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# Constitutional Asymmetries and Mixed Legal Systems: New Itineraries of Legal Comparison *

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## *1. Introduction*

In the past decades, legal scholarship has widely explored the phenomenon of constitutional asymmetries in multi-tiered systems[1], often in the wake of developments in European legal systems, such as Italy, Spain, Belgium, and the United Kingdom. Indeed, the literature has increasingly refined the theory on asymmetric federalism and identified three legal dimensions in which asymmetries are expressed, namely the status of subnational entities, the distribution of powers and competencies, and fiscal arrangements[2]. However, some authors, such as Palermo[3], have identified an additional dimension in which asymmetries can manifest themselves, i.e., the maintenance of historical legal specificities in particular parts of the territory. For example, Palermo recalled the existence of peculiar legal institutions, e.g., the *derecho foral* in the Basque Country and Navarre, or the

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[1] See, for example, G. Martinico – M. Monti (eds.), *New Trends in Comparative Federalism*, in *Perspective on Federalism*, vol. 16, no. 1, 2024.

[2] See F. Palermo, *Introduction*, in F. Palermo et al. (eds.), *Asymmetries in Constitutional Law*, Bolzano, 2009, p. 12 ff.

[3] F. Palermo, "*Divided We Stand*". *L'asimmetria negli ordinamenti composti*, in A. Torre (ed.), *Processi di devolution e transizioni costituzionali negli Stati unitari (dal Regno Unito all'Europa)*, Torino, 2007, p. 163.

*geschlossener Hof* in South Tyrol, as well as the maintenance of civil law in specific subnational entities in otherwise common law legal systems, e.g., Québec, Scotland, Puerto Rico, Louisiana. Despite providing an extremely interesting perspective on the phenomenon of asymmetries in multi-tiered systems, the intersection between constitutional asymmetries and mixed legal systems has attracted only limited attention in the scholarship[4].

This study aims to explore this gap by analyzing four jurisdictions where the presence of a mixed legal system has generated asymmetrical outcomes. To do so, the article is divided into two parts. The first part is dedicated to the theoretical foundations of the research, i.e., the definition of the two core concepts of asymmetries in federal theory (paragraph 2) and mixed legal systems (paragraph 3). Then, the second part addresses four case studies, selected according to two main criteria. On the one hand, they are multi-tiered systems[5] where asymmetry (or, in the Nigerian, symmetry[6]) has been introduced to accommodate ethnocultural diversity[7]. On the other hand, they represent the two different conceptions of mixed legal systems as identified by Palmer[8]. Indeed, Québec and Scotland (paragraph 4) respond to the more traditional conception of «mixed jurisdiction», where a coexistence of common law and civil law can be found. As will emerge in the rest of the article, in these two cases, the constitutional asymmetries deriving from the presence of a mixed legal system consist in a translation of this specificity in the composition of the Supreme Court (in Canada) and the organization of the judiciary (in Scotland). Then, Nigeria and Indonesia (paragraph 5) are more closely linked to the «pluralist conception» of mixed

[4] As observed also by Martinico in G. Martinico, *La genesi "mista" dell'asimmetria canadese*, in G. Delledonne et al. (eds.), *Il costituzionalismo canadese a 150 anni dalla Confederazione. Riflessioni comparatistiche*, Pisa, 2017, p. 15-16.

[5] This article relied on the category of «multi-tiered systems» (MTS), i.e., those system with multiple tiers of government in which the central level co-exists with subnational entities having lawmaking powers. This choice allowed to include in the analysis also the United Kingdom and Indonesia, as they do not strictly define themselves as «federations» (as Canada and Nigeria), but they do present multiple tiers of government (i.e., the devolved nations in the UK and the provinces in Indonesia) with lawmaking powers. For more on MTS, see F. Palermo – K. Kössler, *Comparative Federalism. Constitutional Arrangements and Case Law*, London, 2017, p. 8; P. Popelier, *Dynamic Federalism. A New Theory for Cohesion and Regional Autonomy*, London and New York, 2021, p. 50-51.

[6] See R. Suberu, *Federalism in Africa: The Nigerian Experience in Comparative Perspective*, in *Ethnopolitics*, vol. 8, no. 1, 2009, p. 67-86.

[7] See P. Popelier – M. Sahadžić (eds.), *Constitutional Asymmetry in Multinational Federalism*, Cham, 2019.

[8] V.V. Palmer, *Two Rival Theories of Mixed Legal Systems*, in *Journal of Comparative Law*, vol. 3, no. 1, 2008, p. 7-33.

legal systems, with the combination and stratification of common/civil law, Islamic *Shari'a*, and customary law. In these two contexts, the direct implementation of Islamic criminal law in limited parts of the territory has generated *de jure* asymmetries in the Aceh province of Indonesia and an asymmetrical outcome in terms of protection of rights in the northern states of Nigeria. In both systems, the adoption of Islamic criminal codes has raised concerns over human rights violations of non-Muslim citizens, minorities, and vulnerable groups[9]. The article chose such different cases[10] as it was interested in studying the varieties of constitutional asymmetries deriving from the mixed nature of the legal systems and in bringing together different legal traditions, both in the Global North and the Global South.

Finally, in the Conclusion, the article paves the way to new itineraries of legal comparison by reflecting upon the legacies of colonialism and the role played by asymmetric federalism in embracing diversity and legal pluralism.

## 2. *Asymmetries in Federal Theory*

Up until Charles Tarlton's essay, which first introduced the concept of asymmetry in 1965[11], the idea of asymmetry had remained only implicit in federal theory, and symmetry was considered the norm (whereas asymmetry was the exception). This perception stemmed mainly from two factors. First, the centripetal origin of traditional coming-together federations (e.g., the United States, Germany) led inevitably to prioritizing the guarantee of a symmetrical relationship among subnational entities to ensure full equality among them. However, more recent federal systems (e.g., Belgium, Spain, Bosnia-Herzegovina) have followed an opposite dynamic. Given their centrifugal origin, in these holding-together federal

[9] See S. Butt, *Provincial Asymmetry in Indonesia: What is so 'Special' About it? A Country Study of Constitutional Asymmetry in Indonesia*, in P. Popelier – M. Sahadžić (eds.), *Constitutional Asymmetry in Multinational Federalism*, London, 2019, p. 247-248; M.H.A., Bolaji, *Shari'ah in Northern Nigeria in the Light of Asymmetrical Federalism*, in *Publius: The Journal of Federalism*, vol. 40, no. 1, 2010, p. 122-123.

[10] On the different case selection logics, see R. Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, in *The American Journal of Comparative Law*, vol. 53, no. 1, 2005, p. 133-152, whereas on the comparative study of heterogeneous systems, see G. de Vergottini, *Constitutional Law and the Comparative Method*, in J. Cremades – C. Hermida (eds.), *Encyclopedia of Contemporary Constitutionalism*, Cham, 2020, p. 13-14.

[11] C.D. Tarlton, *Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation*, in *The Journal of Politics*, vol. 27, no. 4, 1965, p. 861 ff.

systems, constitutional norms had to regulate internal diversity by ensuring differentiated levels of autonomy to preserve the unity and integrity of the system[12]. The increasing implementation of different forms of asymmetrical arrangements in federal systems led some scholars to argue that «viewing symmetry as the rule and asymmetry as the exception […] is legally wrong»[13].

The literature on asymmetric federalism generally distinguishes between *de facto* (or political) and *de jure* (or constitutional) asymmetries[14]. The former refers to «actual practices or relations resulting from the impact of cultural, social, and economic differences among constituent units within a federation» [15], while the latter to asymmetries «embedded in constitutional processes in which constituent units are treated differently by law» [16]. Federal systems can exhibit different types and degrees of asymmetries[17], and it has been observed that constitutional asymmetries often result from the incorporation of political asymmetries into the constitutional framework[18]. Within federal systems, political asymmetries can take different forms, such as variations in the size of territory and population, as well as in wealth, identity, and political landscape[19]. Some federal systems have translated their political asymmetries into constitutional asymmetries, entrenching them in their legal and constitutional frameworks. Indeed, constitutions may do so to recognize significant variations in geographic size and population or in their social and cultural composition and economic capacity.

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[12] F. Palermo, *Introduction*, cit., p. 13.

[13] Ibidem.

[14] See R. Agranoff (ed.), *Accommodating Diversity: Asymmetry in Federal States*, Baden-Baden, 1999; R.L. Watts, *A Comparative Perspective On Asymmetry In Federations*, in *Asymmetry Series - IIGR, Queen's University*, 2005, no. 4, p. 1 ff.; R. Bifulco, *Differenziazione e asimmetrie nella teoria federale contemporanea*, in *Diritti Regionali*, no. 1, 2020, p. 139-172.

[15] R.L. Watts, *A Comparative Perspective*, cit., p. 2.

[16] Ibidem.

[17] M. Burgess, *The Paradox of Diversity - Asymmetrical Federalism in Comparative Perspective*, in F. Palermo et al. (eds.), *Asymmetries in Constitutional Law*, cit., p. 24.

[18] Cfr. R. Agranoff, *Accommodating Diversity*, p. 16; P. Popelier – M. Sahadžić, *Conclusion,* in P. Popelier – M. Sahadžić (eds.), *Constitutional Asymmetry in Multinational Federalism*, Cham, 2019, p. 489-492.

[19] R.L. Watts, *The Theoretical and Practical Implications of Asymmetrical Federalism*, in R. Agranoff (ed.), *Accommodating Diversity: Asymmetry in Federal States*, Baden-Baden, 1999, p. 30 ff; P. Popelier – M. Sahadžić, *Linking Constitutional Asymmetry with Multinationalism*, in P. Popelier – M. Sahadžić (eds.), *Constitutional Asymmetry in Multinational Federalism*, Cham, 2019, p. 5.

