PUBLIC POLICY IN FAMILIES AND SUCCESSIONS REGULATIONS: THE CASE OF "TALAQ"

EL ORDEN PÚBLICO EN LOS REGLAMENTOS DE FAMILIA Y SUCESIONES: EL CASO DEL "TALAQ"

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ABSTRACT: According to EU Regulations on transnational families and successions, a foreign rule remains without effect if it is deemed contrary to the so-called public policy (ordre public) of the forum's legal system. As a consequence, judges have to evaluate whether the application of foreign law is incompatible with fundamental principles of the domestic law, especially whether it would constitute a violation against human rights. An outstanding controversial issue is today represented by Islamic repudiation (talaq): two contrasting Italian judicial decisions of August 2020 may illustrate how difficult it could be to determine what public policy is.

P KEY WORDS: Public policy; migration; human rights; talaq.

RESUMEN: *De acuerdo con la normativa europea sobre familias y sucesiones trasnacionales, un precepto extranjero permanece sin efecto si se considera contrario al orden público del sistema legal del foro de aplicación. Como consecuencia, los jueces deben evaluar si la aplicación de la regla extranjera es incompatible con los principios fundamentales del foro, especialmente si constituiría una violación de los derechos humanos. Un controvertido ejemplo muy destacado es la repudiación islámica (talaq): Dos sentencias italianas contrapuestas de agosto de 2020 pueden ilustrar hasta qué punto puede ser complicado determinar qué es el orden público.*

ALABRAS CLAVE: *Orden público; migración; derechos humanos; talaq.*

TABLE OF CONTENTS: I. THE LEGAL CHALLENGES OF MIGRATION.- II. PUBLIC POLICY AND HUMAN RIGHTS.- III. OLD AND NEW PUBLIC POLICY. IV. THE HARD CASE OF REPUDIATION.

I. THE LEGAL CHALLENGES OF MIGRATION.

In the last decades, within a general framework of social and economic globalization, the growth of migratory flows in and to Europe has been very relevant[1]. For some countries, such as France or the United Kingdom, this is just the continuation of older trends, dating back to colonial times and to the connected longer migration history, but for other countries that in the recent past were more accustomed to mainly intra-European migratory flows, such as Germany, or were countries of emigration, such as Spain, Italy or Greece, all this sounds quite new. Mass immigration raises new legal challenges, for both the European Union and the Member States. One of them is to balance the respect for an immigrant's cultural and religious identity with the domestic system of values in family and successions law.

In fact, many of the new immigrants come from countries of Africa or Western and Southern Asia, that are governed by Islamic law (*Sharia*) in its different variations[2]. According to the private international law rules, once migrants have established habitual residence in the country of destination, jurisdiction in matters of civil law generally lies with the courts of the State of residence, but the law applicable to the merits of a given legal dispute with a transnational element is determined by the rules on conflict of laws. And, in many instances, nationality is used (or can be used, after an act or an agreement of choice of law) as a connecting factor to determine the law applicable to personal status, encompassing, amongst others, a natural person's legal capacity as well as the person's family relations and marital status as a spouse.

1 According to the 2019 Annual Report on Intra-EU Labour Mobility - Final Report January 2020, intra-European mobility continued to grow and in 2018 there were 17.6 million EU-28 movers within the EU, while, according to the latest updated data of Eurostat (extracted in March 2019), 2.4 million immigrants entered in 2017 the Union from non-EU countries. Of course, mobility and migration have then been affected by the pandemic-related restrictions but is going to recover soon.

2 In fact, according to the data of the United Nations High Commissioner for Refugees, the top four nationalities of unauthorized entrants into the European Union during the so-called refugee crisis were: Syrian, Afghan, Iraqi, and Eritrean.

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In any case, the application of the law of nationality may be regarded as a token of recognition of the person's cultural identity but can also provoke tensions and fragmentations, given that it contrasts with one of the cornerstones of the Western paradigm of modern State: the principle of territoriality of the law, that guarantees the paramount value of formal equality among all persons and, at the same time, ensures the monopolistic control of the State over the legal system as a whole.

II. PUBLIC POLICY AND HUMAN RIGHTS.

When, in consequence, European courts increasingly have to apply Islamic family and successions law, tensions with the domestic scale of values are imminent. Problematic cases arise in particular because of issues of gender inequality, with regard, for instance, to polygamy, underage marriages, repudiation and dower. Here, both religious and legal beliefs intertwine and possibly collide.

Private international law is pervaded by tolerance for foreign law and by international comity, but the application of the law of another State has its limits[3]. A foreign rule remains without effect if it is deemed contrary to the so-called public policy *(ordre public)* of the forum's legal system: such a formula is often used by both domestic legislation[4] and EU Regulations[5]. Accordingly, judges have to

3 See, also for further references: Rademacher, L.: "Die Abwehr anstößigen Familien- und Erbrechts: Zwischen Toleranz und Geschlechter-gleichstellung", in Rupp, C.S., Antomo, J., Duden, K., Kramme, M., Lutzi, T., Melcher, M., Montana, M.T., Segger-Piening, S., Pförtner, F. and Walter, S. (ed.): *IPR zwischen Tradition und Innovation*, Tübingen, 2019, pp. 121–140; Rizzuti, M.: "Ordine pubblico costituzionale e rapporti familiari: i casi della poligamia e del ripudio", *Actualidad Jurídica Iberoamericana*, 2019, pp. 604-627; Rizzuti, M.: "Transnational divorces and «public policy»", in Gallardo Rodríguez, A., Estancona Pérez, A.A. and Berti De Marinis, G. (ed.): *Los nuevos retos del derecho de familia*, Valencia, 2020, pp. 703-716.

