

THE TRANSNATIONAL FAMILY, CONFLICT OF LAWS BETWEEN ISLAMIC AND EUROPEAN SYSTEM

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Abstract:

The goal that animates the present work is to analyze, on the basis of the rules of private international law, the question of the right bed where one of the parties, or both, are devoted to Islam. Such devotion tends to imply, observant, a perfect coincidence between the legal sphere and the religious sphere. Which is why the phenomenon of migration, by Muslims as it poses many problems with respect to the applicable law. The focus, in the remainder of this paper, it invests the Islamic family law and, specifically, the types of family ties outside our legislation involving conflicts of civilization. The intent is to understand how posing as the Italian domestic law when, following the provisions of private international law, it's "in touch" with the rules and practices of the Islamic family law that may conflicts with the fundamental principles of the law of the forum whose interest is in the exception of public order. The Islamic system is in fact incompatible with fundamental principles of our legal system (and not just legal): first the secular state and religious pluralism.

Keywords: Poligamy, immigration, shari'a

The transnational family : relationships between systems in conflict with the law

The evolution of the migratory phenomenon has led, in recent years, to a profound social change in our country from a country of emigration has become a land of immigration. This leads to issues emerging from the comparison with different geographical, religious, and socio-cultural norms often very different.

Migration outset involving workers from the perspective of animated stop on our territory for a few seasons or a few years. Today the situation is radically changed and the migrant, with the advent of transnational perspective, plays an active and dynamic role in the host society.

The process of transnationalism involves entire families who choose the country of immigration to stay permanently or individuals who, over time, constitute a family away from the homeland. The choice of this theme relates to the fact that the family is the foundation of every society and, consequently, the legal issues that relate to assume paramount importance. In the most frequent cases, family migration is a process implemented in phases one member from the family chooses to immigrate to other country, during which time the family relationships are maintained at a distance, and finally comes the time of family reunification . In any case «migration implies processes of fragmentation and grouping of the family unit that usually cause substantial structural changes in the functioning of the family»¹³⁴.

This consideration requires special consideration in view of the fact that can affect migrants who arrive in our country with families already established, foreigners who get married in Italy (or in other countries of the European Union) between them and foreigners who join Italian citizens European or giving, so life to "mixed marriages".

¹³⁴ TORRALBA O., in LAGOMARSINO F., *Famiglia e migrazione: un rapporto complesso*, Milano, 2006, p. 185; GOZZOLI C., REGALIA C., *Famiglie e migrazioni*, Bologna, 2005, p.30; MANCINI L., *Immigrazione musulmana e cultura giuridica*, Milano, 2008, p. 55.

Below we examine some of the legal issues that the Islamic presence in Italy, but more generally in Europe arises. Specifically, when immigration is an Islamic one is confronted with a familiar pattern which has a fundamentally different structure than the prevailing conception of the family in the West. The model of Islamic family, classically understood, raises many problems of coexistence, as well as normative, with a reality like the Italian one.

The Italian private international law has among the various objectives to level the differences between the various legal systems allowing, where possible, to live together. The increase in the free movement of persons and the growth of households "International" led to wonder whether the application of the rules of private international law lead to his legitimate status and family relationships recognized in third countries.

The regulatory environment in which these conflicts are detected more prominently is that of family law by virtue of social settings and as a result regulations, with profound differences¹³⁵.

This consideration requires special consideration in view of the fact that can affect migrants who arrive in our country with families already established, foreigners who get married in Italy (or in other countries of the European Union) between them and foreigners who join Italian citizens European or giving, so life to "mixed marriages".

Compared to the transnational family is more important than ever groped achieved the integration between legal methods of coordination between jurisdictions. The difficulty is exacerbated when the family has transnational forms of connection with tradition of shari'a countries from which conflicts can arise from policies where it is legal civilization animated by principles contrary to those of the Italian own.

