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Diverse cultures and official laws: multiculturalism and Euroscepticism?

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1. Introduction

In the twenty-first century we are still living in an era of the nation state. In the Europe of today, the state provides the source of law and is the legitimiser of sources of law, offering a predominantly monolithic, centralised, territorial top-down model of law, which may or may not allow competing sources of law to exist. When it does not allow this, it is regarded as intolerant, undemocratic, even despotic and self-referential. When it does so, however, this appears to be a weak version of legal pluralism where the top-down source of law is receptive to other sources and is therefore regarded as tolerant, democratic, multicultural and reflecting an open society. In the Western tradition, the stronger version of legal pluralism, in which levels of law of equal value coexist in the same territorial or social space as overlapping orders, with the same status as state law and independent of it, is not favoured. The centralist forces of the unitary state do not live comfortably with so many rivals.

The complex problems of ‘inter-legality’ become a dilemma for the lawyers of the Western world as they face multiculturalism, regional orders and the laws of indigenous peoples, displaced peoples and refugees, which challenge even the weak version of legal pluralism, let alone ‘state centralism’ and the monist approach. The contemporary move suggests a progression from monism to relativism and, finally, to pluralism. The crucial question then becomes whether the unitary nation state can cope with this progression. Can it accept the fact that all societies have diversity of legal orders – of which ‘official’ state law is only one – which overlap, interact and often conflict? If not, can it legislate for diversity and how? Can it today opt for prohibition and assimilation, or for integration by protecting diversity only as part of respect for cultural pluralism? Or, should it opt for preserving and supporting diversity and pluralisation by enacting legislation to promote, maintain and develop diverse cultures and localisms?¹

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1 For these views generally, see E. Örüçü, ‘Waar wet en cultuur elkaar ontmoeten: cultureel pluralisme, juridisch pluralisme en pragmatisme’, 2002 *Justitiële verkenningen* 28, no. 5 (‘Culturele diversiteit’), pp. 96-107.

Normative pluralism, of which legal pluralism is a species, refers to a social fact: the coexistence of different bodies of norms within the same social space. State legal pluralism indicates a single national legal system but with plural laws, the state recognising different rules for specific categories of persons such as was the case in colonial times, for instance. However, the equating of legal pluralism with state law is challenged today as being a narrow and weak version of legal pluralism in which state centralism still prevails.

Sociology may regard pluralism as the belief that society is constructed of many interacting groups, while anthropology² considers pluralism as ethnic units coexisting in a dynamic relationship with one another; but how does law regard pluralism? 'The nation state originally was built on the idea of an identifiable culture', says Volkmar Gessner; and though sub-cultural influence is of growing importance, 'it can in most cases still be treated as a cultural unit'.³ So what happens when this law meets diverse cultures? How can the modern unitary nation state recognise diversity and cultural and religious norms developing independently of officially endorsed rules? Can the state control the whole of the law? Should legislators provide a legal regime for each lifestyle? In their turn, can cultural and social aspects of legal principles accept outside control? These questions are crucial ones for all European legal systems today, as well as European law itself.

The pragmatic option may be to allow cultural rules to apply to personal or societal relationships alone, with an overarching general system of law reflecting the values of the dominant group, since in a modern unitary state there is only limited scope for normative pluralism. Yet, how is the paradox between cultural pluralism and official state law to be resolved? Should 'cultural and localised exceptionalism' and 'cultural relativism' trump 'globalising uniformity' and universal standards, or can 'globalising uniformity' always trump 'cultural exceptionalism'? As yet, the legal discourse concerning challenges of multiculturalism has not matured and legal measures with a clear multicultural message are piecemeal, only focusing on sporadic problems such as forced marriages, honour killings, female circumcision or polygamy.

2. Issues to consider

When multiculturalism becomes the norm and postures as the strong version of cultural pluralism demanding its manifestation in legal pluralism, it becomes a serious issue since this appears to be a threat to the territorial integrity of a state or when nationalism inherent in culture groups is perceived as a threat to the monolithic values or dominant culture within that state. Thus, if one accepts that cultural pluralism is the rule and should be reflected as strong legal pluralism, then the modern unitary nation state is an exception. If, however, the unitary state is the rule, then cultural pluralism, that is distinctiveness, cannot be reflected in the legal system as legal pluralism and becomes the exception. As William Twining says: 'processes of globalisation stir up old nationalisms, exacerbate cultural conflict, and encourage post-modern scepticism about the universality of values and ideas'.⁴

2 T. Gladwin, 'Cultures and Logical Process', in W. Goodenough (ed.), *Explorations in Cultural Anthropology: Essays in Honour of George Peter Murcock*, 1964.

3 V. Gessner, 'Global Legal Integration and Legal Cultures', 1994 *Ratio Juris*, no.7, p. 132.

4 W. Twining, 'Comparative Law and Legal Theory: The Country and Western Tradition', in I. Edge (ed.), *Comparative Law in Global Perspective*, 2000, p. 21.

It is true that legal development is a rational and natural response to existing social, economic, political, geographic and religious circumstances. However, there are many examples to prove that law has been made and used as a creative tool for bringing about certain desired effects and sometimes even needs in society rather than rationally and naturally reflecting peoples' needs and desires. Law can act as a harmonising agent with economic, social and cultural implications. Law can 'lead' and so change society rather than adjust a legal system to social change; it can 'follow' social change and reflect multi-cultures; or, it can 'tinker' and seek to keep the existing system operating while making adjustments to improve efficiency. Thus, law can be a reactor to social change or its initiator. These approaches to law have significant consequences for the dilemma surrounding the relationship of legal change to social change: law versus culture.

