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Application of foreign law in domestic courts in Europe and the challenges of legal pluralism

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1. A disclaimer and a question

In a panel full of prominent Private International Law lawyers, I must start my presentation with a disclaimer. I am not a Private International Law lawyer. My field is Comparative Law and Human Rights. I am interested in looking into the way in which the debate about the application of foreign law by domestic courts in Europe, under Private International Law mechanisms (i.e. conflict-of-laws rules), intersects with another debate, also focused on what the courts are doing, about cultural diversity and legal practice, generally known as «multicultural jurisprudence» or «cultural defence»⁽¹⁾. The two debates have been going on in parallel for a long time⁽²⁾ and have come to overlap in recent years, largely due to the attention paid to what some deem to be a «dangerous Islamisation of western legal systems»⁽³⁾ resulting

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⁽¹⁾ See MARIE-CLAIRE FOBLETS and ALISON DUNDES RENTELN, *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense*, Oxford and Portland Oregon, Hart Publishing, 2009; RALPH GRILLO et al. (eds.), *Legal Practice and Cultural Diversity*, Farnham, Ashgate, 2009; MARIE-CLAIRE FOBLETS et al. (eds.), *Cultural Diversity and the Law: State Responses from Around the World*, Brussels, Bruylant, 2010.

⁽²⁾ Which does not mean, of course, that Private International Law lawyers have been oblivious of the interplay between cultural diversity and the application of foreign laws by domestic courts. I thank this reminder to Professor Susan Rutten, who kindly gave me some comments on a first draft of this text.

⁽³⁾ Consider, for instance, the pamphlet circulated, in 2014, by the Center for Security Policy Press («Civilization Jihad Reader Series») with the title *Sharia in American Courts: The Expanding Incursion of Islamic Law in the U.S. Legal System*. The same fear has prompted several legal initiatives, in some States in the US, in Canada and in the United Kingdom, designed to prevent the application of foreign legal provisions inspired by Islamic law in domestic courts and arbitration tribunals.

from the realisation that domestic courts in the West have been applying religiously inspired foreign legal provisions to the adjudication of judicial disputes.

With this presentation, I address the question of whether or not Private International Law mechanisms can be the answer to the multicultural jurisprudence's quest for more judicial sensibility to cultural diversity and legal pluralism. I will start with a brief overview of some of the main arguments put forward by advocates of the cultural defence and of the accommodation of minority legal orders, and the backlash that these arguments have met, mostly due to concern for the integrity of western domestic legal systems. I will then look into the way in which foreign laws have been applied by domestic courts in Europe, under Private International Law mechanisms, to assess if (and if so, to what extent) the «openness» to foreign laws attested by judicial practice in this context can help the cause of the advocates of the cultural defence.

2. Cultural diversity and legal practice

For over 20 years, academics such as Alison Dundes Renteln and Werner Menski have been arguing for more sensitivity on the part of western courts to cultural diversity as a means to prevent «miscarriages of justice»⁽⁴⁾, including through the admissibility of cultural evidence in court and the recognition of legal relevance to minority norms and practices which are foreign to western legal systems and have been «implanted»⁽⁵⁾ in the West as a result of mass migration processes initiated after the end of the second world war.

The arguments for the admissibility of cultural evidence in the courtroom have usually been grounded in human rights concerns – respect for individual autonomy, right to a fair trial, religious freedom, equality before

⁽⁴⁾ See ALISON DUNDES RENTELN, «The use and abuse of the cultural defense», in Marie-Claire Foblets and Alison Dundes Renteln (eds.), *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense*, Oxford and Portland Oregon, Hart Publishing, 2009, p. 61.

