Human Rights and Conflicts in European Multicultural Societies

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ABSTRACT
This paper analyzes the role of law in the management of conflicts in multicultural societies, particularly those related to migration. It discusses the dichotomy between punitive legal rules and the non-regulation by law of certain practices linked to respecting and guaranteeing human rights. For this purpose, the example is taken of the legal regulation of genital mutilation, polygamous marriage, use of the *burka*, the *niqab*, the *hijab*, the *chador* and the *shyala* in public spaces and the presence of religious items in schools. The point is to show that the law should only intervene through legislation to preserve democratic principles.

Keywords: 1. human rights, 2. multicultural societies, 3. conflicts, 4. legal systems, 5. Europe.

Derechos humanos y conflictos en sociedades multiculturales europeas

RESUMEN
Este trabajo analiza el papel del derecho en la gestión de los conflictos en sociedades multiculturales, en concreto, aquéllos asociados a las migraciones. Se plantea la dicotomía entre las normas jurídicas punitivas y la falta de regulación jurídica de determinadas prácticas relacionadas con el respeto y la garantía de los derechos humanos. Para ello se toma como ejemplo la regulación jurídica de las mutilaciones genitales; el matrimonio poligámico; la utilización del *burka*, *niqab*, *hiyab*, *chador* y *shyala* en el espacio público y la presencia de elementos religiosos en las escuelas. La idea principal es evidenciar que el derecho debe intervenir legislativamente sólo para preservar los principios democráticos.

Palabras clave: 1. derechos humanos, 2. sociedades multiculturales, 3. conflictos, 4. ordenamiento jurídico, 5. Europa.

The Place of the Law in Multicultural Societies[1]

In plural societies undergoing constant change, the theoretical and functional framework assignable to the law in conflict management becomes complicated. This has, for example, been the case in recent decades in European states where there have been different types of response (Cachón, 2011).

In effect, groups are formed as aggregates of individuals based on defined cohesive elements which, from a legislative perspective, are expressed as fundamental rights (human rights at the most universal level) that represent the most basic common morality, shared by the rule of law: the nucleus of a public ethics whose main purpose is not so much to create a desire for it to be imposed, but to create a point of reference for free individual adhesion. There may, however, be difficulties and disagreements in establishing the content of such a minimum common, shared morality, or in making it a practical reality. It is in this sense that Dworkin (2008:54-55) stresses the idea of human dignity linked to the objective value of human life in a line of argument which coincides with the Kantian categorical imperative, in terms of which human life is an end in itself.

So, if we find ourselves in societies with significant ethical pluralism, in other words, societies in which there is not only a plurality of fundamental goods or values, but also an irreducibility of such goods and values to a common hierarchy, the role that the legal system is expected to play becomes complicated.

Thus we enter a second dimension in the analysis of the role played by the law in conflict management, because even if one identifies the functions it is called upon to exercise and recognizes the greater complexity of doing so in plural societies, another ele-

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ment of distortion appears on the legal-political scene: what is the legitimacy of laws that apply to subjects exempt from the democratic process that shapes them? In other words, the legitimacy of the legal system is called into question when it may itself be viewed as the instrument of institutional exclusion. This is the experience of non-citizens, whether foreign nationals or immigrants, when legal provisions limit their legal status specifically with regard to rights, such as political rights, that form part of the citizenship to which they belong.

As De Lucas (2010:13) has pointed out, the challenge is to go beyond a notion of rights and citizenship that has largely become a tool of assimilation rather than of emancipation, which excludes certain groups while insisting on a colonial logic inappropriate to a world in a constant state of flux. This displays new forms of precariousness and disaffiliation that directly challenge social and political links, since they attempt to provide an answer, albeit a futile one, to the old categories of the nation state and citizenship.

In modern democracies, a group of people can regulate their shared life democratically if it is conceived in terms of inclusive citizenship, influencing the conditions of its existence by political means (Habermas, 2004:94). Justifying the idea of belonging (in terms of a political, but also social, economic and legal community) with equal rights at all levels (Añón, 2010:625-638), including political participation, is (must be) the starting point from which to be able to manage conflicts in a legal system with a high degree of legitimacy. The opposite alternative is more or less a version of the tyranny of the majority (Garzón, 2010:12-20). In a scenario in which legal equality (in its formal, material dimensions) and freedom are the criteria for representation, the place of the law may be to guide conduct and handle declared conflicts. The means of doing this may vary.