Many see an intimate connection between law and the culture of the society in which it operates. Others regard law as a tool for social engineering, finding practical adjustments, and reconciling conflicting and overlapping interests. It has often been asked whether a legal system can and should be used to change society, or whether the law is 'merely' a codification of existing social practices. Both questions can be answered in the affirmative depending on ideological predispositions and choice of illustrations.

The debate surrounding the wider issues involved and the pertinent philosophical underpinnings that centre around methods of thought, the historical school of jurisprudence, the interaction theory, social engineering, the pluralism of cultures and of laws, ethno-cultural differences, socio-political factors, the relationship between law and morality, universal standards versus local exceptionism, globalisation and localisation are of great significance today. In the Europe of today, multiculturalism should be viewed within this context.

The state and its laws, society and its normative orders and religion and world views, are expected to work together to achieve a balanced and sustainable legal order. Yet, legal centralism reflects the ambition of the modern nation state for total legal control and by definition rejects polycentric law. Though, as John Griffiths says, it may be that 'legal pluralism is the fact, legal centralism is a myth, an ideal, a claim, an illusion';⁵ in the Western world, the plural arrangement in a centralist legal system – the weaker version of legal pluralism – is the best on offer today. Catering for normative multiplicity, including normative dualism, without an overarching unitary normative framework does not seem to be in accordance with a unitary Western nation state.⁶

Indeed, moral pluralism, value pluralism, ethnic pluralism and cultural pluralism are part of social reality and have to be not only tolerated, but preserved. Yet, the translation of these into legal pluralism carries with it fundamental problems and may not be in the best interests of progress towards the targets of achieving a universal, comprehensive, internally reconcilable and cohesive moral or political monism. The fit is always uncomfortable.

5 J. Griffiths, 'What is legal pluralism?', 1986 *Journal of Legal Pluralism and Unofficial Law* 24, pp. 1-56.

6 We could give, for instance, the UK and Sweden as two examples of the reaction of the official legal systems to such challenges by diverse cultures (and religion). The English legal system reacts to such new challenges 'in a basically defensive form', the official legal system being assimilationist, though the legal treatment of diverse legal cultures seems inconsistent and confused. See W. Menski, 'Ethnic minority studies in English law', in R. Jones et al. (eds.), *Ethnic Minorities in English Law*, 2000, p. xvii. The other example, Sweden, also takes a stance that can be called 'combating multicultural' and asserts that equality demands that all citizens adhere only to 'the law of the land', rather than relate to something other than 'the law of the land'. See M. Jänterä-Jareborg, 'Family Law in a Multicultural Sweden – the challenges of migration and religion', in M. Dahlberg (ed.), *Uppsala – Minnesota Colloquium: Law, Culture and Values*, 2009, p. 143. Both systems, as well as many others, have difficulties especially when faced with, for instance, forced and/or child marriages (regarded as violating human rights), female circumcision (described as cruel, inhuman or degrading treatment), polygamy (violating sexual equality in the formation of marriage), *talaq* (a divorce with no judicial hearing and fair trial) and, sometimes, the wearing of beards and turbans (violating requirements of employment law).

The divides between the universal and the particular, homogeneity and heterogeneity, global and local can be discussed in the context of theories of modernisation, world systems and the homogenising and converging force of the global.⁷ It has been said that ‘the task for social science is to make sense of these new kinds of global-local relations’,⁸ in order to accommodate the local dimension.⁹ Roland Robertson claims that there is now an ‘interpenetration of the universalisation of particularism and the particularisation of universalism’.¹⁰ Where do we stand in Europe in this regard?

In our day, ironically, the trend to integrate and converge has moved the focus from the similar towards the different. Ethnic exclusionism versus universalism occupies much of today’s discourse. Can ‘global’ be regarded as ‘a collection of diverse ‘locals’? Does globalisation require us ‘to recognise “the Other” and, in doing so, to accommodate the “diversity” and “co-existence of cultures”’?¹¹ Can the universal be constituted in the perspective of each culture?¹² Yet, globalised, universal human rights seen as integral to liberalism, democracy, individualism and progressive change, are presented against the pervasive dominance by the community or the state and claim inclusiveness.¹³

3. Two illustrations in family law

One of the most important concepts of our times is equality and the following are the questions attached to this concept: Does equality demand absolute and total inclusiveness or have we now reached the stage where we can reject the terms of neutrality and consider the difference in the nature and composition of the community? Is there a collision between the ‘formal, universalistic’ conception of equality and the ‘social, localised’ conception thereof?¹⁴ Is it not the case that to treat those who are socially unequal equally, until they are made equal, is against the precepts of equality?¹⁵ Should solutions not go beyond the ideas of inclusion and integration? Should not the rhetoric of equality accept the factual inevitability of difference and accommodate the actuality of societal relationships,¹⁶ especially within the contextual subject of the family?¹⁷

The rhetoric of equality suggests supremacy and finality, being the ultimate expression of generality and homogeneity. However, cultural context indicates open-endedness, at times an

7 See R. Robertson, *Globalization: Social Theory and Global Culture*, 1992.

8 S. Lash Scott et al., *Economics of Signs and Space*, 1994, p. 312.

9 R. Robertson, ‘Glocalization: time-space and homogeneity-heterogeneity’, in M. Featherstone et al. (eds.), *Global Modernities*, 1995, pp. 38, 41. Also see M. Featherstone, *Undoing Culture: Globalization, Postmodernism and Identity*, 1995.

