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### **“REFLECTIONS OF LEGAL PLURALISM IN MULTICULTURAL SETTINGS”**

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# REFLECTIONS OF LEGAL PLURALISM IN MULTICULTURAL SETTINGS\*

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*SUMMARY:* I. INTRODUCTION. II. PLURALISM IN SUBSTANTIVE LAW. III. PLURALISM IN EXTERNAL LEGAL TRANSACTION REGULATIONS. 1. State regulations. 2. International regulations. IV. CONCLUSIONS.

## I. INTRODUCTION

The authors of this paper have carried out an extensive, thoroughly documented initial study (published elsewhere) on a major aspect of the relation between legal pluralism and multiculturalism, namely conflict resolution channels – particularly Islamic – that offer an alternative to the legal processes in Western countries, focusing on the USA, Canada and the United Kingdom<sup>1</sup>. During the exacting preparation of this study, we encountered many interesting questions related to our research subject that for various reasons we considered should not be included. In this paper, we deal with some of these issues, qualified in the title as ‘*reflections*’, which we believe could provide new insight into knowledge of legal pluralism today in Western societies, which are somewhat arrogantly held up as advanced, particularly in terms of the development and *experience* of human rights.

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\* This study was carried out as part of the Proyecto Consolider–Ingenio 2010, *HURI-AGE-THE AGE OF RIGHTS*. CSD2008-0007.

<sup>1</sup> “Pluralismo y multiculturalidad: Tribunal Arbitral Musulmán y Consejos Islámicos (“*Sharia Courts*”) en el Reino Unido”, forthcoming in *ADEE*, 2012.

An initial line of thoughts would lead us to verify the current concept of *legal pluralism* that – doctrinal disputes aside and from a purely intuitive approach for our present purposes – we might define as *the existence of a multitude of autonomous sources of regulation and of conflict resolution channels that fall outside those of the state*. It is, in any event, a widely studied phenomenon on which legal sociology opened up pioneering debate, for example, following the germinal work of E. Ehrlich and his notion of “*living law*”<sup>2</sup>. We also explore very recent approaches that show how the *spontaneous* submission to a regulatory pluriverse originating from all manner of social and economic entities and actors can arise in people’s ordinary lives. This is the case, for example, of the renowned author, W. Twining, who, with a certain sense of humour, reminds us that *even his laziest students* are able to recognise, in a two-day practical session, more than one hundred regulatory systems they have been compelled to observe in the normal course of their lives over that short space of time<sup>3</sup>. If, moreover,

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<sup>2</sup> See for example, D. Nelken, “Eugen Ehrlich, Living Law and Plural Legalities”, *Theoretical Inquiries in Law*, vol. 9, 2008, pp. 443-471; A. Cebeira Moro, “Pluralismo jurídico y Derecho Vivo: la concepción sociológica de Ehrlich”, in *¿Hacia un paradigma cosmopolita del derecho?: Pluralismo jurídico, ciudadanía y resolución de conflictos*, N. Beloso and A. de Julios-Campuzano, (eds.), Madrid, Dykinson, 2008, pp. 79-98 and G. Teubner, “Global Bukowina: Legal Pluralism in the World Society”, in *Global Law Without a State*, G. Teubner, (ed.), Dartmouth, Brookfield, 1997, pp. 3-28. On more recent doctrine, see, in general, among others: P. S. Berman, “The New Legal Pluralism”, *The Annual Review of Law and Social Science*, vol. 5, 2009, pp. 225-42; M. Croce, “Does Legal Institutionalism Rule Out Legal Pluralism? Schmitt’s Institutional Theory and the Problem of the Concrete Order”, *Utrecht Law Review*, vol. 7, 2011, pp. 42-59; G. M. Ferreira-Snyman, “The Harmonisation of Laws Within the African Union and the Viability of Legal Pluralism as an Alternative”, *Journal of Contemporary Roman-Dutch Law*, vol. 73, 2010, pp. 608-628; K. Günther, “Legal Pluralism or Uniform Concept of Law?”, *NoFo*, 5-IV-2008, 21 pp.; E. Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism*, Ashgate Press, 2009; R. Michaels, “Global Legal Pluralism”, *Duke Law School Faculty Scholarship Series*, Paper 185, 26 pp.; J-S Bergé, “Implementation of the Law, Global Legal Pluralism and Hierarchy of Norms”, *European Journal of Legal Studies*, vol. 4, 2011, pp. 241-263; B. Z. Tamanaha, “The Rule of Law and Legal Pluralism in Development”, *Legal Studies Research Paper Series, Washington University, in St. Louis, School of Law*, Paper No. 11-07-01, July 2011, 26 pp.; W. Twining, *General Jurisprudence*, Cambridge University Press, 2009, pp. 362-365; International Council on Human Rights Policy, *When Legal Worlds Overlap: Human Rights, State and Non-State Law*, 2009; F. Colom González, “Justicia Intercultural. El Pluralismo Jurídico y el Potencial de la Hermenéutica Normativa”, *RIFP*, vol. 33, 2009, pp. 7-24; *ibid*, “Entre el credo y la ley. Las minorías etno-religiosas y los fenómenos de pluralismo jurídico”, in *¿Hacia una sociedad post-secular?*, F. Colom and A. Sala, (eds.), Fundación M. Giménez Abad, Zaragoza, 2011, pp. 157-178; N. Lerner, “Group Rights and Legal Pluralism”, *Emory International Law Review*, vol. 25, 2011, pp. 829-851; Consejo Internacional de Políticas de Derechos Humanos, “*Pluralismo Legal y Derechos Humanos*”, available at <http://www.ichrp.org/es/proyectos/135>; J. Ferreiro, “La libertad religiosa como palanca para la integración: la Fundación Pluralismo y Convivencia” in AA.VV., *Protección jurídica de la persona*, Civitas, 2010, pp. 205-253; M. J. Roca, “Deberes de los poderes públicos para garantizar el respeto al pluralismo cultural, ideológico y religioso en el ámbito escolar” in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, 17 (2008), pp.1-37 and T. Prieto Álvarez, *Libertad religiosa y espacios públicos (Laicidad, pluralismo, símbolos)*, Civitas-Thomson Reuters, Navarra, 2010.