4 See in Italian legal literature: Badiali, G.: *Ordine pubblico e diritto straniero*, Milano, 1963; Paladin, L.: "Ordine pubblico", *Noviss. dig. it.*, XII, Torino, 1965, p. 130 ff.; Barile, G.: *I principi fondamentali della comunità statale ed il coordinamento fra sistemi (l'ordine pubblico internazionale)*, Padova, 1969; Ferri, G.B.: *Ordine pubblico, buon costume e la teoria del contratto*, Milano, 1970; Guarneri, A.: *L'ordine pubblico e il sistema delle fonti nel diritto civile*, Padova, 1974; Palaia, N.: *L'ordine pubblico internazionale*, Padova, 1974; Benvenuti, P.: *Comunità statale, comunità internazionale e ordine pubblico internazionale*, Milano, 1977; Panza, G.: "Ordine pubblico, Teoria generale", *Enc. giur.* Treccani, Roma, 1990, p. 1 ff..; Lonardo, L.: *Ordine pubblico e illiceità del contratto*, Napoli, 1993; Mosconi, F.: "Qualche considerazione sugli effetti dell'eccezione di ordine pubblico", *Riv. dir. int. priv. proc.*, 1994, pp. 5-14; Emanuele, C.F.: "Prime riflessioni sul concetto di ordine pubblico nella legge di riforma del diritto internazionale privato italiano", *Dir. fam. pers.*, 1996, p. 326 ff..; Angelini, F.: *Ordine pubblico e integrazione costituzionale europea*, Padova, 2007; Barba, V.: "L'ordine pubblico internazionale", in Perlingieri, G. and D'Ambrosio, M. (ed.): *Fonti, metodo e interpretazione*, Napoli, 2017, p. 409 ff.; Perlingieri, P.: "Libertà religiosa, principio di differenziazione e ordine pubblico", in AA.VV.: *Principi, regole, interpretazione. Contratti e obbligazioni, famiglie e successioni. Scritti in onore di G. Furgiuele*, Mantova, 2017, I, p. 355 ff.; Salerno, F.: "La costituzionalizzazione dell'ordine pubblico internazionale", *Riv. dir. int. priv. proc.*, 2018, p. 259-291; Perlingieri, G. and Zarra, G.: *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale*, Napoli, 2019; Tescaro, M.: "L'ordine pubblico internazionale nella giurisprudenza italiana in tema di risarcimento punitivo e di maternità surrogata", *Nuovo diritto civile*, 2020, pp. 23-55.

5 For a general overview about public policy (*ordre public*) in the EU law see Feraci, O.: *L'ordine pubblico nel diritto dell'Unione europea*, Milano, 2012. With specific reference to the field of families and successions law we have to consider: Article 35 of EU Regulation 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession; Article 31 of EU Regulation 1103/2016, implementing enhanced cooperation in the area of jurisdiction, applicable law and the

determine whether the application of foreign law is incompatible with fundamental principles of the domestic law, especially whether it would constitute a violation against human rights.

In a recent decision, the European Court of Human Rights, dealing with a peculiar Greek case, not connected with migration but arising from a sort of relic of the premodern Ottoman *millet* system of personal law, has opined that the application of *Sharia*'s inheritance rules is not in itself unacceptable, provided that it takes place on a voluntary basis[6]. The same principles have to be considered when *Sharia* plays the role of a foreign law, applicable to migrant families because of the mentioned mechanisms of international private law, but also in merely internal situations, where an application of *Sharia* could be determined because of phenomena of private ordering within migrant communities, as in the case of the so-called Muslim arbitration tribunal and *Sharia* councils in the United Kingdom[7]. Some commentators have therefore critically remarked that the European Court of Human Rights' judgment could have opened the door to the application of *Sharia*

recognition and enforcement of decisions in matters of matrimonial property regimes; Article 31 of EU Regulation 1104/2016, implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

