



JPs Review of Conferences, Seminars and Events

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

Trento, 16th - 17th April 2015

by Elena Valentina Zonca, University of Trieste

The international workshop on legal pluralism in Europe and the *ordre public* (public policy) exception was held at the University of Trento, Department of Sociology and Social Research. The event was organized within the framework of the PRIN (Italian acronym for “research project of national interest”) 2012-2014 on “Jurisdiction and Pluralisms” and gathered a distinguished interdisciplinary group of international scholars from different universities in Italy, United Kingdom, Spain, Portugal and Israel.

The workshop addressed the issue of legal pluralism and religious diversity from the perspective of private international law. European legal systems increasingly need to harmonize claims by individuals (resulting mainly from migration and diaspora) to have their family matters regulated by the law of their country of origin with fundamental rights standards. Striking a balance seems particularly problematic when foreign norms to be applied (or foreign judgments to be recognised) concern Islamic law. The workshop aimed at exploring the attitude(s) of the judiciary in Europe in

recognising (or denying) legal effects of controversial Islamic law-based institutions, e.g. polygamy and unilateral repudiation (*talaq*), and in applying the *ordre public* exception when such institutions are deemed to be incompatible with fundamental rights, such as gender equality.

The workshop started with a Round-table discussion on the book *Muslim Family Law in Western Courts* (2013) edited by Elisa Giunchi (University of Milan). The session was chaired by Cinzia Piciocchi (University of Trento) and involved participants from various Italian universities: Elisa Giunchi, Cristiana Cianitto (University of Milan), Elena Ioriatti (University of Trento), Elena Valentina Zonca (University of Trieste). The book explores controversial Islamic marriage-related issues, such as polygamous unions and divorces (including *talaq*), and it analyses how Islamic family law is interpreted and applied by judges in Europe, Australia and North America in order to balance religious diversity and the right to family life whilst respecting fundamental rights. In a broader perspective, it also explores how Muslim Diasporas align their Islamic worldview with a Western normative narrative.

Participants in the Round-table discussed new understandings and insights provided in the book and engaged in a rich debate concerning marriage-related issues, such as the bride's consent within different religious traditions. The discussion also touched on broader topics concerning the internal diversity within Islam (which in fact is usually defined as a monolithic entity), its feasibility in Europe and – as Roberto Toniatti (University of Trento and PRIN national coordinator) considered –, the possibility of a “right to religious diversity”. Also, the dishomogeneous Western judicial approach in assessing the compatibility of controversial Islamic law-based institutions with *ordre public* was highlighted from a comparative perspective: on the one hand it seems to be guided by a thoughtful case-by-case analysis based on the recognition of facts on the ground. For example, although polygamous unions or unilateral repudiation are not accepted, some legal effects are recognised for the sake of equality or for preventing limping relationships and forum shopping. On the other hand, in other cases the application of an abstract notion of *ordre public* prevailed, for example in the case of non-recognition of foreign divorces obtained by *talaq*.

Giuseppe Sciortino, Dean of the Sociology and Social research Department - University of Trento, opened the second day of the workshop welcoming the participants and delivering a speech on the relationship between migration, perceived

diversity and actual diversity from a sociological perspective.

The morning session on *Legal Pluralism and Islamic Law*, was introduced and chaired by Davide Strazzari (University of Trento) who referred to Griffith's idea of "weak" and "strong" legal pluralism and described private international law as a way to allow more religious and legal pluralism.

The first speaker, Elisa Giunchi, explored how judges interpret and apply Islamic family law in Muslim countries. She emphasized the idea of *Shari'a* as an internally diverse system and the existence of discrepancies between legal norms and court practice in countries like Pakistan, Afghanistan and Egypt. Using *ijtihad*, judges can advantage women and other vulnerable parties. She also noticed that Western judges do not seem particularly aware of such discrepancies.

To follow, Prakash Shah (Queen's Mary University, London) dealt with "translocal legal pluralism" in the United Kingdom, focusing on how contemporary Muslim subjects navigate different legal orders with regard to matrimonial matters, for example by choosing to seek the advice of a *Shari'a* council to issue a divorce certificate. That said, he also pointed out that the framework where accommodation of diversity takes place is positivist as the agent for such accommodation is the State. He also pointed out that the analysis of the relevant court cases seems to suggest a reductive judicial vision of Islam, which is deemed to be by definition against *ordre public*.

