

CULTURAL DIVERSITY AND LAW



Islamic Law in Europe?

Legal Pluralism and its Limits in
European Family Laws



Andrea Büchler

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ISLAMIC LAW IN EUROPE?

Cultural Diversity and Law

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Around the world, most states are faced with difficult issues arising out of cultural diversity in their territories. Within the legal field, such issues span across matters of private law through to public and constitutional law. At international level too there is now considerable jurisprudence regarding ethnic, religious and cultural diversity. In addition, there are several layers of legal control – from communal and religious regulation to state and international regulation. This multiplicity of norm setting has been variously termed legal pluralism, inter-legality or inter-normativity and provides a fascinating lens for academic analysis that links up to cultural diversity in new and interesting ways. The umbrella of cultural diversity encompasses various population groups throughout the world ranging from national, ethnic, religious or indigenous groupings. This series particularly welcomes work that is of comparative interest, concerning various state jurisdictions as well as different population groups.

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Preface

Family-law codes in Europe have been subject to a succession of reforms over many years. ‘Modernisation’ has been the leitmotif of all the changes which have been made. It is these modernising initiatives which, in numerous countries in Europe, have resulted in family-law codes which are capable, at least partially, of embracing a whole range of family living arrangements – single-parent families, step-families, unmarried couples, same-sex couples. Migration from countries with a predominantly Muslim population has presented an additional challenge to Europe’s family-law codes. Are these modernised codes also able to accommodate alien concepts and understandings of what constitutes a family and of the purpose of family law? Where do these family-law codes reach the limit of what they can achieve, and how are those limits justified? Is Europe about to see its family reality reverting to more traditional models, which will, at the very least, irritate certain fundamental concepts of the relationship between the sexes, of autonomy and of inter-generational ties? To rephrase the question somewhat: where, and how, are alien concepts of family law gaining entry into European countries’ legal systems? Is it desirable for there to be a plurality of family-law codes comprising different provisions for different cultural and religious groups? Given the human right to cultural and religious identity, may such plurality indeed even be a necessity? What are the alternatives?

I first examined these issues – which are now attracting much attention from European social scientists, lawyers and politicians – in a paper I presented at a conference of the German Society of International Law in Halle in 2007.¹ During the 2008/2009 academic year, the Institute for Advanced Study in Berlin then provided me with an ideal environment in which to develop my initial ideas in greater detail and to expose them to debate. This text is the result of that process. Many fellows and friends have joined in the discussion of the issues examined here. I am deeply grateful to them all.

I should also like to thank Nicholas MacCabe for taking care of the English manuscript.

Andrea Büchler
Zurich, November 2010

1 A. Büchler, Kulturelle Vielfalt und Familienrecht. Die Bedeutung kultureller Identität für die Ausgestaltung europäischer Familienrechtsordnungen – am Beispiel islamischer Rechtsverständnisse, in G. Nolte, H. Keller, A. von Bogdandy, H.P. Mansel, A. Büchler, C. Walter, *Pluralistische Gesellschaften und Internationales Recht. Berichte der Deutschen Gesellschaft für Völkerrecht*, Heidelberg: C.F. Müller, 2008, 215–252.

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Introduction

‘Rencontrer un homme, c’est être tenu en éveil par une énigme.’*

Emmanuel Levinas

These words were written by the French philosopher Emmanuel Levinas.¹ In writing that sentence, Levinas combined memories of his physical and spiritual encounters with his teacher Edmund Husserl which are of almost tender fondness. Yet, concealed within those same words is the very essence of the unique depth and seriousness of his fascination with the other, for it is man himself who is that infinitely unique other. Encountering man means becoming aware of his existence. It is that encounter which gives birth to language and which kindles feelings of responsibility.² For Levinas it is that confusing manifestation of alterity which constitutes the puzzle, the enigma, the dialectic transcendence.³ That is what keeps us alert, indeed it is a prerequisite for our very awareness of our own existence.