6 We refer to the ECHR decision of 19th December, 2018, Appl. no. 20452/2014, the case of *Molla Sali v. Greece*, addressing the issue with regard to the peculiar situation of an historical Muslim minority in Greece, that for historical reasons was authorized to apply *Sharia* instead of the Civil Code in family and successions matters: see Tsaoussi, A. and Zervogianni, E.: "Multiculturalism and Family Law: The Case of Greek Muslims", in Boele-Woelki, K. and Sverdrup, T. (ed.): *European Challenges in Contemporary Family Law*, Antwerp-Oxford, 2008, pp. 209-239. In fact, a widow, who lost three quarters of her husband's inheritance because of *Sharia* rules, resorted to ECHR, so that Greece was condemned for the breach of her fundamental rights to free self-identification and to non-discrimination. The justices opined that, if a State created a special status for the members of a community to protect them, it must also recognize to the individuals a right to opt for the application of ordinary law. For some comments about the decision see: Tsavousoglou, İ.: "The Curious Case of Molla Sali v. Greece: Legal Pluralism Through the Lens of the ECtHR", *https://strasbourgobservers.com.*, 2019; Koumoutzis, N. and Papastylianos, C.: "Human Rights Issues Arising from the Implementation of Sharia Law on the Minority of Western Thrace", *Religions*, 30th April 2019; McGoldrick, D.: "Sharia Law in Europe? Legacies of the Ottoman Empire and the European Convention on Human Rights", *Oxford Journal of Law and Religion*, 2019, pp. 517–566; Jayme, E. and Nordmeier, C.F.: "Testierfreiheit als europäische Menschenrecht? – Kritische Betrachtungen zur Westthrazien-Entscheidung des Europäischen Gerichtshofs für Menschenrechte", *Praxis des Internationalen Privat- und Verfahrensrechts*, 2019, p. 200-202; Rizzuti, M.: "The Strange Case of Ms. Molla Sali v. Greece: Individual Rights and Group Rights in a Multicultural Order", in Landini, S. (ed.): *EU Regulations 650/2012, 1103 and 1104/2016: cross-border families, international successions, mediation issues and new financial assets. Goineu plus project final volume*, Napoli, 2020, pp. 387-413.

7 In the United Kingdom many *Sharia* councils provide services of family mediation and, when mediation fails, dissolve Islamic marriages. *Sharia* councils try to elaborate solutions that could be recognizable both by English law and by the laws of the involved migrants' countries of origin. Therefore, they have developed a legal order without a State, whose concrete contents derive from *Sharia* but are also strongly influenced by English law: the so-called *Angrezi Shariat*. See at these regards: Pearl, D. and Menski, W.F.: *Muslim Family Law*, London, 1998, pp. 277 ff.; Menski, W.F.: "Muslim Law in Britain", *Journal of Asian and African Studies*, 2001, pp. 127-163; Yilmaz, I.: "The Challenge of Post-Modern Legality and Muslim Legal Pluralism in England", *Journal of Ethnic and Migration Studies*, 2002, pp. 343-354; Menski, W.F.: "Angrezi Shariat: Glocalised Plural Arrangements by Migrants in Britain", *Law Vision*, 2008, pp. 10-12; Keshavjee, M.M.: *Islam, Sharia & Alternative Dispute Resolution. Mechanisms for Legal Redress in the Muslim Community*, London, 2013; Parolari, P.: "Sharia e corti islamiche in Inghilterra tra mito e realtà. Pluralità di ordinamenti giuridici e interlegalità nelle società multireligiose e multiculturali", *Mat. st. cult. giur.*, 2017, pp. 157-191; Parolari, P.: *Diritto policentrico e interlegalità nei paesi europei di immigrazione. Il caso degli shari'ah councils in Inghilterra*, Torino, 2020; Rinella, A.: *La shari'a in Occidente. Giurisdizioni e diritto islamico: Regno Unito, Canada e Stati Uniti d'America*, Bologna, 2021.

in Europe on a voluntary basis[8]. Such forms of migrants' private ordering may, in fact, play an important role in family matters, helping the integration of different communities in the context of the so-called multi-conjugalism (*i.e.* multiculturalism applied to conjugal relationships)[9], but the States have to ensure in any case an effective right of opting out for the individuals, especially for the most vulnerable ones[10].

III. OLD AND NEW PUBLIC POLICY.

Nobody could know what public policy exactly means: in every field of the law general clauses are indeed useful precisely because they are not previously bound within strict limits, thus allowing jurists to deal with unprecedented issues. Moreover, public policy does not imply a control on the abstract content of the foreign law, but on its concrete effects. The question is how to give a concrete content to such a clause, and this is a very complex and uncertain evaluation, also because the European model of family is deeply changed, developing from the traditional one towards pluralism and gender equality.

A few decades ago, in fact, it could be probably easier to determine the content of public policy, identifying it with the defence of the only possible legally recognized family model, the traditional, or allegedly natural, one: *i.e.* the heterosexual, patriarchal, monogamous and indissoluble marriage. Today such a model has quite evidently lost its primacy even in our domestic laws, and it would be very difficult to use it as a benchmark in order to evaluate the foreign ones. In fact, throughout Europe the current state of legislation and case-law endorses a pluralistic approach towards family[11], but a paramount value is represented by

8 We refer to Puppinck, G.: "Charia: ce que révèle la décision de la CEDH", *FigaroVox*, 26th December 2018, who critically highlighted that "la Cour européenne a condamné cette application forcée de la charia… mais pas la charia en elle-même" and "S'agissant du point essentiel du contenu de la charia, la Cour ne porte pas de jugement". Therefore, "acceptant le principe même de l'applicabilité de la charia en Europe, fut-ce de façon limitée, cet arrêt permet aux partis politiques qui en veulent l'application, de prétendre agir '«dans le respect des droits de l'homme'»" so that "Ce qui risque d'arriver, et apparaît déjà dans cette affaire, c'est l'introduction de la charia, par la volonté individuelle, dans les droits de l'homme: c'est le droit à la charia'".

