# State legal order and polyculturality[1]

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ABSTRACT

Legal Theory is incumbent to analyze the mechanisms by which legal orders deal with the problems of polyculturality. This article focuses on the issue of community norms, particularly if they are regarded as material facts or as normative facts. The question is whether polyculturality can be the source of a normative fact that must be respected even if it does not agree with the dominant social values in society, or are these values to prevail. Taking into account a wide set of cases, the Author addresses the issue of the conflict of values and how it is – or should be – solved by public powers, taking into stock their function and the concrete cases at hand.

KEYWORDS

Polyculturality, Legal Theory, normative facts, normative density, community norms, normative hierarchy, fundamental rights, administrative application, judicial review

## 1. Background

### 1.1. A legal theory perspective

The problem posed by the relationship between law and other normative bodies forming a specific culture within the majority of the population governed by that same law can be examined in itself, concerning values presupposed *in abstracto*, from a universalist perspective. However, it necessarily involves the reception by the state legal order of rules, usages, customs, etc., shared by a minority community – in the respect for community idiosyncrasies or, on the contrary, following the desire to integrate a foreign population.

[1] English translation by Dulce Lopes of the original French article published in Moor (2021). Ordre juridique étatique et polyculturalité. In P. Moor (AA.), Le travail du droit (chapter 8, pp. 183-199). Québec: Presses de l'Université Laval.

Since the legal order has a claim to exclusivity over the territory and its inhabitants, it is that legal order that sets the conditions to which that reception is subject. Consequently, it is in the procedures for adopting its own norms and in the modalities of its *mise en oeuvre (implementation)* that the decisions to accept or reject community norms will be taken.

From this point of view, the problem is no different from any other socio-political context: it requires the analysis of the internal conditions of the formation of legal norms. And this is why the legal theory approach - which has precisely such an analysis as its object, whatever the domain regulated by legal norms (or the socio-political context) may be - is suitable for revealing how law can resolve conflicts, incompatibilities, contradictions between communitarian social norms and the legal order. It is therefore not a question of analysing how this or that conflict must, or should, be resolved, but under which forms law apprehends them.

More precisely, it is a question of knowing how polyculturality - like any other situation, such as sex, gender, profession - can be constitutive of a normative fact, as we will call it below: that is to say, a fact that the legal order, in its positivity, can, or even must take into account, or, on the contrary, that it can, or even must not take into account, and will therefore be non-normative.

This is why we shall begin here with a general presentation of the theory of law - the prolegomena - to situate the perspectives that we shall follow subsequently, and what its consequences will be. It is, in fact, the theory of law, by explaining how legal decisions are taken, that can shed light on how the legal system will accept - or reject - community standards that are foreign to it.

## 1.2. Hermeneutics of facts

It is well known that facts are never known or knowable as they are in themselves and by themselves. If they were to be reproduced identically, the original and the reproduction would merge to reform the original unity; one only has to read Borges' - very brief - text on the map that the cartographers of a Chinese emperor drew of the territory of the Empire at a scale of 1:1[2]. In Kantian terms, facts belong to the noumenal universe.

[2] Borges (1951, 129 ss.).

We apprehend them in the form of phenomena, which reveal certain aspects of them: the phenomenal universe. These phenomena first appear in the disorganised form: our perception of the noumenon has deconstructed them.

It is then a question of recomposing them. It is a hermeneutic task: reading phenomena in order to read them until they appear to form the most coherent unit possible - that is to say, a text (a word whose etymology derives, as we know, from the Latin *texere*, to weave). It is a hermeneutic universe because this work will be accomplished using applicable codes, whose signs will, in a way, appropriate the phenomena. The signs available in these codes thus have the effect of filtering the admissible phenomena by isolating the aspects that are of interest to them.

Codes are of various kinds: mathematical, figurative, linguistic, etc. Their function is not only to understand but also to communicate what has been understood between all those who use the same code.

The relevant code here is the legal one, in which legal texts are expressed. But this code is special because it uses the signs of another code - that of the common language -, since the law works with language to signify and communicate what it understands. The legal order can thus be understood as a code, i.e. a set of texts composed of signs, a code that implies a particular type of reading, and the legal system as the differentiated organisation of the circulation of these texts.