10 For a good discussion, see P. Fitzpatrick, ‘Globalisation and the Humanity of Rights’, 2000 *Law, Social Justice and Global Development (LGD)*, available at: <<http://elj.warwick.ac.uk/global/issue/2000-1/fitzpatrick.html>>, pp. 1-18 and Robertson, supra note 7, p. 100.

11 U. Hannerz, ‘Cosmopolitans and locals in World Culture’, in M. Featherstone (ed.), *Global Culture: Nationalism, Globalization and Modernity*, 1990, p. 239.

12 See B.S. Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*, 2002, pp. 268-289.

13 R. Howard, ‘Cultural Absolutism and the Nostalgia for the Community’, 1993 *Human Rights Quarterly* 15, pp. 315-338.

14 See a summary discussion on equality and inclusiveness versus equality and difference in S. Toddington, ‘Universalism, Multiculturalism and the Rule of law’, 2008 *Student Law Review* 54, p. 49.

15 For a critique of ‘equal treatment’ as opposed to ‘same treatment’ see J. Squires, *Gender in Political Theory*, 1999; and for the lack of protection for women inherent in treating everyone in the same way, see A. Phillips, ‘Feminism and Liberalism Revisited: Has Martha Nussbaum Got It Right?’ 2001 *Constellations* 8, no. 2, p. 249, and A. Phillips ‘Universal Pretensions in Political Thought’, in M. Barrett et al. (eds.), *Destabilizing Theory: Contemporary Feminist Debates*, 1992.

16 For a discussion of the neglect of the private sphere as a fundamental source of gender inequalities, see C. Pateman, ‘The Patriarchal Welfare State’, in C. Pateman (ed.), *The Disorder of Women: Democracy, Feminism and Political Theory*, 1989; and M.C. Nussbaum, *Sex and Social Justice*, 1999.

17 For a critical treatment of ‘relational theory’ in its application to family law as a contextual subject, see R. Leckey, *Contextual Subjects: Family, State, and Relational Theory*, 2008.

incommensurable coexistence of cultures, values and viewpoints and diversity.¹⁸ Today, it is often acknowledged that cultural context must be taken into account if legal frameworks are to function satisfactorily. This acknowledgement does not have to go so far as to claim that a plurality of parallel legalities should operate simultaneously, but to accommodate for differences within an overarching legal framework. With this in mind, a claim can be made that the actors best suited to the task are judges performing a balancing act considering ‘actuality’ and using the bottom-up model to alleviate the harshness of the top-down model,¹⁹ which more often than not reflects the ‘rhetoric’ of inclusive equality, seen as a *sine qua non* of our times.²⁰

In an effort to meet the demands of equality, the realities of social relationships have been ignored and brushed aside, in the hope that things would conform to the new ideal.²¹ This is most striking in the area of the Western approach to family law, which seems to disregard the actual and the very real inequalities of family relationships. Family law is dominated by consequentialist/utilitarian themes. The top-down framework may so dictate, but judges, as navigators between rhetoric and actuality, must be fully prepared and equipped to act creatively to fill the gaps and give direction to the legal rules in order to satisfy the needs of societies that they serve.²² Their legal output must match the societal input.

In family law, the principle of equality challenges tradition and rightly so, but, especially in relation to weaker parties, a protective approach to be adopted by the courts must be allowed to mitigate the standardising impact of this principle, as long as the courts are dealing with those who are in fact not equal. This approach should not be taken to mean that the traditional attitude towards women is being condoned here. It is an axiom of our times that men and women are categorically equal partners. However, being the weaker party in marriages – and this is the case in most societies whether admitted or not – women should be protected by law, not only the legal legislative framework today reflecting the rhetoric of absolute equality but by the work of the courts. Private law, especially family law, must be more society-oriented, manifesting itself in the aim of achieving an adequate level of protection for the weaker party. Even in societies where men and women are equal, since ‘some are more equal than others’, women need this protection.

I do not locate the issues in the framework of the binary opposition of multiculturalism versus feminism, universalism versus cultural relativism or secular versus religious practices, but I challenge the notion of equality, which I view as rhetoric when family realities point in a different direction. Mine is not in any way an attempt to associate women with the protection of cultural and traditional or religious values. Neither do I regard the secular normative framework, though it threatens cultural values, as an undesirable development. On the contrary, tradition and culture inimical to social and economic injustice to women should be eliminated categorically.²³ However, it is also worth remembering that family laws can never hope to be totally neutral, secular or pluralist. It is true that rights discourse can strengthen the politics of gender justice; but in the process women who in fact are the ‘weaker party’ in ‘family realities’ must be protected. Otherwise the rhetoric of equality turns against women’s interests. Empowerment

18 For a discussion of issues central to the concept of diversity, see S. Fredman, ‘Double Trouble: Multiple Discrimination and EU Law’, 2005 *European Anti-discrimination Law Review*, p. 13.

19 See E. Örüçü, ‘Judicial navigation as official law meets culture in Turkey’, 2008 *International Journal of Law in Context* 4, no. 1, p. 35.

