The Legal Self-regulation of Religious Groups:

Tackling the Challenges of Legal Pluralism in Theory and Practice

Francisco Colom González

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The Legal Self-regulation of Religious Groups. Tackling the Challenges of Legal Pluralism in Theory and Practice

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Abstract

This paper focuses on the claims for legal self-regulation made by some religious minorities in Western societies. Such claims have often reached the legal system of the state, either through arbitration practices, judicial litigation on religious marital agreements or personal status laws, and they have also stirred public discussion in the political arena. Both circumstances have substantial implications for legal and political theory: whereas the interaction of religious and civil law has sometimes resulted in legal hybridization, the cultural exceptions to the rule of law are a politically sensitive issue. After reviewing several experiences with religious arbitration and the 'interlegality' resulting from the cultural transplant of legal norms, it is maintained that the legitimacy of these types of claims can be significantly enhanced by intercultural legal hermeneutics and democratic deliberation. These two approaches presuppose a dialogical evaluation of the principles guiding social relations. Accordingly, two complementary strategies are suggested to tackle the challenges of legal pluralism: an intercultural approach to legal interpretation, and the public deliberation on the normative purpose lying behind the possible granting of legal autonomy to religious groups.

The increasing privatization of the judicial functions of the state has indirectly created a new front in the management of intercultural relations, namely the claims for legal self-regulation posed by some ethnic and religious groups. These claims not only question the state monopoly on the production and interpretation of the law, but also compromise the formal guarantees that the 'rule of law' is conventionally assumed to provide. This formula is commonly understood as the requirement that authority should be exercised within a framework of public norms (Waldron 2008). This notion of lawful process goes back to the English *Magna Carta* in the Middle Ages, which stated that:

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled. Nor will we proceed with force against him, except by the lawful judgement of his equals or by the law of the land. To no one will we sell, to no one deny or delay right or justice.

The historical development of the rule of law runs parallel to the secularization of legal validity and the formal rationalization of the law. The normative core of this Anglo-American notion overlaps with the German doctrine of the *Rechtsstaat*, which makes the legitimate exercise of sovereign power conditional to its subjection to a rational legal

structure. Both systems share a common conviction on the unity and uniqueness of legal authority, its jurisdictional cohesion and the hierarchical organization of legal norms. This view, which has been sometimes described as an 'ideology of legal centralism' (Griffiths 1986) was hegemonic during most of the modern period, and it presupposes the active role of the state for the existence of the law. As Klaus Günther has put it:

> Most academic as well as political debates about the law are still directed to the concept of a national legal order with a centralised and public legislation, with a legally bound executive power that is responsible to the sovereign people, and with a relatively autonomous judiciary that is committed to a coherent adjudication of a legitimate legal system (Günther 2008: 5).

Pluralist legal doctrines have offered an alternative to this positivistic view. 'Legal pluralism' can be understood either as an empirical fact or as a stream in critical legal theory. In the first sense it simply refers to the inexistence of a unified and homogeneous source of legal authority in a given society, be it for the political inability of the state to impose it – as is the case in many societies which experienced or resulted from colonialism, and where local or customary law coexists with modern state law - or for the organized cohabitation of two or more legal systems – as for instance in Canada, where English common law and French civil law have been preserved on a territorial basis, or in many Muslim countries, where a jurisdictional articulation of Islamic and positive law can be found (Dupret 1999). The extent to which heterogeneous legal orders interact and mutually recognize each other is a contingent fact that depends on multiple circumstances.

As a theoretical approach, however, legal pluralism takes a normative stand and assumes the parallel and often contradictory types of legitimation underlying legal norms. Its basic premise is that the notion of 'law' must not be solely confined to state, international and transnational law, but it should be enlarged to include normative conceptions whose validity is authoritatively asserted within a given social formation (Von Benda-Beckmann 2006). If a legal order is considered as nothing but the political and juridical systematization of social practices, and justice is not viewed as an abstract code of legal statements but what entitles legal practitioners to perform, one would be keener to recognize the polycentric character of most legal systems and the uneven scale of their normative efficacy. From a pluralist perspective then, state law would be only one among other systems of social rules, and it would be permanently pressed to negotiate the validity of its own norms, their implementation and their assimilation of other systems (Falk Moore 1978).

