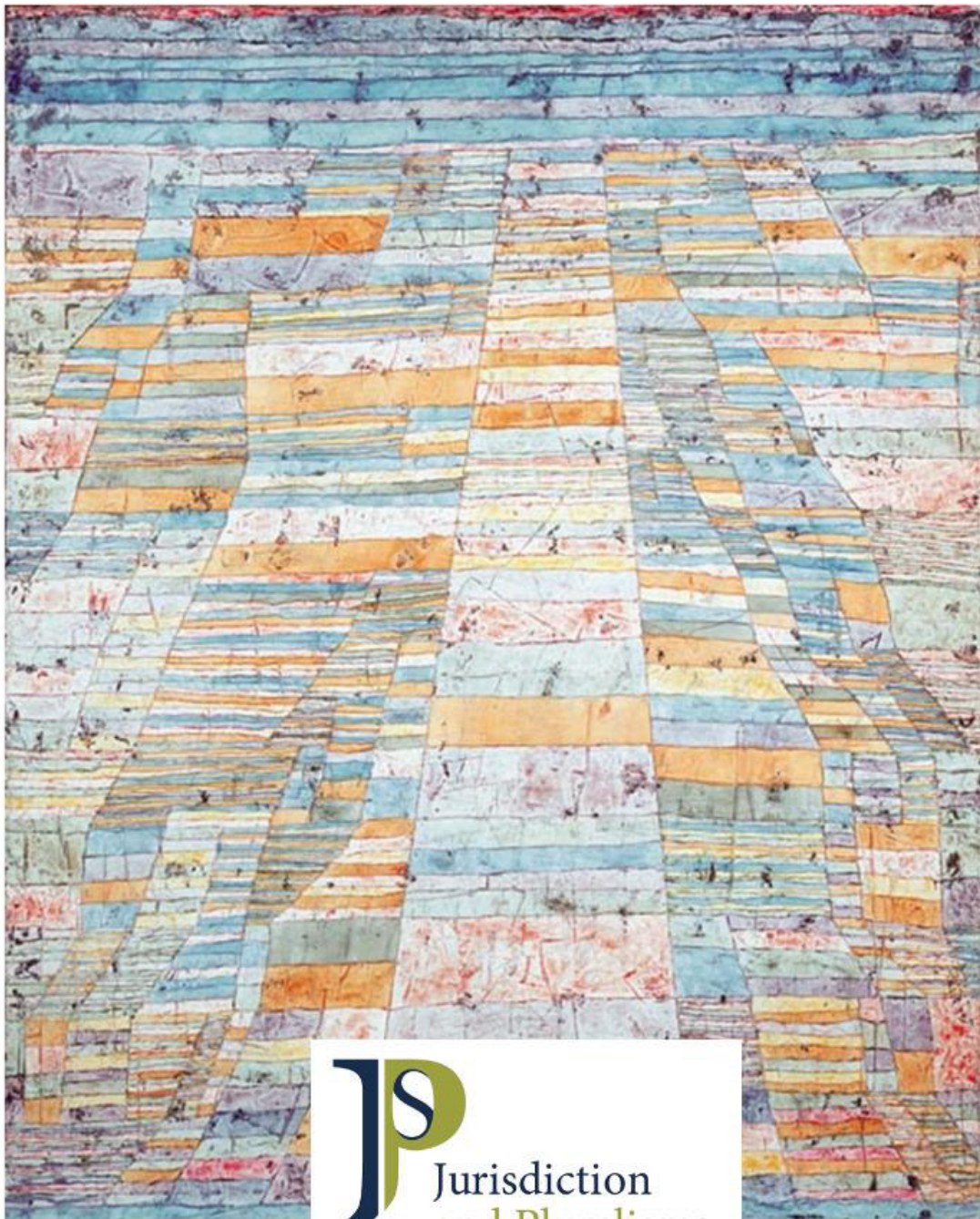


**LEGAL PLURALISM IN EUROPE
AND THE *ORDRE PUBLIC*
EXCEPTION:
NORMATIVE AND JUDICIAL PERSPECTIVES**



LEGAL PLURALISM IN EUROPE AND THE ORDRE PUBLIC EXCEPTION: NORMATIVE AND JUDICIAL PERSPECTIVES

Proceedings of the International Workshop held in Trento, 16 and 17 April 2015

July 2016

Roberto Toniatti and Davide Strazzari (eds.)

ISBN 978-88-8443-683-2

Website: <http://www.jupls.eu/>



© Copyright 2016

Elisa Giunchi, Prakash Shah, Gloria Esteban de la Rosa, Davide Strazzari, Marta Tomasi, Elena
Valentina Zonca

Università degli Studi di Trento

Cover: Paul Klee, Hauptweg und Nebenwege, 1929, Öl auf Leinwand, Museum Ludwig, Köln - Wikimedia Commons

LEGAL PLURALISM IN EUROPE AND THE *ORDRE PUBLIC* EXCEPTION: NORMATIVE AND JUDICIAL PERSPECTIVES

Table of contents

Foreword	i
<i>Davide Strazzari, Roberto Toniatti</i>	
Secular judges and sacred law. Court practice and family law in Muslim countries	1
<i>Elisa Giunchi</i>	
Private international law, Muslim trans-national legal pluralism, and the under-mining of official law in the British isle	17
<i>Prakash Shah</i>	
Public policy exception, “recognition method” and Regulation (EU) 1259/2010	39
<i>Gloria Esteban de la Rosa</i>	
The <i>ordre public</i> exception as a means to protect fundamental rights, or not? The recognition of repudiations and polygamous unions in France and Belgium.....	65
<i>Davide Strazzari</i>	
Towards an emerging notion of European <i>ordre public</i> : a comment on the case-law about inter- national surrogacy in Europe	83
<i>Marta Tomasi</i>	
Religious diversity, immigration laws and the <i>ordre public</i> exception in Europe: the role of gender.....	107
<i>Elena Valentina Zonca</i>	

TABLE OF CONTENTS

Legal pluralism in Europe and the <i>ordre public</i> exception: an introductory comparative constitu- tional law framework	131
<i>Roberto Toniatti</i>	

FOREWORD

The e-volume collects the papers presented at the international workshop on “Legal Pluralism in Europe and the *Ordre Public* Exception: Normative and Judicial Perspectives”, held in Trento in April 2015, within the framework of the Jurisdiction and Pluralisms (JPs) research project.

The international workshop and the present e-volume draw their inspiration from the circumstance that several countries in Europe are experiencing a growing number of cases in which individuals (mainly immigrants) claim to have a series of family and personal matters regulated by the law of their country of origin, under international private law.

In so far as this foreign law corresponds to – or is largely influenced by – Islamic law (or other religious law), domestic legal systems in Europe face the problem of reviewing the compatibility of such religiously inspired foreign law with domestic (and European) standards of fundamental rights, mainly by applying the public policy (*ordre public*) exception which prevents the administrative application or the judicial enforcement of foreign law or foreign judicial or administrative decisions that are qualified as incompatible.

The chapters of this e-volume aim at considering the current attitude shown by the judiciary in some European states, while ultimately focusing on whether a shared European *ordre public* conception in the field of family law is emerging in case law. At the same time, there is a need to consider that traditional Islamic law is not in itself an uniform body of law and the role of judiciary towards more “liberal” interpretation of Islamic law should be not underestimated.

While acknowledging that much further scientific research is needed, the JPs research project has the ambition of achieving some positive results in the field of exploring and assessing the impact that legal pluralism – and indeed a plurality of pluralisms - determines on the unitary character of judicial function and on uniformity of case law. Within this remit, in April 2016, a second international workshop on

DAVIDE STRAZZARI, ROBERTO TONIATTI

“Religious Pluralism, Legal Monism and Personal Law Regimes: Comparing Experiences and Trends” has taken place at Trento Law School whose proceedings, once published, will hopefully add a further contribution to the research.

Davide Strazzari, Roberto Toniatti

SECULAR JUDGES AND SACRED LAW

COURT PRACTICE AND FAMILY LAW IN MUSLIM COUNTRIES

Elisa Giunchi

SUMMARY: 1. *Introduction.* 2. *From flexibility to codification.* 3. *Fiqh as residual law.* 4. *Is progress over-stated?* 5. *Why this is relevant to us.* 5. *Conclusions*

1. Introduction.

In the pre-modern Muslim world, jurists and *qāḍīs* did not have a monopoly over the law, as political authorities, whether caliphs or sultans, enacted decrees and run their own courts. And yet *sharī'a* was, in a way, paramount: decrees were enacted on an *ad hoc* basis to address specific questions, they were framed in a religious discourse and mostly filled in *fiqh*'s loopholes rather than replacing it. As long as they did not contradict the shared injunctions of sacred law, decrees were considered as legitimate and in fact part of the ruler's religious duty to ensure a stable and orderly society. It was in this specific sense *dīn* encompassed *dawla*. From the 19th century onwards, secular courts, alien procedures and codes were introduced, with the effect of confining *sharī'a*, with some exceptions, to personal status law, inheritance and *waqf*. But even in these areas, codification, while apparently preserving the *sharī'a*, actually subverted its meaning and made it subversive to the State.

However, un-codified Islamic law has survived, not just in the actual practice of the Muslim world and within modern-day unofficial *sharī'a* councils in the West. In some contemporary Muslim countries, secular judges display some of the old-day *qāḍīs*' flexibility by referring to various elements of un-codified *sharī'a*, with the effect of legitimising, supplementing and at times even replacing legislated norms. This judi-

cial activism has been made possible by the clause in most family codes according to which a specific juristic school (*madhhab*), or *fiqh* in general, can be referred to at the adjudication level in case of legal lacunae or to explain and supplement vague norms. While for centuries state decrees had *de facto* been the residual law, now it is un-codified *sharī'a* that has that status in most Muslim countries.

The first part of this paper addresses the following questions: How are the clauses on residual law mentioned by legislation on personal status actually interpreted? Can reference to un-codified *sharī'a* advance an ethical perspective that is consonant with the values underlying our legal system? Does *sharī'a* necessarily penalize women, as is commonly assumed? Or can it, in some circumstances, secure their rights and interests?

These questions have a bearing on court practice in the West, which will be addressed in the second part of the paper. The main questions here are: Are western judges who are called to apply *sharī'a*-based laws aware that judges in Muslim countries refer to un-codified *sharī'a* to supplement and even replace legislated norms, and that as a consequence court practice may differ from codified law? More in general, how do Western judges understand and address concepts and institutions that originate from the Islamic doctrine?

2. From flexibility to codification.

Islamic law developed through the centuries by drawing from various sources, resulting in a normative system that was internally diverse and allowed a great degree of flexibility at the adjudication level. Far from being a systematic set of ready-made judicable prescriptions, as it is nowadays presented by Salafis and Western media alike, Islamic law was an ethical and methodological framework under which differing solutions to human problems could find room and new circumstances addressed, as long as certain precepts and principles on which *ijmā'* existed were not violated. Juristic schools, which consolidated and narrowed down in number by the 9th century, differed one from another and contained within themselves considerable variations. Rather than

being perceived as problematic, this plurality was inherent in the idea of *sharī'a* that was prevalent at the time: as only God knew the truth, all that judges and *muftīs* could do was to provide, as Johansen puts it, 'a probable, but fallible interpretation of infallible texts'.¹

Albeit mostly within a specific madhhabic framework, *qāḍīs* resorted to different opinions on an *ad hoc* basis, guided by a sort of 'judicial relativism'.² The judge, who knew the community where he served, took in fact into consideration the context and the specific circumstances of each case with the aim of protecting the interests of the weakest party without subverting God-mandated social and gender differences. Thus women could approach the courts with some hope to see their *sharī'* rights redressed, though it may be going too far to hold, as Hallaq does, that they enjoyed full agency.³

Even after the so-called "closing of the door of *ijtihād*" around the 10-12th century, Islamic law remained a dialectical process between ethical principles, foundational norms and context. Certain opinions, mostly those of the eponyms of the *madhhabs*, acquired prevailing weight, but were not to be blindly replicated: past opinions were rather intended to be examples of a mode of reasoning and were constantly refined, questioned, and supplemented by new opinions on the basis of new circumstances. Legal developments after the 10th century, when a basic "canon" had been agreed upon, occurred to a great extent through *qāḍīs* and *muftīs*. The former have long been considered peripheral, partly due to the scarcity of court documents, but we now know that even after the so called "closing of *ijtihād*" judges continued to adapt the legal doctrine to new circumstances and even created "established customs" that were incorporated into legal literature. When they felt they were not up to exercising *ijtihād*, they asked *muftīs* for opinions. Though not binding, their *fatwās* were usually followed, particularly if the *muftī* was considered authoritative.

'*Ulamā'*, whether jurists, *muftīs* or *qāḍīs*, did not have a monopoly over law: rulers enacted decrees and run their own courts. But *sharī'a*

¹ B. JOHANSEN, *Contingency in a Sacred Law. Legal and ethical norms in the Muslim fiqh*, Leiden and Boston, MA, 1999, 37.

² W.B. HALLAQ, *Sharī'a. Theory, practice, transformations*, Cambridge, 2009, 165.

³ *Ibid.*, 196.

long remained paramount: decrees were framed in a religious discourse and mostly filled in *fiqh*'s loopholes. As long as they did not contradict the shared injunctions of sacred law, decrees and official adjudication were considered as perfectly legitimate and in fact part of the ruler's religious duty to ensure a stable and orderly society. Secular and *sharī'a* courts were not parallel, but rather intersecting: the former often consulted *mufītīs* and *qāḍīs* and the State paid a salary to the *qāḍīs* (and later on, particularly under the Ottoman empire, other officials in high positions such as the *Shaykh ul-Islām*) and used its coercive power to uphold their decisions. Only in this specific sense *dīn* encompassed *dawla*: laws originated from a variety of sources, including *urf*, but all of them were, if compatible with *sharī'a*, part of it.

This system was gradually eroded by a number of internal and external factors. Foremost amongst them was the idea of coherence that informed Europe's legal developments in the 19th century and that was translated into codification either by colonial powers or by Muslim rulers. Islamic law was gradually replaced with western-based codes and was soon confined, with some exceptions, to personal status law, inheritance and *waqf*. But even there, codification, while apparently preserving the *sharī'a*, actually subverted it, turning what had been a flexible and contextual adjudication into a rigid system which left no room for discretion. Specific opinions were selected, and other discarded, taking away from the judge the possibility to practice *ijtihād* and to refer to opinions considered more adequate to the specific case addressed. Islamic law was delinked from the context, turned into fixed norms, accompanied by procedural laws that were totally new and applied by judges who were in most countries devoid of a traditional religious background. The subtleties of classical law were also abandoned as they could not easily fit into judiciable norms. Among those parts that were discarded were many *hiyal* (legal devices) that had been traditionally resorted to in order to bypass harsh rules or soften the rigour of punishments. Most important, Islamic law, which until then had legitimated *ad hoc* decrees by the rulers, was made subservient to the State: only those parts of *fiqh* that were turned into norms were to be justiciable.

3. *Fiqh as residual law and its gender impact.*

Some scope for interpretative creativity is, however, provided by the clause, contained in most codes of the contemporary Muslim world, which instructs judges to rely on a specific *madhhab* or on its dominant positions or on *fiqh* in general in the absence of statutory provisions or in order to explain them. This is not a theoretical possibility only: many *sharī'a*-based norms in family codes are vague and contain legal loopholes that need to be filled in. For example, in Egypt divorce can be requested by a woman for harm (*darar*) or polygamy if the latter causes harm; the burden of proof lies on her but, as legislation does not describe what constitutes injury, it is up to the court to define what constitutes harm and to assess whether the harm suffered by her is a sufficient ground for divorce.⁴ In Pakistan, no mention is made in the law of the legal consequences of the failure to provide notification of *talāq* on the validity of marriage, nor is the issue of the *walī*'s consent addressed. This vagueness has inevitably left some space to judicial discretion.

Increasing reference to un-codified Islamic law has also originated from the introduction in an increasing number of Constitutions of clauses explicitly recognising that state law is subordinated to the *sharī'a*: although these clauses are usually not meant according to higher courts to be justiciable, they have justified in some instances the reference by judges to un-codified Islamic law, sometimes with the effect of contradicting codified law. Pakistan is a glaring example. Some Pakistani High Courts, particularly since the mid-1980s, refused to apply some norms of the Muslim family Law Ordinance (MFLO) as un-Islamic by arguing that the *sharī'a* clause introduced in 1985 in the Constitution controlled all other laws and was self-executory rather than constituting a mere principle of policy that should guide new legislation.

The research I carried out in the 1990s as a graduate student indicated that the references to uncoded Islamic law by Pakistani superior courts often had the effect of widening women's rights, thus bypassing

⁴ N. BERNARD-MAUGIRON, *Courts and reform of personal status law in Egypt*, in E. GIUNCHI, ed., *Adjudicating family law in Muslim courts*, London and New York, 2014, 106-120.

codified laws that were asymmetric, and integrating offspring that would otherwise be illegitimate within a family unit.⁵ More recent research has confirmed those initial findings.⁶ The Pakistani case is not isolated. In various countries the interpretation by the higher judiciary is often far more advanced than the letter of the law, particularly where law reform is obstructed by either a fragmented executive or political sensitivities, and the courts are staffed with judges with a liberal outlook: as in Pakistan, also elsewhere reference to Islam amplifies women's rights while restricting men's privileges: courts, at least in the sphere of family life, in these cases can be seen as assuming a semi-legislative role which advances both women's rights and a progressive reading of sacred texts.

In Egypt, for example, judges interpret harm in such a broad way so as to facilitate divorce requested by women.⁷ In Morocco, an expansive reading of *shiqāq*, which has been introduced in 2004 as a ground for divorce for both spouses, has had the same consequence.⁸ In Pakistan, both secular and Islamic appeal courts have often taken a stand in favour of the female parties to the litigation by referring to un-codified *sharī'a*: this has occurred in cases concerning divorce initiated by women, for example by allowing women's marriage without the *walī*'s consent, an issue on which the law is silent, as well as allowing women-initiated divorce by *khul'* when the husband's consent is lacking. Already in 1959 a High Court decided that the husband's consent was not necessary, contrary to Hanafī law but according to the judges' interpretation, to the Qur'an.⁹ Forty years later, the Federal Shariat Court (FSC) – an appeal court established in 1980 to check the islamicity of laws and as an appeal court for *ḥudūd* cases – confirmed that in some *khul'* cases the husband's consent is irrelevant.¹⁰ Merely stating one's dislike

⁵ E. GIUNCHI, *Radicalismo islamico e condizione femminile in Pakistan*, Torino, 1999.

⁶ E. GIUNCHI, *Islamization and Judicial Activism in Pakistan: what sarīah?*, in *Oriente moderno*, 1, 93, 2013, 188-204.

⁷ N. BERNARD-MAUGIRON, *op.cit.*, 106-120.

⁸ F. SADIQI, *The Potential Within: adjudications on shiqāq discord divorce by Moroccan judges*, in *Ibidem*, 121- 135.

⁹ *Balquis Fatima v. Najm Ullkram Qureshi* (1959 PLD 566).

¹⁰ *Jan Ali v. Gul Raja* (1994 PLD 245).

for the husband, with no reasons given, has been held as sufficient ground for divorce¹¹ and occasionally the financial consideration due to the husband has been postponed to a separate civil suit, which entails transaction costs that the husband may not be willing to pay, thus de facto discouraging his claim. As to *ṭalāq*, judges have considered the effects of the lack of notice to the local council according to what would most further women's interest in a specific case.¹² The judges of all superior courts have also consistently upheld the Hanafī rule that after puberty such consent is not mandatory, with the effect of protecting from criminal prosecution adult women who choose their spouse against the will of their family members.¹³ Judges have also referred to un-codified Islamic law so as to benefit women in cases related to custody of children.¹⁴

Another example concerns the registration of *ṭalāq* and *nikāḥ*, often considered as not obligatory under Islam, despite being prescribed by the MFLO, with the consequence of helping women escape prosecution for *zinā* and facilitating the inclusion of children in the family unit.¹⁵ More recently, the Federal Shariat Court has held that registration, albeit not obligatory under Islam, is not forbidden by it either; while not a prerequisite of the validity of marriage, it is auspicious as it contributes to an orderly society, as foreseen by the Qur'an and Sunna.¹⁶ Accordingly, the court has not recommended the state to get rid of the clause on registration, but rather to increase the penalty prescribed in case of lack of registration. As to polygamy, the FSC has observed that it is a permitted but not obligatory act, and that as a consequence it can be limited or even forbidden to put an end to the many injustices found in

¹¹ *Shakila Bibi v. Muhammad Farooq* (1994 CLC 230).

¹² *Mst. Naziran v. the Collector Sialkot* (1990 SCMR 803). On more cases and a more in-depth discussion see N. HAIDER, *Islamic Legal Reform: The case of Pakistan and family law*, in *Yale Journal of Law and Feminism*, 2, 12, 2000, 287-340.

¹³ *Muhammad Imtiaz and another v. the State* (PLD 1981 FSC 308); *Muhammad Ramzan v. the State* (PLD 1984 FSC 93); *Hafiz Abdul Waheed v. Asma Jahangir* (PLD 2004 SC 219).

¹⁴ Cf. N. AHMED, *Family Law in Pakistan: Using the secular to influence the religious*, in E. GIUNCHI, ed., *Adjudicating Family Law* cit., 70-86.

¹⁵ See cases analysed in E. GIUNCHI, *Radicalismo islamico* cit., 89-93.

¹⁶ *Allah Rakha vs. Federation of Pakistan* (PLD 2000 FSC 1).

Pakistani society.¹⁷ The Pakistani FSC has time and again stated that certain acts considered as Islamic, such as unrestricted polygamy and triple *ṭalāq*, should be avoided because in addition to causing “grave hardship” to women they also violate Qur’anic injunctions.

Case analysis also shows that judges in several Muslim countries tend to accommodate *sharī‘a*-based customs that contradict state law, such as unofficial or irregular marriages, if this allows to integrate out-of-wedlock children in the family unit and to guarantee state benefits to irregularly married women and their offspring. For example, the right of compensation for death in work-related accidents has been time and again recognised to women married through unofficial ways or to the second co-habiting wife who had not been validly married. In all these cases, the court is clearly outcome –oriented, the preferred outcome being that which benefits women and children the most. Women rights, even when not specifically set by the legislation or *fiqh*, are seen as fully in conformity with Islam, while discriminatory laws or customs are often considered as against Islam and thus in need to be reformed. This position has been reiterated also in cases not related to the family.

In a case in which the FSC discussed a petition arguing that the introduction of women judges is against Islam, the judges argued that contrary to what has happened in other cultures, Islam puts women and men on the same level.¹⁸ The Court has also considered un-Islamic a clause of the Qanun-e shahadat, arguing that taking into consideration the morality of the victim in rape cases is against the principles of gender equality of the Qur’an, which give women a status that is even superior to that of men.¹⁹ Similar arguments have been advanced to correct gender discriminations contained in the laws on nationality.²⁰ As to

¹⁷ *Ibidem*.

¹⁸ *Burney v. Federation of Pakistan and others* (PLD 1983 FSC 73), 80. See also *Humaira Mehmood v. State* (PLD 1999 Lah. 494). In *Murtaza vs Federation of Pakistan and others* (PLD 2011 FSC 117) the FSC reiterated the position held in *Burney v. Federation* cit..

¹⁹ *Shahadat law against Quran, Sunnah: FSC*, The news, 12 February 2009, <http://www.thenews.com.pk/TodaysPrintDetail.aspx?ID=162186&Cat=5&dt=2/13/2009>.

²⁰ Si vedano i casi discussi in S.A. CHEEMA, *Federal Shariat Court as a vehicle of progressive trends in Islamic scholarship in Pakistan*, in *al-Adwa*, 39, 28 (2013), *passim*.

the impact and status of the 1985 *shar'īa* clause in the Constitution, already in 1998 the Supreme Court held that if differing constitutional norms cannot be harmonized, precedence must be given to the one “that offers more rights”.²¹

Through religion-based judicial activism judges respond to a social context that has changed in the last decades: particularly among urban middle-class families, the same class from where judges originate, increasing female literacy rates and numbers of women entering the job market and contributing to the household income has contradicted the ideal family structure that is enshrined in the *qiwāma* postulate, that is, the requirement of wife's obedience in return to maintenance, and is reproduced in the codes. By referring to un-codified Islamic law secular judges can bypass codes that for political reasons cannot be reformed and adapt them in the name of Islam to changed circumstances.

What I find particularly interesting is that judges referring to un-codified *sharī'a* by surfing through *madhhabs* and practising *ijtihād* are not *qāḍīs* rooted in traditional religious knowledge. They are secular judges who have a superficial knowledge of *fiqh* and do not possess those qualifications mostly linked to scholarly competence that in theory should make them eligible to practice *ijtihād*. It is significant that the function of Islamic review is vested in Egypt in the Supreme Constitutional Court (SCC), which is entirely composed of secular judges, while in Pakistan it is the FSC, only some of whose judges are '*ulamā*', that must decide on the “islamicity” of laws. An extreme case is that of Indian courts, where judges, who are mostly non-Muslims, are entitled to enforce “Muslim personal Law” (MPL), which is largely un-codified, in cases that involve Muslims.²²

²¹ *Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan* (PLD 1998 SC 1263).

²² S. VATUK, *The Application of Muslim Personal Law in India: A system of legal pluralism in action*, in Giunchi, ed., *Adjudicating family law* cit., 49-69.

4. *Is progress over-stated?*

The judicial activism mentioned in the previous pages has been hailed by some scholars in enthusiastic terms as promoting women's rights²³ and even liberal democracy.²⁴ We should however be careful not to exaggerate or generalise the extent of judicial activism and its woman-friendly outcome. This is for a number of reasons.

First of all, there is still very limited research on the subject, and it concerns a handful of states only. Second, in the countries analysed, the language employed by judges in marital disputes, while revealing a sympathetic attitude to the plight of women locked in unhappy marriages, also upholds women's role as mothers and overall a traditional view of the family which sees women as subordinate to men.²⁵ In the *zinā* cases I analysed, men's opportunistic motives behind accusations of misconduct against their wives are often unveiled and the object of scant criticism by the judges, but a disparaging language is often used when addressing women who do not conform to widespread cultural expectations.²⁶ Third, the expansion of women's rights through the judiciary has been somewhat erratic, as reference to un-codified rules gives rise to contradicting verdicts, not all of which benefit women. Flexibility allows judges to adapt the law to specific circumstances but also promotes inconsistency, particularly when the judiciary is internally divided between modernists and traditionalists, as is the case with Pakistan. According to the sources that are selected and the exegetical method that is followed, reference to un-codified Islamic law can either

²³ As to Pakistan, see K.C. YEFET, *The Constitution and Female-Initiated Divorce in Pakistan: Western Liberalism in Islamic Garb*, in *Harvard Journal of Law and Gender*, 34, 2011, 586; for similar statements see I. YILMAZ, *Good Governance in Action: Pakistani Muslim Law on Human Rights and Gender Equality*, in *European Journal of Economic and Political Studies*, 2, 4, 2011, 155-168 e Id., *Pakistan's Federal Shariat Court's collective Ijtihād on Gender Equality, Women's Rights and the Right to Family Life*, in *Islam and Christian-Muslim Relations*, 2, 25, 2014, 181-192.

²⁴ Also on Pakistan, see C.B. LOMBARDI, *Can Islamizing a Legal System ever Help Promote Liberal Democracy? A View from Pakistan*, in *University of St. Thomas Law Journal*, 3, 7 (2010).

²⁵ See for example S.F. HIRSCH, *Pronouncing and Persevering: gender and the discourses of disputing in an African Islamic court*, Chicago IL., 1998; E. GIUNCHI, *Radicalismo islamico e condizione femminile in Pakistan*, Torino, 1999.

²⁶ Ivi, 80-82 and the cases indicated.

penalise or advantage women. In Pakistan, for example, by referring to Hanafi *fiqh*, judges have upheld adult women's right to marry without their guardian, as already mentioned. Some judges, however, have at times referred to Malikism to support that a woman's guardian should conclude the marriage on her behalf even if she has reached puberty. The same goes for the consequence of pregnancy for unmarried women, considered in some cases according to Maliki law as evidence per se of *zinā*, and in others, according to Hanafism, as needing to be substantiated by further evidence.²⁷ In some cases, courts have held triple *ṭalāq*, which makes divorce irrevocable immediately, as valid according to Hanafi law, thus contradicting the MFLO.²⁸ One has the impression that most restricting readings of the MFLO have come from secular judges of the High Courts, while the FSC has mostly interpreted codified law so as to secure and even expand women's rights, reflecting the modernist orientation of the higher judiciary. However, it should be noted that the FSC has not applied *suo moto* the principle of gender equality, thus avoiding to challenge on its own initiative discriminating laws such as the Hudood Ordinances. Quite the contrary: in 2010 the Court annulled as un-Islamic some clauses of the Protection of women (criminal laws amendment) Act 2006 that the President Pervaiz Musharraf had introduced to soften the rigour and correct the worst abuses of the Zina Ordinance.²⁹

In Egypt as in Pakistan, at times judges have referred to *khul'* as a contract of divorce, thus requiring the husband's consent to it, while in others, with reference to Maliki opinions, as a judicial dissolution of marriage that can be imposed by the judge irrespective of the husbands'

²⁷ See *Zarab Khan v. the State* (PLD 1981 FSC 293) and *Mst. Jehan Mina v. the State* (PLD 1983 FSC 183), according to Maliki law; see for cases where Malikism is not used to justify the verdict: *Mst. Rani v. the State* (PLD 1996 Kar. 316) which is based on *Sakina v. the State* (PLD 1981 FSC 320); see also *Mst. Safia Bibi v. the State* (PLD 1985 FSC 120), *Mst. Siani v. State* (PLD 21984 FSC 121), *Mst. Su Khan v. the State* (1985 P Cr.LJ 110); *Zarab Khan v. the State* (PLD 1981 FSC 293), *Mst. Itebar Jana v. the State* (PLD 1985 FSC 160).

²⁸ *Allah Banda v. Khurshid Bibi* (1990 CLC 1683).

²⁹ http://www.pakistani.org/pakistan/judgments/2010/fsc_wpb.pdf. For legislation and courts, the transliteration that is used in Pakistan has been used rather than its Arabic equivalent, such as *zinā* and *ḥudūd*.

will.³⁰ Research in other countries confirms that a consistent pattern cannot be detected:³¹ referring to un-codified Islamic law promotes judicial discretionality, pointing to differing ideas on what is an ideal society and what is “authentic” *sharī’a*.

This raises the point of whether some sources or methods extend women’s rights more than others. Case analysis shows that “progressive” rulings are usually based on either *maddhab* surfing (choosing specific opinions from different *madhhabs*), or on *ijtihād* (whereby reference is made to a progressive reading of specific Qur’anic verses or to the ‘spirit’ or ‘goals’ of *sharī’a*). Often both methods are employed. For example, stressing the general Qur’anic principles of justice and equality as well as referring to specific Maliki opinions have enabled judges in Pakistan to depart from traditional interpretations of *khul’* shared by most Sunni schools.

5. Why this is relevant to us.

Due to large scale immigration, increasingly Western judges have had to refer to the legislation of Muslim countries. This has occurred mostly in situations arising under private international law, that is, when the parties in the dispute were foreign nationals who resided in the forum state and came from countries where laws of personal status were *sharī’a*-based. The most challenging norms have been those related to polygamy and *ṭalāq*. In addressing these institutions, judges in the West have had to balance the principle of *ordre public* with other considerations. In several western countries, for example, judges tend to

³⁰ M. LINDBECK, *The Enforcement of Personal Status Law by Egyptian Courts*, in E. GIUNCHI, ed., *Adjudicating Family Law* cit., 98-99.

³¹ . See for example R. HOQUE and M.M. KHAN, *Judicial Activism and Islamic Family Law: A socio-legal evaluation of recent trends in Bangladesh*, in *Islamic Law and Society*, 2, 14, 2007, 204-239, and compare with A. RAHMAN, *Development of Muslim Family Law in Bangladesh: Empowerment or streamlining of women?*, in *Journal of the Asiatic Society of Bangladesh*, 2, 53, 2008 (www.asiaticsociety.org.bd/journals/Dec2008/contents/Anisur_Rahman.htm#edn1 (accessed 20 January 2013); S. VATUK, *op.cit.*, 48-69; R. MITCHELL, *Family Law in Algeria Before and After the 1404/1984 Family Code*, in R. GLEAVE and E. KERMELI, eds., *Islamic Law. Theory and practice*, London, 1997.

recognise *talaq*, which *prima facie* contradicts the principle of equality of spouses, as long as the wife consents to it, with the aim of avoiding “limping marriages”: if couples who have divorced under one legal regime were considered as still married in another one, this would cause several problems to the couple, and particularly to the woman involved. Also polygamy has been considered in some western countries as having some valid effects: second wives have been granted maintenance, social security and inheritance, though family reunification is usually granted to one wife only. Judges have made some accommodation also on as marriage by proxy and *mahr*, while being much less willing to compromise on women’s age and consent.³²

In general, despite differences between countries, and variations within the same country, what emerges from studies on Western practice is a pragmatic outcome-oriented approach which takes into consideration the specific circumstances of each situation and the effects of recognising or not certain legal acts: with some exceptions, such as that of recent French case law, foreign *sharī’a*-based court decisions and documents are recognized despite violating *ordre public* if the outcome of the recognition is deemed preferable for the parties involved; particularly those of the party in most need – usually the wife and offspring. Protecting or even extending legislated human rights on an *ad hoc* basis has thus preference over an abstract human rights’ approach. Also in some Muslim countries, as I mentioned in the first part of the paper, courts often have a case by case approach that focuses on the impact of legally recognising or not an act that contradicts the law in the books. Extending or protecting women’s rights and those of their offspring is justified by referring to un-codified Islam, which is seen as perfectly consonant with human rights.

A question that comes to mind when approaching western case law is whether western judges are aware that in many Muslim countries judges often refer to un-codified *sharī’a* as residual law, and that this judicial activism at times causes court practice to differ from codified law. Some studies actually point to a general neglect by western judges of court practice in the Muslim world. Al-Rahim Moosa and Denise

³² See the essays in E. GIUNCHI, ed., *Muslim family Law in Western Courts*, Routledge, London and New York, 2014.

Helly, for example, report a case where a British court considered as invalid a repudiation pronounced by a Pakistani man as it had not been registered in conformity with the MFLO,³³ though Pakistan courts, as we have mentioned above, have long considered the registration of *ṭalāq* as not required by Islam as well as contrary to women's interests in some circumstances; it is an optional practice, that may be advisable, but is not mandated by God. This and other cases indicate that there is a need in the west not just for accurate information about the specificities of *sharī'a*-based family laws, and the way in which other western states deal with them, as is often pointed out, but with court practice in the Muslim world.

6. Conclusions.

The diverse, context-sensitive, outcome-oriented approach of pre-modern Islamic law still finds expression in the contemporary court practice of some Muslim countries, as clauses on residual law have been used by judges to stray from codified law in the name of Islam. The examples mentioned in the paper indicate that this religiously-inspired judicial activism often reinforces and even extend women's rights, though it may be going too far to state that Islam in the contemporary court practice is used in the service of human rights. This is often the case, but we do not have enough information to generalise the findings of some case studies, nor should be forget that within each country there are considerable variations. While in the past *qāḍīs*, though referring to an internally diverse *fiqh*, shared a common set of values, today judicial discretion can have much more diverse outcomes. What is the socio-economic background and degree of autonomy of the judiciary vis-à-vis the executive determines the outcome of its *ijtihād*. Further research is needed to widen the number of case studies and to look into the composition of the judiciary as key to its choice of sources and interpretative methods. A research of that kind may be of some use also to legal practitioners in the West: the fact that court practice in the

³³ A. MOOSA and D. HELLY, *An Analysis of British Judicial Treatment of Islamic Divorces, 1997-2009*, in *Ibidem*, 130-148.

SECULAR JUDGES AND SACRED LAW

Muslim world may considerably differ from the law in the books points to the need to abandoning an exclusively text-centric approach.

