CDCT Centro di Diritto Comparato e Transnazionale

The European Legal Culture Project, University of Turin

CDCT working paper 13-2012
ISSN 2280-9406 [Online]

European Legal Culture

Domenico Francavilla

Uniformising or pluralising family law in Europe? An inclusive comparative approach

Suggested citation: Francavilla, Domenico, "Uniformising or pluralising family law in Europe? An inclusive comparative approach", CDCT working paper 13-2012/ European Legal Culture 7, available at http://www.cdct.it/Pubblicazioni.aspx

ACKNOWLEDGMENTS

The research leading to these results has received funding from the University of Torino under the agreement with the Compagnia di San Paolo – Progetti di Ateneo 2011 – title of the Project "The Making of a New European Legal Culture. Prevalence of a single model, or cross-fertilisation of national legal traditions?" academic coordinator Prof. Michele Graziadei.

La presente pubblicazione è frutto della ricerca svolta nell'ambito del Progetto di Ateneo 2011 "The Making of a New European Legal Culture. Prevalence of a single model, or cross-fertilisation of national legal traditions?" , coordinatore scientifico Prof. Michele Graziadei, finanziato dalla Compagnia di San Paolo.

Abstract

IT *L'articolo identifica alcuni problemi relativi al posto e al potenziale ruolo delle minoranze etniche nel quadro delle tendenze verso l'uniformazione del diritto di famiglia in Europa. Affronta alcune questioni teoriche riguardanti la 'logica' dell'uniformazione e tratta del problema generale della desiderabilità e fattibilità di un diritto uniforme. L'analisi fa riferimento agli sviluppi del diritto di famiglia hindu moderno al fine di evidenziare da un punto di vista comparativo la dinamica tra uniformità e diversità nel contesto indiano, e fornisce una prospettiva su un approccio comparativo di tipo inclusivo come strumento per analizzare l'accomodamento dei diritti delle minoranze etniche nel contesto europeo che non li confini in una sfera a parte sia dal punto di vista teorico che da quello pratico.*

EN *The article identifies some issues concerning the place and potential role of ethnic minorities within uniformising trends of European family law. It addresses several theoretical questions concerning the 'logic' of uniformisation and deals with the general problem of feasibility and desirability of uniform law. The analysis makes reference to developments in modern Hindu family law aiming at highlighting from a comparative point of view the dynamics between uniformity and diversity in the Indian context, and provides an account of what an inclusive comparative approach would mean as a tool to analyse the accommodation of ethnic minority laws in the European context without confining them in a realm apart from both a theoretical perspective and a practical one.*

Keywords: Uniformisation – Ethnic minority- Europe

UNIFORMISING OR PLURALISING FAMILY LAW IN EUROPE? AN INCLUSIVE COMPARATIVE APPROACH

DOMENICO FRANCAVILLA*

1. Ethnic minorities and uniformising trends in European law - 2. Towards a European civil code? - 3. The logic of uniform law - 4. Inclusive comparative approach – 5. The place of differences

1. Ethnic minorities and uniformising trends in European law

The interaction between the rules followed by ethnic minorities and official European legal systems in multicultural Europe is inevitably connected to a tension between uniformity and diversity. This tension between legal uniformity and legal diversity is a general feature of legal systems and one could argue that the entire history of law could be read from the perspective of different balances reached between these two 'forces'. In a sense, modern law in Europe has been the outcome of the making of uniform State laws, and medieval law, although not uniform, was characterized by a balance between local laws and a tendency towards universalism, which is at the basis of what is called *ius commune* (see in detail Cavanna 1982). On the other hand, clearly this is not just a European legal phenomenon. Ancient Indian law, for instance, may be seen as the result of a dynamic between local legal systems and general laws, as expressed in *dharmashastra* literature, made up basically of doctrinal opinions, which was universalistic in character, albeit universalism in this context was by no means the kind of state-directed uniformity which is assumed in modernity.[1] From a theoretical point of view, the couples uniform-diverse, monist-pluralist or, in simpler terms, one law-many laws are crucial and have been variously elaborated in several legal traditions and – even more significantly – continuously demands new conceptualizations.

In this sense, the current debate on legal practice and accommodation of cultural diversity in Europe is better addressed when linked to more general theoretical questions.[2] This also helps to avoid that sense of the analysis of the

*Professore Associato di Diritto privato comparato, Università di Torino; Research Associate, School of Law, School of Oriental and African Studies, University of London; domenico.francavilla@unito.it

[1] On the interaction between *dharmashastra* and local customary laws in India see Menski (2003) and Francavilla (2006).

