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Transnational family relations in migration contexts: British variations on European themes

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Abstract

This paper discusses the increasingly transnational and trans-jurisdictional activities that members of diasporic communities engage in, and the ways in which members of such communities may experience legal penalties within Western legal systems for such engagements. With a focus on British legal systems and some European jurisprudence, the paper outlines the ways in which trans-jurisdictional marriages and divorces have become two key areas where penalties may be experienced. The writer argues that this not only poses problems for the ways in which domestic legal systems in Europe may impose unjust results for those diasporic communities, but goes on to suggest that, for a more just global legal order, the basis of private international law rules in the principle of the 'comity of nations' may have to be rethought by its transformation to that of a 'comity of peoples'.

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Introduction

In writing this article from near the western corner of the Eurasian landmass, it is evident that migration is involving an increasingly complex set of trans-jurisdictional activities worldwide. We have yet to come to grips with the kinds of legal navigation by individuals and families taking place across legal frontiers, although some theorists have begun to locate its place within wider phenomena of transnationalism.¹ Recent events evidently demonstrate the often conflictual context in which migration occurs, as well as its many dysfunctional consequences. Just before I began writing this article in December 2010, news came of a suicide bomb attack in Stockholm by a man who had reportedly become ‘radicalized’ in the English town of Luton. A number of arrests in various European countries have been taking place more or less simultaneously of men of migrant origin suspected of involvement in terror-related activities. The fairly high-intensity conflict-ridden profile of migrants and their descendants being built in Europe and elsewhere, hides a more widespread, lower-intensity conflict in which official laws are also implicated. State authorities are penalizing trans-jurisdictional legal navigation, which occurs in a wide range of settings, and often concerns families and kin networks.

It is well known that many of the major streams of post-second world war immigration into Western Europe were followed by large-scale family reunification. By all accounts, such immigration has not stopped, but has diversified to a greater number of source countries, overlain by further, sometimes complex, processes of family reunification and formation. This is part of the picture of ‘superdiversity’ in European cities conveyed by Vertovec.² Relatively less has been said, especially in the European literature, about the maintenance of family relations across different countries and continents either among South-North migrants or global diasporas, although important new writing is starting to fill the gap.³ The less we inquire about the reality of globally dispersed families, the less we tend to know about the methodological limits of our legal tools and concepts in that context.

¹ WF Menski, ‘Immigration and Multiculturalism in Britain: New Issues in Research and Policy’ (2002) XII *KIAPS: Bulletin of Asia-Pacific Studies* 43; F von Benda-Beckmann, K von Benda-Beckmann and A Griffiths (eds), *Mobile People, Mobile Law: Expanding Legal Relations in a Contracting World* (Ashgate, Aldershot 2005); R Cotterrell, ‘Transnational Communities and the Concept of Law’ (2008) 21 *Ratio Juris* 1; R Ballard, ‘The Dynamics of Translocal and Transjurisdictional Networks: A Diasporic Perspective’ (2009) 1 *South Asian Diaspora* 141.

² S Vertovec, ‘Super-diversity and its Implications’ (2007) 30 *Ethnic and Racial Studies* 1024.

³ D. Bryceson and U. Vuorella, *The Transnational Family: New European Frontiers and Global Networks* (Berg, Oxford 2002); R Grillo (ed), *The Family in Question: Immigrant and Ethnic Minorities in Multicultural Europe* (Amsterdam University Press, Amsterdam 2008); E Kofman: ‘Family-related Migration: A Critical Review of European Studies’ (2004) 30 *Journal of Ethnic and Migration Studies* 243.

The ostensibly contraceptive policy view from the North is that we are in control, and should continue to closely regulate family migrants and how they arrange their legal relations. This amounts to a denial by legislators and other legal actors of the plurality of modern Britain, and contemporary Europe, which the leading British immigration lawyer, Ian Macdonald QC, has referred to as ostrich-like behaviour, with one's head buried in the sand.⁴ Immigration regulation certainly constitutes types of 'borders', now often deployed extraterritorially,⁵ but other, mental borders are erected through legal systems as controls are imposed on the more systemic pluralizing impact of the migrant presence, and the continuity of law within transnational social fields,⁶ between 'here' and 'there'. Thus, attempts to freeze out legal alterity go beyond the sections of officialdom concerned with immigration control, permeating other areas of official behaviour. In this article, by discussing some evidence from Britain, I want to nudge the reader a little more in the direction of considering these issues; in what ways and why officials and legal systems are effectively failing to do justice to migrant families; and to take some steps towards rethinking the theoretical underpinnings of legal systems so as to find ways to move forward, with a view to keeping policy and theory in consonance with 'real life'. I do not however claim to say something completely new here. Satvinder Juss has already written about the necessity of a 'cultural jurisprudence' as a social scientific and legal realist approach to the lives of migrants and ethnic minorities as part of a newly required global ethic of civility.⁷ More recent writing has been grappling with the problem of such intercultural human rights,⁸ although it may be said that we are still at the beginnings of a new phase in legal studies.

⁴ I. Macdonald, 'Preface' in P. Shah and WF Menski (eds), *Migration, Diasporas and Legal Systems in Europe* (RoutledgeCavendish, London 2006) xv.

⁵ B. Ryan and V. Mitsilegas, *Extraterritorial Immigration Control: Legal Challenges* (Martnus Nijhoff, Leiden 2010).

⁶ N. Glick Schiller, 'Transborder Citizenship: An Outcome of Legal Pluralism within Transnational Social Fields' in Benda-Beckmann, Benda-Beckmann and Griffiths (n 2).

⁷ S. Juss, *Discretion and Deviation in the Administration of Immigration Control* (Sweet and Maxwell, London 1997).

