
In recent years public attention has increasingly been focused on Muslims and family law in Europe. The topic has generally been surrounded by much public misinformation as witnessed in the widespread perception that England has authorized Shari'a courts, not to mention the enactment in a couple of US states of laws forbidding reference to Shari’a or, for that matter, any foreign law by the courts. Although the federal courts have annulled such laws, such incidents also illustrate the degree of disconnect there is between the law and legal practice, on the one hand, and popular perceptions, on the other.

In her introduction to this important and cool-headed study Andrea Büchler acknowledges this tension when she draws attention to the growing diversity in European society and the increasing tendency to regard the ethnic minority communities of non-European origin as ‘different’, and especially if they are Muslim. This difference awakens fears and encourages some sections of the European majorities into defensive positions. The context of the study is one in which traditional European family patterns have weakened, and the state has ceded much of its control over what constitutes ‘family’.

At one level one could ask why, then, there is such a concern about Muslim couples moving together on the basis of an Islamic form of marriage without any corresponding civil formalization? To some extent there is not a problem except the one arising out of majority perceptions and the degree of fear which seem to be associated with Islam. But, of course, that is too easy. While in most cases such arrangements run more or less without frictions, or certainly not more than is the case in any marriage, the problems arise when tensions move towards the irreconcilable and lead to a breakdown. Suddenly the cultural norms of the larger community within which such a marriage is situated become active and lay down limits. This affects community recognition of the split—will it be recognized as a divorce allowing the woman to remarry, who takes responsibility for the children, will the agreed mahār (dower) be paid?

It is such very practical matters which give rise to the whole question of the room for diversity in the law: legal pluralism. Büchler’s very thorough study mobilizes both the relevant legal theoretical dimensions and the specific experiences of Germany, Switzerland, France, England and Spain, each representing distinct types of legal and national-cultural tradition, and all with significant Muslim populations of various immigrant origin. In the opening chapter the author argues that European law is faced with a weakening of the identification of culture and nation, which was always something of a myth, but with the scale of cross-border migration of the last half-century or more the myth is clearly losing its power and relevance. Shared cultures are increasingly transnational, as are Benedict Anderson’s ‘imagined communities’. That they are also mobile is one reason why such a study has to start with a look at Private International Law (PIL), the system by which family law status (and contracts, for that matter) can remain stable as they cross borders. As Büchler points out in her second chapter this can give particular complexity to practice in England where it is the law of the domicile (the ‘connecting factor’) which determines which national law shall apply—most of Europe applies the law of the nationality, while a few countries apply the law of habitual residence. On the face of it the definition of domicile (developed by case
law precedent over several centuries) is simple, but in individual cases it can be complex and is open to manipulation, especially if the judge is not an expert or does not take advice. On the other hand, nationality can be too rigid and mechanical as a connecting factor. The various systems seem to be converging around the criterion of habitual residence, although it still remains a difficult enough issue that a recent EU attempt to harmonize European law around it has so far not succeeded.

However, PIL is increasingly limited in its use, as a younger generation, the children and grandchildren of the immigrants, increasingly obviously fall under domestic law: their domicile is in England, they are French or German nationals, or their habitual residence is Switzerland. But many of them still expect to have a reference to Islam in their culture and especially in their family arrangements. In her third chapter, the author indicates that this comes to the possibly most extreme expression in England, where a large proportion (although there is little quantitative research to determine how many) of young Muslims do not obtain a civil marriage, even though most do know that this is required for the marriage to be recognized in law. Anecdotal evidence suggests that in some cases the women do want a civil wedding to go with the nikah but their husbands dissuade them, and in some cases the consideration of the cost of a civil divorce in time and cash also dissuades. It is no coincidence, therefore, that it is in England that there has been a growth of so-called Shari’a courts, often called councils (the earliest date from the early 1980s) and in practice, as a number of studies have shown, functioning rather as family reconciliation and advice agencies, however they formally describe themselves.

Büchler continues in the fourth chapter investigating the strengths and weaknesses of various understandings of legal pluralism, a subject of growing interest in academia. As she points out, it is difficult to imagine a widely practical approach to dealing with Muslim demands of the law. Not only are the various European national contexts widely different, so are the Islamic: there is no common set of Islamic rules, not even within the traditional Sunni schools of law (madhahib), even before one starts looking at the various reforms which have been enacted in different Muslim countries. One also has to keep the door open for the potentials of new ideas which are appearing in various places about aspects of Islamic family arrangements, some of which represent significant breaks with tradition, and which can only be tried out in Europe once the legal links with the countries of origin have been broken, including in circumstances where PIL is no longer applicable. Büchler is quite clear, rightly in my view, that to assume that this legal pluralism should lead to some form of institutionalization, some form of parallel jurisdiction—proper Shari’a courts—is to take the wrong path. It can contribute to strengthen cultural and communal differentiation and thus undermine the common cohesion of what used to be called the nation state. It also implies a preference for communal rights over the autonomy of the individual which is essential to the practice of freedom of religion in a plural democracy, in the way the concept has been developed in the European Court of Human Rights.

In her last main chapter the author argues that the way forward is ‘to embrace openly the multiplicity of family-law discourses, with a view to directing these towards mutual understanding and consensus . . .’ (p. 94). Two approaches to the legal diversity we are faced with are key. One at a more theoretical level is to develop a discourse of legal diversity involving all parties inclusively and equally with the only basic condition being a common commitment