That is why this irritatingly pristine statement is of such unimagined significance for the present day, and for its somewhat restless dealings with all that is other.

Ethnic, religious and cultural diversity is increasingly evident in Western Europe. In a number of European countries there are fears that foreign or, more specifically, Islamic family law is becoming entrenched. All parties to this discussion see themselves as under threat. Migrant populations are afraid of losing their cultural identity, while their adopted countries’ established populations see a risk to social cohesion and a threat to modernity. Cultural diversity and equality, autonomy and inclusion. These are the faultlines, and the tensions which are building up along them are becoming increasingly noticeable, especially as the volume of migration from countries with a predominantly Muslim population has increased. Family law brings these underlying tensions into sharp focus, probably because it is widely perceived and understood to be both closely intertwined with culture and a key source of identity. Furthermore, Europe’s current modernity is the product of a long and hard struggle, especially where family law is concerned.

* Levinas 1967, 125.

1 Emmanuel Levinas, a Jewish philosopher, was born in Lithuania in 1906 and died in France in 1995. He was awarded a doctorate in Paris in 1930 for his dissertation on the philosophy of Husserl, gaining his *venia legendi* in 1961 for his work on totality and infinity. He was awarded a chair at Nanterre in 1967 and at the Sorbonne in 1973.

2 Cf. Levinas 1991, *passim*.

3 Cf. Levinas 1967, 208: ‘Cette façon pour l’Autre de quérir ma reconnaissance tout en conservant son *incognito*, en dédaignant le recours au clin d’œil d’entente ou de complicité, cette façon de se manifester, nous l’appelons – en remontant à l’étymologie de ce terme grec et par opposition à l’apparoir indiscret et victorieux du *phénomène* – énigme.’

There is no doubt that the last few decades have seen European nations' family-law codes subjected to fundamental changes. As family living arrangements have become increasingly pluralised, strict family-law models have needed special justification. The state is in retreat. There is talk of family law becoming de-institutionalised and contractualised, particularly as couples are now largely free to define their living arrangements themselves, with individual agreements taking the place of universal institutions. This widespread trend in Western family law, which modernisation has brought in its wake, has recently been accompanied by a second development which, while its traditional inspiration may initially make it appear contradictory to the first, nevertheless also represents a challenge to the loosening of family-law codes. As migrants from countries of origin with a Muslim population have established themselves in Europe, there have been calls for cultural and religious plurality to be reflected in European laws, and for these also to pay heed to Islamic legal concepts, processes and values. The proponents of these claims base their argument on the fact that cultural and religious identity is now recognised as a fundamental human right, upheld by a whole series of international treaties.

Differing concepts of family law have, at one time or another, inflamed the entire debate on such critical issues as human rights, equality, progress, secularisation, revelation, universality, identity and imperialism. Europe's legal systems have reacted to the new challenges posed by migration from countries of origin with a Muslim population in many different ways. Often, their response has taken the form of an *apologia*. Rarely has it been informed by theory. Traditional solutions of the kind offered by private international law rules are too clear-cut to accommodate the complexities involved. New answers have yet to establish themselves. The theoretical and practical challenges involved are forcing us to re-evaluate the concepts of European countries' family laws in a culturally diverse, pluralistic society.

Cultural and religious identity and family law are interrelated in a number of ways and raise various complex issues. I shall endeavour to describe areas in which conflicts may arise (chapter 1), with a view to mapping out the field of tension between cultural diversity, equality, autonomy and inclusion, to indicating possible paths towards addressing these conflicts in an affirmative and productive manner and towards reconciling the protection of cultural identity and autonomy with the advancement of social and legal inclusion. My thoughts primarily take the form of broad outlines and are perhaps overly biased towards theory. They are ideas about something which is necessarily subject to political contingencies and the unpredictable ways in which societies evolve. I shall examine international and European private law, defining my own critical, and admittedly somewhat apodictic, position within that framework (chapter 2). The following sections will include a description of, and some comments on, the various degrees of consideration accorded to cultural identity within substantive family law (chapter 3) and some remarks on models of legal pluralism (chapter 4). I conclude with an

evaluation of various approaches which are process-based rather than institution-centred (chapter 5), before presenting my main theses (chapter 6).