The relevance of the cultural substratum for the operating of the legal process was originally signalled by Eugen Ehrlich at the beginning of the twentieth century. A witness to the inextricable diversity of the Habsburg Empire, Ehrlich introduced the concept of 'living law' (*lebendes Recht*) to criticize the conventional approach of the jurisprudence of his time, which limited itself to the written laws laid down in the Austrian legal code, while ignoring the legal traditions in which it was embedded. Ehrlich noticed that there was an intimate relation between social and legal norms, and that legal obligation was mostly induced by settled patterns of behaviour, rather than by an abstract abidance with the law. According to him, the law is basically an 'ordering' (*Ordnung*) of human behaviour, so the legal interpreter must search for the roots of the present laws in the inner organization of human associations. As he tried to show with his research on the legal customs regulating marriage and inheritance in his native Bukovina region, beneath state norms there existed a customary law that was at least as important, if not more so, than statutory law. This unofficial law enjoyed social acceptance, stemmed from continued practice and worked in a parallel, but not necessarily opposite way to state law.

> The rules that, by themselves, people living together consider binding are the living law. They constitute a legal order just like those included in the legal codes. The difference is that the former become valid by the voluntary action of the parties involved, whereas the latter must, to a great extent, be enforced by the courts and public authority (Ehrlich, 1986: 233; my translation).

After being criticized by Kelsen and the Austrian positivistic school, whose theoretical hegemony he could not challenge, Ehrlich's work fell mostly into oblivion. It was rediscovered several decades later by legal anthropologists, who applied some of his notions to the study of both primitive and developed societies. This approach instigated an ongoing academic debate on the different types of social norms and the interaction between coexisting legal systems (Nelken 2009; Pospisil 1971).

Religious arbitration in Canada and Great Britain

Globalisation has increased the polycentric character of legal processes. As Klaus Günther has observed, with the current proliferation of private and public legal actors

> A 'uniform concept of law' can no longer be maintained. Instead, legal theory has to deal with many different normative systems. The positivist concept of 'one' legal system that is logically ordered and hierarchically differentiated turns into a 'plurality' of legal regimes. The fact of 'legal pluralism' seems to turn the idea of a unified legal system into a mere fiction (Günther 2008: 6)

Günther had in mind the role of supranational organisations with *de iure* or *de facto* legal capacity, but also the normative problems that emerge from fragmented procedures of self-regulation – like a deficit on the accountability, transparency and legitimacy of the law. On the other hand, the decentralization of law-making processes has run in favour of certain ethnic and religious groups. There are in most contemporary societies a number of communities whose members have chosen to regulate their behaviour in matters of diet, family and intra-communitarian issues according to self-imposed standards that conspicuously differ from those of mainstream society. Many of these groups have attempted to obtain some degree of autonomy and official recognition for their regulative practices. The conflict of laws that this has sometimes engendered has several sources: in some cases it is a by-product of the right to self-determination granted to aboriginal peoples by international conventions; in other cases it is derived from the 'diasporic legal reconstructions' (Shah 2005) locally impelled by immigrant communities, and more generally it results from the rules on personal status recognized by international private law.

Canada became an early testing ground for the experience of legal pluralism both in its ethnic and religious facets. Whereas aboriginal claims to self-rule have their legal and historical roots in the Royal Proclamation of 1763 and in the treaties signed by the First Nations and the Crown, the religious dimension of legal pluralism came out into the open more recently, as a result of some practices of communitarian arbitration among immigrants. Religious arbitration can be defined as

> A voluntary dispute resolution process, conducted according to religious principles…. It can refer to processes that are binding, or non-binding; to actions that are highly formal, or highly informal; and to processes that are intended to serve as a prelude to court action, a partial substitute for court action, or a complete substitute (Walter 2012: 503-504)

A variety of these types of practices has existed in Canada and the United States since the colonial times, but they came to the forefront of the public attention in 2003, when the president of the Canadian Society of Muslims, Syed Mumtaz Ali, announced the creation of a *Sharia* arbitration court (the Islamic Institute of Civil Justice) for the Ontario Muslim community in order to apply traditional Islamic law in marriage and other private issues. This initiative made use of the Ontario Arbitration Act of 1991, which in Section 32.1 stated that "*in deciding a dispute, an arbitral tribunal shall apply the rules of law designated by the parties or, if none are designated, the rules of law it considers appropriate in the circumstances*". This Act made all arbitrations within Ontario binding and enforceable, except for commercial disputes between international parties. It did not explicitly exclude the family law from it and did not mention the requirement that judgments should conform to Canadian law, as did the previous provincial arbitration act. Under these circumstances, it seemed possible for religious boards to make binding decisions on divorce or inheritance cases based on grounds that Canadian courts would not necessarily recognize.