20 Consider the notion of ‘mainstreaming’ gender, which also amounts to ‘sidelining’, in the second half of the 1990s at the EU level. See W. Kok and High Level Group, *Facing the Challenge: The Lisbon Strategy for Growth and Employment*, 2004. However, also consider the idea of ‘intersectionality’ used in the diversity discourse and in understanding inequalities. See N. Yuval-Davis ‘Intersectionality and Feminist Politics’, 2006 *European Journal of Women’s Studies* 13, no. 3, p. 193.

21 See S. Walby, ‘The European Union and Gender Equality: Emergent Varieties of Gender Regime’, 2004 *Social Policy* 11, no. 1, p. 4.

22 See Örüçü, supra note 19.

23 See S.M. Okin et al. (eds.), *Is Multiculturalism Bad for Women?*, 1999.

programmes may lend strength and accelerate the process of internal change towards gender discrimination,²⁴ but state regulation in the private arena can only be limited. Therefore, what is most needed are judges equipped with more discretion, the main concern being ‘protecting the weaker party’.

Fundamental questions that could be considered are: Is it legitimate for the legislature and the judiciary to interfere and try to change tradition and social reality? How far can concessions be given to tradition and yet at the same time the rhetoric be upheld? How can a balance be struck? What kinds of problems may be caused for society by slavishly adhering to the rhetoric of equality? Should the ensuing dilemmas be acknowledged, accepted or ignored? What are the consequences of each of these stances? Are measures for ‘protecting the weaker party’ commensurate with the principle of equality? Is legislative neutrality only a guise for political compromise? Has the European harmonisation process in family law succeeded in law but failed women? Has it been successful in curtailing the impact that judges can make and therefore is it in the process of hampering the creative capacities of the courts and thus further alienating women from the law and indirectly and discreetly empowering men further?

3.1. An illustration from Turkish family law

The amendments and the new provisions of the 2002 Turkish Civil Code, by opting for total equality between the spouses, do aim to bring Turkish family law into line with the laws of the Member States of the European Union and international instruments, as well as to give women the basic security of being able to rely on a law that gives them equality. This is commendable and yet, law here does not accord with the entirety of the socio-culture. We can only hope that, in time, what is provided for by law becomes internalised by both sexes and the society at large. However, within the framework of the ‘rhetoric of equality’, ‘family realities’ cannot be ignored. Indeed, the law assumes equality where it does not in fact exist. Equality and rights may oversimplify complex power relations. The exercising of rights in the private sphere has little to do with legal rights.

The 1926 Civil Code was taken with minor amendments from the 1907 (in effect in 1912) Swiss Civil Code. Section 169 of the 1926 Civil Code on ‘legal transactions between the spouses and transactions to the benefit of the husband’ permitted every type of legal transaction between husband and wife, though transactions involving the wife’s personal property or goods subject to community property could not be valid unless certified by a justice of the peace. This rule applied also to obligations undertaken by the wife towards third parties for the benefit of the husband. This meant that the law provided that a husband could become a guarantor for his wife’s debts but a wife could only become a guarantor for her husband’s debts with the agreement, approval or permission of the judge. Thus Section 169/2 was an exception to the wife’s capacity to act.²⁵ In addition, the transactions covered by this section were only ‘entering into obligations’ and therefore not ‘creating gains’, though the *Yargıtay* (the Court of Appeal) treated both types of transactions as being the same, giving Section 169/2 a wider interpretation. It is true that, at times, instead of protecting the wife this section was used as a trap for creditors. Therefore it was suggested that the boundaries of this provision should be kept as narrow as possible and should only be a requirement for ‘obligations’. The wife should not be used for the aim of evading or circumscribing the law. In order for Section 169/2 to be applicable, the obligation

24 See C. Hoskyns, ‘A Study of Four Action Programmes on Equal Opportunities’, in M. Rossilli (ed.), *Gender Politics in the European Union*, 2000.

25 In Turkish legal literature, some scholars considered this as ‘limited capacity’, some as ‘limited incapacity’.

(Sections 174 and 483 of the Code of Obligations, and Section 612 of the Code of Commerce) that the wife entered into should have been ‘for the benefit of the husband’. If the transactions were also directly for her own benefit, Section 169/2 should not have been applicable. Turkish law required ‘ratification’ by the judge, whereas the source, Swiss law, talked of ‘agreement’.

The whole issue reached the *Anayasa Mahkemesi* (the Constitutional Court) twice as a violation of the principle of the equality of the spouses. It arose first in a case where the wife had become a guarantor to her husband and a debtor to third parties in the husband’s interest without asking permission from the judge and was subject to execution proceedings. The wife claimed that her guarantee was null and void as it was not given in conformity with Section 169. The lower court was convinced that Section 169 was contrary to Articles 10 and 12 of the Constitution and, therefore, unconstitutional. The claim was that this provision, which appears at first sight to be protecting the rights of a wife, actually treats her as a minor since the husband in the same position does not need permission: the insinuation being that she is a second-class citizen. This view upheld the rhetoric of equality. Treating the realities of Turkish society as paramount, the *Anayasa Mahkemesi* opined that,

‘The aim of this provision is to protect the wife from entering into obligations unwittingly as she may not know the consequences, the scope and the aim of this debt. She may enter into such an obligation under the husband’s influence. This limitation is to protect the unity of the family and is in the public interest and therefore not unconstitutional.’²⁶

The three judges writing the dissenting opinion observed:

‘This unequal treatment of the woman violates the Convention on the Elimination of All Forms of Discrimination Against Women, any discrimination based on sex is illegal; national provisions should be viewed in the light of this Convention, not just the Turkish Constitution. Our Civil Code is based on the 1907 Swiss Code and it may have been meant to protect the wife; but in our day this is not acceptable. This protection presumes that the woman is less intelligent and less capable. Her legal capacity has been limited by this provision, which assumes that she cannot foresee the consequences of her actions. In addition, to protect only one of the members of the family does not amount to protecting the family unit. Our view is supported by draft Civil Codes prepared since 1982, none of which have this provision. In fact, this provision was removed from the Swiss Code in 1984; now consent to such a contract is demanded in relation to either party.’

