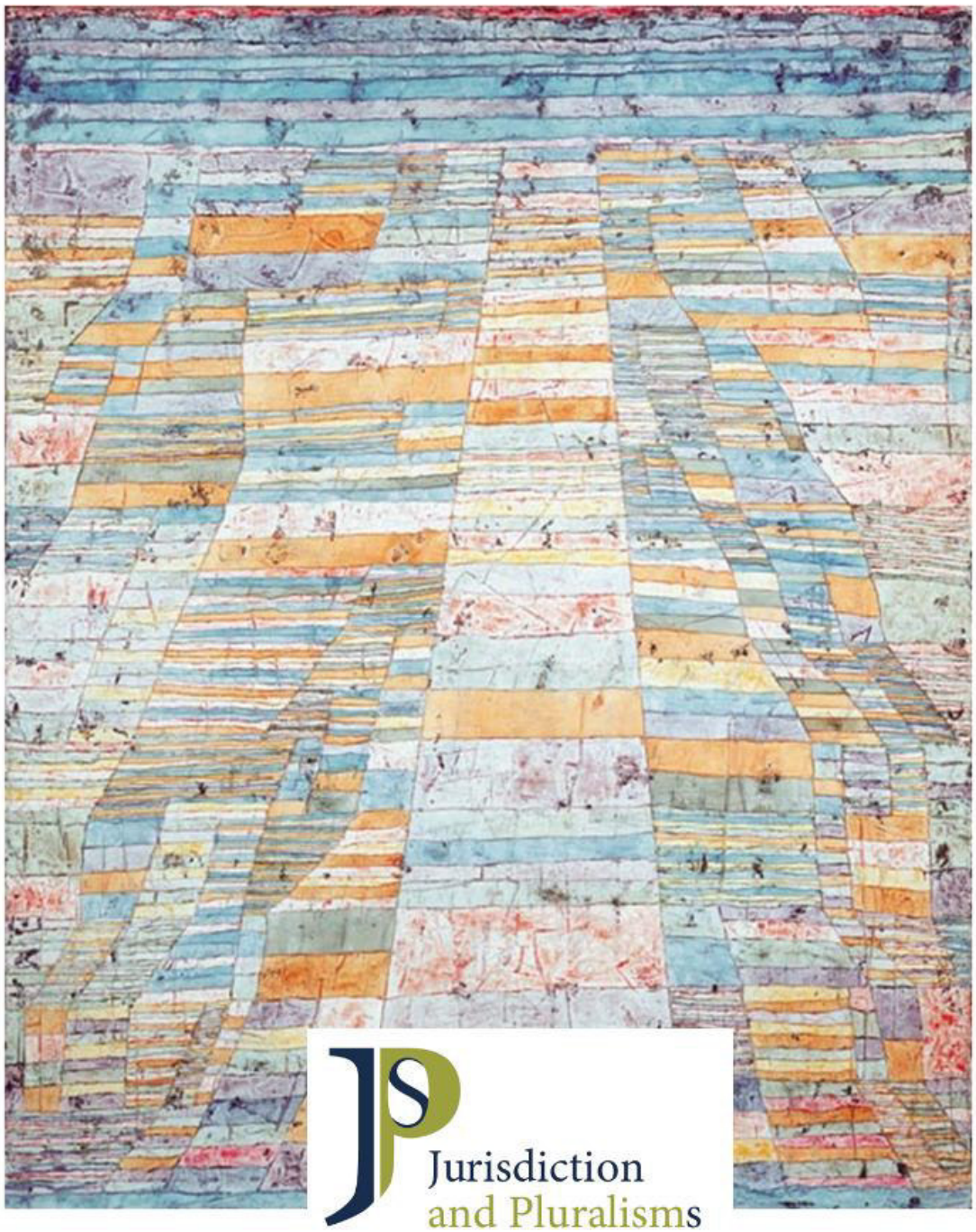
LEGAL PLURALISM IN EUROPE AND THE *ORDRE PUBLIC* EXCEPTION:

NORMATIVE AND JUDICIAL PERSPECTIVES



Jurisdiction and Pluralisms

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/

Jurisdiction and Pluralisms

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

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 Europe[1].

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) exception[2].

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 attenué* 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 attenué*). 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 attenué* 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 attenué* 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 periods[5].

[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 '50[6].

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 be 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 lead 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 easier[7].

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 provision[8].

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 cases[9].

In a case concerning the failure of the appelate 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 societès 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. (1er Ch) 03.07.2001, in *Rev. Critique Droit Int. Privé*, 2001, 704, annoted by L. GANNAGÉ, Dalloz, 2001, 3378.

[9] Cass. Civ. (1re 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* exception[10]. 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 recognition[11]. 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 application[12].

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 notion[13].

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 attenué*. 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 marriage[14]. 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 child[16].

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 spouses[17].

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 nationality[18].

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 socialedes 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 order[19].

Some legal scholars harshly criticized the 2007 cassation ruling and its departure from the settled practice of the *ordre public attenué* 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 nationality[20].

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 provision[21].

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* notion[22].

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 succession[23].

The tendency emerges even considering EU pieces of legislation with regard to some Islamic institutions[24]. 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 apply[25]. 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 State[26].

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 law[27].

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 pluralism[28]. Moreover, the failure to recognize a repudiation under foreign law could be in breach of the right to respect for family life[29].

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 protect[30]. 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 order[31].

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 Europe[33]. 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 values[34].

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.