An agitated public debate followed suit, with forty-eight organizations putting their names to a declaration denouncing the danger of such an initiative to women's equality rights. The main concern was that religious arbitration might become a judicial ghetto for the most vulnerable members of the Muslim community - mainly women who had recently migrated into the country - and that it would actually deprive them of the possibility of moving out of, and learning to cope with, different social environments (Baqi 2005; Rahnema, 2006). Contrariwise, the arguments in favour of the initiative stressed the convenience of protecting those women who wish to live up to the religious standards of their community, and the necessity to regulate a type of practice that already exists in the daily lives of many people in immigration societies (Bakht 2007).

As a reaction to the public concern, the Attorney General of Ontario asked an independent legal consultant, Marion Boyd, to conduct a review on the use of arbitration in the province. The official report that followed recognised that "*Canada is a multicultural society, and the fundamental tension that must be addressed is between respect for the minority group and protection of a person's individual rights within that minority*" (Boyd 2004: 3), but it did not exclude the possibility of arbitration by way of religious law in family and inheritance cases, provided that the promotion of alternative ways of dispute resolution for minority groups was balanced against "*a firm commitment to individual autonomy*". She therefore recommended a series of additional provisos and procedural guarantees to the Arbitration Act. In 2005 the Premier of Ontario, Dalton McGuinty, decided nevertheless to veto the initiative and to abrogate all religious arbitration boards in the province. The Family Law Amendment Act, enacted one year later, narrowed family arbitration in accordance with the law of Ontario and Canadian jurisdiction.

The defeat of the plan to introduce Islamic arbitration boards in Ontario was therefore political, not strictly juridical, and it took place in the political sphere, not in the courts, for it could not overcome the local 'moral panic' and the prejudices associated with the notion of 'Islamic law'. This initiative actually entailed as many problems as it tried to address, for divorce is a mainly federal jurisdiction in Canada, and no mention was made of the Islamic legal tradition that would be followed by the arbitration board, nor how its decisions would be reconciled with Canadian law.

A comparable debate ignited in the United Kingdom in 2008, when some statements by the Archbishop of Canterbury at the Royal Courts of Justice about "*crafting a just and constructive relationship between Islamic law and the statutory law of the United Kingdom*" aroused a political upheaval (Williams 2008). What the Archbishop actually mentioned, quoting the work of Ayelet Shachar, an Israeli academic based in Canada, was the possibility of recognizing a 'supplementary jurisdiction' so that Muslims could freely decide to resort to a British court or to religious institutions to settle some of their intra-communitarian disputes. As the Muslim Council of Great Britain hurried to remark, such

possibility would just put British Muslims on the same level as other religious communities, like the Jewish, which for centuries have had at their disposal institutions like the *Batei Din* or rabbinic tribunals for arbitrating family matters and interpreting religious rules and rituals. Indeed, British Muslims have been using for some time now, informal practices of arbitration as an authoritative reference for the resolution of private disputes. The peculiarity of the English case is that its common law system, and more concretely the Arbitration Act of 1996, does not require that the rules of arbitration belong to English law, and it does not preclude that the third party to which the resolution is delegated be a religious authority. The only prerequisite is that the parties involved freely and voluntarily agree to submit to such jurisdiction and commit to manage the whole procedure in a fair and adequate manner. Originally these practices were not recognised as officially binding, but since 2007 the British government has sanctioned the operation of several 'Muslim Arbitration Tribunals' throughout the country. As the Lord Chief Justice of England and Wales remarked in a speech at the East London Muslim Centre,

> There is no reason why principles of Sharia Law, or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution. It must be recognized, however, that any sanctions for a failure to comply with the agreed terms of the mediation would be drawn from the laws of England and Wales. So far as aspects of matrimonial law are concerned, there is a limited precedent for English law to recognize aspects of religious laws, although when it comes to divorce this can only be effected in accordance with the civil law of this country (Lord Philips 2008: 19)

The public animosity against the very idea of 'Sharia courts' dealing with family issues in Britain pressed Jack Straw, the Secretary of State for Justice in the Cabinet of Tony Blair, to make clear before the British Parliament that arbitration, as a method for dispute resolution, could not be applied to family matters.

> Arbitration is not a system of dispute resolution that may be used in family cases. Therefore no draft consent orders embodying the terms of an agreement reached by the use of a Sharia council have been enforced within the meaning of the Arbitration Act 1996 in matrimonial proceedings (Straw 2008).

The consequences of this debate still loom large in the Bill on Arbitration and Mediation Services *(Equality Bill, HL Bill 72)* currently under consideration at the House of Commons, which explicitly excludes criminal and family issues from arbitration. A new case, *Jivraj v. Hashwani*, has more recently put forward the limitations that the public function of arbitration imposes on the autonomy of the parties.