9 This is how some American scholars have described the trend towards the private and social ordering of a family law that is increasingly shaped not only by States but also by other players, such as the religious communities. See at these regards Nichols, J.A. (ed.): *Marriage and Divorce in a Multicultural Context. Multi-Tiered Marriage and the Boundaries of Civil Law and Religion*, Cambridge MA, 2012, that analyses not only the debates about Islamic arbitration but also the more consolidated case of Jewish arbitration administered by the Beth Din in the U.S.A. and especially in New York.

10 Kymlicka, W.: "The Rights of Minority Cultures: Reply to Kukathas", *Political Theory*, 1992, pp. 140-146, and Id.: *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford, 1995, p. 152 ff., emphasized the importance of the right of the individual to a free exit from the community, somehow anticipating the solution of the mentioned European Court's judgement. Moreover, it is worth to remind that the Italian Constitutional Court, with its decision of 30th July 1984, no. 239, declared unconstitutional Article 4 of r.d. no. 1731 of 1930, providing for an automatic belonging of all Italian Jews to the established Israelite Communities, because such a provision was in violation of Article 18 of the Constitution, that protects the freedom of association also in its "negative" side, *i.e.* the freedom not to associate.

11 Such a liberal pluralism may open the way to the recognition of very different ways of life and choices of values: at these regards see Joppke, C.: "Multiculturalism by Liberal Law. The Empowerment of Gays and

equality, and more specifically gender equality[12]. Thus, old solutions in the matter of public policy have to be revised, in order to change the outcomes or at least their motivations and argumentations. To sum up, we need to reshape the concept of public policy also at the European level.

Let's consider the paradigmatic example of polygamy. For the said reasons, it is not enough to say that polygamy contrasts with "our traditional model of family", but it could be still correct to consider Islamic polygyny as contrasting with the "new public policy" too, because the institution is inherently imbalanced in favour of the husband[13]. However, if we follow this new rationale, we cannot invoke such an argument against the women themselves. Therefore, with regard to the succession of a deceased migrant polygamist who has left some estate located in Europe, it would be not justifiable to invoke public policy in order to deny the application of a foreign inheritance rule that entitles all surviving spouses to inherit simultaneously: otherwise, precisely the women would be unjustly harmed by the denial of their rights to an inheritance share[14]. Moreover, we have to consider that not all polygamies are the same: going besides Islamic polygyny, we can find also other models that are not necessarily gender unbalanced and could therefore be considered as non-contrasting with the European public policy[15].

Muslims", *European Journal of Sociology*, 2017, 1, pp. 1–32.

12 The principle of gender equality is enshrined in many of the twentieth century's Constitutions: see Article 119 of the German Constitution of 1919 (the so-called Constitution of Weimar); Article 43 of the Spanish Republican Constitution of 1931; Article 3 of the Italian Republican Constitution of 1948; Article 3 of the German Basic Law of 1949; Article 32 of the Spanish Constitution of 1978. At the international level we have to mention at least Article 16 of the Universal Declaration of Human Rights of 1948, stating that spouses «are entitled to equal rights as to marriage, during marriage and at its dissolution», and Article 5 of the 7th Additional Protocol of 1984 to the European Convention on Human Rights, stating that spouses "shall enjoy equal rights and responsibilities of private law character between them and in their relations with their children as to marriage, during marriage and in the event of its dissolution".

13 In fact, according to the *Quran*, 4.3, a man may marry up to four wives, but a woman can never marry more than one husband.

14 Such an approach has been accepted in the case-law throughout Europe and beyond. In some countries, such as France or Great Britain, it is a quite old solution because of previous colonial experiences: see, respectively, Court of Appeal of Alger, 9th February 1910, *Revue critique de droit international privé*, 1913, p. 103, and High Court of Justice, *In Estate of Abdul Majid Belshah*, *Law Quarterly Review*, 1926, p. 348. We can also mention an American decision for its interesting motivation: according to California Court of Appeal, *In re Dalip Singh Bir's Estate*, (1948), 188 P.2d 499, 502: "'Public policy' would not be affected by dividing the money equally between the two wives, particularly since there is no contest between them and they are the only interested parties". In other countries, such as Spain or Italy, the issue of polygamy represents a quite new problem: see, respectively, Cass., 2nd March 1999, no. 1739, *Giust. civ.*, 1999, 10, p. 2695, and Spanish Supreme Tribunal, 24th January 2018, no. 84, *Familia*, 2018, p. 325. For further references see also: Shah, P.: "Attitudes to Polygamy in English Law", *International and Comparative Law Quarterly*, 2002, p. 359-400; Rohe, M.: "Application of Sharī'a Rules in Europe: Scope and Limits", *Die Welt des Islams*, 2004, p. 323-350; Gaullier, P.: "La décohabitation et le relogement des familles polygames. Un malaise politique émaillé d'injonctions contradictoires", *Recherches et Prévisions*, 2008, p. 59-69; Pousson-Petit, J. (ed.): *Les droits maghrebins des personnes et de la famille à l'épreuve du droit français*, Paris, 2009; Labaca Zabala, M.L.: "El matrimonio polígamo islámico y su repercussion en el derecho español", *Revista Jurìdica de Castilla y León*, 2009, pp. 261-331; Rizzuti, M.: *Il problema dei rapporti familiari poligamici. Precedenti storici e attualità della questione*, Napoli, 2016.