Generally speaking, the literature has identified three areas in which constitutional asymmetries can be identified: the status of subnational entities, the distribution of powers and competencies, and fiscal autonomy[20]. Asymmetries in status concern an asymmetric institutional framework among subnational entities[21], a different composition of the central legislative level[22], the bodies of intergovernmental relations[23], as well as subnational constitutional autonomy enjoyed only by specific units[24]. Next, in terms of asymmetries in powers and jurisdiction[25], Popelier and Sahadžić identified several indicators of asymmetries, such as specific sets of competencies enjoyed by only one or a few subnational entities, different allocation techniques, and differences in political and judicial dispute resolution in federalism[26]. Finally, asymmetries in fiscal autonomy are closely intertwined with the domains of status and power distribution[27] and can manifest in taxing powers, power to raise revenue, spending capacity, transfer dependence, and budget control[28].

It is also relevant to recall the further distinction made by Burgess between the preconditions leading to asymmetry and the relative asymmetrical outcomes[29]. Specifically, Burgess identified two sets of preconditions, i.e., socio-economic (regional, demographic, and socio-economic disparities) and cultural-ideological (religious, linguistic, territorial, cultural, and ethno-national patterns). Concerning the asymmetrical outcomes, Burgess recalled the *de facto* and *de jure* distinction identifying the political and constitutional asymmetries that can derive from the sets of preconditions. As it will be explained when addressing the

[20] F. Palermo, *Introduction*, cit., p. 12 ff.

[21] M. Sahadžić, *Asymmetry, Multinationalism and Constitutional Law*, London and New York, 2020, p. 32-33.

[22] M. Sahadžić, *Asymmetry*, cit., p. 34-36; F. Palermo, *"Divided We Stand"*, cit., p. 161-164; R.L. Watts, *Theoretical and Practical Implications*, cit., p. 36.

[23] Cfr. R.L. Watts, *Theoretical and Practical Implications*, cit., p. 33-40.

[24] P. Popelier, *op. cit.*, p. 92-93.

[25] F. Palermo, *"Divided We Stand"*, cit., p. 159-160; R.L. Watts, *Theoretical and Practical Implications*, cit., p. 37

[26] M. Sahadžić, *Asymmetry*, cit., p. 77-78; P. Popelier, *op. cit.*, p. 140-170.

[27] See M. Sahadžić, *Asymmetry*, cit., p. 41; H. Blöchliger – A. Montes-Nebreda, *Diversity and Asymmetric Arrangements as Drivers of Fiscal Federalism: A Comparative Overview*, in F.J. Romero Caro – A. Valdesalici (eds.), *Fiscal Federalism and Diversity Accommodation in Multi-level States*, Cham, 2024, p. 11-40.

[28] P. Popelier, *op. cit.*, p. 182-183.

[29] M. Burgess, *Comparative Federalism: Theory and Practice*, London and New York, 2006, p. 215-221.

Nigerian case, these two concepts will be partly re-discussed by exploring a further scenario: the possible asymmetrical outcomes of constitutional symmetry.

Asymmetries are often referred to in the scholarship on constitutional models of diversity governance[30]. Specifically, Palermo and Woelk suggest that asymmetric solutions are often adopted in federal systems to meet distinctive needs within their own territory[31]. Therefore, it can be argued that asymmetries are a valid system for accommodating diversity[32] since «federal asymmetries arise from the challenge of diversity within federal societies»[33]. Constitutional asymmetries can also be considered a distinct constitutional model for addressing diversity[34], as they allow for greater flexibility[35] often absent in consociations or national federations. In fact, varying degrees of constitutional asymmetries have been introduced to manage diversity not only in multinational federations (e.g., Belgium, Canada, and India) but also in formally unitary states that are «partially

[30] Cfr. A. Lijphart, *Consociation and Federation: Conceptual and Empirical Link*, in *Canadian Journal of Political Science*, vol. 12, no. 3, 1979, p. 510; D. Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society*, Berkeley, 1992, p. 214; A. Stepan, *Federalism and Democracy: Beyond the U.S. Model*, in *Journal of Democracy*, vol. 10, no. 4, 1999, p. 29-30; A. Stepan, *Towards a New Comparative Politics of Federalism, Multinationalism, and Democracy: Beyond Rikerian Federalism*, in Edward L. Gibson (ed.), *Federalism and Democracy in Latin America*, Baltimore, 2004, p. 40; J. McGarry – B. O'Leary, *Federation as a Method of Ethnic Conflict Regulation*, in S. Noel (ed.), *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies*, Montréal, 2005, p. 273.

[31] F. Palermo – J. Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze*, Padova, 2021, p. 174-175.

[32] For further references see S. Mancini, *Minoranze autoctone e Stato*, Milano, 1996; Y. Ghai, *Constitutional Asymmetries: Communal Representation, Federalism, and Cultural Autonomy*, in A. Reynolds (ed.), *The Architecture of Democracy*, Oxford, 2002, p. 141-170; M. Weller – K. Nobbs (eds.), *Asymmetric Autonomy and the Settlement of Ethnic Conflicts*, Philadelphia, 2010; A. Mastromarino, *Il Federalismo disaggregativo. Un percorso costituzionale negli Stati multinazionali*, Milano, 2010; S. Keil – E. Alber, *Introduction: Federalism as a Tool of Conflict Resolution*, in *Ethnopolitics*, 2020, vol. 19, no. 4, p. 335 ff.

[33] R. Agranoff, *Power Shifts, Diversity and Asymmetry*, in R. Agranoff (ed.), *Accommodating Diversity: Asymmetry in Federal States*, Baden-Baden, 1999, p. 11 ff. On asymmetry and the «federal society», see also W.S. Livingston, *A Note on the Nature of Federalism*, in *Political Science Quarterly*, vol. 67, no. 1, 1952, p. 81-95.

[34] P. Popelier – M. Sahadžić, *Linking Constitutional Asymmetry*, cit., p. 2.

[35] S. Wolff, *Cases of Asymmetrical Territorial Autonomy*, in M. Weller – K. Nobbs (eds.), *Asymmetric Autonomy and the Settlement of Ethnic Conflicts*, Philadelphia, 2010, p. 24.

divided societies»[36] (e.g., the United Kingdom, Spain, and Indonesia) that have adopted regional or devolved structures[37]. This exemplifies the fact that constitutional asymmetries may be more easily acceptable than the federal institutional structure as a whole[38] since a traditional federation may be perceived as a threat to the territorial integrity of the state, encouraging secession or separatism[39]. Conversely, the introduction of constitutional asymmetries represents a dynamic instrument to preserve the integrity of the system[40] allowing for a more efficient application of the principle of self-rule and shared rule among subnational units and with the center[41].

However, it should not be forgotten that «asymmetry is not a panacea for the resolution of territorial self-determination disputes» and therefore is «a double-edged sword whose application requires careful consideration of the potential consequences»[42]. Specifically, the balance between constitutional asymmetries and the principle of equality seems to be one of the most pressing and recurring issues in the scholarly debate on the risks

[36] N.P. Alessi – F. Palermo, *Intergovernmental Relations and Identity Politics in Italy*, in Y.T. Fessha – K. Kössler (eds.), *Intergovernmental Relations in Divided Societies*, Cham, 2022, p. 185.

[37] For a comprehensive analysis on European asymmetrical systems, see G. D'Ignazio, *Integrazione europea e asimmetrie regionali*, Milano, 2007; F. Palermo et al. (eds.), *Asymmetries in Constitutional Law*, Bolzano, 2009; S. Wolff, *op. cit.*; G. D'Ignazio – A.M. Russo (eds.), *Asimmetria e conflitti territoriali nel quadro dell'integrazione europea*, in *Istituzioni del Federalismo*, vol. 2, 2018; P. Popelier – M. Sahadžić (eds.), *Constitutional Asymmetry in Multinational Federalism*, Cham, 2019; M. Olivetti, *Il federalismo asimmetrico belga e le sue recenti evoluzioni*, in G. D'Ignazio (eds.), *Integrazione europea e asimmetrie regionali*, Milano, 2007, p. 63-90; M. Olivetti, *Il regionalismo differenziato alla prova dell'esame parlamentare*, in *Federalismi.it*, no. 6, 2019, p. 2-40; G. Rolla, *Alcune considerazioni in merito al fondamento costituzionale del regionalismo speciale*, in *Federalismi.it*, no. 13, 2015, p. 2-22; A.M. Russo, *Pluralismo territoriale e integrazione europea: asimmetria e relazionalità nello Stato autonomico spagnolo*, Napoli, 2010; A. D'Atena, *Passato, presente… e futuro delle autonomie regionali speciali*, in *Rivista AIC*, no. 4, 2014, p. 1-15; M. Monti, *Federalismo disintegrativo. Secessione e asimmetria in Italia e Spagna*, Torino, 2021.

[38] S. Wolff, *op. cit.*, 24.

[39] F. Palermo – K. Kössler, *op. cit.*, p. 98-100.

[40] M. Burgess, *The Paradox of Diversity*, cit., p. 25-26.

[41] On the sustainability of constitutional asymmetries, see G. Martinico, *L'origine "mista" dell'asimmetria canadese*, cit., p. 30; G. Martinico, *Quanto è sostenibile l'integrazione (asimmetrica) sovranazionale. Note di diritto comparato*, in *Istituzioni del Federalismo*, no. 2, 2018, p. 287-300; G. Martinico, *Asymmetry and Complex Adaptive (Legal) Systems: The Case of the European Union*, in *Maastricht Journal of European and Comparative Law*, vol. 21, no. 2, 2014, p. 281-299; G. Martinico, *Asymmetry as an Instrument of Differentiated Integration: The Case of the European Union*, in *European Journal of Law Reform*, vol. 18, no. 2, 2016, p. 139-158; M. Monti, *op. cit.*, p. 28 ff.

[42] S. Wolff, *op cit.*, p. 25.

arising from asymmetries[43]. Overall, as pointed out by Martinico, «[...] asymmetry is a game between centripetal and centrifugal forces, and here again interesting insights can be found from comparative studies: in fact, the debate on the possible negative implications of asymmetry leads to the identification of the existence of a constitutional core of principles and values whose respect makes asymmetry sustainable [...] »[44].