A very similar case again came to the *Anayasa Mahkemesi* in 1999.²⁷ The facts were nearly the same and the claim of the lower court was the unconstitutionality of the second paragraph of Section 169 in view of Articles 10 and 12 of the Constitution. The *Anayasa Mahkemesi* reached the same conclusion with the same reasoning, that there was no unconstitutionality. There was again one dissenting opinion, now signed by four judges, the fourth being a new member of the Court. This time it was stated that in no other civilised country was there such a rule as that contained in Section 169. Obviously, for them, in the same vein as in the previous case, modernity, Westernisation and becoming a member of the European Union were more important than facing the realities of the country, so they upheld the rhetoric rather than the family realities.

26 1997/27; 1998/43; 30/6/1998 (*Resmi Gazete* 23934, 15.1.2000).

27 1999/47; 1999/46; 28.12.1999; (*Resmi Gazete* 23989, 10.3.2000).

These two decisions of the *Anayasa Mahkemesi*, though they still reflect the family realities in most Turkish marriages, have no bearing on the present situation, since this section of the 1926 Civil Code has now been changed, equalised and modernised. Now Section 189 of the 2002 Civil Code dealing with liability lays down a brief principle: ‘liability towards third parties is joint and several’.²⁸ Section 193 dealing with legal transactions of the spouses states that unless the law determines otherwise, ‘each spouse can enter into every kind of legal transaction with the other and third parties’. These could be regarded as welcome developments, which put men and women on an equal footing not only with each other but also in view of European developments. However, it could also be easily claimed that the development is unfortunate in a society where most wives live under the pressure of their husbands and are not financially independent, that this is a sacrifice of family realities to the rhetoric of equality. This development is detrimental to an illiterate woman who would sign any piece of paper under a threat from her husband and therefore is not in accordance with Turkish realities as they stand at present.

Although in Switzerland the equivalent provision was removed from the Swiss Civil Code on October 5, 1984, developments occurred in a different direction. In keeping with the equality principle, consent to such a contract is demanded in relation to either party as reflected in Section 494 Paragraph 1 of the Swiss Code of Obligations on guarantee contracts.²⁹ Thus, the Swiss see husband and wife as partners, uphold equality and still can maintain some protection.

So why is it that the Turkish legislator did not consider the Swiss option and has proceeded to create total equality between the spouses in the case of their becoming a guarantor for each other’s debts? How will the courts deal with this new ‘equality’? Can the courts prove to be better navigators between rhetoric and reality than the legislator? Cannot equality be created and protected in more ways than one? Why expose the wife to the economic perils awaiting her in the precarious free market of our times, at the mercy of the husband and his creditor. Is it just because the rhetoric of equality has to be adhered to absolutely in the name of modernity?

All that could be available to a ‘wife as guarantor’ now is a defence against the enforcement of the contract, which would have to rely on other provisions of the law of contract based on the claim that there had been no true consent since the agreement was obtained either under undue influence or by misrepresentation.³⁰ This could allow the protection of the wife through the back door, while still adhering to spousal equality as a principle. However, proof of this would be a tall order for the wife.

Turkish law is an example of a top-down model and there is no official recognition of pluralism.³¹ Should this be so? In such a system, the work done by the courts in everyday situations becomes of the utmost importance. In reformulating the law, the courts must attune it to the context to achieve the ‘best’ substantive result for spouses and for children. However, in this attuning, can judges override solutions and principles encoded in private law codifications or other laws by using the weapon of interpretation, when these provisions do not live up to what they regard as ‘socially just’? The language of universalism inscribed into the normative framework cannot alone be a sufficiently helpful emancipatory tool in the struggle against domination. A more nuanced approach to the realities of married women’s lives must be

28 Section 189: ‘When representing the family unit, the spouses are liable to third parties jointly and severally. A spouse who enters into a transaction without the capacity to represent the union will be personally liable. However, if the capacity to represent has been exceeded to a degree not to be understood by third parties, the spouses are liable jointly and severally’.

29 The Turkish Code of Obligations (TCO) was also translated and received from the Swiss Code of Obligations in 1926 and the section equivalent to the Swiss Sec. 494 is Sec. 485 in the TCO. However, there has been no corresponding development in Sec. 485.

30 Sections 21, 23, 24, 28, 29 and 30 of the Code of Obligations.

31 See E. Örüçü, ‘A Synthetic and Hyphenated Legal System: The Turkish Experience’, 2006 *Journal of Comparative Law* 1, no. 2, pp. 27-47.

encouraged. Courts must remain active in spite of the legal framework. Nevertheless, they have to provide consistent ‘relevant criteria’ and resolve issues such as ‘adequate justification’, ‘distinction without reasonable ground’, ‘genuine qualifications’ and ‘motif légitime’ to be used in their judgments to pass muster and satisfy academic scrutiny.