⁸ P. Shah and WF Menski (eds), *Migration, Diasporas and Legal Systems in Europe* (RoutledgeCavendish, London 2006); R Mehdi and others (eds), *Religion and Law in Multicultural Societies* (DJØF Publishing, Copenhagen 2008); R Grillo and others, *Legal Practice and Cultural Diversity* (Ashgate, Farnham 2009); M-C Foblets, J-F Gaudreault-DesBiens, AD Renteln: *Cultural Diversity and the Law: State Responses from Around the World* (Bruylant, Brussels 2010).

The landscape of family based migration

In the north-western parts of Europe, the large-scale recruitment of southern European and non-European labour migrants for post-war reconstruction was followed by systematic recruitment stops.⁹ These ‘stops’ did not result in the curtailment of immigration but a change in its character. They led to widespread decisions among migrants to settle and sponsor their families, or to contract new marriages in the areas of origin of the migrants. Countries on the northern Mediterranean rim have more recently attracted immigrants and their families,¹⁰ while countries to the east of the continent also appear to have new colonies of migrants from further east and south.¹¹ Refugee movements have added considerably to the diversity of Europe’s population and, in their shadows, a large number of irregular migrants have also come, irregularity often being a direct function of restrictive immigration policies.¹² Although family migrants have tended to follow primary migrants, this is not inevitable, and families are often spread transnationally, while international commuting is not unknown. In recent decades, family members often accompany each other as forced migrants, who can find themselves detained by less than hospitable states, leading to a continuous stream of horror stories. Families are also sending young people ahead as bridgeheads for possible future immigration or merely for their safety and a better life, and such youngsters are often then involved in scenarios of trafficking and state paternalism to which they might become victims.¹³ Newly formed relationships are also leading to claims by migrants who may have entered on another basis to remain in Europe. While the race for talent and knowledge migrants is well underway among various countries,¹⁴ family members are often allowed to accompany such migrants, or their qualification to immigrate could partly depend on the status of a family member.

⁹ WR Böning, *The Migration of Workers in the United Kingdom and the European Community* (Oxford University Press for the Institute of Race Relations, London 1972); S Castles and G Kosack, *Immigrant Workers and Class Structure in Western Europe* (Oxford University Press for the Institute of Race Relations, London 1973); S Collinson, *Europe and International Migration* (Pinter Publishers, London 1993).

¹⁰ K. Calavita, *Immigrants at the Margins: Law, Race and Exclusion in Southern Europe* (Cambridge University Press, Cambridge 2005).

¹¹ P Nyíri, *New Chinese Migrants in Europe: The Case of the Chinese Community in Hungary* (Ashgate, Aldershot 1999); K Romaniszyn, ‘The Cultural Implications of International Migrations’ (2004) 2 *Polish Sociological Review* 141.

¹² B Bogusz and others, *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Brill, Leiden 2004).

¹³ J Bhabha, ‘Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children’ (2000) 7 *University of Chicago Law School Roundtable* 269.

¹⁴ A Shachar, ‘The Race for Talent: High Skilled Migrants and Competitive Immigration Regimes’ (2006) 81 *New York University Law Review* 101.

All these movements have led to the indelible pluralization of European societies, especially given the kinds of social change brought about by the establishment of newly cohering communities because of the presence of families and extended kin networks. As Castles et al indicated, already in the 1980s, these ethnic minorities are ‘here for good’.¹⁵ Their networks have induced further immigration, often overtly on the basis of family ties, but also hidden among the many asylum applications. It has been noted that the family has become the main channel for legal entry into the EU.¹⁶ Comparative evidence of marriage formation indicates a strong preference among many groups of migrants for partners in the country of origin.¹⁷ As Ballard shows, the migration ‘escalators’ which kinship furnishes, particularly through ties of descent and marriage, operate as a strengthening factor of ethnic colonies in economic no less than cultural terms.¹⁸ This ‘bottom-up’ equalizing strategy which such migration entrepreneurs use to challenge the uneven effects of ‘top-down’ globalization, combined with the pluralizing consequences of kin-based immigration, have not been entirely welcomed in European countries.

If recent evidence of voting patterns is anything to go by, European populations have become increasingly nervous and frustrated about the new forms of ethnic alterity in their neighbourhoods and in the economic sphere. The events of 11 September 2001 and subsequent terror incidents in different European cities have evidently had an impact by raising tensions. The cry about a country being ‘overrun by immigrants’ is often heard. To the extent that states have pursued policies of multiculturalism – that is, either a laissez faire attitude towards such diverse populations or active state support for the maintenance of their cultural activities - such policies have also come under intense scrutiny.¹⁹ In October 2010, Germany’s Chancellor, Angela Merkel, noted that multiculturalism had utterly failed, while British Prime Minister, David Cameron, has, at various times, spoken of multiculturalism as a wrong-headed doctrine, entailing a divisive right to difference. Rules requiring integration impose some sort of obligatory subscription to majoritarian values and practices. Such pressures are very manifest in immigration control and citizenship criteria.²⁰

¹⁵ S Castles, H Booth and T Wallace, *Here for Good: Western Europe’s Ethnic Minorities* (Pluto, London 1984).

¹⁶ E Kofman and V Meetoo, ‘Family migration’ in *World Migration Report 2008: Managing Labour Mobility in the Evolving Global Economy* (International Organisation for Migration, Geneva 2008).

¹⁷ E Beck-Gernsheim, ‘Transnational Lives, Transnational Marriages: A Review of Evidence from Migrant Communities in Europe’ (2007) 7 *Global Networks* 271.

¹⁸ Ballard (n 1).