⁽⁵⁾ See WERNER MENSKI, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, 2nd ed., Cambridge, Cambridge University Press, 2006, p. 58 and ff.

the law, right to culture, etc. – and referred to international human rights standards at global and regional levels. As Alison Dundes Renteln puts it, these human rights standards should be interpreted as meaning, at the very least, that «individuals who migrate to other countries have the opportunity to tell a court of law what motivated the actions that apparently clash with the law of the new country»⁽⁶⁾. This does not mean that courts should be deferential vis-à-vis cultural factors, but only that such factors may impact individuals' behaviour and, as such, should be considered by the courts when ruling on concrete cases and not immediately dismissed as irrelevant. On the other hand, it has been extensively noted, by Werner Menski and others, including Mathias Rohe at this table, that migrants do not become a clean slate on crossing international borders⁽⁷⁾. Migrants adapt to their new circumstances, for sure, but they also tend to hold on to norms and practices from their countries of origin, particularly in matters of private status, such as marriage and divorce. It can be argued, with Maleiha Malik, that in these areas of private life there are good reasons to allow individuals the right to govern their lives according to rules that reflect their religious values, in the name of individual autonomy and provided that there is respect for the limits set by the constitutional norms of the host state⁽⁸⁾.

These arguments for the accommodation of «minority legal orders»⁽⁹⁾ and for the admissibility of the «cultural defence» have been met with scepticism when not with sheer outrage. Prominent among the counter arguments advanced by multicultural jurisprudence opponents are: respect for human rights, respect for secularism, and the need to safeguard the unity and integrity of domestic legal systems in the West. Accommodation of minority claims and minority legal orders is often equated with State complacency vis-à-vis

⁽⁶⁾ See ALISON DUNDES RENTELN, «The use and abuse of the cultural defense», *cit.*, p. 63.

⁽⁷⁾ See WERNER MENSKI, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, *cit.*, pp. 63-65; ROGER BALLARD *et al.*, «Cultural diversity: Challenge and accommodation», in Ralph Grillo *et al.* (eds.), *Legal Practice and Cultural Diversity*, Farnham, Ashgate, 2009, p. 9; MATHIAS ROHE, «Alternative dispute resolution in Europe under the auspices of religious norms», in *RELIGARE Working Paper*, no. 6, 2011, pp. 1-4.

⁽⁸⁾ See MALEIHA MALIK, «Muslim legal norms and the integration of European Muslims», in *EUI Working Papers*, RSCAS 2009/29, p. 1.

⁽⁹⁾ See MALEIHA MALIK, *Minority Legal Orders in the UK: Minorities, Pluralism and the Law*, London, The British Academy, 2012.

When the parties to the dispute are nationals of the *forum* State, as is increasingly the case, Islamic law may be taken into consideration by domestic courts in their rulings on religiously based claims, but that will depend entirely on the concrete justices' understanding of secularism, equality, freedom of religion and minority rights. The approaches vary significantly among different State jurisdictions in Europe and even within the same State jurisdiction.

When the parties to the dispute are foreigners, the operation of conflict-of-laws rules may determine the application of religiously inspired foreign legal provisions (as is the case with the Family Code of the Kingdom of Morocco, largely based on Islamic law), an outcome that can only be prevented if it is concluded that the application of those provisions would be contrary to international public order principles of the *forum* State, such as the principle of equality between men and women. It has been reported that public order reasons are sometimes set aside in favour of strictly pragmatic considerations, in order not to disturb already stabilised situations and to protect the interests of women and children⁽¹⁷⁾. That is the case with the recognition of legal effects to polygamous marriages, for instance. And the same openness to legal pluralism can be found in the way domestic courts in Europe overcome the «technical difficulties»⁽¹⁸⁾ associated with the incorporation of Islamic concepts without correspondence in the *lex fori*, such as the *mahr*, i.e. dowry. In Germany, for instance, courts have been dismissing the fact that *mahr* has no equivalent in German law (marriage contract? alimony following divorce?) and recognising it as an integral part of Islamic customs, with the result that, in most cases, they end up concluding that the husband is bound to pay the agreed amount⁽¹⁹⁾. Similarly, Swedish courts have been willing to grant requests made by Muslim wives, a willingness which, ac-

⁽¹⁷⁾ See ELISA GIUNCHI, «Muslim family law and legal practice in the West: An introduction», in Elisa Giunchi (ed.), *Muslim Family Law in Western Courts*, London and New York, Routledge, 2014, p. 10.

⁽¹⁸⁾ See PASCALE FOURNIER, «The reception of Muslim family laws in western liberal states», *cit.*, p. 72.