Cultural Practices and Legal Prohibition

When the social dimension of a conflict achieves a particularly significant scope, recourse to the law as a prohibitive measure

is one of the options for its management. This, for example, is what happened in the case of female genital mutilation, declared a crime in most European legal systems. On the other hand, the idea of a conflict that is in fact latent, although undeclared, in the existence of a prior legal prohibition of the matter, also occurs in other examples such as polygamous marriage, which even though it is banned *de jure* in all European states, cannot be said to have been eradicated *de facto* throughout the respective territories.

Female Genital Mutilation

Among the various assumptions linked to cultural practices, female genital mutilation is one that has most obviously attracted the sanction of law in the interest of guiding behavior and the legislative treatment of the conflict due to the importance of the legal interest at stake. Indeed, in this case, the rights to life, physical integrity and health as well as the sexual and reproductive rights of women are affected, in addition to other cross-cutting rights such as equality (Casado, 2002). The legal implications of these practices have led most European states to incorporate them into their national legislation to prevent, prosecute and punish from different perspectives (Leye and Deblonde, 2004): *a)* some European countries have elected to pass specific laws, such as Norway, Sweden and the United Kingdom; *b)* others have changed their laws (Austria, Belgium, Denmark and Spain) to describe female genital mutilation as a crime, while *c)* for a third group of European states, female genital mutilation has been legally prohibited by general criminal laws since it is often equated with an attack on the physical and moral integrity of the person and, in particular, with a crime of injury. This is the case in Germany, Finland, France, Greece, Italy, the Netherlands and Switzerland.

Spain in particular has been concerned with this specific issue at a legal level for the past decade (De Lucas *et al.*, 2008). *Organic Law 11/2003* (PE, 2003) introduced a section in article 149 of the *Criminal Code* (*Código Penal*, 2011) for the inclusion of the specific offense of female genital mutilation within the crime of injury. On

the other hand, *Organic Law 3/2005* amended *Organic Law 6/1985* (PE, 2005b) to pursue female genital mutilation extraterritorially, provided that the perpetrators or the victim are in Spanish territory.

The passage of *Law 12/2009* (PE, 2009) presupposed the introduction, in the section relating to the reasons for pursuit, of an explicit reference to gender that may be linked to the practice of female genital mutilation, among other matters, although the letter of the law is unclear. Prior to the current asylum law, "Additional Provision Nineteen" of *Organic Law 3/2007* (PE, 2007) had already introduced a new provision into the law then in force governing the right of asylum and subsidiary protection to include fear grounded in suffering from gender-based persecution, which was much less confusing than the current *Law 12/2009* (PE, 2009). Indeed, the 2009 regulation on the right of asylum as amended by article 7.1(e) refers to sexual orientation or sexual identity and gender with a final statement that specifies "without such aspects alone giving rise to the application of this article" (Solanes, 2010:103-122).

The question of whether the rights themselves are better guaranteed by a general law, such as the regulation in the *Criminal Code* (BOE, 2011) alone, or by a specific assumption, is controversial. On the one hand, the majority of European states do not require a specific law, since their respective criminal codes contain provisions relating to attacks on physical or moral integrity, and they specifically provide for the crime of injury in such a way that it is not necessary to define female genital mutilation, allowing for generic reference to any type of mutilation.

The problem with this assumption is that the generic nature of the crime may not take into consideration the relevant specific nature of female genital mutilation. The crime of injury is characterized by the fact that the agent wounds, strikes or batters the victim, causing the latter harm or disturbance to her physical and psychological wellbeing with an *animus laedendi* (intent to injure) such that harm is done and there is a harmful outcome, together with the will to cause harm to physical or psychological integrity as a subjective element. In the case of female genital mutilation,

the damage and the result are evident, but the subjective element may be called into question (Ropero, 2003; Torres, 2008).

In addition to measures of a strictly legal and judicial nature, others of a non-judicial nature are essential for non-punitive action. Among these are preventive action plans, actions in the sphere of information and awareness, the development of intervention and detection mechanisms, the establishment of guidelines for intervention at different levels, which include health, education and the police, along the lines that countries such as Spain have begun to develop (Lucas, 2008).

Polygamous Marriage

The concept of *ius connubii* (the right to marry) is redefined through immigration. This right is recognized in principle in various international instruments aimed at guaranteeing human rights[2] and at a national level at least to guarantee the right to marriage between a man and a woman. Some states have recognized same-sex marriages, such as Spain with *Law 13/2005* (PE, 2005a). However, no European country allows polygamous marriage, even though this is accepted in certain immigrants' places of origin and is considered to be one of the most paradigmatic and controversial institutions in Islamic family law.