15 Probably, the equalitarian agreements of polyamorous (different-sex and/or same-sex) cohabitation, practiced in Brazil and Colombia, and statutorily recognized in Massachusetts during the 2020 pandemic, are not against our new concept of public policy: see, also for further references, Grande, E. and Pes, L. (ed.): *Più cuori e una capanna. Il poliamore come istituzione*, Torino, 2018. We can even meet a so-called

IV. THE HARD CASE OF REPUDIATION.

Another very controversial issue is the dissolution of marriage by unilateral marital repudiation (*talaq*), admitted in the countries of origin of many migrants under Shariatic law[16].

We have to consider that today also in many European countries it is possible to perform an uncontested divorce through a private act. Indeed, after the end of the ancient Roman general freedom of divorce[17] that lasted until the Christianization of the Empire[18], in Western legal traditions divorce, or legal separation when divorce was not admitted at all[19], for centuries had been regarded as an exceptional sanction against the most severe breaches of family duties[20]. Only in quite recent times the focus shifted from the binding force of the act of marriage, and the related necessity to sanction its breach, to the consideration of the relationship among spouses, so that divorce was reshaped as a remedy for the no-fault disintegration of family relationships, that the judge has to apply when there is no possibility to

"matriarchal polygamy", or polyandry: the Interamerican Court of Human Rights, in its judgement of 4th December 1991, in the case of *Aloeboetoe*, dealing with the reparations due to the families of tribal peoples killed by Surinamese soldiers, noted that the involved tribe displayed such a family model, and accordingly recognised those marriages in the division of the compensations. For a general overview about such family structures see also Starkweather, K.E. and Hames, R.: "A Survey of Non-Classical Polyandry", *Human Nature*, 2012, pp. 149-172.

16 Pursuant to classical Islamic law, in accordance also with the more ancient Jewish tradition (see *Deuteronomy*, 24,1-4), the husband is free to repudiate the wife without any need for motivation or judicial control. The repudiation is performed just with the triple pronunciation of the word "*talaq*".

17 Classical Roman law *matrimonium* was not a formal binding contractual agreement but a legally relevant *de facto* situation of marital cohabitation, that could be freely interrupted in any moment. See, also for other references, Giunti, P.: *Consors vitae. Matrimonio e ripudio in Roma antica*, Milano, 2004.

18 The first attempt to limit freedom to divorce was made by emperor Constantine I, even if it is not clear if it depended on Christian inspiration or on other reasons (see Castello, C.: "Assenza d'ispirazione cristiana in C.Th.3.16.1", in Bravasa, E., Emeri, C. and Seurin, J.L. (ed.): *Religion, société et politique. Mélanges en hommage à J. Ellul*, Paris, 1983, p. 203-212). After that, the ancient freedom was reintroduced by emperor Julian "the Apostate", and then limited again by emperors Honorius of the Western part and Theodosius II of the Eastern one, both surely Christian, in 421 (*C.Th.3.16.2*). See, also for further references, Agnati, U.: *Profili giuridici del repudium nei secoli IV e V*, Napoli, 2017.

19 According to the Catholic Church, dissolution of a sacramental marriage among two baptized persons is almost impossible (with the exception of unconsummated marriage), because, as stated in the Gospels: "What therefore God has joined together, let not man put asunder", while separation is possible in cases of severe breach of conjugal duties. On the other hand, Orthodox and Protestant Churches consider divorce possible in some cases of severe breach of conjugal duties, given that also in the Gospel of St. Matthew an exception to indissolubility is provided for the case of "*Πορνεία*" (19.9), but in practical terms it is probably easier to obtain a Catholic declaration of marriage nullity than an Orthodox divorce. Due to the strong Catholic influence, Italy was among the last European countries to (re)introduce divorce in 1970, while the attempts to obtain the recognition of foreign so-called "bootleg divorces" through international private law were quite common, especially when, soon after World War I, some peculiar circumstances offered the possibility to take advantage of the liberal legislation in force in the short-lived Free State of Fiume, (see Rizzuti, M.: "Diritto di famiglia e Costituzione nella vicenda di Fiume", in Orrù, R., Gallo, F. and Sciannella, L. [ed.]: *Tra storia e diritto: dall'impero austro-ungarico al Nation Building del primo dopoguerra*, Napoli, 2020, pp. 283-297).

20 We can remind that also in the secular Napoleonic Code of 1804 a unilateral demand of divorce was admissible only for severe breaches of conjugal duties, even if a relevant innovation was represented by the introduction of divorce by mutual consent. See, also for further references, Solimano, S.: *Amori in causa. Strategie matrimoniali nel Regno d'Italia napoleonico (1806-1814)*, Torino, 2017, and Mastrolia, P.: *L'ombra lunga della tradizione. Cultura giuridica e prassi matrimoniale nel Regno di Napoli (1809-1815)*, Torino, 2018.

reconcile them[21]. Even more recently, divorce has been transformed again into a free choice that each one of the spouses has always the right to make[22], and that accordingly does not necessarily need the intervention of a judge[23].