In this sense, what are erroneously called "facts" ("relevant facts", the establishment of "facts") is the apprehension of reality as postulated by the signs of the legal order, through the tracks or clues presented by the phenomena, the proof of which should be provided. The list of these facts is established by the interpretation of the norm and not by reality: the latter is only the material in which their tracks are sought. The fact itself - the noumenon - is the referent of the sign: the object of the discourse, what is spoken of when a text is uttered or written; what the text refers to[3]. To distinguish between them, we will hereafter speak of a factual situation for the referent and of normative facts for those that, being sufficiently coherent and proven, can be considered a specific case of the sign. The normative fact is what the norm

[3] In semiotics, the referent is the element outside the subject to which a sign relates, what is communicated about. The referent can neither communicate by itself, nor be communicated by itself: it requires the sign, or a set of signs – a text. See Eco (1988, 63 ff.) (who speaks of "renvoi"), and Klinkenberg (1996, 35 ff.). This is one of the three elements of the semiotic triangle – sign (signifier/signified) and referent.

designates as legally relevant in the factual situation and whose realisation leads to the applicability of the norm. In other words, normative facts are constitutive of the relevance of the sign as contained in the normative text.

We have said that the legal code uses the signs of the common language in all their denotations and connotations, including those deriving from rhetorical uses (e.g. metonymies). Within a homogeneous culture in its use of language, this opens up the possibilities of interpretation of the legal text, between which the argumentation makes the selection which it is able to make convincing (albeit not necessary)[4]. Based on this interpretation of the sign, the relevant facts must be established. A difficulty will ensue in the presence of a polyculturality that gives another divergent interpretation, concerning which the factual situation will also be divergent from which would derive from the use of the vernacular. Which of these two interpretations should be retained, the question is discussed[5]. An example: Sikhs carry a dagger, the *kirpan*, as a religious symbol to remind them of their obligation to protect against oppression and injustice, and their religion prohibits them from using it aggressively - should it be considered a weapon in the ordinary sense of the word or an act that falls within the scope of religious freedom? Canadian jurisprudence has opted for the latter[6], Italian for the former.

### 1.3. Normative facts

Material facts or, more broadly, material situations - events, behaviours, enduring states of affairs, etc. - can rarely be isolated within an idiosyncrasy that defines them exhaustively; this may be the case when they are absolutely singular or when, always and in all circumstances, they reproduce themselves in a perfectly identical manner. Material situation and normative fact then coincide.

But, very often, material facts are complex groupings of diverse elements that the viewer must construct; it is this view that constitutes them and enables them to be read as constituting a coherent whole. Coherence is then not in the things themselves but in the gaze that links the elements to each

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[4] Cf. further developed in Moor (2021, chapters V, 6 and 7, IX, 2.3 and 5, pp. 116-121, 209-214, 225-230).

[5] See the in-depth analysis of such situations in Ricca (2018, 101). The following example, from the kirpan, is borrowed from him.

[6] This solution does not necessarily imply freedom to wear the kirpan: a balance of interests must be struck between the guarantee of religious freedom and the public interests that may justify a ban.

other in a certain order, selecting them according to the degree of relevance that seems most appropriate to form a whole.

Legal facts are the product of this construction, which is guided by the norm: it is the norm that defines the relevant elements to be isolated from the material facts while at the same time indicating the means of proof necessary to give them the quality of 'established facts'. A story can then be constructed, which is the narrative of the facts of the case and which constitutes the case to be judged. Some of the legal facts required for the applicability of the norm may not have been established due to a lack of appropriate evidence (unless the norm provides that they are presumed): this is where the rules on the burden of proof come in[7].

Whilst abstractly built as normative facts, material situations are thus reconstructed sets that can be read from various angles, depending on how they can be analysed according to the criteria by which the various norms that take them as referents define their applicability (including the levels of competence to adopt and apply them). The normative fact then becomes a case of the norm, if the latter is applicable, or, if not, a non-case (which is also a case of the norm, but in a negative form).

Normative facts may involve differentiated interests - social, ecological, economic and cultural. Taking into account these interests and, if necessary, their reciprocal weighting can be the responsibility of the legislature or of the administration (judges and administrative bodies) in the phase of application. The definition of the relevant criteria for their determination will occur at one or other of these two levels depending on the normative density of the applicable norms.

### 1.4. Political action

On this subject, it should be noted that certain effects produced by material situations will give rise to a need for intervention to counteract them or, on the contrary, to favour them: the decision to intervene constitutes a political and legal *reaction*. These reactions will be defined according to the

[7] On all these points, see Moor (2010, 83) (with references), where we have called the judicial narrative the synthesis of the facts that the judge has retained as the "facts of the case". On social and judicial preconceptions on the construction of narratives, see Moor (2021, 113-115).

legal arrangement of the respective competences of the various communities or authorities that represent the compromised interests. Depending on the diversity of the interests involved, the reaction will have to combine the different levels of competence – within the same community, the attributions of several authorities - and choose the means, material and/or legal, to invest in in order to achieve the targeted objectives. An ensemble is thus formed, constituting a public policy.