The migrantes from the states of North Africa and the Middle East regions are the bearers of culture and religion that have profound differences with the western reality. The problem is not only "formal" but it is much more complex when you consider "the idea of the discomfort that some Islamic institutions raise social consciousness in Western Europe, and the difficulty of integration of foreigners originating in Islamic states "¹³⁶.

The issue of conflicts of civilization is extremely topical for the phenomenon of migration in general and for continuous streams of muslim immigrants in particular. The problem involves not only the legal sphere, but also the cultural identity that must be balanced with immigration policies aimed at the integration of migrants in host societies¹³⁷.

¹³⁵ BARATTA R. (edited by), *Diritto internazionale privato. Collana dizionari del diritto privato*, Milano, 2010, p. 280 ss.

¹³⁶ CAMPIGLIO C., *La famiglia islamica in Italia*, in BARIATTI S., DANОВI A.G. (a cura di), *La famiglia senza frontiere*, Padova, 2008, p. 11; PARISI M., *L'Islam e i paesi europei: problemi giuridici e di legalità costituzionale*, Salerno, 2002, p. 19 ss.; OBERTO G., *Matrimoni misti e unioni paramatrimoniali: ordine pubblico e principi sovranazionali*, visibile su www.osservatoriofamiglia.it; CARPINETO L., *La tutela della famiglia nell'ambito della CEDU. Il caso di "Maria"*, in CARBONE S. M., QUEIROLO I. (edited by), *Diritto di famiglia e Unione europea*, Torino, 2008; CAMASSA AUREA A., *L'immigrazione proveniente dai paesi islamici. Conflitti ipotizzabili e soluzioni possibili*, in *Arch. giur.*, 1996, p. 31 ss.; CESARALE V., *La codificazione del diritto di famiglia nei paesi arabi. Alcuni aspetti della condizione delle donne nell'Islam alla luce dei diritti umani internazionali*, in *Donne e Islam*, Roma, 1999; COLAIANNI N., *Poligamia e principi del diritto europeo*, in *Studi in onore di RAVÁ A.*, I, Torino, 2003, p. 227 ss.; GALOPPINI A., *Problemi familiari tra diritto italiano e diritto musulmano*, in *Riv. crit. dir. priv.*, 2003, p. 167 ss. About conflict of civilization GIACOBBE G., *Il modello costituzionale della famiglia nell'ordinamento italiano*, in *Riv. dir. civ.*, 2006, I, p. 481; LILLO P., *Famiglie immigrate e diritti fondamentali dell'uomo*, in *Arch. giur.*, 1995, p. 91 ss.; PILLITU A.P., *Ripudio marocchino e legge italiana sul divorzio*, in *Riv. dir. int. priv. proc.*, 1997, p. 92 ss.; MAURY V., *Règles générales des conflits de lois*, in *RCADI*, 1936; VIVIANI A., *Coordinamento fra valori fondamentali internazionali e statali: la tutela dei diritti umani e la clausola di ordine pubblico*, *Riv. dir. int. priv. proc.*, 1999, p. 847 ss.; CALVARESI F., *Poligamia e comunità immigrate in Europa. La questione del riconoscimento giuridico della diversità*, Torino, 2008.

¹³⁷ MEZGHANI A., *Le juge francais et les institutions du droit musulman*, in *Journal du droit International*, 2003, p. 722 ss. MEZGAHNI sostiene che: «Le Droit est alors perçu comme l'un des éléments constitutifs de l'identité. Ce par lui que s'affirme aussi la spécificité. En effet, l'expansion du modèle juridique occidental n'est

From the system of international law is not obtainable a positive definition of "conflict of civilizations ", which is related to the difficulty of being limited to a concept according to criteria and space¹³⁸. Conflicts of civilization «does not relate to the diversity of the connecting factors used in the two systems, but to the radical differences of the fundamental principles which inspired one system over the other, which of course leads to a diversity of public intervention peculiar»¹³⁹. The conflict of civilization is then when the application of the limit of public order leads to the exclusion of some sectors of the foreign law of States with different legal traditions to an obvious difference in the ordering principles on which it stands, this is the case of relationship between the legal orders of the Islamic tradition and Western style .