¹⁹ C Joppke, ‘The Retreat of Multiculturalism in the Liberal State: Theory and Policy’ (2004) 55 *The British Journal of Sociology* 237; R Grillo, ‘An Excess of Alterity? Debating Difference in a Multicultural Society’ (2007) 30 *Ethnic and Racial Studies* 979.

²⁰ O Löwenheim and O Gazit, ‘Power and Examination: A Critique of Citizenship Tests’ (2009) 40 *Security Dialogue* 145; R van Oers, E Ersbøll, D Kostakopoulou (eds), *A Re-definition of Belonging? Language and Integration Tests in Europe* (Martinus Nijhoff, Leiden 2010).

Since transnational marriages are identified as a liability to the integrity of the social formations of European national states, and of European identity more broadly, they have become obvious targets of control, although restrictions are by no means only directed at spouses. British official policies and practices dictate which family members are to be recognized, sometimes leading to ridiculous situations. Once waiting for another hearing at the Asylum and Immigration Tribunal in London's Angel, we came across a woman sponsor of a visitor from the Punjab, her husband's deceased brother's wife, waiting to hear the outcome of a preliminary hearing. There was a frenzied discussion outside as it was realized that, because the relationship between the two women was not among those listed, the intended visitor did not qualify as a 'family visitor', and therefore had no right to appeal against being refused a visa!²¹ In other cases, legal policies and official practices dictate the range of eligible marriage partners, and when a marriage or other family relationship is considered legitimate or valid. These policies and practices, which often run counter to norms accepted within the communities concerned or the family laws of other countries, reach beyond the immigration control sphere, infesting a range of other official legal fora.

Assessment of family relationships of people from non-Western cultures means that they are subjected to an intense gaze upon their 'alien' traditions. Immigration control and other legal arenas thereby become the location for an Orientalist (re)construction of family norms of the non-Western 'other'. Such traditions are judged as being inherently deficient from a dominant Western perspective. A passage from a book by Prof. Jackson, also a one-time Vice-President of the Immigration Appeal Tribunal, reveals one such construction:

There is undoubtedly a problem connected with marriage in immigration terms. Marriage offers to young men and women a way of radically improving their economic standard of living and no doubt in some cases an opportunity for financial gain by those who by virtue of tradition have it in their power to offer it. This is especially so where arranged marriages are the norm and where children (particularly daughters) continue to marry as they are directed by their parents.²²

The remarkable part of this passage is not the fact that non-Western marriages are cast as 'traditional', presumably as opposed to modern, Western marriages, nor any inaccuracy in its description of the former. Rather, it is the impulse to their problematization *because* of their different nature and dynamics. Neither is the relevance of this kind of statement reduced because others in positions of

²¹ See the Immigration Appeals (Family Visitor) (No. 2) Regulations 2000, SI 2000 No. 2446, at para. 2(2).

²² D Jackson, *Immigration: Law and Practice* (Sweet and Maxwell, London 2006).

power construct their own accounts justifying the derisory treatment of non-Western family relations. Take the following statement in a case concerning the recognition of Hindu law adoptions in India decided by the Asylum and Immigration Tribunal:

Nobody is entitled to say “I have adopted (or been adopted) according to my rules; therefore you are obliged to recognise the adoption as entirely valid under your rules”. Unless an Indian adoption can be found to be subject to the same requirements and the same intentions, and to have the same effects as an adoption in the United Kingdom, there would appear to be no reason why it should be treated as though it were a United Kingdom adoption. And if it is not to be treated in general as a United Kingdom adoption, there is no reason why it should be treated as a United Kingdom adoption for the purposes of the Immigration Rules. The truth of the matter is that adoption means different things in different countries. The fact that the same word is used does not mean that the effects are, or ought to be, the same.²³

Again, the problem with differences in the ways of formalizing family relationships and in their effects militates against their recognition, as if every culture should be a carbon copy of Western norm patterns. Evidently, there will be a variety of such discourses. Notwithstanding that variety, we find a widespread replication of negativity towards non-Western families in British and other Western legal systems. Further, whatever instrumentalities may lie behind a particular policy, legal restrictions are often enough premised on this negativity. Read as the Western framing of the other through the former’s own experience, ‘legal Orientalism’ plays a key role in shaping policy towards transnational family migrants.²⁴ The much bigger question entailed by the quoted statement is whether family forms arising in different cultural contexts should indeed be treated as equivalent to a category existing within Western law or whether, because they are indeed set within a different cultural framework, they

²³ *SK ('Adoption' not recognised in the UK) India* (2006) UKAIT 00068. This case is discussed in more detail in P Shah, ‘Transnational Hindu law Adoptions: Recognition and Treatment in Britain’ (2009) 5 *International Journal of Law in Context* 107. In the event, the adopters won their appeal against refusal of a dependent visa to the child, not under the adoption rules or by using human rights and discrimination arguments, but under the rule allowing admission of relatives whose exclusion is considered undesirable because of compassionate circumstances.