'Interlegality' and the cultural transplant of legal norms

The coexistence of different normative systems within the same political body tends to create multiple affiliations, that is, membership in overlapping and potentially conflicting sets of jurisdiction. Whether such multiplicity is ignored, rejected or accepted by the established legal system is an open political question. One possibility is to recognize a given legal body as a collective right of those living under its rule. This would approach it to what Will Kymlicka, in his general theory of minority rights, has vaguely characterized as 'polyethnic rights' (Kymlicka 1995). Another alternative is to incorporate unofficial law

into state law through legal or judicial interpretation. Sousa Santos has coined the term 'interlegality' for defining this peculiar phenomenon of interpenetrating legal orders.

> We live in a time of porous legality or legal porosity, multiple networks of legal orders forcing us to constant transitions and trespassing. Our legal life is constituted by the intersection of different legal orders, that is, by interlegality. Interlegality is the phenomenological counterpart of legal pluralism, and a key concept in a postmodern conception of law (Sousa Santos 2002: 437)

Interlegality can indeed be conceived as both a process and an outcome, namely:

> As a process of adoption of elements of a dominant legal order, both national and international, and of the frames of meaning that constitute these orders, into the practices of a local legal order, and/or the other way round; or as the outcome of such process, a hybrid new legal order (Hoekema 2005: 11)

This notion goes beyond the restricted sense in which Alan Watson first used the term 'legal transplant' decades ago (Watson 1974). Whereas Watson merely meant by this, the transfer of a legal rule from one jurisdiction to another, the notion of 'interlegality' buys into a pluralist conception of the law that takes into account its cultural background. Both notions concerning the relocation of norms and the resulting legal hybridization can be applied to describe the transferal of private arbitration to the litigation methods of the state law system. This is typically the case when disputes on marital contracts, inheritance, children custody or commercial agreements within immigrant communities have transcended the original boundaries of religious or unofficial law and reached the ordinary jurisdiction. State courts then turn into an 'interface' for heterogeneous and often conflicting legal codes. The termination of Muslim and Jewish marriages, which is ruled by contractual principles, has been often involved in such cases. In the Muslim tradition, the different procedures conducive to the dissolution of the marital bond entail a dissimilar degree of initiative on the part of the wife and the corresponding right to receiving compensation from the husband. The reparation incorporated into the marital contract is conceived as a means of sustenance for the wife in case of a sudden death of the husband, divorce or other emergency situations. In spite of its protective function, this type of endowment (*Mahr*) is not strictly a gift or a gratuity. An early sentence by an English court in 1965 interpreted the *Mahr* as a property right, rather than a lump sum or a marital compensation.

> This right [to the *Mahr*] is far more closely to be compared with a right of property than a matrimonial right or obligation, and I think that, upon the true analysis of it, it is a right *ex contractu*, which, whilst it can in the nature of things only arise in connection with a marriage by Mohammedan law (which is *ex hypothesi* polygamous), is not a matrimonial right. It is not a right derived from the marriage but is a right *in personam*, enforceable by the wife or widow against the husband or his heirs (*Shahnaz v. Rizwan*)

According to this interpretation, the *Mahr* would be a legal effect of the marital contract to which the wife is entitled as her exclusive property. Repudiation (*Talaq*), on the other hand, is a unilateral termination of marriage by the husband without further need to justify his decision in a court. However, it implies his obligation to pay the full monetary amount due to the wife. Divorce can also be initiated by the wife with the husband's consent (*Khula*) and the mediation of a religious judge, but usually at the cost of renouncing the *Mahr*; or it

can be done without the husband's consent (*Faskh*), provided that the wife can demonstrate to the judge that she has suffered some kind of harm during the marriage. In such case the wife may still be entitled to receive the payment. Unlike Muslim marriages, whose particular arrangements are directly negotiated between the parties, the terms of Jewish marriages are fairly standard, and it only ends with the death of one of the spouses or with the voluntary and unilateral granting of divorce (*Get*) by the husband.

The attempt to have these religious arrangements enforced by state courts has created a range of disparate legal resolutions and put forward some of the normative problems involved in legal transplant. Following the initial path set by *Shahnaz v. Rizwan*, some judges in the United States and in Canada have resorted to universalistic patterns of interpretation, adapting the religious clauses of the marriage agreements to the conventional principles of contract law. In such cases the judge limits him/herself to resolve the dispute between the parties through an internal rule, without entering to interpret the religious norm as such, as in *Avitzur v. Avitzur*. This case dealt with the refusal of a Jewish husband to grant the religious divorce (*Get*) to his wife, thereby preventing her from remarrying according to her religious beliefs. The Court put the Jewish prenuptial agreement (*Ketubah*) on the same level as an ordinary contract, thereby conceiving its terms as enforceable obligations, and ordered the husband to appear before the rabbinical board. After two appeals by the parties involved, the New York Supreme Court ruled that this was not an intrusion of the state in religious matters, because it just required the parties to appear before a dispute resolution panel to which they had agreed before marriage, and it did not force any particular outcome on the husband.