<sup>3</sup> See his “Normative and Legal Pluralism: A Global Perspective”, *Duke Journal of Comparative and International Law*, vol. 20, 2010, p. 476.

we turn to the emerging field of “global legal pluralism”, the same author, in this case with a certain uneasiness, provides diverse references to depict it as an irrepressible tide:

“[...] in globalization discourse much is made of the diversification of significant actors in international relations and international law [...]; international lawyers, concerned about the fragmentation of their subject, point, inter alia, to the proliferation of supranational courts and tribunals (over 130 at a recent count), and norm creating agencies (such as the ILO, WTO, non-state regulatory agencies, governing bodies of sports such as IOC and FIFA). Related to this, scholars sometimes refer to “pluralism” of putative, emergent, even fantastical, supranational branches of law: global administrative law, internet law, *lex mercatoria*, *lex sportiva*, *lex constructionis*, *ius humanitatis*, *lex pacificatoria*. Inspired by “the new governance” there is talk of constitutional pluralism and plurinational democracy. And so on”<sup>4</sup>.

Although consternation over the situation described so vividly by Twining is understandable, we believe that it is no less certain, in the end and in the context of multiculturalism, that any *reasonable* approach towards a solution to the complex problems arising within this context must unquestionably be grounded on a foundation of legal pluralism. Outstanding scholars of the aforementioned sociology of law have shown this to be the case, and, we might say, this approach corresponds to the very nature of things, in an approach embodied in the societies referred to above<sup>5</sup>. Nevertheless, it is also of note that on occasions, the democratic, secular state, guarantor of human rights, the same state we associate with these societies, shows extreme rigour, especially with regard to the relations with minorities – Muslims in particular – and to their religious rights, within a dynamic, perhaps, of *making religion invisible*<sup>6</sup>.

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<sup>4</sup> Ibid, p. 512. There is a clear rejection in his writing of the theses of, for example, R. Michaels, cited in note (2), *supra*, and of P. S. Berman; see, on the latter, for example, “Global Legal Pluralism”, *Southern California Law Review*, vol. 80, 2007, pp. 1155-1237 and *ibid*, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*, L. Lavoisier, 2012. Also, in general, J. Linarelli, *Reasonable Pluralism and International Law*, at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1834922](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1834922) and S. Ferreri, “Complexity of Transnational Sources, General Report”, at <http://isaidat.di.unito.it/index.php/isaidat/article/viewFile/87/103>. A very precise and illustrative point on the subject of pluralism in sport can be found in N. Zambrana, “Contador, ¿qué es eso del TAS?”, in *Diario de Navarra*, 15-XII-2011, p. 14.

<sup>5</sup> On the interconnection between pluralism and multiculturalism, see, for example, the extensive bibliography reported in note (7) of our study cited in note (1), *supra*. For some critical appreciations in a very precise sphere see, M. Sharafi, “Justice in Many Rooms since Galanter: De-Romanticizing Legal Pluralism Through the Cultural Defense”, *Law and Contemporary Problems*, vol. 71, 2008, pp. 139-146; M. J. Escrivá Ivars, “Pluralismo, multiculturalismo y objeción de conciencia en una sociedad democrática avanzada”, in AA.VV. (Dir. M. L. Jordan Villacampa) *Multiculturalismo y Movimientos Migratorios*, Tirant Lo Blanch, 2003, pp. 295-31 and M. L. Jordán Villacampa, “Grupos religiosos e inmigración”, *ibid*, pp. 21-81; Y. García Ruiz, “Flujos migratorios, confesiones religiosas acatólicas en la Comunidad Valenciana y cuestiones bioéticas”, *ibid*, pp.315- 334.

<sup>6</sup> See for example, D. Grimm, “Religion and Constitutional Adjudication: Conflicts Between General Laws and Religious Norms”, *Cardozo Law Review*, vol. 30, 2009, pp. 2369-2382; R. Ballard, “Human Rights in Contexts of Ethnic Plurality: Always a Vehicle for Liberation?”, in *Legal Practice and Cultural Diversity*, R. Grillo *et alii*, (eds.), Ashgate, 2009, pp. 299-330 and C. Joppke, “The Retreat of Multiculturalism in the Liberal State: Theory and Policy”, *The British Journal of Sociology*, vol. 55, 2004, pp. 237-257. See, for example, the study by E. Daly, “Laïcité, Gender Equality and the Politics of Non-Domination”, *European Journal of Political Theory*, Vol. 0(0), 2012, pp. 1-32. Likewise, see, D.

Particularly worth mentioning is, for example, the *legal rigidity* of constitutional States<sup>7</sup>, or the emergence of a new “*civil religion*”<sup>8</sup>. We introduce this question here, which we consider merits thorough research, and only comment that the supporters of such “*religion*” seem on occasions to assemble their forces against a monolithic concept of Islam and Sharia, a concept that, we believe, is a long way from matching reality, especially with regard to the minority Islamic groups settled in Western countries<sup>9</sup>.