Therefore, we can argue that the admissibility at the domestic level of divorce as an extrajudicial private act must change also the definition of public policy for the purposes of the evaluation of transnational divorces. In the recent past divorce in itself, or at least extrajudicial divorce as such, could be considered as contrasting with public policy in each and every case. Accordingly, in Italian case-law the negative solution was the same both for Soviet divorce, with an equal power of each spouse to repudiate the other "by postcard"[24], and for Islamic *talaq*, with the repudiation as a privilege of the husband[25]. But today the evaluation must be different, given that according to the current legislation[26] a judicial intervention in divorce cannot be deemed, in itself, as a public policy issue.

In any case, we still have to say that Islamic repudiation, being a unilateral power of the husband, is different from a domestic uncontested divorce and may

21 The main Western European legal systems introduced such reform in the same period: Great Britain with the Divorce Reform Act 1969 introducing divorce for "irretrievable breakdown"; Italy with law no. 898 of 1970, introducing divorce for breach of the "*comunione spirituale* e *materiale tra i coniugi*"; France with Act no. 617 of 1975 introducing divorce for "*rupture de la vie commune*"; Germany with the reform of 1976 introducing the "*Zerrüttungsprinzip*".

22 Among Western legal systems, a turning point was marked by the Swedish reform of 1973 introducing divorce on demand, that was probably influenced also by the Soviet model (see Phillips, R.: *Putting Asunder. A History of Divorce in Western Society*, New York, 1988; Antokolskaia, M.: *Harmonisation of Family Law in Europe: A Historical Perspective. A Tale of Two Millennia*, Antwerp-Oxford, 2006, p. 315-342; Oberto, G.: "Il divorzio in Europa", *Fam. dir.*, 2021, 1, p. 112 ff.). The generalization of this evolutive process has been, of course, determined by the transformation of family law from the pre-eminence of the family as institution to the primacy of individual autonomy (see Furgiuele, G.: *Libertà* e *famiglia*, Milano, 1979), but was also accelerated by the growing competition among different legal systems, with "divorce tourists" who utilize forum shopping in order to avail of the shorter and cheaper procedures offered by the States that have already introduced "easy divorce", while the other States are compelled by supranational legal mechanisms to recognize effects to such divorces. Therefore, in order to avoid a general "divorce flight" to other jurisdictions, at the end even the most reluctant States and legal orders think better to reform their domestic law, introducing shorter and cheaper procedure in turn. Interestingly, soon after the introduction of extrajudicial divorce in Italy in 2014, even the Catholic Church, with the pontifical *Motu proprio "Mitis Judex Dominus Jesus"*, of 15th August 2015, reformed its procedures for the declaration of marriage nullity, and in the media such reform has been known also as the "short annulment".

23 E.g., among the EU Member States, private divorces by mutual consent without necessary judicial interventions are provided in: Belgium, Estonia, France, Italy, Latvia, Portugal, Romania, Spain. Moreover, the pandemic crisis of 2020 has accelerated the transition towards online divorce, so that private divorce is probably going to become the "new normal".

24 Italian Court of Cassation, with its judgment of 17th March, 1955, no. 789, *Giust. civ.*, 1955, I, p. 1654, declared Soviet repudiation contrasting with Italian public policy.

25 Trib. Milano, 21st September, 1967, *Riv. dir. int. priv. proc.*, 1968, p. 403, stated that a repudiated Iranian woman had not the right to marry again because of the contrast of repudiation with Italian public policy.

26 Pursuant to the law decree no. 132 of 2014, uncontested divorce can be performed through an agreement of the spouses to be registered at the municipality or negotiated with the assistance of lawyers. Moreover, pursuant to the law no. 76 of 2016, with regard to the so-called contracts of cohabitation also a unilateral extrajudicial dissolution is possible. See, also for other references, Patti, S.: "The privatization of the divorce in Italy", *Familia*, 2017, 2, p. 155 ff.; Montinaro, R.: "Marital Contracts and Private Ordering of Marriage from the Italian Family Law Perspective", *The Italian Law Journal*, 2017, pp. 75-90; Mazzariol, R.: *Convivenze di fatto e autonomia privata: il contratto di convivenza*, Napoli, 2018, p. 237 ff.; Bugetti, M.N.: "Il divorzio tra intervento giudiziale e autonomia dei coniugi", *Fam. dir.*, 2021, 1, p. 34 ff.

contrast with public policy from the viewpoint of the gender equality principle. But, also in this case, such a new motivation may change the possible concrete outcomes and solutions. Indeed, if we deny effects to repudiations just in order to protect the repudiated wife, then we should recognize her the power to avail of the repudiation itself, in order, first of all, to be free to marry again[27].

Moreover, the repudiated wife should also be able to avail of the repudiation itself in order to claim for the payments that may be due as a consequence of divorce, such as alimony or maintenance, or the dower stipulated as a typically Islamic *mahr*. In fact, pursuant to Islamic nuptial contracts, *mahr* is a sum of money that has to be paid in two phases, the first one at the time of wedding and the second one at the time of marriage dissolution, so that this second payment, usually the most economically relevant, compensates the traditional absence of provisions on post-divorce maintenance in such a legal context. Maybe, from a Western point of view, this ancient legal institution could be compared with post-modern marital contracts and could therefore play a relevant role in the contractual governance of family relationships, as a sort of culturally connotated prenuptial agreement[28].