Finally, as anticipated in the Introduction, beyond the three dimensions of status, powers, and fiscal arrangements, some scholars have suggested the existence of a further legal expression of asymmetry, namely the guarantee of the maintenance of historical specificities related to certain legal institutions in a territory[45]. While this is an extremely interesting perspective, it has not yet attracted systematic attention from the literature. Given the aim to explore this gap, it should be clarified that this article focuses on constitutional asymmetries that are an expression of the presence of a mixed legal system and does not delve into a detailed analysis of asymmetries in the other three dimensions.

### *3. Defining mixed legal systems*

Similar to asymmetry, which was originally framed by federal theory as an exception, mixed legal systems were also initially considered

[43] On the possible negative outcomes of asymmetries, especially in relation to the principle of equality, see D. Milne, *Equality or Asymmetry: Why Choose?*, in R.L. Watts – D.M. Brown (eds.), *Options for a New Canada*, Toronto, 1991, p. 285 ff; R. Bauböck, *United in Misunderstanding? Asymmetry in Multinational Federations*, in *Ice Working Paper Series*, vol. 1, 2002, p. 1 ff; K. Henrard, E*quality Considerations and Their Relations to Minority Protections, State Constitution Law, and Federalism*, in A. Tarr et al. (eds.), *Federalism, Subnational Constitutions, and Minority Rights*, Westport, 2004, p. 25 ff; R. Toniatti, *Asimmetrie regionali, identità culturale e competitività dei territori*, in F. Palermo – S. Parolari (eds.), *Il futuro della specialità regionale alla luce della revisione costituzionale*, Napoli, 2016, p. 40 ff; M. Sahadžić, *Asymmetry*, cit., p. 180-196; M. Sahadžić, *Constitutional Asymmetry and Equality in Multinational Systems with Federal Arrangements*, in E.M. Belser et al. (eds.), *The Principle of Equality in Diverse States*, Leiden and Boston, 2021, p. 36-61; M. Monti, *op. cit.*, p. 77-90.

[44] G. Martinico, *Asymmetry as an Instrument of Differentiated Integration*, cit., p. 143.

[45] Cfr. F. Palermo, "*Divided We Stand*", cit., p. 163; G. Martinico, *La genesi "mista" dell'asimmetria canadese*, cit., p. 15 ff.

anomalies[46]. However, comparative law scholarship observed that mixed legal systems as well «have recurred too often and have endured too long to be regarded as accidents and anomalies».[47] In the attempt at systematizing these systems, Palmer identified two conceptions that more narrowly or expansively define such hybridity: the mixed jurisdiction conception, and the pluralist conception[48].

### 3.1. *The Mixed Jurisdiction Conception*

The mixed jurisdiction conception refers to the group of British scholars who tended to restrict the scope of comparative research to a single typology of hybrid systems, i.e., mixed systems of common law and civil law. The study of mixed jurisdictions began at the outset of the 20th century, when Walton[49] compared Québec, Scotland, and Louisiana, observing that these jurisdictions shared some common features in between the common law and civil law legal traditions, combining civil codes with the doctrine of *stare decisis*, mercantile law and rules of procedures typical of the common law. A few years later, Lee built on Walton's first theorization by studying the legal systems of former British colonies[50] «to assess how the civil law was faring against the ceaseless intrusions of the common law»[51]. A similar study has been conducted by Amos on systems displaying mixtures of

[46] For more references on mixed legal systems, see E. Örücü et al. (eds.), *Studies in Legal Systems: Mixed and Mixing*, The Hague, 1996; A. Pizzorusso, *Sistemi giuridici comparati*, Milano, 1998, p. 381-384; N. Mariani – G. Fuentes, *Les systèmes juridique dans le monde/World Legal Systems*, Montréal, 2000; K.G.C. Reid, *The Idea of Mixed Legal Systems*, in *Tulane Law Review*, vol. 78, no. 1&2, 2003, p. 5-40; D. Visser, *Cultural Forces in the Making of Mixed Legal Systems*, in *Tulane Law Review*, vol. 78, no. 1 & 2, 2003, p. 41-78; R. Zimmermann et al. (eds.), *Mixed Legal Systems in Comparative Perspective*, Oxford, 2004; A. Gambaro – R. Sacco (eds.), *Sistemi giuridici comparati*, Torino, 2018, p. 36 ff; J. du Plessis, *Comparative Law and the Study of Mixed Legal Systems*, in M. Reinmann – R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford, 2019, p. 474-501; G.F. Ferrari, *Sistemi giuridici: origine e diffusione*, in G.F. Ferrari (ed.), *Atlante di diritto pubblico comparato*, Torino, 2023, p. 13-15.

[47] V.V. Palmer, *Mixed Legal Systems*, in M. Bussani – U. Mattei (eds.), *The Cambridge Companion to Comparative Law*, Cambridge, 2012, p. 368.

[48] V.V. Palmer, *Two Rival Theories of Mixed Legal Systems*, cit.

[49] F.P. Walton, *The Civil Law and the Common Law in Canada*, in *Juridical Review*, vol. 11, no. 3, 1899, p. 282-301.

[50] R.W. Lee, *Civil Law and the Common Law - A World Survey*, in *Michigan Law Review*, vol. 14, no. 2, 1915, p. 89-101.

[51] V.V. Palmer, *Mixed Legal Systems*, cit., p. 370.

common and civil law within the British Commonwealth[52], although the term «mixed jurisdiction» was not employed. On the European continent, Lawson[53] and Smith[54] extensively studied Scots law in comparative perspective, establishing the use of the category «mixed jurisdiction» to describe the systems «in which common law and civil law elements in the private law interacted and vied for supremacy»[55]. More recently, Tetley reflected upon the relationship between mixed jurisdiction and mixed legal system, defining the former as the expression of the political entities belonging to a mixed legal system, whereas the latter referred to those legal systems deriving from one or more legal traditions[56]. Tetley also identified a series of phenomena at the basis of mixed jurisdictions, such as a plurality of languages and cultures as well as of legal education institutions, a dual judicial system, a dual legislative in federal systems, and a dual nation in a single state[57]. Finally, Palmer[58] forged the expression «third legal family»[59] to indicate these classic mixed systems characterized by «impressive unity despite the indisputable diversity of peoples, cultures, languages, climates, religions, economies, and indigenous laws existing among them»[60].

[52] M.S. Amos, *The Common Law and the Civil Law in the British Commonwealth of Nations*, in *Harvard Law Review*, vol. 50, no. 8, 1937, p. 282-307.

[53] F.H. Lawson, *The Field of Comparative Law*, in *Juridical Review*, vol. 61, no. 1, 1949, p. 16-36.

[54] T.B. Smith, *Studies Critical and Comparative*, Edinburgh, 1962.

[55] V.V. Palmer, *Mixed Legal Systems*, cit., p. 372.

[56] See W. Tetley, *Nationalism in a Mixed Jurisdiction and the Importance of Language (South Africa, Israel, and Quebec/Canada)*, in *Tulane Law Review*, vol. 78, no. 1&2, 2003, p. 175-218.

[57] See W. Tetley, *Mixed Jurisdictions: Common Law vs Civil Law (Codified and Uncodified) (Part I)*, in *Uniform Law Review - Revue de Droit Uniforme*, vol. 4, no. 3, 1999, p. 591-618; W. Tetley, *Mixed Jurisdictions: Common Law vs Civil Law (Codified and Uncodified) (Part II)*, in *Uniform Law Review - Revue de Droit Uniforme*, vol. 4, no. 4, 1999, p. 877-905.

[58] See V.V. Palmer, *Mixed Legal Systems... and the Myth of Pure Laws*, in *Louisiana Law Review*, vol. 67, no. 4, 2007, p. 1205-1218; V.V. Palmer, *Two Rival Theories*, cit.; V.V. Palmer, *Mixed Legal Systems*, cit., p. 368-383; V. V. Palmer et al. (eds.), *Mixed Legal Systems, East and West*, Farnham, 2015.

[59] V.V. Palmer (ed.), *Mixed Jurisdictions Worldwide. The Third Legal Family*, Cambridge, 2001.

[60] V.V. Palmer, *Mixed Legal Systems*, cit., p. 373. Palmer also identified a series of problems and patterns of development in mixed jurisdictions: (1) civil law rules and principles are filtered through Anglo-American institutions; (2) judicial decisions are given strong precedential value whether the civil law is codified or not; (3) civil procedure is adversarial and Anglo-American; (4) common law makes incursions into the civil law sphere following typical paths and patterns; (5) commercial law is transformed and replaced by Anglo-American commercial law.

According to Palmer, the main characteristics of mixed jurisdictions, aside from the mixture of common law and civil law, are the founding character of both legal traditions within the system, the dualistic nature of the legal system, and the prevalence of civil law in the domain of private law and of common law in public law[61].

### 3.2. *The Pluralist Conception*

Conversely, the pluralist conception includes those scholars who rely on the framework provided by legal pluralism[62] to define mixed legal systems in a more expansive direction, thus encompassing also those systems displaying all the possible combinations of common law, civil law, Islamic *Shari'a*, and customary law. For instance, Örücü[63] advocated for an «expansion» rather than «exclusion» in the comparative study of mixed legal systems, arguing that «combinations of disparate legal and social cultures do give birth to mixed systems. Overlap, cross-fertilization, reciprocal influence, horizontal transfer, fusion, infusion, grafting and the like all contribute to the coming into being of mixed and mixing systems. All are forever in flux, as are all legal systems»[64]. Therefore, the pluralist approach explores colonial and post-colonial non-Western societies, where different

[61] See V.V. Palmer (ed.), *Mixed Jurisdictions Worldwide*, cit.

