurisprudence of balancing” (*fiqh al-muwazana*), which «means that the Muslim weighs things and has to select the less prohibited and lighter depravity, leave the lower benefits to obtain the higher ones, select the smaller damage to avoid the more dangerous damage, and select the personal damage to avoid the general damage»¹⁰⁹.

In turn, most scholars living in Western countries sustain the obligatory character of political participation. Muhammad Rassoul, for example, justifies political participation of Muslims in Germany based on the possibility of the development of a “German caliphate” by means of the democratic political process. In the Netherlands, Muhammad Zaki Badawi presented a *fatwa* stressing that «Those who interpret Islamic citizenship as confining Muslim loyalty to only one section of humanity miss the essential universality and humanity of Islam»¹¹⁰.

Finally, the European Council for Fatwa and Research issued a fatwa to answer if it was permitted for a Muslim to participate in local elections in Europe. The ECFR referred the question back to local Islamic foundations and associations, who could better assess if political participation would promote the general interest of Muslims, «on the condition that this does not imply a greater concession from the part of the Muslims than the advantage they enjoy»¹¹¹.

Uriya Shavit drew upon this work by focusing on *wasati* and *salafi fatawa*, demonstrating the existence of a predominant agreement among Muslim scholars on the permissibility of political participation in the West. According to him, «Legitimization of Muslim minorities’

¹⁰⁸ *Ivi*, 157.

¹⁰⁹ Quoted in *ivi*, 158.

¹¹⁰ Quoted in *ivi*, 160.

¹¹¹ Quoted in *ivi*, 162.

political participation in non-Muslim majority countries was a logical result of the *wasati* approach to electoral politics and to their jurisprudence of Muslim minorities (*fiqh al-aqalliyat al-Muslima*)¹¹². In particular, *wasati* scholars justify their opinion by stressing that participation serves a *maslaha* (i.e., a purpose of *shari'a*): promoting permanent Muslim presence in Western countries and the spread of Islam. They also stress the application of *fiqh al-mumazanat*, «suggesting that, while participation in infidel political systems involves harm from the religious point of view, or constitutes evil, the potential implications of abstention for Muslims and for Islam should be also considered»¹¹³. In this perspective, whenever the benefits for the Muslim community outweigh the harm in taking part of a system contrary to Islamic law, participation is allowed or even required.

In addition, many *salafi* jurists also permit political participation in the West. Although they reject the *wasati* approach, *salafis* reach a similar practical conclusion, since «their *fiqh* for Muslim minorities – which invokes proselytizing as a justification for residing in the West – recognizes the legitimacy of concessions when the communal *maslaha* of spreading Islam at large is at stake»¹¹⁴. Hence, «the mainstream *salafi* prohibition on being elected to parliaments that govern by laws other than Allah's is not categorical; it is lawful to run for office and to vote, if the purpose is to change the system into one that abides exclusively by Allah's laws»¹¹⁵. Nevertheless, Shavit's research revealed the lack of consensus on the issue, considering that some *salafi* jurists and *jihadi-salafi* activists refute the possibility of political participation because of their rigid application of the principle of loyalty and disavowal and their opposition to liberal-democratic norms¹¹⁶.

These juristic opinions on the issue of political participation of Muslims in Western countries and, in particular, in Europe indicate a form of transnational politics and legal culture that challenges «the traditional demand of nation-states to be the primary source of citizens' allegiance»¹¹⁷. They corroborate the observation that European state law and Islamic law coexist in hybrid legal spaces and interact in many different ways,¹¹⁸ including in the field of the public law's discipline of political participation. However, consolidated democracies in Western countries set up constitutional structures aimed at absorbing

¹¹² U. Shavit, “*The Lesser of Two Evils*”: *Islamic Law and the Emergence of a Broad Agreement on Muslim Participation in Western Political Systems*, *Contemporary Islam*, 8, 242 (2014).

¹¹³ *Ivi*, 244.

¹¹⁴ *Ivi*, 250.

¹¹⁵ *Id.*, *Shari'a and Muslim minorities*, cit., 74.

¹¹⁶ See *Id.*, “*The Lesser of Two Evils*”, cit., 252.

¹¹⁷ *Ivi*, 254.

¹¹⁸ P. Parolari, *Taking interlegality seriously: Some notes on (women's) human rights and the application of Islamic family law in European countries*, in *Revista General de Derecho Público Comparado*, 28 (2020).

dissent and dealing with particularistic demands of specific groups, while *shari'a* and *fiqh* do not offer an uniform and rigid answer to the question of political participation of Muslims in Europe.

CONCLUDING REMARKS

The analysis developed throughout the article allow for some concluding remarks that, as a matter of fact, are likely to open a space for further reflections that are definitively needed in order to face the big challenge posed by the increasing cultural and religious pluralism to European democracies.