PRIVATE INTERNATIONAL LAW, MUSLIM TRANS-NATIONAL LEGAL PLURALISM, AND THE UNDERMINING OF OFFICIAL LAW IN THE BRITISH ISLE

Prakash Shah

SUMMARY: *1. Introduction. - 2. Immigration and multiculturalism. 3- The official recognition framework of private international law. – 4. Sharia in the mix of the transnational legal pluralism. 5. Concluding remarks*

1. Introduction.

Private international law theory, including its resort to choice of law frameworks, has so far been unable to accommodate the complex transnational movements and the consequent personal decision making that is involved in the process of trans-jurisdictional activity. To these can be added the comparative law problems taking the form of smoke and mirrors games of what exactly non-Western legal systems allow and don't allow partly because of their recognition of personal laws in the sphere of the family. What has generally been referred to as 'forum shopping' is a reality but it is far more nuanced than capable of being explained merely by the seeking of the most appropriate or profitable forum. There are also problems within Western jurisdictions such as the UK that impose a stricter dividing line between official and unofficial practices and recognize only the former as legitimate. The emergence of sharia fora in the UK and elsewhere has focused the mind on the role of unofficial institutions as well as the capacity of official legal systems to contain Muslim legal alterity in particular. With its focus on Britain within a larger comparative legal context, this chapter characterizes the current state of play as a possible stage in the eventual collapse of the boundary currently maintained by private international law to contain Muslim legal difference, in light of the transnational social fields in

which people actually operate.¹ These complexities are discussed through the use of reported and unreported case material, the latter gleaned through the writer's own work as an expert witness, where stories can be related of the personal experiences, and ways of maneuvering within and around legal systems.

First, this chapter discusses the inescapable fact that South Asian Muslims in Europe have formed communities that result from immigration over several decades. Most well established in Britain, and in such a way as to set the tone for how Muslims in general are regarded, such communities have tangibly fanned out across Europe and beyond. That conditions the types of private international law questions raised and how recent developments associated with Muslims, from other parts of the world too, have put into doubt previously favoured models of multiculturalism. In the second section are discussed some salient features of the private international law framework applicable in Britain, comparing them with those existing in the European civil law countries where different assumptions apply. In the same section, there is a very brief overview of the South Asian comparative backdrop against which can be set questions which come up in British and other European legal systems, including the basic feature of personal laws, which is the norm in South Asia but exceptional for Europe. Third, there is a focus on how the development of unofficial sharia fora in the UK, within larger comparative contexts and transnationalism, is complicating and potentially undermining the existing model of private international law and the model of official laws more generally.

2. Immigration and multiculturalism.

As South Asian countries have been the key source of migration for Britain since the 1950s, and increasingly there are South Asians settled

¹ For a discussion of transnational social fields, see N. GLICH SCHILLER, *Transborder Citizenship: An Outcome of Legal Pluralism within Transnational Social Fields*, in F. VON BENDA BECKMANN, K. VON BENDA BECKMANN, A. GRIFFITHS (eds), *Mobile People, Mobile Law: Expanding Legal Relations in a Contracting World*, Aldershot, 2005, 27.

in several European pockets, there are obvious transnational connections. Much of the case law in Britain that dealt with questions of private international law was itself generated within an immigration control context, and immigration cases continue to feature strongly. Often immigration law and practices of control have added further requirements as regards, say, the relationship between married partners or the adoption of children to what was already a complex field of law. Earlier, racial considerations were given as the reason for the legislation of the 1960s that laid the foundations for control of immigration from the British Commonwealth, with the non-white Commonwealth identified as the target. That legislation was ratcheted up to limit the immigration of South Asians being driven away from East African countries. However, the need to control immigration from societies that were *culturally and religiously* so different was emphasised more so from the early 1970s and, for Britain, this meant South Asian countries. Parallel processes have occurred throughout Western Europe since the 1970s, which have often brought within the sway of immigration laws Muslims who migrated to Europe. Among those with a significant Muslim component, the newer South Asian groups include Afghans, although the additions to the Muslim population are now likely to come from West Asian fleeing the prevailing regional conflicts.

The British case law generated from the immigration context in the 1970s features Pakistanis as the main group who were engaged in family reunification at the time. Case law (as well as changes in the legislation and immigration rules) from the 1980s saw the prevalence of Bangladeshis who were engaged in family reunification in a major way at the time.² Secondary migration involving family formation and particularly transnational marriage also came into the scope of the UK immigration laws from the 1970s and is now regulated widely in Europe.³ Such patterns of immigration have not subsided although regions of origin may have diversified much more since the older days of mainly Commonwealth immigration. As South Asian settlement advanced,

² S. S. JUSS, *Discretion and Deviation in the Administration of Immigration Control*, London, 1997.

³ For a path breaking early study on this issue in the UK, see S. SACHDEVA, *The Primary Purpose Rule in British Immigration Law*, Stoke-on-Trent, 1993.

cases increasingly issued from private litigation between spouses or between housing and welfare authorities and individuals and their families.

The basis that South Asian family reunification (and family formation) laid for the development of an unprecedentedly plural Britain also set the context for the problematising (legal and otherwise) of culturally different family forms, as the prospects of a plural society were not always welcomed despite the famed British tolerance and official backing for multiculturalist policies. That there are segments of society, particularly among the Muslim South Asians, joined by coreligionists from Africa and West Asia, who follow a different sense of civility and do not mingle and mix well with other sections of British society, have borne out the fears of those who predicted problems way back in the 1970s. Today these problems are formulated in terms of anxieties about segregation and lack of social cohesion. The idea of multiculturalism that Roy Jenkins famously expressed as Home Secretary 50 years ago, as a contemporary version of British toleration, is no longer the favoured catchword and doubts about it are expressed across Europe as a failed model.⁴ Folk wisdom also puts such complained-of living patterns down to the importation of sharia, often conveyed through the geographical idiom of 'sharia zones'. Rightly or wrongly, such living patterns embellish the spectre of Islamist terrorism, with particular concerns about Pakistan as a laboratory, training ground and exporter of terror activities within South Asia and beyond. The discovery that groups of Muslim, mainly Pakistani men across the UK are involved in criminal activity, including the trapping of young women into sexual exploitation, does nothing to alleviate concerns about lack of adherence to norms of British civility. Negative demographic measures on Muslims such as the disproportionate presence of Muslim men in British prisons, higher unemployment, higher levels of reliance on social wel-

⁴ S. VERTOVEC, S. WESSENDORF, *The Multiculturalism Backlash: European Discourses, Policies and Practices*, New York, 2010; C.L. ADIDA, D.D. LAITIN, M.A. VALFORT, *Why Muslim Integration Fails in Christian-Heritage Societies*, Cambridge, MA, 2016.

fare, and educational under-achievement are not unnoticed,⁵ and could well mirror the pattern elsewhere in Europe as well as in South Asia.

On the one hand, this developing profile has led to a further tightening of immigration controls against those coming from countries, notably Pakistan, seen as most prone not to integrate well into British society. As a result, various requirements have been added to qualifications for immigration, residence and nationality status such as minimum age of entry for spouses (out of concerns for early and forced marriage), income, and English language ability,⁶ with Muslim groups showing the least likelihood of acquiring English language. Although not strictly matters of private international law, these add to basic qualifying criteria, giving a different tinge to how ‘foreignness’ is determined under British law. On the other hand, underage marriage, adoptions, polygamous marriage, marriages of convenience, forced marriages, and talaq divorces began to see light of day in the case law both within as well as beyond the immigration law context. British legal systems have also been drawing up other types of legal and administrative measures to control and even criminalise unwanted conduct such as forced marriages.⁷ UK law has not yet equated the making of marriages between cousins to forced marriage but Danish law already does so, effectively disqualifying such marriages for immigration purposes.⁸ It is known, how-

⁵ MUSLIM COUNCIL OF BRITAIN, *British Muslims in Numbers: A Demographic, Socio-economic and Health profile of Muslims in Britain drawing on the 2011 Census*, January 2015 < <http://www.mcb.org.uk/muslimstatistics/> > accessed 17 March 2016.

⁶ H. WRAY, *Moulding the Migrant Family*, *Legal Studies*, Vol. 29, No. 4, 2009, 592, P. SHAH, *Trans-Jurisdictional Marriage and Family Reunification for Refugees in the United Kingdom*, *İstanbul Kültür Üniversitesi Hukuk Fakültesi Dergisi*, Vol. 9, No. 2, 2010, 93 at. pp. 94-100.

⁷ R. GRILLO, *Muslim Families, Politics and the Law: A Legal Industry in Multicultural Britain*, Farnham, 2015, at pp. 59-91.

⁸ A. LIVERSAGE, M. RYTTER, *A Cousin Marriage Equals a Forced Marriage: Transnational Marriages between Closely Related Spouses in Denmark*, in A. SHAW, A. RAZ (eds), *Cousin Marriages: Between Tradition, Genetic Risk and Cultural Change*, Oxford, 2015, 113.

ever, that Pakistanis are likely to engage in consanguineous marriages, leading to severe health problems for offspring.⁹

3. *The official recognition framework of private international law.*

European legal systems grant recognition to claims with a ‘foreign’ element by employing the mechanism of private international law. This mechanism differs from country to country, but the basic approach as outlined in the relevant texts is recognition via private international law.¹⁰ Private international law should diminish in importance the more established and settled a population becomes and its foreignness recedes, but that is mitigated by continuing transnationalism. In recent years, especially in the domain of family relations, questions of Muslim law arise frequently and in unprecedented ways in European courts.¹¹ For reasons that have not been appropriately analysed yet, it is also particularly for Muslims that discussion about legal pluralism occurs in Western countries in ways that are not only about ‘foreign law’, in the sense conceived of in private international law, although they may overlap with the latter. Given continuous immigration and trans-jurisdictional behaviour, questions of how ‘foreign law’ can be recognised in European legal systems remain prominent and should continue to do so given there is no real alternative conceptual framework being provided to that of private international law. My own suggestion that a ‘comity of peoples’ rather than a ‘comity of nations’ should be the basis of any such reformulation has not been picked up by other scholars alt-

⁹ K. HASAN, *The Medical and Social Costs of Consanguineous Marriages among British Mirpuris*, *South Asia Research*, Vol. 29, No. 3, 2009, 275.

¹⁰ M. ROHE, *Muslim Minorities and the Law in Europe: Chances and Challenges*, New Delhi, 2007. See also A. BÜCHLER, *Islamic Law in Europe: Legal Pluralism and its Limits in European Family Laws*, Farnham, 2011.

¹¹ E. GIUNCHI (ed), *Muslim Family Law in Western Courts*, Abingdon, 2014; R. MEHDI, W. MENSKI, J.S. NIELSEN (eds), *Interpreting Divorce Laws in Islam*, Copenhagen, 2012; R. MEHDI, J.S. NIELSEN (eds), *Embedding Mahr (Islamic dower) in the European Legal System*, Copenhagen, 2011; P. SHAH, M.-C. FOBLETS, M. ROHE (eds), *Family, Religion and Law: Cultural Encounters in Europe*, Farnham, 2014.

though, in an increasingly transnational world, some such conceptualisation may yet provide a basis for an alternative.¹² Thus, the recognition of legal and cultural alterity and its accommodation tends to be seen as a matter of working out the best way of using *existing legal methods or mechanisms*. However, current official legal frameworks are not able to ‘contain’ the complexity of legal pluralism and their use in practice results in a distortion of the experiences of migrants and transnationals.

A key difference between those continental European jurisdictions, which have a civil law basis to their rules on private international law, and the British approach is that the former rely far more on the nationality link and attempt to *apply* the relevant foreign law in their court systems. In the UK, meanwhile, nationality is treated as a connecting factor only in some cases, while domicile, with all its slipperiness, still constitutes a basic point of departure to determine capacity to enter into certain legal relations such as polygamous marriage.¹³ British courts are not as familiar with the approach of *applying* the foreign law, except where contracts specify an applicable law while giving jurisdiction to British courts.¹⁴ More usually, however, the law of the forum (i.e. English or Scottish law) has to be applied to the substantive claim. Foreign law is not ‘applied’ in the sense it is in civil law countries but is merely noticed as a ‘fact’ which helps assess the validity of legal relationships concluded in other jurisdictions. This key difference between some civil and common law countries means that in the former set of countries foreign law has a stronger position as part of the official law. In turn, as discussed further below, this difference lies behind some important developments in Anglospheric common law jurisdictions (besides the UK, chiefly the United States, Canada and Australia).

¹² P. SHAH, *Transnational Family Relations in Migration Contexts: British Variations on European Themes*, in SATVINDER JUSS (ed), *The Ashgate Research Companion to Migration Law, Theory and Policy*, Farnham, 2013, 599.

¹³ For example, P. SHAH, *Attitudes to Polygamy in English Law* Vol. 52 *International and Comparative Law Quarterly*, 2003, 359.

¹⁴ For example, see *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* (No.1) [2004] 1 WLR 1784, where, in fact, the “‘Glorious Sharia’a”, being a “non-national system of law”, was not accepted as capable of being applied by an English court.

Although treaties increasingly feature in Europe as part of the applicable rule complex, this is far less so in Britain, which relies on the common law approach and reforming legislation. However, treaty law may be relevant when the UK is also a party to a multilateral convention (e.g. the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption 1993, to which both the UK and India are parties since 2003); takes part in an arrangement as part of the EU legal system (e.g. the Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters); or is party to some other arrangement with Commonwealth countries (e.g. on the enforcement of judgments with Pakistan and India, which seems increasingly relevant in practice today).

Outside of those countries of origin that apply a secular form of law in the context of family relations on the broad European model (which the larger countries in South Asia do only exceptionally, since by default they use religion-based personal laws), the focus tends to be on 'religious' rules and justifications and their accommodation to find a *modus vivendi*. Although it is true that 'custom' remains relevant for legal recognition within South Asian family laws too,¹⁵ it is not well understood, and is generally confused with religion. Besides, being often apprehended in the narrowly-constrained, colonial sense, it tends to be much underplayed by lawyers. The formal rule framework of private international law - involving questions about the applicable law, the capacities of parties, and whether to recognise or apply the foreign law - seems to play an important role, but one which is not necessarily conducive to finding the best or the most just solution to a problem or dispute. For many decades, official authorities in the fields, say, of immigration, housing and social welfare have also intervened in the affairs of families that have some legal relations of a transnational character, which means that concerns of a public law nature are often at stake.

The public order (*ordre public*) exception (or 'public policy' in British usage) is an accepted means of excluding the application or recognition of foreign law. In practice, however, it not used as an exception but

¹⁵ W.F. MENSKI, *Hindu Law: Beyond Tradition and Modernity*, New Delhi, 2003; D. PEARL, W. MENSKI, *Muslim Family Law*, London, 1998.

is routinely applied especially to exclude either the ways of entering into legal relations under Muslim law or the consequences flowing therefrom. Addressing the question slightly differently, but not inconsistently, Bowen and Rohe say as follows:

The definition of what offends *ordre public* in what other people do thus not only reveals current French, German, or British notions about the limits of the morally acceptable, but also may be used to render concrete a general sense of a “clash of civilizations.” It is with respect to Islam that this last function of *ordre public* emerges most notably in current jurisprudence.¹⁶

While it is by default within the domain of judicial practice, public order is increasingly used by legislatures to circumscribe judges in being able to decide the limits of what is acceptable and what is not. This restricts judicial discretion and, to that extent, judges have to conform to legislated assessments of what public order requires. Actually, from the 1970s, British judges were already constrained by legislation demanding that English courts may only recognise divorces obtained abroad through “judicial or other proceedings”, effectively preventing judges from recognising non-state forms of divorcing, which affects the Muslim *talaq* in particular.¹⁷ Similar reforms have occurred more recently in Belgium too.¹⁸ In effect, an evaluation of the situation as judges might see it in individual cases is being substituted for a more rigid rule based system which is likely to create more, not fewer, problems in practice. If the legislative route has the attraction of providing greater legal certainty, it is a dubious one, because it nevertheless creates its own uncertainties. Private international law is already hedged around with many other uncertainties, making it impossible for parties to rely

¹⁶ J.R. BOWEN, M. ROHE, *Juridical Framings of Muslims and Islam in France and Germany* in J.R. BOWEN, C. BERTOSI, J.W. DUYVENDAK, M.L. KROOK (eds), *European States and their Muslim Citizens: The Impact of Institutions on Perceptions and Boundaries*, New York, 2013 143.

¹⁷ PEARL, MENSKI, *Muslim Family Law*, *op. cit.*

¹⁸ M. ROHE, *Family and the Law in Europe: Bringing Together Secular Legal Orders and Religious Norms and Needs*, in P. SHAH, M.-C. FOLETS, M. ROHE, *Family, Religion and Law: Cultural Encounters in Europe*, Fanham, 2014, 63-64.

on any rule without doubts creeping in, or for lawyers to advise clearly when advance planning is needed or once disputes reach the courts. However, even judges do not always settle cases based on individuated evaluation but do so from a rigid antipathy for particular foreign legal institutions. Again, the Muslim *talaq* divorce runs into problems among judges in several European countries.¹⁹ Indeed, as Bowen and Rohe indicate in the quote cited above, when judges are confronted by practices that they discover do not conform to the dominant framework of family relations in their states, they tend not to recognise or apply them. This reinforces my hypothesis that the deployment of public order (or public policy) to limit recognition to foreign, particularly Islamic legal institutions is not *exceptional* but *routine*.

All these modes of recognition and exclusion presume what Griffiths refers to as the ‘weak’ form of legal pluralism, whereby the legal agent is and should be the state, which is presumed to be dominant. Meanwhile, the wider dimensions of ‘strong’ legal pluralism, i.e. the presence of more than one legal order in a social field, tend to be missed out.²⁰ This is an area where a lot of uncertainty prevails and, although presupposing the state as central (‘legal centralism’) has elicited critical writing, notably by Menski,²¹ the idea of the primacy of a state law able to determine matters of intimate family relations remains in place. It would be odd if it were otherwise given that all European states still maintain the façade of state intervention in family life among their citizens too, let alone for foreigners. It is a façade because, in the UK at any rate, the state is increasingly withdrawing from intervening in family life by limiting access to legal aid funds and instead encouraging private ordering.²²

¹⁹ *Ibidem*, 64.

²⁰ J. GRIFFITHS, *What is Legal Pluralism?* No. 24 *Journal of Legal Pluralism and Unofficial Law*, 1986, 1.

²¹ PEARL and MENSKI, *Muslim Family Law*, *op. cit.*; W.F. MENSKI, *Muslim Law in Britain* No. 62 *Journal of Asian and African Studies*, 2001, 127.

²² G. DOUGLAS, *Who Regulates Marriage? The Case of Religious Marriage and Divorce*, in R. SANDBERG (ed), *Religion and Legal Pluralism*, Farnham, 2015, 61-64.

Except for the recognition of Islamic law in the Greek region of Western Thrace, which is an Ottoman reside,²³ European states do not follow the colonial model of personal laws, which has been preserved, with some reforms, by the South Asian post-colonial countries. These latter set of countries anyway have a cultural background that supports much looser forms of state intervention in family life. Beyond their endeavour to mimic European style legal systems, it is far from clear what purpose such intervention serves. The differences between the South Asian models of personal laws and the prevailing European uniformity models often create problems of understanding, especially given the rather myopic view of comparative law prevailing in European law schools.²⁴ Ignorance of these comparative aspects, which exist on both sides of the European-South Asian legal-cultural divide, means that when lawyers enter into legal practice they are not competent to advise about them and fictitious assumptions often dominate. Even academic 'experts' may well take different positions on a single point, leaving judges with another problem to solve. The resultant distortions overlap with the additional distortions created by the framework of private international law, premised as it is on a particular, Western cultural view of the link between persons and the legal systems of origin or transit, and of the way courts should decide about the 'reception' of that link in their legal systems.

Any legal reforms to personal laws or to private international laws in South Asian countries should ideally take place only after such matters are considered thoroughly. Once widely thought of as worth emulating, it is by no means the case that European models are suitable. The longstanding and periodically revived idea of enacting a uniform civil code in India may therefore be a face-saving measure ostensibly to eliminate the visibility of palpably separate personal laws and the quite retrograde treatment of Muslim women and children. However, it needs proper consideration whether a code based on a European model, which is probably what will be desired by default, is any solution to the cul-

²³ K. TSITSELIKIS, *Old and New Islam in Greece: From Historical Minorities to Immigrant Newcomers*, Leiden, 2012.

²⁴ W. MENSKI, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge, 2006, 25-81.

ture specific requirements of a country like India. Meanwhile, modernist reforms of Pakistani Muslim law under the military-rule induced Muslim Family Laws Ordinance 1961 also appear to have been clawed back by the reassertion of religious rules and customary practices.²⁵ This has a sideways impact on non-Muslim groups whose numbers have become miniscule since independence. In Pakistan, not only are Ahmadis not recognised as Muslims, but their marriages are also treated as falling out of reach of Muslim law. Although they therefore have no statutory law to which they can point, the High Court in London moved to recognise Ahmadi marriages in the case of *R v M*.²⁶ Matters take a quite different turn in Europe, and notably in Britain, where Muslims are prone to denounce any circumscription of their associational and religious freedoms. Effectively, these amount to demands that sharia rules be respected in germane spheres of life. Although their starting position as not long-present communities of recent migrant origin is different to the once-dominant Indian Muslims, there are echoes of the staunch Muslim resistance to any reforms in Indian personal law, a matter dealt with further below.²⁷

The considerations discussed above just about hold when it comes to discussion of the South Asian post-colonial countries and consequent recognition in British and European legal systems. However, if one glances at the liminal contexts of Somalia or Afghanistan, or even of Pakistan-occupied (so-called Azad) Kashmir, the distance between what people do and whatever sort of official laws there may be (or may have been) becomes even remoter and harder to bridge. Refugee-hood also complicates issues considerably. It is not unusual for courts and expert witnesses to have to engage with Somali cases where transnational dispersal results in various features, such as proxy or telephone

²⁵ PEARL and MENSKI, *Muslim Family Law*, *op. cit.*, 48, N. AHMED, *Family Law in Pakistan: Using the Secular to Influence the Religious*, in E. GIUNCHI (ed), *Adjudicating Family Law in Muslim Courts*, Abingdon, 2014, 70.

²⁶ [2011] EWHC 2132 (Fam).

²⁷ PEARL and MENSKI, *Muslim Family Law*, *op. cit.*, 45-46, S. VATUK, *The Application of Muslim Personal Law in India: A System of Legal Pluralism in Action*, in E. GIUNCHI (ed), *Adjudicating Family Law in Muslim Courts*, Abingdon, 2014, 52-53, M. ROHE, *Islamic Law in Past and Present*, Leiden, 2015, 398-407.

marriages or informal guardianship by relatives, which are otherwise less frequently encountered by British courts. To expect such persons to have followed some state-mandated procedures in countries of origin or transit could be often unrealistic. Therefore, official fora just have to make do with the facts as they have and decide cases as best as they can. This can be exasperating to judges who expect a formal rule structure to guide them as to what is legal and what is not. However, as the Ahmadi case above shows such strictures are not irresolvable. In one case in which the present writer acted as an expert witness, the immigration tribunal in the UK accepted a ‘de facto’ adoption among Somali relatives as coming within the scope of Article 8 of the European Convention on Human Rights. However, in a rather ambitious appeal, the Court of Appeal and the Supreme Court, perhaps predictably, would not agree that a *kafala* qualified under the Immigration Rules.²⁸ We can expect more such issues to arise when the impact of more recent migrations from West Asia and elsewhere comes to be realised within legal systems.

4. Sharia in the mix of transnational legal pluralism.

Sharia has been mentioned, but more needs to be said about it not least because of Britain as kind of a European hub for the building of unofficial sharia institutions. Somewhat like the Dar-ul Qaza movement in India, and similar institutions in North America,²⁹ these bodies are known in the UK as “sharia councils” although they are often dubbed “sharia courts” by the press. They too are a factor in the way Muslims organise their legal lives and this somewhat complicates how they use private international law mechanisms. Since men and women enjoy completely asymmetrical opportunities for divorce under Islamic law, the main function of these sharia councils rests on the unmaking of

²⁸ *AA (Somalia) (FC) (Appellant) v Entry Clearance Officer (Addis Ababa) (Respondent)* [2013] UKSC 81 for the Supreme Court’s judgment.

²⁹ J. MacFARLANE, *Islamic Divorce in North America: A Shari’a Path in a Secular Society*, New York, 2012; A.C. KORTEWEG, J.A. SELBY, *Debating Sharia: Islam, Gender politics, and Family Law Arbitration*, Toronto, 2012.

marriages that women want to end.³⁰ An explanatory link is sometimes made between the fact that official British courts will *not* issue Islamic divorces and the existence of sharia councils. However, the Indian example shows that this hypothesis is not quite satisfactory. After all, Indian courts are able to issue ‘sharia’ divorces because Muslim personal law is applied officially in India and yet the Dar-ul Qaza movement seeks to keep matters of family law away from the official courts and vest it in the hands of the ulema.³¹ The Indian example therefore reveals distrust of non-Muslim judges who, especially since the *Shah Bano* case³² some thirty years ago, have been making inroads into the allegedly sacrosanct status of Muslim personal law and that forms part of the background to how the ulema have been developing their alternative framework.

Still, after a series of reported “obnoxious fatwas”,³³ the Supreme Court of India’s decision of 7 July 2014 in the *Vishwa Lochan Madan* public interest litigation petition confirmed that decisions of the Dar-ul Qaza cannot have official effect. According to the Indian Supreme Court, they do not constitute a “parallel judicial system”, and are therefore not illegal, illegitimate and unconstitutional, as the petitioner had claimed. This short judgement by the Indian Supreme Court is not cognisant of the concern that Mathias Rohe expresses: that “it is possible for social pressure to reach a degree that makes implementation of rulings inevitable”.³⁴ Would an English Court then be free not to recognise the marriage of Muslim woman who marries after being divorced by a Dar-ul Qaza in India? At present that question receives a positive answer because, according to the applicable English legislation, the Family Law Act 1986, section 46 (1) and (2), it would not be seen as “effective under the law of the country in which it was obtained”. That situation would be consonant with the non-recognition in the UK of mar-

³⁰ GRILLO, *Muslim Families, Politics and the Law*, *op. cit.*, 18-19.

³¹ PEARL and MENSKI, *Muslim Family Law*, *op. cit.*, 45n; VATUK, *The Application of Muslim Personal Law in India*, *op. cit.*, 50-53; M. ROHE, *Islamic Law in Past and Present*, *op. cit.*, 391-396.

³² A.I.R. 1985 S.C. 945.

³³ See also M. ROHE, *Islamic Law in Past and Present*, *op. cit.*, 365-366.

³⁴ *Ibidem*, 394.

riages that take place subsequent to “non-proceedings” *talaq* divorces in South Asia generally (although the qualifying rules under section 46 (1) and (2) differ for ‘proceedings’ and ‘non-proceedings’ overseas divorces respectively). However, this question of recognition of various styles of *talaq* divorces, which affects those South Asian and other Muslims who try to function trans-jurisdictionally, constitutes a critical and recurrent question in British (and European) courts and tribunals. To that extent, Muslims can expect to face continued problems, as European fora remain suspicious of the evident privileging by Islamic law of the male right to divorce as well as the possibilities of divorcing by non-formal means. The sort of distrust of official courts and tribunals observed among Muslims in India was recently confirmed when the organisation of ulema, the Jamiat-Ulama-i-Hind, submitted in another public interest litigation case that Muslim personal law could not be scrutinised by the Indian Supreme Court.³⁵ Such distrust may also be present in the UK context whereby the ulema keep open and enable the prospect of a more ‘Islamic’ solution to women’s divorce. However, reports of misogynistic attitudes among ulema will not endear them to many Western-educated Muslim women.

I have suggested elsewhere that the rise of sharia councils and similar tribunals in the Anglospheric countries (UK, United States, Canada and Australia) as compared to the continental ‘civil law’ jurisdictions may have some relationship to the differently structured systems of private international law in either type of legal system.³⁶ The Anglospheric ‘common law’ countries tend to rely on the *lex fori* in dealing with disputes in their courts, and use private international law in a more limited sense to determine the validity of legal relationships that have been formed (or unmade) abroad. In this sense, they provide little space for sharia based arguments to surface in the courts unless it is to persuade the courts that they should take notice of a cultural or religious tincture colouring a particular practice. Meanwhile, the continental ‘civil law’

³⁵ *Muslim personal law founded on Quran, SC can't question it: Jamiat*, in *Times of India*, February 6, 2016.

³⁶ P. SHAH, *Shari'a in the West: Colonial Consciousness in a Context of Normative Competition*, in E. GIUNCHI (ed), *Adjudicating Family Law in Muslim Courts*, Abingdon, 2014, 16-17, 20.

countries, at least presumptively, seek to apply the foreign law to a dispute. Sometimes this can have unexpected consequences as in the rejection by French authorities of a full-fledged civil law adoption on the ground of the Algerian nationality of the child and the prohibition of adoption within Islam as his personal status law. Moreover, the European Court of Human Rights has held such a refusal to be compatible with France's human rights obligations.³⁷ This French case on adoption underlines how private international law can act to hold some foreign nationals under a form of Islamic law in these civil law countries. It provides endorsement, if in a rather extreme way, of Rohe's depiction of Islamic law as having a strong position in the areas of family law and inheritance where, as in Germany, they are decided based on the nationality of the persons involved.³⁸

By contrast, British and other Anglospheric legal systems have provided a more fertile ground for sharia councils and similar fora to emerge as part of the unofficial landscape. There are active attempts to involve sharia councils and like fora in more than just family matters. Reported cases reveal transnational activity in this regard as well as a consciousness of developments in other jurisdictions, such as the negative focus on sharia tribunals in Ontario, which can in turn determine how matters are played out in the UK.³⁹ Thus, reactions against the taking root of sharia can be seen in these countries too. While Canada withdrew in 2006 the statutory framework allowing Ontario's religious bodies to have official imprimatur of their arbitrations, in the UK, a Bill has been repeatedly introduced into parliament to bring equality law to bear on sharia council activities.⁴⁰ Many of the state jurisdictions of the

³⁷ *Harroudj v France*, Application no. 43631/09, judgment of 4 October 2012.

³⁸ M. ROHE, *Muslim Minorities and the Law in Europe*, op. cit., 19, 90.

³⁹ See *Bhatti v Bhatti* [2009] EWHC 3506 (Ch), concerning Ahmadi transnational arbitration through their own system and *Jivraj v Hashwani* [2011] UKSC 40, concerning Shia Ismaili litigation designed to ensure a safe playing field in the UK for their Conciliation and Arbitration Boards.

⁴⁰ A.C. KORTEWEG, J.A. SELBY, *Debating Sharia: Islam, Gender politics, and Family Law Arbitration*, Toronto, 2012 on Canada.

United States have gone a step further with legislation to prevent recognition of sharia as a foreign law in American courts.⁴¹

Certain socio-legal factors may also provide some explanation for the use if not the popularity of sharia councils. Non-registered marriages are officially not valid if they take place in the UK although, with some exceptions, they would be recognised in British legal systems if they have taken place in a jurisdiction where they are valid, which would include all South Asian countries. This rule of thumb will not necessarily prevent recognition problems if marriages have been conducted by telephone, by proxy, or are polygamous or temporary. Meanwhile, UK-formed *nikah*-only marriages, which appear to be a significant proportion of Muslim marriages,⁴² would not come under the matrimonial jurisdiction of the official courts if they run into trouble, although courts and social welfare authorities can still exercise vigilance over children. Some continental jurisdictions, such as France, Belgium, and the Netherlands demand registration prior to any religious marriage although, originating at a time when the civil authorities in these European states sought to supersede church jurisdiction, real enforcement of such provisions is unheard of today. Courts in Turkey, which also used actively to criminalise unregistered, so-called *imam nikah* marriages, now take a less strident position, a sign of the turn to Islamisation. British legal systems, meanwhile, simply tolerate unregistered marriages, by treating them as cohabitation arrangements, while the courts are still refusing to extend general recognition to such marriages *as marriages*.⁴³ Sharia councils in the UK, and those in other countries as far as they exist, may therefore be seen as a useful 'Islamic' port of call to unmake such unregistered marriages.

A proper consideration of the use by women of sharia councils should also keep in mind that especially when marriages are arranged

⁴¹ J. GRUNERT, *How Do You Solve a Problem Like Sharia? Awad v. Ziriah and the Question of Sharia Law in America*, in Vol. 40, Issue 3, *Pepperdine Law Review*, 2013, 695.

⁴² R. GRILLO, *Muslim Families, Politics and the Law*, *op. cit.*, 41-47.

⁴³ DOUGLAS, *Who Regulates Marriage? op cit.*, GRILLO, *Muslim Families, Politics and the Law*, *op. cit.*, 41-47.

between cousins or close kin,⁴⁴ incompatibility between them could be underplayed because of other priorities around marriage making. When such a relationship fails those around the couple may insist that the parties reconcile. Men can use the *talaq* option if they are bold enough to go against wishes of kinsfolk, while sharia councils may well provide a means for women who are courageous enough to get out of such marriages. In this way, they can use the 'Islamic' imprimatur from such councils as a trump card to show to their kinsfolk that ulema accept that the marriage has failed and should be ended. This kind of problem does not surface in the on-going scrutiny of sharia councils by parliamentarians, the government and the media. Researchers have not yet gone into the specific question of how kinship structures and their role in marriage making influences decisions to have recourse to sharia councils. The tendency among Muslims to conceptualise family matters in terms of their religious doctrines rather than as an outcome of customary processes and kinship relations (often consigned to the state of pre-Islamic paganism) prevents much sense being made out of these questions even by researchers.⁴⁵ Meanwhile, current research shielding Muslim women who use sharia councils by centring on their agency will not do much to salvage the role of institutions that have acquired a bad name publicly and which, in any case, can be seen as party to the subordination of women.⁴⁶ While it is known that women dissatisfied with individual sharia councils may shop around to see what sort of response they obtain from other similar bodies, there is a haphazard and contingent mixing of the official and unofficial laws in what appears to be the process of securing the maximum advantages from the legal options available. More research is required on this issue to examine closely just how the different legal orders are being accessed and utilised. Accounts of indi-

⁴⁴ A. SHAW, *Kinship, Cultural Preference and Immigration: Consanguineous Marriage among British Pakistanis*, Vol. 7 *Journal of the Royal Anthropological Institute*, 2001, 315.

⁴⁵ P. SHAH, *In Pursuit of the Pagans: Muslim Law in the English Context*, Vol. 45, No. 1 *Journal of Legal Pluralism*, 2013, 58.

⁴⁶ S. BANO, *Muslim Women and Shari'ah Councils: Transcending the Boundaries of Community and Law*, Basingstoke, 2012 expresses this tension well.

vidual cases are already emerging.⁴⁷ Many such cases, which reveal some kind of ‘interlegality’ between the official and unofficial levels, have a transnational dimension too which makes them important from the perspective of those thinking about problems from a private international law perspective.

One such case I dealt with as an expert witness during the course of 2013-14 involved a marriage contracted between a divorced woman from Muzaffarnagar in Uttar Pradesh and a widower of Pakistani origin living in Britain. They had had a telephone *nikah* based on which the woman obtained entry as a spouse to the UK. If one examines the guidance on the recognition of marriage and divorce issued by the UK’s Immigration Services Directorate, there is a clear statement that “a telephone marriage celebrated whilst one of the parties is in the United Kingdom will not be valid as telephone marriages are not valid in this country”. Notwithstanding that rule, the wife was somehow admitted to the UK as a spouse. After some ten years of marriage and the birth of four children, she sought a divorce and she managed to obtain a religious divorce from the Islamic Judiciary Board U.K. (IJB) based in Birmingham (operated by the Markazi Jamiat Ahl-e-Hadith, and most likely drawing support and funding from Saudi Wahhabis). During those proceedings, the husband cooperated and agreed to the divorce implying his acceptance that he was after all married. He could not have done otherwise as he had helped in the woman’s admission to the UK, lived with her, and had four children with her. To an Islamic judge, it would appear incongruous that he would deny being married to her and the alternative would be to regard their relationship as being tantamount to *zina*.