In recent years, substantial efforts have been made in states that allow polygamous marriages to establish more stringent requirements in order to restrict them. The influence migrants have over such changes in countries that do not allow polygamy is obvious. Evidently contradictions are involved in the different ideological and therefore legal conceptions of marriage between nation-

[2] In international law this right is enshrined, among others, in: article 16 of the *Universal Declaration of Human Rights* of 1948 (UN General Assembly, 1948); article 10 of the *International Covenant on Economic, Social and Cultural Rights* of 1966 (UN General Assembly, 1966a); article 23 of the *International Covenant on Civil and Political Rights* of 1966 (UN General Assembly, 1966b); articles 12 and 14 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* of 1950 (Council of Europe, 1950) and article 19 of the *Universal Islamic Declaration of Human Rights* of 1981 (Islamic Council of Europe, 1981).

als of foreign countries that support polygamous marriage and those of the host countries (Adroher, 2000:879-900; Martinell, 2002:277-311):

a) The imposition of a concept of marriage characteristic of the host country but alien to the immigrant, as happens with the notion of family in the case of family reunification (La Spina, 2011:217-297).
b) The wishes of the country of origin for their nationals in other states to maintain the ideological view prevailing in their place of origin, with a definite commitment to the empowerment of personal status.
c) The suspicion which falls on the institution of marriage when it is linked to the law on aliens and immigration in host states, where notions such as marriages of convenience, fraudulent marriages, etc. crop up.

The judicial justifications that underlie legal decisions that accept polygamous marriage are largely of a religious nature, based on theocratic conceptions of Islam that subordinate civil law to the divine (the Sharia) from more or less restrictive interpretations that are never compatible with the principles prevalent in European states.

For example, if we take the Spanish legal system as a reference, polygamous marriage would be incompatible with the formulation of the principle of equality enshrined in article 14 of the *Constitución española* (PE, 1978). This does not allow discrimination, including on religious grounds, and is specifically opposed to the inequality of the married couple, a feature of Islamic family law (Diago, 2001:6-13). Furthermore, under Spanish law other errors combine to invalidate polygamous marriage, making it inadmissible through the impairment of the capacity of a person to give consent through being already married under the provisions of article 46.2 of the *Civil Code* (BOE, 2008). Even if such a union were to take place, the marriage would be void and would not have any effect, as asserted in article 73.2 of the *Civil Code*.

In terms of the legal basis for prohibiting this institution in legislatures such as Spain, an attempt has been made to uncouple it from fundamental rights such as religious freedom. The enshrinement of the principle of monogamy in articles such as 32.1 of the *Constitución española* (PE, 1978) and 46.2.2 of the *Civil Code* (BOE, 2008) has since been endorsed by sanctions via the *Criminal Code* (BOE, 2011) with articles such as 217 that punishes anyone who contracts a second or subsequent marriage, in the knowledge of the legality of the previous marriage, and of the precepts criminalizing bigamy as a crime against the civil state, since its opposition to the family is understood to threaten public order (Rodríguez, 2001:746-760).

Linking polygamous marriage to religious freedom would assume a conceptualization radically different from that upheld by European states. Indeed, the approach is the opposite of condemning polygamy. Thus, in the Spanish case, it is considered that the freedom referred to in article 16.1 of the *Constitución española* (PE, 1978), where it is stated that "the freedom of belief, religion and worship of individuals and communities with no restriction on their expression other than what is necessary for the maintenance of public order protected by law" can be understood as absolute freedom of belief but with limits on the practice of religious beliefs. In this respect, polygamy, conceived as being contrary to public order, would not form part of the content of the right to religious freedom with external activities (Llamazares, 2001:271-304).

There would therefore be an incompatibility between polygamous marriage and respect for public order at two levels of infringement: first, the offense against the principle of equality by upholding the inequality of the parties as a defining aspect, and a second level in which the public morality component is transgressed in a given socio-cultural context different from that incorporated by the states into their legal systems (Lema, 2003:163).

In keeping with the state law regarding the non-acceptance of polygamous marriage, the European Commission on Human Rights ruled that there is no infringement of religious freedom involved in the non-recognition by a state of the legal effects of a

religious marriage. Thus, in a complaint filed against Germany, it was stated that marriage is not merely considered a means of expressing thought, conscience or religion but rather is governed by specific provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular, article 12 concerning the right to enter into marriage whereby "women and men of marriageable age have the right to marry and establish a family according to the national laws governing the exercise of this right". National laws therefore take precedence over the configuration of the legal concepts of marriage and family (Rodríguez, 2001:751).

The most recent conflicts over polygamy in European states have been related to the possibility of acquiring or retaining nationality. In this respect in France, for example, there has been a return to the public debate over the possibility of withdrawing French nationality from a citizen on suspicion of practicing polygamy. In Spain, cases of conflict over polygamy have been raised in the acquisition of nationality, including issues such as widows' pensions and the law of succession (Almagro, 2009:278).