On the other hand, we can never accept that a woman's freedom to divorce could be limited by the discriminatory law of her country of origin. Therefore,

27 As said, in a not so remote past such a possibility was denied to an Iranian repudiated wife by the Italian judges (Trib. Milano, 21st September 1967, cit.), but we opine that today, in accordance with the new concept of public policy, this position would be untenable. In fact, the Spanish Supreme Tribunal, 21st April 1998, stated that repudiation can be recognized when the repudiated woman is who asks for the recognition. According to a similar rationale, Article 57 of the Belgian Code of Private International Law of 16th July 2004, provides that repudiation can be recognized when the woman has accepted it, and, as explained also in the parliamentary preparatory works, such acceptance has to be first of all inferred from a judicial claim of the woman herself asking for alimony or for the right to a new marriage, precisely in order to avoid a «double victimization» of the repudiated wife (see the minutes of the Belgian Senate's session of 4th March 2004).

28 See at these regards: Diago Diago, M.: "La dot islamique à l'épreuve du conflit de civilisations, sous l'angle du droit international privé espagnole", *Annales Droit Louvain*, 2001, p. 407 ff.; Mehdi, R.: "Danish Law and the Practice of Mahr among Muslim Pakistanis in Denmark", *International Journal of the Sociology of Law*, 2003, p. 115-129; Jindani, M.: "The Concept of Mahr (Dower) in Islamic Law: The Need of Statutory Recognition by English Law", *Yearbook of Islamic and Middle Eastern Law Online*, 2004, pp. 219-227; Wurmnest, W.: "Die Brautgabe im Bürgerlichen Recht", *Familienrecht Zeitung*, 2005, pp. 1878-1885; Id..: "Die Mär von der mahr - Zur Qualifikation von Ansprüchen aus Brautgabevereinbarungen", *Rabels Zeitschrif für ausländisches und internationales Privatrecht*, 2007, p. 527-558; Sayed, M.: "The Muslim Dower (Mahr) in Europe - With Special Reference to Sweden", in Boele-Woelki, K. and Sverdrup, T. (ed.): *European Challenges in Contemporary Family Law*, cit., p. 187 ff.; Jones-Pauly, C.: "Marriage Contracts of Muslims in the Diaspora: Problems in the Recognition of Mahr Contracts in German Law", in Quraishi, A. and Vogel, F.E. (ed.): *The Islamic Marriage Contract. Case Studies in Islamic Family Law*, Cambridge MA, 2008, pp. 299-330; Fournier, P.: "Flirting with God in Western Secular Courts: Mahr in the West", *International Journal of Law, Policy and the Family*, 2010, p. 67–94; Fournier, P.: *Muslim Marriage in Western Courts. Lost in Transplantation*, Farnham UK, 2010; Yassari, N.: "Die islamische Brautgabe im deutschen Kollisions - und Sachrecht", *Praxis des Internationalen Privat- und Verfahrensrechts*, 2011, p. 63 ff.; Büchler, A.: *Islamic Law in Europe? Legal Pluralism and Its Limits in European Family Laws*, London, 2011, p. 67 ff.; Spencer, K.: "Mahr as Contract: Internal Pluralism and External Perspectives", *Oñati Socio-Legal Series*, 2011, 1, no. 2; Sportel, I.: "Because it's an Islamic Marriage. Conditions upon Marriage and after Divorce in Transnational Dutch-Moroccan and Dutch-Egyptian marriages", *Oñati Socio-Legal Series*, 2013, 3, no. 6; Yassari, N.: *Die Brautgabe im Familienvermögensrecht*, Tübingen, 2014; Günther, U., Herzog, M. and Müssig, S.: "Researching Mahr in Germany: A Multidisciplinary Approach", *Review of Middle East Studies*, 2015, p. 23-37; Rizzuti, M.: "Patti prematrimoniali, divorzi privati e multi-coniugalismo", in Palazzo, M. and Landini, S. (ed.): *Accordi in vista della crisi dei rapporti familiari*, *Biblioteca della Fondazione Italiana del Notariato*, 2018, 1, pp. 337-354.

provisions that, only with regard to the wife, exclude the right to get divorced or make the dissolution of marriage possible only after the payment of a price[29], will be surely against public policy. In such cases the migrant wife must have the right to access internal procedures of divorce, notwithstanding the constraints posed by the law of her country of origin.

The main issue is whether to consider the repudiation as concretely contrasting with the new public policy when its recognition is asked by the repudiating husband, or possibly by his relatives for inheritance purposes. Different judicial solutions have been proposed. A very criticized decision stated that *talaq* is not against public policy, as the Islamic wife can access divorce too, through *khola*: the judgement is not convincing because the latter proceeding is much more burdensome than *talaq*[30]. Other jurists argued that, if the wife accepts *talaq*, then it becomes quite similar to a domestic uncontested divorce and does not contrast with public policy[31]. However, it is indeed quite questionable how really free could be such an acceptance in certain social and familiar contexts.