[2] On this debate see, for instance, Grillo et al. (2009).

rules followed by ethnic minorities as a minority issue as often perceived by legal scholars. On the contrary, such difficult issues require investigation into general jurisprudential questions (see e.g. Cotterrell 2006, 2007; Menski 2006) and, at the same time, can improve our understanding of other legal fields. This article aims at dealing with legal practice and accommodation in multicultural Europe from the perspective of general uniformising trends in European laws. In fact, if the tension between uniformity and diversity is real, as it seems to be, an investigation into these trends and, more generally, into the logic of uniformisation could help us to understand the nature and limits of accommodation.

Placing the focus on family law several questions arise concerning European law as a whole: is there any uniform family law in Europe at the official level? How much cultural diversity exists between the family laws of the official systems of European countries? Are these systems converging? What problems could be experienced in writing a uniform European civil code in family matters? More generally, is uniformity of family laws in Europe desirable and/or feasible? In this framework, a further dimension could be added by considering the role and place of the rules followed by ethnic minorities in family matters in Europe. How do these harmonisation processes impact on ethnic minorities? How could ethnic minority family laws be accommodated in a uniform European family law, if not in an hypothetical European civil code?

Family law can be seen as a series of interconnected rules ranging from the age for marriage to maintenance, from adoption to divorce. This research endeavor should take into account the interaction between several kinds of law in the European context at different levels aiming at highlighting processes of uniformisation and pluralisation on the ground. In this article I focus on some issues that seem particularly worth considering. First, I briefly sketch the general rationale of uniformising trends in European laws. In this regard, European contract law is by far the most advanced field, even though work on European uniform family law is visibly increasing. This situation depends on the 'exceptional' character of family law, which is due to the fact that family law is more visibly connected to cultural and community identity. In fact, one could hold that uniform law may be good in contract law but bad in marriage law, and this attitude is widely diffused among scholars and policy-makers as far as European laws are concerned. Nonetheless, when one comes to the rules followed by ethnic minorities in Europe this concern for diversity seems to be superseded. In addition, it is worth remembering that, although family law in Europe remains the central concern for ethnic minority issues, other parts of law, including contract law, are now more visibly involved, as the case *Khan v. Khan* clearly shows.[3]

[3] *Khan v Khan* [2007] EWCA Civ 399. On this important case decided by the Court of Appeal of England and Wales see the analysis by Ballard (2009).

I then address some general issues concerning the logic of uniformisation and deal briefly with the general problem of feasibility and desirability of uniform law. In this context, I will make reference to some reforms in modern Hindu family law and to the debate on the Uniform Civil Code in India, which concerns family law, while contract, property, tort, etc. are already uniform, at least in the sense that they are not applied on a personal basis. Finally, I provide an account of what an inclusive comparative approach would mean. At the end of the day, the theoretical question I address concerns the place of differences. Provided that diversity is a fact, at what level could and should it be effectively dealt with?

2. Towards a European civil code?

The uniformisation of European private law is presently carried on with reference to several legal fields. This process concerns EU law as such and national legal systems. More analytically, 'uniformisation' could be distinguished from 'harmonization', which is typical of EU directives. A uniform European law is not necessarily the outcome of legislation but, in this context, a European civil code may be seen as the highly symbolic expression of a single private law governing all European citizens in all European states. The debate on a future European civil code has become a standard issue for comparative lawyers. Some are enthusiastic about this project, while others are skeptical (e.g. Legrand 1997; Cotterrell 2007). In any event, much scholarly research addresses this issue. This scholarly endeavor is at the same time highly theoretical and practice-oriented. In fact, legal research addressing difficult comparative issues across European laws is potentially the basis for sustained legal reforms. The making of a uniform European law, and possibly of a uniform civil code in Europe, includes the activity of several research groups and projects. Among these, one can mention the activities of the Lando Commission, the Common Core of European Private Law project, the Acquis group project, the Study Group on a European Civil Code and the activities of the Commission on European family law.[4]

As concerns ethnic minority issues, one of the most interesting aspects of this impressive movement towards uniformisation is that it is based on the idea of a preliminary ascertainment of what European law really is. Particularly, the Common Core project aims to "unearth the common core of the bulk of European private law, i.e., what is already common, if anything, among the different legal systems of European Union Member States" (Bussani-Mattei 1997). The Acquis group project is inspired by a similar perspective and the main difference is that it is concerned with EU law as such and aims at elaborating the principles of existing EC law, while the common

[4] For a clear outline and critical analysis of convergence of private law in Europe see Smits (2007). On different working groups and their method see Bussani-Mattei (1997) and Antokolskaia (2007).

core project is concerned with the national legal systems of European countries. The works of the Commission on European family law adopt the common core approach and combine it with the 'better law' approach, that is to say an approach that select what could be seen as the best legal solution, independently from its being common.