The Supreme Court is conclusive in ruling out the possibility of Spanish citizenship being acquired, emphasizing that it is not possible to consent to the existence of polygamous marriages between Spanish citizens and "that it is not the same to reside in Spain, something that could only be denied to people in polygamous marriages if it were provided for in Spanish law, as to acquire Spanish citizenship, which involves a series of rights, including active and passive suffrage and access to public office and functions" (Almagro, 2009:279).

Other Conflicts between Prohibition and Non-Regulation by Law

Unlike the conflicts analyzed so far, which are clearly incompatible with the laws of European states that receive immigrants, which are progressively being consolidated as multicultural societies, there are other cases where uncertainty may arise over the use of punishment or inaction on the part of the law.

The Full Islamic Veil: The Burqa *and* Niqab

Among the cases that place the greatest strain on the relationship between legal rules, tradition and culture, we find the full Islamic veil, in other words, the *burqa* and *niqab*. As Naïr (2006, 2010) points out, in the legal-political dimension, Western host societies fluctuate between cultural rejection and respect for individual freedom. There does not appear to be a good *a priori* choice, at least not one clearly consistent with the principles of the rule of law, or with the legal grounds for general prohibition, or for the acceptance of this dress, consideration of which is by no means banal, since it may largely be seen as linked to the practice of radical Islam.

It is difficult to argue that the ban on veils in public spaces can be founded in law on the principle of the defense of public order, or rather for security reasons. It is not so easy to distinguish one woman wearing the *burqa* for purely religious reasons from another doing so with the intention of violating public order (for example, hiding under the garment, or any other that would completely cover the face, a weapon, explosives, etc.) in such a way that the obvious potential risk tips the balance in favor of the principle of security, understood in its most objective sense, as determined by Pérez (1994) amongst others.

In fact, the concealment that this type of garment involves with regard to the identity of the wearer can be compared (taking existing differences into consideration) with the aggravating circumstances specified by criminal responsibility, for example, in article 22.2 of the Spanish *Criminal Code* (BOE, 2011). Indeed, the precept considers "commission of the act when in disguise" an aggravating circumstance on the grounds of the impact on the principle of security that arises in this case since an attempt is made to prevent identification. The key issue is to show that when a clash of principles takes place, it forces them to give way, even when they are in the form of fundamental rights.

Once it is admitted that it is only in specific cases that complete veiling of the face may be legally inadmissible in public spaces,

the question arises as to whether a legal ban is the most appropriate means of achieving the ultimate aim being pursued.

In France, for example, *Law 2010-1192* (AN, 2010a) was approved to prohibit the concealment of the face in public. The parliamentary debate on this law and the reports it elicited, reviewed the various implications of this conflict. Among these reports, the first, "for information", should be noted (AN, 2010b), which is divided into three parts which state:

1. The concealment of the face as a mark of the inferiority of women. This section connects the denial of citizenship through the invisibility of women in public spaces and the need to practice equality of dignity of persons of both sexes. It views the rejection by women of the freedom to choose their dress as a violation and it associates it with a return to a patriarchal conception of the duties of women. All this is seen as a rejection of the social contract and the principle of fraternity, given that it involves an unequal relationship between men and women, an attack on community life and an assertion of sectarianism.
2. The concealment of the face compromises the autonomy of women since on the one hand it can affect access to work, and on the other it may create difficulties regarding access to contraception.
3. The third part of the report states that the provisions of the law are an attempt to curb the practice of concealment of the face, which is considered intolerable, through prohibition in the public space (with exceptions defined by law or in the regulations), making particular reference to the penalty for wearing the veil or for forcing someone to wear it.

This first report was completed by a second (SF, 2010), whose most relevant section, for our purposes, is devoted to the justification from constitutional principles of the prohibition on face covering, based on the tangible and abstract aspects of public order. It therefore begins by stating that the legislator may set limits on the exercise of freedoms when taking the general interest into

consideration. Furthermore there is no constitutional principle that protects the freedom to choose clothing, and it should be noted that the law respects the private sphere insofar as the prohibition applies only to public space.

The reasoning that justifies legal action in favor of the constitutional principles of secularism and equality is therefore derived from tangible and abstract aspects of public order. With regard to the former, it is considered that this dimension of public order refers to security, public peace and safety. This dimension needs to take a double requirement into consideration: restrictions on rights and freedoms must be justified on the basis of the existence of proportional risks to the public order, so that the constraints may be proportionate to the safeguarding of the same. In this respect, constitutional law is reluctant to issue blanket prohibitions (Conseil Constitutionnel, 2004).