If we stay within the traditional constitutional framework of European pluralist democracies, as we saw, we must conclude that the free expression of cultural and religious identities in the public space, and in particular at the political level, is somehow implied by the centrality of democratic rights and liberties – and Islam is not an exception to that. Furthermore, not only this expression is legitimate, but it may also prove to be appropriate to the extent that it allows for historically marginalized groups to finally overcome discrimination and exclusion. Restrictions, let alone prohibitions, against the Islamic presence in the political arena are therefore acceptable insofar they are proportionate and functional to the protection of constitutional principles and interests.

If we move the analysis on a different level – trying to investigate whether this increased cultural and religious pluralism affects the form of State and, in particular, in which terms an “intercultural State”¹¹⁹ may be conceptualized – the focus is not so much on the limits of fundamental rights and liberties but on the potential of representing minority cultural and religious identities in the political arena. The notion of “interculturalism”, as is well known, relies on the dialogue between people with different (ethnic, cultural, religious, ideological) identities on an equal basis, with a view not only to let differences coexist side by side, but rather to make a new synthesis which is likely to represent a new (internally plural) identity. Reflecting on an “intercultural State” goes a step further by implying it is not sufficient to focus on specific (judicial, legislative, administrative) intercultural

¹¹⁹ S. Bagni, *Lo Stato interculturale: primi tentativi di costruzione prescrittiva della categoria*, in S. Bagni, G. A. Figueroa Mejía, G. Pavani (eds.), *La ciencia del Derecho constitucional comparado. Estudios en Homenaje a Lucio Pegoraro*, 117 (II, 2017). See also the papers collected in the monographic issue “*La búsqueda de modelos de gestión intercultural de los conflictos sociales*”, in *Revista General de Derecho Público Comparado*, 28 (2020).

solutions, but a re-framing of the State's fundamental principles from the perspective of constitutionalism and the form of State is needed. In identifying the intercultural State's essential elements, Silvia Bagni stresses the importance of political participation and representation, to the extent that it is crucial that every subject is involved on an equal basis in the definition of the (constitutional and legislative) rules that make it possible to "live together"¹²⁰.

It thus becomes essential to search for conditions and forms of interaction and coexistence between different worldviews, religious beliefs, cultural practices, taking into account that cultural and religious belonging may also imply, as with Islam, the adherence to an autonomous legal system.

Is it possible, from this perspective, looking at *fiqh al-aqalliyat* as a way to imagine an "intercultural law"? This very notion and its related jurisprudence are undoubtedly controversial and are challenged by harsh criticism within the community of Muslim scholars and activists. Despite its shortcomings, however, and while considering that it does not provide for an unequivocal answer to the question of political participation of Muslims in Europe, the idea of a "fiqh for the minorities" seems to demonstrate that there is room for original forms of interaction and overlapping legitimation between majority and minority political and legal cultures.

And, in addition, what role may minority (and Muslim, in particular) political participation and representation play in this search for the intercultural State's essential elements and conditions? While we agree that, for an intercultural State to really promote diverse citizens' search for the common good, the "question" of Islam in the political arena must be conceptualised not in the light of an "Islamic exceptionalism", but rather in terms of re-signified citizenship and political participation¹²¹, the possibility for minority cultural and religious identities to really participate and be *substantially* represented at the political level remains a controversial issue. In fact, on the one hand, active political participation and effective access to representation of cultural and religious minorities, resulting in "diverse parliaments" where the multiple articulations of society are acknowledged, are relevant indicators of the form of State turning "intercultural". On the other hand, as already noted, descriptive and substantive representation do not necessarily coincide, since political actors with a minority background, even if they enjoy strong support and are eventually legitimized by the vote of the members of a minority group, do not automatically act «in the interest

¹²⁰ S. Bagni, cit., 169-170.

¹²¹ See. G. Spanò, cit., 30, who regards the presence of Islam in the political sphere of Western democracies as a «legitimate *framework of argumentation* and a shared space for (particularistic) claiming, not letting different identities run in circles inside stereotypical roles».

of the represented, in a manner responsive to them»¹²². Furthermore, the ambiguities of ascriptive identities, with their potentially sectarian and anti-democratic character, cannot be underestimated¹²³, as well as the pitfalls that are likely to stem from political activism aimed at representing European Muslims¹²⁴.

¹²² H. Pitkin, cit., 109.

¹²³ See M. Nadim, *Ascribed representation: ethnic and religious minorities in the mediated public sphere*, in A.H. Midtbøen, K. Steer-johnsen, K. Thorbjørnsrud (eds.), *Boundary Struggles: Contestations of Free Speech in The Norwegian Public Sphere*, 230 (2017), who notes how minority groups managing to participate in public and political debate (e.g. by having access to the media) often experience a process of “ethnicization” in terms of being “trapped” in a specific ethnic and religious identity, with that single aspect of a person’s identity determining how she is represented and what topics she can address.

¹²⁴ M. Didero, *Muslim Political Participation in Germany: A Structurationist Approach*, in J.S. Nielsen (ed.), *Muslim Political Participation in Europe*, 50 (2013), for example, identifies them in «foreigners being equated with Muslims and both being perceived as social out-groups, any political organisation which knowingly positions itself with relation to both of these categories needs to be aware of the severe headwinds it will face».