[62] On legal pluralism, see M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and New-Colonial Laws*, Oxford, 1975; J. Griffith, *What is Legal Pluralism?*, in *The Journal of Legal Pluralism and Unofficial Law*, vol. 18, no. 24, 1986, p. 1-55; C. Fuller, *Legal Anthropology, Legal Pluralism and Legal Thought*, in *Anthropology Today*, vol. 10, no. 3, 1994, p. 9-12; P.S. Berman *The New Legal Pluralism*, in *Annual Review of Law and Social Sciences*, vol. 5, no. 1, 2009, p. 225-242; R. Michaels, *Global Legal Pluralism*, in *Annual Review of Law and Social Sciences*, vol. 5, no. 1, 2009, p. 243-262; R. Toniatti, *Pluralismo e autodeterminazione delle identità negli ordinamenti culturalmente composti: osservazioni in tema di cittadinanza culturale*, in E. Ceccherini – M. Cosulich (eds.), *Tutela delle identità culturali, diritti linguistici e istruzione: dal Trentino-Alto Adige/Südtirol alla prospettiva comparata*, Padova, 2012, p. 5-29; R. Toniatti, *La razionalizzazione del «pluralismo giuridico debole»: le prospettive di un nuovo modello giuridico e costituzionale nell'esperienza africana*, in M. Calamo Specchia (ed.), *Le trasformazioni costituzionali del secondo millennio*, Sant'Arcangelo di Romagna, 2016, p. 449-484; R. Toniatti – D. Strazzari (eds.), *Legal Pluralism and the* Ordre Public *Clause Exception: Normative and Judicial Perspectives*, Trento, 2016; P.S. Berman (ed.), *The Oxford Handbook of Global Legal Pluralism*, Oxford, 2020; C.R. Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy*, New Haven and London, 2023.

[63] E. Örücü, *What is a Mixed Legal System: Exclusion or Expansion?*, in *Journal of Comparative Law*, vol. 3, no. 1, 2008, p. 34-52.

[64] E. Örücü, *What is a Mixed Legal System*, cit., p. 50.

kinds of personal laws[65] coexist and interact with the legacy of colonial laws[66]. According to this perspective, «any interaction of a different type or source – indigenous with exogenous, religious with customary, Western with non-Western – is sufficient to constitute a mixed legal system»[67], thus re-framing the previous taxonomies and classifications of comparative law[68].

Before moving to the analysis of the four case studies, it is interesting to recall the intersecting points that Palmer identified between these two conceptions. Indeed, the scholar observes that the pluralist approach offers «an important corrective against selective, perhaps Eurocentric, accounts of comparative law»[69] by focusing on systems in the Global South or on aboriginal and indigenous peoples. Moreover, the pluralist conception's interest in personal laws goes straight to the heart of these mixed legal systems, i.e., the struggle to preserve and maintain personal laws through the colonial experience[70]. In this sense, the reference to the legacies of colonialism is rather clear since mixed legal systems were often created after a people's loss of sovereignty while preserving the right to live under their previous personal laws[71]. Finally, the perspective adopted by legal pluralism is helpful in highlighting that all systems, and not only the traditional mixed jurisdictions of common and civil law, are «laboratories of comparative law»[72] and that mixed legal systems are not mere accidents[73].

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[65] It should be clarified that the term «personal laws» refers to a subset of private law, generally limited to a list of matters (i.e., family law, inheritance, marriage, divorce). These may be the Hindu, Muslim, Jewish or African customary laws which regulate the life of different communities within the same territory (see for example R.V. Williams, *Postcolonial Politics and Personal Laws: Colonial Legal Legacies and the Indian State*, Oxford, 2006; C. Mallat, *Comparative Law and the Islamic (Middle Eastern) Legal Culture*, in M. Reimann – R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford, 2019, p. 624-651; R. Sacco, *The Sub-Saharan Legal Tradition*, in M. Bussani – U. Mattei (eds.), *The Cambridge Companion to Comparative Law*, Cambridge, 2012, p. 332-335).

[66] See M.B. Hooker, *Legal Pluralism*, cit.

[67] V.V. Palmer, *Mixed Legal Systems*, cit., p. 375.

[68] See V.V. Palmer, *Two Rival Theories*, cit.

[69] V.V. Palmer, *Mixed Legal Systems*, cit., p. 377.

[70] Ibidem.

[71] V.V. Palmer, *Mixed Legal Systems*, cit., p. 377-378.

[72] V.V. Palmer, *Mixed Legal Systems*, cit., p. 379.

[73] Cfr. U. Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, in *The American Journal of Comparative Law*, vol. 45, no. 1, p. 1997, p. 5-44; M.M. Siems, *Varieties of Legal Systems: Towards a New Global Taxonomy*, in *Journal of Institutional Economics*, vol. 12, no. 3, 2016, p. 579–602.

### 4. *Common Law and Civil Law in Québec and Scotland*

As already mentioned, Québec and Scotland are the two mixed jurisdictions that first paved the way for the theorization of mixed legal systems in comparative law. Interestingly, in terms of *de jure* asymmetry, in both cases, the co-existence of common law and civil law has led to a translation of this specificity in the organization of their judicial systems.

#### *4.1. Canada*

The assessment of asymmetry in Canada[74] greatly exemplifies the difference between *de facto* and *de jure* asymmetry previously recalled. Indeed, if on the one hand political asymmetries are widely present within the Canadian federation in terms of different size, population, and wealth of provinces, on the other hand, asymmetry is extremely limited on a constitutional level[75]. Indeed, from a constitutional point of view, provinces enjoy overall the same degree of autonomy in all dimensions of power, status, and fiscal arrangements, thus ensuring symmetry and equality among subnational entities[76]. What is interesting to notice is that the few existing *de jure* asymmetries derive precisely from Canadian bijuralism[77], i.e., the specific presence of the civil law tradition in Québec[78]. The Québecois legal system

[74] For some references on asymmetries in Canada A.-G. Gagnon – G. Laforest, *The Future of Federalism: Lessons from Canada and Quebec*, in *International Journal*, vol. 48, no. 3, 1993, p. 470-491; D. Milne, *Asymmetry in Canada: Past and Present*, in *Asymmetry Series – IIGR Queen's University*, 2005, p. 1-8; K. Kössler, *Changing Faces of Asymmetry – The Canadian Example*, in F. Palermo et al. (eds.), *Asymmetries in Constitutional Law*, cit., p. 133-166; R. Iacovino, *Partial Asymmetry and Federal Construction: Accommodating Diversity in the Canadian Constitution*, in M. Weller – K. Nobbs (eds.), *Asymmetric Autonomy and the Settlement of Ethnic Conflicts*, cit., p. 75-96; A-G. Gagnon – J.-D. Garon, *Constitutional and Non-constitutional Asymmetries in the Canada Federation*, in P. Popelier and M. Sahadžić (eds.), *Constitutional Asymmetry in Multinational Federalism*, cit., p. 77-104.

[75] D. Milne, *Asymmetry in Canada: Past and Present*, in *Asymmetry Series - IIGR, Queen's University*, 2005, p. 5 ff.

[76] Ibidem.

[77] For more on bijuralism, see C. Lloyd Brown-John – H. Pawley PC, *When Legal Systems Meet: Bijuralism in the Canadian Federal System*, Barcelona, 2004.

[78] On civil law in Québec, see F.P. Walton, *The Legal System of Quebec*, in *Colorado Law Review*, vol. 13, no. 3, 1913, p. 213-231; F.P. Walton, *The Scope and Interpretation of the Civil Code of Lower Canada*, Toronto, 1980; J.E.C. Brierley, *Quebec's Civil Law Codification*, in

has its roots in history as a former French colony subject to French private law. With the Treaty of Paris of 1763, the province became a British colony but the civil law in Québec was preserved and is now based on ten books[79]. The constitutional foundations of civil law in Québec can be found in section 94 of the Constitution Act 1867, which exempted Québec from the unification of laws over property and civil rights[80], and in section 129, recognizing civil law only in the province of Québec[81]. Over time, Canadian bijuralism has been the subject of specific legislative interventions to grant some degree of legal uniformity within the federation without affecting Québec's specificities. Indeed, the «Committee of bijuralism» was instituted to review and comment on the recommendations given by comparative law experts assisting in drafting activities[82]. In 2001, the federal government promoted a revision of federal laws dealing with private law, which then led to the approval of the Federal Law–Civil Law Harmonization Act, with the explicit objective to «harmonize federal law with the civil law of the

*McGill Law Journal*, vol. 14, no. 4, 1968, p. 522-574; V.V. Palmer, *Quebec and Her Sisters in the Third Legal Family*, in *McGill Law Journal*, vol. 54, no. 1, 2009, p. 321-351; C. Valcke, *Quebec Civil Law and Canadian Federalism*, in *Yale Journal of International Law*, vol. 21, no. 1, 1996, p. 67-122.

[79] (1) Persons; (2) The Family; (3) Successions; (4) Property; (5) Obligations; (6) Prior Claims and Hypothecs; (7) Evidence; (8) Prescription; (9) Publication of Rights; (10) Private International Law (see LégisQuébec, available at https://www.legisquebec.gouv.qc.ca/en/tdm/cs/ccq-1991/20170616).

[80] Canadian Constitution Act 1867 – section 94: «Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.»

[81] Canadian Constitution Act 1867 – section 129: «Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act».

[82] See G. Martinico, *L'origine "mista" dell'asimmetria canadese*, cit., p. 21.

Province of Quebec and to amend certain Acts in order to ensure that each language version takes into account the common law and the civil law»[83].

In terms of constitutional asymmetry, this specificity has been translated in the organization of the judicial system at the provincial and federal levels and entrenched in the constitutional framework by the 1967 Constitution Act and the 1985 Supreme Court Act. Indeed, section 98 of the Constitution Act 1867 provided that «judges of the Court of Québec shall be selected from the Bar of that Province»[84], whereas, at the federal level, the 1985 Supreme Court Act introduced the appointment of three judges from Québec to the Canadian Supreme Court[85]. These forms of recognition (through constitutional asymmetry) go a long way toward ensuring adequate knowledge of the *québecois* legal system, with which the language factor is also inevitably intertwined[86]. Thus, the presence of civil law in Québec appears to be *per se* a source of constitutional asymmetry compared to the rest of the system (based on common law)[87].

### *4.2. The United Kingdom*

Concerning the United Kingdom, the degree of asymmetry[88] substantially varies depending on whether England is considered a separate

[83] Federal Law–Civil Law Harmonization Act, No. 1 (S.C. 2001, c. 4).

[84] Canadian Constitution Act 1867 – section 98.