Yet the wife did not stop there and wanted to pursue financial provision in the official family court. Sharia councils do not generally decide on financial provision and issues related to children. The official courts remain attractive because of the high potential awards that can be expected from them especially if a marriage has lasted a number of years. It was when faced with legal action in an English court that the husband

⁴⁷ J. BOWEN, *How Could English Courts Recognize Shariah?*, in Vol. 7 *University of St. Thomas Law Journal*, 2011, 411, discussing *Uddin v Choudhury* [2009] EWCA Civ 1205.

began to deny the validity of the marriage. He argued that he had been compelled to enter into the marriage and, in any case, the wife had not been free to enter into a marriage with him because, at the time, she was already married to someone else. It was at this point that I was called in as an expert witness. There was evidence that the previous marriage of the wife had broken down prior to her marriage with the defendant husband. I also stated in my report, and later in court, that both as a matter of private international law and as a matter of English law there were grounds on which the judge could uphold its validity. Otherwise, the court would be going against the presumption in both Islamic and English law that there was a marriage on the basis of cohabitation and the four children of the couple. Additionally, both would have had to collaborate to facilitate the wife's admission to the UK and the husband had already accepted he was married while cooperating with the sharia council's decision on divorce. Unfortunately, it is not known to me what the family court judge ruled. The trial often goes cold once lawyers have what they want from an expert witness.

5. Concluding remarks.

This article briefly discussed some features of the private international law framework applicable in Britain, in comparison to that prevailing in European civil law countries where different assumptions apply. Most interestingly, for the present discussion, the difference between the two models is characterized by the recognition of foreign law as a fact in the former, whereas in the latter there are attempts to apply the foreign law, thus potentially maintaining South Asian Muslims among others in a 'foreigner' category for longer. The brief overview of the comparisons of family law regimes in South Asia shows in particular how the retention in post-colonial South Asia of personal law systems leads to more complicated scenarios which European legal systems find difficult to grapple with and often end up distorting further. This does not mean that the distinction between official and unofficial law is not maintained in South Asia too. However, the recent development of Dar-ul Qaza in India shows how difficult it remains for the

state to retain control of the legal field. Even where Muslims live as significant non-dominant populations, there may be lacking a spirit of mutual accommodation and adjustment in the legal field, whereby Muslim-only concerns and the spreading of a Muslim-centric framework are prioritized and it is expected that non-Muslim others ought to live according to these too. In the British and wider European contexts, the reactions are being felt sharply as these countries begin to withdraw whatever concessionary multiculturalist frameworks may have been previously erected.

There have been signs for several decades that Muslims, especially women, are taking recourse to the secular British courts. Those courts are able to furnish remedies to them which would not be available to them in Islamic fora. Muslim women can use the British court system to secure advantages that would not be available to them under any interpretations of Islamic law, which obviously remains quite male centred. As the welfare state recedes further and men are made more liable to support families they might otherwise take less interest in, there could well be greater resentment in future against submitting to British legal systems. The case cited above is not the only one of its kind I have dealt with where men make an effort, often in alliance with their families, to avoid divorced women gaining access to a portion of the property they may have shared during a marriage. Often this takes the form, as also in the case above, of denying the validity of marriage, a line of argument that lawyers may encourage given that more funds can be gained from pursuing legal arguments even when they ultimately prove to be without much weight.

There are suggestions that, like in India, Muslims in the UK are developing a parallel court system. The Indian experience reveals that the ulema have placed emphasis on the Dar-ul Qaza because they have taken the position that Muslims should not submit to the Indian legal system because it is secular and Hindu dominated. Although this seems an exaggerated position to adopt given the current situation and evidence, the prospect of a number of sharia councils functioning more like courts, and thus involving themselves in more than merely declaring the marital status of Muslim women, may not be a very distant prospect in the UK either. Some of the evidence cited in this article shows that al-

ready the distinction between what properly belongs to the realm of private international law and what is raised merely as a matter of cultural or religious rights before the legal system in the UK may be collapsing. Perhaps this will eventually be replaced by *first* greater pressure on British legal systems to accommodate Muslim alterity to a much higher degree and *second*, and arguably in tension with the first, the building of autonomous institutions that cover a greater range of legal areas to avoid submitting to the British courts. Thus, the attempt to contain Muslim alterity through private international law, which is currently widely advocated by European scholars, is bound to crumble. Having said that, there are also simultaneous efforts being made so that official law is less accessible to persons with modest means and the longer-term effects of such developments could be to reinforce the prospect that Islamic court systems fill the vacuum thereby created.

PUBLIC POLICY EXCEPTION, “RECOGNITION METHOD” AND REGULATION (EU) 1259/2010

THE CASE OF SPAIN AND OTHER EUROPEAN COUNTRIES

Gloria Esteban de la Rosa

SOMMARIO: 1. Introduction. 2. Notions of culture and cultural diversity. 3. Treatment of cultural diversity in Private International Law, in particular, in the European Union legislation and in case law of Member States. 4. Treatment by the authorities of the Member States. 5. Final consideration and proposed interpretation: the “Recognition method”. 5.1. General considerations. 6. Conclusions. 7. References.

1. Introduction.

There have been nowadays important changes in the international society that have been followed by a new definition of the traditional public policy (*ordre public*) notion in the field of Private International Law according to a new function of this system of law (communication channel between legal orders). Public policy can't be already considered an exception to foreign laws but as a tool for promoting the cultural diversity inside the European Union because it is a value in the current “international community” where persons are considered in the first position. International migrations have been one change key-factor (see below). As a result: “*the challenge of the new 21st century remains to define the human rights in capable terms of upholding the principle of equality based on the recognition of diversity*” (Nash, 1999).

As has been stated, international community can be defined as an overcoming notion of the traditional international society, to the extent

that there is place in it for values that are the hallmarks of mankind¹ and, specially, cultural diversity, which can be considered a value of every society that is considered advanced and, in particular, constituted by States that are members of the European Union. In this sense, it is important not to lose sight of the necessarily multicultural nature of the European Union, since these are countries comprising a plurality of people of different provenance and origin.

Therefore, we are talking about the “multiverse Europe” to refer that the particular paradox of Europe is to be a pluralist culture that exists only in its differences. On the other hand, it can be said that the current European Union regulations recognize cultural diversity as a value of society in line with the UNESCO Declaration of November 2, 2001. And in this sense, a number of policy instruments can be cited as having been adopted by European Union institutions for managing the diversity of cultures and the recognition of that diversity. In this regard, it includes the European agenda for Culture in a globalizing world [SEC (2007) 570]², and the plurality of times when European Union institutions have conducted demonstrations in favour of Intercultural Dialogue, specially highlighting the year 2008³.

Besides this, in 2010, the European Union Commission prepared a Report (for the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions), on the implementation of the European Agenda for Culture [SEC (2010) 904]⁴. Therefore, the recognition of cultural diversity as a value of the

¹ J.A. CARRILLO SALCEDO, *Influencia de la noción de comunidad internacional en la naturaleza del Derecho internacional público*, in *Pacis Artes. Obra homenaje al Profesor Julio D. González Campos*, vol. I, Madrid, 2005, 175 ff.

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on “A European agenda for culture in a globalizing world”, Brussels, 10.05.2007 [COM(2007 242 final)].

³ It has been considered the European Year of Intercultural Dialogue, in order to give expression and visibility to the best practices and processes of Intercultural Dialogue, so as to establish a sustainable strategy beyond 2008. Decision n° 1983/2006 / EC of the European Parliament and of the Council of December 18, 2006 (*Official Journal (European Union)*, L Series, n. 412 of 30.12.2006).

⁴ As stated in the said report, “Culture lies at the heart of the European project and is the anchor on which the European Union's “unity in diversity” is founded. The combination of respect for cultural diversity and the ability to unite around shared values

European Union regulations is undoubtedly present in the current process of integration, which, in turn, is related to the maintenance of peace.

We should go back to the original idea of diversity that makes the European Union in the context of the end of the Second World War (as well as other international organizations such as the United Nations) with a clear purpose of ensuring peace among historically enemy nations. This involved channelling the –said- "demand for recognition" (Ch. Taylor) of each of the people which originally integrated it (see below)⁵. Thus, the current European Community cannot be explained without the recognition of diversity (linguistic, ethnic, etc.) within its borders, as the Charter of Fundamental Rights (2000) and the current Treaty on the Functioning of the European Union does.

On the other hand, in any case, it is a responsibility shared with the Member States and, finally, it has a plurality of statements, among which are of special interest the scope of international private situations and, therefore, the receptivity of Private international Law of European origin to the value of cultural diversity (assumption of creation of multicultural societies). However, it may be appreciated a certain deficit in the treatment given to that diversity in the sense that it is focused, primarily, on the diversity which arises within the European Union (particularly, the diversity of rules), but not so much in the diversity which originates in the arrival of people from third countries (see below).

2. *Notions of culture and cultural diversity.*

It is not easy to define what is meant by cultural diversity, to the extent that it should not be considered that there is one single notion, applicable in all cases, regardless of the particular field in which it is used

has guaranteed the peace, prosperity and solidarity the EU enjoys. In today's globalising world, culture can make a unique contribution to a European Strategy for smart, sustainable and inclusive growth, promoting stability, mutual understanding and cooperation worldwide" (see introduction). *Documents COM* (2010) 390 final, prepared in Brussels on July 19, 2010.

⁵ CH. TAYLOR, *El multiculturalismo y "la política del reconocimiento"*, México, 1993.

or coined⁶. Therefore, it is based on the notion of cultural diversity (directly related to the idea of multiculturalism) which is used by the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of March 18, 2007. According to art. 4, 1º, cultural diversity refers to “the “manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies”.

On November 2, 2001, at the 31st Conference of UNESCO (United Nations Educational, Scientific and Cultural Organization), the Universal Declaration on Cultural Diversity had previously been adopted, whose Art. 1 states that cultural diversity is the common heritage of mankind. Furthermore, cultural diversity widens the range of options open to everyone; it is one of the roots of development, understood not simply in terms of economic growth, but also as a means to achieve a satisfactory intellectual, emotional, moral and spiritual existence (art. 3). And finally, it notes that the defence of cultural diversity is an ethical imperative, inseparable from respect for the dignity of the human person (art. 4).

Firstly, as stated in the field of anthropology, cultural identity and diversity are not isomorphic notions, i.e. they do not crystallize together. And secondly, the idea of multiculturalism can also be understood differently, not only from the point of view of the theory-policy, but also according to the particular scope of the regulations in which it is used. And, specifically, when it comes to private international law, cultural diversity and identity can be safeguarded differently, several proposals having been raised by the doctrine in this sense, both Spanish⁷ and foreign⁸.

⁶ M. PETTIT, *Génesis y evolución de los conceptos cultura y diversidad desde los acuerdos de la OMC (1994) hasta la Convención de la UNESCO sobre diversidad cultural* (2005), *Revista de Estudios Políticos*, nº 156, 2012, 209 ff.

⁷ P. ABARCA JUNCO, *La regulación de la sociedad multicultural*, in *Estatuto personal y multiculturalidad de la familia*, Madrid, 2000, 16 ff; A. QUIÑONES ESCÁMEZ, *El estatuto personal de los inmigrantes musulmanes en Europa: exclusión, alternancia y coordinación de sistemas*, in *XVII Jornadas de Profesores de Derecho internacional y Relaciones Internacionales* (1997), Madrid, 1999, 181 ff; A. RODRÍGUEZ BENOT, *Tráfico externo, Derecho de familia y multiculturalidad en el Derecho español*, in *ID. (dir.), La multiculturalidad, especial referencia al Islam*, Col. Cuadernos de Derecho judicial, VIII-2002, Madrid, 2002, 15 ff.

3. Treatment of Cultural diversity in Private international Law, in particular in the European Union legislation and in the case law of the member States.

3.1. Presentation.

When reference is made to the multiculturalism in the current European Union, the reflexion often focuses on the arrival of people from third countries during a specific recent historical age. However, we should not forget that the European Union itself is "one in the diversity" and the profound meaning of the community spirit (as stated by Jean Monnet, one of the founding fathers) was to be accepted, i.e., to be recognized, in the well known formula of Ch. Taylor about the "policy of recognition" (see below).

On the other hand, based on the concept of multiculturalism that matters for purposes of the Law and, in particular, of the Private International Law, it would be interesting to verify the treatment it receives from the perspective of European Union regulations and in particular, in the most recent European Union instruments. Records used by the Private International Law system both for European Union Member States and for the European Private International Law system itself to give answers to this multiculturalism located in the territory that comprises the European Union Member States are discussed below.

However, the presence of a multicultural society in the European Union is not simultaneously a unitary reality; it has a plurality of expressions, which, in turn, have been taken into account by the Private International Law system of each one of the Member States. In principle, the answers given by each Private International Law system of the Member States to the presence of nationals of third States in their respective territories was to reform the Private International Law systems in order to vary the criterion of nationality as a connection point of the conflict rule, stating instead, the usual place of residence.

⁸ E. JAYME, *Diritto di famiglia, società multiculturale e nuovi sviluppi del Diritto Internazionale Privato*, *Rivista di Diritto Internazionale Privato e Processuale*, 1992, 295-304.

This would thus ensure that personal and family relationships of foreigners residing in a European Union Member State are regulated in accordance with the law of that State, which speeds solving issues on the one hand and, on the other hand it prevents the application of foreign regulations that are considered incompatible with public policy. This has been the case in several European Union Member States, in particular, France and Belgium, among others, but also in Spain, because as it is known, the amendment of Art. 107 of the Civil Code by means of *Ley Orgánica* 11/2003 (Organic Law, by its Spanish abbreviation), which took place as an urgent measure in order to prevent the problems and shortcomings that were occurring for its application to cases of couples of Moroccan nationality⁹.

Such reform has been accompanied by the inclusion in the cited art. 107 of the Civil Code of a new paragraph which includes an extension of the rule that allows the application of the Spanish law when a number of circumstances occur. The application of national common law of the spouse as the first connection criterion is maintained, but it is accompanied by an extension of the rule that, in practice, has worked as a general rule and the rule of conflict as an exception¹⁰. Thus, it has allowed the Spanish judicial authorities to discontinue the application of the content of the Moroccan Family Law, given its prospective incompatibility with public policy, and instead, to dissolve the marriage according to the law of the forum¹¹.

⁹ P. ABARCA JUNCO, "Un ejemplo de materialización en el Derecho internacional privado español. La reforma del art. 107 del Código civil", in *Pacis Artes. Obra homenaje al Profesor Julio D. González Campos*, Tomo II, Madrid, 2005, 1096 ff; M^a D. ADAM MUÑOZ, *La modificación del art. 107 del Código civil y su incidencia en cuanto a la protección del derecho a la no discriminación por razón de sexo*, *Ámbitos. Revista de Estudios de Ciencias Sociales y Humanidades*, nº 11, 2004, 2nd period, 81 ff.

¹⁰ Art. 107 of Spanish Civil Code has been modified recently by the 15/2015 Act (*Official Gazette of Spain* of July 3, 2015). According to the new provision, separation and divorce are governed by the European or Domestic Private International Law rules.

¹¹ And in this regard, we may highlight the Judgement of the Court of First Instance of Nules of December 30, 2005 [G. ESTEBAN DE LA ROSA, K. OUALD ALI, T. SAGHIR, *Reconocimiento en Marruecos de la decisión españolas de divorcio? (sobre la sentencia del JPI de Nules, de 30 de diciembre de 2005)*, *Revista electrónica de la Facultad de Derecho de la Universidad de Granada*, January 8, 2007, 1 ff.].

Contributions of the doctrine on the receipt of the modifications made in some of these countries with Islamic traditions in European Law have become very frequent¹². Such changes have been intended to allow the application of Law in these countries by the European authorities, considering that the current wording of some of its provisions (for example, the Moroccan Family Code 2004) is not inconsistent with international public policy¹³.

It should be noted, on the other hand, that the application of Muslim family law is personal in nature, i.e. it binds Muslims despite not residing in the country of their nationality. It is a kind of protection of the national law to all its nationals residing abroad¹⁴.

3.2. *Cultural diversity and European Private international Law. Methods and tools: Art. 10 of Council Regulation 1259/2010.*

Without prejudice to the treatment given by national regulations (Private International Law systems) of each Member State to the issue of cultural diversity existing in the current European society, it may be mentioned the position that has also been taken by the European Union legislature of Private International Law on the treatment of said diversity. In special, the art. 10 of the Council Regulation (EU) 1259/2010 of 20 December 2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation¹⁵.

The said provision points that: “*Application of the law of the forum. Where the law applicable pursuant to Article 5 or Article 8 makes no*

¹² A. QUIÑONES ESCÁMEZ, *La réception du nouveau Code de la famille marocain (Moudawana, 2004) en Europe*, *Rivista di Diritto Internazionale Privato e Processuale*, n° 3, 2004, 887-888.

¹³ This is how the reform that has taken place in Morocco can be considered, specifically in relation with the forms of dissolution of marriage, which makes it no longer necessary to apply Art. 107 of the CC after its reform by the OL 11/2003, as there are new ways to dissolve a marriage which are not inconsistent with Spanish public policy (G. ESTEBAN DE LA ROSA, T. SAGHIR, *Reconocimiento en Marruecos de las decisiones españolas de disolución del matrimonio (en el marco de las relaciones hispano-marroquíes)*, in AAVV, *Inmigración e integración de los extranjeros en España*, Madrid, 2009, 477 ff).

¹⁴ M^a-C. FOBLETS, J.-Y. CARLIER, *Le Code marocain de la famille. Incidences au regard du droit international privé en Europe*, Bruxelles, 2005.

¹⁵ *Official Journal (European Union)*, Serie L, n° 343 of December 29, 2010.

provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the forum shall apply". This exception (public policy) will be practically operational in general when it comes to the implementation of the national system of an Islamic countries, because it may be considered that there is a difference between men and women in everything related to family relationships, as it has already been highlighted by jurisprudence of the French Court of Cassation in relation to petitions for dissolution of marriage filed by nationals of countries with which France has a Convention (Algeria, Morocco)¹⁶. In such cases, it is considered that such regulations do not allow access to the dissolution of marriage to men and women on equal terms.

It is stated that the said art. 10 is directed, specifically, to married couples of Muslim origin, not allowing the application of foreign regulations when there is no dissolution of marriage or when it is more burdensome for one of the spouses¹⁷. On the other hand, it is a provision that, although inserted within a rule of European Union origin, has been widely criticized. It is considered a true innovation of the European Private International Law system, because it does not allow public policy to fulfil its function through the analysis of a particular outcome caused in a particular case by the application of foreign Law, and it makes a judgement in the abstract of his incompatibility with public policy.

In fact, it is considered different from the classical *ordre public* exception that is regulated in art. 12 of the Regulation ("*Public policy. Application of a provision of the law designated by virtue of this Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum*").

Therefore, art. 10 of Rome III Regulation does not allow public policy to fulfil its function and the specific circumstances of the case to be analysed, as it happens for example in German jurisprudence, in particular, the judgement of the *Oberlandesgericht* (Higher Regional Court

¹⁶ F. MONEGER, *Le Code de la famille marocain de 2004 devant la Cour de Cassation*, *Revue Critique de Droit International Privé*, 2014-2, 247 ff.

¹⁷ U.P. GRUBER, *Scheidung auf Europäisch – die Rom III-Verordnung*, *Praxis des internationalen Privat- und Verfahrensrechts*, 2012-5, 381 ff.

of Appeals) of Munich, dated September 19, 1988, considering that the divorce requested by the spouses is not incompatible in accordance with their national law (unilateral repudiation), to the extent that it has been accepted by the wife and, on the other hand, this form of dissolution of marriage exists in the German legislation¹⁸.

The decisions of the *Oberlandesgericht* of Hamburg, dated May 21, 2003 and of the *Oberlandesgericht* of Koblenz, on September 19, 2012 are also of interest. In them, there was discussion on the petition for “dissolution of marriage in exchange for compensation” or the woman foregoing something. Specifically, there was discussion of the possibility of the woman to forego the dowry, in exchange for the dissolution of the marriage. This was not considered incompatible with public policy¹⁹.

German case law has considered that in such cases, a reduction in the dowry in this mode of dissolution of marriage is in order, as it is not deemed incompatible with public policy²⁰. However, the doctrine understands that this form of dissolution of marriage is discriminatory, because it is only provided for the case of women and, therefore, it is not admissible in accordance with art. 10 of the Rome III Regulation, which also prevents the use of the “theory of data” (“*datum* theory”)²¹.

In any case, art. 10 of the Rome III Regulation leads to an abstract control on the compatibility with the public policy of foreign law applicable to divorce²². The European legislature did not want the Islamic *sharia* Law to be applied²³. This conception recalls largely the Savignian notion of public policy, understood as defense mechanism of Christian civilization against Ottoman. And, for this reason, reference should be made to the critic (made by the doctrine) of the poor values

¹⁸ Commented by E. JAYME in, *Praxis des internationalen Privat- und Verfahrensrechts*, 1989, 23 ff.

¹⁹ M.-PH. WELLER, *Die neue Mobilitätsanknüpfung im Internationalen Familienrecht-Abfederung des personalstatutenwechsels über die Datumtheorie*, *Praxis des internationalen Privat- und Verfahrensrechts*, 2014-3, 232, note 175.

²⁰ However, this position is criticized by the doctrine. W. WURMNEST, *Die Brautgabe in Bürgerlichen Recht*, *Zeitschrift für das gesamte Familienrecht*, 2005, 1878 ff.

²¹ M.-PH. WELLER, *op. cit.*, 233.

²² M.-PH. WELLER, *op. cit.*, 232 (note 171).

²³ U. P. GRUBER, *op. cit.*, 381 ff.

of the Private International Law and to the fact that at present cultural diversity is also a value for the Private International Law.

In these cases, the possibility of a teleological reduction of the rule is proposed, in such a way that it can be considered that the regulation is not inconsistent with public order, if the woman accepts the divorce²⁴. On the other hand, the cases are already reaching to the European Court of Justice and, in particular, it might mention the recent preliminary ruling raised by the *Oberlandesgericht* (Provincial High Court) of Munich, the 11 June 2005 (As. C-281/15, *Soha Sahyouni v. Raja Mamisch*)²⁵. Lastly, it is of interest to analyse its substantive scope, that is, the issues that fall under this new rule of the (European) Community system of Private International Law, in so far as it has also been discussed²⁶.

4. Treatment by the authorities of the Member States.

4.1. Implementation of the Moroccan Family Code and the principle of equality.

We can quote judgements pronounced by the authorities of the European Union in the field of Private International Law, which have also specifically solved issues which are increasingly frequently raised, where the element or “cultural factor” is present. In this sense, the pronouncements of judicial authorities of the European Union Member States on matters where the stakes the application of a foreign system of Islamic tradition (in particular, Moroccan Family Law) is at stake, begin to be significant, not only numerically, but also qualitatively. However, the questions that have generated most interest were un-

²⁴ See judgement of the *Oberlandesgericht* of Hamburg, dated May 7, 2013, commented by T. HELMS, *Konkludente Wahl des auf die Ehescheidung anwendbaren Rechts?*, *Praxis des internationalen Privat- und Verfahrensrechts*, 2014-4, 334 ff.

²⁵ *Official Journal (European Union)*, L Serie, n. 343.

²⁶ Please see, in particular, W. WINKLER v. MOHRENFELS, *Die Rom III-VO-Teilvereinheitlichung des europäischen internationalen Scheidungsrechts*, *Zeitschrift für Europäisches Privatrecht*, 2013, 699 ff.

doubtedly polygamy and repudiation, being these, at least in appearance, most likely to be incompatible with public policy²⁷.

And, specifically, knowing whether the current regulation of dissolution of marriage in the mentioned Moroccan Family Code is incompatible with public policy is an issue that generates interest, as it contravenes the principle of equality between men and women, by providing different procedures for the dissolution of marriage for each. And, specifically, in the case of dissolution under judicial supervision, case law indicates that equality is not granted in the access (to man and woman) to the above dissolution²⁸.

And in this sense, we may quote two judgements of the French Court of Cassation, of October 23, 2013 (ns. 12-25802 and 12-21344), commented by the doctrine, criticizing the position held by the High Court, which considers that the dissolution of marriage under judicial control that is included in both the new Moroccan Family Code and the Algerian Family Code is incompatible with French public policy²⁹.

In both cases it was possible to apply Foreign law, corresponding to the nationality of both spouses (Morocco), as two bilateral covenants subscribed between France and Morocco and Algeria were in force, and allowed the implementation of the common national law, despite the entry into force of Regulation (EU) n. 1259/2000 on the law applicable to the dissolution of the marriage.

On the other hand, the notion of public policy of proximity is used, so that it is not accepted, for example, for the husband, of Moroccan nationality and resident in France, to file for dissolution of marriage under judicial supervision, if he could have requested it under grounds of disagreement. This case is incompatible with public policy, given that this person should have filed for divorce under a form of dissolution of marriage that exists in his national legislation and which is more compatible with those existing under French Law.

²⁷ M. CHECA MARTÍNEZ, *Reconocimiento de la poligamia y del repudio islámicos en perspectiva comparada: a propósito de la Mudawwana marroquí*, in J.V. GAVIDIA SÁNCHEZ (ed.), *Inmigración, familia y Derecho*, Madrid, 2011, 245 ff.

²⁸ K. OUALD ALI, *La disolución del matrimonio en el Derecho marroquí* in, J.V. GAVIDIA SÁNCHEZ (dir.), *Inmigración, familia y Derecho*, Madrid, 2011, 289 ff.

²⁹ For a summary of such decisions, please see *Revue Trimestrielle de Droit civil*, 2014-1, pp. 94-95. Widely discussed by F. MONEGER, op. cit., 247 ff.

Spanish case law uses public policy when it comes to the revocable dissolution of marriage and, in particular, in a Judgement of the DGRN (General Directorate of Registries and Notaries) of October 26, 2006, it considers that this form of dissolution of marriage is incompatible with public policy, because it violates the principle of stability of the civil status of the person, as we are unable to find out if the person is divorced or not in this type of procedure for dissolution of marriage³⁰.

Also note the interesting judgement of the Court of Barcelona, dated April 6, 2000 (section 12), indicating that Moroccan Law is not inconsistent with public policy, but other than that followed by the Spanish legislature regarding the dissolution of marriage after the Law of 1981. The cases that were raised to the Spanish authorities in which the Moroccan Family Code is applied are already numerous, in accordance to the art. 107 of the Civil Code, without being considered that this is a regulation incompatible with the public policy.

On the contrary, the recent sentences of the Provincial High Courts in Spain are a good example because they repeatedly consider that there is no such incompatibility neither in the case of dissolution of the marriage by the existence of disagreements (Art. 94-97 of the Family Code) neither by the causation of damage to the woman (Art. 98 of the Family Code). They are two different methods of dissolution of the marriage provided in the current Family Code of Morocco.

However, the entry into force of the Regulation 1259/2010 has changed this situation (see *supra*) by providing that, in case of absence of choice of applicable law, the required law to the common nationality of the spouse is applied. In this case, the Spanish judicial authorities apply the Spanish law. Particularly, the art. 8 of said Regulation provides that: "Applicable law in the absence of a choice by the parties. In the absence of a choice pursuant to Article 5, divorce and legal separation shall be subject to the law of the State: (a) where the spouses are habitually resident at the time the court is seized; or, failing that (b) where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that State at the time the

³⁰ *Official Gazette of Spain* of December 13, 2006.

court is seized; or, failing that (c) of which both spouses are nationals at the time the court is seized; or, failing that (d) where the court is seized”.

Concerning the so-called “consolation dowry” (*mutʿa*) is also considered incompatible with the public policy, but, on the contrary, its equivalence with the alimony is established, existing in the common civil regulation³¹. However, it should be recalled that its function is to indemnify. We may not consider the anticipated impact of public policy, as the Judgement of the Provincial Court of Murcia nº 166/2003 (section 1) of May 12 suggests³².

Finally, the Belgian case is interesting, which states that contrary to the notion of a secular State defended in France, in the formation of the Belgian State they have taken another model in which the secular is just another unit together with the religious and other forms of expression of society and its group. It is called “consociational political model”, which leads to outcomes of interest in the field of Private International Law, to the extent that some situations are handled without taking into account the presence of the rules of conflict, and giving a direct response to the existence of a person of some of these connectives (including Muslims)³³.

4.2. *Compatibility of the regulation of the dowry with ordre public?*

The issue on compatibility in the regulation of the dowry with public policy in Islamic legal systems is of interest, and in this sense, it has been proposed to make use of the so-called “theory of data” to allow the consideration of the relevant Law corresponding to the origin of the

³¹ Judgement of *Audiencia Provincial* (Provincial Court) of Gerona (section 1^a), October, 2nd (nº 413/2014), in interpretation of art. 84 of Family Code of Morocco.

³² J. CARRASCOSA GONZÁLEZ, *Crisis matrimoniales internacionales: Foro de necesidad y Derecho extranjero*, *Revista Española de Derecho Internacional*, 2004-1, 225 ff.

³³ L.L. CHRISTIANS, *Les références belges à l'ordre public comme standard de régulation et révélateur de conflits de valeurs dans le statut des personnes musulmanes en dehors du Droit international privé: l'exemple belge*, in N. BERNARD-MAUGIRON, B. DUPRET (dirs), *Ordre public et Droit musulman de la famille en Europe et en Afrique du Nord*, Brussels, 2012, 463.

person (even though the person has changed nationality, and holds that of the Forum) in such cases³⁴.

Use of the theory of data by the German jurisprudence cited *above* highlights the open mind that allows foreign legislation that has close ties with the matter, to be taken into account to give effect to the provisions of domestic substantive Law. In this sense, not only German judicial authorities do not consider the case to be of an unknown establishment, but they use the so-called “theory of data” (*datum* theory) to consider, for example, the existence in Iranian Law of clues that determine the amount corresponding to the woman in concept of dowry, in case this has not been determined at the time of marriage.

Or they even consider a reduction of the dowry, if the woman has requested the dissolution of marriage in exchange for a waiver of the dowry. However, there are a number of critical positions regarding this interpretation made by case law. Finally, we must also mention the decision of the *Bundesgerichtshof* (German Supreme Court) of October 6, 2004, on the dissolution of marriage requested by the Iranian wife³⁵.

4.3. *Other institutions of the Moroccan Family Code: kafala.*

Other issues of interest are also those arising from the possibility of using the procedure for family reunification in the case of EU Member State nationals under Directive 2004/38, in the case of children who have been taken in foster care in *kafala*. On this issue, the Communication from the Commission to the European Parliament and the Council of July 2, 2009, entitled “*Guidance on aspects with a difficult transposition and application of Directive 2004/38*”, states that children taken in temporary or foster care and parents exercising temporary care are entitled to avail of the rights conferred thereto by this directive based on the solidarity of the link established in each case³⁶.

³⁴ M.-PH. WELLER, *op. cit.*, 225 ff.

³⁵ TH. RAUSCHER, *Iranischrechtliche Scheidung auf Antrag der Ehefrau vor deutschen Gerichten* (zu BGH, 6.10.2004), *Praxis des internationalen Privat- und Verfahrensrechts*, 2005-4, 313 ff.

³⁶ Please see European Parliament Resolution of April 2, 2009, on the implementation of Directive 2004/38 / EC on the right of citizens of the Union and their family

And in this sense, the judgement of the *Court of Cassation* of Italy (for the unification of the doctrine) of September 16, 2013 (No. 21108), believes that Italian nationals who wish to transfer the child taken in *kafala* in Morocco to Italy may do so in accordance with the said Directive³⁷. It considers particularly that a resolution would now be out of place as the circumstances related to the case which led to the resource have changed.

4.4. *Distribution of widow's pension in the case of polygamy?*

On the other hand, the issue of public policy has been also presented when the wives of the deceased apply for the widow's pension after his death in Spain. They are cases that have been resolved in very disparate ways by *Tribunal Superior de Justicia* (High Court of Justice) in Spain. In this regards, we may quote cases in which the pension to both widows is recognized (polygamous marriage), and other in which, on the other hand, the second marriage is considered null and, therefore, that pension could not be perceived.

In the first sense suggested, specifically, the STSJ (High Court of Justice) of Galicia of April 2, 2002 (appeal no. 4795/1998) recognizes the widow's pension to both wives, of Senegalese nationality, of the deceased, of the same nationality, by employing—clearly—the notion of attenuate public policy. In particular, it is considered that public policy exception must act in a less rigid form (according to the jurisprudence of the Supreme Court) and, therefore, in the benefits context of the Social Security, it must be recognized the legal effects resulting from the marriage bond contracted abroad. However, the situation of polygamy does not allow qualifying for the full widow's pension for both widows, but it proceeds to its distribution.

The STSJ of Madrid of July 29, 2002 (appeal n. 3180/2002) also recognized the right of both widows of a Moroccan worker to receive a percentage of widow's pension. It was applicable the Conven-

members to move and reside freely within the territory of Member States (2008/2184 (INI))

³⁷ The decision is published (full text) in *Rivista di Diritto Internazionale Privato e Processuale*, 2014, 144 ff.

tion on social security between Spain and Morocco of November 8, 1979³⁸. The art. 23 provides that: *“the widow’s pension caused by a Moroccan worker will be distributed in equal parts and definitively between those who proved to be, according to the Moroccan legislation, beneficiaries of said pension”*.

However, the question of the concrete distribution of the pension arises, which must be done according to the Spanish legislation, i.e., calculated with respect to period of marital coexistence. And, in this case, it is the 50% of the pension for each of the wives.

On the other hand, the STSJ of Catalonia, n. 5255/2003, of July 30, considers that, in the case of polygamous marriage contracted in Gambia, only is treated as the spouse the wife who with the deceased contracted the first marriage. The polygamy referred to a substantial element is rejected, which is considered of public policy, by deriving directly from the Constitution and the human rights conventions. The public policy model set out in the Constitution, as in the case of the European cultural environment and in Christian-rooted, determines the monogamy and none of the European Union countries accepts the celebration of a polygamous marriage³⁹.

Finally, the STSJ of Valencia (n. 1821/2005) of June 6, 2005 adopts a similar position regarding the situation of two widows of the deceased, who contracted arranged marriage in the municipality of Tmixco (Mexican state of Morelos), without having been dissolved his previous marriage. Therefore, the second marriage is null and incompatible with public policy. It should be mentioned, in any event, the incoherence of this argument, as the nullity of a second marriage prevents the employment of the public policy exception to prevent that having implications in the forum. We must only allege the public policy when it is a valid relation, which cannot have implications in the forum as it is in contradiction to the higher principles or values of the regulation in a particular moment in time (present of the public policy).

³⁸ *Official Gazette of Spain* n° 245 of October 13, 1982.

³⁹ P. JUÁREZ PÉREZ, *Jurisdicción española y poligamia islámica: ¿un matrimonio forzoso?*, *Revista Electrónica de Estudios Internacionales*, 2012, 1 ff.

5. *Final considerations and proposed interpretation: the “Recognition method”.*

5.1. *General considerations.*

The progressive recognition of cultural diversity within the regulations and by international bodies (UNESCO) makes this diversity a value that must also be taken into account by the Private International Law system and it can lead to a renewal of regulation methods and techniques, which can also represent a renewal of the function of this system of rules. No longer does it only consist in giving a satisfactory response to international private situations, but also to channel (through its specific techniques and tools) values prevailing in the international community and ensuring the full effectiveness of human rights.

Along with this, the present day society, and in particular within the European Union, has also evolved into a multicultural society in which people who coexist have not all been socialized in the same territory, there are also others who come from other territorial spaces and places in the world, whose usual place of residence is within the said European society⁴⁰. Therefore, multicultural spaces have been created in places where previously there were only monolithic societies. This has forced us to conduct a process of adapting the techniques and tools traditionally used by the European Union legislature to respond to such multicultural societies.

On the other hand, the foreign element may have become diffuse, to the extent that many people born abroad have acquired the nationality of the forum, but Private International Law questions still arise, and solutions must be provided, being this a situation of change of national law⁴¹. Again, European case law is proof of such modification of personal status and of the need for the Private International Law system (European) to provide answers to such questions, highlighting most notably the efforts of the German case law cited *above*.