²⁴ On this reading of Orientalism, see S N Balagangadhara and M Keppens, ‘Reconceptualising the Postcolonial Project: Beyond the Strictures and Structures of Orientalism’, (2009) 11 *Interventions* 50. For the legal application of Orientalism, see T Ruskola, ‘Legal Orientalism’ (2002) 101 *Michigan Law Review* 179.

ought to be recognized as different, known as such, *and* be given recognition in their own right. My own view is that the latter option is the better one and offers the greatest scope for pluralism.²⁵

Whom to marry

Individuals also encounter pulls in other directions in these complex transnational conflicts within legal pluralism.²⁶ European countries are obliged to ensure respect for family life. This is significantly the result of the European Convention on Human Rights (ECHR) and specifically its Articles 8 (respect for private and family life) and 12 (right to marry and found a family). Various instruments agreed at EU level also oblige some minimal respect for the family lives of third country nationals. Although the UK remains reluctant to sign up to these, minimal recognition of family unity is found in immigration legislation and rules. Not least among them are the national recognition of ECHR norms and the availability of appeals and judicial review to contest the non-recognition of family unity by officials. EU free movement rules, adopted through Italian pressure in the 1960s, before immigration became the hot potato that it now is, continue to confer the widest recognition of family unity, justified earlier on economic grounds, and now also on human rights grounds.²⁷ The economic justification for family unity used by the European Court of Justice has not found appeal beyond the EU free movement context, an illustration of how the ground shifts depending on what types of family one is dealing with. There obviously remains a key tension between national and EU systems of regulation, a tension which shows up especially when third country nationals lay claim to EU rights of family unity. However, this discussion presupposes that we are speaking in a context where there is a basic recognition of family unity, although now increasingly hedged about by different restrictions. In contrast, some labour importing Asian states have remained resistant to recognizing a right of family unity for migrants to avoid the kinds of secondary immigration flows which Europe has experienced. In some countries, such as Turkey and Bangladesh, immigrating spouses of nationals are not

²⁵ This option goes beyond that of mere translation which is flagged up by WF Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press, Cambridge 2006) 67. For a problematization of the loss in transplantation of the Islamic legal institution of *mahr* in the courts of four Western countries, see P Fournier, *Muslim Marriage in Western Courts: Lost in Transplantation* (Ashgate, Farnham 2010). Fournier's book thus provokes thinking about the analogies between translation and transplantation.

²⁶ For 'legal pluralism in conflict', see M Chiba, 'Other Phases of Legal Pluralism in the Contemporary World' (1998) 11 *Ratio Juris* 228.

²⁷ Contrast, for example, Case C-370/90 *R v Immigration Appeal Tribunal Ex p Secretary of State for the Home Department* [1992] ECR I-4265 with Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

necessarily given the right to work, an issue which is also relevant in British immigration decision making when considering whether married life is viable elsewhere.

While agreeing that the Convention was engaged in immigration cases, the European Court of Human Rights in the *Abdulaziz* case declined to hold that a state was obliged by Article 8 alone to allow a couple to reside in the state of their choosing, stating:

The Court observes that the present proceedings do not relate to immigrants who already had a family which they left behind in another country until they had achieved settled status in the United Kingdom. It was only after becoming settled in the United Kingdom, as single persons, that the applicants contracted marriage The duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country.²⁸

Therefore, unless an element of discrimination can be shown to have been present (as the applicants in that case were able to establish), or the non-viability of family life elsewhere can be shown, the Convention's right to family life does not go very far to respect the residence choices of spouses. The lower level of protection offered to families by the Court underlines the minimal relevance of the ECHR in restraining states' ability to control spouse entry and residence, and has subsequently been criticized as a failure of the European human rights protection system.²⁹

A series of similar restrictive norms and practices have been applied across European states to prevent members of such minorities relying on established preferences for marriage with their kin groups based elsewhere. The UK appears to have been a pioneer in this respect. Sachdeva documented the discriminatory immigration controls chiefly applied to South Asian spouses, mainly husbands, in the 1980s and 1990s under the so-called 'primary purpose rule'.³⁰ That rule was finally abolished in 1997 but not before the British government had attempted, unsuccessfully, to smuggle it into EU law. Juss further describes the application of immigration restrictions on family members through various other methods, including questioning the veracity of family relationships, finding problems with

²⁸ *Abdulaziz, Cabales and Balkandali v UK* (1985) 7 EHRR 471 [68].

²⁹ See the special issue (2009) 11,3 *European Journal of Migration and Law*, especially the articles by de Hart and Farahat, on the shortcomings of the European Court of Human Rights jurisprudence in the field of family migration.

³⁰ S Sachdeva, *The Primary Purpose Rule in British Immigration Law* (Trentham Books, Stoke on Trent 1993).

documentary evidence, casting doubt on the credibility of applicants, and so on.³¹ Both writers demonstrate forms of ‘othering’ at the appellate and judicial review stages as well as during initial decision making at visa posts abroad. Having human rights guarantees does not therefore mean that states will not find some room for maneuver in establishing practices which frustrate family unity or married life.

Meanwhile, reading the way it treated the factual background in the Abdulaziz case more closely, it is evident that the Court thought that choosing to marry a non-national spouse whose leave to remain in the UK had already expired, or was about expire soon, should have put the sponsoring wives on notice that the immigration rules would be against them. This instruction to marry only those who have some sort of security of residence effectively means that legal systems, including the Human Rights Court, participate in creating a hierarchy of desirable spouses, virtually overriding the aim of Article 12 and its right to marry and found a family, also with discriminatory consequences. As immigration lawyers know all too well, the insinuation that one should be more careful in one’s choice of spouse is not at all unusual among officials, including some judges. In one case I was instructed on as an expert witness in 2010, the immigration judge had held that continuing family life in Bangladesh for the appellant and her British citizen cohabitant (with three children) would not pose insurmountable difficulties. After all, the man who was of Afghan origin, had naturalized as a British citizen, and had been in the UK for less than ten years!³² The Home Office had even proceeded to make removal directions to Bangladesh for all five family members, including the British citizen man and the child they had together who was also a British citizen. It is no longer enough to be a ‘white’ British person to establish the right of a spouse to accompany one in the UK. In another recent instance, a British citizen woman now living in Turkey with her Turkish citizen husband, but facing economic and adjustment difficulties there, was told that he would not be admitted into the UK, effectively obliging the couple to remain in Turkey or explore other possibilities. Ironically, legal admission for such a couple under free movement rules into a European Economic Area state other than the UK would be far easier, assuming the lack of other hurdles.