Despite all the efforts made to achieve harmonisation, Europe's various individual jurisdictions remain characterised by numerous specific differences in the very broad area covered by family law. This book does not present a systematic analysis of Europe's various family-law codes. Rather, by reference to examples from legislation and court decisions, it discusses various approaches to questions relating to cultural and religious identity and to diversity in family-law matters. Examples will be drawn from considerations of the paths adopted by Germany as a culture-based nation, Switzerland as a nation based on political will, France as a secular republic, England with its colonial past and Spain with its historical Islamic imprint. These countries represent the nuances between various concepts of the role of the state and how those concepts have influenced their approach to religious freedom and the tension between religious pluralism and social cohesion.

Chapter 1

Cultural and Religious Diversity in the Context of Family Law

Some Reflections on the Semantics of Cultural Identities

Abstractions and Binary Codes

The semantics of cultural diversity incorporate the concept of otherness in a number of ways. Differentiation is a prerequisite for inclusion, however. What is this cultural identity which has the ability to distinguish between the self and all that is 'other'?

On the one hand, cultural identity is an expressive, non-purposeful, non-rational emanation of the personal. On the other hand, it is a construct, invoked to articulate and recreate itself assertively and continuously in the social and institutional context. We often experience a more or less overtly stated binary logic, based on purported attributes of 'us' and 'them'. These attributes exert substantial influence throughout society, giving rise to concepts of social groups which are entrenched in the collective memory such as 'Islam' or 'the Muslims'. Cultural perceptions and ascriptions operating like a binary code play a considerable part in encouraging depersonalised abstractions. In certain socio-cultural configurations, this can lead to processes of forced identification or delimitation, or to the attribution and appropriation of identities which are absolute.¹ Turks, Pakistanis, North Africans and Malaysians are all reduced to their common religious affiliations and simply declared to belong to a single collective. Muslims in Europe, however, are not one homogeneous, clearly defined and delimited group. They are a set of different individuals, each with different religious practices and attachments.

The Renaissance and Pluralisation of Religion

How, though, are the religion and the religious identity of Muslim men and women actually evolving in European societies? Let it first be noted that this very question is a relatively recent one. The first generation of Muslim immigrants which arrived in Europe in the aftermath of the Second World War were perceived largely in terms of their economic role as migrant workers, and their residence in Europe was wrongly assumed to be temporary. As additional family members joined those

¹ On this 'compulsive explicitness' (in German 'Zwang zur Eindeutigkeit') and its attendant dangers, see Schiffauer 2008, 88 and 93.

who had already established themselves in Europe, and the myth of a subsequent return to their homelands was abandoned, Muslim men and women began to establish organisational structures of their own and make their voices heard. For the first time, questions were raised as to how their religious affiliation should be treated, and religious templates also began to be applied to social issues as well. Chronologically speaking, this new Islamic presence in Europe can now be said to be about thirty years old.²

Religion is indeed experiencing something of a renaissance in the discourse of cultural diversity and is becoming an ever more important form of self-identification. Diaspora communities increasingly emphasise links to the religious identities they have brought with them, as exemplified by their use of emblems such as the headscarf.³ Indeed, emigration often raises people's consciousness of their religious affiliations, as a symbolic means of reinforcing their own identity. Or, as van der Veer puts it: 'paradoxically, migration to the lands of unbelievers strengthens the religious commitment of the migrants'.⁴ The particular circumstances of migration make the issue of identity more pressing and increase the need for identifiable points of reference by which individuals can gauge themselves.⁵ Religion offers people both a meaningful framework and a network of contacts on which they can depend during times of crisis.