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Helly, “Orientalisme Populaire et Modernisme. Une Nouvelle Rectitude Politique au Canada”, *La Revue Tocqueville*, vol. 31 (2), 2010, pp. 157-193. In support of secular constitutionalism without breaches, see, in contrast, for example, F. Raday, “Gender and Religion: Secular Constitutionalism Vindicated”, *Cardozo Law Review*, vol. 30, 2009, pp. 2769- 2798. Also of interest is J-C Monod, “What’s New in Our Current ‘International Secularism’?”, *Leiden Journal of International Law*, vol. 25, 2012, pp. 67-72 ; L. Zucca, “Law v. Religion”, in *Law, State and Religion in the New Europe*, L. Zucca and C. Ungureanu, (eds.), Cambridge University Press, 2012, pp. 137-159 and V. Zwart, “The Right to Remain Religious: Muslim Integration on Human Rights in Post Secular Europe”, in *Righting Wrongs*, vol. 1, 2011, pp. 103-110.

<sup>7</sup> See, for instance, C. Backenköhler, *Los conflictos del pluralismo cultural y jurídico: Retos metodológicos ante la irrupción del Islam*, at [http://csic.academia.edu/ChristianBackenkohler/Talks/49901/Los\\_conflictos\\_del\\_pluralismo\\_cultural\\_y\\_juridico](http://csic.academia.edu/ChristianBackenkohler/Talks/49901/Los_conflictos_del_pluralismo_cultural_y_juridico) retos metodológicos ante la irrupción del Islam. For a general view, see, for example, D. Augenstein, “Religious Pluralism and National Constitutional Traditions in Europe”, in *Law, State and Religion...*, cit., pp. 261-280; S. Meseguer Velasco (coord.), single issue section “Principios constitucionales y libertad religiosa: cuestiones conflictivas”, *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, no. 25, 2011; J. A. Souto Paz and C. Souto Galván, *El Derecho de Libertad de Creencias*, Marcial Pons, 2011; M. J. Roca, “Teoría y práctica de la laicidad”, Acerca de su contenido y su función jurídica”, in *Persona y Derecho*, no. 53, 2005, pp. 223-257; G. Suárez Pertierra, “Laicidad en el constitucionalismo español” in AA.VV. (D. Llamazares, coord.), *Libertad de conciencia y Laicidad en las instituciones y servicios públicos*, Dykinson, 2005, pp.119-132; J. Martínez-Torrón, (ed.), *Estado y Religión en la Constitución Española y en la Constitución Europea*, Comares, Granada, 2006; I. Martín Sánchez, “El modelo actual de relación entre el Estado y el factor religioso en España”, *ibid*, no. 16, 2008; A. Ollero Tassara, *La libertad religiosa en perspectiva constitucional*, Thomson-Aranzadi, Navarra, 2009; R. Palomino Lozano, “Neutralidad y factor religioso: mito, principio, y significado”, in *Aequitas sive Deus. Studi in honore di Rinaldo Bertolino*, II, Giappichelli, Torino, 2011, pp. 948-971.

<sup>8</sup> See, for example, R. Hirsch and A. Sachar, “State Sovereignty and Constitutional Models for the Relation Between Religion and the State: The New Wall of Separation: Permitting Diversity, Restricting Competition”, *Cardozo Law Review*, vol. 30, 2009, pp. 2535-2560 and A. Rivero, “La vuelta de la religión a la política en Europa”, in *¿Hacia una sociedad post-secular?*, cit., pp. 37-57. D. Helly talks of *ultra-laicism*; see her “Formas de intolerancia religiosa en Canadá”, *ibid*, pp. 146-148. In general, R. Navarro-Valls and R. Palomino, *Estado y Religión. Textos para una reflexión crítica*, Ariel, Barcelona 2000; J. Ferreiro, “State-Religion Relations in Spain: Legal and Constitutional Framework” in *Legal Aspects of Religious Freedom*, Ljubljana 2008, pp. 458-469; G. Morán *Comunidad Política y Religiosa. Claves de la Cultura Jurídica Europea*, vol.1, ed. Netbiblo, 2008; I. C. Ibán, “State and Church in Spain”, in G. Robbers (ed.), *State and Church in the European Union*, Second Edition, Nomos, Baden-Baden, 2005, pp.139-155.

<sup>9</sup> These are an archetype of what A. Sachar, following R. Corver, calls *nomoi* groups; see her *Multicultural Jurisdictions*, Cambridge University Press, Cambridge, 2001, p. 2 and therein, note (5). With particular reference to the United Kingdom, see, for example, P. Shah, “Between God and the Sultana? Legal Pluralism in the British Muslim Diaspora”, in *Sharia as Discourse*, J. S. Nielsen and L. Christoffersen, (eds.), Ashgate, Surrey, 2010, pp. 117-139; I. Yilmaz, “Law as Chameleon: The Incorporation of Muslim Personal Law into the English Law”, *Journal of Muslim Minority Affairs*, vol. 21, 2001, pp. 297-308; *idem*, “Marriage Solemnization among Turks in Britain: The Emergence of a Hybrid Anglo-Muslim Law”, *ibid*, vol. 24, 2004, pp. 57-66 and *idem*, “Muslim Law in Britain: Reflections in the Socio-Legal Sphere and Differential Legal Treatment”, *ibid*, vol. 20, 2000, pp. 353-360. M. Rohe states, “(...) in England, [...] an ‘*angrezi shariat*’ (English sharia) is obviously

These points bring the present section to a close. In the following two sections, we attempt to illustrate the influence of pluralism and the acceptance of non-state religious legal systems with regard to both domestic – or substantive – law (II), and private international law systems (III). In keeping with the summary style of this paper, we explore these questions below from Western legal system viewpoint, and bring the paper to a close with some brief conclusions in section (IV).