In other cases – as in *Kaddoura v. Hammoud*, which dealt with a counter-petition by a Muslim wife and the payment of *Mahr* – the court assumed a relativistic perspective and considered that religious law has inherent properties that prevent civil law from interfering with it, lest the civil courts be led into the 'religious thicket'. According to this view, religious obligation should not be considered as an obligation suitable for adjudication in the civil courts. It has also been the case that a court has rejected the enforceability of the *Mahr* as contrary to public policy, as *In re Marriage of Dajani,* where the Court of Appeals of California interpreted it as a 'dowry agreement' clearly designed for the wife to profit from a divorce. The court therefore ruled that a contract encouraging marriage dissolution could not be legally enforced.

Similar experiences of interlegality are less frequent in countries with civil law systems. However, European courts have also been pressed to decide on the validity of religious arrangements in cases involving private international law and heterogeneous personal status. The most recurrent cases have to do with the registration of foreign Muslim marriages, with the civil effects of polygamy, with repudiation (*Talaq*) as a procedure for the dissolution of marriage, and with the custody of minors (*Kafala*). European jurisprudence shows some similarities and differences in this field. In countries like France, Spain, Italy and Belgium, nationality is the connecting factor for assigning a particular case to one legal system. Under this principle, when a norm or institution is permitted by the personal status law of both spouses - even if it has no legal standing in the host country - it may have some legal effects on issues like family reunification, inheritance rights, alimony and widow's pension. In France, Germany, Netherlands and Belgium the courts also keep the standard that declares foreign law applicable in principle, but without authorising the actual application of those rules considered discriminatory in a particular situation. On the whole though, the result of this case-by-case procedure is quite uncertain, as it depends on the judge's conviction, and it therefore renders a very insecure and divided jurisprudence on these matters (Foblets 2003).

When it comes to the theoretical approach for legal interpretation in cases of conflict of laws, some authors have proposed that a search be made for a legal meta-language or for a universal code of legality "*which contains basic legal concepts and rules, like the concept of rights and of fair procedures, and the concepts of sanction and*

competence" (Günther 2008: 16). Although Günther's view is far from a natural law approach, it is, in its own way, compatible with Lon Fuller's well-known notion of the 'principles of legality' that every system of law, properly understood, must meet (Fuller 1964). Other authors have instead advocated for the articulation of interlegality through the recognition of 'normative compatibilities' (Amstutz 2005) or by adopting a 'functionalist approach'. This last one has been standard procedure in international private law, where the judge searches in the foreign rules for similar functions to the law of the land. When in doing this he finds an incompatibility with the fundamental principles of the domestic legal system, foreign law is usually set aside invoking the 'public order exception' as a reason. However, legal format need not be systematically privileged over cultural context. Some authors have seen here a chance for a non-hegemonic recognition of legal norms that are culturally alien. In the particular case of the *Mahr*,

> This functional approach has the advantage of taking an internal vantage point on cultural practices and investigating their contours, rather than focusing on their difference and lack of familiarity. [For instance] a judge could look behind the religious nature of the *Mahr* to ask what its purpose is in a marriage, and what values, such as trust, respect, and financial independence are promoted by its enforcement (Fournier 2010: 70-71)

This functionalist approach enjoyed considerable acceptance in the 1980's, but since then the trend in Europe has reversed toward a more systematic refusal of recognizing any legally dissonant effect of marriages contracted abroad. In general terms then, the predisposition of the ordinary courts to enforce religious legal agreements has depended on their consideration from a purely civil perspective, but this has not prevented them from being culturally misinterpreted. For instance, some authors have denounced the translation of Islamic marital arrangements as if they were prenuptial agreements as producing a 'denaturation'[1] of the original legal institution. As the case of the *Mahr* would illustrate, this has resulted in the diminishing or even in the denying of the contractual capacity of the bride (Fournier 2010; Wolfe 2006; Qaisi 2001-2). But the opposite can also be true. In cases like the custody of minors, the principle of the child's best interest has sometimes led to more generous interpretations by the courts than the original Muslim institution (*Kafala*) which, unlike adoption, does not create any bond of filiation.[2] It is therefore difficult to conclude whether legal transplant has inherent emancipatory or alienating consequences. Its practical results depend on the insertion of such practice within a wider social and political context.