It is therefore necessary to seek a second justification in terms of abstract public order aimed at guaranteeing public morality, which allows for special administrative measures. According to the second meaning, this order refers to the minimum basis of reciprocal demands and fundamental guarantees of life in society, such as pluralism, for example, which should condition the exercise of other freedoms.

> These basic requirements of the implicit and permanent social contract may imply, in our Republic, that when an individual is in a public place in general, in other words, where it is likely that others will pass by chance, membership of the society cannot be denied by covering the face and the eyes from others, so as to avoid being recognized (SF, 2010).

Based on these arguments, Circular of March 2, 2011 (PMF, 2011) was passed to implement *Law no. 2010-1192* (AN, 2010a), with the aim of establishing the scope of the application of the higher rule, alluding to the legal exceptions and the absence of restrictions on the exercise of religious freedom in places of worship, as well as the penalties for infringements.

In Spain, various parliamentary groups presented different motions urging the government to carry out legal and regulatory reforms to prohibit use of clothing or accessories that cover the entire face in public spaces or at events that do not have a strictly religious purpose, or to ask the government to take specific actions regarding the use of the full veil by women (CG, 2010b).

Of these, the motion urging the government to make the aforementioned legal reforms to prohibit clothing or accessories that completely cover the face was passed by 131 votes in favor and 129 against (CG, 2010a).

In this second line of opposition to the motion approved, the socialist parliamentary group in the government maintained the rejection of the *burqa* and *niqab*, and any discriminatory use, custom or practice restricting the freedom of women. They believed a better option, instead of prohibition (CG, 2010c), was to focus on education, standardization of the law without including a specific prohibition, and partnership with the stakeholders involved. The controversy has also been significant in the autonomous regions. Probably one of the most controversial cases has been that of Lleida, where there was a precautionary suspension of the municipal ordinance for the prohibition of the full veil in municipal buildings. The Tribunal Superior de Justicia de Cataluña (TSJC, 2011) agreed to suspend the effectiveness and enforceability of the agreement of the City Council of Lleida of October 8, 2010, which was under appeal. The council amended three articles of the municipal ordinance of coexistence and citizenship adopted by the Council on February 23, 2007, incorporating any limitations on or prohibitions on the wearing of the full veil in municipal buildings and facilities.

Islamic Veil: The Hijab

The same principles of equality and freedom, rather than (objective) security, which are arguable for the establishment of a legal regulation that envisages a ban or avoidance of wearing the full veil in public, should also be taken into account in another

conflict of a similar nature but with a different approach. I refer to the use of the (partial) Islamic veil. In this case we include the *hijab* as well as the *chador* and *shyala*, as veils or scarves that do not cover the face completely.

The French case is also a model for this situation. The Law of March 15, 2004 (AN, 2004) marked a shift in the use of religious symbols in public schools. Prohibition was chosen as a tool to guide the non-use of religious symbols in public spaces on the grounds that it was intended to strike a balance between secular identity and the integration of the Muslim population.

A key reference in the enshrinement of republican secularism as a principle of integration was the Stasi Commission Report (Innerarity, 2005:139-162; Lasagabaster, 2004). The Commission focused on presenting positive recommendations on religion, the state, diversity, the promotion of the Arabic language and Islamic education. It emphasized the freedom of conscience, equal rights in religious choices, and the neutrality of political power from an axiological perspective, only to conclude that tolerance of the use of Islamic veils is not so much a question of the freedom of conscience of Muslims as of public order. Once again, the primacy of security is linked to the clause for the protection of public order as a vague legal concept that re-emerges in the regulatory provisions related to immigration (De Lucas, 2002:59-84).

Other European states have not opted for a regulatory response to the veil, at least at a national level (Briones, 2009:19-20). For example, Germany is in an intermediate situation in not having a state law prohibiting the use of religious symbols in a general manner, although a sectoral approach has been taken by some *Länder* (German states) that have approved legislation specifically prohibiting the use of Islamic headscarves when entering public schools due to specific events related more to the difficulty of Muslim teachers wearing a particular garment than students, emphasizing the potential repercussions that wearing the veil could have on children's education.

The German Constitutional Court had issued a ruling in 2003, following a suit filed by a university professor, who wore

the Islamic veil, against the land of Baden-Württemberg, regarding the possibility of teachers wearing religious symbols. On that occasion, the German High Court ruled that "the absence of an explicit legislative ban allows teachers to wear the veil". In this case, the subject of debate was to determine the extent to which the use of the veil by a public official damaged the principle of state neutrality (Contreras and Celador, 2007:43).