## II. PLURALISM IN SUBSTANTIVE LAW

In this and the following section we use examples to show how the Western systems we have taken as our vantage point tackle the solution of what A. Borrás rightly calls “*hidden conflicts*”<sup>10</sup> in multicultural settings.

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developing”; see his *Alternative Dispute Resolution in Europe Under The Auspices of Religious Norms*, RELIGARE W. P. No. 6/January 2011, p. 5. See also, in general, A. Yousif, “Islam, Minorities and Religious Freedom: A Challenge to Modern Theory of Pluralism”, *Journal of Muslim Minority Affairs*, vol. 20, 2000, pp. 29-41; A. El-Azhary Sonbol, “The Genesis of Family Law: How Shari’ah, Custom and Colonial Laws Influenced the Development of Personal Status Codes”, in *Wanted, Equality and Justice in the Muslim Family*, Musawah, 2009, pp. 179-207; K. A. El Fadl, “Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries”, *Islamic Law and Society*, vol. 1, 1994, pp. 141-187; S.A. Mallech, “A Contextual Reading of Shari’a in the Qur’an: Implications for Contemporary Western Societies”, *Journal of Islamic Law and Culture*, vol. 11, 2009, pp. 1-12 ; A. Hussain, “Muslims, Pluralism and the Interfaith Dialogue”, in *Progressive Muslims*, O. Safi, (ed.), Oneworld, 2008, pp. 251-286 and C. Bottici and B. Challand, “Islam and the Public Sphere: Public Reason or Public Imagination?”, in *Law, State and Religion...*, cit., pp. 115-133. Among other interesting approaches, see also, for example, J.A. Souto Paz, “Multiculturalismo, inmigración y libertad religiosa”, in C. V. Zambrano (coord.), *Pluralismo religioso y libertad de conciencia: Configuraciones jurídicas y políticas en la contemporaneidad*, 2003, pp.29-44; AA.VV., M. L. Jordán Villacampa, (dir.), *Multiculturalismo y movimientos migratorios*, TLB, Valencia, 2003; Rodríguez Benot, “El estatuto personal de los extranjeros procedentes de países musulmanes”, in *Derecho Islámico e Interculturalidad*, Iustel, 2011, pp. 89-110; M. Rohe, “Shari’a in a European Context”, in *Legal Practice and Cultural Diversity*, R. Grillo, et alii, (eds.), Ashgate, Surrey, 2009, pp. 93-113; L. Christoffersen, “Is Shari’a Law, Religion or a Combination? European Legal Discourses on Shari’a”, in *Shari’a as Discourse*, cit., pp. 57-75; M. L. Movsesian, “Fiqh and Canons: Reflections on Islamic and Christian Jurisprudence”, *Seton Hall Law Review*, vol. 40, 2010, pp. 861-888 ; V. Sisler, “Cyber Counsellors”, *Information, Communication and Society*, 2011, pp. 1-24 ; M. Kohn, “Western Imperialism and Islamic Law”, in *Law Without Nations*, A. Sarat, et alii, (eds.), Stanford Law Books, Stanford, 2011, pp. 138-156 and M. Roca, “¿ La Shari’a como ley aplicable en virtud de libertad religiosa?”, in *Derecho Islámico e Internacional*, P. Diago et alii, (eds.), 2011, pp. 45-87. On personal law systems and references to Muslim law, see also, for example J. A. Redding, “Dignity, Legal Pluralism and Same-Sex Marriage”, *Brooklyn Law Review*, vol. 75, 2010, pp. 825-832. A particularly good example of the adaptive capacity of Sharia is found in Israel; see, for example, Y. Reiter, “Judge Reform: Facilitating Divorce by Shari’a Courts in Israel”, *Journal of Islamic Law and Culture*, vol. 11, 2009, pp. 13-38. The reform of the Moroccan Family Code, *Moudawana*, of special importance from a Spanish perspective for obvious reasons, is also a significant development; for various key aspects, see, for example, M-C Foblets, “Moroccan Women in Europe: Bargaining for Autonomy”, *Washington and Lee Law Review*, vol. 64, 2007, pp. 1385-1415. In reference to Italy, see, for example, E. Pförtl, “Muslim Women Between Secular State and Religion”, *International Review of Sociology*, 2012, pp. 1-12, *iFirst article*.

<sup>10</sup> Graphic expression by this renowned author, which we believe could also alert us to the primarily indirect and fragmentary way in which these systems attempt to channel such questions; see her “Europa: entre la integración y la multiculturalidad”, in *Derecho islámico e interculturalidad*, AA.VV., IUSTEL, 2011, p. 25 onwards.

Of prime interest in this section is the question of marriage in some regulations that come under the label of pluralism in the USA and the United Kingdom. In the USA, what are known as *covenant marriages* are one of the legal forms of marriage recognised under the laws of some states. However, it should be pointed out that in reality, they constitute a kind of *reinforced marriage*, indicative of the emergence in the USA of dual marriage systems, as indicated in the doctrine on these covenant marriages<sup>11</sup>. We refer readers to this doctrine, and to our own analysis of the question<sup>12</sup>.