The law is only one of these means. In the context of a public policy, law is part of a whole, within which it is instrumentalised. Unlike classical legal rules, which create their own object (property, marriage, etc.) and therefore do not need to be integrated into a non-legal universe, law loses here its autonomy insofar as its object is imposed on it from outside by the programme of the politically decided public task.

From this perspective, law provides politics with competencies and procedures which allow political choices. But the normative content is not dictated by the law: it is inserted into its structures in accordance with the norms of competences and procedures that the same politics has integrated into it. And by politics, we mean not only the macro-political dimension - that of the legislator – but also the micro-political dimension of the judge or any authority called upon to implement an abstract norm. This is what we will now shed light on.

### 1.5. Normative density

The freedom available to the authority adopting or performing the norms depends on the normative density of the norms and their rank in the legal order that they constitute as a whole – below we shall examine how this freedom may be used[8]. The greater the normative density of a norm, the less freedom the application authority will have, since, in virtue of its rank, it is bound to respect it. Conversely, the more freedom an authority wants to give to the authorities obliged to comply with the norms it issues, the lower will be the normative density of the norms provided. These are political options.

[8] On the concept of normative density, see Moor (2021, 66–78) and Moor (2010, 113 ff.).

In other words, the definition of normative facts by the legislature may be completely determinative, leaving no room for any latitude of autonomy for the application authority: the latter only has to deduce from the abstract sign the concrete features of the case-species. But this is not often the case: it happens for instance when we have numerical data or data concerning the civil status. The normative density is then absolute.

At the other extreme are cases where the authority has complete autonomy: this is, at least in states governed by the rule of law, rare or even exceptional - for example, the granting of pardons.

Between these two extremes, the normative density evolves gradually. It is fairly low when the implementing authority has a great deal of freedom - for example, the legislature, which only has to comply with constitutional law (which has often low density) and international law, or the application authority when the norm allows for decisions on opportunity. On the other hand, it is somewhat higher when the applicable norms contain indeterminate legal concepts, in which the factual situations are co-determinant: and to a certain extent variable because the application authority, determined by the norm and its programme, is free to decide on itself the elements which, present in the factual situation, will constitute the normative facts - these will then be co-determinant, within the margin of indeterminacy left by the norm. The meaning of the sign thus applied will be constituted by a kind of cooperation between the normative phase and the application phase: it will retroact on the norm, into whose field it will enter as one of its cases, among all the others that have already been codetermined.

We can find such configurations in the whole of the legal order. Constitutions already contain them: for example, what is the "manifestation of a belief" concerning the guarantee of religious freedom, or what behaviour falls within the scope of personal freedom? Legislation is full of them: for example, is there a 'just cause' according to the terms of a school law, for granting an exemption from education, or what is a 'religious symbol' in a civil service law that prohibits its being worn?

It is clear that the objectivation - and therefore the legal rationality - of decisions that allow a reference to the applied norm depend on the normative density of the latter. The lower the normative density, the more the content of the decision is subject to the influence of subjective factors. Subjectivity is understood here in a broad sense: it is an element that codetermines the way things are viewed within the text of the norm. There are, therefore, social

subjectivities: how society (or at least a significant part of it) looks at itself - one might say a vernacular way of looking at things, exercised by individuals without them even necessarily being aware of it. These are usages, customs, but also religious and cultural representations and *Weltanschauungen*. But the authorities themselves also have their individual subjectivities, which depend on the biography, character, opinions, etc., of the people who hold office[9].

Within low normative density, where reference to the norm alone causes undecidability as to the choice of a solution, the authority must reason to justify it; such argumentation aims to convince and can only aim at a relative objectivation - another argumentation, leading to another solution, would have been possible. To achieve this, the reasons it will invoke are those it can discover through its own subjectivity within social subjectivities: this reference is essential to the acceptability of the decision it takes[10].

## 1.6. Return to polyculturality

It is from this perspective that the encoding of factual situations into normative facts and the implementation of texts containing indeterminate legal concepts must be understood.

More precisely, concerning the problem of polyculturality , the existence of community norms is presented first of all as a material fact; it is not in itself, from the point of view of the State legal order, to be respected under a force that would be intrinsic to it.