The United Kingdom has chosen not to prohibit the use of religious symbols in the public space. Nevertheless, in practice, this absence of prohibition has translated into the freedom for different educational centers to establish their own internal regulations. The general rule is that students should wear school uniform, the wearing of jewelry or religious symbols being unlimited, unless they contradict the legislation on health and hygiene, paying attention to security (which would prevent the use of full veils that make the identification of students impossible), taking into account social integration (in a way that does not allow, for example, the use of clothing associated with extremist movements) and strengthening social harmony.

Belgian schools are also allowed to establish their own internal regulations, with a general rule that they do not permit their use and, in cases where the courts have ruled, they have done so to show that state neutrality, which should prevail in public schools, should be interpreted as preventing the wearing of religious symbols by students (Contreras and Celador, 2007:42).

Italy, with its strong Catholic tradition, despite having signed some agreements with non-Catholic denominations, has not passed an organic law granting religious freedom to minorities. The controversy surrounding the veil issue has traditionally focused more on a social and political level, rather than a legal one (Briones, 2009:65). The debate on the prohibition of the full veil in Italy was, however, reopened in August 2011, with the presentation of a draft law to this effect, which has yet to pass through the parliamentary process.

Spain is another example of the non-prohibition of the wearing of religious symbols in schools although there have been several

conflicts instigated especially by Muslim students who wish to wear the (partial) Islamic veil in schools. Specifically in relation to one of these conflicts the Juzgado de lo Contencioso-Administrativo de Madrid issued ruling 35/2012 (JCAM, 2012) prohibiting the wearing of Islamic veils in an institute on the understanding that banning them from wearing it in the educational center did "not disregard the dignity" of the student or "interfere with her religious freedom". In the opinion of the abovementioned court, the center acted in compliance with its rules, which are "the same for everyone". Furthermore the ruling emphasizes that in view of the situation in other European countries, in the absence of a law which specifically regulates this matter, and given the organizational and regulatory autonomy conferred on schools by article 120.2 of *Organic Law 2/2006* (PE, 2006), it is legitimate and in accordance with the law to prohibit the use on their premises of the Islamic veil in accordance with the doctrine established by the European Court of Human Rights, for example in the case of Dahlab versus Switzerland of February 15, 2001 (McGoldrick, 2005:48-53; Ruiz, 2009:13), given that the student and her parents accepted the rules of coexistence.

Religious Items in the Classroom

The same reasoning used to preserve the neutrality of the state, or rather the necessary separation of public and private space in terms of religious expression through certain symbols, has been linked mainly to Islamic religious manifestations that have proliferated in European states largely because of migration. However, there are also conflicts in public space linked to the symbols of other religions, even of the majority religion, in the states where they are established.

By this I mean the question of the presence of religious items such as crucifixes in public school classrooms (García, 2011:186-200). The case of Lautsi versus Italy is emblematic in this situation, in which the Grand Chamber revised a judgment handed down by one of the sections of the European Court of Human Rights.

Initially the European Court of Human Rights (ECHR, 2009) understood that the Italian state had violated the Convention for the Protection of Human Rights and Fundamental Freedoms by imposing the crucifix in the country's public school classrooms.

This case involved the complaint filed by an Italian citizen against the Republic of Italy and submitted to the Court on July 27, 2006 in which it was stated that there had been state interference through the display of the crucifix in the classes of the public schools that their children attended, which was incompatible with the freedom of belief and religion, and with the right to education and teaching in accordance with their religious and philosophical convictions. Thus there was an alleged infringement of article 2 of additional "Protocol 1" of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Council of Europe, 1950) in relation to article 9 of the *Convention*.

In the 2009 ruling, the European Court held that the state has a duty to uphold confessional neutrality in public education, where school attendance is compulsory regardless of religion, and which seeks to instill in pupils the habit of critical thought. The Court does not see how the display in public school classrooms of a symbol that was reasonable to associate with the majority religion in Italy could serve the educational pluralism that is essential for the preservation of "democratic society" within the meaning ascribed to that term by the *Convention*, particularly since this pluralism has been recognized by the European Court of Human Rights (ECHR, 2009:56) in domestic law.

The Grand Chamber of the ECHR does not usually revoke judgments. This is, however, what took place in the aforementioned 2009 judgment, underlining the sensitive nature of this issue. The judgment of the Grand Chamber of the European Court of Human Rights (ECHR, 2011) corrected the Second Section of this Court on November 3, 2009 (ECHR, 2009). In March 2011 the Court noted that Italy had not violated the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and had acted within the limits of its competence by keeping crucifixes in public schools (Mancini, 2011:137-141).