Despite the Private International Law aspires to international uniformity of solutions, it is possible that the conflict of laws is not surmountable and, in some cases, lead to a conflict of civilization. The distinction between the two forms of conflict is marked by the role of public - that is invoked to protect the basic values of the legal system of the host - which operates as an exception in conflict with the law and is, on the contrary, recalled systematic manner in the conflicts of civilization¹⁴⁰.

The conflict of civilization connotes the topic of this discussion given the difficulties, more or less evident, in Western countries to recognize institutions of family law tradition of shari'a. Just think of the repudiation or polygamous unions in order to understand how, in addition to being contrary to the fundamental principles on which our legal system is founded, produce reflections derived legal situations such as family reunification, the dissolution of unions and profiles successors¹⁴¹.

The legal Islamic create conflicts classified on different levels: at the national level with the Italian Constitution, at the international level with the Universal Declaration of Human Rights of 1948¹⁴², with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950 and other international conventions ratified by Italy .

A rule, in particular, against polygamous unions also spoke at the Committee for Human Rights (Human Rights Committee) that the UN, in General Comment 28 of 29 March 2000, affirms the absolute incompatibility between human rights and polygamy . Similarly, the Parliamentary Assembly of the Council of Europe, in its resolution no. 1292 of 2002 established that «repudiation and polygamy violated the principles of human dignity. Polygamous marriages can not, thus, be Recognised by Council of Europe member states»¹⁴³ .

pas étrangère à cette centralité du Droit. Il a donc fallu résister à l'acculturation. Bien qu'elle soit antérieure au phénomène colonial, qui n'a fait que l'accélérer, l'influence étrangère est vécue comme une agression, la marque indélébile de la défaite. Concomitant, il a fallu s'accrocher au patri moine et à l'héritage. L'identité s'est alors construite autour d'un droit figé, puisque hérité, légué par les ancêtres».

¹³⁸ CARELLA G., *Diritti umani, conflitti di legge e conflitti di civilizzazione*, Bari, 2011.

¹³⁹ CARELLA G., PIZZOLANTE G., *Il richiamo o rinvio al diritto straniero*, in PREITE F., GAZZANTI PUGLIESE DI CROTONE A. (a cura di), in *Atti notarili. Diritto comunitario e internazionale*, Torino, 2011, p. 38.

¹⁴⁰ Cfr. CARELLA G., *La famiglia transnazionale fra conflitti di civilizzazione e diritti umani*, in TRIGGIANI E. (a cura di), in "Europa e Mediterraneo. Le regole per la costruzione di una società integrata". *Atti del convegno tenuto a Bari il 18-19 giugno 2009*, Napoli, 2010, p. 429 ss.; NAJM M.C., *Principes directeurs du droit international privé et conflict de civilisations. Relations entre systèmes laïques et systèmes religieux*, Paris, 2005; MERCIER P., *Conflicts de civilisation et droit international privé: polygamie et repudiation*, Genève, 1975.

¹⁴¹ Cfr. CARELLA G., *La famiglia transnazionale*, op. cit., p. 430.

¹⁴² The Declaration of Human Rights was adopted by the UN General Assembly on 10 December 1948. For the reference to other conventions, among others, the American Convention on Human Rights of 1969, the African Charter on Human and Peoples' Rights of 1981.

¹⁴³ Par. 24: «The right to choose one's spouse may be restricted by laws or practices that prevent the marriage of a woman of a particular religion with a man who professes no religion or a different religion. States should provide information on these laws and practices and on the measures taken to abolish the laws and eradicate the

Within Europe, in 2012, was enacted the Resolution of the European Parliament to reaffirm the principle of equality between man and woman which is clearly evaded in institutions of shari'a of polygamous marriage and divorce¹⁴⁴.