All these approaches and particularly those that are more assertive about the goal of a uniform civil code are debatable, but what is interesting for the problem of legal practice and accommodation of cultural diversity in Europe is the attempt to define something like a common core of European law, what is common and what is different in all European laws, and therefore, in some sense, the boundaries of European laws. In fact, the supposed conflict between some ethnic minority laws and European law, meant as both the law of European States and EU law, is still largely ideological and not sufficiently empirical. A better understanding of the real boundaries of European laws, and of the range of possibilities, could help to discern where exactly some ethnic minority laws conflict or may be accommodated.

This debate concerns primarily contract law but also family law is more and more analysed from the perspective of uniformising European laws. As mentioned, family law is often seen as a realm apart, being more cultural, and, as a result, comparative family law is a less established subject than comparative contract law. For certain, while same-sex marriage, divorce, polygamy have always given rise to hot debates and social movements, contract law and other parts of are much more technical, even though national legal traditions may contrast uniformisation in these fields also.

Coping with the issue of an hypothetical European uniform family law one could highlight that European laws here basically mean the official family laws of European countries, with their norms on marriage, adoption, divorce, patrimonial aspects and so on. Crucial to the argument here is that this debate should not avoid taking into account Muslim, Hindu and other originally non-European family laws. In my view these are now European laws in the extent to which they are followed in Europe by wide communities and significantly by individuals that are in many cases European citizens. In this sense, the debate on uniformisation could be an important opportunity for understanding the place of these laws side-by-side with other family legal regimes in Europe.

Furthermore, the comparison of European family laws opens a broader space than that existing within the boundaries of a single European state law. In other words, European diversity helps us to understand diversity as such and therefore could potentially make room for a more sensitive attitude towards ethnic minority cultural diversity. On the other hand, Ballard (2007) highlights that Europe has often dealt with cultural plurality and the novelty is now the unfamiliar, extra-European and non Judeo-Christian, character of

new dimensions of plurality. In this sense, the awareness of European cultural diversity is not a guarantee of accommodation of further cultural diversity.

Therefore, the idea of a common core of European laws has much to say, in my view, about ethnic minority issues and, furthermore, ethnic minority issues would have much to say in this debate, and it is a lost opportunity that they are not fully considered from those perspectives. To be clear, in so saying, I do not want to engage myself here with the idea of the European civil code. I simply think that this debate is instructive, independently of the outcome of unification, in its descriptive aspects for the identity of European laws and, more generally, for the kinds of attitudes it may reveal. I am also interested in considering this possible European civil code in the perspective of accommodation in multicultural Europe as a speculative issue.

Actually, if this code is hypothetical, even more hypothetical is that this code would acknowledge ethnic minority laws. These laws are normally located in the shadow of official state laws. They may be recognized by official judgments or new specific legislation, but for certain these laws are generally recognized as official laws of almost no European country and no generalized system of personal laws comparable with the Indian one is operating in Europe. Therefore the debate on a uniform European civil code, specifically in family matters, is framed in terms that differ from the debate on the Indian uniform civil code, where the problem is whether to supersede the system of personal laws and adopt a uniform civil code for all Indians, irrespective of their being Hindus, Muslims, Parsis and so on. On the contrary, the starting point in Europe is the uniformisation at the European level of uniform state laws.

Nonetheless, the difficult enterprise of writing a European uniform family code could be an opportunity to consider the possible accommodation of ethnic minority law within a European code. In other words, once the door is opened to consider what norms should be written in this code, one should ask what one could do to accommodate plural Europe within this code. How inclusive would this hypothetical code be? I use the term 'inclusive' considering that European law, in its broader meaning, should be considered as including also non-originally European laws that are presently followed in Europe even though at an unofficial level. As far as many ethnic minority members are European citizens, a uniform civil code should take them into account.