The public sphere and the rule of law

Pluralist approaches probably reflect the social dynamics of the legal process more accurately than positivism does, but they offer no clues for the normative coordination of heterogeneous or conflicting legal orders. Legal pluralism grapples indeed with an inescapable tension between three main normative references: state sovereignty, the

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[1] In anthropology, the French term *dénaturation* refers to the loss by a legal system of the characteristics that define its specificity against other systems, that is, the change of its fundamental logic so that "*the legal system is dispossessed of what constitutes its identity, leaving the population with rules and habits that are in the process of losing their meaning*" (Bé-Nkogho Bé 2006).

[2] For instance, when dealing with the right to orphan's pension of two Moroccan children living in Spain, the High Court of Andalusia came to recognize the 'correspondence effects' and the 'functional similarity' between *Kafala* and adoption, putting both institutions on the same practical level (*Sentencia del Tribunal Superior de Justicia de Andalucía de 14-09-2004; rec. 1014/2003*; Quiñones Escámez 2009).

recognition of minority groups and the rights of the individuals. The implementation of legal jurisdictions on ethnic or religious grounds - particularly if they are endowed with the right to self-regulation - runs against the liberal perception of the public sphere as a testing ground for the reasonability of public demands. This is why even if there may be good reasons for granting this type of legal autonomy, there are also solid arguments for deterrence.

Self-regulation is most often claimed by groups that are driven by their traditional *nomos* or coded cultural habits (Cover 1983) in order to ensure their social survival and the reproduction of their identity. Such groups tend to impose a subordinate role on women, who as biological reproducers of the group usually bear a disproportionate share in the task of transmitting tradition. The implementation of a system of legal compartments thus fosters the risk of entrenching discrimination against the most vulnerable members of the group, depriving them of the institutional frame that in liberal polities protects the rights of the individuals. Some authors maintain that the interaction of 'external protections' and 'internal restrictions' may outplay the concentration of normative authority typical of traditionalist communities (Shachar 2001, Kymlicka 1995). The joint governance of different sources of authority should thus increase the competition between individual affiliations and press for the transformative accommodation of the group. However, this view underestimates the conservative kernel of the communities that typically plea for these types of arrangements and that are by definition hostile to change.

A strong version of legal pluralism, for example one that recognizes the exclusive jurisdiction of religious or ethnic boards, would imply the renunciation of state sovereignty upon a whole segment of society and the legal protection that the rule of law provides. Such formula does not merely protect cultural difference but entrenches legal differentiation by multiplying the sources of legal authority. In their extreme or illiberal version, multicultural jurisdictions tend to segment the *demos* on ascribed grounds and contradict the principle of publicity and deliberative justification that has traditionally inspired the very notion of the rule of law (Waldron 2008). Arrangements of this type were not uncommon before the emergence of the national state, like the *millet* system in the Ottoman Empire, the self-governing *aljamas* of Moors and Jews in the medieval kingdoms in Spain or the *repúblicas de indios* in colonial Spanish America.

Modern states have been traditionally hostile to accept this type of legal diversity, since it runs against their egalitarian and homogenizing ethos. The cultural and legal uniformity promoted by the national state was supposed to facilitate social communication and help develop the political judgment of free and equal citizens. Monolingualism and secularisation were not only perceived as the standard path to be followed by modern societies, but as a structural prerequisite for a successful democratic process. In its liberal version, the public sphere was closely associated to what John Stuart Mill termed the 'common sympathies' necessary for creating a national community. This type of social affinity was mainly fostered by shared language and recollections.

> Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist. The influences which form opinions and decide political acts are different in the different sections of the country… The same books, newspapers, pamphlets, speeches, do not reach them. One section does not know what opinions, or what instigations, are circulating in another. The same incidents, the same acts, the same system of government, affect them in different ways (Mill 1861: 289)

Contemporary societies are far more complex than those that first witnessed the emergence of the liberal public sphere. Ethnically heterogeneous polities are not something new in history. What is new is their political combination with egalitarianism and democracy. In any case, the modern global dynamics has made them an inescapable phenomenon. In this context, the naïve universalism envisioned by the European Enlightenment has been met by many discourses that advocate some type of moral particularism for the sake of social fairness and as compensation for past abuses. Aboriginal movements, for instance, have regularly denounced the compulsory processes of acculturation to which their peoples were submitted - like the residential schools of the 'lost generation' in Canada and Australia - and whose legitimation relied on the alleged benefits that membership to a national society, the privatization of common land, and the acquisition of citizenship rights were to bring to them. These processes, as is well known, very often have resulted in the disintegration of native communities and in multiple forms of marginalization.