There are two possible scenarios. The first is a *conflict, for example,* between a school regulation or directive prohibiting female teachers from wearing the *hijab* and the Muslim community norm on veiling, or a municipal regulation on the ordering of cemeteries and the Muslim norm that dead bodies should be buried in the direction of Mecca. Such conflicts must be resolved - whatever the final solution adopted - by applying a higher state rule than the one the community member is contesting - law or constitution (in the examples, the constitutional guarantee of religious freedom). The question

[9] See Moor (2021, chapter V, 107 ff.).

[10] See Moor (2021, Chapter IX, 5) and Moor (2010, 294 ff.).

then is: will the existence of the community rule be considered a normative fact for interpreting this norm?

The second hypothesis is that where the conflict does not arise between two norms, the state norm and the community norm, but where the *existence* of a community norm can be considered - or not - as a *normative fact* for the application of a state norm; the situation arises when the legal rule is not explicitly aimed at a configuration of polyculturality (this would be the first hypothesis), but when the authority of application can bring in - or not - the existence of a community norm as a normative fact in the co-determination of a notion that the state norm leaves undetermined, thus with a low normative density (example: Should the *kirpan* be considered a "weapon" within the meaning of the legislation on the carrying of weapons or not?).

## 2. Problem settings

It is embedded in this epistemological context that we will approach the questions of polyculturality, restricting ourselves to those that arise within a single legal order and leaving aside those that arise from conflicts between two or more legal orders that conform to different legal cultures. But this can be transposed if we conceive international law in its diverse applications by States according to their different cultures.

The assumption is that there is a community within the population of a state that obeys specific norms and whose members demand respect. And questions of polyculturality arise in relation to these norms and the state legal order. It is clear that the state norm prevails when, with sufficient normative density to be immediately applicable, it is imperative - the question is then to determine whether it is valid with regard to state norms that are superior to it (i.e. the constitution). But it will arise when its solution requires reference to norms whose normative density is indeterminate and whose normative programme does not exclude *a priori* consideration of a fact based on a non-state norm - whether these are constitutional norms (regarding religious freedom, for example) or legal norms (such as the exemption from an obligation on 'fair grounds').

It should be noted at the outset that while the conflict arising from a contradiction between a community norm and a state norm may be obvious (e.g. the 'law' of *omertà* in Mafia organisations, or the prohibition of polygamy

for members of a religion or sect that authorises or even recommends it), it also often arises in a contingent manner during the application of a norm (e.g. the wearing of the *hijab* by civil servants).

Thus, if the legislature becomes aware that a potential conflict is on the political agenda, it may adopt a specific norm that addresses it (e.g. by prohibiting the wearing of the *niqab* in public spaces). Frequently, however, the conflict may arise with a pre-existing norm, which was not specifically aimed at it, but whose implementation, according to its interpretation or the definition given in the framework of its application, is likely to give rise to it: it is then up to the application authority to say whether there is a real conflict and if so, to give it a solution. And it will do so with greater or lesser argumentative freedom, depending on the normative density of the state norm.

The review of the constitutionality of legislative or administrative measures offers many examples. Guarantees of fundamental rights often have a low normative density, which makes the task of constitutional jurisdiction both difficult and fascinating. We refer here to the conflicts of polyculturality that arise in relation to Muslim communities in Europe. First of all, there are questions about the scope of fundamental rights application. For example, are their own norms manifestations of their faith - in which case the guarantee of religious freedom would apply - or are they purely social prescriptions? The question arises as to the wearing of the *hijab* or *niqab*. But what is indeterminate about such guarantees is above all the conditions that the legislature or the judicial or administrative authority must respect for their validity: does the public interest justify the prohibition of the *niqab* in public or the prohibition of Muslim women teachers from wearing the *hijab* in the exercise of their duties? Do such measures comply with the principle of proportionality? The same problems arise, for example, in judging a request to exempt Muslim girls from mixed swimming lessons. The simple and unique reference to the guarantee in question is not enough to decide: the court must, in any case, take a position: is polyculturality the source of a normative fact that must be respected even if it does not agree with the dominant social values in society, or are these values to prevail? There is a conflict of values, which the court is confronted with and which it is obliged to resolve by virtue of its function. It is at this point that the factors of the decision will be determined by subjectivity, both social and individual; the constraint weighing on the court here is factual: it must justify its decision in such a way that the result reached (the decision) appears not only legally,

but also socially acceptable - which is precisely where the court's task is difficult, as mentioned above, because in such situations social subjectivities are divided between the two possible solutions, admitting the fact of polyculturality as a normative fact or rejecting it. To this extent, the jurisdiction has, by its very position, a micro-political function.