⁽¹⁹⁾ See *ibidem*. According to Fournier, French courts have also been recognising *mahr* contracts, by operation of Private International Law mechanisms, even though there haven't been many cases to rule on (p. 69).

ording to Maarit Jänterä-Jareborg, helps to explain the high number of *mahr* cases submitted every year to these courts⁽²⁰⁾.

The cases described by Maarit Jänterä-Jareborg suggest that the courts' approach has little to do with openness to legal pluralism and more with the preservation of the fundamental values of the *forum* State. One of the cases, decided in 2012, involved an Iranian couple who had agreed to the payment of 700 gold coins at the time of the wedding celebrations in Iran. At the time of the wedding, the wife was already a resident of Sweden for ten years. The couple separated soon after the arrival of the husband in Sweden and the marriage was dissolved by a Swedish court at the wife's initiative. After the divorce was decreed, the wife started judicial proceedings to demand the agreed dowry, to which the husband objected on the grounds that the *mahr* contract in Iran had served a merely symbolic purpose and that the wife had agreed not to claim the dowry. Among other arguments, the husband claimed that the wife had lost the right to the dowry after the marriage was dissolved in Sweden at her initiative. The court found that the husband had not proved the agreement by the wife not to claim the dowry nor the merely symbolic value of the *mahr* contract. From the information on Iranian law available to it, the court concluded that the divorce decreed in Sweden would not be recognised in Iran. Invoking the principle of loyal interpretation of foreign law, the court held that the wife was entitled to the agreed dowry, since the parties continued to be married under Iranian law⁽²¹⁾. Swedish courts are therefore flexible enough to recognise a foreign legal concept without correspondence in Swedish law, but also that, when they do so, they try to adjust it to Swedish law, in particular to the general tendency of Swedish family law to protect the weaker party⁽²²⁾. The purpose is mainly to protect the wives' interests, in line with the fundamental values of the *forum* State, not exactly to transplant a legal concept in full, which explains that, sometimes, the recognition of *mahr* is accomplished with disregard for the foreign legal provisions regarding the concept, as seems to have been the case with the Swedish decision just described, since the fact that the wife had initiated

⁽²⁰⁾ See MAARIT JÄNTERÄ-JAREBORG, «Cross-border family cases and religious diversity: What can judges do?», *cit.*, p. 16.

⁽²¹⁾ See *idem*, pp. 17-18.

⁽²²⁾ See *idem*, p. 19.

the divorce did not result in the loss of the right to the dowry as it would have been the case in Iran.

Protection of women's interests also explains the concessions to Islamic norms and practices in cases involving *talaq* divorces (i.e. repudiation of the wife by the husband) and polygamous marriages, sometimes with recourse to «creative solutions»⁽²³⁾. There are reports, for instance, of German courts which, in divorce cases between Muslims spouses, attempt to adjust the divorce decrees, in its formal aspects, not only to German law but also to Islamic practice, in order to avoid the creation of uncertain or limping legal statuses – recognised in some legal systems but not in other – in matters pertaining to divorce and child custody⁽²⁴⁾. For similar reasons, German courts have been willing to recognise *talaq* divorces if the wife appears before the court and confirms that she agrees with the dissolution of the marriage, as was the case with a 1992 decision by a Court of First Instance of Esslingen, which dissolved the marriage after the husband pronounced *talaq* in the justice's presence⁽²⁵⁾. In what regards polygamous marriages, both German and French courts have been willing to recognise some legal effects, provided that the marriages were validly celebrated in a State which allows polygamy. The French Supreme Court of Justice has stated repeatedly that polygamy does not violate French public order in those circumstances, even though a similar marriage would be declared null and void if celebrated in France.

⁽²³⁾ See MAARIT JÄNTERÄ-JAREBORG, «Cross-border family cases and religious diversity: What can judges do?», *cit.*, p. 31.

⁽²⁴⁾ See *ibidem*.