In normative terms, the implementation of ethnic or religious jurisdictions - like multicultural arrangements in general – needs an explanation for why the relationship between individuals and cultures is not something contingent or fortuitous. In the past, romantic ideas and nationalistic ideologies resorted to ontological and essentialist conceptions for doing this, but such views have lost much of their theoretical clout and moral respectability. In my opinion, a more plausible alternative consists in focusing on the regulative function of normative systems and their connection with social competence. It has been argued that social competence presupposes a familiarity with the symbols, norms and values that define the boundaries of social agency (Kymlicka 1989). Individuals develop their moral judgment, self-esteem and personal identity by exercising their social capabilities within a network of shared cultural meanings. This is illustrated by regulative practices, which ultimately depend on the compliance of the individuals involved in them; but consensus is a limited social resource. Legal orders need to develop mechanisms for shaping some collective standards against the background of normative disagreement (Webber 2009). In particular, they must be able to provide regulative responses to situations concerning distributive justice or moral redress. The effectiveness of a scheme of justice depends on a set of 'common understandings' (Walzer 1983) without which the adjudication of goods is unintelligible or will be perceived as arbitrary by their recipients. It is altogether practical evidence that the attempts to apply principles of justice that are alien to the *lifeworld* in which they must operate turn them sterile and unable to perform the regulative functions that are expected from them. The functional complementation between regulative practices, cultural meanings and moral competence indirectly raises the possibility of finding cross-cultural normative equivalences. This can work as an encouragement for the analogical interpretation of legal principles and moral goods, and more generally as a plea for a culturally nuanced hermeneutics of the law (Colom González 2013).

Intercultural hermeneutics is a task for which moral constructivism and legal positivism are not well suited. Both standpoints resist considering social practices and ways of life as a source of normative authority. They also share a common conviction on the hierarchical character of the legal system, either by conceiving it as a qualitative ranking of possible consensus – from a higher 'constitutional consensus' down to a mere *modus vivendi* (Rawls 1993) – by presupposing a 'basic norm' underneath the system (Kelsen 2005), or by distinguishing between 'primary' and 'secondary' rules (Hart 1961). From a positivist perspective, a custom can only become 'law' if it can be traced back to a basic norm or to a rule of recognition about its origin and formation. Conversely, an analogical approach to legal hermeneutics presupposes a situated understanding of the law (Beuchot 2005). Such methodology should discern the different meanings that a norm may have in its original context and the multiple purposes it may serve. The cultural transplant of a norm can indeed convey a new meaning to it, and the judge must be aware of its consequences when adjudicating an intercultural situation. But there is a political side to this process too.

Since Habermas' early work on the history of the 'public sphere' (Habermas 1969) this idea and its connection with social agency have fed a sustained debate in political philosophy. The public sphere is a normative notion that links political rationality to public deliberation. The Habermasian notion of 'publicity' (*Öffentlichkeit*) has been submitted to subsequent critique by Marxist, feminist, post-modern and more recently, multicultural detractors (Dahlberg 2005). The core of these critiques maintains that Habermas' utterly rationalistic conception of social communication and agency excludes certain groups and issues from the public domain, detaches deliberation from power relations, and it is altogether driven by a consensualistic bias. Other views have been less critical, merely classifying his notion as one of the possible ways of understanding the public sphere, i.e. as the closest to a discursive or deliberative theory of democracy (Marx Ferree 2002).

I will maintain that exceptions to the rule of law for cultural reasons - like minority claims for legal self-regulation - are politically dependent on the deliberative rationalization of their normative purpose in an open space of political communication. The ethno-religious segmentation of a legal system does not actually rest on a compensatory or restorative conception of justice, as is usually the case of 'reasonable accommodations', which suspend or adapt a norm in order to obtain a compensatory effect. It is the contingent outcome of political decisions concerning the internal configuration of the polity, and like any asymmetrical arrangement it requires a strong degree of public acquiescence. The role of public deliberation is not really different here from other cases where cultural immunities need to be politically legitimated, but from a dialogical conception of democracy the idea of public reasoning as a social mediator provides an additional normative support. In our context, 'reasonableness' can be understood in its basic Rawlsian sense, as a moral predisposition to engage in fair cooperation. In political terms though, it means that all the norms striving for an enforceable status in a liberal society should be capable of justification through the public use of reason. Whereas reasonableness implies the idea of a certain dialogical reciprocity, rationality is related to adopting the most effective means to ends. Rawls does not try to derive the 'reasonable' from the 'rational'. He presents both as complementary ideas working in tandem and as connected to distinct moral powers, namely to the capacity for a sense of justice in the first case, and for a conception of the good in the second. This is why any scheme of fair cooperation must be necessarily based on both principles.