The same may be true in the context of the application of a legal provision. For example, a Muslim man marries a Christian woman and, on the wedding night, discovers that his wife is not a virgin; he applies to the courts to have the marriage declared null and void on the grounds of an error in an essential quality of the person (Art. 180 para. 2 of the French Civil Code); the first court accepts the application, but, on appeal, the Court of the second instance rejects it. The two courts had different conceptions of polyculturality, which led to equally different interpretations of the notion of "essential quality"[11].

Finally, the same applies to the definition of normative facts. For example, what facts can be used to judge the integration of a foreigner applying for naturalisation? What are the cultural particularities that would prevent the authority from considering the applicant to be 'integrated' - for example, his or her respect for certain precepts of the community of origin?

## 3. Legal configurations

### 3.1. The normative hierarchy

The cases in which polyculturality poses a problem do not arise in the abstract but in the specific contingent structures of the state's legal order whose authority must resolve them. Therefore, it is a question of knowing the nature and the level of the competent authority, the normative density of the applicable norms, and the modalities of control available to the higher authorities. In this way, it will be possible to see whether the normative fact of polyculturality is taken into account by an abstract norm and must therefore be respected by the implementing authorities, or whether, on the contrary, it is absent, and, in this case, whether or not the implementing authority can consider it.

[11] See reference footnote 22.

## 3.2. The constitution

### 3.2.1. *Fundamental rights*

First, the constitution. It contains values - fundamental rights; some of them being particularly relevant in this context such as personal freedom and freedom of opinion in particular. They have a relatively low normative density in terms of their field of application and the conditions for the validity of any restrictions that can validly be imposed. The constitutional judge, therefore, has a relative argumentative freedom. Still, the question arises as to whether the court's power to examine the constitutional validity of acts brought before it is limitless or, on the contrary, whether it is limited to verifying their justification in the light of one of several possible rationales. The prohibition of the wearing of the *hijab* by female teachers offers a good example: the principle of secularism in schools can be extended to the prohibition of any manifestation of the teacher's faith, but it can also be interpreted, in a narrower sense, as prohibiting any active manifestation of propaganda. The position of the constitutional court judge will depend on the nature of the authority whose act is challenged: if it is that of a federated state, the judge, a federal authority, may be inclined to limit his or her power of review in order to respect the organisational autonomy of the federated state.

It is rare for the constitution to contain normatively dense standards on such issues. One example is the Swiss constitutional ban on construction of minarets, introduced following a popular initiative (the appeal to the European Court of Human Rights was declared inadmissible[12]). But there are other historical examples: the Swiss constitution of 1874 prohibited the Jesuit order, as this propagated ideological teaching, certainly in line with contemporary Catholic theory but contrary to the democratic and liberal standards of the Protestant majority; at the same time, it secularised cemeteries, as the standards in use in Catholic regions prohibited the burial of the mortal remains of Protestants, Jews, and persons that committed suicide.

But it is obviously with regard to fundamental rights that the problem is important because it is against this yardstick that the validity of legislation

[12] Ouardiri Hafid v. Switzerland, 28 June 2011, N.º 65840/09.

(where there is a review of its constitutionality) and that of lower-ranking acts, either regulations or concrete acts, will be measured. The judge will be confronted with two questions. The first is the field of application of these rights: does the measure in question fall within them, for instance, can the wearing of the Islamic headscarf or the non-participation of Muslim children in mixed swimming lessons acts be described as religious acts? Secondly, it concerns the constitutionality of the restrictions: do they have a sufficient legal basis, does a relevant public interest justify them, do they respect the principle of proportionality? It is obviously the assessment of the public interest - a concept with a low normative density - that attracts attention. For example, from the point of view of freedom of belief and personal freedom, is the protection of public health sufficient to legitimise the obligation to vaccinate against dangerous contagious diseases in the light of the religious standards of certain sects? Does religious freedom require that Jewish, Muslim, Pentecostal or Jehovah's Witness pupils be exempted from attending classes on Saturdays, or is there a public interest in compulsory education? On all these questions, the constitutional judge has to balance conflicting interests and, depending on the weight he or she gives to the public interest, the social community norm will give way to the state norm or not.

Applying the constitutional norm guaranteeing a fundamental right may be limited by another constitutional principle. The most striking example is that of the secularity of the State, which justified the prohibition on female public officials wearing the Islamic headscarf.