A form of protection of the local culture, however, must be continually balanced with the goal of integration between peoples in order to avoid excessive rigidity of the sort.

Compared to Islamic law the conflict of civilization emerges in a more evident given the coincidence, as noted in the introduction of this paper, between law and religion that makes it even more rigid than the influences of other jurisdictions. It is therefore for the western states groped through theories which we shall later, the resolution of conflicts of civilization directed to the primary objective of integration between cultures¹⁴⁵.

Of particular interest is the case study of the qualification in the Italian system of international law to an institution typical of the right -derived of shari'a, which polygamous marriages¹⁴⁶.

The recognition of these forms of union assumes a significance that is not limited to the classification of the bond as such but extends to other issues that would arise such as the sonship, the possible dissolution of a marriage, family reunification and inheritance issues. Considering the issue in light of the international private method based on a selection of the control, it is good to evaluate what effects would result from the recognition of polygamous union in Italy¹⁴⁷.

Polygamous unions raise questions with respect to the qualification in non-Islamic countries causing an obvious conflict with the principles espoused by our system. Specifically, the lesion is found with the principles of moral and legal equality between spouses, equality between the sexes and the right to family and private life, and these principles are enshrined in the Italian Constitution, the Universal Declaration of Human Rights, the European Convention on Human Rights and other international treaties ratified by Italy .

practices which undermine the right of women to marry only when they have given free and full consent. It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist».

¹⁴⁴ Resolution of European Parliament adopted on 13 march 2012 on equality between men and women in European Union (2011/2244 (INI)).

¹⁴⁵ PALESTRA B., *Crisi familiare e gestione dei conflitti tra procedure e culture diverse*, in PASCUZZI G. (edited by), *La famiglia senza frontiere, Atti del convegno tenuto presso la Facoltà di Giurisprudenza dell'Università degli Studi di Milano il 1° ottobre 2005*, Trento, 2006, p. 193 ss.

¹⁴⁶ Polygamy is rooted in the Koran (Sura IV, 3). The Koran is not very clear about the number of wives who can marry: according to a traditional reading the limit is four, more modern schools interpret the expression "two or three or four" as indicative of any number greater than one . Regardless of the interpretation, a possible union with a fifth wife is vitiated by lack of absolute nullity since it is one of the essential elements of the marriage contract itself. With the end of the nineteenth century began to consider polygamy a "tare historic" that afflicts the Islamic countries because of intrinsic instability of such marriages which they arise. In North Africa, polygamy is undergoing a slow regression than in the past. This type of union is one of the fundamental traits in which Islamic law manifests a clear legal disparities between spouses. The type of polygamy to which reference is made is for the majority of cases the "diachronic" is a situation in which women are the same for approval to the husband, after many years, more marriages CONTRACT (up to be able to have up to four wives at the same time). ALUFFI BECK-PECCOZ R., *La modernizzazione del diritto di famiglia nei Pesi arabi*, Milano, 1990, p. 51; ID., *Le leggi del diritto di famiglia negli stati arabi del Nord-Africa*, Torino, 1997; CHARFI M., *L'influence de la religion dans le droit international privé des pays musulmans in RCADI*, t 203, 1987, III, p. 329; FADLALLAH I., *La famille légitime en droit international privé*, Paris, 1977; PEARL D., MENSKY W., *Muslim family law*, III ed., London, 1998.

¹⁴⁷ Of this opinion CARELLA G., in *Diritto di famiglia islamico*, cit., p. 87. Cfr. DE NOVA R., *Rilevanza di un matrimonio poligamico straniero*, in *Giur. comp. dir. int. priv.*, IX, 1954, p. 188 ss.; GRASSANO P., *La poligamia ed i suoi riflessi sulla validità del matrimonio contratto tra soggetti appartenenti a sistemi monogamici e poligamici*, in *Stato civ. it.*, 2004, p. 342 ss.