A number of schemes have been developed in recent years premising the right to family formation or reunification upon prospective spousal entrants passing (European) language and culture ‘integration tests’. In the Netherlands (since 2006) and Germany (since 2007) pre-entry language tests have been

³¹ Juss (n 8).

³² Appeal no. AA/02434/2009, Determination dated 19 May 2009.

required for citizens of most countries intending to immigrate as spouses.³³ British policy has caught up with these countries. From 29 November 2010, an English language test or evidence of English language competence is required of spouses applying to join partners in the UK who are not nationals of European Economic Area countries, Switzerland, or of a country listed as being majority English-speaking.³⁴ However, the status of the sponsoring spouse is also important, in that the rules do not apply to spouses of sponsors who are European Economic Area nationals, again reflecting the above-mentioned tension between EU free movement law and ‘domestic’ rules. These contemporary restrictions in several European countries are increasingly beginning to resemble immigration controls applied in what is now South Africa and Australia during the late nineteenth and early twentieth century, when language tests were also being used to reject non-European immigrants. Other measures include raising the eligible age for spouse visas to be issued as compared to the legal age for marriage within the legal systems concerned, as well as the growing policing of marriages on the pretext of ensuring that such unions have been entered into by ‘free consent’, and are not a result of familial pressure and therefore not ‘forced’.³⁵ In fact, the UK’s requirement that both spouses be of 21 years of age was justified on the basis of concerns about forced marriages. This raising of the qualifying age was recently held to be unlawful for its ‘sledgehammer’ attempt to curb forced marriages, and therefore in breach of the common law, and a disproportionate interference with the Convention’s rights to family life and to marry.³⁶

The freedom to marry within Britain also became the subject of restrictions eliciting a finding by the European Court of Human Rights, in the O’Donoghue case,³⁷ of a violation by the UK of the right to marry in Article 12. Under the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, the UK introduced a requirement, with effect from February 2005, for a certificate for approval for marriage by application to the Home Office. Those who were not European Economic Area nationals or did not have indefinite leave to remain in the UK were obliged to acquire a certificate of approval upon paying a fee and submitting relevant documents. Only after that could they apply to a designated

³³ K McGauran, ‘Germany’s Immigration Amendment Act of 2007: Achieving Integration of Foreigners?’ (2007) 21 *Journal of Immigration, Asylum and Nationality Law* 295; Human Rights Watch, *The Netherlands: Discrimination in the Name of Integration* (May 2008),

<<http://www.hrw.org/legacy/backgrounder/2008/netherlands0508/>> accessed 31 December 2010.

³⁴ ‘Listed’ does not mean that all countries where there may be a majority of English speakers, such as Nigeria or Philippines, are recognized. Only an ability to speak and understand seems to be required and not any level of literacy.

³⁵ H Wray, ‘Moulding the Migrant Family’ (2009) 29 *Legal Studies* 592.

³⁶ *Quila & Anor v Secretary of State for the Home Department* [2010] EWCA Civ 1482. The Home Office has signaled its intention to appeal the case to the Supreme Court.

³⁷ *O’Donoghue and others v the United Kingdom* App no 34848/07 (ECHR, 14 December 2010).

registrar for a license to marry. Those marrying in the Anglican Church were exempt from such a requirement, while those who had less than three months remaining on a six month visa did not qualify at all for a certificate. The scheme remained in place despite several British court judgments, including by the House of Lords, pronouncing it as being a violation of Article 12.³⁸

Despite successive adjustments, widening the range of qualifying applicants, and eventually eliminating the fee requirement, the scheme remained in place. The British state was effectively saying that those not possessing the relevant leave to remain were not eligible marriage partners, even though marriages in the Anglican Church would escape scrutiny. Even those qualifying for a certificate would have to pay for the privilege of being granted one, thus raising the cost of marrying. One of the applicants in *O'Donoghue* was Nigerian, and did not have leave to remain or permission to take up employment on account on his pending application for asylum. His intended wife was on social welfare benefits and the fees charged were consequently unaffordable. After changes to the scheme he was eventually granted a certificate of approval to marry. The European Court nevertheless found that the operation of the scheme violated the couple's right to marry because of his initial ineligibility and, later, because of the fees charged. It also found the scheme to be discriminatory in conjunction with the right to marry and freedom of religion.

The certificate of approval scheme was rightly criticized by the European Court. Having said that, the Court's jurisprudence has not necessarily been rigorous enough against other state interferences in the marrying process. In *O'Donoghue* itself, the Court stated with reference to the House of Lords judgment and previous ECHR case law:

It is clear from the Court's case-law and from earlier Commission decisions that a Contracting State may properly impose reasonable conditions on the right of a third-country national to marry in order to ascertain whether the proposed marriage is one of convenience and, if necessary, to prevent it. Consequently, a Contracting States will not necessarily be acting in violation of Article 12 of the Convention if they subject marriages involving foreign nationals to scrutiny in order to establish whether or not they are marriages of convenience ... Such scrutiny may be exercised by requiring foreign nationals to notify the authorities of an intended marriage and, if necessary, asking them to submit information relevant to their immigration status and to the genuineness of the marriage.... Moreover, a requirement that a non-national planning to marry in a Contracting State

³⁸ For the House of Lords judgment, see *R (on the application of Baiyai and others) v Secretary of State for the Home Department* [2008] UKHL 53, [2009] 1 AC 287.

should first obtain a certificate of capacity will not necessarily violate Article 12 of the Convention.... Consequently, the Court agrees with the House of Lords that the requirement under section 19 of the 2004 Act that non-EEA nationals submit an application to the Secretary of State for the Home Department for a Certificate of Approval before being permitted to marry in the United Kingdom is not inherently objectionable.³⁹