> Merely reasonable agents would have no ends of their own they wanted to advance by fair cooperation; merely rational agents lack a sense of justice and fail to recognize the independent validity of the claims of others (Rawls 1993: 52)

A further difference between both principles is that reasonableness has a public dimension that the rational lacks.

> It is by the reasonable that we enter as equals the public world of others and stand ready to propose, or to accept, as the case may be, fair terms of cooperation with them. These terms, set out as principles, specify the reasons we are to share and publicly recognize before one another as grounding our social relations. Insofar as we are reasonable, we are ready to work out the framework for the public social world (Rawls 1993: 53)

Within this scheme, the lack of reciprocity would turn the attempts to cooperate with others on reasonable principles into an 'irrational' or 'self-sacrificial' act. Reasonable cooperation might then be suspended, leaving the strategic approach to social agency alone. It is the reciprocity contained in the idea of reasonableness that gives us the key to a deliberative interpretation of the democratic process. According to this, cultural immunities should test

their political feasibility in an open space of reasonable deliberation, i.e. through a public exchange of mutually comprehensible arguments. This postulate does not really demand a 'filter of rationality' for the propositions admitted to the forum. In a liberal public sphere, the traditionalist worldviews or illiberal doctrines are not *per se* excluded from public discussion. Even if a set of norms is claimed to have a religious or customary origin, this should not be an obstacle for entering into a deliberation about the jurisdictional organization of the political community. However, in order to qualify them as 'law' – that is, as norms enforceable by public authority – the arguments sustaining such claims should be fashioned so as to engage in reasonable argumentation. Those norms should thus be formally defended as if they were amenable to human interpretation and change. On the other hand, *prima facie* universalistic arguments should face an opposite test of legitimacy, namely showing that they can adapt to changing social circumstances and can accept moral interpellations from different cultural backgrounds.

The deliberative component of the democratic process does certainly not suffice by itself to settle the legitimation ground for such complex political arrangements. There are doubtlessly other historical and social circumstances that must be accounted for in each context. After all, legal procedures are but an expression of the existing regulatory practices in a given society. They are not traditions that can be invented out of the blue or the imaginary product of attributed identities. The communitarian justice practiced by some native peoples, or the Islamic law with its developed jurisprudential schools, are deeply rooted in their social environment and count on distinct historical and political credentials. It is mainly when their norms are transplanted or applied in circumstances different from the original that they loose their authoritative aura and find themselves in need of a contextual justification.

Conclusion

Trans-cultural diffusion is a pervasive historical phenomenon from which the law has not been spared. Many changes in legal systems occur indeed as the result of borrowing, but as in any process of translation - *traduttore, traditore* - the original meanings often get lost. A different matter is the social hegemony under which such transferences take place. As we have seen, the processes of interlegality do not necessarily function in a unidirectional way. There are significant examples of state systems attempting to 'read' aboriginal customary law and of traditionalist groups trying to adopt egalitarian ideas. In any case, the norms involved in pluralist arrangements are not intended for generalization, since they are usually attached to a minority status. In order to gain political plausibility and to fight potential prejudice, their normative purpose should have the chance to be explained and submitted to public scrutiny and opinion. This is both a cognitive and a normative postulate: the debate on legal pluralism needs to deal with the morals involved in the cultural narratives of the groups claiming for such arrangements in a public way; on the other hand, the interpretation of legal norms should not be constricted to a single cultural perspective.

Both dimensions are complementary, since an intercultural approach to legal hermeneutics may illuminate the public discussion on minority claims. Reasonable deliberation functions here as a link between the political and the juridical spheres. Both practices presuppose a dialogical evaluation of the normative principles guiding our social relations. The type of argumentation practiced by legal hermeneutics is certainly different from the public discourse used in political communication, but it is not completely detached from it. It likewise needs to face peer review and to take into account the public opinion as an ultimate test of its reasonableness. After all, the *ordre public* or 'public policy' doctrine used in international private law, refers to the social values that underpin the functioning of a legal system and bind a society together. When adjudicating a conflict of laws, a judge must evaluate the consistency of the foreign norms with the principles sustaining the

national law, a task that cannot be undertaken without some degree of cultural interpretation and social authorization. Public deliberation and adroit legal hermeneutics thus appear as converging strategies for debating the accommodation of legal pluralism in democratic societies. They jointly offer a political and a jurisprudential ground so that different types of groups may have the chance to defend, translate or adapt the meaning of their most cherished moral goods while avoiding essentialist interpretations of their own tradition. The actual result of this process and the degree of consensus it may achieve are, however, an open question necessarily subjected to the contingencies of political life.

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