Our case is seized of the matter in an " indirect " in the sense that " hardly our judges will be called upon to rule on polygamy in the main street : the polygamous marriage is in fact expected to be destined to end up in court in cases (...) compared to the solution of which its validity is a mere preliminary issue¹⁴⁸". In this perspective, even the limit of public order, pursuant to art. 16 of Law 218/1995, can avoid the recognition of the links fate polygamous union produces legal effects concerning the main issue.

Among the issues "accessory" that such an establishment invests figures prominently, family reunification, in the presence of polygamous unions, caused resonances at international level. The Committee for Human Rights Ordinance N.U. stated in General Comment no. 28 of 28 March 2000¹⁴⁹, § 24, an indisputable impossibility of coexistence between polygamous unions and human rights, has taken the same position in the European Union directive¹⁵⁰ on family reunification, which states that «the right to family reunification should be exercised in proper compliance the values and principles recognized by the Member States, in particular with respect to the rights of women and of children. Such compliance justifies the requests for family reunification of polygamous family can be contrasted to the restrictive measures».

A less rigid approach can be seen as part of the Institut de droit internationalement in the "Resolution on cultural differences and public policy in the private international law of the family"¹⁵¹, adopted at the session of 2005 in Krakow, where he called on Member States to limit the use of the public policy condemning excessive closure of the European states, to the institutions of Islamic law. The Institut praised the French doctrine anticipated the recurrent use of the theory inspired attenuated the effect of public order.

The Italian Court of Cassation and the Italian courts called upon to deal with requests for family reunification by polygamous families, showed a fairly linear trend with the exception of specific cases, this attitude is justified by the fact that the judges have, in each case chosen to focus on different aspects. In this regard, we cite a judgment that has become a " leading case " in which the Court of Bologna has been recognized family reunification to a polygamous family¹⁵². In particular, it was to bring together two sons of the same father with their mothers, first and second wife of the man in question. The court decided for the reunion justifying it with the absence of a crime having been both celebrated their wedding in a country that allows polygamy.

This ruling is an emblematic example of selective application of the method for which it is possible to separate the status of the institution and, therefore, assess the extent of injury to the above-mentioned principles by choosing to preserve some of the effects. The Italian Supreme Court has instead followed a less "favorable" insisting on the opposition to polygamy remembering that «the orientation of the Court's legitimacy, according to which the process of the right to family reunification has a complex nature and is gradually developing involving the evaluation activity of the administrative authority, that of the diplomatic and possible recourse to the ordinary courts, so the scrutiny of the requirements to be performed by virtue of the procedural rule applicable to the outcome of the process, he found, however, further recent own confirmation with reference to the news article 29 Legislative Decree no. N . 286 of 1998, addressed in this judgment¹⁵³».

¹⁴⁸ CAMPIGLIO C., *La famiglia islamica, op. cit.*, p. 31.

¹⁴⁹ www. ohchr.org.

¹⁵⁰ Dir. 2003/86/CE of Council adopted on 22 september 2003, in *GUUE*, L 251 3 october 2003.

¹⁵¹ Resolution on cultural differences and public policy in the private international law of the family, adopted in 2005 in Krakow, in *Riv. dir.int. priv. proc.*, 2005, p. 1224 ss.

¹⁵² Court of Bologna Decree of 13 March 2003, in *Dir imm. citt.*, 2003, p. 172. In this decree states that "the crime of bigamy can be committed only by an Italian citizen in Italy being irrelevant conduct abroad by an alien whose national law recognizes the possibility of acquiring more marriages".

¹⁵³ The Supreme Court, Order of 28 February 2013, n. 4984. On www.sentenze-cassazione.com.