While the judgment was followed with an announcement by the UK government that the scheme was to be abolished, states could still conceivably continue to find room for maneuvering around the somewhat loose restrictions imposed upon them by the ECHR, penalizing migrants for their marriage choices.⁴⁰ It is not unusual to encounter allegations that a marriage is one of convenience, which sets up married persons for a potentially expensive and time-consuming struggle through the legal process.⁴¹

Valid relationships

The almost obsessive control by European legal systems of the marriage process seems in stark contrast to the relative flexibility for marrying in non-Western jurisdictions, where non-state forms of marriage are often accepted as valid. Establishing the existence of marriage or other family relationship, whether it is one conducted abroad, or even in Britain, is increasingly becoming an area of contestation. While the rules of private international law ostensibly ensure that legal acts in one jurisdiction are afforded recognition in another, the process of gaining such recognition is far from smooth and sometimes impossible. The ostensible underpinning of private international law by the principle of the ‘comity of nations’ is therefore often violated in practice. This is down to a number of reasons. Private international law rules are now often premised on compliance with Western norms systems, rather than concerned to confer recognition on relationships formalized under foreign rules. In such instances, the comity of nations principle seems violated by the unilateral Western insistence

³⁹ *O’Donoghue* (n 38) [87].

⁴⁰ See also *Baiai* (n 39) [20-21] for discussion of other European Court of Human Rights judgments - *Sanders v France* (1996) 87 B-DR 160 and *Klip and Krüger v Netherlands* (1997) 91 A-DR 66 – in which restrictions imposed by states have been upheld as showing no violation of the Convention. The same cases feature in the Strasbourg judgment in *O’Donoghue* (n 38) [87].

⁴¹ The use of such allegations is also open in cases with an EU element after the decision of the ECJ in Case C-109/01 *Secretary of State for the Home Department v Akrich* [2003] ECR I-9607, [2003] 3 CMLR 26 after the UK government’s suggestion that a marriage of convenience test was necessary.

that ‘our’ norms be followed, whether this is done by laws imposed in a single jurisdiction, like England, or through international conventions which actually hide the limited and far from global consensus behind them. This could be seen as a contemporary form of ‘legal imperialism’ as evidenced, in earlier times, by the imposition of extra-territorial jurisdictions in non-Western countries by Western countries.⁴² Even when it is likely that recognition could be forthcoming, for example in the vast majority of marriage cases, the application of private international law rules is subverted by mischievous decision making in practice. There also remains widespread ignorance among officials of how rules in foreign jurisdictions function, which leads to their erroneous interpretations by British officials. The default position adopted in such circumstances is that foreign rules should look like ours, with consequent penalties for individuals and families for following a foreign rule system. The unilateral imposition of extra-territorial norms is well exemplified by Ramnik Shah’s account of practice by visa officials at the British High Commission in Kenya requiring evidence of marriage registration from South Asian applicants in defiance of Kenyan rules which recognize marriages without need for registration.⁴³

There is no doubt, meanwhile, that family law is becoming internationalized in so far as it must reckon with legal acts in other countries because of increasing trans-jurisdictionalism. It is worth noting the observation by Murphy that,

English family law has had to broaden its horizons in recent years to deal adequately with the myriad of novel issues raised by migrant single adults, migrant families and migrant children. Indeed, there can be no doubt that for a significant minority of people either resident or domiciled in this country, the traditional boundaries of family law (at least so far as it is taught in English law schools) fail to accommodate or give adequate emphasis to what are now crucial international dimensions.⁴⁴

While Murphy is undoubtedly correct in his criticism, his general reliance on the rearrangement of the rules of private international law as a way of solving problems is not convincing enough, because it depends far too much on existing conceptual apparatus of private international law, which increasingly appears outmoded, and still subject to official abuses in practice. Rather, much new thinking seems required which takes on board the virtually limitless plurality that now faces official legal orders. It is certainly not enough for family lawyers to remain focused, as happens often within family law

⁴² T Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge University Press, Cambridge 2010).

⁴³ R Shah, ‘The Phenomenon of the (UK) Officially Inspired Forced Marriages’ (2005) 19 *Journal of Immigration, Asylum and Nationality Law* 195.

⁴⁴ J Murphy, *International Dimensions in Family Law* (Manchester University Press, Manchester 2005) 2.

curricula, on the more trendy Western developments such as the recognition of heterosexual cohabitantes or same-sex partnerships, which are also driving reforms in the migration context. The champions of such developments generally tend to remain silent on the othering of non-Western family relationships, or even perpetuate negative Eurocentric stereotypes about them.

The limits imposed upon divorcing in plural ways provide a good instance of the manner in which English law attempts to prevent reliance on other laws. As Pearl and Menski have shown, English private international law and the ‘domestic’ laws were rewritten in the early 1970s in order to prevent Muslims, in particular, from using extra-judicial means of divorcing.⁴⁵ When divorcing abroad, therefore, individuals have to make sure that they have gone through ‘judicial or other proceedings’. It appears that French judges have been sending even stronger signals about the unacceptability of Muslim divorces.⁴⁶ Meanwhile, the practice of divorcing abroad could well have been encouraged by the ban on domestic non-judicial divorces. In practice, the requirement of a ‘proceedings’ divorce abroad causes many problems for migrants or those engaging in trans-jurisdictional behaviour, not least the non-recognition of a divorce and therefore also a subsequent marriage. The further involvement of the family courts also cannot be ruled out by such non-recognition as one party to the divorce may well claim that no divorce has taken place. Recent evidence indicates the developing practice of prosecutions for bigamy where individuals have married after believing that they were properly divorced in another jurisdiction, and this practice may well be encouraged by one of the parties to the divorce who wants to penalize the other.⁴⁷ It is not altogether evident what public benefit accrues from such prosecutions, especially in cases where the divorcing party or parties have followed foreign rules correctly and believe themselves to be validly re-married. Such prosecutions also appear to progress despite the well-established principle that English and Scottish domiciliaries do not even have the capacity to contract polygamous marriages.⁴⁸ If anything, this is further evidence of officials disregarding such legal principles to ‘teach immigrants a lesson’ through the criminal courts.