Some USA state laws notably establish unique systems for the celebration of marriage. This is the case, for example, of the New York regulation which requires that the parties “must solemnly declare [...] that they take each other as husband and wife”, but also states that this requirement “shall not affect marriages among the people called Friends or Quakers; nor marriages among the people of any other denominations having as such any particular mode of solemnizing marriages”<sup>13</sup>. A Rhode Island law allows Jews to marry “within the degrees of affinity or consanguinity allowed by their religion”, even if State law otherwise prohibits such marriages<sup>14</sup>. These prescriptions by US legislators are, in our view, significant, as are the provisions for Jews and Quakers in the United Kingdom dating back to Lord Hardwicke’s Marriage Act (1753), which have survived subsequent marriage law reforms<sup>15</sup>. A further piece of UK legislation worthy of mention is the Marriage (Registration of Buildings) Act of 1990, a symbol of the gradual official recognition of the new ethnic minorities settled in the United Kingdom, such as Sikhs, in that it allows civil and religious marriage ceremonies to be held *in the same building*, thereby removing the problems that arose prior to its approval<sup>16</sup>.

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<sup>11</sup> On this question, see the in-depth study by L. Martínez Vázquez de Castro, *El concepto de matrimonio en el Código civil*, Thomson, 2008, particularly pp.150-156.

<sup>12</sup> See, for example, J. A. Nichols, “Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community”, *Vanderbilt Journal of Transnational Law*, vol. 40, 2007, pp. 148-153; our contribution can be found in section 2.2 of the publication cited in note (1), *supra*.

<sup>13</sup> N.Y. DOM. REL. Law, Sect. 12; in addition, A. Laquer Estin notes that the UNIFORM MARRIAGE AND DIVORCE ACT, Sect. 206, 9A U. L.A.182 (1998), allows the solemnisation of marriage “in accordance with any mode of solemnization recognised by any religious denomination, Indian Nation or Tribe, or Native Group”; see her “Unofficial Family Law”, *Iowa Law Review*, vol. 94, 2009, p. 457, and note (27) therein.

<sup>14</sup> R.I. GEN. LAWS Sect. 15 1-4 (2003), reported by A. Laquer Estin, *op. cit.*, p. 457 and note (28) therein.

<sup>15</sup> See, for example, I. Yilmaz, “Muslim Law in Britain: Reflections in the Socio-legal Sphere and Differential Treatment”, *Journal of Muslim Minority Affairs*, vol. 20, 2000, p. 355.

<sup>16</sup> In *Kaur v. Singh*, 1 All E. R. 1972, p. 292, the court held that Sikh practice and religion require that for a marriage to be valid, the civil ceremony must be held in an officially recognised building, and the religious ceremony in a Sikh temple; see I. Yilmaz, *ibid*.



Polygamous marriage has also generated diverse responses at a comparative level; we present three examples that incline towards the substantive method among those for regulating external legal transactions. The first of these concerns Section 34 (2) of the German Social Security Systems Law, which provides for pro rata payment of pensions to widows of polygamous marriages contracted abroad<sup>17</sup>. The second example comes from the United Kingdom, and revokes the classic *Hyde v Hyde* precedent by recognising polygamous marriages contracted abroad and opening up all legal channels on matrimonial matters to interested parties, regardless of their *potential or de facto* polygamous nature. The law in question is the *Matrimonial Proceedings (Polygamous Marriages Act)* of 1973<sup>18</sup>. The third example comes from Spain, and concerns *family reunification* in polygamous marriages, and the interesting doctrinal attention opened up by Organic Law 4/2000, of 11 January, article 17<sup>19</sup>.

Important normative data are also available on the question of divorce, such as when a husband is reluctant to or refuses to grant his wife the *get* or Jewish divorce document, thus leaving her in a situation of *agunah* – literally ‘chained’ or ‘anchored’ – in the eyes of her faith and community, even if she obtains a civil divorce. In contrast, the recalcitrant husband faces no serious problems if he obtains a civil divorce and remarries. This particular situation – which in situations of conflict may lead to the husband exerting pressure on the wife over, for instance, financial agreements included in the divorce procedure – has been dealt with by New York legislators in several laws, such as that of 1992, or by the UK government through the 2002 *Divorce Act (Religious Marriages)*, designed to improve the wife’s position. We have dealt with this question

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<sup>17</sup> See J. Cesari, “Shari’a and the Future of Secular Europe”, in *Muslims in the West After 9/11*, J. Cesari, (ed.), Routledge, 2010, p. 153.

<sup>18</sup> *Ibid*, p. 154.