### 3.2.2. *Casuistry: American case law on religious freedom*

American law offers numerous examples; given the multiplicity of religions, sects and diverse beliefs that characterise the United States, it is not surprising that the problem of conflicts between state law and community norms has often occupied the jurisprudence of the American Supreme Court; this illustrates well the possible fluctuations in the recognition or not of a fact of polyculturality as a normative fact[13].

[13] For an early history, and a critique of the jurisprudential development, Zilberfein (1992).

The first line in American jurisprudence originated in the prohibition of polygamy by federal law, in opposition to the norm of the Mormon sect: the Court ruled that it did not violate the guarantee of religious freedom provided for in the First Amendment to the Constitution[14]. The same was true, more than a century later, for the denial of unemployment compensation to an employee fired for consuming peyote in a ritualistic (Indian) ceremony of the Native American Church°: "[...] The right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)"[15]. This line applies to cases in which the challenged regulation is of general applicability.

In the meantime, however, other judgments have balanced the interests, at least in the case of regulations that are not generally applicable: the prohibition or obligation imposed by the legislation must be justified by a "compelling state interest" that cannot be achieved by a less restrictive means. Thus, the denial of unemployment compensation to an employee, a member of the Seventh Day Adventist Church, who was dismissed because she refused to work on Saturdays[16], and the obligation for an Amish man to send his children to school[17], were deemed to be contrary to religious freedom.

The discrepancy between these two lines, and especially the fact that the former had seemed to prevail in case of law over the latter[18], led Congress to pass the *Religious Freedom Restoration Act* in 1993, which endorsed the latter; it was amended in 2000 after a Supreme Court ruling[19] that excluded its application to the states. Subsequently, Congress passed the *Religious Land Use and Institutionalized Persons Act,* also applicable to the states but only in imprisonment and private property use regimes.

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14 Reynolds v. United States, 98 U.S. 145 (1879).

15 Employment Division, Dep. Of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). The denial of compensation was based on the fact that the dismissal was due to misconduct.

16 Sherbert v. Verner, 374 U.S. 398 (1963). The reason for the denial was that the employee's situation – that, given her refusal to work on Saturdays, she could not find new employment – was without "good cause".

17 Wisconsin v. Yoder, 406 U.S. 205 (1972).

18 But the latter became relevant again after Smith (cited at note14): the Supreme Court struck down a regulation prohibiting ritual animal sacrifice, Church of the Lukumi Babalu Aye, Inc. v. Hialeah 508 U.S. 520 (1993) – although the judgment was unanimous, the competing opinions in that case reflect the difficulty of reconciling the two lines.

19 City of Boerne v. Flores, 521 U.S. 507.

## 3.3. Legislation and its application

### 3.3.1. *Arbitration through legislation*

Sometimes a legislature will decide on the solution to the problem of polyculturality. It is free to do so in compliance with constitutional norms, where there is judicial review of the constitutionality of laws[20]. Thus, in 2004, the French legislature adopted the *law on religious symbols in French public schools* and, in 2010, *the law prohibiting the concealment of one's face in public*.

The legislature may include exceptions or derogations in its regulations. For example, the French *law on religious symbols* allows "discreet signs". Some of the laws requiring motorcyclists to wear helmets allow Sikhs not to wear them.

Another example is the legislation allowing doctors in public hospitals not to perform treatment in case of a conflict of conscience, even though the institution to which they are attached has an obligation of care; such a conflict often arises because of norms dictated by religious faith - the Catholic religion or certain American sects. This is the case with the legal termination of pregnancy[21].

### *3.3.2. The application of the law*

When adopting abstract state norms, it is up to the legislature to decide on their normative density, i.e. the freedom of appreciation that it wishes to leave or not to the authority responsible for their application. It is sometimes the subject itself of the legislation that imposes such a choice: this is the case when it is important to ensure compliance with the principle of proportionality when applying the abstract norm, which implies a low normative density - for example, to allow the relevant administration to grant exemptions when the

[20] American examples were given above.

[21] Thus Article L2212-8 of the French Public Health Code: "A doctor or midwife is never obliged to carry out a voluntary interruption of pregnancy, but he or she must inform the person concerned without delay of his or her refusal and immediately inform her of the names of practitioners or midwives who are likely to carry out this intervention in accordance with the procedures laid down [by law]". This provision is very specific, in that it clarifies a general provision (R.4127-47 of the Public Health Code) for the sole case of termination of pregnancy; it was introduced to facilitate the adoption of the 1975 law on the voluntary termination of pregnancy.

public interest does not justify its absolute application: so for the exemption from classes on Saturdays, but not for the obligation to perform military service or civil service in the case of members of certain sects.