Legal pluralism and family law in Israel was the subject of the contribution by Michel Karayanni (Hebrew University, Jerusalem), who looked at this topic from the perspective of Palestinian-Arab religious communities in Israel, as a paradigmatic example of accommodation of religious minorities in non-Western states which identified with the religion of the majority group. He argued that, although in line with multicultural liberalism, accommodation granted to these communities provides group rights but risks perpetuating internal norms that uphold patriarchy and overlook individual rights, especially with regard to vulnerable parties such as women and children.

The afternoon session was chaired by Roberto Toniatti and explored the judicial enforcement of Islamic family law in Europe in relation to the notion of *ordre public*.

Gloria Esteban de la Rosa (University of Jaén) firstly illustrated the 2004 Moroccan family code (*Moudawana*) and its application in European countries, particularly in Spain, Germany and France. The *Moudawana* advocates *ijtihad* and its purposes are to tackle inequality between men and women while preserving men's rights, and to protect children's rights. The speaker then focused on European private international law, namely on the recent Council Regulation 1259/2010 (Rome III regulation) concerning enhanced cooperation in the area of the law applicable to divorce and legal separation, and argued that an abstract notion of *ordre public* seems to have emerged in such EU regulation. Finally, she emphasised the importance of the "recognition method" as a general clause for the interpretation of European private international law in order not to treat legal family situations mechanically and to accommodate religious diversity.

The contribution of Davide Strazzari addressed the application of Islamic family law (namely the enforcement of repudiation deeds and the indirect recognition of polygamous unions) in France and Belgium from the perspective of the *ordre public*. The recent case law of both countries suggests a shift towards an absolutistic reading of equality on the grounds of sex intertwined with a progressively stricter application of the *ordre public* exception, without a case-by-case evaluation. Strazzari wonders if such a trend does protect fundamental rights or if it risks becoming instrumental for the defense of legal monism and the adherence of migrants to European values.

The interlinkage between legal pluralism and conflicts of laws within the Italian system of private international law was the subject of Sara Tonolo's contribution (University of Trieste). She explored some controversial aspects in relation to the application of foreign law and the recognition of foreign judgements about polygamy, *talaq*, *kafala* and proxy marriages and analysed the relevant Italian case law in order to identify different (sometimes contradictory) uses of the *ordre public* exception. Her analysis calls for a use of such a notion not as a "*charte blanche*" but as an inclusive tool to include fundamental values and legal pluralism within a common concept of justice.

During the special focus of the workshop, Marta Tomasi (University of Trento) tackled the topic of surrogacy by commenting on the relevant case law of the ECtHR, and the related notion of *ordre public*, in connection with the principle of the best interest of the child.

Elena Valentina Zonca, acting as discussant in the workshop, observed that, despite some fragmentation and contradiction, two main approaches seem to emerge in applying the notion of *ordre public*: a theoretical and preventive application of such notion but also a more substantial approach based on a case-by-case determination of the genuine welfare of vulnerable subjects involved.

Finally, Rui Manuel Gens de Moura Ramos (University of Coimbra) provided some conclusive remarks. He pointed out the risks connected to the application of a “blind” notion of *ordre public* and emphasized the need for an *ordre public* exception which addresses concrete cases.

The purpose of the international workshop was to explore attitudes of the judiciary in legal systems influenced by Islamic law as well as in some European states and to observe if a common European *ordre public* exception is developing within courts practice concerning family law. The workshop provided new understandings and useful insights to start framing an answer to the complex questions at stake.

The comparative perspective adopted in the workshop seems to suggest that *ordre public* is a highly disputed notion whose content, boundaries and implications can be shaped either by assessing the different interests at stake in each case, in order to effectively protect fundamental rights, or by turning to an abstract concept – an “empty shell” – which risks being counterproductive in accommodating religious diversity and protecting fundamental rights.

The connection between legal pluralism and *ordre public* exception needs to be further problematized, and its complexity further acknowledged. With this regard, a more widespread dynamic, not ideological judicial approach in Europe, which considers concrete cases and recognises the complexity of legal norms and court practice in non-Western countries, could be a good point to start from.