3. The logic of uniform law

What would a uniform European family law be like? The answer to this question requires a better understanding of how uniformisation works. Starting from a situation of considerable pluralism on the ground, and assuming that one wants to move towards a single uniform law applicable to all those who up to then were subject to several different laws, what routes

one could take? Specifically, is uniform law a new law? Or is uniform law one of the preexisting laws that comes to be generalized? Who makes uniform law? Why is uniform law so attractive? Even more fundamentally, is it formal uniformity or substantial uniformity that counts?[5]

In this regard, we can usefully consider the debate on the uniform civil code in India. One of the reasons why it seems to be a failed attempt is that Indian Muslims fear that basically a sort of modified Hindu law would be applied to them. In other words, the fear is that uniform law would be nothing else that the generalization of one of the preexisting laws, the Hindu one. If we look at the reform of Hindu law after Indian independence, which aimed at amending and simplifying preexisting Hindu law, it can indeed be observed that this reform was made in some areas by generalizing some specific Hindu legal rules to all Hindus. The clearest example is provided by the case of monogamy, which was elevated to a general rule for all Hindus, in spite of the fact that significant Hindu communities were in fact polygamous. This means that the rule followed by a part of the society is generalized and extended to all those falling under the jurisdiction of the law of that society.

Another example could be provided by reference to dowry in Italy when family law was reformed in 1975. Dowry was an institution clearly recognized in the Italian civil code (1942) and was followed in many societal contexts, particularly but not only in the South of Italy, while it was not followed in other areas of Italian society. The reform promulgated in 1975 abrogated the norms on dowry, which ultimately became a forbidden practice. In this way, the rules that were already followed by some parts of Italian society were extended to all parts of society and institutionalized in the civil code. Formal written rules have, in many cases, precisely this role of extending by imposition some rules that have had their origin or are followed in some localized context. Interestingly, one could argue that those following dowry practices under the civil code, continued to follow dowry practices against the official law after 1975. In other words, dowry became the unofficial law of some parts of Italian society. This also shows that methodologically one could consider unofficial European laws, for instance unofficial southern Italian dowry practices, as comparable to unofficial South Asian laws in Europe.

In any event, the point I want to make here is that uniformisation actually comes down to generalization and this means that uniformisation disacknowledges diversity not simply because it is uniformising but, more significantly, because it reaches uniformity by setting aside some forms of life. In fact, in principle, one could imagine a different way to uniformisation, that is to say, uniformisation reached by producing a genuinely new uniform law

[5] The distinction between formal and substantial uniformity is used by Werner Menski (2008) in his analysis of the debate on the Indian uniform civil code and aims at demonstrating the existence of harmonization patterns in Indian personal laws. On this issue see also Menski 2010.

that tries to accommodate several different preexisting laws. But this new uniform law is hard to conceive of. In fact, what actually happens is that some preexisting rules will prevail over others by reason of their prestige or following the application of a 'better law' principle. Diversity could be preserved only through a uniform framework that makes room for on-the-ground legal diversities by accepting the pluralisation of rules, so to say, at a second level. For instance, the Hindu Marriage Act, 1955, introduced some uniformity in preexisting Hindu laws but renounced the regulation of all aspects of marriage and recognized, in some cases, local customs in two ways: by laying down a general rule that could be derogated by customs, as in the case of degrees of prohibited relationship, or by renouncing any general rule and making reference directly to customs, as in the case of the solemnisation of marriages.[6] It is worth remarking that under official Hindu law, in order to be applied, customs must be certain, reasonable and not opposed to public policy. This test could be seen as a uniformising factor, setting aside those customs that are, so to say, beyond the boundaries of the legal system. On the other hand, much depends on the judicial application of these criteria to assess customs.[7] As a result we have a piece of legislation that makes some rules uniform, provides a general framework for other non-uniform rules and, in so doing, allows a certain degree of diversity. Judicial application may tend to uniformise this diversity or to pluralise those norms that seem to be uniformised, depending on the specific case. Needless to say, in spite of any kind of state legislation or judicial application, some rules will continue to be followed at the unofficial level.

Law is inherently plural and this depends on the very same legal process. In fact, rules have a localized origin in specific social groups and then are diffused to an entire society and institutionalized in a formal legal system. If legal diversity is a fact, the making of a legal system is basically a process of uniformisation and centralization in contrast to competing processes of pluralisation. Even when there is no uniform law, uniformising processes happen and, on the other hand, even when there is formally a uniform law, pluralizing processes continuously happen. Uniform law is also related to the making of wider integrated communities including originally separate groups. Interaction within these communities tends, in the long term, to select some rules, setting aside other originally coexisting rules. In other cases, on the contrary, some social groups can emerge as distinct communities and separate themselves from their original community because they elaborate new rules that cannot be integrated and legitimated in the original normative system. In this sense, social cohesion requires a certain degree of acknowledgement of

[6] A comprehensive analysis of the Hindu Marriage Act, 1955, explaining the role of customs in modern Hindu law may be read in Menski 2003.
[7] On this complex issue see Menski 2003.

different practices. But, as we will see, unity does not strictly require uniformisation.