[85] Supreme Court Act (R.S.C., 1985, c. S-26) – s. 6: « At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province». On the reform of the Canadian Supreme Court and the relative position of Québec, see S. Choudhry – R. Stacey, *Independent or Dependent? Constitutional Courts in Divided Societies*, in C. Harvey – A. Schwartz (eds.), *Rights in Divided Societies*, Oxford, 2012, p. 106-107.

[86] See Burgess, *Comparative Federalism*, cit., p. 221.

[87] G. Martinico, *L'origine "mista" dell'asimmetria canadese*, cit., p. 26 ff.

[88] For some references on asymmetries in the United Kingdom, see S. Parolari, *Asymmetrical Devolutionary Tendencies and Policy-Making in the United Kingdom*, in F. Palermo et al. (eds.), *Asymmetries in Constitutional Law*, cit., p. 63-76; J. McGarry, *Asymmetric Autonomy in the United Kingdom*, in M. Weller – K. Nobbs (eds.), *Asymmetric Autonomy and the Settlement of Ethnic Conflicts*, cit., p. 148-179; C. Martinelli, *Territorial Asymmetries in the Comparative Landscape and the UK Devolution Process*, in *Gruppo di Pisa*, no. 2, 2020, p. 505-524; B. Dickson, *Work in Progress. A Country Study of Constitutional Asymmetry in the United Kingdom*, in P. Popelier – M. Sahadžić (eds.), *Constitutional Asymmetry in Multinational Federalism*, cit., p. 461-488.

subnational entity or not. Indeed, if the analysis considers only Scotland, Wales, and Northern Ireland as subnational entities, given the fact that these are subjects of devolved legislation, granting them devolved powers and legislatures[89], asymmetry is mainly limited to the domain of powers (including taxing powers)[90]. However, if England is included in the analysis, the picture is rather different, and the degree of asymmetry is striking in all dimensions if compared to the other devolved nations. Indeed, England has no devolved parliament and executive[91], and the relative powers and competencies are exercised by the UK Parliament and executive, creating a substantial gap in terms of subnational autonomy. Theoretical speculations aside, this provides an effective indication of the relational nature of asymmetry[92], whose degree of intensity is not fixed and always depends on the units of analysis selected in the study.

However limited, an interesting and often overlooked perspective on asymmetry in the UK is provided by those asymmetries emerging from the preservation of Scots law[93] within the British legal system[94]. Indeed, the Act of Union of 1707[95] recognized Scotland as a constitutive part of the newly established Kingdom of Great Britain (along with England and Wales) and guaranteed the preservation of a great part of Scottish institutional

[89] The core of the devolution legislation is constituted by the Scotland Act 1998, the Northern Ireland Act 1998, and the Government of Wales Act 2006. Further powers have been more recently devolved through the Scotland Act 2016 and Wales Act 2017.

[90] B. Dickson, *op. cit.*, p. 480.

[91] On the parliamentary debate over English devolution, see Select Committee on the Constitution, *Respect and Co-operation: Building a Stronger Union for the 21st century*, 10th Report of Session 2021-22 (20 January 2022) - HL Paper 142, chapter 7, para. 230: «There are no obvious governance changes to provide England with a distinctive voice that command political and public support. Establishing an English parliament would crystallize England's relative strength – in population and economic terms – vis- à-vis the existing devolved legislatures. This would destabilize the Union».

[92] Agranoff, *Power shifts*, cit., p. 20.

[93] For further references on Scots law (*Lagh na h-Alba* in Scottish Gaelic), see D.M. Walker, *Some Characteristics of Scots Law*, in *Modern Law Review*, vol. 18, no. 4, 1955, p. 321-337; E. Reid – D.L. Carey Miller, *A Mixed Legal System in Transition: TB Smith and the Progress of Scots Law*, Edinburg, 2005; R. White et al., *The Scottish Legal System*, London, 2013; C. Himsworth – C. O'Neill, *Scotland's Constitution. Law and Practice*, 2015; A. Torre, *Le corti di Scots law. Sistema giuridico e autogoverno pluralistico del suo giudiziario*, in *DPCE Online*, vol. 45, no. 4, 2020, p. 5033-5044; G. Keegan, *Scottish Legal System Essentials*, Edinburgh, 2021.

[94] B. Dickson, *op. cit.*, p. 481.

[95] Union with Scotland Act 1706, passed by the Parliament of England, and Union with England Act 1707, passed by the Parliament of Scotland.

arrangements, including the legal and judicial system[96]. As a hybrid common-civil law system, the distinctive element of Scots law is a codification anchored on Roman law and legislative production, increasingly combined with typical elements of common law. Among these, the principle of *stare decisis*, the trial by jury in criminal law matters, and equity institutions (e.g., trust)[97]. It should be noticed that many judges of the High Courts, along with Scottish legal scholars, were deeply committed to resisting the influences of British common law insofar as they perceived Scots law as «the touchstone of Scottish nationality, without which Scotland would cease to be a nation»[98].

In terms of constitutional asymmetry, as for the case of Québec, the preservation of Scots law is a source of «significant asymmetry»[99] within the British constitutional system. As a result, Scotland retained its judicial system based on the Sheriff Courts, the Court of Session (for civil law appeals), and the High Court of Justiciary (for criminal law appeals)[100]. Moreover, constitutional asymmetry further emerges from the relations between the Scottish and central-level judicial systems. As observed by Dickson, «it has never been possible for an appeal in a criminal case to be taken from Scotland to the top court in the UK»[101]. Indeed, criminal cases are ultimately decided by the High Court of Justiciary based in Edinburgh and not by the Supreme Court of the United Kingdom (as is the case for other devolved entities)[102]. However, appeals may be heard by the UK Supreme Court in civil law cases from the Scottish Court of Session[103]. It should be noted that, unlike the Canadian case, where three judges from Québec must sit in the Supreme Court of Canada, the presence of judges from Scotland (and thus a devolved entity) in the UK Supreme Court is not a Scottish prerogative and therefore is not a source of asymmetry. Indeed, it is custom and practice that, of the 12 Supreme Court judges, two are from

[96] See F. Del Conte – A. Torre (trad.), *Act of Union [1707]*, Macerata, 2014, p. 42 ff; D. Scullion, *The Union of 1707 and its Impact on Scots Law*, in *Aberdeen Student Law Review*, vol. 1, 2010, p. 111-118.

[97] A. Torre, *op. cit.*, p. 5034-5035.

[98] J.G. Kellas, *The Scottish Political System*, Cambridge, 1984, p. 22.

[99] B. Dickson, *op. cit.*, p. 481.

[100] A. Torre, *op. cit.*, p. 5035-5037.

[101] B. Dickson, *op. cit.*, p. 481.

[102] The UK Supreme Court powers were formally restrained when it came to such cases through the adoption of the Scotland Act 2012 and the Courts Reform (Scotland) Act 2014.

[103] A. Torre, *op. cit.*, p. 5037.

Scotland, and one is from Northern Ireland[104], whereas England and Wales are still involved in the process through the Judicial Appointments Commission for England and Wales and the First Minister of Wales[105]. Generally speaking, the appointment procedures have been designed to «ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom»[106].

### 5. *Islamic Shari'a in Indonesia and Nigeria*

Perhaps the most interesting cases to explore the link between constitutional asymmetries and mixed legal systems involve those systems in which Islamic criminal law[107] is implemented only in specific parts of the territory, leading to asymmetrical outcomes in terms of the protection of the rights of non-Muslim citizens, minorities, and vulnerable groups. It should be acknowledged that a wide diversity exists within the Islamic legal tradition, especially in terms of sources (i.e., formal and practical sources of law) and schools of jurisprudence[108]. *Shari'a* pluralism is reflected also in the two case studies, both of Sunni majority but belonging to different schools of jurisprudence. The predominant schools are the Shafi'i in Indonesia, whereas the Maliki in Nigeria[109].

#### 5.1. *Indonesia*

[104] B. Dickson, *op. cit.*, p. 476.

[105] Constitutional Reform Act 2005, s 27(1B) and 27A (3).

[106] Constitutional Reform Act 2005, s 27(8).

[107] Cfr. M.H. Kamali, *Crime and Punishment in Islamic Law: A Fresh Interpretation*, Oxford, 2019.

[108] For some references on Islamic *Shari'a*, see M.H. Kamali, *Principles of Islamic Jurisprudence*, Cambridge, 1991; W.B.B. Hallaq, *A History of Islamic Legal Theories*, Cambridge, 1999; Y. Dutton, *The Origins of Islamic Law*, Surrey, 1999; W.B.B. Hallaq, *Shari'a: Theory, Practice and Transformation*, Cambridge, 2009; K. Abou El Fadl, et al. (eds.), *Routledge Handbook of Islamic Law*, London and New York, 2019; K. Abou El Fadl, *The Islamic Legal Tradition*, in M. Bussani – U. Mattei (eds.), *The Cambridge Companion to Comparative Law*, Cambridge, 2012, p. 295-312; M. Rohe, *Islamic Law in Past and Present*, Leiden, 2014; A. Gambaro – R. Sacco (eds.), *Sistemi giuridici comparati*, cit., p. 232-344; A.A. An-Na'im, *Islam,* Sharia *and Comparative Constitutionalism*, in S. Mancini (ed.) *Constitutions and Religion*, Cheltenham and Northampton, 2020, p. 172-183; L. Mezzetti, *Diritto islamico*, Torino, 2022.

[109] Cfr. I.A.K. Nyazee, *Islamic Jurisprudence*, Islamabad, 2019; L.A. Bsoul, *The Emergence of the Major Schools of Islamic Law*/Madhhabs, in K. Abou El Fadl, et al. (eds.), *Routledge Handbook of Islamic Law*, London and New York, 2019, p. 141-155.