3.2. The Work of the Commission on European Family Law

If we now turn our gaze to another illustration, the work of the Commission on European Family Law (CEFL), can we say something on harmonisation?³² Let us first take note of the fact that in family law the so-called common law/civil law divide is not a determinant as far as values are concerned and family law is predominantly about values. This divide is reflected only in the role and the discretionary powers of the courts. What is crucial here is religion. In secular societies moral values that reflect religious positions do not disappear. Differing political economies do have a role to play in choices made by top-down models, but, overall, this is of lesser importance to the people.

Although it may be said that in our day religion is on the decline in the predominantly secular Western Europe, this is happening at best at different speeds in different societies. In Eastern and Central Europe, however, the direction is not the same in some of the former socialist republics, if not the reverse. It is also worth remembering that religion has been traditionally a major source of conflict between European countries historically. Protestant, Catholic and Eastern Orthodox Christianity divided Europe into North and South, and East and West. In many of the countries in Europe today, in spite of secularism at the level of the legal systems, there are divided religious structures following the patterns of multiculturalism, also exacerbated by large-scale migrations from outside the EU. It must be remembered that each country has a multifaceted culture and, internally, law and culture do not mirror one another.

To put it crudely, as religion is reflected into the concept of the family, we see that in the predominantly Lutheran North family ties are weak and welfare systems are strong, whereas in the mostly Catholic and Eastern Orthodox South, family ties are strong and welfare systems are weak. It is also a fact that in Northern Lutheran countries and Great Britain the divorce rates are higher than in the Southern Catholic countries. The number of births outside marriage also follows a similar trend, being high in the North and in Great Britain and low in the South.³³ In Turkey with a secular legal system, and a family law derived originally from Switzerland (reflecting the Swiss divided religious structure), yet quite similar to the Southern Catholic and Eastern Orthodox countries, we observe that the predominant values held by the people are traditional and conservative, 98% of the population being Muslims of different traditions, sects and schools.

An interesting scale of values came to light in a survey which we carried out juxtaposing some selected systems to the General Principles on divorce and maintenance drawn up by the CEFL. The scale ranged from a Lutheran population with an ex-socialist secular legal system (Estonia), a number of secular legal systems with Evangelical Lutheran populations (the Nordic countries), a predominantly Roman Catholic population with a secular legal system (France), a Roman Catholic population with an ex-socialist legal system (Lithuania), a predominantly

32 The following observations are a summary of the final assessment part of our work juxtaposing some legal systems to the General Principles drawn up by the CEFL in the area of divorce and maintenance. See E. Özücü, ‘The Principles of European Family Law Put to the Test: Diversity in Harmony or Harmony in Diversity?’, in E. Özücü et al. (eds.), *Juxtaposing Legal Systems and the Principles of European Family Law on Divorce and Maintenance*, 2007, pp. 233-254.

33 See further on what factors divide Europeans, M. Guibernau, ‘Introduction: Unity and Diversity in Europe’, in M Guibernau, (ed.), *Governing European Diversity*, 2001, pp. 1-34 at pp. 14-19.

Protestant Anglican population with a secular legal system (England and Wales), a mixed Presbyterian Protestant – Roman Catholic population with a secular legal system (Scotland), a Roman Catholic population without a secular legal system (Malta), to a Muslim population with a secular legal system (Turkey). The impact of the values these beliefs embody can be traced in their present family laws – secular or not – and regardless of their membership of the civil law or common law families. However, all these countries are on the path of modernisation but, within their own circumstances, definitely at different speeds and not necessarily in the same direction.³⁴

For the people then, the family, with its values, aspirations and mentalities, is responsible for all its members and especially those who cannot be in paid employment: the young, the elderly, the infirm and those in full-time education. Different societies, however, organise these tasks in many different ways, with significant variations. In order to appreciate the differences, different historical, political, socio-economic and, above all, cultural and religious contexts must be kept in mind.

Culture is the product of historical influences and it is not uniform but hybrid. Obviously long-standing historical patterns can be altered, otherwise there would be no room for reform. To the extent that cultures remain closed or are self-referential, they become mummified. However, though cultures can be dynamic and be influenced by evolutionary change, this change should be spontaneous and autonomous to be healthy, internalised and continuous to be effective and a bottom-up development to be acceptable.

Although Masha Antokolskaia regards CEFL as providing a model for the voluntary bottom-up harmonisation of family law,³⁵ this assessment can be challenged by the fact that, since CEFL targets national legislators – even if only hoping to be a source of information and inspiration – this can only bring about a top-down method of harmonisation. There is no suggestion here of a spontaneous bottom-up convergence.

There is always tension between tradition and transformation that almost invariably leads to conflict between the two. Though consensus can mostly be achieved after negotiation, ‘certain positions are not open to negotiation and dialogue’.³⁶ When considering family life in Europe, diversity comes to the fore, though there are some signs of commonality in the development of societies. The European context is shifting, countries being transformed broadly in the same direction such as in fertility and divorce, says Catherine Lloyd.³⁷ However, she also points out that ‘political and social developments in different countries have followed very different trajectories.’³⁸ In addition, in our day, there is no longer one socio-culture in any one country either.