4. Inclusive comparative approach

Law is a complex reality and what seems uniform may be not uniform and vice versa. Where should similarities and divergences be searched for, when comparing two legal orders? The Common Core of European Private Law project explicitly relies on the concept of legal formants as introduced by Rodolfo Sacco (1991), meant as "all those formative elements that make any given rule of law amidst statutes, general propositions, particular definitions, reasons, holdings, etc." (Bussani and Mattei 1997, 344). This theory can be described in a very simplified form by saying that it is based on the observation that the rules embodied in legislation, in judgments and in the work of interpreters may be the same but in many cases they are different and conflicting.[8] The same could be said considering, for instance, customary law. One could ask where should uniform rules be searched for. All the attempts of uniformising law, for instance in contractual matters, should take into account that if one stops at one of the legal formants the conclusions could be undermined. One can hardly say that law is uniform just because legislation is uniform. And, reciprocally, one could argue that despite so many differences on the formal level two legal orders could reach the same result starting from opposite positions. Comparative law, which is interested in ascertaining the real differences, must take this into account.

From our perspective on ethnic minority issues and European family law, the problem may be framed considering the interaction of different sources. But, while the idea of including all formants is accepted in current legal analysis of uniformising trends in European law, the idea of including all legal orders is not really accepted. If comparative law, at least in its basic sense, is comparing differences between legal systems, no doubt one has to articulate the analysis by considering several different kinds of law operating within a legal system. Specifically, one has to consider different legal orders, and their legal formants, along with the formal state legal order. The resulting picture would be much more complex but much more realistic and useful. For instance, one might discover that the official legislative rule of a European State may be in conflict with a Hindu doctrinal rule but not with a Hindu custom, which may be well conflicting with the doctrinal rule.

An inclusive comparative approach means, in my view, that European official laws should be analysed together with unofficial European and originally non-European laws. This is necessary from a dynamic point of view, interested in considering the law resulting from complex interactions in legal

[8] On the theory of legal formants and its relationship with other methodologies of comparative law, including the Cornell Common Core Project, see also Monateri and Sacco (1998) and Mattei (2001).

reality. In this sense, in analysing a specific legal institution in Europe, one should consider not only the rules resulting from legislation, judgments, and doctrinal works of a specific European jurisdiction and compare all this with other European legal systems, within the framework of EU supranational law, but also those rules that operate in unofficial contexts, particularly ethnic minority customary law and written rules followed by ethnic minority communities in their interaction with these customary rules. The aim of this difficult task is to define the range of possibilities, the constraints of different legal traditions and the limits for further integration of new practices in European laws.

One could also highlight that the opposition between European laws and "foreign" laws is misleading. For instance, in many cases Indian state law in its attempts to cope with some Hindu customs is on the same position as European laws.[9] In other terms, in Europe and elsewhere, what happens is a complex dynamics involving several normative actors, some who want to preserve the rules they follow and others who want to change them, usually by generalizing other rules. This is a general phenomenon, not restricted to ethnic minorities. There is no perfect correspondence between a single European state law and all the European social communities living under that law, as abundantly shown by issues as euthanasia and same-sex marriages. As a general rule, some parts of society are discontented with State enforcement of some rules that are at the same time supported by other parts of society.

Legitimation is a crucial topic when considering the process of integration of new rules in European laws. Through legitimation others' practices can become 'our' practices. In other words, they are integrated within a legal tradition. This does not necessarily mean 'sameness' but rather 'togetherness'. Can some Hindu or Muslim practices, for instance, be legitimated in a European context? This depends very much on where one recognizes the boundaries of legal traditions and what is assumed to be foundational for legal identity. But, boundaries are not fixed once and for all. For instance, gender equality is seen as foundational in Europe, and what does not meet the standard of gender equality can hardly be accepted, that is to say legitimated.[10] Much depends on the force of the necessity of integrating new forms of life. Each standard rule is originally a negotiated rule. Therefore what the rule is very much depends on who are the parts involved. In this sense polygamy, which is firmly opposed by European laws, *had* to find its way through official Indian law, because it could not be ignored, being the rule

[9] For a comparative analysis of different strategies to accommodate religious, cultural and ethnic diversity in Britain and India, see Menski 2010.