Two contrasting judicial decisions of the same Italian Supreme Court, both issued in August 2020, may illustrate how difficult it could be to solve the problem. According to the first one, the husband can never get the recognition of the repudiation, because of its contrast with public policy from the viewpoint of

29 In classical Islamic law one of the few possibilities for a woman to get divorced was paying back the part of *mahr* (whose Arab etymology is, in fact, related to "price") received at the time of wedding, in order to ransom herself (for references about *mahr* see above). With regard to the religious limits against women's freedom of divorce in many legal orders see also Deogratias, B.: *Trapped in a Religious Marriage. A Human Rights Perspective on the Phenomenon of Marital Captivity*, Cambridge UK, 2020.

30 We are referring to App. Cagliari, 16th May 2008, in *Riv. dir. int. priv. proc.*, 2009, p. 647, regarding an Egyptian case. As said, the motivation is wrong, but we have also to consider that in the concrete case none of the spouses was contesting the repudiation, whose recognition was indeed challenged only by the public prosecutor, and that, moreover, the repudiated wife had already married another man: therefore, it is not surprising that the judges have managed to find a way to grant the recognition.

31 The case of *S. Sahyouni v. R. Mamisch*, regarding such an issue with reference to a German-Syrian divorce, is arrived at the attention of the Court of Justice of the European Union: however, the judgment of 20th December 2017, C-372/16, did not go into the substance, but just stated that private divorces fell outside of the scope of the EU Regulation no. 1259/2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, and that therefore the Court had no jurisdiction at these regards. So, unfortunately, the decision did not solve the problem of how to deal with Islamic *talaq* but raised doubts about the European regime of circulation of the extrajudicial divorces provided, as said, by many Member States (see Silvestri, C.: "La circolazione nello spazio giudiziario europeo degli accordi di negoziazione assistita in materia di separazione dei coniugi e cessazione degli effetti civili del matrimonio", *Riv. trim.*, 2016, 4, pp. 1287-1308; Bernasconi, S.: "La circolazione degli accordi di negoziazione assistita e di altre forme di divorzio stragiudiziale in Europa", *Fam. dir.*, 2019, p. 335 ff.; D'Alessandro, E.: "The Impact of Private Divorces on EU International Private Law", in Scherpe, J.M. and Bargelli, E. [ed.]: *The Interaction between Family Law, Succession Law and Private International Law: Adapting to Change*, Cambridge, 2021, p. 59 ff.). As a consequence, these doubts have been brought also to the attention of the same E.U. Court by the *Bundesgerichtshof*'s decision of 28th October 2020, no. 187, with regard to the recognition of an Italian uncontested divorce in Germany, a country whose internal legislation does not provide for extrajudicial divorce. But meanwhile the new EU Regulation no. 1111/2019, that recasts EC Regulation 2201/2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, and will apply since 1st August 2022, has opened the way to their free circulation (see Honorati, C. and Bernasconi, S.: "L'efficacia cross-border degli accordi stragiudiziali in materia familiare tra i regolamenti Bruxelles II-bis e Bruxelles II-ter", *Freedom, Security & Justice: European Legal Studies*, 2020, 2, pp. 22-50).

gender equality[32]. According to the other one, the evaluation has not to focus on the abstract, and of course gender-unbalanced, structure of *talaq* in the country of origin, but on its concrete effects, that consist in the dissolution of the marital bond: therefore, if the family life of the concerned couple is already objectively disintegrated, there is no reason to deny the recognition also of its legal dissolution[33].

Probably the question will have to be, as soon as possible, re-examined by the Joint Sections, *i.e.* by the special panel of the Supreme Court precisely charged to solve such conflicts of interpretation, but, in any case, we opine that the second view should be considered more coherent with the already discussed function of public policy in the legal order[34]. Therefore, the evaluation should focus on the specific concrete effects: in a situation of already disintegrated family life after *talaq*, the effect of a legal termination of marriage should be recognized, while other effects of the foreign regulation of divorce-related matters, such as maintenance or child custody, should not be recognized if they turn out to be contrasting with gender equality or with the concerned child's best interests.

32 Cass., 7th August 2020, no. 16804, in *Dir. fam. pers.*, 2020, 4, I, p. 1386, with regard to a Palestinian divorce. See also the comments by Virgadamo, P.: "Ripudio islamico e contrarietà all'ordine pubblico tra unitarietà del limite e corretta individuazione dei principi", *Dir. fam. pers.*, 2017, pp. 347-364 (with regard to the previous decision of the App. Roma, 12th December 2016, on the same Palestinian divorce); Di Mauro, E.W.: "Il ripudio islamico tra riconoscimento e contrarietà all'ordine pubblico", *Diritto delle successioni e della famiglia*, 2020, 3, p. 1086 ff, and Tuo, C.E.: "Divorzio-ripudio islamico, riconoscimento automatico e ordine pubblico", *Corr. giur.*, 2021, 4, p. 481 ff.

33 Cass., 14th August 2020, no. 17170, *Giur. it.*, 2021, 2, p. 344, with regard to an Iranian divorce. See also the comment by Vanin, O.: "Divorzio iraniano e controllo «in concreto» di compatibilità con l'ordine pubblico del provvedimento straniero", *Fam. dir.*, 2021, 5, p. 507 ff.

34 See also the critical remarks of Pesce, F.: "La corte di cassazione ritorna sul tema del riconoscimento del ripudio islamico", *Cuadernos de Derecho Transnacional*, 2021, 1, pp. 552-573.

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