The non-recognition of re-marriage after divorce comes up in other contexts too. In one case I had to deal with as an expert witness, a Bangladeshi woman was penalised several times, forced to go from pillar-to-post to secure recognition of divorce and a subsequent marriage. Having originally come to

⁴⁵ D Pearl and WF Menski, *Muslim Family Law* (Sweet & Maxwell, London 1998).

⁴⁶ H Fulchiron, ‘The French Family Judge Encounters Cultural Pluralism’ in M-C Foblets, JF Gaudreault-DesBiens, AD Renteln (eds), *Cultural Diversity and the Law: State Responses from Around the World* (Bruylant, Brussels 2010).

⁴⁷ I am grateful to Prof Werner Menski and Dr Roger Ballard for sharing information on recent bigamy prosecutions.

⁴⁸ See *Hussain v Hussain* [1982] 1 All ER 369 and, for further discussion of the context and consequences of that case, see P Shah, ‘Attitudes to Polygamy in English law’ (2003) 52 *International and Comparative Law Quarterly* 359.

the UK as a spouse herself, she divorced her first husband in Bangladesh. Unlike those mentioned above, this was clearly a ‘proceedings’ divorce which had gone through an official court in Bangladesh. However, advice from an Asian women’s group in London was offered to the effect that her divorce would not be recognized, and that divorce proceedings in Britain be started. Her former husband claimed before the English court that he was divorced already and, having read my expert report to the same effect, the family court judge dismissed the petition. When the woman got married to another man in Bangladesh, and he applied for a spouse visa, the entry clearance officer doubted the validity of the previous divorce and the matter had to be appealed. The woman was able to use my expert report again and the marriage was recognized by an immigration judge. Still, this case illustrates the kinds of hurdles some migrants have to go through unnecessarily in order to secure their legal status before British legal systems. Not only does it highlight penalties experienced because of the ignorance of those who serve the official legal system, but also the on-the-ground unworkability of a system unless one goes through multiple hoops.⁴⁹

Cases of transnational marriage refuse to go away, however, and in the last few years I have been involved as an expert witness in several immigration cases concerning marriages which took place when the spouses were not even in the same country when the marriage took place. This often seems to occur within communities dispersed because of war or persecution such as the Somalis. It is not unusual to see the use of proxy or telephone marriages where one or even both spouses are not present at the marriage ceremony. Under Muslim law, and as far as the Muslims worldwide are concerned, these are perfectly lawful arrangements, but are quite likely to be refused by entry clearance officers upon the mere allegation that the ‘marriage does not appear to be valid’. This will then force such families into a potentially expensive legal process to establish their right to be in the same country. The less they resemble Western assumptions about proper marriages, the more likely it is they will end up being refused. The Asylum and Immigration Tribunal has, for example, stated that Shia *mut’a* or *sighē* marriages are not to be recognized for immigration purposes.⁵⁰

The drawing of such lines, about what is and is not a proper marriage, sometimes goes to extreme lengths. In one recent case, an entry clearance officer alleged that a Muslim *nikah* in a mosque in Delhi did not appear to be valid because the document on which the marriage contract was written was torn unevenly on one side although its terms were fully visible for all to see. Presumably a page with the written contract could look torn on one side if taken from a book of such contracts, but was significant enough for the entry clearance officer to override the other evidence given by both parties.

⁴⁹ For another such case with even more bouts of struggle, see WF Menski, ‘Dodgy Asians or Dodgy Laws? The Story of H’ (2007) 21 *Journal of Immigration, Asylum and Nationality Law* 284.

⁵⁰ See LS (*Mut’a* or *sighē*) Iran [2007] UKAIT 00072.

When the matter came to appeal, the Home Office Presenting Officer took up the new point that Muslim marriages in India ought to be registered and, not having been registered officially, the marriage in question was not valid. No one could help the couple at that point – their barrister was not sure about the Indian legal position and nor was the immigration judge. The expert report which I eventually wrote merely stated the blindingly obvious point that Muslim marriages in India need not be registered to be considered valid. The immigration judge at the second hearing was so furious, and rightly, about the level of abuse in this case that he recommended that the matter be reported to the Ombudsman. It may have helped that the Bangladeshi woman in this case, who had met her husband on one of her trips to India, was present in the UK as a Highly Skilled Migrant, a well-paid psychiatrist. One can also see cases from Pakistan where it is asserted that a marriage should have been registered, in obvious disregard of Pakistani law. Pakistani *Christians* may even be told that they should have registered their marriages under the *Muslim Family Laws Ordinance of 1961!*

At other times, marriages are conducted in Britain or other Western jurisdictions which do not comply with official expectations, while people from minority communities appear to be resorting to non-official methods of marrying, sometimes in response to official and other constraints, such as the certificate of approval requirements discussed above. An example of an early post-war Sikh migrant couple shows clearly how a legal system may come under pressure to recognize married status despite non-compliance with official rules. In the *Bath* case,⁵¹ the English Court of Appeal had to decide the married status of just such a couple years later, the husband having died, and the surviving wife needing to establish her right to a widow's pension through successive bouts of legal struggle. The couple had gone through Sikh marriage rites in England, but had not fully complied with the Marriage Acts. The Court, in its wisdom, decided to borrow the principle of presumption of marriage, then still extant in Scottish law, to recognize their marriage.⁵² It is reported that marriages, especially among Muslims in the UK, will now often not go through the registration process. One solicitor who specializes in Muslim family law casework suggests that the figure could be as high as seventy per cent of the cases she sees. When legal problems arise, and despite cases like *Bath*, practitioners report a heavy reluctance on the part of family court judges to accept the couples as married, and they may have recourse to the one of the *shari'a* councils in Britain instead. These cases may also have severe consequences in terms of custody rights of a parent.⁵³ The question might arise about the possible

⁵¹ *Chief Adjudication Officer v Bath* [2000] 1 FCR 419, [2000] 1 FLR 8, [2000] Fam Law 91.