<sup>19</sup> See, for example, C. Vaquero, “*El Harem desde Occidente: La protección de la mujer en el sistema español de DIPr*”, in *Conflictos Actuales en el mundo árabe e islámico, Cursos de Derechos Humanos de Donostia- San Sebastián*, vol. IX, 2008, pp. 41-43. A precedent of Spanish doctrine on polygamous marriages, seen from the view of external legal transactions law can be found in, for example, F. J. Zamora Cabot, “El Derecho internacional privado ante el matrimonio poligámico: experiencias francesa y británica y su eventual repercusión en España”, *Revista de Derecho Privado*, 1982, pp. 111-124. See also, for example, I. García Rodríguez, “La celebración del matrimonio en una sociedad multicultural: formas e *ius connubi* (especial referencia a la poligamia)”, in *Cuadernos de Derecho Judicial*, vol. VIII, 2002, pp. 145-220 and M. L. Labaca Zabala, “El matrimonio polígamo islámico y su repercusión en el Derecho español”, in *Revista Jurídica de Castilla León*, no. 18, 2009, pp.261-330. See also M. E. Olmos, “Matrimonio, Mujer e Islam”, in *Anuario de Derecho Eclesiástico del Estado*, vol.24, 2008, pp.493-523; M. Alenda Salinas, “Derecho de familia en un país de inmigración: entre el desconocimiento y la normalidad del instituto matrimonial islámico en España”, in *Actas del IX Congreso Internacional de Derecho Eclesiástico del Estado. Derecho de Familia y libertad de conciencia en la Unión Europea y el Derecho Comparado*, Servicio editorial del Universidad del País Vasco, 2001, pp.299-315.

elsewhere<sup>20</sup>, but it should be noted here however that problems remain in practice with regard to the UK law, while in the New York case, cooperation between civil and religious authorities has been encouraged through what M. J. Broyde graphically and astutely describes as an “*invisible dance*”<sup>21</sup>.

A further example of particular relevance within the legal pluralism debate refers to youth custody and the way the Dutch government has dealt with the Islamic institution of *kafala*, a guardian or fostering system that has been profusely and thoroughly examined in Spanish doctrine<sup>22</sup>. The guardian of the *kafala*, the *kafil*, commits to care for minors from other families, protecting them and ensuring their needs and education are provided for, without the natural parents losing rights to custody over them. According to P. Diago, it is “[...] an institution closely linked to the traditional social values that govern Islamic society in general, and specifically its religious values”<sup>23</sup>; Diago also notes that the care of homeless children is contemplated in the Koran (bear in mind that Muhammad himself was an orphan), and under *Sharia* law numerous children’s rights have been recognised for over fourteen centuries<sup>24</sup>. The practical application of the Dutch General Child Benefit Act – *Algemene kinderbijslagwet* – managed by the Social Insurance Bank, however, has obliged certain changes in the Bank’s policy, which initially refused benefits to the guardians of the *kafala*, since, as mentioned above, custody rights remained with the children’s natural parents. In 2001, the Bank established new lines of action that entitled the *kafala* guardians to apply for these benefits, *provided they bring the children up as their own*<sup>25</sup>, which fully complies with the nature of the *kafala* contract as set out, for example, in the Algerian Family Code, Art. 116, “the commitment to take voluntary responsibility for the maintenance, education and protection of the minor child *in the same way a father would for his son*” or the Moroccan Kafala Law No. 15-01, covering abandoned children who must be protected “*in the same way a father would for his son*”<sup>26</sup>. The Bank’s new policy, in turn, following a legal report, led to an official ruling by the State

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<sup>20</sup> See our publication cited in note (1), *supra*, sections 2.2 and 3.1.

<sup>21</sup> See his “New York’s Regulation of Jewish Marriage: Covenant, Contract or Statute”, in *Marriage and Divorce in a Multicultural Context: Multi-Tiered Marriage and the Boundaries of Civil Law and Religion*, J. A. Nichols, (ed.), Cambridge, University Press, 2012, p. 159.

<sup>22</sup> See, for example, P. Diago, “La *kafala* islámica en España”, in *Derecho Islámico e Interculturalidad*, cit., pp. 11-159.

<sup>23</sup> *Ibid*, p. 114.

<sup>24</sup> *Ibid*.

<sup>25</sup> See A. J. Hoekema, “Does the Dutch Judiciary Pluralize Domestic Law?”, in *Legal Practice and Cultural Diversity*, cited in note (6), *supra*, p. 181.

<sup>26</sup> See P. Diago, op. cit., p. 114.

Secretary of Social Affairs in 2002 to expand the notion of foster parents and was appropriately codified into the regulations<sup>27</sup>. As stated above, we consider this example to be particularly relevant, not only because it accommodated the institution of *kafala*, but **the way** this was carried out: the *kafala* contract itself was not admitted as such, **but rather, the regulations in force were adapted to accommodate it**. As W. Menski observes, the *kafala* was “smuggled” into English law in 2002, through a new concept of “**special guardianship**”<sup>28</sup>. We will return to these developments in our conclusions.

We conclude the present section with a brief mention of some regulations we consider to be of interest. These include legislation on the ritual slaughter of animals for human consumption in the United Kingdom, regulated under Sec. 1 (2) of the *Slaughter of Poultry Act* of 1967, or Sec. 36 (3) of the *Slaughterhouses Act* of 1979, permitting the slaughter of poultry and other animals in abattoirs according to Jewish and Muslim traditional methods; or in the case of Spain, provisions made for the same traditions in Art. 14. 3, of the Cooperation Agreement with the Federation of Israelite Communities in Spain, or in Art. 14. 3, of the Cooperation Agreement with the Islamic Commission of Spain<sup>29</sup>.

Burial arrangements can also be significant; for instance, the provisions contained in Art. 2.6 of the above-mentioned Agreement with the Federation of Israelite Communities, or Art. 2.5 of the Agreement with the Islamic Commission of Spain. The latter recognises the right to transfer the remains of deceased Muslims, subject to the provisions of local government legislation and health regulations. Finally, Muslim burial ceremonies are exempt from provisions established by Dutch law<sup>30</sup>.

In the comparative field, there are many regulations similar to the ones mentioned above, some of which may even appear somewhat quaint or eccentric, such

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<sup>27</sup> See P. Hoekema, op. cit., p. 181.