[10] This issue would require some clarification. First of all gender equality is recent in European legal history and this should suggest that foundational characters do not need to be permanent characters. Secondly, gender equality is a uniform foundational legal principle while, from a societal point of view, it is not at all uniform in European societies.

followed by a huge part of Indian population. This is the case for Indian Muslims, whose personal law can hardly be set aside for the sake of uniformising marriage laws in India. Should this happen, the rule would be monogamy in India also, considering that this is the statutory Hindu rule. Interestingly, as mentioned, Hindu law also allowed polygamy among several groups. These rules have been outlawed through the pursuit of uniformisation of Indian Hindu law, with the result that Hindus practising polygamy after 1955 had to follow the monogamy rule as far as official Hindu law was concerned, even though these communities remain polygamous at the unofficial level.[11] Arguably this happened because, differently from Islam, the dominant rule in Hinduism is monogamy and an opposition to Hindu polygamy was not felt as radically anti-Hindu. Therefore, quantitative factors have to be considered along with cultural aspects in considering the context where the rules are negotiated. On the other hand, the legitimation of same-sex marriages is much more discussed in Europe than in Asia, because in Europe the interests at stake are much more sensible, demand public recognition and are supported by some cultural movements, even though, of course, they have to front a strong cultural opposition of other parts of European societies.

A general problem is whether uniform law is feasible and/or desirable. According to many, uniformity is unfeasible, precisely because while one may be successful in writing a uniform civil code, diversity will still find its way through other formants. As for desirability, each attempt to impose uniformity may be seen as a loss of something and as 'authoritarian'.[12] On the other hand, one should not underestimate what could be seen as uniformity from below, that is to say, uniformising trends operating in social reality independently of the intervention of state law. This might also involve the rules followed by ethnic minorities. Imitation might have a role in uniformising rules followed in social practice by different communities, even though principles are seemingly irreconcilable. Furthermore, rules followed in practice by ethnic minorities might be the same of those followed by individuals who are not part of ethnic minorities, irrespective of official state law . To sum up, multiple kinds of interaction may happen and should be understood by distinguishing several formants within a legal order and between legal orders.

[11] This dynamic has a great impact on living laws and Indian judges are compelled to articulate these different normative systems in order to provide just solutions in practice. For a detailed analysis see Menski 2003.

[12] Considering recent perspectives on this issue one could consider, for instance, the work of Legrand (1997), Cotterrell (2007) and Sacco (2007). All pluralistic approaches to laws, including for instance Ehrlich's theory of living law (1936), arguably embody the view and a warning that state-centered monopoly of law cannot be but authoritarian in character. In other words, pluralist analysis also unveils the competition between different social powers and social groups.

5. The place of differences

How many forms of life can co-exist? Unity is different from uniformity. Every society has to organize different and often conflicting rules of behavior and values in a coherent system. In this process the forms of life that a society considers binding are selected among the several that claim to be normative. In front of conflicting models of behavior the system may preserve its unity through the elimination of one of the alternatives or through their co-ordination. The first possibility is more compatible with an egalitarian society, but in this case the place of differences becomes external to the legal system. Uniform law implies the unity of the juridical subject and tends to set aside several forms of life, by selecting one as appropriate and imposing it on the overall society. But diversity emerges at other levels. In this sense uniform law does not seem to be an appropriate answer to complex societies and, at the same time, some uniformisation seems to be inherent to law, which in no case can accommodate all diversities and operates at a different level than individual worldview and expectations. In fact, legal rules must provide a suitable context for interactions that may occur between individuals who may be more or less different.

The articulation of differences in the laws of contemporary societies is a difficult but necessary task. This necessity arises from cultural diversity represented by ethnic minorities but not only by them. This issue is much more general. The real question is how many forms of life may coexist and be protected. Difference is a matter of fact and the problem is to find a theory and a practice of law that creates an appropriate place for diversity. European laws developed on the cultural basis of the unity of the subject of law, for citizenship, generally speaking, cannot be further qualified through other kinds of belonging. This makes them unready to integrate more cultural diversity within themselves. On the other hand, this simply means that differences remain outside the realm of official law. In this way, the norms that are expression of this cultural diversity are dismissed as traditional habits. Nonetheless, they may preserve a high grade of institutionalization and a binding character for those who adhere to that system of rules (Shah 2005).

