Andrea Büchler, Kulturelle Vielfalt und Familienrecht. Die Bedeutung kultureller Identität für die Ausgestaltung europäischer Familienrechtsordnungen - am Beispiel islamischer Rechtsverständnisse, in: Pluralistische Gesellschaften und Internationales Recht, Berichte DGVR Bd. 43, Heidelberg 2008

Summary

Cultural Diversity and Family Law

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Conflicts of cultures and norms

A positive approach to diversity and integration policy

Within European communities today, diverging legal concepts and understandings of family often collide in such a way that Family Law theory and practice may encounter conflicts of cultures and norms. A positive approach to diversity which at the same time heeds the objectives of integration policy is the key challenge which modern societies have to face today.

Inclusion or exclusion of alien Family Law?

Europe's search for the self and that which is other, for balance and for *permissible diversity*

From a Comparative Law point of view, I observe that all European countries are engaged in seeking reassurance in their quest for balance in the degree of plurality in Family Law which is acceptable. While commonalities and convergences dominate, presumably because the countries concerned are addressing comparable problems, differences in emphasis are also apparent. It is in *France* that *public order* considerations under International Private Law most evidently serve to protect self-affirmation. *Switzerland* pursues a policy of integration, as is evident from its tendency to apply the law of the domicile. *Germany*, by contrast, identifies strongly with its own cultural codes. Its frequent recourse to the law of Islamic countries and its noteworthy reticence in giving precedence to German Law on *ordre public* grounds can be seen as both a defence mechanism and a demarcation line within its borders as well as respect for differences. *Spain* takes account of its Islamic past, thereby opening up new fields of cultural autonomy. Finally, *England*'s social structures display signs of communitarianism. Despite applying law based on an individual's domicile, the state shows willingness to allow culture-based canons of Family Law to co-exist with a very considerable degree of legal autonomy. The Muslim community in England has thus largely maintained its legal traditions, albeit in a modified form.

The (de-)construction of binary opposition

Inadequacies in International Private Law discourse in post-national and post-secular societies

In the „post-national" and „post-secular" society which Habermas postulates, attempting to use national borders to determine the relevant context for the determination of identity ultimately amounts to legal reductionism. Serious misgivings also apply to determining the Family Law applicable to individuals on the basis of their nationality, particularly since this is an approach based on exclusion. Nationality is not the appropriate connecting factor in International Family Law. It is an approach which anticipates a difference, which it then re-emphasises with every decision. It is thus a performative act, engaging

in the binary logic of the self and that which is other. That said, determination of applicable law based on nationality is in decline, ceding ground to a determination of jurisdiction based on shared living space and choice of laws, the objective being to find common ground.

Incorporating cultural (and legal) diversity through the application of substantive Family Laws

Concretising norms on hermeneutic principles, autonomous determination of the law, culturally diversified sets of laws

An approach to recognising cultural identity and alien understandings of Family Law within the scope of substantive law aims to find common ground. Such common ground can be found in many areas. While it is rare that the Family Law applicable to a given situation is culturally diversified, accommodation of alien legal concepts by autonomous jurisdictions is nevertheless more frequent. In order to incorporate culturally or religiously alien legal formulations, a process of norm concretisation needs to be sufficiently open to cultural and normative diversity.

Legal pluralism in Family Law: Empirical findings from anthropological investigations

Pluralism of legal cultures and equality of normative obligation

Legal pluralism, conversely, is a field of anthropological investigation. Legal ethnology teaches us that social space is not a normative vacuum. Pluralistic legal structures challenge the modern idea that legislative monopoly rests with the state, highlight the limits of state law, and bring into sharp focus the enormous interdependence and complexity which exist in the relationship between law and society – as separate social entities – and between normative systems and social practices.

It is thanks to the anthropological theory of legal pluralism that jurisprudence has turned its attention to this complexity, to the empirically observable law as it is actually lived. Nevertheless, parallel systems of Family Law are not a realistic prospect for Europe, especially since they must necessarily pose a challenge which the theory of law tailored to the individual cannot possibly meet. The right to cultural identity in the context of Family Law does not rule out "every equality of normative obligation", precisely because this right also needs a foundation, a basis, in order for its own validity to be guaranteed. Moreover, cultural inclusion in institutions and procedures of Family Law is something which *cannot* be dispensed with.

Discursive practice and „Legitimisation by proceedings"

Challenges to inter-cultural and trans-cultural Family Law contexts: *protecting choice – promoting inclusion*

I believe that empirical and normative perspectives can ultimately best be combined in a Family Law context based on discourse. There is very considerable scope for accommodating a plurality of views about the family. Depending on the area it is regulating, European Family Law can limit itself to recognising self-determined proceedings, to integrating culture-based institutions, rules and values – despite the legislative prerogative which state law obviously holds – or, finally, to finding procedures within its state monopoly for reconciling differing positions. Autonomy ensures recourse to familiar dis-

course and to interpretative sovereignty. Nevertheless, cultural and normative syncretisation can occur, pointing the way beyond the limitations of individual points of view.

The converging development of Family Law provides additional impetus to this integrative approach, and Islamic countries are very much involved in this convergence. An irreducible core of Family Law values which is sufficiently abstract and to which everyone could subscribe can integrate growing cultural differentiations within society. The present task is to protect choice and promote inclusion, by means of a Family Law which accommodates cultural identity without sacrificing justice. The present task is to reshape Family Law in order to reconcile a diversity of cultures and beliefs within the unitary Family Law institutions of modern states -- this is ambitious but a worthwhile goal.