⁵² The Family Law (Scotland) Act 2006, section 3 now prevents Scottish courts using the presumption of marriage principle to confer recognition thus taking away a remedy often used by ethnic minorities.

⁵³ See *A v H* [2009] EWHC 636 (Fam), [2009] 4 All ER 641 where a father, who had married by *nikah*, subsequently divorced and the mother of the child, his former wife, took the child to Holland. The English court

recognition of such marriages elsewhere than in Britain. In one asylum-related case, the (now) Immigration and Asylum Chamber of the Upper Tribunal wanted to know whether a *nikah* conducted in a mosque in east London, without any official registration, would be recognized in Pakistan as a proper marriage.⁵⁴ I expressed the view that in Pakistan such a marriage would be considered valid even if it would not in Britain, although my view was never communicated to the immigration judge re-hearing the case.

Concluding Observations

Despite attempts by states to restrict family based or other forms of migration, it is bound to continue in different ways. Thus the issues discussed in this article will be of ever growing salience. This means that European states face tough choices about how to move next to take into account the ‘superdiverse’ conditions of their societies, which have strong implications in terms of legal diversity also. The old methods of dealing with such diversities are failing and costing a lot in terms of money, ill-feeling and injustice, which can rebound on the larger societies if care is not taken. Readjusting the old models, for example within private international law, to accommodate minorities and transnational communities more fairly could be one solution but, while such suggestions are made from an obvious sympathy for the plight of parties caught in legal struggles, I am fearful that such re-jigging of old models simply ends up presenting the same wine in new bottles, but does not help in addressing the underlying ideological and practical problems. The presence of transnational communities means that there is a collapse of the boundaries between ‘domestic’ and private international laws. However, that mental barriers are strongly present can be seen in the restrictions and blockages illustrated in the present article. Reading about the century-old story of Gandhi’s campaigns in South Africa one comes across the ruling of the Supreme Court in 1913 which effectively refused to recognize all non-Christian marriages, with severe consequences for families seeking to reunite and leading to other legal barriers for Indian workers.⁵⁵ A century later we may ask why European legal systems continue to replicate such restrictions in more secularized forms. Contemporary interferences effectively tend to rely on long-present Christian presuppositions of family law including consent in marriage, the involvement

did not recognize custody under the Hague Convention on the Civil Aspects of International Child Abduction 1980 because he was held to have had no ‘parental responsibility’. The judge, Sir Christopher Sumner, specifically refused to apply the presumption of marriage on account of the short duration of the marriage, even though he had been allowed to register as the father of the child by officials.

⁵⁴ Appeal no. AA/15800/2009, date of determination 29 July 2010.

⁵⁵ *Esop v Union Government (Minister of the Interior)* (1913) CPD 133.

of an intercessory to formalize marriage, restrictiveness around divorcing, and so on. However secularized and universalized such normative assumptions may have become, it is futile to deny their specific lineage, which is linked to one culture, the Western culture. That they derive from a specific culture entails problems of incommensurability which need to be taken into account for the ends of inter-cultural justice. It seems that rather than rely any longer on the outdated concept of the ‘comity of nations’, we ought to try to move towards a ‘comity of peoples’. It is the presence of transnational communities which span nation-states which is making us realize this more and more, and the implications are not restricted to the Western legal systems only; they face all legal systems in different ways – a big global challenge.

Project Identity

Title:	RELIGARE - Religious Diversity and Secular Models in Europe. Innovative Approaches to Law and Policy
Funding Scheme:	Collaborative Project (CP): small or medium-scale focused research project
Coordinator:	K.U. Leuven (Faculties of Law and Canon Law), Prof. Marie-Claire Foblets
Project Managers:	Dr. Jogchum Vrielink Dr. Myriam Witvrouw
Duration:	1 February 2010 – 31 January 2013 (36 months)
Contact e-mail:	info@religareproject.eu
Short Description:	The RELIGARE project is about religions, belonging, beliefs and secularism. It examines the current realities in Europe, including the legal rules protecting or limiting (constraining) the experiences of religious or other belief-based communities. Where the practices of communities or individuals do not conform to State law requirements, or where communities turn to their own legal regimes or tribunals, the reasons behind these developments need to be understood.
Partners:	13 (10 countries)
Consortium:	Centre for European Policy Studies (CEPS), Belgium Université Catholique de Louvain (UCL), Belgium International Center for Minority Studies and Intercultural Relations (IMIR), Bulgaria University of Copenhagen (UCPH), Denmark Centre National de la Recherche Scientifique: Politique, religion, institutions et sociétés: mutations européennes (PRISME), France Universität Erlangen-Nürnberg (UEN), Germany Università Degli Studi di Milano (UNIMI), Italy Vrije Universiteit Amsterdam (VUA), The Netherlands Universiteit van Amsterdam (UvA), The Netherlands Universidad Complutense Madrid (UCM), Spain Middle East Technical University (METU), Turkey Queen Mary, University of London (QMUL), U.K.
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