Conversely, over the last ten years or so, the focus of debate on religions has shifted from their potentially pacifying aspects to the perspective of threat and conflict. Islam has been most notably affected by this shift, and is often perceived, as it were, as the symbol of cataclysm, the quintessence of everything which threatens modernity, not least because of the religious determinism of its discourse on family law.⁶ Shortly after the terrorist attacks of 11 September 2001, Habermas spoke of a 'post-secular society'.⁷ Of course, it is certainly also true that the classic paradigm of secularisation⁸ itself has met with increasing criticism – a paradigm exemplified partly by the idea that religious observance was practised more intensely in former times and that religion's very significance and purpose have

2 Tiesler 2007, 25.

3 On the phenomenon of re-ethnicisation, cf. Reuter 2002, 407; about the increasing visibility of Islam in the European public space, cf. Cherribi 2003, 195.

4 van der Veer 1994, 119.

5 Lauser, Weissköppel 2008, 7 and 9, which contains numerous references to research on migration.

6 For Germany, cf. Bielefeldt 2010, 173–174.

7 Habermas 2001, *passim*, in particular 12.

8 Admittedly, the term 'secularisation' has itself been the subject of intense debate. In essence, the process of secularisation is characterised by differentiation between religious institutions and the state and between knowledge and belief, though the significance and function of religion in a society has also been addressed.

been diminished, and partly by Weber's thesis⁹ that modernisation will necessarily bring about changes in religion.¹⁰

Whether we are now witnessing the return of religion, or merely its transformation, there seems to be little doubt that religion is assuming a more public profile and that it is demanding recognition, that religious references have proliferated, and European societies have become far more pluralised, both ethnically and religiously. There can be no doubt that European societies now have multifarious religious strands running through them. Religion can provide an anchor for the individual confronting societal, technical and economic complexities which he or she can neither control nor fathom. To those uprooted by modernising and postmodernising trends, religion offers a basis for addressing existential questions – what is feasible, what is permitted, what is available? – as well as the prospect both of answering them with a degree of certainty and definition, and of dealing with new contingencies as they arise.¹¹ There can be no doubt that Europe must be prepared for religious communities to endure in a secularised environment.¹² Europe must thus attempt to reincorporate religion into its civil and social structures, making religion part of the modern secular society it understands and proclaims itself to be.¹³

The Focus on Difference and the Shifts Caused by Globalisation

Culture is indisputably imbued with specific historical and social meaning. Culture lends significance to individual existence, tying the individual to society with a tacit sense of belonging. But culture, as Clifford puts it, is 'not an object to be described, neither is it a unified corpus of symbols and meanings that can be definitively interpreted. Culture is contested, temporal, and emergent. Representation and explanation – both by insiders and outsiders – is implicated in this emergence.'¹⁴

9 Cf. Weber 1968, 577: 'The needs of economic life make themselves manifest either through a reinterpretation of the sacred commandments or through their casuistic by-passing. Occasionally we also come upon a simple, practical elimination of religious injunctions in the course of the ecclesiastical dispensation of penance and grace.'

10 For detailed criticism of the secularisation paradigm, see Zachuber 2007, 17.

11 Cf. Gräß 2007, 81, also Mahlmann 2006, 75 and 77.

12 Cf. Habermas 2001, 13.

13 For a detailed discussion of the necessity for these efforts and of the theory of religion as a resource for social integration, see Sellmann 2007, *passim*.

14 Clifford 1986, 19. A discussion of the concept of culture is not intended here, nor would it be feasible. In this context, culture is understood as 'ein komplexes Ganzes, welches Wissen und seine Anwendung, Glaubensvorstellungen, Kunst, Moral, Gesetze und Bräuche sowie all jene Fähigkeiten und Eigenschaften einschliesst, die sich Menschen als Mitglieder einer bestimmten Gesellschaft aneignen und wodurch sie sich von anderen Gruppierungen unterscheiden', as in Kälén 2000, 21.