⁽²⁵⁾ See PASCALE FOURNIER, «The reception of Muslim family laws in western liberal states», *cit.*, p. 72. On a side note, it is worth mentioning that the single *talaq* ruling by Portuguese higher courts was favourable to the recognition of the *talaq*'s effects, even though *talaq* divorces are a text-book example given by Portuguese courts of foreign legal concepts which are contrary to Portuguese international public order. The case, decided in 2007, concerned the recognition of a judicial decision by a Moroccan court which had confirmed a *talaq* pronounced by a Portuguese man. The Court of Appeal of Lisbon granted *exequatur* to the Moroccan decision on the grounds that the Portuguese legal system was on the verge of accepting the unilateral dissolution of marriages and that the wife had not opposed the dissolution of the marriage neither in Morocco nor in Portugal. See PATRÍCIA JERÓNIMO, «Intolerância, integração e acomodação jurídica das minorias islâmicas na Europa: Os desafios postos à prática judicial», in Paulo Pulido Adragão (ed.), *Atas do II Colóquio Luso-Italiano sobre a Liberdade Religiosa*, 2017, available at <http://hdl.handle.net/1822/41809> [20.01.2017].

The recognition of legal effects to polygamous marriages validly celebrated abroad has meant that the health insurance could be paid to a wife registered by her husband as his dependant, irrespective of whether the marriage is polygamous or not, and that a second wife in a polygamous marriage could claim social security benefits if the first wife did not receive them too or was no longer resident in France⁽²⁶⁾. In Germany, the judicial recognition of legal effects to polygamous marriages has also meant that second wives have access to social security benefits, besides being entitled to inherit from their husbands and claim alimony for their children⁽²⁷⁾.

As noted by Elisa Giunchi, these judicial signs of willingness to accommodate Islamic norms and practices are mere *ad hoc* concessions, made in very specific circumstances and in a very limited scale, so they do not subvert the domestic legal systems in Europe. It is still up for the States' legal systems to set the limits on what can be accommodated, on the basis of the prevailing perception about what is acceptable⁽²⁸⁾.

3.2. Private International Law and «multicultural jurisprudence»: differences and potential for cross-fertilisation

And here I am back to my initial question: Are Private International Law mechanisms the answer to the claims made by advocates of the cultural defence and of the accommodation of minority legal orders for an increased sensibility to cultural difference and legal pluralism in judicial practice? I will say: Not really. There are significant differences in terms of reasoning and scope between what Private International Law can do and what «multicultural jurisprudence» aspires to. This does not have to be a problem of/for Private International Law. It also does not mean that there is no space for cross-fertilisation.

⁽²⁶⁾ See PASCALE FOURNIER, «The reception of Muslim family laws in western liberal states», *cit.*, p. 68.

⁽²⁷⁾ See *idem*, p. 72.

⁽²⁸⁾ See ELISA GIUNCHI, «Muslim family law and legal practice in the West: An introduction», *cit.*, p. 5.

Let us consider first the main differences that set Private International Law apart from the «multicultural jurisprudence» claims. *First*, the reasoning for the application of foreign legal provisions under Private International Law mechanisms is cooperation between States, the interest in an international harmony of decisions, and the protection of expectations about the applicable law in cross-border cases. Human rights concerns, which are at the centre of «multicultural jurisprudence» demands, are not a primary consideration. Human rights do play a significant part in the operation of Private International Law mechanisms due to its relevance for «public policy» arguments, but here they usually serve to *refuse* the application of foreign legal provisions, not the other way around. *Secondly*, Private International Law mechanisms only apply to private law disputes (e.g. family, contracts, torts), whereas «multicultural jurisprudence» claims cover all areas of law, including Criminal Law, Immigration and Refugee Law, etc. *Thirdly*, Private International Law mechanisms are applicable only in cross-border cases. Conflict-of-laws rules do not solve cross-cultural family situations as such, since they only come into play if one of the parties to the dispute is a foreigner vis-à-vis the *forum* State. If both parties to the dispute are nationals of the *forum* State, conflict-of-laws rules are not applicable, even if the understanding that the parties have about the family issue at stake is influenced by convictions rooted in foreign cultures⁽²⁹⁾. *Fourthly*, only State law is applicable per operation of Private International Law mechanisms⁽³⁰⁾, whereas «multicultural jurisprudence» calls for recognition of legal relevance to religious and customary norms and practices irrespective of whether they find any correspondence in the legal system of any State. *Finally*, as mentioned by Susan Rutten in her contribution to this

⁽²⁹⁾ See ANDREA BÜCHLER, *Islamic Law in Europe? Legal Pluralism and its Limits in European Family Laws*, Farnham, Ashgate, 2011, p. 27.