<sup>28</sup> See his “Law, State and Culture: How Countries Accommodate Religious, Cultural and Ethnic Diversity”, in *Cultural Diversity and the Law*, M. C. Foblets, et alii, (eds.), Bruxelles, Bruylant, 2010, p. 442. Menski also refers to the way the 2003 *Finance Act* “very likely” incorporated the Islamic rejection of *riba*, or usury transactions, through new, cleverly disguised provisions.

<sup>29</sup> In both cases, compliance with current state legislation is established. Both agreements set out in their Articles 14. 1 and 2, respectively, the protection of the denominations *kosher*, and its variations, and *halal* to distinguish food prepared in accordance with their respective traditions. See, on this subject, M. J. Redondo Andrés, A. I. Ribes Suriol, “Análisis descriptivo de las minorías religiosas establecidas en la Comunidad Valenciana: Creencias, régimen jurídico confesional y tradiciones”, in *Multiculturalismo y Movimientos Migratorios*, op.cit., pp.143-170.

<sup>30</sup> See A. J. Hoekema and W. M. Van Rossum, “Empirical Conflict Rules in Dutch Legal Cases of Cultural Diversity”, in *Cultural Diversity and the Law*, cit., p. 859; in general see M. Rodríguez Blanco, “Libertad religiosa y cementerios (primeras aproximaciones)”, in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, vol.19, 2009, pp. 1-23; J. Bonet Navarro, “Los lugares de culto de las minorías religiosas en la Comunidad Valenciana”, in *Multiculturalismo y Movimientos Migratorios*, op, cit., pp. 273-282.

as Sec. 1 of the United Kingdom *Motor-Cycle Crash Helmets (Religious Exemption) Act* of 1976, which amended the 1972 *Road Traffic Act* to grant Sikhs exemption from wearing a helmet when riding a motor-cycle if a turban is worn; or the exemption included in the *Criminal Justice Act* of 1988, allowing swords or daggers to be carried in public places for religious reasons, a provision that also affects the Sikh community; however, these regulations are far from banal. Both these rules and those affecting more substantial questions are clear examples of legal pluralism and respect towards minority groups, who perceive support and protection for their rights and deep convictions.

### III. PLURALISM IN EXTERNAL LEGAL TRANSACTION REGULATIONS

Private international law systems, as would be expected, are frequently set in motion in multicultural contexts. Whether or not the practice derived from them is fully satisfactory is another question, which falls beyond the scope of this paper. Some relevant doctrine has advanced an opinion that is beginning to spread, that the aforesaid practice is causing malfunctions, and reveals certain shortcomings that may well require a thorough review of structural approaches and technical solutions<sup>31</sup>. Taking that into account, however, and for the purposes of the present contribution, in the following sections we briefly consider some examples of both domestic and international regulations, to complete the aspects of pluralism in substantive law outlined above from the perspective of private international law.

#### 1. State regulations

In this area, we provide just two examples, referring to divorce and repudiation, respectively. The former, highlighted by Prof. A. Borrás<sup>32</sup>, corresponds to Art. 107, section. 2 c) of the Spanish Civil Code, in which the application of Spanish law is provided for: “if the laws mentioned in the first paragraph of this section should not acknowledge separation or divorce, or should do it in a manner which is discriminatory or contrary to public policy”, a prevision added to the original article under Organic Law 11/2003, of 29 September, on specific measures for issues of public safety, domestic violence and the integration of foreigners (B.O.E. 30-IX-2003). However,

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<sup>31</sup> See, for example, on the study of problems based on everyday practice, P. Shah, “Transnational Family Relations in Migration Contexts: British Variations on European Themes”, *RELIGARE Working Paper No. 7*, March 2011, 19 pp. and A. J. Hoekema and W. M. Van Rossum, *op. cit.*, *pass.* Free will may be a good card to play in this context. See, for example, A. Borrás, *op. cit.*, p. 39 and D. J. Vicente Blanco, “La ley aplicable al estatuto personal de los extranjeros: de las soluciones domésticas de política migratoria a la necesidad de una aproximación antropológica”, in *Crisis e Inmigración*, TLB, Valencia, (forthcoming), pp. 151-153.

<sup>32</sup> See *op. cit.*, p. 36. Here we do not enter into the impact of Regulation 1259/2010, on the law applicable to separation and divorce, DO L343, of 29 December, 2010 (Rome III).

what may in principle be regarded as a general precept, in its foundations demonstrates its multicultural tenet, in the Statement of Reasons, (IV, 4<sup>o</sup>), of this Organic Law, that indicates the modification is “to solve the problems facing certain foreign women, *fundamentally of Muslim origin*, who apply for separation or divorce” (our italics). We understand that this point is in tune with legal pluralism in the axiological perspective, that of its core values, by attempting to protect, in this case, a particular segment of a significant minority in Spain, even though doing so involves bypassing application of the laws of their original country<sup>33</sup>.

On the question of repudiation, we now turn to Article 57 of the Belgian Code of Private International Law, of July 2004. Experts such as Professors J. Erauw and M. Fallon were closely involved in the drafting of the Code, and it was precisely Article 57 that proved most controversial during its passage through the Belgian Senate. The Code states, “Article 57 sets out the principle that a *talaq* is not recognized in Belgium unless the woman and the man have equal right to divorce. A *talaq* is only recognized in Belgium under very strict conditions, inter alia that the wife has unequivocally accepted the dissolution of the marriage”<sup>34</sup>. Against a background of great misgiving towards repudiation (*talaq*), in our view what is noteworthy is that this Islamic institution *is accepted*, although under strict conditions, once again demonstrating pluralism, here in the recognition of decisions. It should be pointed out, for instance, that Sharia does allow divorce – *khula* – on the woman’s petition, and is usually negotiated with her *mahr* (dowry), and we therefore conclude that the possibility of it being recognised in Belgium, even in the strict terms provided in article 57, is indeed a real possibility<sup>35</sup>.