For instance, over the centuries, divorce laws have evolved in Europe from no divorce, divorce as a sanction, divorce as a remedy, divorce as a spousal decision, to divorce as a right. These options reflect different visions of the family, marriage and morality, and different balances between the intervention of the state and the Church, and spousal autonomy.³⁹ Today, divorce remains based on many grounds: on fault, on irretrievable breakdown, on separation, on

34 See for a different view see M.V. Antokolskaia, ‘The Process of Modernisation of Family Law in Eastern and Western Europe: Difference in Timing, Resemblance in Substance’, 2000 *EJCL* 4, no. 2, <<http://www.ejcl.org/42/art42-1.html>>.

35 M.V. Antokolskaia, *Harmonisation of Family Law in Europe: A Historical perspective – A Tale of Two Millennia*, 2006, p. 362.

36 C. Lloyd, ‘The Transformation of family life and sexual politics’, in Guibernau, supra note 33, p. 165.

37 Ibid.

38 Ibid.

39 For an analysis of these trends see M.V. Antokolskaia, ‘Convergence and Divergence of Divorce Laws in Europe!’, 2006 *Child and Family Law Quarterly* 18, no. 3, p. 308; and for a helpful concise history of developments, pp. 309-323.

consent and on demand. Some legal systems use a combination of these bases. Some use one or two. Some have difficult procedures and time limits while others have easy procedures. A few which appear to provide for easy and quick divorce have surrounded it by unforeseeable restrictions. The differences reflect historical developments, cultural and religious differences and ideological preferences. All that this tells us is that the common core is very limited and any General Principles to harmonise family law in Europe relying on common core research will be of little use. The only effective type of harmonisation today can be top-down intervention reflecting a vision for the future with provisions based on the 'better law' approach. This may provide a desirable modern legal framework but could be regarded as unacceptable in today's multicultural societies.

Cultural diversity necessitates that legal diversity should be maintained. It could legitimately be asked why people should amend their laws in order to meet the requirements of a vision that they do not share. Comparing Estonia and Lithuania, for example, we see the typical phenomenon of convergence under pressure during 1940-1991, followed by a spontaneous divergence reflecting the different cultural/religious contexts – hitherto suppressed – under which the majority of the population live.

Assumptions relying on: working women, equality, women capable of supporting the family and self-sufficiency relate to the values and realities of some societies and not to all. We might consider these values as highly desirable. However, even if that were the case, what is the justification for outside interference in democratic societies? An additional concern must be: Why should some sets of values trump others? Especially in systems where considerable public consultation takes place so that laws more or less match public opinion and expectations, top-down intervention of this sort would be totally unacceptable. In pressing for the transformation of family life, bottom-up strategies are crucial. For this, internally organised social movements are more effective than external interference or even internal legislative enactment.

Can we then endorse the following remarks by Josep Llobera?

'National identities are here to stay. Any forward-looking perspective has to come to terms with the persistence of some very basic categories such as kinship, language, culture, religion and historical memory. The importance of any of the categories may vary from place to place; what matters is the specific combination that occurs in each nation, and which makes it different from others. It is probable that a kind of 'European identity' will be on the increase along with, but not against or as a substitute for, national identities.'⁴⁰

There might very well be an eventual 'norms diffusion' and 'identity change' and European integration may have a transformative effect on the laws of the Member States. However, first, there is as yet no formal harmonisation of family law and, second, even if there were such harmonisation, empirical research suggests that, because of 'differentiated integration', 'partial implementation' and 'flexibility' arrangements inherent in the EU structure, 'convergence' is absent, though there is evidence of 'mutual influence' and 'interdependence'. Antoaneta Dimitrova and Bernard Steunenbergh's research shows that 'no clear and unambiguous trend towards convergence due to the influence of European integration can be found.'⁴¹

40 J.R. Llobera, 'What Unites Europeans', in Guibernau, supra note 33, p. 193

41 A. Dimitrova et al., 'The Search for Convergence of National Policies in the European Union', 2000 *European Union Politics* 1, no. 2, pp. 201-226.

Family life and family law may have an instrumental dimension but their emotional dimension is more prominent. The famous EU slogan ‘unity in diversity’ means that there must be a mutual understanding and acceptance of this diversity. In the type of project we were dealing with, it would be difficult to generate a popular response in favour of a harmonised Europe-wide family law, harmonised through Principles drafted by a committee of legal experts, with the gaps to be filled in by national legislators – Principles that seemingly reflect the value system of a particular world view. There is no indication that these Principles reflect what the majority of the population in the legal systems under review would regard as desirable to replace the product of their own legal cultures. Yet, at the same time, Europeans do need standardised approaches and solutions for at least cross-border relationships. Thus, we end up in a dilemma. For the important work of the CEFL not to remain merely academic and exposed to the critical voices of the multiculturalists and Eurosceptics, a way forward must be found.