⁴⁰ M^a T. REGEIRO GARCÍA, S. PÉREZ ÁLVAREZ (dirs), *Gestión de la diversidad cultural en las sociedades contemporáneas*, Valencia, 2014.

⁴¹ M.-PH. WELLER, *op. cit.*, 225 ff.

Now, another different question is that the successful implementation of a foreign regulation is achieved in all cases, given also the multiplicity of criteria that exist in each of the European Union countries on the judicial function, which is highlighted when we speak of the Private International Law system⁴². To cite just a few examples, we should note the difficulties faced by the French authorities to determine the content of foreign Law (especially in the legislation of Islamic countries) and the ease with which German authorities apply it, for whom getting to know the content of the foreign legislations of any of these countries has no difficulty, focusing the issue on finding innovative solutions that allow granting a satisfactory solution in such cases.

On the other hand, we must quote the Belgian case, in which it has been considered that the constitution of this State allows the formation of different groups, which are on an equal footing, and, therefore, the secular nature of the State is just another one in conjunction with the religious outlook of the communities living therein (when compared with the French case) and, thus, the religious factor is considered within the regulation system, i.e., it has become internalized in the domestic substantive regulations, the PIL therefore not having to be applied.

Finally, Spanish decisions highlight the important ignorance that still exists on the content of such regulations and, in particular, on the Law of Morocco, despite the proximity of the two countries, not only geographically, but also on a personal level⁴³. However, the role of Private International Law, which is to promote the spatial continuity of decisions and to serve as a channel of communication between different regulations, must be fulfilled now more than ever.

Otherwise, on the one hand the creation of multicultural societies will not be enabled, and on the other hand, the recognition of European decisions in the country of origin of those migrating will be prevented. And therefore, a proposed interpretation of the whole PIL system is made according to the “recognition method” (see *below*).

⁴² N. BERNARD-MAUGIRON, B. DUPRET (dirs), *Ordre public et Droit musulman de la famille en Europe et en Afrique du Nord*, Brussels, 2012.

⁴³ G. ESTEBAN DE LA ROSA, *Implementation of the Moroccan Family Code by Spanish Authorities to immigrant women (through the Recognition Method)*, *Journal of Civil and Legal Sciences*, vol. 3, n° 2, 2014, 1-9.

5.2. The “Recognition method”.

The personal and family situations of migrants must be dealt with by the System of Private International Law, given that a foreign element is present. It is worth pointing out that currently a methodological renovation of Private International Law is taking place, especially after the second half of the twentieth century, where a collapse in the leadership previously enjoyed by certain States in the world order took place on the one hand and, on the other, the world became divided into symbolic units (sometimes in preference to people)⁴⁴.

This renovation can also be linked to the current conformation of a micro-system within the legislation, the “social law of immigration”, which effects Private International Law, obliging a reconsideration of its function and, above all, its traditional regulatory techniques, with the aim of verifying whether an adequate response to the needs of the people who migrate, in particular regarding their social integration, is offered⁴⁵.

This question can also be found in the framework of a concrete political theory and/or philosophy, given that the system of Private International Law is no stranger to either the social demands or to the principle constructions and reflections on these demands. For this reason the “Theory of Recognition” offered by Charles TAYLOR seems to be the one to follow. This author refers to “*the overwhelmingly monological tendency of the mainstream of modern philosophy*” before cultural communities who wish to survive and who demand “recognition”, because they have realized that the identity of each person conforms to

⁴⁴ As A. Pérez-Agote points out, this divide took place once all aspiration to understand the sense of each of the “functional systems” which currently make up the world was lost. These systems interact as complex systems and do not allow predictions over the consequences (effects) that they may have over some aspects [*In the global age: breaking equations and dichotomies of modernity* in, A. ARIÑO VILLARROYA (ed.), *The crossroads of cultural diversity*, Madrid, 2005, 313 onwards].

⁴⁵ The conformation of a social immigration law is related to a concrete understanding of the legislation proposed by G. GURVITCH, *La idea del Derecho social*, Granada, 2005.

and is molded by, in part, their recognition or lack thereof (false recognition)⁴⁶.

So that the current system of Private International Law can respond to the social question of immigration it must be –above all– a law which supports the needs of the people who migrate⁴⁷. Its aim is to promote the spatial continuity of a person's family relationships, both in the country of origin and of habitual residence overseas. Thus, the "recognition method" depends on there being a general clause, which allows interpretation in accordance with the principle of social integration, in the system in question⁴⁸.

The Spanish authorities ought to verify whether the relationship which they are to enter into the Forum would be recognised in the immigrant's country of origin and, if not, they must verify and consider the interests in play and the fairness of the result. That is, the authorities must examine the interests of those involved in order to decide, through the elimination, as far as possible, of difficulties concerning the recognition and enforcement of foreign judgements (in accordance with Spanish law) whether the foreign law must be applied to promote extra-territorial recognition of the (Spanish) decision in the immigrant's country of origin.

Note that the "recognition method" does not require a reform of Private International Law, rather its interpretation in accordance with the principle of social integration when a private international situation re-

⁴⁶ For this author, the notion of recognition is linked to the current concept of personal dignity (versus the concept of honour, abolished following the decadence of the hierarchical society) and is a vital human necessity (CH. TAYLOR, *op. cit.*, 45, 52, 91 and 97-98). And, on the other hand, the identity "indicates something equivalent to the interpretation of who a person is and of its fundamental defining characteristics as a human being" (43).

⁴⁷ It has been noted that "mass immigration", most importantly since the end of the last century, calls for a transformation of the system of Private International Law, which must give safe and simple responses (D. MAYER, *Evolution du statut de la famille en droit international privé*, *Journal du Droit International*, 1977. p. 453). From a different perspective, along the same lines, it is believed that the solutions must be efficient (H. MUIR WATT, *Le modèles familiaux à l'épreuve de la mondialisation (aspects de Droit international privé)*, in A.-L. CALVO-CARAVACA, J.L. IRIARTE ÁNGEL (eds). *Mundialización y familia*, Madrid, 2001, 12).

⁴⁸ G. ESTEBAN DE LA ROSA, *La integración social de los inmigrantes desde la perspectiva del sistema (español) de Derecho internacional privado*, in J.V. GAVIDIA SÁNCHEZ (ed.). *Inmigración, familia y Derecho*, Madrid, 2011, 155-179.

lated to immigration is submitted to the judicial authorities or other orders. Some cases in the Spanish case law can also be considered here, in which judicial authorities value the constitution of legal relations in the forum in response to the possibilities that have to be accredited in the immigrant’s country of origin.

In this regard, the Sentence of the Appeal Court of Barcelona, no. 381/2006 (12th Section) of 8 June is noteworthy, as it considers the appeal filed and partially reverses the judgment at first instance, based on a different rationale law than that relied on by the appellant, in accordance with the Family Code⁴⁹. The Appeal Court considers article 128 of the Family Code in order to assess whether the Spanish decision will be recognized in the country of origin of the former spouses, of Moroccan nationality⁵⁰. If the Family Code of the dissolution of marriage is applied, the Spanish decision will be recognised in Morocco (art. 128)⁵¹.

Finally, the recognition method represents a limit to the performance of peremptory norms (that protect fundamental rights), given that social integration is measured by Private International Law in the spatial continuity of an immigrant’s family and personal relationships, both in their country of origin and in their country of habitual residence overseas.

⁴⁹ Aranzadi Database, JUR 2007\19193.

⁵⁰ G. ESTEBAN DE LA ROSA, K. OUALD ALI, T. SAGHIR, *Revista Española de Derecho internacional*, 2007-I, 304-307.

⁵¹ Article 128 of the Family Code allows for the accreditation of foreign decisions over the dissolution of marriage, even if the Family Code was not applied, as long as the causes set out in Moroccan law were respected, in accordance with the case law interpretation (M. LOUKILI, *El reconocimiento de decisiones en Marruecos en el ámbito del Derecho de familia*, in AAVV. *Inmigración e integración de los inmigrantes desde una perspectiva hispano-francesa en el contexto de las actuales políticas comunitarias sobre inmigración*, Granada, 2010, 285-304). However, art. 128 must be considered in relation to articles 430-432 of the Civil Procedural Code, as well as to the Convention between Morocco and Spain of 30th May 1997, on judicial cooperation in civil, trade and administrative matters (*Official Gazette of Spain* n. 151, 25 June 1997). A. OUNNIR, *La reconnaissance et l'exécution des jugements étrangers au Maroc*, in AAVV. *Estudios e Informes sobre la Inmigración extranjera en la provincia de Jaén (2005-2006)*, Granada, 2008, 451 ff.

5.3. *Ordre public and Recognition method.*

Therefore, it can be said that within the framework of the progressive conformation of immigration and multicultural societies, the understanding of the role of public policy is also changing, inasmuch as it acts—in any case—once has been presented and known the contents of foreign law (and, therefore, it cannot be considered the early action of public policy), rejecting its application if it is contrary to the higher values or principles of regulations of the forum as they cannot be interpreted by taking into account the foreign cultural specificity (legal).

And, with regard to the Private International Law system, the recognition method stands as a limit to the required application of the law of the forum, as the functional nature of the notion of integration, consisting in the spatial continuity of personal and family relationships of people who migrate (in countries of origin and residence abroad). In this regards, the doctrine refers to the public policy understood as concern of material justice⁵².

The regulation of dissolution of the marriage in the current Family Code of Morocco (2004) could be given as an example. It is known that man and woman can use two different proceedings to request the dissolution of the marriage against the judicial authority, so that the first one can submit the request by *talaq* (as well as the woman in specific cases) and the second one by *tatliq* (and also the men on a supposed case).

Moreover, the new Moroccan Family Code has made some relevant modifications that does not allow to considerate at the present time that said regulation is unlawful against the essential contents of the fundamental right to equality between man and woman (art. 14 of the Spanish Constitution), as the Moroccan legislator has planned that the dissolution of the marriage also can be requested by both by the same way, allowing to take place without the woman has to meet more burdensome requirements.

Therefore, the Moroccan law must be applied when the conflict-of-law rule demands it, whereas it is incompatible with the Spanish public

⁵² H. GAUDEMET-TALLON, *Cours général. Le pluralisme en Droit international privé : richesses et faiblesses (le funambule et l'arc-en-ciel, Recueil des Cours*, vol. 312, 2005, 275.

policy because, on the contrary, the essential contents of the right to equality is interpreted according to the (cultural) standards of the Islamic law, it is understandable that these differences have been maintained (A. Ounnir), that they are present in the form in which the dissolution of the marriage is conceived⁵³. But this hasn’t stopped to include new criteria that allow requesting the dissolution of the marriage to both spouses through the same proceedings, and alleging the existence of disagreements (art. 97 of Moroccan Family Code).

On the other hand, if the Moroccan law is applied to the dissolution of the marriage, the Spanish decision is recognized in said country according to the art. 128 of the Family Code of Morocco. And, finally, in any case, by stopping applying the foreign law, their specificities in order can be taken into consideration, for example, to promote the recognition of a decision in the country of origin of the immigrant⁵⁴. It’s necessary to know the Private International Law system of said foreign country and to encourage, thus, the intercultural communication between the regulations of origin and those from the country of residence of the foreign immigrant.

So the lack of appeal to the public policy exception (and its use, rather, as safeguard clause) allows the consultation of the foreign law—even when the essential content of a fundamental right is at stake—and the application when their contents are not incompatible with the fundamental right, what happens in this case, due the fact that the current regulation that provides the Family Code relation to the dissolution of the marriage cannot be considered, it is incompatible with the right to equality between man and woman.

Therefore, the public policy becomes a safeguard clause, i.e., a limit to the possibility that the forum accepts the cultural particularities or

⁵³ For the position of the Islamic law with reference to the texts that recognize the human rights, please see K. KREUZER, *International Instruments on Human Rights and Shariah Law*, in *Vers des nouveaux équilibres entre ordres juridiques. Mélanges en l’honneur de Hélène Gaudemet-Tallon*, Paris, 2008, 343 ff.

⁵⁴ I.e., even in the case of the action of the public policy have impeded the application of foreign law, the specificities of said regulation could be taken into account as a form of guardianship of free development of the personality and to promote the recognition of decisions in his/her country of origin (G. ESTEBAN DE LA ROSA, *Inmigración y Derecho internacional privado*, Madrid, 2009).

specificities of foreign law, because the sense in which said fundamental right is regulated does not allow, not only in the regulation of the forum, but in the international community. However, a mere difference regarding the content of foreign Law does not justify stopping applying, but it is necessary to know its interpretation to value what extent the scope of the fundamental right can infringe⁵⁵. So there will be issues which cannot be regulated by the indicated in a foreign law regarding fundamental rights, but it is necessary to identify clearly—firstly—the essential contents of the fundamental rights⁵⁶.

However, the rules of necessary application can be projected on the private relationship (e.g., for the safeguard equality, understanding this to be the equal legal valuation of the differences), but, at the same time, the foreign Law can be applied to safeguard or promote the cultural identity, i.e., the free development of personality that, as is known, constitutes the active dimension of the right to dignity (Art. 10 of the Spanish Constitution), taking into consideration the specificities of the foreign law, in order to take place the recognition of the decision made by the authorities of the forum in the country of origin of the immigrant. And, even when the action of public policy does not allow the application of foreign Law claimed by the conflict-of-law rule.

For this reason, we must note that public policy has changed its role when it is about regulating some of the rights related to the (cultural) identity of the person. So, we must also note that public policy becomes a proceeding which modulates the possibility of accepting the cultural diversity, once the fundamental rights are not at stake, which constitute mandatory material rules.

⁵⁵And, in this sense, the doctrine refers to the secularization, specialization and flexibilization process that is experiencing the public policy at the present time (M. AGUILAR BENÍTEZ DE LUGO, *Estatuto personal y orden público en un contexto de creciente multiculturalidad*, in I. GARCÍA RODRÍGUEZ, *Las minorías en una sociedad democrática y pluricultural*, Alcalá de Henares, 2001, 332-333).

⁵⁶In this sense, A. QUIÑONES ESCÁMEZ refers to the hard core of the fundamental rights [*El estatuto personal*, cit., 181 ff]. But, in that case, it is not about the action of public policy, but the mandatory rules of the forum, which regulate necessarily specific aspects of personal, familiar and living relationships of the immigrants. Thus, it can be said that in the immigration Private International Law gain in importance the rules of “necessary implementation” (*lois d’application immédiate*) and not so much the notion of public policy.

6. *Conclusions.*

The international society has become an international community where the cultural diversity is a value which, therefore, must also make the system of Private International Law. On the other hand, Private International Law is a variable which is dependent on the organizational forms of the international society (M. Aguilar Navarro) and will also be affected by changes which are taking place. This involves the recovery of the “ecological dimension” of the international society, on which International Law and, more specifically, Private International Law must inquire in crisis and changing situations such as the present. And, on the other hand, considering the possibility that a change in the function of Private International Law takes place, which is not just about the coordination of systems, but in putting human beings –perfectly– so that they can make their personal dimension (dignity) in a global level.

Private International Law has already overcome its liberal approach of protection of national interests (against the foreign) or the satisfaction of merchant interest (in connection with commercial trade transactions), but it is about protecting human beings as person, being protected all their dimensions in this way. And to that end, it is necessary the cooperation between legal systems, which, in turn, requires the use of the comparative method, but from a renewed conception, not the corseted one which succumbed to the formalistic approaches of the late legal positivism.

Its use at the present time allows the rapprochement between regulations, by knowing its contents, the role of each institution and establishing similarities or differences with the regulation of the forum, preventing the public policy exception operates as an exception. And, therefore, it must be conceived as a clause for safeguarding the fundamental values and principles of the forum.

As part of the gradual formation of multicultural societies, the understanding of the role of public policy is changing, to the extent that it acts once the content of the foreign law is apparent (an action in advance of public policy cannot be considered), dismissing application of the law if it is contrary to the higher values of the forum, and provided that it cannot be interpreted taking into account the foreign cultural

specificity (legal). This will allow to know to what extent the fundamental rights can be interpreted according the value of the diversity, as a challenge for current Western societies.

This approach links up with the idea maintained by renowned sociologists and philosophers of “cosmopolitan Europe”⁵⁷ about moving forward in the direction towards a new form of global democracy, as proposed by D. Held in the field of the contemporary political theory⁵⁸. Starting from the moral equality of all human beings, he recognizes the equality of freedom and forms of government based on deliberation and consent. Human beings are autonomous moral agents, capable of making rational decisions collectively, in such a way that the Law seeks to ensure minimum conditions to enable the exercise of their autonomy.

Finally, the European Private International Law is to serve as a “communication channel” between legislations which are beginning to coincide due to the new private international situations taking place in Europe, as a new foreign population begins to settle, in particular when it comes to Moroccan immigrants. In these cases Moroccan family law may be applied or considered by the European authorities, favouring thus the recognition of decisions taken in Morocco.

⁵⁷ U. BECK, *La mirada cosmopolita o la guerra es la paz*, Barcelona, 2005.

⁵⁸ D. HELD, *Cosmopolitismo. Ideales y realidades*, Madrid, 2012.

THE *ORDRE PUBLIC* EXCEPTION AS A MEANS TO PROTECT FUNDAMENTAL RIGHTS, OR NOT?

THE RECOGNITION OF REPUDIATIONS AND POLYGAMOUS UNIONS IN FRANCE AND BELGIUM

Davide Strazzari

SUMMARY: 1. *Private international law and the promotion of religious legal pluralism: preliminary remarks* 2. *The case of repudiation in the French legal system* 3. *The case of repudiation in Belgium* 4. *The recognition of polygamous unions in France and Belgium* 5. *Concluding remarks*

1. Private international law and the promotion of religious legal pluralism: preliminary remarks.

Because of immigration, European Countries have been experiencing a growing number of cases in which individuals claim, under private international law, to have a series of family and personal matters regulated by the law of their country of origin. In so far as this law corresponds to, or is largely influenced by traditional Islamic law, private international law appears as an effective means to foster legal pluralism in Europe¹.

To this extent, it should be noted that private international law pursues two different and sometimes competing goals. On the one hand, it envisages to further the principle of the comity of nations and thus to favour mutual trust among jurisdictions. On the other hand, private international law provides the States with instruments allowing them to hamper the application of foreign law or the enforcement of foreign decision when they appear to violate some fundamental principle of the

¹ E. JAIME, *Identité culturelle et intégration. Le droit international privé postmoderne*, in *Recueil des cours*, 1995, t. 251 ; C. CAMPIGLIO, *Identità culturale, diritti umani e diritto internazionale privato*, in *Riv. dir. int.*, 2011, 4, pp. 1037 y ss.

legal order. This is done through the *ordre public* (public policy) exception².

The *ordre public* exception enforcement requires, therefore, striking a balance between these two competing goals: favouring harmony and good relations among states, on the one hand, and protecting basic legal, social, economic values of the recognizing state, on the other.

Thus, the *ordre public* exception must be cautiously triggered: public authorities of the recognising legal order should review the compatibility of a foreign legal institution with their internal public order on a case by case approach. It is not a foreign statute or legal institution as such that must be evaluated in the light of the public policy exception but rather its concrete application in the dispute pending before the recognising state public authority.

Because of this, the *ordre public* exception is applied according to different degrees of intensity taking into consideration the ties of the relevant material situation with the legal order called to apply or to enforce foreign law, and the consequences for the national legal order in case the foreign law would be applied or enforced.

In the French and Belgian legal doctrine and jurisprudence – whose experience my analysis is mainly focused on – it is familiar to distinguish between the notion of *ordre public atténué* and *ordre public de proximité*³.

When the foreign situation has mild connections with the recognising legal order, a lenient standard of public policy exception applies (*ordre public atténué*). On the contrary, the more the ties with the recognising legal order are strong, the more the public policy exception is strictly applied (*ordre public de proximité*).

Usually, the so called *ordre public atténué* is applied when public authorities merely give effect to a foreign decision or act. However, if the parties have connections with the *lex fori* legal order, because for

² P. LAGARDE, *Recherches sur l'ordre public en droit international privé*, Paris, 1959.

³ See F. RIGAUX, M. FALLON, *Droit international privé*, 3 ed., Bruxelles, 2005, 322, P. LAGARDE, *Le principe de proximité dans le droit international privé contemporain*, in *Rec. des cours*, 1986, t. 1, v. 196, 9.

instance they are national or habitual residents in the recognizing State, the *ordre public de proximité* could apply.

Within this scheme, both Belgian and French judges have dealt with some highly controversial family Islamic law institutions such as repudiation and polygamous marriage. Whereas there has never been a case where a French or Belgian judge pronounced a repudiation or allowed a polygamous marriage in pursuance of the substantive law of the parties, the recognition of repudiation decisions and/or the recognition of some legal effects to polygamous marriage were quite common in the '80s.

This approach was in line with the notion of the *ordre public atténué* and consistent with bilateral international agreements the two states concluded with most of the Maghreb countries, where immigrants in the two States mostly come from.

Recently, a change of attitude occurred in these legal systems leading to systematically deny effect to these traditional Islamic law instruments. Since they are considered inherently in contrast with the equality principle, and in particular with the non discrimination principle on the ground of sex, the public policy exception is strictly applied, based on considerations *in abstracto*⁴.

The language of fundamental rights, especially as they are enshrined in the ECHR, is increasingly invoked to justify the application of the public policy exception.

After examining this evolution, I will argue that it is not fully consistent with the language of fundamental rights and I will suggest whether other reasons could explain this change of attitude.

2. The case of repudiation in the French legal system.

French case-law concerning the recognition of foreign deeds of repudiation may be divided in three periods⁵.

⁴ For similar findings, see M.C. FOBLETS, *The Admissibility of Repudiation : Recent Developments in Dutch, French and Belgian Private International law*, in *Hawwa*, v. 5, n. 1, 2007, 10 ss.

⁵ See especially M.C. NAJM, *Le sort des répudiations musulmanes dans l'ordre juridique français. Droit et idéologie(s)*, in *Droit et cultures*, 2010, n. 59, 209, M.L.

The first phase, which dates back, to the '80 is characterized by a flexible attitude of the judiciary towards the recognition of repudiation deeds. This approach had been favoured by bilateral international agreements concerning judicial cooperation that France concluded with several Maghreb countries. Among them, a particularly important one is the 1981 agreement between France and Morocco concerning judicial cooperation in family matters which complement a previous agreement between the two states dating back to the '50⁶.

This agreement is important because it sets the principle according to which the applicable law can be set aside only when it is manifestly contrary to public policy. It also establishes, at section 13, that an act declaring the dissolution of marriage between two spouses, sanctioned by a Moroccan judge, will be recognised in France as it were a divorce decree.

The result of the convention was to allow the full recognition of repudiation deeds in France. Section 13 was read as implicitly admitting the compatibility of repudiations with the French notion of the *ordre public*.

The second phase dates back to the '90s. It is characterized by a more restrictive approach towards the recognition of foreign repudiation deeds and by an increasing application of the public policy exception. Disputes presented a common framework: women started in France their legal proceedings to get divorce, but the husband opposed the repudiation already obtained in his country of origin.

However, still in this phase the public policy exception is applied on a case by case basis, leading to deny repudiation enforcement when the procedural rights of the wife have not been guaranteed (so called *ordre public procedural*) and alimony compensation has not been provided (*ordre public alimentaire*).

In the '90's the case law shows essentially the attempt to strike a reasonable balance between, on the one hand, the recognition of foreign

NIBOYET, *Regard français sur la reconnaissance en France des répudiations musulmanes*, in *Rev. int. droit comp.*, 2006, 27, 32.

⁶ See *Convention entre la République française et le Royaume du Maroc relative au statut des personnes et de la famille et à la coopération judiciaire*, Décret n. 83-435, 27.05.1983, in J.O. 01/06/1983, 1643.

decisions and, on the other hand, the respect of some basic principles of the French legal system. The evaluation is conducted on an individual basis, a feature that may explain why decisions are very often contradictory with each other.

This change in the case law of the French jurisdiction is usually seen as a pushing factor that led the Moroccan legislator in 1993 to change its family law in order to make the recognition of repudiation decisions in France and other European states easier⁷.

These changes did not put into question the fundamental idea that only the husband has the power to dissolve a marriage. However in line with some reading of the traditional Islamic law, before repudiation is declared by religious authorities, authorization must be obtained by a state judge. The judge will attempt to reconcile the couple and will oblige the husband to provide alimony for the woman.

This approach was successful: in 2001 a French Cassation decision recognized the effect of a repudiation decision as long as it was respectful of the procedural right of the parties and the woman benefited of adequate financial provision⁸.

It is also important to note that no reference at the equality principle was made by the Cassation court, although this was a ground explicitly invoked by the claimant.

In 2004 the Court of Cassation with five almost identical decisions reversed the 2001 line of cases⁹.

In a case concerning the failure of the appellate court to enforce a repudiation deed, because of its conflict with art. 5, prot. VII of the ECHR and thus with the public policy exception, the court noted that

⁷ Although family law is perceived as a core part of *shari'a*, Islamic states have known different degrees of "codification" with regard to their personal status law or family law, with the view of protecting the weakest parties such as women and children. See R. ALUFFI BECK-PECCOZ, *La modernizzazione del diritto di famiglia nei paesi arabi*, Milano, 1990; B. BOTIVEAU, *Loi islamique et droit dans les sociétés arabes*, Parigi-Aix en Provence, 1993. On the case of Morocco and the 2004 reforms see J.Y. CARLIER, M.C. FOBLETS, *Le code marocain de la famille. Incidences au regard du droit international privé en Europe*, Bruxelles, 2005.

⁸ Cass, civ. (1^{er} Ch) 03.07.2001, in *Rev. Critique Droit Int. Privé*, 2001, 704, annotated by L. GANNAGÉ, Dalloz, 2001, 3378.

⁹ Cass. Civ. (1^{re} ch), 17.02.2004, in *RCDIP*, 2004, 423.

according to *shari'a* and the Algerian code dissolution of marriage is a prerogative reserved to the husband. The judge cannot deny such a request but only accommodate the financial consequences of the repudiation. The court stated that the failure to provide equal access to dissolution to both husband and wife on equal grounds was contrary to art. 5, of the protocol VII of ECHR and thus contrary to the French public legal order.

It is important to highlight that no reference is made to national source of law prohibiting discrimination on the ground of sex but only to the provisions of the ECHR. This suggests that the Court wanted to somehow legitimate its reasoning by invoking international human rights standards rather than the national one.

However, despite the categorical statement concerning the fact that repudiation institution is in breach of fundamental rights, the Court suggests that possible recognition in France of the repudiation deed may occur in the event the two spouses are not domiciled in France. The lack of strong territorial connection of the dispute allow for the application of the mild form of *ordre public*.

Legal scholars agree in considering this Cassation decision – whose *ratio decidendi* is currently applied nowadays – as an abstract application of the *ordre public* exception¹⁰. It is the repudiation institution as such that is considered against public policy exception with no evaluation for the concrete situation of the case. On the contrary, the '90s line of cases was based on a concrete evaluation of the situation since due consideration was given to respect of defense rights and to the financial protection of the wife's interests.

¹⁰ See N. JOUBERT, E. GALLANT, *Le recours à l'exception d'ordre public en droit français de la famille face à des normes de pays du Sud de la Méditerranée*, in N. BERNARD-MAUGIRON, B. DUPRET (ed.s), *Ordre public et droit musulman de la famille*, Bruxelles, 2012, 308. On the 2004 French Court of Cassation line of case see H. FULCHIRON, "Ne répudiez point..." pour une interprétation raisonnée des arrêts du 17 février 2004, in *Rev. int. droit. comp.*, 1, 2006, 7; J.P. MARGUENAUD, *Quand la Cour de cassation française n'hésite plus à s'ériger en championne de la protection des droits de la femme: la question de la répudiation*, in *R.T.D civ.*, 2004, 367.

3. *The case of repudiation in Belgium.*

Since 2004, Art. 57 of the Belgian code of private international law explicitly bans the recognition of repudiation deeds issued abroad.

Prior to the introduction of this provision, Belgian case law was characterized by a case by case application of the public policy notion in cases of repudiation recognition¹¹. Thus, as in France, respect of the woman defense rights and alimony were elements taken into consideration leading to possible recognition of repudiation deeds.

According to art. 57 any foreign unilateral act of dissolution of marriage, coming from the husband, is not enforceable in Belgium provided that the woman has no equal access to such a remedy. However, some exceptions are provided. According to the second indent of art. 57, a repudiation act may be enforced provided that the following cumulative conditions are fulfilled: a) the act has been sanctioned by a judge of the Country of origin state; b) at the time of sanctioning neither of the spouses had the nationality or habitual residence in a state whose law does not allow unilateral act of dissolution; c) the wife has accepted the dissolution in an unambiguous manner and without any coercion.

Whereas the first paragraph of art. 57 is grounded on the premise of the protection of fundamental rights and it speaks in absolute terms, the second paragraph is coherent with the classical idea of *ordre public* as an instrument to be used according to a case by case application¹².

However, consent of the woman and procedural rights respect are not sufficient to allow for the recognition of legal effects to a repudiation deed, in so far as the couple has, at the moment the deed is homologated by the foreign judge, nationality or residence in any state not providing for repudiation institution.

Strictly speaking, this territorial and nationality based condition is not referred to Belgium but to any country where repudiation institution

¹¹ See for references S. SAROLEA, *Chronique de jurisprudence (1988-1996)*, in *Rev. trim. dr. fam.*, 1998, 7-79.

¹² See F. COLIENNE, *La reconnaissance des répudiations en droit belge après l'entrée en vigueur du Code de droit international privé*, in *Rev. gen. droit civ.*, 2005, 445.

is not envisaged by law, according to the idea of a common European standard of public policy.

In the case that the spouses – or even one of them – are residing in Belgium or hold the Belgian nationality, repudiation cannot be recognised, even in the event the wife has accepted or even has herself requested for the repudiation to be recognized.

The wording of art. 57 has caused some interpretative problems. What can be considered as an unilateral act of dissolution of marriage? For instance Moroccan law recognizes the so called *khul* institution. Formally speaking *khul* is a repudiation of the husband but it is pronounced on the request of the wife who most frequently renounces to the dowry in change of the marital consent.

The practice seems to suggest that all these forms of dissolution fall under the art. 57 rule rather than being scrutinised in the light of an individual appreciation of the case according to the public policy notion¹³.

4. *The recognition of polygamous unions in France and Belgium.*

Polygamous union is certainly one of the most controversial traditional Islamic institutions in the light of the human rights western legal tradition. However, both French and Belgian jurisdictions have admitted that polygamous union may produce some effects that could be recognised in the receiving legal order, in accordance with the notion of the *ordre public atténué*. Sons recognition, compensatory claims in case of death of the husband are good example of this.

Recently, however, a more rigorous approach towards polygamous union is emerging in both the two states. As a consequence, indirect recognition effects of polygamous union are more uncommon.

In this regard, two situations can be taken into consideration: the recognition of polygamous unions within family reunification requests, advanced by immigrants, and claims related to the reversibility pension.

¹³ See C. HENRICOT, *L'application du code marocain de la famille, à la croisée des jurisprudences belge et marocaine en matière de dissolution du mariage*, Bruxelles, 3, 2011, 6.

The first topic has also a EU relevance: the 2003 EU directive on family reunification contains a specific provision forbidding Member States to allow family reunification in favour of a polygamous spouse. The same provision allows Member States to extend this prohibition to the sons of a polygamous couples.

France dealt with the issue of polygamous marriage in the context of immigration rules in the '90s when a statute imposed the so called "decohabitation" process. Polygamous families were forced to split facing otherwise a risk of being deported. Since then, no stay permit may be issued to the second spouses, nor to the sons of a polygamous marriage¹⁴. The *Conseil constitutionnel* in a 1993 decision has considered this provision in line with the French constitution noting that : «les conditions d'une vie familiale normales sont celles qui prévalent en France, pays d'accueil, les quelles excluent la polygamie»¹⁵.

Belgium as well prohibited family reunification in favour of the second spouse of a polygamous union and extended the prohibition to the sons as well. However, the Belgian constitutional court stroke down the limitation concerning the sons, deeming it in contrast with art. 8 of the ECHR and the best interest of the child¹⁶.

The second area that gave rise to legal debate concerns the cases of reversibility pension in cases of polygamous marriages.

Both France and Belgium concluded in the '60 international agreements with Maghreb Countries in the field of social coordination for foreign workers.

Although a general clause concerning the respect of the respective public policy is included in these acts, they explicitly take into consideration the case of polygamous marriage. They state that in case the worker is allowed by his personal status law to have more than one

¹⁴ See loi n. 1027/93 in fact reversing the previous *Conseil d'Etat* case law (*Montcho* case, 11.07.1980), published in *Rev. crit. dr. int. privé*, 1981, 658.

¹⁵ See *Cons. const.* 13.08.1993.

¹⁶ See decision n. 95/2008 declaring the unconstitutionality of sec. 6 of the *Loi du 15 septembre 2006* which introduced the limitation mentioned in the text.

spouse, the reversibility pension is to be divided between the two survivor spouses¹⁷.

The rule has been applied consistently in both Belgian and French legal systems.

In 1988, however, the French Cassation Court stated that in case the first spouse has acquired the French nationality, no indirect recognition of the polygamous marriage is possible. Thus, the full amount of the reversibility pension is to be given to the first spouse. The court then applied the public policy exception on the ground that the dispute was strictly connected with the *lex fori* legal order, as the claimant had French nationality¹⁸.

In Belgium, the Cassation Court adopted a similar line of reasoning in 2007. As noted, in pursuance of art. 24 of the Moroccan-Belgian convention on social security, the reversibility pension may be shared among the several spouses, as far as the worker is allowed to have polygamous marriage according to his national law. According to the parliamentary records, art. 24 was considered as a pragmatic way for the Belgian government to accommodate the familiar situation of many Moroccan workers at the same time avoiding that the entire amount of the reversibility pension could be claimed by both the surviving spouses, thus ending up in a too heavy burden for the state.

The practice to share the amount of reversibility pension was indeed followed by the national pension office. This was considered by legal scholars as a clear example of the mild application of the *ordre public*.

The above mentioned 2007 decision reversed this practice. According to the Belgian Court of Cassation in cases where the national law of the first spouse do not admit polygamous marriage - as it is the case when the first wife has acquired the Belgian nationality - the *ordre pub-*

¹⁷ See, for instance, *Convention générale sur la sécurité social entre le Royaume de Belgique et le Royaume du Maroc*, signed in 1968, whose sec. 24 says : «la pension de veuve est éventuellement répartie, également et définitivement entre les bénéficiaires, dans les conditions prévues par le statut personnel de l'assuré». In similar terms, see art. 34 of the agreement between France and Algeria signed in 1980.

¹⁸ See the *Baaziz* decision, Cass. civ. (1re ch), 06.07.1988, in *RCDIP*, 1989, 71. See C. BIDAUD-GARON, *Les droits à prestation sociale des veuves d'une union polygame*, *Dalloz*, 2006, 2454.

lic exception prevents the recognition of the indirect effect of polygamous marriages because of the strong ties the situation present with the recognizing legal order¹⁹.

Some legal scholars harshly criticized the 2007 cassation ruling and its departure from the settled practice of the *ordre public atténué* towards the application of the *ordre public de proximité*. They observe that doing so the Court acted in breaching of the non-discrimination principle on the grounds of nationality. As a matter of fact, women, having acquired Belgian nationality because of naturalization, are treated more favourably than women not in possession of this nationality²⁰.

A subsequent ruling of the Constitutional Court has in part undermined the 2007 Court of Cassation decision.

The Belgian Constitutional Court had to review the compatibility with the equality principle of the above mentioned art. 24 provision of the Belgian/Moroccan bilateral convention.

The Constitutional Court starts its reasoning by highlighting that being the challenged act international in character, it is required a deferential reading. The Court deems that it is not unreasonable for the state to provide that a reversibility pension can be shared among several beneficiaries. This occurred also in the national context, for instance in cases in which the worker had gotten a divorce and then had remarried. The Court, then, considered in details whether the fact that one of the beneficiaries is a Belgian citizen makes the provision less justified and it concluded by saying that the Belgian nationality of one of the two beneficiaries does not preclude the application of the provision²¹.