On a formal level, Indonesia is a unitary state, recognizing five «special» provinces (i.e., Aceh, Papua and West Papua, Jakarta and Yogyakarta), alongside «ordinary» provinces[110]. These five special provinces generally enjoy more powers than ordinary provinces, even though central oversight still remains strong, thus limiting the overall degree of asymmetry[111]. It should be noted that the «special» nature of Aceh and the Papua provinces derives from decades of civil war between separatist groups and the national armed forces[112]. Their claims were based on religious and cultural differences. On the one hand, citizens from Aceh claimed to be historically «more Islamic» than the rest of Indonesia[113], whereas, on the other hand, the Papuan people held that they were culturally and ethnically distinct[114] from the other Indonesians and that they never explicitly agreed to join Indonesia[115]. Starting from 1999, after three decades of authoritarian rule by Soeharto had reduced the autonomy of Papua and Aceh to the minimum and exploited their natural resources, particular forms of autonomy were granted to these provinces to preserve the integrity of Indonesia.

These premises contribute to explaining why the main source of constitutional asymmetry derives from the distinct status of Aceh within the Indonesian legal system. The Indonesian jurisdiction displays a mixed

[110] Constitution of Indonesia – art. 1: «The State of Indonesia shall be a unitary state in the form of a republic»; art. 18: «The Unitary State of the Republic of Indonesia shall be divided into provinces […]». Autonomy of provinces is regulated by the 2014 Regional Autonomy Law, whereas the five special provinces are entrenched in art. 18B of the Constitution («The State recognizes and respects units of regional authorities that are special and distinct, which shall be regulated by law») and regulated by Law 21 of 2001 on Special Autonomy for Papua Province (dividing Papua into two provinces: Papua and West Papua), the Law 11 of 2006 on Aceh Special Autonomy, the Law 13 of 2012 on The Special Region of Yogyakarta, and Law 29 of 2007 on the Administration of the Special Province of Jakarta. It should be clarified that these are official translations.

[111] For some references on asymmetries in Indonesia, see J. Bertrand, *Indonesia: "Special Autonomy" for Aceh and Papua*, in G. Anderson – S. Choudhry (eds.), *Territory and Power in Constitutional Transitions*, Oxford, 2019, p. 119-139; S. Butt, *Provincial Asymmetry in Indonesia*, cit.

[112] S. Butt, *Provincial Asymmetry in Indonesia*, cit., p. 228.

[113] A. Salim, *Contemporary Islamic law in Indonesia: Sharia and Legal Pluralism*, Edinburgh, 2015, p. 11.

[114] The ethnic composition of Papua is mainly Melanesian and for much of Indonesian history Papua was known as «Irian» (see S. Butt, *Provincial Asymmetry in Indonesia*, cit., p. 237).

[115] S. Butt, *Provincial Asymmetry in Indonesia*, cit., p. 228.

system of civil law based on the Roman model introduced during the Dutch colonial time, Islamic *Shari'a*, and customary law (*adat*)[116]. However, it is not the mixed nature of the legal system *per se*, nor the mere application of Islamic *Shari'a*, that leads to constitutional asymmetry. Indeed, given the overwhelming majority of Muslim citizens in Indonesia[117], Islamic *Shari'a* still widely applies across the entire territory in civil and personal law matters, especially marriage, divorce, and inheritance[118]. Moreover, *adat* remains the traditional legal basis for resolving disputes at the village/local level[119]. The determining element at the heart of constitutional asymmetry in Indonesia is that Aceh is the only province that has been granted the power to directly regulate Islamic *Shari'a* in the province[120] and, specifically, to implement Islamic criminal law[121]. This finds its legal entrenchment in Law 11 of 2006 on the autonomous government of Aceh[122] that recognized the deep-rooted Islamic tradition in Aceh[123] and granted wide powers to the Aceh government on how to regulate the implementation of Islamic *Shari'a* by issuing *Qanun* (i.e., regional regulations). The law expressly mentioned criminal law (*jinayat*)[124], and provides that «Every adherent to Islam in Aceh must adhere to and observe Islamic law»[125] and that «Every person living in

[116] On Indonesian law, see T. Lindsey – S. Butt, *Indonesian Law*, Oxford, 2018; T. Lindsey (ed.), *Indonesia, Law and Society*, Sydney, 2008; D.S. Lev, *Legal Evolution and Political Authority in Indonesia*, Leiden, 2000. On the Indonesian mixed legal system, see L.T.A.L. Wardhani et al., *The Adoption of Various Legal Systems in Indonesia: An Effort to Initiate the Prismatic Mixed Legal Systems*, in *Cogent Social Sciences*, vol. 8, no. 1, 2022, p. 1-21.

[117] Central Intelligence Agency, *The World Factbook: Indonesia*, 30 July 2024, available at: https://www.cia.gov/the-world-factbook/countries/indonesia/#people-and-society.

[118] Lindsey and Butt observe that Islamic *Shari'a* dominates litigation, with 98% of divorce cases relating to Muslim marriages, despite non-Muslim population accounts for 13% of the population (see T. Lindsey – S. Butt, *op. cit.*, p. 449).

[119] See T. Lindsey – S. Butt, *op. cit.*, p. 127-142.

[120] According to art. 10(1) of the 2014 Regional Government Law (i.e., the law regulating provincial autonomy in Indonesia), religion would normally fall within the exclusive jurisdiction of the central government, along with foreign affairs, fiscal and monetary policy, judicial matters, defense and security.

[121] T. Lindsey – S. Butt, *op. cit.*, p. 205.

[122] Law no. 11 of 2006 on the Governing of Aceh – artt. 125-127.

[123] On the Islamic legal tradition and legal pluralism in Indonesia, see A. Salim, *op. cit.*, p. 23-37; T. Lindsey, *Islam, Law and the State in Indonesia*, London, 2012; R.M. Feener, *Shari'a and Social Engineering: The Implementation of Islamic Law in Contemporary Aceh, Indonesia*, Oxford, 2013.

[124] Law no. 11 of 2006 on the Governing of Aceh – art. 125.2.

[125] Law no. 11 of 2006 on the Governing of Aceh – art. 126.1.

or present in Aceh must respect the application of Islamic law»[126]. Even though the same law at art. 127.2 specifies that the Aceh government is required to respect religious diversity, Islamic *Shari'a* currently applies also to non-Muslims in Aceh, thus compressing religious and legal pluralism.

The *Qanun* are applied by Aceh *Shari'a* courts[127], whose decision can be appealed by the Supreme Court of Indonesia and who are subject to its processes, according to which the Supreme Court can reopen every case. Moreover, the judges of the *Shari'a* courts are recommended for appointment by the Supreme Court, which also administers the courts' organization, administration, and financial affairs[128].

In 2014, the Aceh government issued the *Qanun Jinyat* (the Islamic Criminal Code)[129], making Aceh the only Indonesian province where Islamic criminal law is directly applied to both Muslim and non-Muslim citizens. The enactment of the *Qanun Jinyat* was highly controversial, not only because it raised concerns over violations of human rights standards[130] but also because art. 75 of the *Qanun Jinyat* asserts that its provisions and the imposed precepts prevail over national laws and even international human rights laws. Some scholars argue that this would be in violation of the Indonesian Constitution, which protects human rights in chapter XA (art. 28 to 28(J))[131]. Moreover, other scholars observe that it violates the integrity of the Indonesian legal order based on the hierarchy of laws, according to which subnational regulations must not contradict national statutes as well as the Constitution[132]. Despite the challenge of the *Qanun*

[126] Law no. 11 of 2006 on the Governing of Aceh – art. 126.2.

[127] On *Shari'a* courts in Indonesia, see R.M. Feener, *op. cit.*, p. 153–184.

[128] Law no. 11 of 2006 on the Governing of Aceh – artt. 131.1, 131.3, 135.1.

[129] The Qanun Aceh 6 of 2014 on Islamic Criminal Law came into force in 2015.

[130] S. Butt, *Provincial Asymmetry in Indonesia*, cit., p. 247-248.

[131] Specifically, freedom of religion is recognized in art. 28E(1) of the Indonesian Constitution, according to which «[e]very person shall be free to choose and to practice the religion of his/her choice [...].» Similarly, art. 28E(2) states that «[e]very person shall have the right to the freedom to believe his/her faith (*kepercayaan*), and to express his/her views and thoughts, in accordance with his/her conscience». Moreover, art. 28I(5) provides that «[f]or the purpose of upholding and protecting human rights in accordance with the principle of a democratic and law-based state, the implementation of human rights shall be guaranteed, regulated and set forth in laws and regulations.»

[132] S. Butt, *Provincial Asymmetry in Indonesia*, cit., p. 248.

*Jinyat* before the Supreme Court in 2016, the Islamic Criminal Code in Aceh remains currently in force[133].

### *5.2. Nigeria*

As anticipated in the Introduction, the 1999 Nigerian Constitution established complete constitutional symmetry in the federation. Suberu argued that constitutional symmetry was a deliberate choice of constitutional designers to depart from the past and recompose internal diversity: «it has been an explicit goal of federal design in Nigeria not only to create constitutionally symmetrical states, but also to restrict the development of *de facto*, political asymmetries among sub-units. […] Constitutional asymmetry, from a Nigerian perspective, is normatively undesirable, historically unviable, functionally problematic, and politically contentious and unsustainable»[134]. For this reason, the Nigerian federal structure entrenched symmetry even in the design of the subnational entities, providing 36 states with approximately equal populations. Specifically, the former hegemonic northern region has been subdivided into 19 states, and the three major ethnic groups (i.e., Hausa-Fulani, Yoruba, and Igbo) were fragmented into more than five states. In this way, «the Nigerian federation is remarkably free of any flagrant inter-unit demographic disparities that can threaten capture of the center by a single or few subunits and, thus, thwart national unity»[135].

As a symmetrical federation, the case of Nigeria partly differs from the previous cases. Yet, the Nigerian case helps us reflect on the complexity of asymmetries and the possible asymmetrical outcomes of symmetry[136]. Indeed, while the Nigerian Constitution technically guarantees equal status and powers to all 36 federated states, in the aftermath of the enactment of

[133] See S. Butt, *Religious Conservatism, Islamic Criminal Law and the Judiciary in Indonesia: A Tale of Three Courts*, in *Journal of Legal Pluralism and Unofficial Law*, vol. 50, no. 3, 2018, p. 402-434; S. Butt, *Judicial Reasoning and Review in the Indonesian Supreme Court*, in *Asian Journal of Law and Society*, no. 6, 2019, p. 67–97.