In the judgment of the Grand Chamber, the Court held that when the state assumes a role in educational matters, including the determination of the educational environment, there must be respect for the rights of parents which are recognized in article 2 of "Protocol 1" of the *Convention* (ECHR, 2011:64). The decision over whether or not there should be crucifixes in the classrooms of public schools is, in principle, something that falls under the discretion of states (ECHR, 2011:70).

It is true that for the European Court of Human Rights regulating the presence of crucifixes in the classrooms of public education centers implies conferring on a country's majority religion a preponderant visibility in the school environment. This is not sufficient for it to involve a process of state indoctrination arising from an infringement of article 2 of "Protocol 1" of the *Convention* (ECHR, 2011:71). In the same vein, the Court reasoned that "a crucifix on a wall is an essentially passive symbol and this point is of importance in the Court's view, particularly with regard to the principle of neutrality", therefore "it cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities" (ECHR, 2011:72).

For the above reasons, in an interesting exercise in legal argument, the Grand Chamber of the European Court of Human Rights concluded by fifteen votes for to two against, that there was no violation of article 2 of "Protocol 1" and that it did not raise any separate issues in relation to article 9 of the *Convention*. Equally, it was unanimously agreed that there were no grounds for considering the claim under article 14 of the *Convention* (ECHR, 2011).

The wearing of religious symbols by teachers can lead to problems similar to those raised by the presence of crucifixes in classrooms. In this case, the various circumstances that they can affect need to be taken into consideration. As suggested by Contreras and Celador (2007:43) in the case of teaching staff, the use of religious symbols is subordinate to respect for students' freedom of conscience, which operates as a limitation. Therefore one of the elements to be considered would be the age and degree of ma-

turity of the students, the extent to which they could understand that the use of such symbols could be linked, even indirectly, with proselytizing. In this case it would be questioning both the student's freedom of conscience and the right of parents to choose the religious and moral education they wish their children to receive.

When we look at higher education, this argument would disappear insofar as it is understood that the age and maturity of students allow them to appreciate the fact that religious symbols worn by teachers are not of an institutional, but of a personal nature, in contrast to the situation when they are on display to children in the classroom. In any case this does not obviate the fact that the use of religious symbols should be subordinated to the guarantee of the right to education, in other words, to the correct provision of educational services. In the Spanish legal system, for example, this right appears directly linked, via article 27.2 of the *Constitución española* (PE, 1978), to the full development of personality, with respect for the democratic principles of coexistence and fundamental rights and freedoms.

What Can the Law Achieve?

From the cross-sectoral approach in this paper, the articulation of a regulatory point of view must being with the conception of a just society in which immigrants not only do not become an underclass but rather progressively have the opportunity to attain full citizenship. It is possible to set out a proactive proposal based on the law to address the conflicts such as those mentioned. The legal response should strike a balance between protecting the legal interest at stake and respect for human rights, going beyond the simplistic duality of prohibition or permission, which is insufficient in complex societies.

The Parliamentary Assembly of the Council of Europe has positioned itself along these lines to try to respond to phenomena that are being repeated in the various Member States: the link with Islamic radicalism and the manipulation of religious beliefs

to place them in opposition to human rights and democratic values. One of the key points that the Assembly focuses on is Islamic extremism, and the extremism rejected by Muslim communities in Europe as phenomena that feed into each other.

The legal dimension requires, however, a minimum, shared starting point on which to base the function of social control on values that must be universal, though not equivocally global. The scope of this universality thesis has a clear impact on the assertion of human rights. Thus, as De Lucas states, it may be understood that the first among such rights is "that all human beings should be recognized as individuals, and not because a homogeneous model is universalized, but precisely because of their irreplaceable nature, derived from their differences and otherness. That is precisely the right to inclusion" (De Lucas, 2008:59, 2012:36-44).

The first step to achieving that inclusion in multicultural societies, via the law, and for this to function as an instrument of conflict management, is to address the relationship between cultural differences and legal conflicts. Indeed, as we have seen in various examples (and others which cannot be covered here such as the location of places of worship or the conflict between freedom of speech and of the press and respect for certain faiths), migratory processes make identity clashes visible and one of the first responses may be to require the immigrant to become more integrated from the legal perspective (Solanes, 2009:47-75).

To address these conflicts through the law, it is not possible to respond by denying pluralism. If this happens, an attempt is often made to pass judgment on the legitimacy of a culture out of context that discredits the need for knowledge and understanding of other cultural and religious standards that are also rooted in the legal field. Denial and imposition by assimilation spawn new conflicts.