Despite this ruling, ordinary judges keep following the 2007 Court of Cassation precedent. They add however a further element. In order to reject the critics concerning the possible contrast with the non-discrimination principle on the ground of nationality, they took into

¹⁹ *Cour de Cassation*, 03.12.2007, H.A. c. *Office national de pensions*.

²⁰ See J.Y. CARLIER, *Quand l'ordre public fait désordre*, in *Rev. gen. droit civ.*, 2008, 525.

²¹ Stressing the contrast between the Constitutional Court and the Court of Cassation decisions, see M. FALLON, *L'effet de l'union polygamique sur le droit à la pension de survie au regard du principe constitutionnel de non-discrimination*, in *Rev. trim. dr. famille*, 2010, 107.

consideration the prolonged residency in the recognizing legal system. Long term residence in Belgium of the first spouse is considered as creating a strong connection with the Belgian legal order and thus allowing for the triggering of the *ordre public* notion²².

5. Concluding remarks.

Protection of fundamental rights and thus non-discrimination on the ground of sex have always been part of the material content of the public policy exception. Nevertheless, both the Belgian and the French judiciary has applied the *ordre public* exception in a flexible way, admitting in some cases some effects to controversial Islamic-based institutions and thus accommodating to a certain extent religious legal pluralism.

However, the 2004 French Court of Cassation case law concerning repudiations and the insertion of section 57 in the Belgian Code of private international law determined a change in this regard: since then, the public policy exception has been more and more applied on an abstract evaluation, as this religious institution was deemed inherently in contrast with the western legal traditions values.

The case law of the ECtHR seems in part to support the view that indeed Islamic law is structurally prejudicial to the values of democracy for Convention purposes, especially taking into consideration rules permitting discrimination based on the gender of the parties concerned, as in polygamy and privileges for the male sex in matters of divorce and succession²³.

The tendency emerges even considering EU pieces of legislation with regard to some Islamic institutions²⁴. Art. 10 of the EU Regulation

²² See *Cour de travail de Bruxelles*, 17.2.2001, in *Journal de Tribunaux*, 2011, 383; *Tribunal du travail de Bruxelles*, 10.2.2012.

²³ See *Refah Partisi v. Turkey*, 13.02.2003.

²⁴ On the idea of an emerging European notion of *ordre public* in the context of private international law, somehow superseding national applications, see F. SUDRE, *L'ordre public européen*, in M.J. REDOR (dir), *L'ordre public: ordre public ou ordres publics? Ordre public et droits fondamentaux*, Bruxelles, 2001, 109 ; P. MAYER, *La*

on the applicable law to divorce and legal separation states that in case the chosen law applicable to divorce by the spouses does not grant one of the spouses equal access to divorce on ground of his/her sex, the law of the forum shall apply²⁵. Directive 2003/86/EC on family reunification explicitly prevents Member States from allowing family reunification of a further spouse in the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a member State²⁶.

Legal scholars have questioned to what extent human rights protection, and especially the ECHR provisions, are to be applied within the framework of private international law²⁷.

Some advocate for the need of a strict application of the human rights provisions, others argue in favour of a reasonable accommodation between individual rights and the need to keep the *raison d'être* of private international law, namely to favour mutual trust among jurisdictions. An absolutist reading of the protection of fundamental right may therefore be compared with other, more relativistic views.

The enforcement of the public policy exception is clearly influenced by the two different approaches and, as said, both the French and Belgian legal systems seems to endorse the first option, after a time in

convention européenne des droits de l'homme et l'application des norme étrangères, in *Rev. crit. DIP*, 1991, 651; P. HAMMJE, *Droits fondamentaux et ordre public*, in *Rev. crit. DIP*, 1997, 451; E FOHRER, *L'incidence de la Convention européenne de droits de l'homme sur l'ordre public international français*, Bruxelles, 1999.

²⁵ Council Reg. 1259/2010, in *OJ* n. 343, 29.12.2010.

²⁶ Council Dir. 2003/86/EC on the right to family reunification, in *OJ* n. 251, 3.10.2003.

²⁷ H. GAUDEMET TALLON, *Nationalité, statut personnel et droits de l'homme*, in AA.VV., *Mélanges dédiés à Eric Jayme*, Monaco, 2004, 219 ; J. DEPREZ, *Droit international privé et conflits de civilisations. Aspects méthodologiques (Les relations entre systèmes d'Europe occidentale et systèmes islamiques en matière de statut personnel)*, in *Rec. des cours*, 1988, t. 211 ; L. GANNAGE, *A propos de "absolutisme" des droits fondamentaux*, in AA.VV., *Vers de nouveaux équilibres entre ordres juridiques. Mélanges en l'honneur de Hélène Gaudemet-Tallon*, Paris, 2008, 265 P. GANNAGE, *Les méthodes du droit international privé à l'épreuve des conflits des cultures*, in *Rec. de cours*, 2010; M.C. NAJM, *Principes directeurs du droit international privé et conflits de civilisations*, Paris, 2005.

which they favoured a reasonable accommodation between the two competing interests.

I think, however, that this approach is not fully in line with the rationale of the protection of human rights.

With regard to this, it is important to distinguish between the absolute character of fundamental rights and the universal one.

According to the European Convention of Human Rights and the case law of the ECtHR, only few rights are indeed absolute, i.e. no exceptions in their enjoyment can be admitted.

As for equality between spouses, according to the explanatory report on Art. 5 of the VII protocol, it must be ensured in the relations between the spouses themselves, in regard to their person or their property and in their relations with their children. The rights and responsibilities are thus of a private law character. The article does not apply to other fields of law, ecclesiastical law included. The article does not imply any obligation on a state to provide any form of dissolution. Limitations are admitted in so far as they are in the interest of the children. Admittedly this could cover the children born to the second wedlock, especially if this has been contracted on the assumption that the first was dissolved.

Although the Convention is primarily concerned with individual rather than collective rights, respect for cultural/religious identity of groups is indeed a value the Court of Strasbourg has recognized as being indirectly promoted by the Convention system. In the case of *Harroudj v. France*, it considered not in breach of the Convention a French statute prohibiting the adoption of children when their national law does not admit adoption. According to the ECtHR the French statute was respectful of the cultural pluralism²⁸. Moreover, the failure to recognize a repudiation under foreign law could be in breach of the right to respect for family life²⁹.

On the other hand, the rights of the European Convention are indeed universal. According to art. 1 of the Convention, the Parties shall secure

²⁸ *Harroudj v. France*, n. 43631/09, 04.10.2012.

²⁹ In this sense, see the German Federal Constitutional Court, BVerfG FamRZ 2007, 615, quoted by M. ROHE, *Islamic Law in Past and Present*, 2015, Leiden-Boston, 471.

to everyone within their jurisdiction the rights and freedoms of the Convention.

No doubts that when an European judge retains jurisdiction, respect of conventional rights shall apply equally to the parties involved irrespective of their nationality or domicile.

If we look at the French and Belgian there are indeed some contradictions.

As for the absolute reading of the non-discrimination on the ground of sex, the risk is that it ends up to harm the very person it is intended to protect³⁰. This is the case, for instance, of a woman that could not benefit of a repudiation decree even if she accepted it or payed for it (as it is the case for a *khul*), thus obliging her to start a new procedure before a civil judge of the host state. At the same time, concerning the reversibility pension, the decision of not sharing the sum in case of a polygamous union, whenever the first spouse is national or long resident in France or Belgium, could seriously undermine the second wife living conditions, in case she was completely economically dependent on the husband.

On the other hand, in contradiction with the universal character of the Conventional rights, the French and the Belgian system admit derogations – thus recognizing repudiations or the sharing of the pension reversibility in case of polygamous union - in so far as the parties (both or just one) are not nationals or do not reside in the recognizing legal order³¹.

With regard to this, it may be recalled the finding of the 2005 resolution of the Institute of International Law on cultural differences and *ordre public* in family private international law. Stating on the issue of repudiation, the resolution says: «Public policy may be invoked against the recognition of the unilateral repudiation of the woman by her hus-

³⁰ In similar terms, M. ROHE, *op. cit.*, 474

³¹ See art. 57 of the Belgian private international law code admitting the recognition of repudiation deeds provided that the woman has given consent, the repudiation has been sanctioned by a judge and either of the two parties were not, at the moment of the sanctioning, national or resident in a State which do not admit repudiation. The 2004 French Court of Cassation leading case seems to suggest that were neither of the spouses resident in France, the *ordre public* exception would have not been applied.

band if the woman has or has had the nationality of the recognizing State or of a State not allowing such repudiation, or if she has her habitual residence in one of these States, unless she has consented to the repudiation or if she has benefited from adequate financial provision»³².

According to this statement, nationality or territorial connection with the recognizing state are not the only criteria to be followed in order to decide on the enforcement of the public policy exception. Indeed consent of the woman or adequate financial provision are considered first.

The use of these more substantive value-oriented criteria rather than nationality or territorial connection would allow reasonable accommodation between the protection of non-discrimination on the ground of sex and respect for cultural identities, irrespective of the territorial or national connection with the relevant recognizing legal order. A solution that seems to me more in line with the universal character of the European Convention rights.

The contradictions I highlight in the two legal orders – absolute reading of the equality principle but, at the same time, questionable use of territorial or national connecting factor in order to adopt a more flexible application of the *ordre public* exception - lead me to suggest that the change occurred in these two legal systems could be explained in the light of the topic of immigrant integration.

For a long time integration of migrants has been a missing issue in the political debate in Europe³³. This is explained by the fact that in some countries, especially in Central and Northern Europe, immigration was considered as a temporary phenomenon. Immigrant workers would have gone back after the end of their job.

In other Countries, especially those with strong colonial ties, there was the expectation that immigrants would get assimilated by the host society. This may explain why both Belgium and France in the '60s, '70s and '80s have shown a more liberal attitude toward the recognition of some controversial Islamic law institutions. There was the expecta-

³² Available at http://www.justitiaetpace.org/idiE/resolutionsE/2005_kra_02_en.pdf

³³ See S CARRERA, *In Search of the Perfect Citizen? - The Intersection between Integration, Immigration and nationality in the EU*, Leiden-Boston, 2009.

tion that either migrants would return home or they would end up to accept domestic values.

Admitting some practices that derogate from the traditional European standard conception of family was seen as a temporary phenomenon, not challenging in depth the cultural oriented vision of the society and thus, conversely, the legal monism of these countries.

Nowadays the perception is different. Integration is increasingly considered as a process that should be guided by the host state institutions by imposing specific legal duties on migrants. Thus, in many European countries, immigrants, especially for reasons of family reunification, are required, even prior to their settlement in Europe, to attend integration courses based on linguistic and civic values³⁴.

The permanent character of immigration suggest that any deviation from the mainstream cultural vision of the host society could be a threat for the effective integration of immigrant population. The reference to the protection of fundamental rights rationale, especially in the light of its abstract and absolutist reading, seems instrumental. What counts is the protection or rather the promotion of European values to be applied strictly whenever the immigrant want to settle in Europe. Is this a militant use of the protection of fundamental rights rationale?

³⁴ See R. VAN OERS, E. ERSBØLL, D. KOSTAKOPOULOU, *A Re-definition of Belonging? - Language and Integration Tests in Europe*, Leiden-Boston, 2010.

TOWARDS AN EMERGING NOTION OF EUROPEAN
ORDRE PUBLIC:
A COMMENT ON THE CASE-LAW ABOUT INTERNA-
TIONAL SURROGACY IN EUROPE

Marta Tomasi

SUMMARY: 1. *Some reasons for a pragmatic approach.* 2. *Surrogacy: practices that divide.* 3. *International public policy clause.* 4. *Some case-law: two main judiciary approaches.* 5. *Public policy reservation and the explicit prohibition of surrogacy.* 6. *The case-law of the ECtHR.* 7. *The aftermath of the ECtHR's judgments.* 8. *Drafting some conclusions: a European approach to ordre public.*

1. Some reasons for a pragmatic approach.

Surrogacy procedures find themselves at the crossroad of a plurality of thorny ethical and legal issues. The coexistence of a multiplicity of ethical attitudes to these practices is translated, in the global realm of law, into different normative approaches that go from strict prohibitions to more liberal tendencies.¹

The main target of this paper is offering a reflection about the consequences deriving from the application of surrogacy techniques and, in particular, about the role of the judiciary in governing ethical and axiological pluralism. Due to the differences in regulating surrogacy around the world, in fact, the judiciary more and more often comes to be confronted with the requests of who – after entering surrogacy agreements abroad – ask for parenthood recognition or for the transcription of for-

¹ As to US regulation see C. SPIVACK, *The Law of Surrogate Motherhood in the United States*, in *American Journal of Comparative Law*, 58, 2010, pp. 97-114. With regard to European legislation, see the Report by the Directorate-General for Internal Policies of the European Parliament (*Policy Department C: Citizens' Rights And Constitutional Affairs*), *A Comparative Study on the Regime of Surrogacy in EU Member States*, 2010.

eign birth certificates or judicial decisions in their country of origin. Judges are in charge for filtering these requests in order to ensure the functioning of the whole system and the protection of all of the interests coming into play.

This pragmatic approach – aimed at managing the effects of debated practices – allows to avoid, at least partly, to get stuck into the ethical debate and opens the possibility of taking advantage of this topic to test the consistency of a public policy argument in the European context. The public policy exception is, in fact, the most commonly used argument to oppose the possibility for measures taken abroad to enter national borders.

In a field marked by a lack of consensus among legal orders about the ethical acceptability of surrogacy procedures, it is suggested that the recent judgments given by the European Court of Human Rights (ECtHR) recommend a common approach, oriented by the criterion of the best interest of the child, to solve issues concerning the consequences of transnational surrogacy agreements. As it will be shown, the way paved by the ECtHR suggests a concrete interpretation of the public policy exception and favours an understanding of that clause strictly rooted into factual reality.

2. Surrogacy: practices that divide.

The ever-widening panorama of assisted reproductive techniques offers surrogacy as an alternative when the infertile woman, man or couple are not able to reproduce. Surrogacy is basically an arrangement between a woman (known as surrogate), who offers her womb to carry the baby and who delivers the child, and another person or couple unable to bear a pregnancy. The intention is usually that the child born to the surrogate mother will be handed over after birth to the commissioning person or couple.

Although surrogacy is no new reproductive technology,² its inherence with an “intimate and emotional area of human life”³ makes it a controversial practice: the technique is indisputably showing an increasing trend⁴ but its circulation finds obstacles in the perplexities manifested by those who perceive it as “a kind of baby-farming operation of a wholly distasteful and lamentable kind”.⁵

Furthermore, surrogacy can hardly be framed into a comprehensive picture,⁶ since the application of those procedures gives rise to different scenarios. In particular, differences can be observed between traditional and gestational surrogacy. In the former, the surrogate acts as both the egg donor and as the actual surrogate for the embryo. With the latter, the embryo is created by using the commissioning couple’s gametes. In this case, the surrogate mother is genetically unrelated to the baby. More options are possible, since in both cases gametes can be obtained from third parties not directly involved into the surrogacy agreement.

Due to different features of surrogacy procedures, even the positions shown by those who are not, in principle, contrary to the technique comes to be fragmented: attitudes shown by the general public and by legislators often change according to the existence or non-existence of genetic links between the commissioning parents and the baby,⁷ to the commercial or altruistic nature of the agreement,⁸ to the context of so-

² Some historical examples of reproductive outsourcing can be found in L.J. MARTIN, *Reproductive Tourism in the United States: Creating Family in the Mother Country*, New York, 2014.

³ BRITISH DEPARTMENT OF HEALTH, *Surrogacy: Review for health ministers of current arrangements for payments and regulation - Report of the review team*, 1998, p. 5.

⁴ According to the HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements*, 2012, pp. 6-8, recent reports documented a rise in the practice of surrogacy, to include arrangements that cross national borders.

⁵ This definition was given by Cumming-Bruce J in *A v. C.* [1985] FLR 445, one of the first cases about surrogacy, heard in the United Kingdom in 1978.

⁶ Different forms of surrogacy are presented, among others, in C. CARR, *Unlocking Medical Law and Ethics*, New York, 2014, p. 263 ss.

⁷ For example, the Ukrainian (Family Code of Ukraine, article 123) and the Russian legislation (Family Code of Russia, articles 51-52) differ on this point.

⁸ Commercial surrogacy is legal in India, Ukraine, and California while it is illegal in England, many states of United States, and in Australia, which recognize only altruistic surrogacy. See P. SAXENA, A. MISHRA, S. MALIK, *Surrogacy: Ethical and Legal Issues*, in *Indian Journal of Community Medicine*, 2012, 37(4), pp. 211-213. Some

cial inequality and economic dependency in which agreements take place, to the possibility for same-sex couples or singles to have access to the techniques.

The European legal scenario described in a report by the European Parliament⁹ clearly reflects the aforementioned divides: surrogacy is prohibited and punished in many European legal orders (an explicit provision exists, for example, in Italy, France, Germany, Spain, etc.) and merely tolerated without specific attention in others (*e.g.* Belgium, Ireland).¹⁰ Conversely, surrogacy finds recognition and regulation in few EU member states, such as Greece¹¹ and the UK.¹²

Beyond the general admissibility of surrogacy practices, its divisive nature also influences specific rules concerning, for example, parenthood determination. To make an example, in the UK, parenthood is transferred from the gestational mother (and her husband) to the intending parents by means of adoption or parental order released by a judicial authority, upon verification of some requirements.¹³ In Greece, on the contrary, there is no need for *ex post* adoption procedure, as far as the surrogacy agreement finds court authorization¹⁴ before child's birth; the birth certificate, therefore, will not show the gestational mother's name.

Differences in legal regimes and the global mobility that characterizes today's world created the opportunity for parents willing to have a

critics to the distinction between commercial and altruistic surrogacy in A. STUHMCKE, *The regulation of commercial surrogacy: The wrong answers to the wrong questions*, in *Journal of law and Medicine*, 2015, 23(2), pp. 333-345.

⁹ *A Comparative Study on the Regime of Surrogacy in EU Member States*, *supra*, footnote 1.

¹⁰ Specific aspects of the issue came to the attention of national courts in *M.R. & Anor -v- An tArd Chlaraitheoir & Ors* [2013] IEHC 91 (5 March 2013) and made their way to the European Court of Justice in *C-363/12 Z versus A Government Department and the Board of Management of a Community School* (26 September 2013).

¹¹ See Greek laws n. 3089/2002 and 3305/2005.

¹² Section 54 del HFE Act 2008.

¹³ In particular, the Act excludes the possibility for a compensation, requires consent from the gestational mother, the existence of a biological link with one of the intending parents, the domicile of one or both the intended parents to be in the UK, Channel Islands or Isle of Man.

¹⁴ Upon verification of specific requirements such as the absence of compensation, the existence of medical reasons justifying treatments, the permanent residence in Greece.

baby to take advantage of the processes of international surrogacy. Nonetheless, the birth of a baby of a surrogate mother in one country with genetic or intended parents from another creates legal hurdles and conflicts. The lack of international regulation and the described dishomogeneity of laws potentially encroaches the human rights of the vulnerable subjects involved: beside risks of exploitation and commodification,¹⁵ main threats are related to the position of children who could see their rights and interests impaired and might face the concrete risk of remaining, under some circumstances, stateless and/or parentless.¹⁶

Most of the answers provided by different jurisdictions to the emerging legal issues are related to the application of a public policy clause: facing the whole discourse from this viewpoint allows a pragmatic approach that, regardless of the unsolvable ethical issues involved,¹⁷ considers the consequences of the application of surrogacy techniques and provides some insights about the shape of public policy clause.

3. International public policy clause.

In the field of private international law, the public policy defence often plays the role of one of the most important points of the recognition and enforcement of foreign judgments and other foreign public acts.

In many States, in fact, foreign acts, decisions or orders concerning parenthood determinations are recognized by operation of law. As reported, the most common grounds for non-recognition of a foreign decision or act are: “(1) lack of jurisdiction of the foreign court according to its own jurisdiction rules, (2) violation of public policy of the State

¹⁵ For an acknowledgment of the commercial aspects about reproduction, see D.L. SPAR, *The baby Business: how money, Science, and Politics Drive the Commerce of Conception*, Boston, 2006.

¹⁶ T. LIN, *Born lost: stateless children in international surrogacy arrangements*, in *Cardozo Journal of International and Comparative Law*, 21(2), 2013, p. 545.

¹⁷ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Report of the February 2016 Meeting of the Experts' Group on Parentage/Surrogacy*, Preliminary Document No. 3 of February 2016 for the attention of the Council of March 2016 on General Affairs and Policy of the Conference, available online at <https://assets.hcch.net/docs/f92c95b5-4364-4461-bb04-2382e3c0d50d.pdf>.

where recognition is sought; (3) the existence of fraud; and (4) the existence of a previous decision contradicting the decision to be recognized”.¹⁸

In particular, the concept of *ordre public* is used in several fields and it constitutes a safeguard to national sovereignties of the States. Regardless of the context where it finds application, the clause serves as a safeguard on which States can rely in order to protect certain national interests, which they understand as essential for the maintenance of their legal orders and of the values they want to preserve.¹⁹ Nonetheless, notwithstanding its relevance, the very concept of *ordre public* has no precise definition in most legal orders and jurisprudences: such indetermination may lead to the incoherence in the application of the exception itself and may create legal uncertainty.

A brief analysis of some of the case-law related to the recognition of acts or judgments concerning parental assessment adopted abroad and to the use of the public policy exception may suggest, if not the surfacing of a European public policy exception, a general approach within Europe which should ensure public policy to serve as an instrument to protect fundamental rights. As noted by the Experts’ Group convened by the Council on General Affairs and Policy of the Hague Conference to explore the feasibility of advancing work in the area of Parentage/Surrogacy “it would be useful to have further discussions on the feasibility of unifying the rules on the recognition of foreign public acts and judicial decisions on parentage, taking into account public policy concerns, including those stipulated in domestic law”.²⁰

Before turning to case-law analysis, one last remark concerns the notion of *ordre public* generally opposed to the recognition of foreign

¹⁸ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements*, Preliminary Document No 11 of March 2011 for the attention of the Council of April 2011 on General Affairs and Policy of the Conference, available online at <https://assets.hcch.net/docs/f5991e3e-0f8b-430c-b030-ca93c8ef1c0a.pdf>, p. 18.

¹⁹ A. LOPEZ-TARRUELLA, *The Public Policy Clause in the System of Recognition and Enforcement of the Brussels Convention*, in *The European Legal Forum*, (E) 2-2000/01, pp. 122-129.

²⁰ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Report of the February 2016 Meeting of the Experts’ Group on Parentage/Surrogacy*, *supra*, footnote 17.

measures: as many courts highlighted, in this kind of decisions, the concept of “public order” that was to be taken into account was to be identified with the *international public order*. Therefore, the evaluation of compatibility between the measure adopted abroad and the domestic legal order has to follow two main directives: first, the parameter of the evaluation cannot be represented by a single legal norm, but by an established standard of most basic notions of morality and justice, shared within the international community; second, the foreign measure has to be considered with regard to its effect, to its practical application.²¹

4. Some case-law: two main judiciary approaches.

Cases described in this paper are quite similar to one another as to factual aspects.²² Therefore, it won't be necessary to go deep into case details, since courts' reasoning about the broad and plastic concept of public policy generally overlooks them. All of the cases considered regard either same-sex or heterosexual couples who decide to go abroad to access surrogacy procedures and obtain what is forbidden to them in their countries of origin.

In most cases, even if rules about surrogacy set by foreign legal orders are commonly respected, the problem of the recognition of acts created abroad emerges when couples try to re-enter their countries' borders. Domestic authorities often refuse to give recognition to the certificate of birth created abroad or to judgments settling questions about parenthood given by foreign authorities.

These uncertainties determine a limping situation for children who risk to face no civil status recognition and matters regarding their relationship with parents.²³

²¹ See M. GEBAUER, *Ordre public (Public Policy)*, in R. WOLFRUM, *Max Planck Encyclopedia of Public International Law*, Vol VII, Oxford, 2012 pp. 1008 ff.

²² The case-law concerning surrogacy is quite copious worldwide. The selection of decisions made in this paper depends on the attention specifically given in the courts' reasoning to the concept of public order.

²³ T. LIN, *Born lost: stateless children in international surrogacy arrangements*, *supra*, footnote 16.

Solutions to these issues are obviously deeply rooted into the application of complex international private law mechanisms aimed at striking a proper balance between the need of giving due protection to vulnerable subjects and that of avoiding people to get around national rules and of safeguarding domestic order.

The two main attitudes shown by the judiciary are well summarized in the decisions given in a Belgian case. The case is about a same-sex couple married in Belgium who travelled to the US to enter a surrogacy agreement.²⁴ The gestational mother, living in California, gave birth to twins in December 2008. In accordance with the laws of California,²⁵ being one of the men the biological father of the twins, the birth certificate mentioned the names of the two spouses as fathers. Back to Belgium, local authorities refused to recognize the birth certificates, basically denying the existence of the parental status. The couple decided to file a lawsuit to establish the parental relationship.

The Court of First Instance sitting in Huy²⁶ denied the request focusing not on the recognition in Belgium of the decision by which a California Court authorized, prior to the birth of the children, the birth certificates to mention the names of the two fathers, but rather on the recognition of the birth certificates themselves. The Court referred to Article 27 of the Belgian Code of Private International law,²⁷ under which foreign acts relating to the personal status may only be recognized in Belgium provided, among other requirements, that they comply with public policy.

According to the parents, the choice of the Belgian legislation to allow the adoption of a child by same-sex couples, excluded the need of

²⁴ It has to be noted that surrogacy finds no explicit regulation in Belgium. This Country, moreover, became the second, after the Netherlands, to allow same-sex marriages in Europe in 2003 (see art. 143 of the Belgian Civil Code). Since 2006, furthermore, same-sex couples have had the same rights as opposite-sex couples in adopting children.

²⁵ Section 7630 of the California Family Code.

²⁶ Opinion issued on the 22nd of March, reported by P. WAUTELET, *Belgian Judgment on Surrogate Motherhood*, in *Conflict of laws.net. News and Views in Private international law*, available online at <http://conflictoflaws.net/> and commented by C. HENRICOT, S. SAROLEA, J. SOSSON, *La filiation d'enfants nés d'une gestation pour autrui à l'étranger*, note sous Civ. Huy (4^{ème} ch.), 22 mars 2010 et Liège (1^{ère} ch.), 6 septembre 2010, in *Revue trimestrielle de droit familial*, 2010, pp. 1139-1163.

²⁷ Law of 16th July 2004.

considering the recognition of the birth certificates against the core principles of the Belgian legal order. Contrarily, the Court found that surrogacy agreements presented critical points both under the UN Convention on the Rights of the Child and under the European Convention on Human Rights.

In particular, surrogacy procedures would create the risk of a commodification of children (which would be in contrast with Article 7 of the Convention of the Rights of the Child, which grants each child the right to know and be cared for by his or her parents) and of a violation of the mother's dignity determined by the payment for her services (incompatible with Article 3 of the European Convention on Human Rights).

The Court concluded that giving recognition to the foreign certificates would infringe very fundamental principles, determining a violation of public policy.

The appellate Court reversed in part the decision of the lower court.²⁸ the first Chamber of the Court of Liège considered, first of all, whether the birth certificates could have been issued applying the Belgian law. The factual situation of the two fathers had to be distinguished. As to the biological father of the twin girls, under Belgian law, since the surrogate was not married, he could have recognized the children, legally becoming their father. For the other man, because of the lack of a biological link, the Belgian law offered no different solution than creating a legal parentage through adoption by same-sex couples.

The Court turned, then, to the review of the effects of the recognition of the paternity of the biological father, which derived, also, from a contract, of commercial nature, between the mother and the commissioning parents.

The appellate Court agrees with the lower Court as to the invalidity, under public policy principles, of contracts concerning human beings and human bodies. Nonetheless, in the Court's judgment the public policy reservation calls for a nuanced application: in particular, the public policy mechanism should entail the respect of the fundamental interest of the children. Considering that the twins could not be legally related

²⁸ Court of Appeal of Liège, 1st Chamber, ruling of 6th September 2010, docket No 2010/RQ/20. See C. HENRICOT, S. SAROLEA, J. SOSSON, *op. cit.*, *supra*, footnote 26.

to the mother, the deprivation of any link with the biological father as well would leave the children ultimately parentless. Birth certificates were therefore given effects in so far as they represented the basis for establishing a legal link between the girls and the biological father, being this solution in line with the best interest of the children and, therefore, not contrary to public order.

The absence of a general prohibition against surrogacy in Belgium²⁹ might partially explain the outcome of the decision, but what is more relevant to note is that the result of the judgments is totally dependent on the interpretation of the public policy reservation given by the Courts.

5. Public policy reservation and the explicit prohibition of surrogacy.

The interpretation given by the Court of first instance in Belgium is shared by many recent decisions given in legal orders characterized by the existence of a clear and explicit prohibition against surrogacy procedures.

In Spain, for example, according to art. 10 of *Ley 14/2006 sobre Técnicas de Reproducción Humana Asistida* surrogacy agreements, irrespective of their commercial or non-commercial nature, are to be considered void. Legal motherhood, moreover, in any case corresponds the gestational carrier.

Circumventing this ban, a married gay couple from Spain travelled to California in 2008 to enter a surrogacy agreement, through which a woman gave birth to twins that, as in the Belgian case, were registered as sons of the intending parents. The couple attempted to register the US birth certificate in the Spanish Consular Registry but the Consul rejected the request arguing that the foreign legal act did not comply with the Spanish law. The case – that once again, concerned the “recognition” of a foreign legal act – went through to the Tribunal Supremo

²⁹ Nonetheless, a wide case-law on the topic is reported in K. TRIMMINGS, P. BEAUMONT (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level*, Oxford, 2013, pp. 68 ff.

de España.³⁰ The Tribunal, in carrying out the control of compatibility between the foreign act and the *orden público internacional*, recognizes the impossibility of a requirement of full compliance with every aspect of the domestic legal system. However, a threshold set by the most important values and principles enshrined in the Spanish Constitution and in the international covenants on human rights ratified by Spain has to be respected. This fundamental core includes also rules regulating fundamental aspects of family life and parent-child relationships and, in particular, rejects any form of commodification that compromises the dignity of women and children.

The claimants based their request on two intertwined arguments: on the one hand, they highlighted their request did not concern a recognition of the agreement itself but of its effects only. In this sense, the act of registration represents just the “última y periférica” consequence of the surrogacy agreement. On the other hand, according to the commissioning parents, the inscription is the main means to secure the “best interests of the children”.³¹

Five judges out of nine, however, contended that the “best interest” criterion is a “non-determined” concept that needs to be concretized. Surprisingly, according to the Tribunal, this concretization does not necessarily imply the recognition of parentage to the intending parents. This statement was made despite the surrogate mother explicitly relinquished motherhood and despite the intended parents served for years as social fathers:

La concreción de dicho interés del menor no debe hacerse conforme a sus personales puntos de vista, sino tomando en consideración los

³⁰ Tribunal Supremo de España, n. 835/2013, 6th February 2014, *recurso* n. 245/2012.

³¹ This very same argument was made by the Spanish Administrative Agency in charge of Official Registries when overruling the decision made by the Consulate, and is recalled in the dissenting opinion (*voto particular discrepante*). According to the dissenting opinion, the decision of the majority only ensures a preventive form of public policy exception (“la sentencia de la que se discrepa tutela la excepción del orden público de una forma preventiva”), but far from a case by case concrete determination of that clause (“la vulneración del orden público internacional sólo puede comprobarse caso por caso”), fails to protect the interests of children involved. The refusal of recognise a foreign measure is possible only where “se contraría el orden público entendido desde el interés superior del menor”.

valores asumidos por la sociedad como propios contenidos tanto en las reglas legales como en los principios que inspiran la legislación nacional y las convenciones internacionales.

Sate's interests against commodification of children and motherhood need to be taken into account. Interestingly, in this kind of reasoning we do not have the interest of the child acting as a counterbalance to public policy exception, but, on the contrary, the Tribunal maintains that it is necessary to fill the open and non-determined concept of the best interest of the child with considerations based on the *ordre public* argument: in a perspective that seems to be inverted, the concretization of the best interest of the child depends on the general and abstract values that go to form the *ordre public* reservation.

This very strict application of the public order exception is quite similar to that adopted in three different decisions by the Cour de Cassation in France.³²

Article 16-7 of the French Civil Code clearly states that surrogacy is forbidden.³³ It is interesting enough the fact that art. 16-9 specifies that art. 16-7 – as well as the others pertaining to Chapter II, dedicated to the respect of human body – is a public policy provision.

³² Civil Cassation, 1st Section, n. 10-19.053, n. 09-66.486, n. 09-17.130, all decided on 6th April 2014.

³³ The article was created by art. 3 of the bioethics law n. 94-653 of 29th July 1994. It literally provides “Toute convention portant sur la procréation ou la gestation pour le compte d'autrui est nulle”. Actually, surrogate motherhood has been prohibited in France since 1991, under a decision by the *Cour de cassation* (Cass. Ass. plén., 31st May 1991). Violations of the prohibition are punished by civil (articles 311-25, 325 and 332-1 of the Civil Code) and criminal sanctions (articles 227-12 §3 and 227-13 of the Penal Code). Despite the broad support for reform, the prohibition was reaffirmed during the process for the revision of bioethics laws in 2009-2010 due to a wide consensus within the committee in charge of revising the law, finding that surrogacy is incompatible with French moral principles and human dignity. The committee also rejected the possibility of allowing *ex-post* adoption because it would validate a system in which children are programmed to be abandoned at birth. The results of the discussion can be found in French in CONSEIL D'ÉTAT, *La révision des lois de bioéthique. Étude adoptée par l'assemblée générale plénière le 9 avril 2009*, online at <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/094000288.pdf>, pp. 60 ff.

Differently than in other cases, this time birth certificates were registered but several courts granted the request of the Ministère public to annul the transcription on the grounds that it violated the *ordre public*.

One of the cases brought to the attention of the Court was already decided in 2008: at that time the Court confirmed the annulment of transcript of the birth certificate of two children because their legal parents had entered a surrogacy agreement in California. The main argument in this decision was that French citizens could not go abroad to circumvent French surrogacy laws. The foreign document, thus, was not to receive the *exequatur* in so far as it was contrary to international public order.

In 2011 the old case, together with two new ones, came to the attention of the Cour de Cassation. At a hearing concerning one of the cases (the Menesson case), on 8th March 2011, the advocate-general recommended quashing the judgment. According to his opinion a right lawfully acquired abroad could not be prevented from taking effect in France on grounds of international public policy where this would infringe the integrity of family life, protected by art. 8 of the European Convention of Human Rights. Taking into account the substantial and effective existence of a family dimension, albeit “legally clandestine”, the advocate-general identifies two possible approaches:

At this stage two answers are possible: either – somewhat theoretically and largely paradoxically – the refusal to register the birth particulars is inconsequential and does not substantially affect the family’s daily life, which means that registration is a mere formality and it is therefore difficult to see any major obstacle in the circumstances to recording the details of certificates with such minimal legal effect that it is inconceivable that they are capable in themselves of shaking the foundations of our fundamental principles and seriously contravening public policy (since they do not intrinsically contain any mention of the nature of the birth).

Alternatively, the refusal to register the birth details permanently and substantially disrupts the family’s life, which is legally split into two in France – the French couple on one side and the foreign children on the other – and the question then arises whether our international public policy – even based upon proximity – can frustrate the right to family life within the meaning of Article 8 [of the Convention] or whether, on the contrary, public policy of that kind, whose effects have to be ana-

lysed in practical terms as do those of the foreign rights or decisions that it seeks to exclude, should not be overridden by the obligation to comply with a provision of the Convention.³⁴

The advocate-general highlights the dangers implied in a consequences blind application of the public policy clause and stresses the need for a practical analysis of the factual situation.