[134] R. Suberu, *Federalism in Africa*, cit., p. 73.

[135] Ibidem.

[136] For some references on asymmetries in Nigeria, see R. Suberu, *Federalism in Africa*, cit.; M.H.A. Bolaji, *Shari'ah in Northern Nigeria*, cit., p. 114-135; R. Suberu, *Nigeria's Permanent Constitutional Transition*, in G. Anderson – S. Choudhry (eds.), *Territory and Power in Constitutional Transitions*, cit., p. 181-201; E. Arban – A. Dirri, *Aspirational Principles in African Federalism: South Africa, Ethiopia and Nigeria Compared*, in *African Journal of International and Comparative Law*, vol. 29, no. 3, 2021, p. 362-382.

the 1999 Constitution, 12 northern states exercised the limited powers granted to them by the Constitution and extended Islamic *Shari'a* to their criminal codes[137], thus creating an «unusual asymmetry»[138]. The enactment of Islamic criminal codes also had an impact on legal certainty, especially in terms of courts' jurisdictional competencies. In fact, in the northern states, High Courts are denied the jurisdiction to hear appeals over criminal cases previously decided by *Shari'a* courts[139].

Similarly to Indonesia, the enactment of Islamic criminal codes has created significant consequences in terms of equality and non-discrimination of non-Muslim citizens[140], which is highly problematic in a deeply diverse context such as the Nigerian one[141]. Indeed, the implementation of Islamic criminal law amounted to a dramatic diminution in Nigerian citizenship for religious minorities such as the Christian group, enduring a pattern of discrimination in northern states since colonial times. The same is true for vulnerable groups within Muslims in northern Nigeria, due to internal segregation based on gender and socio-economic status[142]. In particular, women and citizens subject to poverty appear to be the targets of the *Shari'a* implementers, especially the Hisbah police[143]. As in the Indonesian case, the constitutionality of these Islamic criminal codes is a key issue. In this respect, Bolaji observed that «the fact that *Shari'a* supporters quote constitutional provisions to back their claims, that the extension of *Shari'a* to the penal codes is constitutional, has incapacitated the federal authority in resolving the crisis through the courts»[144]. Indeed, the federal and state levels share legislative competencies in some matters, and thus, the northern states claim that they exercised their legitimate

[137] M. Lawan, *Islamic Law and Legal Hybridity in Nigeria*, in *Journal of African Law*, vol. 58, no. 2, 2014, p. 310-311.

[138] M.H.A. Bolaji, *op. cit.*, p. 121 ff.

[139] M.H.A. Bolaji, *op. cit.*, p. 126. On *Shari'a* courts in Nigeria, see also R. Suberu, *The Supreme Court of Nigeria: An Embattled Judiciary More Centralist Than Federalist*, in N. Aroney – J. Kincaid (eds.), *Courts in Federal Countries*, Toronto, 2017, p. 299 ff.

[140] M.H.A. Bolaji, *op. cit.*, p. 123.

[141] See M.U. Okehie-Offoha – M.N.O. Sadiku, *Ethnic and Cultural Diversity in Nigeria*, Trenton, 1996; I.A. Badmus, *Federalism, Multicultural and Multiethnic Challenge: The Nigerian Experience*, in *African Journal of International Affairs and Development*, vol. 8, no. 1, 2003, p. 25-46; W. Akpan, *Ethnic Diversity and Conflict in Nigeria: Lessons From the Niger Delta Crisis*, in *African Journal on Conflict Resolution*, vol. 7, no. 2, 2007, p. 161-191.

[142] M.H.A. Bolaji, *op. cit.*, p. 123.

[143] M.H.A. Bolaji, *op. cit.*, p. 123-126.

[144] M.H.A. Bolaji, *op. cit.*, p. 125.

legislative competencies under the concurrent and/or residual list[145]. However, the Nigerian Constitution protects fundamental rights such as prohibition of torture and cruel treatment[146] and freedom of religion[147], and consequently, some *Shari'a* criminal punishments would be incompatible with the Constitution. If on the one hand analysts expected the central level to prevail, on the other the federal government was too weak to do so, given the political and not merely legal nature of the dispute[148]. Scholars further argued that the constitution-making process that led to the adoption of the 1999 Nigerian Constitution was supervised precisely by northern military rulers, imprinting an «elitist, arrogant, non-participatory, non-inclusive, and non-transparent approach to constitution making»[149]. This would inevitably question the overall legitimacy of the constitutionality claim at the basis of the extension of Islamic *Shari'a* to the criminal codes, given the questionable democratic credentials of the Constitution[150].

Nevertheless, Nigeria is a helpful case for assessing the asymmetrical outcomes of symmetry. In a context of formal constitutional symmetry, the extension of Islamic *Shari'a* to the criminal codes in the northern states created an asymmetrical legal protection of rights not only among citizens within the 12 *Shari'a* states, but also between citizens living in the *Shari'a* states and those living in the non-*Shari'a* states. What is further interesting to notice is the shift in the mixed nature of the Nigerian legal system. In fact, even before the extension of Islamic *Shari'a* to criminal codes in the northern states, Nigeria already had a mixed legal system of common law,

[145] Nigerian Constitution – Schedule II (Part II).
[146] Nigerian Constitution – art. 34.
[147] Nigerian Constitution – art. 38.
[148] See V.O.O. Nmehielle, *Shari'ah Law in the Northern States of Nigeria: To Implement or Not to Implement, the Constitutionality is the Question*, in *Human Rights Quarterly*, vol. 26, no. 3, 2004, p. 730-759.
[149] J.O. Ihonvbere, *How to Make an Undemocratic Constitution: The Nigerian Example*, in *Third World Quarterly*, vol. 21, no. 2, 2000, p. 346.
[150] M.H.A. Bolaji, *op. cit.*, p. 130.

Islamic *Shari'a*[151], and customary law[152]. This hybridity finds its origins in the period of British colonization[153], which created a dual legal system based on citizenship. British colonizers maintained Islamic *Shari'a* to regulate civil and personal laws, and Islamic courts had jurisdiction over the so-called «natives», whereas common law was imposed along with English courts with jurisdiction over non-natives[154]. Concerning criminal law, the British abolished capital punishments under Islamic criminal law and enacted the Penal Code and the Criminal Procedure Code, abrogating Islamic criminal law in Nigeria[155].

Comparing Nigeria with the previous Indonesian case, some similarities can be found. As for Indonesia, also in Nigeria, it is not the mixed nature of the legal system *per se*, nor the mere application of Islamic *Shari'a*, that created an asymmetrical outcome in the protection of rights, but rather the specificity of the implementation of Islamic criminal law in the northern states. Moreover, both in Indonesia and Nigeria, apex courts «evaded some politically sensitive or contentious issues, especially the constitutionality of Islamic *Shari'a* law»[156]. Interestingly, the Indonesian Supreme Court and the Nigerian Supreme Court declared the judicial

[151] On Islamic *Shari'a* in Nigeria, see A.H. Yadudu, *Colonialism and the Transformation of Islamic Law in Northern States of Nigeria*, in *Journal of Legal Pluralism and Unofficial Law*, no. 32, 1992, p. 103–40; M. Lawan, *The Application of Islamic Law in Nigeria*, in *Yearbook of Islamic and Middle Eastern Law Online*, vol. 4, no. 1, 1997, p. 201-209; A.M. Yakubu et al. (eds.), *Understanding Shari'a in Nigeria*, Ibadan, 2001; A.A. Oba, *Islamic Law as Customary Law: The Changing Perspective in Nigeria*, in *International and Comparative Law Quarterly*, vol. 51, no. 4, 2002, p. 817-850; A. Christelow, *Islamic Law and Judicial Practice in Nigeria: An Historical Perspective*, in *Journal of Muslim Minority Affairs*, vol. 22, no. 1, 2002, p. 185-204; M.H.A. Bolaji, *Shari'ah in Northern Nigeria in the Light of Asymmetrical Federalism*, in *Publius: The Journal of Federalism*, vol. 40, no. 1, 2010, p. 114-135; M. Lawan, *Islamic Law and Legal Hybridity in Nigeria*, in *Journal of African Law*, vol. 58, no. 2, 2014, p. 303-327; Y. Sodiq, *A History of the Application of Islamic Law in Nigeria*, Cham, 2017.

[152] On customary and traditional law in Sub-Saharan Africa, see S. Mancuso, *African Law(s): Comparative Insights on the African Lawscape*, Leiden and Boston, 2024; B. Gebeye, *A Theory of Africa Constitutionalism*, Oxford, 2021; T.W. Bennet, *Comparative Law and African Customary Law*, in M. Reimann – R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford, 2019, p. 652–680; R. Sacco, *The Sub-Saharan Legal Tradition*, cit., p. 313-343; R. Sacco, *Il diritto africano*, Torino, 1995.

[153] See A.A. Boahen (ed.), *African Perspective on Colonialism*, Baltimore, 1987.

[154] M. Lawan, *op. cit.*, p. 305.

[155] M. Lawan, *op. cit.*, p. 307.

[156] R. Suberu, *The Supreme Court of Nigeria*, cit., p. 301.

challenges to Islamic *Shari'a* outside their jurisdictions, thus avoiding potential controversies and backlash[157].

However, the Indonesian and Nigerian cases are somehow specular. As already mentioned, in Indonesia, Islamic *Shari'a* is applied in civil and personal law matters across the entire Indonesian territory, and the constitutional and legal framework granted the authority to implement Islamic criminal law only to Aceh. Conversely, in Nigeria, Islamic *Shari'a* had traditionally been applied only in the north, enjoying uninterrupted application in civil and personal law matters even during colonial times[158]. The implementation of Islamic criminal law resulted from the (more or less legitimate) exercise of the state competences by the 12 northern states. Therefore, it appears that if in Indonesia constitutional asymmetry was established «top-down» (i.e., from the center to the benefit of the subnational level), in Nigeria asymmetry originated «bottom-up» (i.e., from the subnational level at the expense of the center).