The concepts of culture current in European countries today appear to focus on difference, and the relevance of diversity is increasing inexorably. This may simply be interpreted as a recognition that it is culture which lends purpose to life. Yet this emphasis on differences in culture and identity arises not only because diversity is perceived as a desirable end in itself, it is also sometimes expressive of the – erroneous – idea that there are a variety of entities, distinct from each other, self-contained, with precedence over the subjective, possessed of logics of their own and with the power to induce uniformity within themselves.¹⁵

Some legal discourse appears to suggest that this notion of culture is congruent with national identity, which, in turn, would imply that cultures are firmly delineated within national boundaries. This is, of course, something of an oversimplification. Culture is not ontologically evident nor is it an anthropological constant. Globalisation¹⁶ has been a key factor in reshaping identity-determining areas beyond nation-states.¹⁷ Transnational areas – for example the spaces linking migrant communities with their country of origin – allow contradictory and cosmopolitan identities to evolve which are not only multi-pillared, but are also universal, hybrid, multi-lingual and ubiquitous. On a sub-national level, this phenomenon is accompanied by the formation of identity patterns whose intent is defensive, and which regularly have recourse to primordial categories such as ethnic origin and religious affiliation. In contrast to their cosmopolitan counterparts, such identity configurations are local, authentic, homogeneous and coherent. Globalisation has produced two contrasting and parallel outcomes. It has not only made society more pluralistic, it has also made social groups more ethnic.

Cultural identity unfolds through discourse, narration and action. It is the result of social interaction. Culture is thus the product of numerous, complex cultural perceptions, attributions and definitions, all of which are shaped by individual concepts of that which is other and thus by individual attitudes towards otherness. Migration has played a significant part in producing today's transnational social spaces. It has unbound nations, creating societies whose individual and collective cultural foundations are pluricentric, and whose loyalties are ambivalent. If migrants to a new country have recourse to religious and cultural symbols and signs of their own,¹⁸ even if they present these as ascribed manifestations of their own selves, these symbols and signs will not have the same significance in the emotional identity of their offspring, born in the country to which their parents

15 On the genesis of the concept of culture, cf. Wicker 1998, 26.

16 A discussion of the ramifications surrounding the concept of globalisation is not intended here. It is important, however, to point at Teubner's observation that the globalisation being witnessed today 'nicht die von der internationalen Politik allmählich gestaltete Weltgesellschaft [ist], sondern ein höchst widersprüchlicher, durch und durch fragmentierter Vorgang der Globalisierung, der von einzelnen Teilsystemen der Gesellschaft in unterschiedlicher Geschwindigkeit vorangetrieben wird'. Cf. Teubner 1996, 258.

17 Wicker 1998, 31.

18 Cf. Belhoul 2005, 159.

emigrated. Caught between the Scylla of a home where parents have vivid and emotional memories of the cultural environment from which they originate and want to hand these down to their children, and the Charybdis of a demanding, often distrustful social majority,¹⁹ this second generation finds its identity split, if not indeed broken, if it is unable to derive productive benefit from its various cultural roots. Members of this second generation are often adept at navigating their cross-cultural environments, well aware of the differing expectations and modes of behaviour which apply within and outside their own ethnic community, able to avail themselves of both sets of values and even skilled in playing off both sides against each other.²⁰ Transnational ties are often maintained, with families remaining in contact with the region from which they originated, with 'back home', not least with a view to future marriages. Indeed, members of European diasporic minority communities often marry spouses from their countries of origin, and also celebrate the marriage in that country, thus making such marriages both transnational and trans-jurisdictional.²¹ It is then the members of the younger, second generation who have multiple senses of belonging and are exposed to conflicting ethnic, national, cultural and legal points of reference. Their identity is shaped by the interplay between synchronic and diachronic perspectives.²²

It is certainly true that the integration process, which may span several generations, can gradually blur the differences between a country's native population and its migrant groups, so that ethnic, religious and cultural affiliation