Nonetheless, the Court dismissed the appeal, confirming the same rationale adopted in 2008 and concludes that the birth certificates registration has to be annulled because giving effect to a surrogacy agreement violates the inalienability of civil status, an essential principle of French law.³⁵

According to the Court this conclusion does not deprive children of the legal parent-child relationship recognized in California and does not prevent them from living in France with the intended parents. Children's private and family life and their best interests are therefore preserved.

These decisions led the way towards the European Court of Human Rights' judgements in the cases of *Menesson* and *Labasee* to which we will turn in a short while.

After Spain and France, a very similar approach characterised a decision given by the Italian Corte di Cassazione in 2014. The case discussed slightly differs from those considered so far in that surrogacy agreement was to be deemed void also under law of Ukraine – where the procedure took place – which requires at least 50% of the DNA to come from the intended parents. Controls carried out confirmed, in fact, a lack of biological links with both commissioning parents. The juvenile Tribunal in Brescia declared the baby to be adoptable and suspended parental rights. Moreover, judges acknowledged that the Ukrainian birth certificate could not be registered in Italy because it

³⁴ The opinion of the advocate general is reported in the judgment by the EUROPEAN COURT OF HUMAN RIGHTS, *infra*, *Menesson v. France*, 26th June 2014 (application n. 65192/11), par. 26.

³⁵ In the original language: “en l'état du droit positif, il est contraire au principe de l'indisponibilité de l'état des personnes, principe essentiel du droit français, de faire produire effet, au regard de la filiation, à une convention portant sur la gestation pour le compte d'autrui, qui, fût-elle licite à l'étranger, est nulle d'une nullité d'ordre public”.

was in violation of public order³⁶ and, in particular, of the Italian law about medically assisted reproduction that openly prohibits surrogacy procedures, their organization and advertising.³⁷ This decision was confirmed in appeal and once again by the Court of Cassation.³⁸

According to the claimants, the existence of a domestic provision prohibiting surrogacy was not, *ex se*, sufficient to declare the birth certificate to be in contrast with international *ordre public*: this concept, built by fundamental principles shaping the ethico-legal attitude of the whole legal system, requires to identify common international values and to harmonize them with the internal order.

Once again the interpretation of public order given by the Court is quite dissimilar to that proposed by the claimants: in its view international *ordre public* is conceived as a limit to safeguard internal coherence and cannot be reduced to international common values, as it embraces fundamental own non-renounceable principles and values.³⁹ In this sense, the best interest of the child is realised giving legal recognition to the gestational mother and reserving to adoption procedures – governed by judges and not left to private agreements – the creation of parentage bonds detached from biological links.⁴⁰

According to the Court the normative prohibition of surrogacy set by the Italian legislation aims at protecting the dignity of the gestational mother and, ensuring the operability of adoption procedures, the best interest of the child.⁴¹

³⁶ In the Italian legal order, as well as in many others, according to law (art. 65 of law n. 218/1995) foreign acts can produce their effects in Italy if, among other requirements, they are in compliance with public order.

³⁷ Art. 12.6 literally provides that “Chiunque, in qualsiasi forma, realizza, organizza o pubblicizza la commercializzazione di gameti o di embrioni o la surrogazione di maternità è punito con la reclusione da tre mesi a due anni e con la multa da 600.000 a un milione di euro”.

³⁸ Court of Cassation, 1st civil Section, judgment n. 24001/14.

³⁹ Page 13 of the decision.

⁴⁰ Page. 16 of the decision.

⁴¹ Page 14 of the decision: “il divieto di pratiche di surrogazione di maternità è certamente di ordine pubblico, come già suggerisce la previsione della sanzione penale, di regola posta appunto a presidio di beni giuridici fondamentali. Vengono qui in rilievo la dignità umana – costituzionalmente tutelata – della gestante e l’istituto dell’adozione (...) governato da regola particolari poste a tutela di tutti gli interessati, in primo luogo dei minori (...)”.

Despite small distinctions to be traced among cases and judicial approaches, the common mark of the described decisions seems to be the adoption of a theoretical and preventive view of the public policy exception. Courts seem to rely on general clauses and procedural rules much more than in-depth analyzing the consequences and the effects on rights and individual positions of their application. The perspective sometimes comes to be inverted: the protection of the best interest of the child seems to depend upon the guarantee of abstract and general values of public order. This latter reservation, by its side, happens to be operative even despite the compression and disregard of the protection of the vulnerable position of the single individualized child.

It has to be acknowledged that two fundamental – albeit implicit – elements seem to affect the decision of the Italian Court of Cassation and allow to partly distinguish it from other judgments given in other countries: the lack of a biological link and the negative evaluation obtained by the couple during previous pre-adoption procedures.⁴² However, staying to what the Court explicitly said, the application of adoption procedures seem to ensure, *in any case*, the realization of the child's best interest.

7. *The case-law of the ECtHR.*

Following the negative decisions adopted by the Cour the Cassation in France the parents of the children lodged two application with the European Court of Human Rights complaining that, to the detriment of the children's best interest, they were unable to obtain recognition in France of the legal parent-child relationship lawfully established abroad.⁴³ Evaluating the complaint of a violation of art. 8 of the Con-

⁴² As reported in the first instance decision, social assistants noticed a lack of awareness about difficulties involved in the choice of adopting a baby and troubles in properly elaborating adoptive parenthood, due to emotional and intellectual limitations (Juvenile Tribunal in Brescia, judgment 142/12, 14th September 2012).

⁴³ Direct references will be made to the already cited case *Menesson v. France*, supra, footnote 34. Most of the considerations of the Court are repeated in the decision EUROPEAN COURT OF HUMAN RIGHTS, *Labassee v. France*, 26th June 2014 (application n. 65941/11).

vention, the Court first of all notices that the refusal of the French authorities to legally recognize the family tie indisputably amounts to an interference in the applicants' right to respect for private life.

Despite the applicants argued for an attenuated effect of public policy – due to the fact that they were only asking for the recognition of a situation acquired, without fraud, abroad⁴⁴ – the Court considers the measure adopted by French judges to be in accordance with the law, since the French Civil code explicitly forbids surrogacy. In the Court's view, moreover, French authorities were pursuing the legitimate aim of deterring French citizens from going abroad to access otherwise forbidden techniques, and that of protecting surrogate mothers and children from commodification risks.⁴⁵ The Court concludes, moreover, that the measure adopted by French courts might be considered necessary in a democratic society with regard to the parents' position because they intentionally decided to access a forbidden technique and they nonetheless managed to create a life dimension with the children (parents and children were able to settle in France).⁴⁶

On the contrary, turning to the position of children the court says that i) the existing margin of appreciation, that generally characterizes State intervention in ethically sensitive areas, has to be restricted when the best interest of a child is involved and ii) parent-child relationships are a basic part of children's identity and that the national decision did not pursue the realization of their best interest.⁴⁷ According to the Court, thus, no *ordre public* is realised if the interests of concrete and individualised children are neglected. The general dimension of public policy has to be taken together with an individual and concrete one, which cannot be neglected.

Issues concerning surrogacy and the effects of the application of related agreements came to the attention of the European Court of Human Rights once again in the case of *Paradiso and Campanelli v. Italy*.⁴⁸

⁴⁴ *Menesson v. France*, par. 51.

⁴⁵ *Menesson v. France*, par. 62.

⁴⁶ *Menesson v. France*, par. 63 ff.

⁴⁷ *Menesson v. France*, par. 96 ff.

⁴⁸ EUROPEAN COURT OF HUMAN RIGHTS, *Paradiso and Campanelli v. Italy*, 27th January 2015 (application n. 25358/12).

In 2008, the claimants, spouses of Italian nationality, contacted a Russian firm to obtain a child by a surrogate mother. The new-born was delivered in March 2011 with a Russian birth certificate indicating the applicants as parents. When they returned to Italy with the child, the transcription of the birth certificate was refused. Following a DNA test a Court decided to remove the child and to place him under guardianship on the ground that he had no biological relationship with the applicants.⁴⁹ The couple was additionally charged for distorting the civil state, circumventing the provision about surrogacy prohibition and violating the law on adoption. Considering the conduct of passing off the baby as their child, the national judges decided that the claimants no longer had standing in the adoption proceedings.

The Court dismissed the part of the complaint concerning the intended parents acting in the name of the child, who had a guardian since October 2011 (par. 49). As to the claim regarding the transcription of the birth certificate, the Court notes that the criterion of the previous exhaustion of internal remedies was not met and, therefore, rejects the argument (par. 90).

The Court then turns to the measures taken by the Italian authorities to separate the baby from the intended parents.

As to the applicability of art. 8 of the Convention, the Court notes that a *de facto* family life existed, since the applicants behaved like parents to the baby for about six months (par. 67 ff.). Moreover, identity is part of private life and it strongly influences the possibility of building one's own personality. The refuse by the Italian authorities to recognize the parent-child relationship and the following activities which led to the removal of the child from the intended parents represented, in the Court's view, an interference with the private and family life. Considering whether these actions pursued a legitimate aim and whether they were necessary in a democratic society – in order to check their compliance with art. 8.2 requirements – the Court considers them not to be unreasonable. What is more relevant, here, however, is the evaluation about their degree of proportionality: this test completely relies on the

⁴⁹ As already noted above, differently from the Ukrainian law, the Russian legislation about surrogacy does not require gametes to come from the intended parents.

interpretation given by the Court to the notion of public order and to its role and function.

According to the Court, the *ordre public* cannot be regarded as a “carte blanche”⁵⁰ and its recall cannot be sufficient to justify any kind of measure. The duty to protect the best interest of the child, in fact, has to be fulfilled by any State, regardless of the nature (biological or not biological) of the parental link. The interruption of the familiar life and the decision to detach the child from his/her family dimension is a very extreme resort to be used only where it obviously meets the necessity to protect the child from an immediate danger (par. 80).

The Court acknowledges the sensitivity of the situation faced by the national authorities in the present case, given by serious suspicions hanging over the applicants. The harm sustained by the child in being separated by his intended parents was deemed to be surmountable, considered his young age and the short period spent with his family. Nonetheless, the Court considers that the conditions justifying the use of the impugned measures were not met (par. 81). Going deep into factual elements concerning the case and carrying on a markedly concrete analysis, the Court notes that “the applicants, who had been assessed as fit to adopt in December 2006 when they received the authorisation to adopt, were found to be incapable of bringing up and loving the child on the sole ground that they had circumvented the adoption legislation, without any expert report having been ordered by the courts”.

The violation of art. 8 derives from the non adequacy of the elements on which the authorities relied in concluding that the child ought to be taken into the care of the social services. The outcome is an unfair balance between the interests at stake.

As highlighted by the ECtHR itself, while the French cases concerned the issue of parent-child relationship and the children’s identities, the primary issue in the Italian case is the national courts’ decision to remove the child and to place him under guardianship.⁵¹ Beyond differences in cases and related outcomes, one aspect common to all of the

⁵⁰ *Paradiso and Campanelli v. Italy*, par. 80.

⁵¹ Press release, EUROPEAN COURT OF HUMAN RIGHTS, *Questions and Answers on the Paradiso and Campanelli v. Italy judgment*, 27th January 2015, online at http://www.echr.coe.int/Documents/Press_Q_A_Paradiso_and_Campanelli_ENG.pdf.

described decisions can be identified: the Court, recognizing the role of public policy reservation in judgments concerning the effects of a surrogacy agreement, points the way ahead with regard to the interpretation to be given to that general clause. All of the decisions are tailored towards a concrete and integrated view of the public policy exception: this clause cannot be construed in abstract and general terms, and applied in a consequences-blind way; rather it comes to be confronted and filled in with the evaluation of the best interest of the child, based on concrete and factual elements.

7. *The aftermath of the ECtHR's judgments.*

A couple of decisions adopted in Europe in the months following the described ECtHR's judgments seem to reflect the visions there expressed.⁵²

The Torino Court of Appeal⁵³ was called to decide on the appeal lodged against a decision in which the Court of first instance found *ordre public* – which, according to the Court, was made of constitutional principles giving shape to the entire legal order – to hamper the recognition of the foreign birth certificate.

Respectful of the indications traced by the ECtHR, the Court of Appeal stressed that the domestic *ordre public* has to be integrated by

⁵² It has to be acknowledged that both the Cour de Cassation in France and the Tribunal Supremo in Spain came back to surrogacy issues after the ECtHR's decisions. In adapting their previous approach none of the Courts specifically focuses on public policy's interpretation arguments. The Spanish Tribunal Supremo (Sala de lo Civil, 2nd February 2015, recurso n. 245/2012) keeps the best interest of the child and the public policy reservation separate, maintaining that the first can be satisfied as other ways to establish parental relationships are possible. The French Cour de Cassation (Assemblée plénière, 3rd July 2015, arrêt n° 619 (14-21.323)) ruled that children born to surrogates abroad will have the right to be granted French birth certificates (with the names of the surrogate mother and biological father) and will be able to claim French citizenship. According to the Court: "Une GPA ne justifie pas, à elle seule, le refus de transcrire à l'état civil français l'acte de naissance étranger d'un enfant ayant un parent français" (Communiqué relatif à l'inscription à l'état civil d'enfants nés à l'étranger d'une GPA, 3rd July 2015).

⁵³ Torino Court of Appeal, decree 29th October 2014, available online at <http://www.biodiritto.org>.

principles coming from a supranational dimension and makes specific reference to the provisions of the European Convention on Human Rights and to Strasbourg Court's jurisprudence. According to the Italian Appellate Court, it is necessary to reach an integration between the two systems of protection: the *ordre public* clause, therefore, has to be interpreted in accordance with the best interest of the child.

Significantly, the best interest of the child is not considered as a counterbalance to public order; rather the concept serves as a parameter to evaluate the compatibility of a certain measure with the *ordre public*.

Similarly, at the end of 2014, the German Bundesgerichtshof⁵⁴ found itself to be confronted with the issues concerning surrogacy and the recognition of a foreign judgment assessing parental rights. The Tribunal highlights that *ordre public* reservation has to be limited to very exceptional cases and that, in the case by case determination concerning the violation of the *ordre public*, rights enshrined by the European Convention on Human Rights have to be considered as well. The foreign judicial adjudication recognising the parent-child relationship does not clash with the fundamental principles of the German legal system, considering that the interest of the child – that has to be concretely assessed – comes out more in favour of the recognition. Once again the best interest of the child does not counterpose itself to the notion of *ordre public*, but comes to integrate it, asking for a case by case evaluation of concrete factual aspects characterizing the single case.

8. Drafting some conclusions: a European approach to *ordre public*.

Affirming the existence of a European notion of public policy represents today a clear overstatement. Nonetheless, in this area of law, deeply marked by a lack of consensus and by ethical disagreements, the ECtHR's case-law suggests a European approach to deal with the concept of *ordre public*. The way pointed requires to avoid a consequences-blind application of international public order exception and fosters the analysis of its effects in practical and concrete terms. In this

⁵⁴ BUNDESGERICHTSHOF, judgment of 10th December 2014, XII ZB 463/13.

sense, the evaluation of the best interest of the child does not play the role of an exception to counterbalance needs related to an abstract notion of public order, but it rather represents a fundamental, constituent part of the *ordre public* clause itself.

This conclusion requires two further specifications.

First, this approach should not be translated into the substitution of a general abstract clause – that of public policy – with another one, likewise theoretical. The consideration of the best interest of the child has to be as concrete as possible, rooted in evidence derived from the factual case and evaluated on the bases of opinions gathered among different professionals who shall be involved. Beyond ethical complexities concerning surrogacy procedures, the duty to protect children has to be fulfilled through a detailed evaluation, as individualized as possible, of the specific matter involved. This approach might also help preserving public policy from criticisms against its uncertain and discretionary character.⁵⁵

Second, the suggested pragmatic approach does not imply setting aside the ethical debate concerning surrogacy, which has to be strengthened and invigorated. Rather, it simply gives a clear indication as to the strike of balance between different interests, allowing to overcome difficulties that may arise in the moment of the evaluation of the effects and consequences of disputed procedures. Surrogacy prohibitions find a solid justification in different moral and ethical concerns (preventing children from becoming commodities traded as merchandise; protecting the interest of children who are psychologically at risk in such transactions; preventing the exploitation of surrogate mothers and perils of social division).⁵⁶ Nonetheless, the current globalized world, where some states permit surrogacy contracts, and infertile couples can go abroad to find surrogate mothers, illustrate the complexity of enforcing

⁵⁵ For a concrete approach to public policy, A. MILLS, *The Dimensions of Public Policy in Private International Law*, in *Journal of Private International Law*, 4(2), 2008, pp. 201-236.

⁵⁶ An interesting perspective about India, in M. UNNITHAN, *Thinking through Surrogacy Legislation in India: Reflections on Relational Consent and the Rights of Infertile Women*, in *Journal of Legal Anthropology*, 2013, Vol. 1., n. 3, pp. 287-313.

this prohibition and imposes to deal with practical questions calling for immediate solutions.⁵⁷

Finally, a consequences-blind application of public order clauses might jeopardize the most important objective that the prohibition against surrogate motherhood is designed to achieve: the protection of the superior interest of the child. This criterion – which, likewise public order, cannot be predetermined – has not to be regarded as a counter-balance to a general need of public policy. Rather, it represents an element to be integrated into the evaluation of any kind of activity and measure to be given recognition, in order to realize the best interest of the society as a whole and to ensure *ordre public* reservation to play a role in the protection of fundamental rights.

⁵⁷ On the difficulties about the idea of an effective regime based on a unifying set of rules, see Y. ERGAS, *Babies without borders: human rights, human dignity, and the regulation of international commercial surrogacy*, in *Emory International Law Review*, 27, 2013, pp. 118-188. A plead for the design of a multilateral regulation of surrogacy that would take into account human rights and democratic values along with matters of private international law, J. DE KOENIGSWARTER, *Breaking Fertile Ground in the European Union. A Trial for the Regulation of Womb and Child Trade in Surrogacy*, in *ICL Journal*, *Vienna Journal on International Constitutional law*, vol. 9, 2015.

RELIGIOUS DIVERSITY, IMMIGRATION LAWS AND THE *ORDRE PUBLIC* EXCEPTION IN EUROPE: THE ROLE OF GENDER

Elena Valentina Zonca

SUMMARY: 1. *Introduction: Family Migration, Gender and Culture* 2. *Transnational Marriages and Muslim Migrants in Europe* 3. *Muslim Families, Women's Rights and the Ordre Public Exception in Migration Law and Policy* 3.1. *Transnational Families and the Right to Respect for Family Life: The Supranational Legal Framework* 3.2. *Family Migration and Civic Integration: Intersecting Gender, Religion and Migration Status* 4. *Religious Diversity and 'the Body of Women' in Migration Law: Transcending Dichotomies*

1. Introduction: Family Migration, Gender and Culture.

Family migration is one of the main forms of permanent settlement in Europe for third country nationals. Although it is one of the (few) legal entry routes, it is a problematic issue for various reasons. Legal regulation of family migration must reconcile tensions between the sovereignty of States on matters of immigration and their duty to respect fundamental human rights. More specifically, the right to respect for private and family life enshrined in European and international human rights law, and national Constitutions, provides a limit to States' power on issues of immigration. Moreover, "States cannot easily select this large group of migrants by skills, education, cultural similarity or other criteria applied to labour migrants"¹, thus granting the right to entry also to 'undesirable' migrants. Accordingly, family migration becomes a paradigm of the '*immigration subie*' – as opposed to '*immigration choisie*' favoring highly skilled migrants – as

¹ H. WRAY, A. AGOSTON AND A. HUTTON, *A Family Resemblance? The Regulation of Marriage Migration in Europe*, in *European Journal of Migration and Law*, 2, 2014, p. 210.

it disrupts “the dominant neoliberal underpinnings of migration policy”.²

On the one hand, family reunification – *i.e.* the possibility of legally reuniting family members – can be seen as an important factor because it helps migrants’ socioeconomic integration process in host countries.³ On the other hand, under conditions of migration, the family becomes the site where clashes connected to cultural and religious diversity can emerge. Hence, it is a crucial standpoint for analysing conflicts in multicultural societies and, as Modood has noted, it challenges the limits of the State in liberal democracies: family falls on the private side of the public/private divide, but the State defines what a lawful family is.⁴

Family reunification concerns marriage and parenthood. Marriage migration seems particularly problematic: “as the meeting point of national systems of family law, transnational marriage adds to the complexity of the situation”.⁵ Transnational marriages are often deemed to introduce patriarchal forms of marital relationships – such as polygamy and forced marriages – and asymmetrical power relations which are detrimental to migrant women and a threat to core European liberal values such as gender equality.

² S. MOLLALLY, *Retreat from Multiculturalism: Community Cohesion, Civic Integration and the Disciplinary Politics of Gender*, in *International Journal of Law in Context*, 2013, p. 413. On this aspect see also J.-P. FOEGLE, *L’immigration ‘choisie’ au prisme des politiques européennes*, in *La revue des droits de l’homme*, 2013, available at <http://revdh.org/2013/11/18/immigration-choisie-politiques-europeennes/>. (accessed on 29.01.2016).

³ See G. BASCHERINI, *Immigrants’ Family Life in the Rulings of the European Supranational Courts*, in G. REPETTO (ed.), *The Constitutional Relevance of the ECHR in Domestic and European Law*, Cambridge-Antwerp-Portland, 2013, p. 191.

⁴ T. MODOOD, *Multiculturalism*, Cambridge-Malden, 2013, p. 70. On these topics see also H. KRAUSE, *Comparative Family Law: Past Traditions Battle Future Trends*, in M. REINMANN AND R. ZIMMERMANN (eds.), *The Oxford Handbook of Comparative Law*, Oxford, 2006, p. 1099 ff.

⁵ K. CHARSLEY AND A. LIVERSAGE, *Transforming Polygamy: Migration, Transnationalism and Multiple Marriages among Muslim Minorities*, in *Global Networks*, 1, 2013, p. 72. See also H. WRAY, A. AGOSTON AND A. HUTTON, *op. cit.*, p. 209.

This aspect is a crucial part of a wider, harsher debate in Europe about multiculturalism and integration policies⁶ for immigrants and religious minorities which is often centered on migrant women. Under conditions of migration, women are questionably seen both as crucial mediators for the integration of their community and as victims of their patriarchal cultures.

Indeed, within debates on gender and cultural diversity, fundamental tensions arise between gender equality and minority cultures – “often viewed in stereotypical and essentialist terms” – and between community rights *versus* individual rights.⁷ Criticism of multiculturalism has often taken the form of a defense of gender equality in light of the idea that multiculturalism-oriented policies are ‘bad for women’. As Okin puts it, group rights endanger the equal rights of women within the group because “most cultures are patriarchal [...], and many (though not all) of the cultural minorities that claim group rights are more patriarchal than the surrounding culture”.⁸

2. *Transnational Marriages and Muslim Migrants in Europe.*

In recent decades, notably after the terrorist attacks of 9/11, Muslim migrants and settlers have become central in debates on migrants’ integration and on the accommodation of religious and cultural diversity.⁹ European legal systems face similar dilemmas in dealing

⁶ On the difference between multiculturalism and integration see T. MODOOD, *op. cit.*, p. 46: “multiculturalism or the accommodation of minorities is different from integration because it recognizes groups, not just individuals at the level of: identities, associations, belonging, including diasporic connections; behaviour, culture, religious practice, etc.; and political mobilization”.

⁷ A. RATTANSI, *Multiculturalism. A Very Short Introduction*, Oxford, 2011, p. 44.

⁸ S. M. OKIN, *Is Multiculturalism Bad for Women?*, in J. COHEN ET AL. (eds.), *Is Multiculturalism Bad for Women*, Princeton, 1999, p. 17.

⁹ For an analysis of the Muslim population at global and European level see PEW RESEARCH CENTER’S FORUM ON RELIGION & PUBLIC LIFE, *The Future of the Global Muslim Population*, 2011, available at <http://www.pewforum.org/2011/01/27/the->

with problematic Islamic family law-based institutions – *e.g.* polygamy and unilateral male repudiation (*talaq*) – deemed to be contrary to *ordre public* as they infringe a core value of Western legal systems which is gender equality. More generally, in Europe Islam is increasingly seen as the ‘irrenconcilable other’.¹⁰

Muslim legal tradition does not recognise men and women as equals. As Mir-Hosseini points out, the most pervasive gender-based legal inequalities that confront Muslim women relate to spousal and parental roles and rights.¹¹ This formal gender inequality is grounded in the concepts of *Qiwamah* and *Wilayah* underpinning Muslim family law and according to which women are under men’s guardianship. *Qiwamah* refers to “a husband’s authority over his wife and his financial responsibility towards her”, whereas *Wilayah* “generally denotes the right and duty of male family members to exercise

future-of-the-global-muslim-population/ (accessed on 29.01.2016). See also O. SCHARBRODT (ed.), *The Yearbook of Muslim in Europe*, Leiden-Boston, 2013.

¹⁰ On Islamic family law in Europe the literature is vast. An extensive analysis of this topic is beyond the scope of this paper. See *e.g.* A. BÜCHLER, *Islamic Family Law in Europe? From Dichotomies to Discourse – or: Beyond Cultural and Religious Identity in Family Law*, in *International Journal of Law in Context*, 2, 2012, p. 196 ff.; M. MALIK, *Muslim Legal Norms and the Integration of European Muslims*, EUI Working Papers, Robert Schumann Centre for Advanced Studies, 2009, available at http://cadmus.eui.eu/bitstream/handle/1814/11653/RSCAS%202009_29.pdf?sequence=1 (accessed on 20.01.2016). In the leading case ECtHR, *Refa Partisi (Welfare Party) and Others v. Turkey*, application No. 41340/98, 41342/98, 41343/98, 41344/98, judgment of 13 February 2003, the European Court of Human Rights found that the dissolution of *Refah* party – an Islamic political party in Turkey – did not violate the applicant’s right to freedom of association in Article 11 of the European Convention on Human Rights (ECHR). According to the Court, a conflict exists between the ECHR and “a regime based on Sharia which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts” (§ 123). On this topic see M.A. BADERIN, *An Analysis of the Relationship between Shari’a and Secular Democracy and the Compatibility of Islamic Law with the European Convention on Human Rights*, in R. GRIFFITH-JONES (ED.), *Islam and English Law*, Cambridge, 2013, p. 72 ff.

¹¹ Z. MIR-HOSSEINI, M. AL-SHARMANI AND J. RUMMINGER, *Introduction*, in ID. (eds.), *Men in Charge? Rethinking Authority in Muslim Legal Tradition*, London, 2015, p. 1-3

guardianship over female members (*e.g.* fathers over daughters when entering into marriage contracts)".¹² These concepts are based on Qur'anic verse 4:34, according to which "men are the protectors and maintainers of women".

Polygamy – *i.e.* the marital relationship between a man and more than one wife¹³ – is one of the most controversial Islamic law institutions. It is detrimental to women's human dignity as it violates the fundamental right of men and women to equality in marriage and family relations.¹⁴ Moreover, it challenges the "enduring traditional Western family-law dogma such as monogamy in the context of *ordre public*".¹⁵ Although polygamous marriages are not uniquely connected to Islam, their presence within Muslim communities pictures polygamy as a paradigmatic example of the assumed incompatibility between Islam and women's rights.

Pursuant to Qur'anic verse 4:3, a man may have to a maximum of four wives if he can treat them all equally: "if you fear you cannot act fairly towards the orphans, then marry the women you like, two, or three, or four. But if you fear you will not be fair, then one, or what you already have. That makes it more likely that you avoid bias". However, there is a debate about this verse among Muslim legal scholars. For some authors the same, read together with Qur'anic verse 4:129 stating the actual impossibility to treat all wives equally, seems to indicate that polygamy is not religiously sanctioned.¹⁶

¹² Z. MIR-HOSSEINI, M. AL-SHARMANI AND J. RUMMINGER, *op. cit.*, p. 1.

¹³ It should be borne in mind that 'polygyny' is the more appropriate term to refer to such relationship. Conversely, 'polyandry' refers to a relationship between one woman and two or more men. For an overview M.K. ZEITZEN, *Polygamy: A Cross-Cultural Analysis*, Oxford, 2008.

¹⁴ See art. 3 International Covenant on Civil and Political Rights and art. 16 Convention on the Elimination of All Forms of Discrimination against Women. See also the General Comment No. 28 of 29 March 2000 by the Human Rights Committee and the General Recommendation No. 29 of 26 February 2013 by the Committee on the Elimination of Discrimination Against Women.

¹⁵ See A. BÜCHLER, *Islamic Law in Europe?: Legal Pluralism and its Limits in European Family Laws*, Farnham, 2011, p. 46.

¹⁶ There is extensive literature on this issue. See, *e.g.*, A. MASHOUR, *Islamic Law and Gender Equality: Could There Be a Common Ground? A Study of Divorce and*

In the domain of immigration laws and integration policies in Europe, the ‘compatibility’ of cultural and religious practices of migrants with European values have given rise to a form of ‘cultural defense’. The latter turns into a process of “culturalization of immigration rules and integration practices under which culture increasingly becomes an essential factor for migrant selection”¹⁷. Such process has notably targeted Islam and Islamic-law based institutions like polygamy.

In this chapter, I address these issues from the angle of immigration law and explore how in Europe they intersect with spousal family reunification rules and affect migrant women.¹⁸

3. Muslim Families, Women’s Rights and the Ordre Public Exception in Migration Law and Policy.

3.1. Transnational Families and the Right to Respect for Family life: The Supranational Legal Framework.

The right to respect for family life is recognized in international and European human right law. However, the right to family reunification for migrants is not absolute.

Article 8 of the European Convention on Human Rights states that: “everyone has the right to respect for his private and family life”¹⁹. The

Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt, in *Human Rights Quarterly*, 7, 2005, p. 562 ff.; R. ALUFFI BECK-PECCOZ, *Le leggi del diritto di famiglia negli Stati arabi del Nord-Africa*, Torino, 1997; Z. MIR-HOSSEINI, M. AL-SHARMANI AND J. RUMMINGER, *op. cit.*, 2015; L. WELCHMANN, *Women and Muslim Family Law in Arab States*, Amsterdam, 2007; D. PEARL AND W. MENSKI, *Muslim Family Law*, London, 1998; M. ROHE, *Islamic Law Past and Present*, Leiden-Boston, 2014.

¹⁷ L. ORGAD, *Illiberal Liberalism Cultural Restrictions on Migration and Access to Citizenship in Europe*, in *The American Journal of Comparative Law*, 1, 2010, p. 63.

¹⁸ For a private international law perspective see E. GIUNCHI (ed.), *Muslim Family Law in Western Courts*, London-New York, 2014.

¹⁹ See also art. 16 para. 3 Universal Declaration of Human Rights; art. 21 para. 1 International Covenant of Civil and Political Rights; art. 10 para. 1 International Covenant of Economic, Social and Cultural Rights; art. 44 para. 1 International Convention

European Court of Human Rights has repeatedly stated that this provision does not oblige States to comply with the choice by married couples of their matrimonial residence or to accept the settlement of a non-national spouse in the country. In cases concerning immigrants' family life, such as the leading case *Abdulaziz, Cabales, Balkandali v. United Kingdom* of 1985, the Strasbourg Court asserted that "the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved"²⁰. In light of the principle of State power to control the entry of non-nationals in its territory, an obligation on the country of destination to facilitate family reunification only arises in some cases. This happens when an 'insurmountable objective obstacle' prevents a migrant already residing in a Council of Europe Member State from developing his/her family life in any other country.²¹

From yet another perspective, it has been noted that, on the whole, the Strasbourg jurisprudence has restricted States' margin of appreciation in the matter of immigrants' family life.²² To give but one example, the European Court of Human Rights held that requirements for family reunification will violate the right to respect for family life if they can be shown to be unreasonable. In *Haydarie and Others v. The Netherlands* of 2005, the Court did not consider unreasonable a requirement that "an alien who seeks family reunion must demonstrate that he/she has sufficient independent and lasting income, not being welfare bene-

on the Protection of the Rights of All Migrants Workers and Members of their Families; art. 16 European Social Charter (revised).

²⁰ ECtHR, *Abdulaziz, Cabales and Balkandali v. United Kingdom*, application No. 9214/80; 9473/81; 9474/81, judgment of 28 May 1985, § 67. See also ECtHR, *Z.H. and R.H. v. Switzerland*, application No. 60119/12, judgment of 8 December 2015. For a recent overview of the Strasbourg jurisprudence on art. 8 ECHR with regard to family migration see G. BASCHERINI, *op. cit.*, p. 191 ff.; D. THYM, *Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: a Human Right to Regularize Illegal Stay?*, in *International and Comparative Law Quarterly*, 1, 2008, p. 87 ff.

²¹ ECtHR, *Benamar and Others v. The Netherlands*, application No. 43786/04, admissibility decision of 5 April 2005; ECtHR, *Gül v. Switzerland*, 187, application No. 53/1995/559/645, judgment of 19 February 1996, § 46.

²² G. BASCHERINI, *op. cit.*, p. 196.

fits, to provide for the basic costs of subsistence of his or her family members with whom reunion is sought”.²³

As regards migration and Muslim family patterns – notably polygamous marriages – despite the dynamic interpretation of the notion of family by the European Court of Human Rights, polygamous families are not recognized as constituting ‘family life’ under Article 8, as laid down by the European Commission of Human Rights in the case *E.A. and A.A. v. The Netherlands* of 1992: “when considering immigration on the basis of family ties, a contracting State cannot be required under the Convention to give full recognition to polygamous marriages which are in conflict with their own legal order”.²⁴

The process of ‘Europeanisation’ of immigration policy developed within the European Union includes the regulation of family migration.²⁵ The EU Directive 2003/86/EC of 22 September 2003 on the right to family reunification lays down common minimum rules to enable family members (spouses and children) of a third country national lawfully residing in the EU to join them.²⁶ Such norms concern minimum age, income, housing, legal residence and integration measures.²⁷

As pointed out by the European Court of Justice, if an applicant of the family reunification procedure – and his/her family members – fulfill the requirements of the Directive, he has a right to family reunification. Article 4, paragraph 1 of the Directive imposes “precise

²³ ECtHR, *Haydarie and Others v. The Netherlands*, application No. 8876/04, admissibility decision of 25 October 2005.

²⁴ ECtHR, *E.A. and A.A. v. The Netherlands*, application No. 14501/89, admissibility decision of 6 January 1992, § 2. On this topic see also the above mentioned *Refah Partisi* case.

²⁵ On this issue see L. BLOCK AND S. BONJOUR, *Fortress Europe or Europe of Rights? The Europeanisation of Family Migration Policies in France, Germany and The Netherlands*, in *European Journal of Migration and Law*, 2, 2013, p. 203 ff.

²⁶ The Directive does not apply to Ireland, Denmark and the United Kingdom. It does not concern family members of EU citizens. Their status is regulated by the Citizens’ directive 2004/38/EC. On the transposition of the family reunification Directive in EU Member States see C.A. GROENENDIJK *et al.*, *The Family Reunification Directive in EU Member States*, Nijmegen, 2007.

²⁷ See respectively art. 4 para. 5; art. 7 para. 1 lett. C; art. 8 and art. 15; art. 7 para. 2 Directive 2003/86.

positive obligations, with corresponding clearly defined individual rights, in the Member States, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation".²⁸ Importantly, in the *Chakroun* case of 2010, the Court also pointed out that measures adopted by States should not undermine the effectiveness of the Directive whose declared objective is to 'promote family reunification'. Furthermore, "measures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law", notably the European Convention on Human Rights and the Charter of Fundamental Rights of the EU.²⁹

Under recital 11 in the Preamble to the Directive, "the right to family reunification should be exercised in proper compliance with the values and principles recognised by Member States, in particular with respect to the rights of women and of children". Such *rationale* justifies the restrictive measures on polygamy laid down in Article 4, paragraph 4, that states: "in the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse". Moreover, "Member States may limit the family reunification of minor children of a further spouse and the sponsor".

As regards integration policies, Article 7, paragraph 2 of the Directive allows Member States to require third country nationals to comply with integration measures. As will be seen in Paragraph 3.2. of this Chapter, many EU countries have established pre-entry integration requirements. The compatibility of these measures with the family

²⁸ C-540/03, *European Parliament v. Council of the European Union* (2006), para. 60.