Antokolskaia concludes her research into the convergence and divergence of divorce law in Europe by saying that all ‘will unavoidably meet each other at the finish line’,⁴² and suggests that ‘administrative divorce on demand’ might be the ‘final point’ for developments in divorce law, thus implying that the ‘modernisation trend’ coincides with a ‘convergence tendency’. This, for her, would be ‘uniformity by way of a spontaneous modernisation/convergence process.’ Maybe one day we will end up at another ‘final point’, whereby one spouse grants a divorce to the other without the involvement of the state in any form or fashion. Maybe one day ‘marriage and divorce will not be regulated by law at all’! She does admit, however, that such futuristic interpretations seem ‘far too speculative’.⁴³

Concluding remarks

In works looking at the legal cultures of Europe, or considering the EU as a multi-level system of governance, or talking of Europe’s legal pluralism, the nation states are still taken as the units of inquiry. This is a fact. However, sub-cultural differences which rely on social class, the level of education, gender, age, religion, ideology or ethnicity are much more difficult to determine. For instance, the effects of the level of education on legal values seem to indicate that the more educated support the rule of law, favour individual liberty and believe in the neutrality of law.⁴⁴ Differences in legal values are rooted primarily in social class and are even more indicative of this: ‘It is those who profit from the existing socio-economic structuring of society who tend to view law as a beneficent institution’.⁴⁵

It may be that when problems arise stemming from the interruption of habitual behaviour, the natural fear of unfamiliar institutions would diminish and disappear over time with a sensitive handling of the cultural layers rather than by changing the law to meet the demands of those layers. Convergence in Europe is the acceptance of shared values. In an atmosphere of building a ‘common legal culture’ and unity in Europe and also facing cultural pluralism, should the emphasis be on the demand side of the bottom or the supply side of the top?

The issue of multiculturalism in a Western unitary nation state connotes catering for diverse cultures within its borders – at times with rules inimical or even repugnant to the official state law – demanding recognition, while at the same time aiming towards maintaining a ‘national

42 Antokolskaia, *supra* note 34, p. 329.

43 *Ibid.*

44 J.L. Gibbon et al., ‘The Legal Cultures of Europe’, 1996 *Law and Society Review* 30, p. 55.

45 *Ibid.*, pp. 70-73.

identity'. For the EU, however, the issue of multiculturalism connotes catering for an increasing number of diverse nation states – themselves struggling to come to terms with diverse internal cultures – in a multi-cultural framework external to the nation states, while at the same time aiming towards building 'a European identity', 'European citizenship', and in the long run, 'a common European culture'.

A cosmopolitan and pragmatic approach would say that in a globalising world, there is an advantage as well as an inevitability in convergence, that the fundamental values represented by universal standards of human rights should override all other claims to 'exceptionalism', that cultural diversity which can be regarded as the spice of life, should stay cultural and not reflect into the legal world, that there should be overarching legal systems all striving towards transnational, regional, inter-communal levels bringing a uniformity of modernity to the legal world which can accommodate multiculturalism in society. At no stage should multiculturalism impede the progress of the law towards these aims. The pursuit is towards ideals of rationality, harmony and reform using a selection of the legal rules and materials best suited to the task.⁴⁶ The acceptance of pluralism is to be qualified. Internal group norms repugnant to some overarching sense of natural justice and morality will not be enforced. A society can only remain healthy if diversity does not threaten unity of purpose. There can only be room for 'qualified legal pluralism'.

One does not have to be either a multiculturalist or a Eurosceptic to ask the following questions which await resolution: When official law meets cultures different to the dominant value system it represents, what should it do? Is it true that only trans-cultural and morally neutral rules can work successfully in a multi-cultural society? Can a legal system of the modern type be independent of social and cultural systems? How do we recognise cultural practices and how is culture to be measured? What should be the criteria of proof and who should bear the burden of proof? Who represents culture? Do the diverse communities have internal governance structures to pronounce authoritatively upon internal rules? Within the EU, another issue may also become crucial: the European harmonisation of rules may even trump certain legal exceptions introduced earlier by a legal system in response to the needs of diverse cultures therein. If transplanted law can create change in a different socio-culture, can domestic law not do the same? Can European law create such an umbrella?

In a modern unitary nation state of the Western type, the accommodation of cultural diversity and multiple normative orders can only be brought about by the judge, who is the tuner or navigator and steersman of the law, by using discretion and creative interpretation and not by the legislators, whose main demarcation lines are clearly drawn within domestic law by the Constitution, and within Europe and within the EU by the demands of human rights and 'ever closer integration'. Domestic courts will become even more important as navigators and tuners of the law in the coming years, in their efforts to keep the ships in shape and on course. I believe that in both of the illustrations above, the Turkish family law and the General Principles of the CEFL, more scope should be given to the judges to cope with and to create the necessary 'fit' between law and culture.

Although this work has approached its subject obliquely, note that I make my observations neither as a multiculturalist (or better still, not as a supporter of multiculturalism being reflected into the stronger version of legal pluralism) nor as a Eurosceptic. Yet, the issues I discussed above worry me more and more as we progress into the 21st century.

⁴⁶ M. Bussani, "'Integrative' Comparative Law Enterprises and the Inner Stratification of Legal Systems", 2000 *European Review of Private Law* 8, p. 89.

Delmas-Marty in her new book 'Ordering Pluralism' asks how can we move beyond the relative and the universal to build order without imposing it, to accept pluralism without giving up on a common law in the 21st century. Opting neither for utopian fusion nor for illusory autonomy, *Ordering Pluralism* is her answer: it means creating a common legal area by progressive adjustments that preserve dignity. This could be regarded as an epistemological revolution. It is posed that since an immutable world order is impossible, 'the imaginative forces of law must be called upon to invent a flexible process of harmonisation that leaves room for believing we can agree on – and protect – common values'.⁴⁷ Can this provide the remedy to our woes?

47 M. Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World*, 2009.