## 2. International regulations

We begin this section with a reference to bilateral agreements as a qualified means to tackle the particular challenges of multiculturalism in European systems. This is the case, for instance, of countries like Belgium or France that, in accordance with the North African origins of their Muslim minorities, have signed various international agreements, as has Spain with its neighbour Morocco, in significant areas such as legal

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<sup>33</sup> In general, see, N. Marchal Escalona, “Nulidad, separación y divorcio de la mujer marroquí en España”, in Instituto Andaluz de la Mujer, *La situación jurídico familiar de la mujer marroquí en España*, Estudios no. 25, 2008, pp.219-244. We believe article 10 of the Rome III Regulation is consistent with the approach of Article 107 section 2, c) of the Spanish Civil Code.

<sup>34</sup> See, for example, comments by J. Cesari, op. cit., in note (17), *supra*, p. 160.

<sup>35</sup> A possibility that has materialised in Spain, for example, in various Supreme Court of Justice decisions, such as the Writ of 8 June 1999, RAJ 1999/ 4346; Writ of 27-1-98, RAJ 1998/2924 and Writ of 21-4-98 RAJ 1998/3536. See, in general H. Zekri, “La disolución del vínculo matrimonial en las relaciones bilaterales Hispano-Marroquíes”, in *La situación jurídico familiar...*, op. cit., pp.245-268.

cooperation in civil, commercial and administrative matters, or on the rights of custody, visits and return of minors<sup>36</sup>. Some examples of multilateral agreements are remarkable like, within the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children<sup>37</sup>, its Art. 33(1), covering *kafala*<sup>38</sup>. From a Spanish perspective also, it is worth of mention that Spain and Morocco are signatories to the 1980 Hague Convention on civil aspects of international child abduction<sup>39</sup>, although this text was not conceived specifically for the multicultural context, nor do its provisions cover aspects from that setting. The continued validity of international cooperation as a tool of great interest with regard to the contexts studied in this paper and the solution of questions arising within them should, however be noted<sup>40</sup>.

#### IV. CONCLUSIONS

Throughout this paper we have provided some examples that illustrate how Western democracies are including in their regulations the *reflections* of legal pluralism referred to in our title. However, although our endeavour is not, nor can be, exhaustive, we are left with a feeling of fragmentation, a lack of systemisation, and perhaps some opportunism in legislators' responses. We have also referred to *hidden conflicts*, *invisible dances* and *invisibility* in religious matters, and to Islamic institutions *smuggled into* the regulatory fabric of a defined country. Similarly, we might use the expression *asymmetric pluralism*, now coined in the doctrine, to refer, for example, to the way some institutions with origins in a particular confession are regulated, while other similar or identical institutions from different faiths sink into oblivion. To our mind, therefore, the States we refer to do show a certain pluralism, but through indirect channels, in the shadows, it might be said, in a very timid way and without a firm conviction. The adage "*The best doctor, the sun; the best police, the light*" could provide a guideline for action that would tackle the often difficult regulation of

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<sup>36</sup> See, BOE (Official State Bulletin) of 25 June 1997 and BOE of 24 June 1997, respectively. Also, A. Borrás, op. cit., pp. 28 onwards.

<sup>37</sup> See, BOE 2 December 2010.

<sup>38</sup> See, for example, comments by A. Borrás, op. cit., pp. 29-31.

<sup>39</sup> See, BOE 24 August 1987.

<sup>40</sup> In general, see, for example, M. P. Diago, "Cooperación jurídica como instrumento para el diálogo de culturas ante el conflicto de diferentes concepciones familiares", in *El discurso civilizador en Derecho internacional. 5 comentarios y tres estudios*, Y. Gamarra (coord.), Institución Fernando el Católico, Zaragoza, 2012, pp. 157-164; J.M<sup>a</sup> Contreras Mazario, *Las Naciones Unidas y la protección de las minorías religiosas*, Tirant Lo Blanch, 2004 and R. M. Ramírez Navalón, "Protección de las minorías religiosas en el Derecho internacional: La Declaración de Naciones Unidas y el Convenio Marco del Consejo de Europa", in *Multiculturalismo y Movimientos Migratorios*, op. cit., pp. 82-110.

coexistence between majority and minority groups through open dialogue, internally within and among groups, a dialogue that would entail a corresponding transfer to the legislative sphere. The times we are witnessing now offer no margin for delay in achieving what has to be done; those of us living through these times increasingly remember another period that an eminently qualified voice denounced “*with burning concern*” – *mit brennender Sorge*. Such times should never have come to pass, and must never be allowed to return<sup>41</sup>.

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<sup>41</sup> We should not avert our gaze - Pius XI in his celebrated Encyclical of 1937, to which we allude here, did not – in the face of the current rise of populism, racism, xenophobia, the “old historical demons”, that in the end, sowed the seeds for the destruction of our continent and to which, for example, J. Ramoneda alludes with his customary brilliance; see, “La decadencia europea”, *El País*, Thursday 23-II-2012, p. 19.