⁽³⁰⁾ Islamic law, much like the Jewish Talmud, is not foreign law applicable to cross-border legal situations, as it is not State law. See MAARIT JÄNTERÄ-JAREBORG, «Cross-border family cases and religious diversity: What can judges do?», *cit.*, p. 27. That is the reason why the notorious 2007 decision by the Frankfurt Family Court was technically wrong. The Court denied the request for an immediate divorce, submitted by a Moroccan wife who claimed to be severely beaten by her husband, with the argument that the beatings alleged by the wife were common in the couple's culture of origin, in light of what was mandated by the Koran. See MATHIAS ROHE, «Shari'a in a European context», in Ralph Grillo *et al.* (eds.), *Legal Practice and Cultural Diversity*, Farnham, Ashgate, 2009, p. 93.

volume, many European States are increasingly replacing nationality with domicile as the connecting factor for the determination of the applicable law in personal status matters.

Furthermore, the way in which Private International Law mechanisms have been operated in recent years does not seem to be very «diversity friendly». There is growing criticism in the literature of what is perceived as an overbroad and culture-insensitive use of the public policy argument to refuse the application of foreign legal provisions or the recognition of acts practiced under foreign laws abroad; a turn which is deemed to be unsuited in increasingly plural societies⁽³¹⁾. For instance, the prevailing trend in *talaq* cases seems to be to refuse recognition of *talaq* divorces validly decreed in the parties' State of origin, without regard for the specific circumstances of each concrete case, the connections with the *forum* State or the justice of the outcome. Similarly, domestic courts in Europe increasingly refuse recognition of legal effects to all polygamous marriages, irrespective of the validity of these marriages in the state where they were celebrated, the connection of the spouses to that state and to the *forum* State, the circumstances in which the marriage was celebrated, the period of time elapsed since then, the interest of the parties in keeping the marriage, etc.⁽³²⁾.

This lack of consideration for the laws, customs and religious practices of the states of origin of spouses in polygamous marriages or in *talaq* divorces is justified by respect for principles of public policy of the *forum* State, which is practically the same as to say for respect of fundamental rights. The frequent recourse to principles of public policy in this context is problematic and has been criticised in the literature. As pointed out by Andrea Büchler, in European legal systems, there are no clear and consistent definitions about what is public policy, a concept which seems to be invoked by courts in an entirely casuistic if not random manner, which is surprising given its far-reaching normative consequences⁽³³⁾. Being as it is an elusive concept, of difficult densification and in permanent evolution, public policy gives courts

⁽³¹⁾ See e.g. MAARIT JÄNTERÄ-JAREBORG, «Cross-border family cases and religious diversity: What can judges do?», *cit.*, p. 25.

⁽³²⁾ See e.g. *idem*, pp. 24-25.

⁽³³⁾ See ANDREA BÜCHLER, *Islamic Law in Europe? Legal Pluralism and its Limits in European Family Laws*, *cit.*, p. 41.

a wide margin of discretion when deciding if/how to apply and interpret provisions of foreign law or recognise its effects⁽³⁴⁾. Besides, there seems to be little doubt that the concept hides ideals of family and marriage which are culture specific and which have an underlying Christian morality⁽³⁵⁾. Also, it is questionable that, in the way that it has been used by domestic courts, the public policy exception actually serves to safeguard fundamental rights. Maarit Jänterä-Jareborg asks why is it that, in spite of the openness shown by the European Court of Human Rights when interpreting the right to private and family life, the family life in cases of polygamous marriages cannot be considered to be worthy of protection when the parties consider themselves to be a family and wish to be recognised as such. Jänterä-Jareborg draws attention to the fact that in many cases the type of marriage celebrated or of divorce decreed is the only legal solution available in the State of origin, which makes a refusal of recognition in such cases paramount to discrimination against ethnic or religious minority groups⁽³⁶⁾.