²⁹ C-578/08, *Rhimou Chakroun v. Minister van Buitenlandse Zaken* (2010), para 44. In the *Chakroun* case the Court ruled against two pre-entry requirements in The Netherlands: the first concerned the establishment of different criteria for family formation and family reunification. The second dealt with a minimum income threshold of 120% of minimum wage for family migration.

reunification Directive have been disputed by the European Commission in 2011 with a statement connected to the *Bibi Mohammed Imran* case.³⁰ Also, in 2006 the European Court of Justice found that “the fact that the concept of integration is not defined cannot be interpreted as authorising the Member States to employ that concept in a manner contrary to general principles of Community law, in particular to fundamental rights”.³¹

Thus, while upholding integration conditions, the Court increasingly plays a role in challenging Member States’ room for restrictive manoeuvre in immigration matters.³²

3.2. *Family Migration and Civic Integration: Intersecting Gender, Religion and Migration Status*

In recent decades, legal regulations of family migration have progressively become more restrictive across Europe, thus limiting the possibility of family life for migrants and ethnic minorities. Severe requirements have been established for allowing family reunification, including restrictions related to minimum age, income, housing standards and language proficiency. Several European countries have also extended to family migration a set of pre-entry integration measures, such as pre-departure integration tests.³³ As regards marriage migration regulations, their major topics have been promoting the integration of

³⁰ See the European Commission written observation of 4 May 2011 in case C-155/11 PPU *Bibi Mohammed Imran v Minister van Buitenlandse Zaken* (2011). On this topic see L. BLOCK AND S. BONJOUR, *op. cit.*, p. 220.

³¹ C-540/03, *European Parliament v. Council of the European Union* (2006) para. 70.

³² L. BLOCK AND S. BONJOUR, *op. cit.*, p. 220. On the European Court of Justice as a human rights court in the migration context see e.g. S. MOLLALLY, *op. cit.*, p. 415.

³³ H. WRAY, A. AGOSTON AND A. HUTTON, *op. cit.*, p. 209 ff. For an analysis of the impact of family reunification requirements see T. STRIK, B. DE HART AND E. NISSEN, *Family Reunification Requirements: A Barrier or Facilitator to Integration? A Comparative study*, Family Reunification Project, Wolf Legal Publishers Law series, available at http://research.icmpd.org/fileadmin/Research-Website/Project_material/Family_Reunification{EIF/FamilyReunification_transnational_report.pdf (accessed on 28.01.2016)

spouses, tackling forced marriages and preventing sham marriages for immigration purposes.

A detailed examination of the legal discipline of marriage migration in Europe is beyond the scope of this chapter. I will rather focus on some meaningful examples of how European States intersect family reunification rules and cultural or religious practices when the latter are deemed to violate women's human dignity.

France is a paradigmatic example of the way in which the interplay of religious diversity (notably Islam), gender equality and the concept of '*intégration républicaine*' has progressively shaped immigration and citizenship rules. Conditions for family reunification are laid down in the *Code de l'entrée et du séjour des étrangers et du droit d'asile* (CESEDA).³⁴ Besides conditions related to income, minimum age and accommodation, the applicant is required to respect the fundamental principles of family life in France such as monogamy, gender equality, respect for the freedom to marry and children education. Furthermore, since 2007 everyone applying for family reunification aged from six to 65 must pass a pre-entry test in his/her country of origin to assess the knowledge of French language and French Republican values. The purpose of such evaluation is "to allow him/her to prepare his/her *intégration républicaine* in French society" (Article L. 411-8 CESEDA).³⁵

In France, family reunification for polygamous marriages was permitted until the 90s. Following the proposals elaborated by the *Haut conseil à l'intégration* in 1992 on "legal and cultural conditions of integration", in 1993 the so-called *loi Pasqua*³⁶ prohibited family reunification for polygamous foreign nationals. Pursuant to Article L. 411-7 CESEDA "when a polygamous foreigner resides in France with a first spouse, the benefit of family reunification may not be granted to another spouse. Unless the other spouse is deceased or deprived of parental

³⁴ See from art. L. 411-1 to art. L. 431-3 CESEDA.

³⁵ For an overview see O. LECUCQ, *Condition d'intégration et regroupement familial*, in *Actualité juridique famille*, 2009, p. 283 ff. If the applicant fails the test, he/she must follow a course in his/her country of origin.

³⁶ *Loi n. 93-1027 du 24 août 1993 relative à la maîtrise de l'immigration et aux conditions d'entrée et de séjour des étrangers en France*.

rights, the children do not benefit from family reunification". The French Constitutional Council validated the provision outlawing family reunification in case of polygamy in the decision No. 93-325 of 13 August 1993³⁷. Also, in 2011, the *Conseil d'État* indicated that polygamy is among the grounds of *ordre public* which are likely to be considered to establish a visa refusal for a second spouse and her children.³⁸

In 2000, the Ministry of Interior issued a circular on the *Renouvellement des cartes de résident obtenues par des ressortissants étrangers polygames avant l'entrée en vigueur de la loi du 24 août 1993* clearly stating that the ban on polygamy is grounded on the respect of French republican values, women's rights and integration of children. The same rationale underpins the *Contrat d'accueil et de l'intégration* (integration and welcome contract) between the French State and every newly arrived third country national. The contract states that

Equality between men and women is a fundamental principle of French society. Women have the same rights and the same duties as men. Parents are jointly responsible for their children. This principle is applied to all, French people and foreigners alike. Women are not subject either to the authority of their husband or to that of their father or brother [...]. Forced marriages and polygamy are forbidden, while the integrity of the body is protected by law.

Since 2007, the 'contractualisation' of the integration process has been extended to family migration: in the case of family reunification of children, the sponsor is also required to sign the *contrat d'accueil et d'intégration pour la famille*. As Lecucq puts it, this new additional requirement, together with the above mentioned pre-entry integration

³⁷ *Conseil constitutionnel, décision n. 93-325*, 13 August 1993 (notably *considérant* 77). However only with the *Circulaire interministérielle n. DPM/DMI2/2006/26 relative au regroupement familial des étrangers* of January 2006 such prohibition was effectively enacted. See V. FEDERICO, *Europe Facing Polygamy: Italy, France and the UK Accept the Challenge of Immigration*, IACL XI World Congress, 2014, (first draft), available at <https://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws6/w6-federico.pdf> (accessed on 28.01.2016)

³⁸ *Conseil d'État, n. 333723*, 24 August 2011.

test, can be seen as an inclusion of family migration into the logic of assimilation.³⁹

Moreover, according to Article L. 314-5 CESEDA the permanent residence permit (*carte de résident*) – valid for ten years and ensuring permanent settlement in France – may not be issued (or renewed) to a foreign national who lives in a polygamous household⁴⁰. Only if polygamous migrants prove that they are engaging in a process towards a monogamous marriage, their status of permanent resident will not be at risk. To accompany female spouses (namely second wives) in leaving polygamous households and gaining autonomy a *décohabitation* process was set.⁴¹ Although accommodation and social assistance for these women was provided by French authorities, in practice, in some cases the effects of the *décohabitation* process turned out to be problematic rather than promoting gender equality. Under the pressure of proving that the process towards monogamy was taking place, some husbands expelled second wives from their homes (or sent them to their country of origin) but kept the children that they had with those wives in order to continue to be entitled to social benefits.⁴² In this case, the adoption of a strict policy against polygamy to protect *les droits de la femme* turned out to be counterproductive and harmful in some cases because it failed to take into account its potential negative effects on vulnerable members of polygamous relations, notably women and young children.

Polygamy is seen as incompatible with the concept of '*intégration républicaine*' grounded in French values such as gender equality. Accordingly, being in a polygamous relationship is considered an insurmountable obstacle to the acquisition of citizenship via naturalization because it shows a lack of assimilation (*défaut d'assimilation*), as rec-

³⁹ On this topic see O. LECUCQ, *op. cit.*, p. 283 ff.

⁴⁰ See *loi Debré* (loi n. 97-396 du 24 avril 1997 portant diverses dispositions relatives à l'immigration) and *loi Chevènement* (loi n. 98-349 du 11 mai 1998 relative à l'entrée et au séjour des étrangers en France et au droit d'asile).

⁴¹ See *Circulaire DPM/AC 14/ n 2001-358 du 10 juin 2001 relative au logement des femmes décohabitant de ménages polygames et engagées dans un processus d'autonomie*.

⁴² See the report COMMISSION NATIONALE CONSULTATIVE DES DROITS DE L'HOMME, *Étude et propositions: la polygamie en France*, 2006, available at <http://www.cncdh.fr/sites/default/files/rapportpolygamie.pdf> (accessed on 27.01.2016).

ognized in Article 21-4 of the *Code civil*. The same ‘lack of assimilation’ was found in the *Faiza Silmi* case concerning a woman whose application for French citizenship was rejected because her headdress – a *niqab* – was found incompatible with French Republican values. In 2008 the *Conseil d’État* agreed that the woman had failed to satisfy the assimilation test required for the grant of citizenship because her ‘radical religious practice’ infringed the core values of French community, namely gender equality and *laïcité*.⁴³

In French immigration and citizenship laws, Islam seems to be framed as being against Republican principles. This trend supports the “expansion of punitive immigration practices”⁴⁴ for those unable to internalize such values. Since 2011 applicants for French citizenship have had to sign the *Charte des Droits et des Devoirs du Citoyen Français* (Charter of the Rights and Duties of the French Citizen) and commit to French principles, values, and symbols. The introduction of this additional condition reflects “a further shift towards the implementation of coercive integration policies against a background of continuing appeals to essential French values, to national identity and to gender equality”.⁴⁵

As seen above, in France the idea of the incompatibility between polygamy and French republican values imbues every aspect of immigration law: family reunification, issuing and renewal of the *carte de résident*, request for French citizenship via naturalization. Although the French case is particularly paradigmatic in this respect, the trends highlighted in the French context can be found in other European countries as well. More generally, comparative analyses have shown that concerns regarding the compatibility of cultural and religious (notably Islamic) practices of migrants with European values have progressively ‘culturalized’ immigration laws and integration policies in Europe, and

⁴³ *Conseil d’État*, n. 286798, 27 June 2008.

⁴⁴ S. MOLLALLY, *op. cit.*, p. 412

⁴⁵ S. MOLLALLY, *op. cit.*, p. 422. On integration as unilateral obligation for migrants in France see also D. LOCHAK, *Devoir d’intégration et immigration*, in *Revue de droit sanitaire et social*, 1, 2009, p. 18 ff.

a move is taking place from voluntary to compulsory cultural assimilation in host countries, also in the context of family migration.⁴⁶

To give but one example, the preoccupation with cultural conformity in family migration is evident in several countries that have introduced pre-departure integration tests for prospective reunited family members in their countries of origin.⁴⁷ The Netherlands firstly introduced pre-departure integration measures as part of the ‘Dutch integration policy’, which has recently shifted from a multiculturalism-oriented to an assimilationist approach.⁴⁸ The Civic Integration (Preparation Abroad) Act of 2005 (*Wet Inburgering in het Buitenland*) requires incoming spouses to pass a civic integration exam based on the knowledge of the Dutch language and Dutch life before entering the country. Despite its alleged ‘civic’ nature – it has been noted – the integration test seems to be culture-based for the way in which it focuses on the idea Dutch people have of themselves and their vision of Dutchness.⁴⁹ Interestingly, EU citizens and nationals from other Western countries, such as the United States and Australia, are exempt. As a matter of fact, pre-entry integration measures seem to address categories of prospective migrants from non-Western countries (notably from Muslim countries) who are considered culturally diverse and have to prove their capability of assimilation before entering The Netherlands.⁵⁰

⁴⁶ See L. ORGAD, *op. cit.*, p. 63 ff. See also C. JOPPKE *Transformation of Immigrant Integration in Western Europe: Civic Integration and Anti-Discrimination Policies in the Netherlands, France, and Germany*, in *World Politics*, 2, 2007, p. 243 ff.

⁴⁷ For a comprehensive overview see B. PERCHINIG *et al*, *The National Policy Frames for the Integration of Newcomers. A Comparative Report*, PROSINT Project, 2012, p. 69 ff., available at <http://research.icmpd.org/research-home/projects/integration-non-discrimination/prosint/> (accessed on 28.01.2016); T. STRIK, B. DE HART AND E. NISSEN, *op. cit.*, p. 15.

⁴⁸ In this topic see P. SCHOLTEN, *Constructing Dutch Immigrant Policy: Research-Policy Migration and Immigrant Integration Policy-Making in the Netherlands*, in *The British Journal of Politics and International Relations*, 1, 2011, p. 75 ff. For an analysis of the Dutch case from a comparative perspective L. BLOCK AND S. BONJOUR, *op. cit.*, p. 203 ff.

⁴⁹ L. ORGAD, *op. cit.*, p. 72.

⁵⁰ L. ORGAD, *op. cit.*, p. 72-74. It is worth noting that the Dutch minimum income requirement for family reunification was successfully challenged in the above mentioned *Chakroun* judgment of the European Court of Justice.

This form of ‘cultural defense’ can be seen as a reaction to concerns about the perceived failed integration of Muslim communities, notably North Africans and Turkish migrants.

Also in the United Kingdom, in 2010, Immigration Rules were amended, and a mandatory test to prove English language proficiency was introduced for incoming spouses and partners. The Government’s objectives for establishing this additional requirement are to assist the spouse or partner’s integration into British society at an early stage, to benefit any children the couple might have and to reduce the vulnerability of newly arrived spouses, especially women, concerning detrimental practices such as forced marriages and honor killings.⁵¹ This obligation was unsuccessfully challenged in the Supreme Court judgment *R (on the applications of Ali and Bibi) v Secretary of State for the Home Department* in 2015.⁵² The introduction of a pre-departure integration program is part of greater restrictiveness in family migration regulations in the UK, particularly regarding income, legal dependency on the sponsor, marriage breakdown rules, and genuine marriage proofs.⁵³ The aim of more stringent requirements is to promote the integration of spouses, to tackle forced marriages and to prevent sham marriages for immigration purposes which are not ‘genuine and subsisting’ relationships as required by the UK Immigration Rules. In the context of the crisis of multiculturalism and increasing concerns about cultural conformity,

⁵¹ See Home Office, *Securing the UK Border: Our Vision and Strategy for the Future* (2007) consultation paper; ID., *Marriage Visas: Pre-Entry English Requirement for Spouses* (2007), a separate consultation paper; ID., *Marriage Visas: The Way Forward* (2008). Nationals from the majority English speaking countries do not have to pass the test.

⁵² *R (on the applications of Ali and Bibi) v Secretary of State for the Home Department* [2015] UKSC 68. Even though, it is worth noting that the Court suggests that exceptions to the rule may be unlawful because of their restrictiveness. For a comment see C. YEO, *Supreme Court Dismisses Challenge to English Language Pre-Entry Test for Spouses in Ali and Bibi Case*, 18.11.2015, available at <https://www.freemovement.org.uk/supreme-court-dismisses-challenge-to-english-language-pre-entry-test-for-spouses-in-ali-and-bibi-case/> (accessed on 5.02.2016).

⁵³ For an overview on marriage migration regulation and case law in the UK see H. WRAY, *Regulating Family Migration into the UK: A Stranger in the Home*, Farnham, 2011.

these legislative measures can be seen as part of a wider UK community cohesion and integration agenda based on disciplinary migration strategies, according to which integration is an obligation primarily placed on migrants.⁵⁴

A similar rationale has inspired the introduction of pre-entry integration testing with regard to the knowledge of the German language for incoming spouses in Germany and Austria.

The compatibility of pre-departure language requirements with the family reunification Directive is contested, as already pointed out by the European Commission in 2011 with a statement connected to the *Bibi Mohammed Imran* case.⁵⁵ More recently in the *Naime Dorgan v Bundesrepublik Deutschland* case of 2014, the European Court of Justice ruled that German pre-entry language requirements for prospective family migrants contravene the ‘standstill’ clause of the EU-Turkey association agreement. The Court has not yet considered the compatibility of pre-entry integration tests with the family reunification Di-

⁵⁴ The emphasis on the idea of ‘Britishness’ and the commitment to British shared identity and values – core concepts of the UK community cohesion and integration agenda – is epitomized by the ‘life in the UK test’ for migrants seeking permanent settlement (indefinite leave to remain) in the UK or British citizenship via naturalization. The literature on this topic is vast. For a critique on what is understood to be Britishness and British values see e.g. S. HALL, *Representation: Cultural Representations and Signifying Practices*, London, 1997. See also B. PAREKH, *Rethinking Multiculturalism: Cultural Diversity and Political Theory*, Basingstoke, 2005. For an analysis of the idea of a UK ‘community of value’ see B. ANDERSON, *Us and Them? The Dangerous Politics of Immigration Control*, Oxford, 2013. In January 2016, the British Prime Minister, David Cameron announced a plan to launch a £20m language fund to help Muslim women unable to speak English. He also plans to introduce language tests for migrant spouses after two and a half years in the UK. See A. SPARROW, *Muslim women to be taught English in £20m plan to beat ‘backward attitudes’*, in *The Guardian*, 18.01.2016, available at <http://www.theguardian.com/uk-news/2016/jan/18/muslim-women-to-be-taught-english-in-20m-plan-to-beat-backward-attitudes>. See also R. MASON AND H. SHERWOOD, *Migrant spouses who fail English test may have to leave UK, says Cameron*, in *The Guardian*, 18.01.2016, available at <http://www.theguardian.com/uk-news/2016/jan/18/pm-migrant-spouses-who-fail-english-test-may-have-to-leave-uk> (accessed on 28.01.2016).

⁵⁵ See the above mentioned European Commission written observation of 4 May 2011 in the case of *Bibi Mohammed Imran v Minister van Buitenlandse Zaken* case.

rective. However, in the case at stake the Court held that pre-departure language tests go “beyond what is necessary in order to attain the objective pursued, in so far as the absence of evidence of sufficient linguistic knowledge automatically leads to the dismissal of the application for family reunification, without account being taken of the specific circumstances of each case”.⁵⁶

Pre-departure tests frame the integration process as a unilateral obligation of the migrant rather than a dynamic two-way process of mutual accommodation involving both immigrants and citizens of host countries, as pictured at EU level.⁵⁷ Moreover, it has been noted that in some cases “little is known about the effects of pre- and post-entry measures in terms of promoting socio-cultural integration”.⁵⁸

The implementation of pre-entry tests is often connected to a gender discourse: they mainly target immigrant women “which are portrayed as forming a relatively homogeneous, subordinate and particularly vulnerable group in need of protection” and emancipation. However, the alleged aim of empowering migrant women from an early stage of their integration process is questionable because, as a matter of fact, pre-entry tests seem to be linked to the side-effect of reducing the entry and settlement of lowly educated migrants and poor or illiterate women from Muslim countries.⁵⁹ Indeed, from a gender-sensitive perspective, attention should be paid to the situation of many women in several parts of the world that might have low levels of education in their own language; hence, they are unable to pass the (often costly) pre-entry integration tests to join their family members in Europe.

⁵⁶ C-183/13, *Naime Dorgan v Bundesrepublik Deutschland* (2014), para 38.

⁵⁷ <https://ec.europa.eu/migrant-integration/the-eu-and-integration/eu-actions-to-make-integration-work> (accessed on 5.02.2016)

⁵⁸ B. PERCHINIG *et al*, *op. cit.*, p. 16.

⁵⁹ B. PERCHINIG *et al*, *op. cit.*, p. 71.

4. *Religious Diversity and 'the Body of Women' in Migration Law: Transcending Dichotomies.*

As seen above, in Europe challenges connected to family migration and integration policies often tend to be portrayed as conflicts between the recognition of the right to respect for 'traditional' practices of new religious and cultural minorities and the "assumed democratic and egalitarian norms of majority European societies".⁶⁰ More specifically, a general focus seems to emerge on "the acceptability in the Enlightenment West of the pre-Enlightenment Muslim".⁶¹

Although based on real concerns, the increasing 'culturalization' of immigration and citizenship regulations risks supporting an essentialist, dichotomizing and simplistic vision of the West and Islam, which considers them as radical opposites and obscures the great diversity of views within both entities. This perspective can become counterproductive, particularly regarding women's protection, as with the case of the *décohabitation* process in France. Furthermore, such a culturally-centered vision about migrants and religious minorities fails to acknowledge that the West is likewise culturally situated. On the contrary – as Modood has noted – what is needed seems to be an approach based on dialogue and negotiation. It is "a careful, institution by institution analysis of how to draw the public-private boundary and further the cause of multicultural equality and inclusivity" to overcome the present state of fear, polarization and ultimately the suicide bombing of our cities.⁶²

Such a dichotomizing vision also lacks the ability to capture the plurality within the Muslim world, and it neglects legislative reforms in

⁶⁰ M. DUSTIN, *Gender Equality, Cultural Diversity: European Comparisons and Lessons*, London, 2006, p. 26, available at http://www.lse.ac.uk/genderInstitute/pdf/NuffieldReport_final.pdf (accessed on 28.01.2016)

⁶¹ S. MOLLALLY, *op. cit.* referring to J.R. BOWEN, *Europeans Against Multiculturalism: Political Attacks Misread History, Target Muslims, and May Win Votes*, in *Boston Review*, 2011, available at <http://www.bostonreview.net/john-r-bowen-european-multiculturalism-islam> (accessed on 5.02.2016).

⁶² T. MODOOD, *op. cit.*, p. 66, 121

family law and judicially innovative rulings in Muslim countries regarding, *inter alia*, polygamy.⁶³ It is worth mentioning that efforts have been made to achieve more egalitarian family laws and new knowledge of gender equality and justice through alternative understandings of the concepts of *Qiwamah* and *Wilayah*.⁶⁴

A perspective based on the harsh opposition between Islam and the West risks being notably detrimental for women.⁶⁵ According to Okin, multiculturalism is bad for women because group rights can limit the capacities of women to live with equal human dignity as men.⁶⁶ One of the main critiques to Okin's theory is her oversimplification of minority groups' internal power differentials and her stereotypes on migrant and minority women as passive victims that recall the above mentioned dichotomizing opposition between 'the West and the Rest'.⁶⁷ Interestingly, as Knop, Michaels and Riles point out, feminist anthropologists and ethnic minority women activists alike increasingly challenge the false image of a stark conflict between equality and culture. Instead, they try to capture the complexity of women's positions and activism in minority cultures by striking a right balance between equality and cultural diversity through the combination of two pragmatic strategies: *compromise* and *tolerance*. In other words, "the other culture may be tolerated, but only to a certain degree".⁶⁸ Such an approach – Engle Merry argues

⁶³ On this topic see sources above fn. 16 and E. GIUNCHI (ed.), *Adjudicating Family Law in Muslim Courts*, London-New York, 2013. See also N. YASSARI, L-M. MÖLLER AND I. GALLALA-ARNDT, *Introduction – Negotiating Parenthood in Muslim Countries: Changing Concepts and Perceptions*, in *The American Journal of Comparative Law*, 4, 2015, p. 819 ff.

⁶⁴ Z. MIR-HOSSEINI, M. AL-SHARMANI AND J. RUMMINGER, *op. cit.*, p. 5-6.

⁶⁵ On this topic A. RATTANSI, *op. cit.*, p. 43 has noted that: "in so far as multiculturalism may be said to be in crisis, more often than not, it is being played out on the bodies of women". With regard to Muslim women see S. RAZACK, *Casting Out: the Eviction of Muslims from Western Law and Politics*, Toronto, 2008.

⁶⁶ S. M. OKIN, *op. cit.*, p. 12.

⁶⁷ A. RATTANSI, *op. cit.*, p. 47.

⁶⁸ See K. KNOP, R. MICHAELS AND A. RILES, *From Multiculturalism to Technique: Feminism, Culture, and the Conflicts of Law Style*, in *Stanford Law Review*, 2012, p. 598.

– helps to consider culture as a concept open to change that can reconcile with a commitment to gender equality.⁶⁹

The same complexity is acknowledged by Muslim feminist legal scholars on women and family patterns in Muslim legal tradition. The binary opposition between West and Islam underpinning debates about immigration, gender equality and cultural diversity in Europe tends to see religion as the only explanation for gender oppression within Muslim communities. It fails to consider that, although the discrimination of women in Muslim family laws and practices is relevant, Muslim women are not a “homogeneous group with uniform challenges”. A large body of literature documents “the complex and multi-layered inequalities that women in different Muslim contexts confront, and which are not reducible to religion”.⁷⁰ Instead, they are deeply embedded in a wider struggle for social justice and democracy.⁷¹

The current rhetoric on the integration of women belonging to Muslim minorities in Europe suggests a notion of Muslim women as passive victims rather than agents. As Dustin puts it, “with the exception of a few celebrated individuals and victims, minority, migrant and Muslim women remain the subject of debate rather than leading it”.⁷² However,

⁶⁹ S. ENGLE MERRY, *Human Rights and Gender Violence. Translating International Law in Local Justice*, Chicago, 2006, p. 9. Similarly, A. PHILLIPS in her book *Multiculturalism without Culture*, Princeton, 2007, rejects an essentialist understanding of culture and suggests a concept of multiculturalism which is centered on human agency.

⁷⁰ Z. MIR-HOSSEINI, M. AL-SHARMANI AND J. RUMMINGER, *op. cit.*, p. 3.

⁷¹ See S. BANO, *Muslim Women and Shari'ah Councils: Transcending the Boundaries of Community and the Law*, Basingstoke, 2012; Z. MIR HOSSEINI, *Muslim Legal Tradition and the Challenge of Gender Equality*, in Z. MIR-HOSSEINI, M. AL-SHARMANI AND J. RUMMINGER, *op. cit.*, p. 13 ff. See also H.A. KADRI, *Right of Muslim Woman with Special Reference to Matrimonial Clauses – A Human Rights Perspective*, in *Fiat Justitia. Let Justice Be Done*, 2015, p. 20 ff.

⁷² See M. DUSTIN, *op. cit.*, p. 33. The Author notes that “the current focus on Muslim women as victims rather than agents is particularly damaging to Muslim minorities, but also means that the specific needs of women in other minority groups may be overlooked”. Moreover “violence against women from minority communities is treated separately from ‘mainstream’ violence against women, often as part of race and immigration policy instead of as part of gender violence work” (p. 1). On the importance of education as a crucial means in relation to the issues at stake see, M.S. ISLAM, *Im-*

feminist Muslim socio-legal scholars observe that several shifts and developments have occurred in women's self-knowledge and relations *vis-à-vis* Muslim legal tradition. This is also evident in the struggle to establish a more egalitarian construction of gender rights by means of rethinking and reconstructing the readings of Islam sacred texts on which gender inequality is based.⁷³

The idea of Muslim women as passive victims throughout European countries and the need to protect them from their religion intersects with the *ordre public* rationale that serves to justify the rejection of problematic Islamic law-based institutions (such as polygamous marriages) because they infringe gender equality.⁷⁴

Drawing upon a perspective that captures the complexity of the issues at stake while rejecting a dichotomic vision of Islam and West, we cannot ignore that, on the one hand, polygamy is an element of 'irreconcilable otherness' and inherently harmful to women. However, on the other hand, empirical research has shown that "transnationalism [...] produces conditions, opportunities and motivations for multiple marriages to occur. In this complex situation of coexisting legal codes, networks and aspirations, polygamy becomes one of the grounds on which intergenerational relations and 'gendered geographies of power' [...] are negotiated".⁷⁵ Immigration law restrictions on this topic, aimed to protect gender equality, need to be based on a more pragmatic approach in order not to be counterproductive and further disempower the most vulnerable subjects – polygamists' wives and their children.

Are the process of culturalization of immigration rules and integration practices in Europe and the discourse of gender equality effective ways to protect women belonging to religious and cultural minorities? Or, are they rather instrumental to pursue an anti-immigration or Islamophobic agenda?⁷⁶ By addressing the issues at stake exclusively in cultural and religious terms it is ignored that women belonging to mi-

portance of Girl's Education as Right: A Legal Study from Islamic Approach, in *Beijing Law Review*, 1, 2016, p. 1 ff.

⁷³ Z. MIR-HOSSEINI, M. AL-SHARMANI AND J. RUMMINGER, *op. cit.*, p. 3 ff.

⁷⁴ See E. GIUNCHI (ed.), *Muslim Family Law in Western Courts*, cit.

⁷⁵ K. CHARLEY AND A. LIVERSAGE, *op. cit.*, p. 73.

⁷⁶ M. DUSTIN, *op. cit.*, p. 2.

norities face socio-economic disadvantages and poverty on a day-to-day basis. As Cooper argues, it is important to recentre social inequality, rather than cultural harm, as the main problem related to diversity.⁷⁷

In order to actually protect (minority and majority) women's rights, simplistic dichotomies need to be transcended. It is crucial to engage with the fact that, as Honig puts it, "the question of what constitutes gender (in)equality must be kept disturbingly open to perpetual re-interrogation".⁷⁸

⁷⁷ D. COOPER, *Challenging Diversity: Rethinking Equality and the Value of Difference*, Cambridge, 2004, p. 74-84 and 192-194, quoted by K. KNOP, R. MICHAELS AND A. RILES, *op. cit.*, p. 608, fn. 86.

⁷⁸ B. HONIG, *Forum Is Multiculturalism Bad for Women?*, in *Boston Review*, 1997, available at <http://www.bostonreview.net/forum/multiculturalism-bad-women/bonnie-honig-complicating-culture> (accessed on 28.01.2016).

LEGAL PLURALISM IN EUROPE AND THE *ORDRE PUBLIC* EXCEPTION: AN INTRODUCTORY COMPARATIVE CONSTITUTIONAL LAW FRAMEWORK

Roberto Toniatti

Summary: 1. Introduction: the interaction between legal pluralism and legal monism in the western legal tradition. 2. Plural features of legal monism in Europe. 3. Legal monism and European public order in the case law of the ECtHR. 4. Legal pluralism and the rationale of conflict of laws in the domestic sphere. 5. Managing legal pluralism: the need for further research and dialogue.

1. Introduction: the interaction between legal pluralism and legal monism in the western legal tradition.

Legal pluralism is a conventional scientific formula¹, originally elaborated by legal anthropologists and later employed by comparative lawyers and scholars of legal traditions (or systems, hence systemology), indicating the impact of the legal systems of colonial powers over the ones of colonised, autochthonous primitive societies: legal pluralism then adequately describes how, within all colonial jurisdictions in Africa, North and South America, Asia, Australia and New Zealand, different segments of society experienced being under the regulation of

¹ The same formula is ever more often associated as well with what appears to be better qualified as *global* legal pluralism, namely a non-hierarchical plurality of sources of transnational law. See R. MICHAELS, *Global Legal Pluralism*, in *Annual Review of Law & Social Science*, 2009, 243; M. ROSENFELD, *Repenser l'ordonnement constitutionnel à l'ère du pluralisme juridique et du pluralisme idéologique*, in H. RUIZ FABRI et M. ROSENFELD, (dir.), *Repenser la constitutionnalisme à l'âge de la mondialisation et de la privatisation*, Paris, 2011, 93; on distinguishing features between the two phenomena see W. TWINING, *Normative and legal pluralism: a global perspective*, in *Duke Journal of Comparative and International Law*, 2010, 473.

different sets of rules: indigenous law for the native autochthonous population and the motherland's law (whether civil law or common law) for the colonial settlers, each set of rules being applicable mainly on the ground of status, namely being part of one group or another.

The distinct sets of rules were further differentiated and qualified by their own distinct cultural founding paradigm: on the one hand, the *rationality of western law*, whether by way of adaptation (in time and space) of sources of Roman law through evolving academic and judicial interpretation during the long *jus commune* realm in continental Europe², or by way of the binding force of judicial precedents in common law England and her colonies, or eventually by way of the normative will of a political majority as expressed by an elected assembly in continental Europe and, on the other, the *holistic foundation of chthonic law*³.

Another pattern of co-existence of distinct legal traditions within the same jurisdiction - indicating again a legal pluralism framework - is to

² In line of continuity with such historical experience reference is to be made to Roman-Dutch law as it still exists in southern Africa, such as in the Republic of South Africa, and also in Botswana, Lesotho, Namibia, Swaziland, and Zimbabwe.

³ See H. P. GLENN, *Legal Traditions of the World*, 5th ed., Oxford, 2014, 61, quoting E. GOLDSMITH, *The Way: an Ecological World View*, London, Rider, 1992 ("the chthonic world-view (...) when people really knew how to live in harmony with the natural world") and explaining that "to describe a legal tradition as chthonic is thus to attempt to describe a tradition by criteria internal to itself, as opposed to imposed criteria. It is an attempt to see the tradition from within, in spite of all problems of language and perception, and to see it from a time prior to the emergence of colonial language", 62. The same source of law is indicated as "ancestors' law" (*diritto ancestrale*, 61) – distinct from customary law (*diritto consuetudinario*) and structurally connected to "sacredness" ("sacralità", 67) and to a "society whereby power is diffuse" (*società a potere diffuso*, 92) – in R. SACCO, *Il diritto africano*, Torino, 1995; as "customary law" (*droit coutumier*) in R. DAVID, C. JAUFFRET-SPINOSI, *Les grands systèmes de droit contemporaines*, XI éd., Paris, 2002, 441 ss.; as "ethnic customs" (*coutumes ethniques*) in R. LEGAIS, *Grands systèmes de droit contemporaines. Approche comparative*, II éd., Paris, 2005, 247; or as «traditional law» (*droit traditionnel*) in G. CUNIBERTI, *Grands systèmes de droit contemporaines*, II éd., Paris, 2011, 441 (adding that «nombre de sociétés traditionnelles africaines connaissaient donc tant la législation [by tribal chiefs] que la jurisprudence comme sources de droit, même si leur importance était incomparablement plus faible qu'en occident », 444).

be taken into account with regard to *religious law*, having its own specific cultural founding paradigm rooted in allegedly supra-natural sources, whether in a thoroughly theocratic scenario or in hybrid or mixed law systems.

Looking at a world map, one would be bound to draw the conclusions that legal pluralism of one sort or another – including mixed jurisdictions – happens to be, in fact, the general rule rather than the exception in a large majority of countries⁴: among other factors, while Asian constitutions, especially due to a stronger influence of the religious factor in society, have experienced a more stable and balanced coexistence of religious law and state law (alongside with indigenous law as well), in Africa and in Latin America a process of constitution making or of amending older constitutions has more recently been taking place, supporting to varying degrees new official settings of legal pluralism. Areas of application of chthonic law as well as of religious law are therefore officially established, thus affecting both substantive law and traditional or religious institutions performing judicial functions⁵. Different itineraries – mainly short of introducing specific writ-

⁴ For a survey of mixed legal systems (“this category includes political entities where two or more systems apply cumulatively or interactively, but also entities where there is a juxtaposition of systems as a result of more or less clearly defined fields of application”), listing and distinguishing (i) mixed systems of civil law and common law, (ii) of civil law and customary law, (iii) of civil law and Muslim law, (iv) of common law and customary law, (v) of common law and Muslim law, (vi) of civil law, Muslim law and customary law; (vii) of common law, Muslim law and customary law; (viii) of civil law, common law, and customary law; of common law, civil law, Muslim law and customary law; of civil law, common law, Jewish law and Muslim law; of Muslim law and customary law see <http://www.juriglobe.ca/eng/index.php>.

⁵ See R. TONIATTI, *Il paradigma costituzionale dell’inclusione culturale in Europa e in America latina: premesse per una ricerca comparata sui rispettivi modelli*, in http://www.jupls.eu/images/JPs_WP6; R. TONIATTI, *El paradigma constitucional de la inclusión de la diversidad cultural: Notas para una comparación entre los modelos de protección de las minorías nacionales en Europa y de los pueblos indígenas en Latinoamérica* in A.M. RUSSO, G. D’IGNAZIO, O. RUIZ-CHIRIGOBÁ (eds), *Desafíos del pluralismo integrativo y jurídico* in *Inter-American and European Human Rights Journal/Revista Interamericana y Europea de Derechos Humanos*, 2016, 118; R. TONIATTI, *La razionalizzazione del «pluralismo giuridico debole»: le prospettive di un nuovo modello giuridico e costituzionale nell’esperienza africana*, in M. CALAMO SPECCHIA

ten constitutional foundations - have been followed in Australia, Canada, New Zealand and United States with the purpose of ensuring the application of the law of the formerly colonised native populations⁶.