The Italian Supreme Court, in this recent ruling, reiterated a closure orientation in regard to a request for recognition of reunification of the child with his mother¹⁵⁴, whose husband had, however, new and additional contract marriage in the Italian territory. The lower courts have upheld the appeal filed in the second instance by the Foreign Ministry, noting that the law imposes a ban on the reunification of spouses of foreign nationals already residing permanently with another spouse in Italy and believes polygamy contrary to public policy.

Polygamy invests, as well as family reunification, the inheritance rights. It is worth pointing out that our case is rather poor in cases that affect the succession of events polygamous families. The few pronouncements¹⁵⁵, however, allow you to confirm the split between the Islamic institute contrary to the Italian and the rights deemed worthy of protection. The judgment of 1999 is that which shows most clearly the intent of the Italian Supreme Court: the case concerned a marriage celebrated in Somalia according to Islamic rites, the Supreme Court confirmed the ruling that, when inherited, had considered relevant status of spouse acquired abroad on the principle *locis regit actum*. The judges welcome, therefore, the address of doctrine that " suggests to distinguish the regulation of the relationship in dispute by the recognition of its assumptions for the profile of private international law, the verification is limited to whether the condition of a spouse for purposes of inheritance.

Even in constancy of children born of polygamous unions should call for inheritance rights, the protection provided by art. 30 of the Italian Constitution¹⁵⁶.

The principle of selection of the control remains, above all, the model that best adheres to the conflicts of laws in question. This *modus operandi* shows how the unquestioned universality of human rights must, within conflicts of civilization, accept "derogations", aimed at safeguarding the higher interests of the parties involved. This approach aims to facilitate the coexistence of sorts through the application of foreign laws and the recognition of judgments or acts issued by authorities of third countries.

Conclusion:

The conclusion that can be drawn, therefore, is that our regulatory system comes with tools that allow the interpreter to work groped for the harmonization of foreign models with the principles of the Italian. This can be accomplished through a rather complex system that allows the selection and protection of instances worthy of protection, while being left without recognition of those instances contrary to the fundamental principles of the.

As regards the religious profile (particularly important for migrants islamic view of the correlation, in some cases, between law and religion) is desirable sort of "unified pastoral", as was the case in France, making it possible to equalize the differences and the difficulties that characterize the mixed marriages. Although this scenery may contribute to the goal of integration of muslim communities, more and more numerous in the territory of the European Union. For this to happen it is necessary to preserve and protect the characteristics and traits typical of the muslim doctrine that, at the same time, they must find a form of coexistence with Western legal systems.

¹⁵⁴ For rulings on family reunification, recalled in the decision of the Italian Supreme Court, see. Court of Cassation, the order of 30 February 2011, n. 7218, the Italian Supreme Court, Order of 30 March 2011, n. 7219, the Italian Supreme Court, Order of 6 March 2012, n. 3493. Visible on www.sentenze-cassazione.com.

¹⁵⁵ Italian Court of Cassation, judgment of 2 March 1999, n. 1739 of the Civil Code in Arch., 1999, p. 1377, with notes SANTARSIERE V., *Matrimonio islamico e successione del coniuge*, in *Fam. e dir.*, 1999 p. 327. Cfr. CONETTI G., *La successione del musulmano poligamo*, in *Studium iuris*, 1997, p. 247 ss.; PALMERINI E., *Status familiari e mobilità transnazionale*, in D'ANGELO A., AMRAM D. (edited by), *Riv. dir. civ. La famiglia fra diversità nazionali ed iniziative dell'Unione europea*, 2011, p. 65 ss.

¹⁵⁶ FUCILLO A., *Giustizia e religione. Matrimonio, famiglia e minori tra identità religiosa e rilevanza civile*, II, Torino, 2011, p. 158 ss.

In the face of the interventions that should be taken is good to conclude that the issues that the transnational family poses are complex but the interpreter can be found through a study that will pursue the protection of interests worthy of protection, the solutions to solve the many conflicts of law.

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