Another reason for lower normative density is the codetermining importance of factual circumstances of all kinds, which only become apparent in the individual case - among which may be the existence of community norms to which the subject of law concerned considers himself bound or which he considers justifying his behaviour: thus the question of the wife's non-virginity, which should be - in his eyes - a reason for the nullity of his marriage.

> The husband, a Muslim, having discovered on the wedding night that his wife was no longer a virgin, applied for the nullity of the marriage based on Article 180 of the French Civil Code ("If there has been an error in the person, or the essential qualities of the person, the other spouse may apply for the nullity of the marriage"), an application which the first judge accepted; on appeal, the second judge rejected the application. The issue to be resolved by the judge was whether or not to recognise the Muslim conception as a normative fact[22].

This example shows that the conflict may only arise when applying a norm, depending on concrete circumstances. The legislature could not foresee such occurrences at all. Even if they could have been imagined, it might have been considered preferable not to legislate on them, considering that it was impossible to prescribe anything about all the potential occurrences that social realities might produce. In such configurations, interests can only be balanced in concrete situations where the conflict arises.

> A similar issue arose in the case of a prisoner who, in order to obtain a suspension of his sentence, went on a life-threatening hunger strike. The authority ordered his forced feeding. Doctors refused to administer it based on an ethical rule codified by the (private) body of medical guilds that all treatment requires the patient's consent. The Swiss Federal Court upheld the authority's decision, even though there no legal basis existed.

[22] On this case, see the daily Le Monde of 29 May and 19 November 2008.

There was sufficient public interest and a situation of urgency, with the general police clause replacing the lack of legal basis[23].

### 3.4. Judicial review

The ordinary channels of judicial review do not pose any specific problems. The court on appeal or recourse applies the same standards as the court of the instance that handed down the contested judgment, i.e. those that apply to the specific matter of the dispute; consequently, the scope of the court's power also depends on the normative density of the rules that it has to apply, and under the same conditions. It is therefore competent in the same way as the court who handed down the contested decision was, for example, to define the legal concept of "essential quality" of the spouse in order to determine whether the absence of virginity is or is not an "essential quality" in the light of the private law norm[24].

This is not the case with the constitutional Court: this court does not apply the specific norms of the dispute settlement, but only a higher norm. It has to judge whether these specific norms or their concrete application conform with the constitutional order. It, therefore, has the full freedom conferred by the indeterminacy of the concepts used in the guarantees of fundamental rights. For example - depending on the respondent authority's interpretation of the concept of the 'essential quality' of a spouse - it could examine whether an EU rule that restricts the virginity requirement to wives but does not extend it to husbands is compatible with the constitutional guarantee of gender equality. This is what makes the task of the constitutional judge often difficult when the subject matter of the judgment to be handed requires him or her to decide questions that involve socially conflicting socio-political options; the politicisation of the election of judges to the Supreme Court of the United States is the best-known manifestation of this.

[23] Decisions of the Swiss Federal Supreme Court 136 (2010) IV 97 (113): "In the event of a discrepancy between a rule of law and medical ethics as conceived by the guidelines, doctors cannot rely on the latter to avoid fulfilling their legal obligation. Consequently, the guidelines of the Swiss Academy of Medical Sciences cannot prevent the cantonal authorities from ordering the forced feeding of the appellant, nor can they exempt the doctors required from carrying it out, if the legal conditions for such a measure are met.

[24] See above footnote 22.

## 4. Conclusion

Conflicts related to polyculturality are usually resolved quite easily when the communities involved are circumscribed; they adapt or resign themselves; such is the case of the American sects or that of the Sikhs, whose typical wearing of the turban - the *dastār* - has posed some problems. (Do they have to take it off to wear a helmet when they ride a motorbike or are on military service? [25])

But when the community norms in question are those of a large minority whose traditions, customs, and history are far removed from those of the national community, the conflicts are not so easily resolved; the issue at stake concerns the whole of society and is divided between the will of a not inconsiderable part of the majority, which wants the minority to be integrated and for whom the latter represents a danger commensurate with its importance, and that of this minority to preserve as much as possible of its original identity. This explains why most of the cases presented here are related to Islam; it is to its presence that, in the West at least, the conflicts of polyculturality - it must be said here - are mostly linked. That the law can contribute to their solution from case to case is certain, especially through the mediation of fundamental rights, but this does not prevent the road to a democratically acceptable, if not generally accepted, solution from still being long.