It is also important to realise that accommodation of foreign legal concepts is often merely apparent. Domestic courts in Europe are deemed to have a duty to abide by the principle of «loyal interpretation of foreign law», but there are many cases which suggest that courts often adapt foreign legal concepts and provisions to the fundamental principles of the *forum* State, sometimes in a blatant disregard for the foreign law regarding the institute. That is often the case when it comes to the recognition of the institute of *mahr*, which, as noted earlier, is also the institute of Islamic inspired foreign law that domestic courts in Europe are more willing to accommodate. In most cases, the courts recognise legal effects to *mahr* agreements and conclude that the husbands have to pay the agreed amounts, not so much out of respect for the foreign laws applicable to the case as out of respect for basic principles

⁽³⁴⁾ See ELISA GIUNCHI, «Muslim family law and legal practice in the West: An introduction», *cit.*, p. 10; MAARIT JÄNTERÄ-JAREBORG, «Cross-border family cases and religious diversity: What can judges do?», *cit.*, p. 30.

⁽³⁵⁾ See ANDREA BÜCHLER and AMIRA LATIF, «Judicial encounters with Islamic and Middle Eastern family law in Switzerland from a private international law perspective – marriage and divorce», in Elisa Giunchi (ed.), *Muslim Family Law in Western Courts*, London and New York, Routledge, 2014, pp. 55-79.

⁽³⁶⁾ See MAARIT JÄNTERÄ-JAREBORG, «Cross-border family cases and religious diversity: What can judges do?», *cit.*, p. 25.

of the domestic legal system, that of protecting the weaker party in family relations. That was the case with the Swedish court case in which the fact that the wife had initiated divorce procedures in Sweden did not have the effect that it would have had in Iran, which would have been a loss of the entitlement to the dowry.

Having said this, it is nevertheless possible to find reasons for optimism in the judicial practice involving Private International Law techniques and in the potential for cross-fertilisation between the academic debates on Private International Law and on multicultural jurisprudence. Private International Law can be considered as a gateway to increased acknowledgement and accommodation of legal pluralism in European societies, thereby contributing (albeit indirectly) to the «multicultural jurisprudence» cause. *First*, although its focus is on State legal systems, the Private International Law literature is clearly attuned to the need to look beyond the official law in the books and into the law in action, as mentioned earlier today by Professor Moura Ramos. This means not only attention to the case law of the courts in the foreign State, but also the acknowledgement of other sources of law, such as customary law, whenever these other sources are recognised by the State's legislation (which is increasingly the case in African and Asian countries). *Secondly*, it is an inescapable fact that most of the cases of accommodation of «cultural arguments» put forward by minorities before domestic courts in Europe occur by operation of Private International Law mechanisms. *Thirdly*, both Private International Law lawyers and «cultural defence» advocates express concern that legal actors are often ill prepared to communicate in intercultural contexts and to interpret legal arguments and norms originating in other legal traditions. From both sides there all calls for the institution of training programs for legal actors, in order to enable them to meet the challenges associated with legal pluralism (knowledge about foreign legal systems; awareness of their own prejudices, etc.)⁽³⁷⁾.

⁽³⁷⁾ The RELIGARE study reported a general lack of credible legal information on the content of norms of foreign law of religious origin among attorneys, judges and political actors. The courts and the public administration often lack the means to fully interpret rules of foreign law and the way such rules are actually interpreted and applied in the states of origin. Among the needs diagnosed were: availability of credible information on foreign legislation and judicial decisions; training programs for judges, court clerks and lawyers in general on the content of

Private International Law has a role to play after all, even though it is not the answer to all the claims put forward by «multicultural jurisprudence» advocates. For those who fear an Islamisation of western legal systems, Private International Law mechanisms already go too far in enabling legal pluralism. For those who see cultural diversity and legal diversity as facts and traits which characterise our societies and which should be acknowledged and even protected for the sake of human rights, Private International Law is too little in the way of getting to that result. It is, nevertheless, a sign of what is possible.

institutes of religiously inspired foreign law, on Private International Law techniques and on different cultural and legal traditions. See VVAA, *Summary Report on the RELIGARE Project*, 2013, available at http://www.religareproject.eu/system/files/RELIGARE-%20Summary%20Report_0.pdf [20.01.2017].

O regime das fontes e da interpretação jurídicas no atual Código Civil português: que futuro?