### *6.Concluding remarks*

As anticipated in the Introduction, this article aimed at filling a gap in the literature on asymmetric federalism and mixed legal systems, and by doing so paved the way for new itineraries of legal comparison that future research could further explore. In particular, three itineraries appear to emerge.

The first itinerary concerns the study of the underdeveloped topic of constitutional asymmetries arising from mixed legal systems. In order to address this gap in the literature, the contribution of comparative law proved to be of utmost importance. Indeed, from the comparative analysis, it emerged that, while in Canada and the United Kingdom the mixed nature of the legal systems has led to constitutional asymmetries in the organization of the judiciary, in Indonesia and Nigeria the *de jure* or *de facto* asymmetries arising from the application of Islamic criminal law in certain parts of the territory had a substantial impact on fundamental rights of citizens and minorities. Similarly, in Canada and the United Kingdom, the constitutional recognition of the civil law tradition resulted in further integration of the legal system and the accommodation of legal pluralism. Conversely, in

[157] Cfr. Supreme Court of Nigeria, *AG Kano v. AG Federation* [2007] 6 NWLR (Pt. 1029); S. Butt, *Religious Conservatism*, cit., p. 423 ff.

[158] M.H.A. Bolaji, *op. cit.*, p. 120.

contexts characterized by internal ethnocultural diversity such as Nigeria and Indonesia, the territorial implementation of Islamic criminal law appeared to compress legal and religious pluralism, not only by imposing Islamic *Shari'a* over common/civil law and customary law but also by applying it also to minorities (i.e., non-Muslim citizens). Moreover, within the field of asymmetric federalism, this article expanded the notion of asymmetrical outcome theorized by Burgess[159] through the analysis of the Nigerian case. Indeed, Nigeria is a constitutional system displaying complete constitutional symmetry as well as significant asymmetrical outcomes. This is particularly relevant because the asymmetrical outcomes of constitutional symmetry do not only have a political outcome (i.e., a distinctive religious and ethnic identity of the northern states compared to the others) but also a legal outcome (i.e., the local implementation of Islamic criminal codes and relative application to non-Muslim citizens). Further research could expand the analysis by comparing more mixed legal systems to assess whether their mixed nature generated asymmetrical outcomes (both institutional and in terms of rights protection).

The second itinerary explores the legacies of colonialism not only on constitutional asymmetries in mixed legal systems but also on comparative law. From the comparative analysis, it clearly emerges that colonialism was central in the formation of mixed jurisdictions (Québec and Scotland) and of mixed legal systems (Indonesia and Nigeria), with different sets of implications. Indeed, the affirmation of colonial power passed through the imposition of the colonizers' legal systems: British common law in the case of Québec, Scotland, and Nigeria; Dutch civil law in the case of Indonesia. However, it is possible to notice a different approach in the maintenance of previous legal systems. In fact, in the case of Québec and Scotland, the asymmetries deriving from the entrenchment of the civil law tradition within the system resulted in a guarantee of the political and legal integrity of the constitutional systems. Conversely, in Indonesia and Nigeria, the imposition of the colonizers' legal systems was strictly linked to a political intent of civilization and exploitation of the colonies, radically transforming the previous legal landscape[160]. Specifically, Lawan observed that, in Nigeria, «the [British] conquerors claimed that Islamic *Shari'a* was inadequate to cope with the commercial activities of the new colony. They believed that English law was the best system to serve their interests. Therefore, they designed an

[159] M. Burgess, *Comparative Federalism*, cit., p. 217.

[160] See K.A. El Fadl, *op. cit.*, p. 310-311; Sacco, *The Sub-Saharan Legal Tradition*, cit., p. 321-326; M. Lawan, *op. cit.*, p. 305.

endless and self-perpetuating process of legal domination»[161]. Similarly, the Dutch colonial experience in Indonesia consolidated a legal structure based on race and ethnicity that endured even after independence[162]. Moreover, the Dutch colonial presence led to a departure from the previous co-existence between customary law and Islamic legal institutions, creating a sharp demarcation between the two by supporting the former and restricting the latter[163]. Salim argued that the evolution of the post-independence Indonesian legal system led to a shift from the colonial system of discrimination based on race to a revised system where discrimination was based on religion[164]. Therefore, the asymmetries generated by the implementation of Islamic criminal law in Aceh and the northern states of Nigeria appear to be in reaction against previous colonial policies that restricted the jurisdiction of Islamic *Shari'a*. Furthermore, exploring the legacy of colonialism on the legal systems is in line with an emerging strand of research dedicated to imprinting a post-/decolonial perspective to comparative law in both the public[165] and private dimensions[166].

Finally, the third itinerary investigates the role of asymmetric federalism in embracing diversity and legal pluralism. The link between federalism and legal pluralism has been increasingly explored by legal

[161] M. Lawan, *op. cit.*, p. 305.
[162] A. Salim, *op. cit.*, p. 30.
[163] A. Salim, *op. cit.*, p. 31.
[164] A. Salim, *op. cit.*, p. 30.
[165] See P. Dann, *Southern Turn, Northern Implications: Rethinking the Meaning of Colonial Legacies for Comparative Constitutional Studies*, in *Comparative Constitutional Studies*, vol. 1, no. 2, 2023, p. 174-196; P. Dann, et al. (eds.), *The Global South and Comparative Constitutional Law*, Oxford, 2020; R. Merino, *Constitution-Making in the Andes: A Decolonial Approach to Comparative Constitutional Change*, in *Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht*, vol. 86, no. 1, 2022, p. 226-253.
[166] See R. Merino, *Decolonial Theory and Comparative Law*, in M. Siems – P.J. Yap (eds.), *The Cambridge Handbook of Comparative Law*, Cambridge, 2024, p. 408–25; H. Dedek, *The Tradition of Comparative Law: Comparison and Its Colonial Legacies*, in M. Siems – P.J. Yap (eds.), *The Cambridge Handbook of Comparative Law*, Cambridge, 2024, p. 387–407; R. Micheals, *Decolonial Comparative Law: FAQ*, in J. Husa (ed.), *A Research Agenda for Comparative Law*, Cheltenham, 2024, p. 61-86; L. Salaymeh – R. Michaels, *Decolonial Comparative Law: A Conceptual Beginning*, in *Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht*, vol. 86, no. 1, 2022, p. 166-188; E. Zitzke, *Decolonial Comparative Law: Thoughts from South Africa*, in *Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht*, vol. 86, no. 1, 2022, p. 189-225.

scholarship[167], although not from an asymmetrical perspective. Specifically, Topidi observes that federalism and legal pluralism «can […] be joined from a pragmatic perspective as their manifestations and operationalization matter in order to reflect on ways to manage and reconcile difference within plural societies»[168]. Indeed, the federal dimension of legal pluralism in the four case studies emerges rather clearly, given the territorial implementation of the different legal traditions in specific subnational entities. However, such federal dimension of legal pluralism also presents a non-territorial manifestation when considering the application of Islamic *Shari'a* in personal and civil law matters[169] in Nigeria and Indonesia, both in colonial and post-colonial times. An interesting point raised by Gagnon and Tremblay is that if Canadian federalism allowed a limited legal pluralism recognizing the distinct legal system of Québec, it failed to do the same towards the legal orders of Indigenous peoples, that «have yet to receive the same degree of recognition and protection»[170]. Moreover, scholars like McCrossan and Ladner[171], and similarly McKerracher[172], argue that the «Aboriginal rights and Treaty rights» under section 35 of the 1982 Constitution Act are not a sufficient instrument to create a strong legal pluralism since it eliminated the Indigenous laws pertaining to territorial jurisdiction. Therefore, further research could explore how asymmetrical arrangements could provide flexible solutions to accommodate the plurality of legal orders.

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[167] See P.S. Berman, *Federalism and International Law Through the Lens of Legal Pluralism*, in *Missouri Law Review*, vol. 73, no. 4, 2008, p. 1149-1184; E. Ryan, *Federalism as Legal Pluralism*, in P.S. Berman (ed.), *The Oxford Handbook of Global Legal Pluralism*, Oxford, 2020, p. 491–531; N.P. Alessi, *A Global Law of Diversity*, London and New York, 2024; K. Topidi, *Federalism, Legal Pluralism and the Law of Diversity*, in N.P. Alessi – M. Trettel (eds.), *Federalism and the Law of Diversity*, Leiden and Boston, forthcoming 2025.

[168] K. Topidi, *op. cit.*

[169] Ibidem.

[170] A.-G. Gagnon – A. Tremblay, *Advanced Introduction to Federalism*, Cheltenham, 2024, p. 136.

[171] In particular, the authors critically addressed the Supreme Court of Canada's decision on *Tsilhqot'in Nation v. British Columbia* [2014 SCC 44] that for the first time recognized Aboriginal title under section 35(1), and they substantially re-dimensioned the wide-reaching nature of this decision in terms of actual protection of Indigenous rights (see M. McCrossan – K.L. Ladner, *Eliminating Indigenous Jurisdictions: Federalism, the Supreme Court of Canada, and Territorial Rationalities of Power*, in *Canadian Journal of Political Science*, vol. 49, no. 3, 2016, p. 411-431).

[172] See K. McKerracher, *Relational Legal Pluralism and Indigenous Legal Orders in Canada,* in *Global Constitutionalism*, vol. 12, no. 1, 2022, p. 133-153.

Overall, these new itineraries of legal comparison appear to suggest that the core finding of this exploratory study is that mixed legal systems and asymmetries are nothing less than different expressions of internal diversity.

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**ABSTRACT:** The paper aims to analyze the constitutional asymmetries that arise from mixed legal systems. After a theoretical framework on asymmetries and mixed legal systems, the study focuses on the manifestations of asymmetries in four case studies. Through the contribution of the comparative method, the analysis shows that if in Quebec and Scotland, the presence of a mixed system has led to a translation of this specificity into the judicial system, in Nigeria and Indonesia, the extension of Islamic *Shari'a* to criminal codes in some parts of the territory has generated significant *de jure* or *de facto* asymmetries, negatively impacting the fundamental rights of non-Muslim citizens and minorities.

**KEYWORDS:** colonialism – comparative law – constitutional asymmetries – legal pluralism – mixed legal systems.

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