This is also true for case law: a deeper analysis is needed than the mere comparison of solutions. In this respect, it is striking to note, at least at first sight, that the Sikh community has often been treated better than the Muslim community, probably because it inspires less fear, being less numerous, as regards its integration.

The need for such analyses, both in legislation and case law, is illustrated by the fact that the same problem is often not solved in the same way in different States or at different times, insofar as facts of polyculturality are recognised as normative or, on the contrary, rejected as irrelevant, and, as a

[25] Helmets are compulsory even for Sikhs in Germany (see the decision of the Federal Administrative Court of 4 July 2019, 3 C 24.17, which confirms the compatibility of the obligation with the guarantee of religious freedom), France, Switzerland, some US states with exceptions (medical, professional, but not for religious reasons), Australia, Denmark (with exceptions - medical or religious reasons), and it is compulsory except for Sikhs in India and the UK (by law).

result, the community norm in question is accepted or not accepted as being compatible with the State legal order. Often, they will then reveal socio-political or ideological presuppositions or unspoken facts. This also explains why motivations are rarely incontrovertible: they are only convincing, leaving a space of potential indecision - convincing as best as possible for the society for which they are intended[26].

> An example. As we have seen, French legislation prohibits public officials from wearing non-discreet religious symbols; it does not, of course, prohibit them from belonging to a religion. How will pupils recognise religion with a non-discreet symbol and not with a discreet symbol, given that a symbol is necessarily worn to be seen - otherwise, it would not be a symbol? And isn't it better for students to recognise it than to make wild guesses based on other clues - such as skin colour? Does the secularity of the state imply more than the prohibition of all propaganda, does it go so far as to require neutrality of passive appearances alone? The point here is not, of course, to take any position on the solution, but to show that another argument, based on otherwise selected normative facts, would have been possible, which reveals that the choice was guided by non-legal considerations and is therefore also contingent on the socio-political context.

Such contingencies also vary over time. An exemplary illustration is provided by comparing two judgements concerning the exemption of children of Muslims from mixed swimming lessons[27]. In 1993, admitting that the refusal of the exemption violated religious freedom, the Federal Court ruled that there was no obligation of integration for foreigners. Fifteen years later, it reversed its decision, referring to the constitutional principles of equal opportunities for all children and gender equality. Noting in fact that the Muslim population had grown from 150,000 in 1990 to 400,000 and that integration issues were becoming increasingly important in public opinion, it stated that "it is a task of the State under the rule of law to ensure, between it and society, the minimum coherence necessary for harmonious cohabitation, marked by respect and tolerance"; and, it continues, the foreign population may therefore be required to modify certain aspects of their way

[26] See Moor (2021, Chapter IX, 5, 225-230) and Moor (2010, 189 ff., 66 ff.).
[27] Swiss Federal Court judgments 119 (1993) Ia 178 and 135 (2008) I 79.

of life, at least insofar as this concerns everyday behaviour and not the very core of their religious beliefs; in this respect, the school has an essential integration function, and it would be inconsistent for certain children to feel excluded from school sociality by the special status that an exemption would give them. In the case of the first judgment, it can be observed that the relationship between the exemption on this ground should also have been examined from a gender perspective. In the case of the second judgment, it could be questioned whether the attendance of swimming lessons is a decisive normative fact for judging an individual's integration. The changing socio-political context has therefore played a decisive role.

It is not our intention to criticise the influence of non-legal considerations as an undue intrusion - even if it is not always explicit. On the contrary: this is normal. Law is not only a structure, or rather, it is a system that allows precisely for its content to be political. It is not only the constituent and the legislature, but also the judge, who, in the margins of freedom left by the normative density of the standards he implements, makes choices that are necessarily political - there is a *micropolitics* of jurisprudence, as has been explained elsewhere[28]. A judge is also a man, an active member of the society in which he lives and which he must convince of the relevance of his judgments, he is not only a function - that is to say, he is what we have called *figures* of the legal order: the positions within the legal system - of the member of the legislature as much as of the judge - in which the function and the individual are superposed and which ensure the transmutation of social normativities, carried by the individual, into legal normativities, pronounced performatively by the discourse of the function[29].

Legal Theory should make this clear in order to analyse the mechanisms by which the legal order deals with the problems of polyculturality, as with any issue on the socio-political agenda. This is why the present text has begun with such a long prolegomenon.

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[28] Moor (2010, 298 ff.).

[29] See Moor (2021, chapter II, 5.1.2, V, 45–47, 107–123) and Moor (2016, 191 ff.).

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