Domestic processes (mostly in Latin America rather than in Africa) have been strongly supported also by the development of sources of (hard and soft) international law, such as the ILO 169 Convention concerning Indigenous and Tribal Peoples in Independent Countries (1989) and the United Nations Declaration on the Rights of Indigenous Peoples (2007).

Both the instruments of international law just mentioned as well the constitutions of the countries having rationalised the *status* of religious law and/or chthonic law in their own domestic legal setting, nevertheless, subordinate the applicability of non-state law to its consistency with the values protected, respectively, by international standards in human rights and by the state constitution. In other words, the scope and the context of legitimacy of legal pluralism are constrained within the limits established by the authority - whether the international community or a national constitution - having the power of choosing, selecting and qualifying non-state sources of law, including religious law. Consequently, even employing the formula of non-state law does not appear to be formally appropriate, inasmuch as the legitimacy of the applicability of such sources of law by their respective judicial authorities depends exclusively on the consent by the state.

Legal pluralism as accommodated within the western legal tradition, therefore, is structurally conditional, limited and of a weak nature⁷ and is, after all, not much more than an articulation within its own conceptual opposite, legal monism. It is on this empirical premise that it may

(cur.), *Le trasformazioni costituzionali del secondo millennio. Scenari e prospettive dall'Europa all'Africa*, Torino, 2016, 449.

⁶ See R. TONIATTI and J. WOELK (eds.), *Indigenous Peoples' Sovereignty and the Limits of Judicial and Legal Pluralism: American Tribes, Canadian First Nations and Scandinavian Sami Compared* - papers and comments presented at the International Conference Trento, 24 and 25 October 2013 in <http://www.jupls.eu/images/ebook%20JPs%20-%202014.pdf>.

⁷ For the basic distinction between weak and strong legal pluralism, the latter existing even without any endorsement by an external (state) authority see J. GRIFFITHS, *What is legal pluralism?*, in *Journal of Legal Pluralism*, 1986, 3.

make sense to approach a perspective of analysis of the margins of relevance of legal pluralism within the western legal tradition and its legal monist structural architecture.

2. *Plural features of legal monism in Europe.*

Europe may be assumed to be immune from any such forms of legal pluralism, at least from the point of view of chthonic law, the interaction with religious law being quite more complex⁸. It's important to recall that legal monism is very much the result of the historical and ideological origins of the nation-state and of the post-Enlightenment secular state's exclusive monopoly over any other competing authority in rule-making power, the focus of the arrangement being a strictly territorial construction of the legal system coupled by a determined reluctance to recognise local customary law⁹ and by a strong refusal to continue to accommodate diversity in the *legal* status of *citizens* depending on the *social* or *cultural* status of *subjects*¹⁰.

⁸ The truly indigenous population in Europe are the Sami, located in the Nordic countries and in Russia. Perspectives on the application of their traditional law are specifically dealt with in Ch. ALLARD, *Legal Pluralism and the Sámi Indigenous People in Europe*, in R. TONIATTI and J. WOELK (eds.), *Indigenous Peoples' Sovereignty....*, 51.

⁹ A notable exception being provided by the phenomenon of the *derecho foral* in Spain, although the state's ultimate authority to establish its foundation is confirmed: see F. J. LAPORTA y A. SAIZ ARNAIZ, *Los derechos históricos en la Constitución*, Madrid, 2010.

¹⁰ The Preamble of the 1791 French constitution is paradigmatically representative of the very detailed rejection of features of social and legal status of individuals as members of a social group that were regarded as typical of the *ancien régime*: "The National Assembly, wishing to establish the French Constitution upon the principles it has just recognized and declared, abolishes irrevocably the institutions which were injurious to liberty and equality of rights. Neither nobility, nor peerage, nor hereditary distinctions, nor distinctions of orders, nor feudal regime, nor patrimonial courts, nor any titles, denominations, or prerogatives derived therefrom, nor any order of knighthood, nor any corporations or decorations requiring proofs of nobility or implying distinctions of birth, nor any superiority other than that of public functionaries in the performance of their duties any longer exists. Neither venality nor inheritance of any public office any longer exists. Neither privilege nor exception to the law common to all

What can be correctly said for Europe, though, does not apply mechanically to the whole western legal tradition, considering the recent attitude to recognise and admit areas of application of various forms of chthonic law in Canada and in the United States, in Latin America, in Australia and New Zealand. On the contrary, with regard to religious law, the western legal tradition presents basically uniform secular features of distinction of legal systems (even when stricter *laïcité* is replaced by forms of cooperation between state institutions and religious (or philosophical) organisations.

A distinction of the pattern of interaction within the western legal tradition becomes at this stage necessary: : on the one hand, we have to consider non-European countries having incorporated within their main national legal setting the whole body of a different chthonic legal tradition, subject to the compatibility of individual rules of the latter's with the former.

On the other hand, European countries and, relatively to religious law, also non-European countries do not incorporate the whole of a different legal tradition and yet do accommodate some single legal rules or practices by establishing an exception to their own legal setting.

In both scenarios, state-law prevails and the ground of such prevalence is the same (priority of constitutional values, among which the principle of equality stands high), but the dynamics of managing the (in)compatibility of legal pluralism is different: in non-European countries of the western tradition, once a different legal tradition is acknowledged, its non-application is the exception while in Europe the exception is the application of a rule of a different legal tradition.

The preference for complete normative uniformity by centralised governmental institutions (strictly reflecting the equality of individuals) has occasionally allowed – even in Europe - to provide for some diversity of legislation in conformity with a territorial division of powers in federal (or regionally decentralised or devolved unitary) states. Over time, moreover, some exceptions to strict legal uniformity - based on an

Frenchmen any longer exists for any part of the nation or for any individual. Neither jurandes nor corporations of professions, arts, and crafts any longer exist. The law no longer recognizes religious vows or any other obligation contrary to natural rights or the Constitution”.

individual-group connection - have experienced developments: for instance, beyond regional areas of territorial self-government and legislative autonomy, instances of protection of national and/or language minorities have taken shape, as well as social areas of affirmative action based on gender, or on indigent status, or on health, or on physical disability do provide for different rules for different segments of society. In fact, the constitutional principle of equality has grown as to require *equal protection of diversities*¹¹.

The same can be said with regard to the recognition and regulation of spaces of legal exceptions due to individual *conscientious objection* to compliance with general rules affecting the majority of citizens, or due to the acknowledgement of the so called *cultural defence* in the field of criminal law¹², or to the acknowledgement of *ministerial exception* in the USA or to the legitimate enforcement of *religious law* as regulated by state legislation and as long as state legislation does so regulate (as indicated, for example, by the legal effects of practices required by religious law – as with regard to male circumcision¹³, or ritual slaughtering¹⁴ -, by the validity of religious celebration of weddings, by the incorporation of religious calendars for limited purposes reserved to those who profess that particular faith, etc.). Religious law is perhaps the most challenging field in the European scenario, as a delicate balance needs being found between the conflicting constitutional obligations to respect and protect religious freedom (beliefs and prac-

¹¹ R. TONIATTI, *La tutela dell'eguaglianza negli Stati Uniti: dalla Costituzione colour blind alla colour conscious Constitution*, Presentazione di L. FABIANO, *Le categorie sensibili dell'eguaglianza negli Stati Uniti d'America*, Torino, 2009.

¹² See M-C. FOLETS and AL. DUNDE RENTELS (eds.), *Multicultural Jurisprudence. Comparative Perspectives on the Cultural Defense*, Oxford and Portland, 2009.

¹³ In Germany, The practice of male circumcision has been the object of legislation in Germany in 2012, following a judicial decision that questioned the constitutionality of such a practice, on the ground that it would cause a bodily harm on younger members of the Jewish and Muslim communities for whom the practice is a religious obligation and is not performed under medical motivation.

¹⁴ See R.TONIATTI, *Sul bilanciamento costituzionale fra libertà religiosa e protezione degli animali*, Presentazione a P. LERNER, A.M. RABELLO, *Il divieto di macellazione rituale (Shechitah Kosher e Halal) e la libertà religiosa delle minoranze*, Trento, 2010.

tices) for individuals and communities within the private sphere and safeguarding the neutrality of the public sphere from identification with any one established religion.

All such rules of diversity – although reflecting religious laws and providing state-regulated exceptions to state-produced general rules – do not belong to a distinct body of legal tradition co-existing as such alongside with state law, do not properly introduce areas of legal pluralism and are, indeed, part and parcel of the “typical” and official state law. *State-controlled exceptions do make the legal system plural within but do not transform legal monism into legal pluralism*¹⁵.

3. Legal monism and European public order in the case law of the ECtHR.

Legal monism – resulting from the state-centred monopoly of normative power, inclusive of the power to select and qualify non-state law as state law to be exceptionally applied in limited circumstances – is then the assumed paradigm of the modern nation-state in Europe.

It is relevant to stress that the western legal tradition, whose respect and protection for many manifestations of pluralism goes quite beyond a mere attitude of tolerance, is rather uncompromising when the issue is the one of legal pluralism: in fact, western and most notably the European constitutionalism – although imbued with values referred to pluralism – remains faithful to its Westphalian origins with regard to both the domestic and the international legal order and consequently is conceived and built like a wall of separation between law, which is exclusively its own – and the law it acknowledges as such –, on the one hand

¹⁵ The statement does not affect the dynamics of global legal pluralism (see above footnote 1) although even the latter does have to cope with issues of states sovereignty and, at least within the European Union, also has to accommodate the required respect for the constitutional identity of member states, as elaborated in R. TONIATTI, *Sovereignty Lost, Constitutional Identity Regained*, in A. SAIZ ARNAIZ, C. ALCOBERRIO LLIVINA (eds), *National Constitutional Identity and European Integration*, Mortsel, 2013.

and, on the other, all other rules, that being non-state law simply are non-law.

Legal monism doesn't limit itself to being part of the very foundations of domestic public order of sovereign nation-states in Europe but it performs the same function and obeys to the same *rationale* in the European public order. Two quite paradigmatic examples may be drawn from the case law of European Court of Human Rights (ECtHR).

The first case - *Muñoz Díaz v. Spain* (2009)¹⁶ - concerns the applicability of traditional customary law of marriage of the Roma community in Spain without any source of state law so providing. Civil effects of the traditional Roma marriage have been recognised by the Spanish Labour court of first instance¹⁷ but have later been denied by other courts, including the *Tribunal constitucional*.

¹⁶ The judgement (application no. 49151/07) has been given by the Third Chamber. The facts: The applicant, a widow and a Rom of Spanish nationality, complained about the refusal by Spanish authorities to grant her a survivor's pension on the sole ground that she had not been the wife of a lawfully married couple under Spanish law, although Spanish authorities implicitly assumed that the couple was indeed married by issuing them with a family record book, granting them large-family status, affording health-care assistance to her and her six children and collecting the corresponding contributions from her Roma husband for nineteen years, three months and eight days. The Unión Romani was allowed to participate as a third-party and to introduce its own oral and written comments as *amicus curiae*.

¹⁷ "... In our country the Roma minority (etnia gitana) has been present since time immemorial and it is known that this minority solemnises marriage according to rites and traditions that are legally binding on the parties. These marriages are not regarded as being contrary to morality or public order and are recognised socially. ... Article 61 of the Civil Code provides that marriage has civil effects from the time it is solemnised but that it must be registered in the Civil Register if those effects are to be recognised. Roma marriages are not registered in the Civil Register because they have not been regarded by the State as a feature of the ethnic culture which has existed in our country for centuries. ... The lack of regulation of the recognition of the civil effects of Roma marriage cannot hinder the protective action to which the State has committed itself by laying down social security norms. ... Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin is applicable to the present case, where the denied benefit derives from the employment relationship of the insured person, who died from natural causes while he was still working. ... Article 4 § 1 of the Civil Code states [that] 'norms are applied *mutatis mutandis* where they do not specifically contemplate the case in question but a comparable

The ECtHR reasoning did consider that “it is necessary to emphasise the importance of the beliefs that the applicant derives from belonging to the Roma community – a community which has its own values that are well established and deeply rooted in Spanish society (56); that “in order to assess the applicant’s good faith the Court must take into consideration the fact that she belongs to a community within which the validity of the marriage, according to its own rites and traditions, has never been disputed or regarded as being contrary to public order by the Government or the domestic authorities, which even recognised in certain respects the applicant’s status as spouse. The Court takes the view that the force of the collective beliefs of a community that is well-defined culturally cannot be ignored” (59); that “there is an emerging international consensus among the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle (see paragraph 33 above, in particular the Council of Europe’s Framework Convention for the Protection of National Minorities), not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity that is of value to the whole community” (60); and that “the vulnerable position of Roma means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases” (61); and nevertheless “*the fact of belonging to a minority does not create an exemption from complying with marriage laws*” (61)¹⁸.

Furthermore, there is no right for minorities and no obligation for the state to acknowledge, without a specific bilateral agreement with a representative institution, the civil effects of a Roma marriage, and fail-

one which can be regarded as having a similar object’. Such application *mutatis mutandis* is applicable to the present case” (as quoted by the ECtHR, italics added). It is to be stressed that the reasoning by the Labour court has been praised by the ECtHR for interpreting “the applicable legislation in accordance with the criteria set out by the Court in its above-mentioned *Buckley* judgment”.

¹⁸ Emphasis added. Nevertheless, the Court did eventually find that denial of the pension was disproportionately discriminatory against the factual background of the case and declared that Spain had violated Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

ure to do so does not entail a form of discrimination in violation of the ECHR¹⁹.

In other words, neither the ECHR nor the Council of Europe's Framework Convention for the Protection of National Minorities – two essential components of public order in Europe (although the latter is

¹⁹ The applicant argued that “the non-recognition under Spanish law of Roma rites as a form of expression of consent to marry, while certain religious rites did constitute valid forms of expression of consent, entailed, *per se*, a violation of the rights invoked. The applicant pointed out that Roma marriage had existed for over five hundred years in Spanish history; it consisted of a form of expression of consent which was neither civil nor religious but was deeply rooted in the culture of her community, being recognised and producing effects *erga omnes* in that community, through the validating effect of custom. Spanish law did not take into account the specificities of the Roma minority because it obliged that community to comply with a form of expression of consent that its members did not recognise” (76); the Unión Romani further “referred to the finality of the consent given in Roma marriage and sought recognition by the State of the validity of their rites. It argued that the Roma community in Spain had maintained its traditions for centuries and invited the Court to find that respect for ethnic minorities, with their traditions and cultural heritage and identity, was an essential component of the Convention” (77). Nevertheless, the Court observed “that civil marriage in Spain, as in force since 1981, is open to everyone, and takes the view that its regulation does not entail any discrimination on religious or other grounds. The same form of marriage, before a mayor, a magistrate or another designated public servant, applies to everyone without distinction. There is no requirement to declare one's religion or beliefs or to belong to a cultural, linguistic, ethnic or other group” (79); that “it is true that certain religious forms of expression of consent are accepted under Spanish law, but those religious forms (Catholic, Protestant, Muslim and Jewish) are recognised by virtue of agreements with the State and thus produce the same effects as civil marriage, whereas other forms (religious or traditional) are not recognised (80). However, “this is a distinction derived from religious affiliation, which is not pertinent in the case of the Roma community. But that distinction does not impede or prohibit civil marriage, which is open to the Roma under the same conditions of equality as to persons not belonging to their community, and is a response to considerations that have to be taken into account by the legislature within its margin of appreciation, as the Government have argued”; and “accordingly, the Court finds that the fact that Roma marriage has no civil effects as desired by the applicant does not constitute discrimination prohibited by Article 14” (81). A critical analysis of the case, suggesting an alternative reasoning, in E. J. Ruíz VIEYTEZ, *Minority marriage and discrimination: redrafting Muñoz Díaz v. Spain*, in E. BREMS (ed.), *Diversity and European Rights. Rewriting Judgements of the ECHR*, Cambridge, 2015, 401.

already in an exceptional status of “grey area”, national majorities being the general rule) – expressly introduce or even implicitly entail any exception to legal monism. Public order in Europe is firmly rooted in legal monism.

The second paradigmatic example is drawn from a leading case by the Grand Chamber of the ECtHR (2003) that unanimously (with two concurring opinions) confirmed a previous majority Chamber decision (4-3, with two dissenting opinions), namely the well-known *Refah Partisi (The Welfare Party) and Others v. Turkey*. Although the controversy concerned specifically the incompatibility of sharia with the European public order as enshrined in the ECHR system, and although pluralism *tout court* – without any further qualification – is proclaimed to be as essential component of democracy²⁰, the judgement ultimately declares *legal pluralism per se* to be in violation of the Convention.

The case involved the review of a decision by the Constitution Court of Turkey to dissolve a political party – the *Refah Partisi* – that had been found to have become a “centre of anti-constitutional activities” (at 116) on the ground of three main arguments: that (i) “Refah intended to set up a plurality of legal systems, leading to discrimination based on religious beliefs”; that (ii) “Refah intended to apply sharia to the internal or external relations of the Muslim community within the context of this plurality of legal systems”; that (iii) “the references made by Refah members to the possibility of recourse to force as a political method”. Although the last set of arguments and the evidence given for supporting it might have been sufficient to confirm the com-

²⁰ Beyond the potential wide reach of the wording, the context makes it clear that the Court refers to the pluralism of political parties: “*The Court considers that there can be no democracy without pluralism*. It is for that reason that freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb (see, among many other authorities, *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 23, § 49, and *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, p. 26, § 37). Inasmuch as their activities form part of a collective exercise of the freedom of expression, political parties are also entitled to seek the protection of Article 10 of the Convention (see *United Communist Party of Turkey and Others*, cited above, pp. 20-21, § 43) (at 89, emphasis added).

patibility of the ban with the Convention, the Grand Chamber articulates its reasoning mostly on the first two.

On the charge of “the plan to set up a plurality of legal systems”²¹, the Grand Chamber “sees no reason to depart from the Chamber’s conclusion that a plurality of legal systems, as proposed by Refah, cannot be considered to be compatible with the Convention system” as the obligation of individuals to comply with binding rules democratically produced by the state in order to accommodate all citizens cannot be replaced by the requirement of individuals’ obeying to their respective religious rules short of any democratic foundation, thus inevitably establishing pre-conditions for discrimination (at 119)²².

²¹ On the point, the opinion of the three dissenting judges in the Third Chamber does not challenge the issue of the “multi-juridical system” *per se*, but on the length of time distancing official statements to that effect and the timing of dissolution. In fact, on the general issue (namely, that a multi-juridical system “would introduce a discrimination between individuals on grounds of their religion, categorising them according to their membership of a particular religious movement, and that such a model of society would not be compatible with the Convention system, imposing as it would on individuals the obligation to obey not the rules laid down by the State but those imposed by the religion concerned”) the dissenting minority write that they “do not find it necessary to examine the precise nature or effect of the multi-juridical society to which reference was made. In fact, the dissenting opinion states: “Unlike the majority, we do not find it necessary to examine the precise nature or effect of the multi-juridical society to which reference was made by Mr. Erbakan, since in our view the statements afford an inadequate basis on which to conclude that these statements posed at the time of the dissolution of Refah a genuine threat to the secular order. In this regard, we note that the statements relied on by the Constitutional Court were extracts from longer addresses made in 1993, well over four years before the decision to dissolve the party and some three years before the party came to power. We can find no evidence in the material before the Court that, once in Government, the party took any steps to introduce a multi-juridical society of the kind indicated in the judgment of the Constitutional Court”.

²² The Third Chamber’s judgement is quoted: “70. ... the Court considers that Refah’s proposal that there should be a plurality of legal systems would introduce into all legal relationships a distinction between individuals grounded on religion, would categorise everyone according to his religious beliefs and would allow him rights and freedoms not as an individual but according to his allegiance to a religious movement. The Court takes the view that such a societal model cannot be considered compatible with the Convention system, for two reasons. Firstly, it would do away with the State’s role as the guarantor of individual rights and freedoms and the impartial organiser of

On the specific assessment concerning Refah' political aim of setting up a regime based on sharia – as acknowledged by the Constitutional Court of Turkey through the factual evidence provided –, the Grand Chamber “concur[s] in the Chamber’s view that sharia is incompatible with the fundamental principles of democracy²³, as set forth in the Convention (at 123)²⁴.

the practice of the various beliefs and religions in a democratic society, since it would oblige individuals to obey, not rules laid down by the State in the exercise of its above-mentioned functions, but static rules of law imposed by the religion concerned. But the State has a positive obligation to ensure that everyone within its jurisdiction enjoys in full, and without being able to waive them, the rights and freedoms guaranteed by the Convention (see, *mutatis mutandis*, *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 14, § 25). Secondly, such a system would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy. A difference in treatment between individuals in all fields of public and private law according to their religion or beliefs manifestly cannot be justified under the Convention, and more particularly Article 14 thereof, which prohibits discrimination. Such a difference in treatment cannot maintain a fair balance between, on the one hand, the claims of certain religious groups who wish to be governed by their own rules and on the other the interest of society as a whole, which must be based on peace and on tolerance between the various religions and beliefs (see, *mutatis mutandis*, the judgment of 23 July 1968 in the “Belgian linguistic” case, Series A no. 6, pp. 33-35, §§ 9 and 10, and *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, pp. 35-36, § 72)”.²³

²³ On the compatibility between Shari’a and human rights with regard to a reformist or a modernist approach within Islam, thus criticising the ECtHR’s approach, see M. A. RAMADAN, *Notes on the Shari’a: Human Rights, Democracy, and the European Court of Human Rights*, in *Israel Law Review*, 2007, 156.

²⁴ The Third Chamber’s decision is quoted once again: “72. Like the Constitutional Court, the Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one’s respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in

Both perspectives – introducing legal pluralism and, within such framework, at the same time introducing sharia as well for the Muslim population – are jointly taken into further consideration by the Court, recalling – although without mentioning it – the millet system of the Ottoman Empire.

On the one hand, the Court avoids “to express an opinion in the abstract on the advantages and disadvantages of a plurality of legal systems; on the other, nevertheless, it feels the need to react to the argument – put forward by Refah Partisi’s counsel – that “prohibiting a plurality of private-law systems in the name of the special role of secularism in Turkey amounted to establishing discrimination against Muslims who wished to live their private lives in accordance with the precepts of their religion” (at 128).

To that purpose, the Court inevitably endorses secularism as the exclusive ground of the concept of public order as established by the European Convention and declares that “freedom of religion, including the freedom to manifest one’s religion by worship and observance, is primarily a matter of individual conscience, and stresses that the sphere of individual conscience is quite different from the field of private law, which concerns the organisation and functioning of society as a whole. It has not been disputed before the Court that in Turkey everyone can

accordance with religious precepts. ... In the Court’s view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.” 124. The Court must not lose sight of the fact that in the past political movements based on religious fundamentalism have been able to seize political power in certain States and have had the opportunity to set up the model of society which they had in mind. It considers that, in accordance with the Convention’s provisions, each Contracting State may oppose such political movements in the light of its historical experience. 125. The Court further observes that there was already an Islamic theocratic regime under Ottoman law. When the former theocratic regime was dismantled and the republican regime was being set up, Turkey opted for a form of secularism which confined Islam and other religions to the sphere of private religious practice. Mindful of the importance for survival of the democratic regime of ensuring respect for the principle of secularism in Turkey, the Court considers that the Constitutional Court was justified in holding that Refah’s policy of establishing sharia was incompatible with democracy”.

observe in his private life the requirements of his religion. On the other hand, Turkey, like any other Contracting Party, may legitimately prevent *the application within its jurisdiction of private-law rules of religious inspiration prejudicial to public order and the values of democracy for Convention purposes* (such as rules permitting discrimination based on the gender of the parties concerned, as in polygamy and privileges for the male sex in matters of divorce and succession). The freedom to enter into contracts cannot encroach upon the State's role as the neutral and impartial organiser of the exercise of religions, faiths and beliefs" (at 128)²⁵.

It is interesting to notice that the concurring opinion by Judge Kovler focuses on the oversimplification shown by the Grand Chamber's reasoning concerning both sharia and legal pluralism²⁶.

²⁵ Emphasis added.

²⁶ I also regret that the Court, in reproducing the Chamber's conclusions (paragraph 119 of the judgment), missed the opportunity to analyse in more detail the concept of a plurality of legal systems, which is linked to that of legal pluralism and is well-established in ancient and modern legal theory and practice (see, in particular, the proceedings of the international congresses on customary law and legal pluralism organised by the International Union of Anthropological and Ethnological Sciences, and J. GRIFFITHS, *What is legal pluralism?*, in *Journal of Legal Pluralism and Unofficial Law*, 1986, no. 24). Not only legal anthropology but also modern constitutional law accepts that under certain conditions members of minorities of all kinds may have more than one type of personal status (see, for example, P. GANNAGÉ, *Le pluralisme des statuts personnels dans les Etats multicommunautaires – Droit libanais et droits proche-orientaux*, Brussels, 2001). Admittedly, this pluralism, which impinges mainly on an individual's private and family life, is limited by the requirements of the general interest. But it is of course more difficult in practice to find a compromise between the interests of the communities concerned and civil society as a whole than to reject the very idea of such a compromise from the outset. This general remark also applies to the assessment to be made of sharia, the legal expression of a religion whose traditions go back more than a thousand years, and which has its fixed points of reference and its excesses, like any other complex system. In any case legal analysis should not caricature polygamy (a form of family organisation which exists in societies other than Islamised peoples) by reducing it to ... "discrimination based on the gender of the parties concerned". As the dissenting judge A. Kovler had been elected under proposal by the Russian Federation, it may be interesting reading L. R. SYKIAINEN, *Sharia Courts: Modern Practice and Prospectives in Russia*, in *National Research University Higher*

Constitutionalism has elaborated a concept of militant or self-defending democracy (*streitbare Demokratie*) that is meant to provide for a legitimate protection of the political security of the system, by way of establishing limits to the exercise of a number of fundamental rights and freedoms and, more in particular, limits to so called “anti-system” political parties²⁷. Parallel to the dimension of militant political democracy, the dimension of a *militant legal monism* is to be added as an essential component of the European public order, as sustained by the ECtHR²⁸.

4. Legal pluralism and the rationale of conflict of laws in the domestic sphere.

The reference made by the ECtHR to the concept of “European public order” – construed as a means of protection of one of its structural components, such as European state secularism, from undue interference onto the public sphere by (any) religious law, or at least from sharia, as well as of insulation of its legal monist setting from any impact by legal pluralism – contributes to giving evidence to an interesting dimension of the contemporary interaction between and among distinct legal traditions.

In short, the *ordre public* (or public policy) exception appears to be the proper and necessary judicial tool for the purpose of identifying the rule of one instead of another legal tradition, each one claiming to have the legitimate authority to regulate the issue at stake: both ECtHR’s cases referred to above, in fact, indicate a virtual conflict of laws – state

School of Economics, WP BRP 60/LAW/2015, available at: <http://ssrn.com/abstract=2708983>.

²⁷ See J.-W. MÜLLER, *Militant democracy*, in M. ROSENFELD, A.- SAIÓ (eds), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, 1253.

²⁸ For critical comments on the decision, among many others, see P. CUMPER, *Europe, Islam and Democracy – Balancing Religious and Secular Values under the European Convention on Human Rights*, in *European Yearbook of Minority Issues*, Vol. 3, 2003/4, 163; K. BOYLE, *Human Rights, Religion and Democracy: The Refah Party Case*, in *Essex Human Rights Review*, vol. 1, 2004, 1.

law vs. an ethnic minority's customary law or vs. religious law) – taking place within the domestic boundaries of a national legal system.

The typical rationale of private international law may then be reproduced in an atypical domestic setting and give a different and fuller meaning to the concept of *conflict of laws*, the latter being not limited to regulate the competition of rules between and among national state legal systems but – at it were – also the competition of rules between and among distinct legal traditions within a national state legal system²⁹.

Of course, the theoretically well established and normatively well protected secular legal monism as the foundation of European public order cannot conceive of the interaction between state-law and religious law as conflict of laws, the latter being non-law; rather, the proper framework is the one based on the main models of regulation of the relationship between state and church(es): either general rules on religious freedom or the integration of the same sort of general legislation by bilateral agreements with established religious institutions.

These arrangements are likely to be unable to meet the pressure coming from religious communities and groups whose tenets not only entail their own rules on all aspects of daily life (from dressing codes to dietary requirements) but represent a general and coherent legal system, thus raising the problem of a re-definition of the boundaries of religious freedom guaranteed by liberal constitutionalism. In other words, protecting the religious freedom of some groups does raise problems of consistency with state law inasmuch as the faith of those groups requires compliance with a distinct legal system of its own, competing with state law in a number of areas. As a matter of fact, experiencing the more recent tensions between religious law and state law does shed new light on the substantive margins of protection of religious freedom.

A further specific feature that needs being taken into consideration is the religious influence inspiring legislation of non-European nation-states that may be applied by the European judge within the framework

²⁹ See P. SHAH, *Inconvenient marriages, or what happens when ethnic minorities marry transjurisdictionally according to their self-chosen norms*, Queen Mary University of London, School of Law, Legal Studies Research Paper No. 47/2010 available at: <http://ssrn.com/abstract=1575002>, also in *Utrecht Law Review*, Vol. 6, 2010.

of private international law: in such a perspective, the distinctive boundaries between *conflict of laws* as a (virtual) domestic issue of co-existence of rules from different legal traditions within the same jurisdiction and *private international law* as the instrument for choosing the rule of one nation state legal system become somehow blurred, and in both cases the concept of *ordre public* or public policy may be conclusive³⁰. The traditional concept of judicial comity may therefore be under stress.

In spite of the innovative hypothesis suggested above, the typical function of private international law is to be continued and, in fact, it is more than likely that its application is going to expand in quantity as well as to grow in quality. More specifically, it is to be stressed that in this area as well the role of the judiciary and the scope of judicial dialogue in adjusting, comparing, borrowing different interpretative approaches prove to be crucial in the development of the law: in fact, the concept of *ordre public* as a general clause is inherently open to an evolutionary process, subject to interpretation of the law in the light of changing present-day conditions, subject also to comparative interaction between and among national, international, and supranational jurisdictions, eventually leading to a shared notion of European *ordre public*.

The outcome of judicial reading new and unexpected forms of compatibility of foreign rules and practices with the domestic (both national and European) legal setting might gradually result into a more inclusive and plural notion of public order.

³⁰ An interesting case of interaction between the Islamic inspiration of the civil code of Algeria, the consequent prohibition by the latter of *adoption* and the regulation of *kafala* as an alternative for providing for the welfare of abandoned minors, sources of international law considering the equivalence between the two, the civil code of France prohibiting adoption of minors whose national legislation prohibits it has been decided by the ECtHR in the Case of Harroudji v. France (Application no. 43631/09) in 2012. In particular, “the Court takes the view that by gradually obviating the prohibition of adoption in this manner, the respondent State [France], which seeks to encourage the integration of children of foreign origin without cutting them off immediately from the rules of their country of origin, has shown respect for cultural pluralism and has struck a fair balance between the public interest and that of the applicant” (at 51).

5. Managing legal pluralism: the need for further research and dialogue.

In a time of massive (whether voluntary or forced) human mobility and of an impressive potential for communication, as the one the world has been experiencing mostly since the last decades of the 20th century, law – as a cultural, social and political phenomenon - is expected to meet the consequent new challenges arising from the interaction between the legal heritage of the lands of arrival and the culture, inclusive of its legal component, of those who arrive.

In previous centuries, namely as a consequence of colonisation, such an interaction between legal cultures took place in the lands under colonisation. At present, on the contrary, this interaction has somehow reversed its course: in fact, although the dynamics of human mobility and worldwide communication are present in wide geographical areas in the world (Africa, North-America, Asia, and Europe), it is with regard to migration to the North of the world that the impact of the legal culture of origin appears to be stronger on the legal systems of the hosting countries.

In some cases, the reaction to new forms of interaction between legal traditions is somehow blunt and naïf at the same time, as shown by the attempted amendment to the constitution of the state of Oklahoma (as part of a political movement supporting reforming of a number of states' constitutions labelled as "Save Our State") – passed in 2010 by an overwhelming majority of the voters (70%) and later invalidated by a federal court for violation of the 1st amendment of the federal constitution – that prohibited state judges from enforcing (international, foreign and), expressly, sharia law³¹. In other cases, as with regard to the

³¹ The text on the ballot was: "This measure amends the State Constitution. It changes a section that deals with the courts of this state. It would amend Article 7, Section 1. It makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law. It forbids courts from considering or using Sharia Law. International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons. The law of nations is formed by the general assent

establishment of sharia councils in the United Kingdom, the attitude has been initially somehow positively responsive and yet at some later stage it has suggested the need for more prudent caution³².

of civilized nations. Sources of international law also include international agreements, as well as treaties. Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed. Shall the proposal be approved?'. On the phenomenon see F. KUTTY, *Islamic Law" in U.S. Courts: Judicial Jihad or Constitutional Imperative?*, Valparaiso University Law School, Legal Studies Research Paper Series, 2014, (draft) at <http://ssrn.com/abstract=2502187>.

³² The issue has caused an intense debate also in the House of Commons: the Parliamentary Under-Secretary of State for Justice (Mrs Helen Grant) gave the following answer: "[...] I start by stressing plainly and clearly that sharia law has no jurisdiction under the law of England and Wales and the courts do not recognise it. There is no parallel court system in this country, and we have no intention of changing the position in any part of England and Wales. [...] Sharia law is the code of personal religious law governing the conduct of Muslims. Those principles can extend to all aspects of people's lives. There are a number of sharia councils in England and Wales that help Muslim communities resolve civil and family disputes by making recommendations by which they hope that the parties will abide, but I make it absolutely clear that they are not part of the court system in this country and have no means of enforcing their decisions. If any of their decisions or recommendations are illegal or contrary to public policy—including equality policies such as the Equality Act 2010—or national law, national law will prevail all the time, every time. That is no different from any other council or tribunal, whether or not based on sharia law. Britain is proud of its tradition of religious tolerance. The Government do not prevent individuals from seeking to regulate their lives through religious beliefs or cultural traditions. Provided that an activity prescribed by sharia principles does not contravene the law of England and Wales, there is nothing that prevents people from living by sharia law. The use of religious councils or other extra-legal bodies to deal with civil disputes is well established and non-contentious. Communities have the option to use religious authorities to adjudicate disputes and to agree to abide by their decisions on a voluntary basis, but such decisions are subject to national law and are not legally enforceable. Any member of any community should know that they have the right to refer to an English court at any point, especially in the event that they feel pressured or coerced to resolve an issue in a way with which they feel uncomfortable. Because sharia councils do not have any legal means of enforcing their decisions, they can only make recommendations that they hope the parties will follow. There is no appeal mechanism. If a party decides to challenge a decision in a civil court, any decision would be made in accordance with English law [...]. Rightly, this country celebrates diversity. We are a country where everyone has an opportunity to contribute, no matter what their background, ethnicity or religion, but that must be within a set of laws and a judicial framework that is common

The issue of managing the interaction among different legal traditions proves to be crucial in contemporary western society and the security of one's entrenchment behind the established legal monism may turn out to be an unreliable self-deceiving illusion.

Scientific research is therefore much needed³³, in the area of comparative law - as individual countries may hardly be in the position of providing their own original solutions, whether through constitutional amendments, or judicial interpretation and application of the *ordre public* clause as indicated by their respective body of private international law -, as well as of other social sciences – starting from legal anthropology – that must combine their efforts in order to enhance the understanding of the dynamics of change that are taking place.

to all and understood by all. There can be no question of there being a parallel court system in this country”, in the House of Commons Hansard, 23 April 2013, Column 289WH.

³³ A paradigmatic work in the field is represented by M.C. FOBLETS, J.F. GAUDREAUTL-DESBIEENS, A. DUNDES RENTELN, (eds), *Cultural Diversity and the Law. State Responses from Around the World*, Bruxelles, 2010.



© Copyright 2016