The proactive or rather constructive approach, in the face of repression, prohibition and sanctions, requires that we start by pointing out the shortfalls and contradictions in the Western legal system. Once these are acknowledged in specific cases of conflict, a question will have to be raised over the legal good being

served by resorting to criminal law to punish, for example, a case of genital mutilation, and what the most appropriate course of action is in the event of conflict. By acknowledging the ineffectiveness of the use of criminal law in such cases, as a result of its concomitant exclusion and negative social consequences, De Lucas rightly arrives at the conclusion that there is an opportunity to maintain the symbolic nature of sanctions and to opt for the legislative route, rather than the courts, without overlooking the fact that these conflicts are catalysts for our own problems (De Lucas, 2003:86-90).

This choice of a constructive rather than a punitive route is proposed by the Parliamentary Assembly with regard to conflicts that appear to be linked to Islam. It is vital to conceive of this alternative from its legal dimension, bearing in mind that criminal law should be seen for what it actually is: a last resort, since if the protection of society as a whole may be achieved through less harmful means, it may be dispensed with.

The Assembly stresses that the democratic norms of the countries that receive many of the Muslim immigrants require a separation between the state and its branches and religion and religious organizations (CEPA, 2007).

As such, public institutions that organize democratic society must be neutral, which does not mean that religion and democracy are incompatible, especially since religion can play a positive social role, in such a way that states should encourage religious organizations to promote harmony, tolerance, solidarity and intercultural dialogue. These affirmations imply:

1. Respect for and a guarantee of freedom of thought, conscience and religion, as well as freedom of expression, without exercising it in an abusive manner—in accordance with articles 9, 10 and 17 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (Council of Europe, 1950).
2. The fight against the social and economic exclusion of Muslims and other minorities in Europe and the implementation of effective measures for integration (and for example the policy

proposed by CEPA in 2006 on Turkish presence in Europe). At this point it is essential that the stakeholders involved should participate, with a contact in all branches of public administration, especially at local levels, to attempt to avoid extremes (CECLRA, 2005; CEPA, 2006, 2008).

As regards female genital mutilation, the Assembly rightly considers them to be practices that must be classified as "crimes" insofar as they challenge the right every person has to physical and moral integrity, in such a way that European states have to fight such practices and help girls and their families through education (CEPA, 2001). This is a form of oppression or violence against women that also requires protective and preventative measures. In this as in other cases of conflict linked to migration, especially in the religious sphere, the nexus between education and religion is essential to prevent extremism (CEPA, 2005).

The Assembly reaffirmed its understanding of the use of the full veil, with explicit reference to the *burqa* and the *niqab*, as having a role in the submission of women to men, restricting the role of women in society, limiting their professional lives and also their social and economic activities. Such practices, as well as partial veils, are not a religious obligation for all Muslims; their association is typically with social or cultural tradition. In any case, this tradition may pose a threat to the dignity and freedom of women. If in addition there is an act of oppression, kidnapping or violence, this is a crime that can be prosecuted by law with the purpose of protecting women and implementing support measures.

By sharing these arguments, a case can be made for the banning of the aforementioned full veils, as some European states have attempted. The legal grounds set out by the aforementioned article 9 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (Council of Europe, 1950) concerning freedom of thought, conscience and religion, enables the free choice of wearing certain religious clothing in private or in public. But this freedom cannot be conceived of as absolute, thus the

restrictions on it need to be justified in democratic societies, for example, for security reasons or when public or professional functions require a person to maintain religious neutrality or to show their face.

A key nuance here grants real importance to the proposal of the Assembly, which turns it into a good guideline for states, compared to the counterproductive results that enforcement measures can produce. This shows that the general prohibition on the use of the *burqa* and the *niqab* could be a denial of the rights of women who freely wish to cover their faces. Rather, as noted at the beginning of this paper, a general prohibition could achieve unintended effects and could cause conflicts parallel to those to which resolution is sought. Therefore, in the words of the Assembly, such a measure could be counterproductive, if it encourages families and the community to put pressure on Muslim women to stay home and to limit their contact with other women. Muslim women would be condemned to additional exclusion if they leave educational institutions, stay away from public places and do not take work away from their communities in order to avoid breaking with their family traditions (CEPA, 2010).

Thus, instead of punitive measures, there is a need for specific policies designed to educate Muslim women about their rights, so that they can participate in public life and have the same opportunities to take part in professional life and to achieve social and economic independence. In this respect, once again the education of young Muslims, their parents and families is fundamental—as is the education of the rest of society (CEPA, 2010).

This does not mean abandoning the establishment of prohibitive measures, since these are clearly required to protect the legal interests at stake, as in the case of female genital mutilation or in specific cases with the wearing of the full veil. In other words, the law should be endowed with the role of guarantor, based not on a general prohibition or an absence of regulation which creates uncertainty and a lack of legal security, but rather on the Aristotelian sense of legislative intervention when required by democratic principles and values.

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