19 Speelman 1995, 71.

20 For an arresting description of a specific case, cf. Ballard 2006, 35. The case involved the successful carrying out of an arranged marriage between a 17-year-old Pakistani woman who had been living in England since the age of six and her cousin, who until then had been living in Pakistan. Two years elapsed before the couple were reunited, during which time the young woman availed herself of her new freedom as a married woman and entered into relationships which were not tolerated by her community. When her husband finally arrived in England, she rejected him. She made plans to run away. She decided that she could best extricate herself from her predicament by presenting herself to a whole set of institutions as a young Asian woman in serious domestic distress, being put through a forced marriage to a violent husband by authoritarian parents who would kill her if they discovered that she was planning to run away. Nobody made a serious effort to establish the story's veracity. The case ended tragically. The woman died in a fire that she almost certainly started herself. A case was brought against her husband but then dismissed due to lack of evidence. On the self-identification of second-generation migrants, see also Schiffauer 2008, *passim*, in particular 91.

21 See the review of research and the discussion of the motivations for transnational marriages in Beck-Gernsheim 2007, 275.

22 See the detailed investigation in Ehringfeld 1997, 38, in particular 60. The term 'transdifference' has also been used to describe the elements of contradiction, inconclusiveness, undecidability and uncertainty which the order of this binary logic suppresses, thus implicitly questioning the validity of binary differential constructs without resolving the differences inscribed. Cf. Lösch 2005.

becomes less important over time. That is not to say that the integration process is simply linear. Indeed, many factors, such as the establishment of relatively stable diaspora structures, or practices such as disrespect, discrimination and marginalisation, can halt it, slow it down or even reverse it.

The family is one of the most private environments, yet it is here that there is intense public discussion about the roles of the sexes, personal autonomy and personal responsibility. As a social construct, a conceptual entity and a moral order, there is hardly any other area of life which is confronted so forcefully by legal and societal expectations as the family. It is thus not surprising that family-law dogma of one kind or another is often at the root of private confrontation and public dispute about the opportunities and threats presented by cultural diversity in Europe.

Family Law in the Islamic Context

Classical Islamic law comprises a system of rules whose development had been more or less completed by the end of the ninth century. It represents a particular interpretation of the religious sources on which it is based. It is not codified, but is set out in a number of substantial private works promulgated by renowned Islamic jurists and scholars who saw it as their task not to develop a new set of laws, but rather to lend formal substance to a set of laws which were already given and which would endure forever. Islamic law is thus not a national law, but rather a source and a point of reference for a legal order. Hence one has to distinguish the legal codifications of individual countries, such as Egypt, Syria, Iran or Sudan, from classical Islamic law. The relationship between these national legal orders and the *sharia* varies, as does the Islamic imprint of the laws of these individual states. Islamic law and Islamic legal concepts and perceptions thus refer to transnational phenomena which are linked to the past.

According to classical doctrine, Islamic law is essentially based on four sources, which are ranked as follows: the Qur'an and the *sunna* (the way, the sayings and the manners of the prophet) – the two primary sources of Islamic law –, the *ijma'* (the consensus of legal scholars) and the *qiyas* (interpretation through analogy) – the two secondary sources.²³ The Qur'an is the supreme source of law and is considered an imperative. It consists of 114 *suras* and more than 6,000 verses. Of this total of over 6,000 verses, however, only relatively few – the figure is variously given as anything from 50 to 800 – deal with questions of law.²⁴ Numerous methods and principles, the *usul al-fiqh*,²⁵ serve to derive legal rules

23 Cf. Kamali 2003, 16, 228; Vikør 2005, 3.

24 Cf. Kamali 2003, 25; Saeed 2006, 16. The legal section deals with the issues of marriage, divorce, alimony, child custody, paternity, inheritance law, law on the sale of goods, rent, murder, space, military law and the laws of evidence. They constitute the basis of what is called Islamic law.

25 See Kamali 2003, 117.