The identification of law with state law hides the fact that competing systems of rules exist. The postulate according to which state law must be one and the same for all citizens runs the risk of being an ideological operation of exclusion of ethnic minorities. In fact, in this perspective the new Europeans having an immigrant origin should simply comply with existing laws and, even more importantly, their needs should not be taken into account in the making of law. This postulate masks the fact that European laws developed for centuries as an answer to new needs of protection emerging in the course of history. To pretend that ethnic minorities should simply comply with a law that was formed without their contribution goes far beyond asserting the principle of legality. In fact, the point is not simply to state that everyone has

to respect the laws of the country but to understand who decides what for whom and the needs and values that have to be protected. On the other hand, the rules followed by ethnic minorities cannot demand official recognition, so to say, statically, as they are and as separate bodies in the society of which they are part, while they could more effectively demand recognition of their legal standing, needs and aspirations, as one of the many different components of European societies.

The building of citizenship and the integration of Europeans belonging to ethnic minorities require a politics of rights and duties where the relevance of original socio-legal structure is effectively recognized and defined. In principle, a system of personal laws following the Indian model could be laid down, and in this case the different systems of norms that are followed in Europe could receive official acknowledgement.[13] But this seems to go beyond one of the legal postulates of European laws. In fact, a system of personal laws does not seem presently viable not only because of the well-known cases of real or potential conflict with European laws at the substantive level, but also for a more general reason, that is to say, the principle of formal uniformity that stands at the basis of modern European state laws.

On the other hand, European laws cannot simply rely on the dismissal of the rules followed by ethnic minorities because this might strongly undermines democracy and the functioning of the legal system as a whole. New forms of life must be recognized in some way, as difficult as it may be, in order to widen the space for differences. The outcome of this process is unpredictable but it will certainly depend on the quantity and quality of interactions. What seems crucial is not so much the recognition of single practices and forms of life and their accommodation, but the acknowledgement of the fact that new subjects, new actors exist in the making of law in Europe and moreover of the fact that European laws concern persons who may belong to different cultural contexts and thus need to be interpreted and applied in a more culture-aware way, not as a matter of concession or derogation but in order to correctly apply the very same European laws and principles. This could be seen as the premise for elaborating increased cultural diversity without resulting in conflict or separation. In order to do so the issues raised by cultural diversity of ethnic minorities in Europe should not be analysed as a separate topic but as an aspect of the wider picture of uniformisation and pluralisation of law in the European context.

[13] In this regard, it is worth-noting that a system of personal laws involving the official acknowledgement of ethnic minority laws could start an evolutionary dynamic, like in India, where different customary Hindu laws, and also Muslim laws, are applied by State courts within the framework of public policy and constitutional principles.

Bibliography

ALUFFI BECK-PECCOZ, Roberta and Giovanna ZINCONE (eds.)
2004 *The Legal Treatment of Islamic Minorities in Europe*, Leuven: Peeters.
ANTOKOLSKAIA, Masha
2007 'Comparative Family Law: Moving with the Times?', pp. 241-262 in Esin Örücü and David Nelken (eds.), *Comparative Law: A Handbook*, Oxford and Portland: Hart Publishing.
BALLARD, Roger
1994 *Desh Pardesh. The South Asian Presence in Britain*, London: Hurst & Co.
2002 'Race, Ethnicity and Culture', in Martin Holborn (ed.), *New Directions in Sociology*, Ormskirk: Causeway, also at http://www.casas.org.uk/papers/pdfpapers/racecult.pdf
2007 'When, why and how far should legal systems take cognisance of cultural diversity?', paper prepared for the International Congress on Justice and Human Values in Europe, Karlsruhe, 9-11 May 2007, http://www.casas.org.uk/papers/pdfpapers/karlsruhe.pdf
2009 'The current status of coparcenaries in English law', Commentary on Pluri-legal issues, http://www.casas.org.uk/papers/pdfpapers/coparcenaries.pdf
BOELE-WOELKI, Katharina (ed.)
2005 *Common Core and Better Law in European Family Law*, European Family Law Series No. 10, Antwerp: Intersentia.
BUSSANI, Mauro and Michele GRAZIADEI (eds.)
2005 *Human Diversity and the Law*, Brussels: Bruylant, et al.
BUSSANI, Mauro and Ugo MATTEI
1997 'The Common Core Approach to European Private Law', *Columbia Journal of European Law*, 12.
CAVALLI-SFORZA, Luigi Luca
2004 *L'evoluzione della cultura*, Torino: Codice edizioni.
CAVANNA, Adriano
1982 *Storia del diritto moderno in Europa. 1: Le fonti e il pensiero giuridico*, Milano: Giuffrè.
CHIBA, Masaji (ed.)
1986 *Asian Indigenous Law: In Interaction with Received Law*, London and New York: KPI.
COTTERRELL, Roger
2006 *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory*, Aldershot: Ashgate.
2007 'Is it so Bad to be Different? Comparative Law and the Appreciation of Diversity', pp. 133-154 in Esin Örücü and David Nelken (eds.), *Comparative Law: A Handbook*, Oxford and Portland: Hart Publishing.
EHRLICH, Eugen

1936 Fundamental Principles of the Sociology of Law, Cambridge, MA: Harvard University Press.

FERRARI, Silvio

2002 *Lo spirito dei diritti religiosi*, Bologna: Il Mulino.

FERRARI, Silvio and Ivan C. IBÁN

1997 *Diritto e religione in Europa occidentale*, Bologna: Il Mulino.

FRANCAVILLA, Domenico

2006 *The Roots of Hindu Jurisprudence*, Corpus Iuris Sanscriticum et Fontes Iuris Asiae Meridianae et Centralis, vol. 7, Torino: Corpus Iuris Sanscriticum Committee - Cesmeo.

GAMBARO, Antonio and Rodolfo SACCO

2008 *Sistemi giuridici comparati*, 3 ed., Torino: UTET.

GRILLO, Ralph et al. (eds.)

2009 *Legal Practice and Cultural Diversity*, Burligton: Ashgate.

JONES, Richard and Gnanapala WELHENGAMA

2000 *Ethnic Minorities in English Law*, Stoke-on-Trent: Trentham Books.

LEGRAND, Pierre

1997 'Against a European Civil Code', *Modern Law Review*, 60, pp. 44-63.

MATTEI, Ugo

2001 'The comparative jurisprudence of Schlesinger and Sacco: A study in legal influence', pp. 238-256 in Annelise Riles (ed.), *Rethinking the Masters of Comparative Law*, Oxford and Portland: Hart.

MATTEI, Ugo and Pier Giuseppe MONATERI

1997 *Introduzione breve al diritto comparato*, Padova: Cedam.

MENSKI, Werner F.

1998 'Asians in Britain and the Question of Adaptation to a New Legal Order: Asian Laws in Britain?', in Milton Israel and Narendra K. Wagle (eds.), *Ethnicity, identity, migration: The South Asian context*, Toronto: University of Toronto, pp. 238-268.

2003 *Hindu Law: Beyond Tradition and Modernity*, Delhi: Oxford University Press.

2004 'Cherrypicking Customs: On What Happens when Custom is not Taught', Proceedings of Windhoek Conference, 26-29 July 2004.

2006 *Comparative Law in a Global Context: The Legal systems of Asia and Africa*, 2 ed., Cambridge: Cambridge University Press.

2008 'The Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda', *German Law Journal*, 9, 3, pp. 211-250.

2010 'Law, State and Culture: How Countries Accomodate Religious, Cultural and Ethnic Diversity', pp. 403-446 in Marie-Claire Foblets et al. (eds.), *Cultural diversity and the Law. State Responses from around the World*, Brussels: Bruylant and Éditions Yvon Blais.

MENSKI, Werner F. (ed.)

1998 *South Asians and the Dowry Problem,* Stoke-on-Trent: Trentham Books.

MONATERI, Pier Giuseppe and Rodolfo SACCO
1998 'Legal formants', pp. 531-33 in Peter Newman (ed.), *The New Palgrave Dictionary of Law and Economics*, 2, London: Macmillan.
POULTER, Sebastian
1986 *English Law and Ethnic Minority Customs*, London: Butterworths.
SACCO, Rodolfo
1991 'Legal Formants. A Dynamic Approach to Comparative Law', *The American Journal of Comparative Law*, 39, 1, pp. 1-34 and 2, pp. 343-401.
2007 *Antropologia giuridica*, Bologna: Il Mulino.
SAGADE, Jaya
2005 *Child Marriage in Indi*a, Delhi: Oxford University Press.
SHAH, Prakash
2005 *Legal Pluralism in Conflict: Copying with Cultural Diversity in Law*, London: The Glass House Press.
SMITS, Jan M.
2007 'Convergence of Private Law in Europe: Towards a New Ius Commune?', pp. 219-240 in Esin Örücü and David Nelken (eds.), *Comparative Law: A Handbook*, Oxford and Portland: Hart Publishing.
SPERBER, Dan
1996 *Explaining Culture: A Naturalistic Approach*, Oxford: Blackwell.
.