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“PUBLIC POLICY” AND FAMILY & SUCCESSIONS LAW: NEW TRENDS AND OPEN QUESTIONS

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Migrant Families in Italy: Past...

For a long time Italy was a Country of emigrants, but in the last years is facing unprecedented immigration flows, with the related new challenges.

- Of course, contacts were possible also in the past. During the 17th century in Leghorn polygamous marriages for the Sephardi Jews were allowed, while Rossini's famous opera buffa "Il Turco in Italia" of 1814 was about the visit of a fictional Turkish Pasha, pursued by one of his wives trying to take him home, and his affair with an Italian Lady, in her own way a polygamist too, having both an husband (asked to sell her to the Pasha) and a ciccio.
- More recently a significant flow of upper-class students, and then intellectuals and professionals, came from Iran since the Fifties.

...and Present

- But the current mass migration flow poses new problems.
- Some issues are expressly regulated: e.g., according to Legislative Decree n. 160 of 3rd October 2008, a migrant is entitled to ask family reunification only for one spouse, not necessarily the first one.
- Many others are not: e.g., if a polygamous deceased migrant has left an estate in Italy, who is entitled to the spousal share? All the wives? None of them? Just one, but which one?
- Being a new phenomenon, nowadays there is still a very little case-law at these regards.

What is Public Policy?

- When challenged by the application of alien legal institutions, judges have to recur to the general clause of “public policy”, a wide formula that refers to the fundamental values of a given legal order.
- Both domestic and EU level regulations often use this formula, but nobody could know exactly what does it mean...
- Indeed, general clauses are useful precisely because they are not previously bound within strict limits, and so allow jurists to deal with unprecedented issues.
- The question is how to give a concrete content to such a formula

What Public Policy was...

- Probably an Italian jurist of some decades ago would have answered that “public policy” in Family and Successions Law means just the defence of the only recognised family model, the traditional or “natural” one: heterosexual, patriarchal, monogamous and indissoluble marriage.
- Today this model has evidently lost its primacy even in domestic law, and it would be quite difficult to use it as a benchmark in order to evaluate the foreign ones.
- In fact, the current state of legislation and case-law endorses a pluralistic approach towards family, but a paramount value is represented by equality, and more specifically gender equality (see art. 3 of the Italian Constitution).

...and what it should be today

Therefore, the approaches adopted in the past have to be revised, changing the solutions or at least the motivations.

- E.g.: Italian domestic legislation allows same-sex civil partnership, and therefore it is no more possible to say that the, quite similar, foreign institution of same-sex marriage contrasts with public policy.
- In other cases, more linked with Migration, maybe a contrast remains, but it has to be motivated differently, therefore with possible different concrete outcomes: here we will take into consideration the examples of polygamy and repudiation.

Polygamy and Public Policy

- Of course, polygamy is not consistent with the traditional family model of Italian Law, and according to art. 86 of the Civil Code bigamous marriages are void.
- However, after the approval of the very controversial law on same-sex civil partnerships (Act. n. 76 of 20th May 2016), the representative of an Islamic community asked: and so, why not polygamy?
- Indeed, it is still possible to say that Islamic polygyny (and not, e.g., South American “polyamorous cohabitation”) contrasts with public policy, even in a context of family pluralism, if we make reference to gender equality principles, because such an institution is inherently unbalanced in favour of the husband.

A Possible Revision

- Thus, it is justifiable to deny effects to foreign polygamous marriages, in order to protect the position of the involved women.
- But, if this is the correct motivation, it implies that in peculiar cases some effects have to be recognised: e.g., if a deceased polygamous husband has left some estate located on the national territory, then it is not justifiable to invoke public policy and deny the application of a foreign succession law rule, which would entitle the surviving spouses to inherit simultaneously.
- Otherwise, precisely the women would be unjustly harmed by the denial of their rights to an inheritance share.

The Somali Case

- Indeed, as early as 1999, the Italian Supreme Court has endorsed the French theory that the contrast of polygamous marriage with public policy does not prevent the recognition of its merely “reflected” effects, such as precisely the inheritance law ones (Court of Cassation, 2nd March 1999, n. 1739).
- We have to underline that it was not the first Migration case, but the last Colonial one: the estate at stake was that of an Italian widower who had married a Somali woman, pursuant to the local customs allowing also polygamy, while his sons argued that such a “potentially polygamous” marriage could not have relevance from a successions law point of view.

Repudiation and Public Policy

- In the past every kind of divorce was deemed to be against the Italian public policy principle of marriage indissolubility.
- In 1970 divorce was allowed in Italy, but under strict limitations, and so, according to the caselaw, foreign divorces performed without a judicial intervention were deemed to be against public policy.
- This was the case of Soviet divorces, in which each spouse had an equal power to repudiate the other “by postcard”, as well as of Islamic talaq, in which repudiation is a privilege of the husband.
- A judicial decision stated that a repudiated Iranian woman cannot be considered free to marry again because her divorce was against public policy (Tribunal of Milan, 21st September 1967).

A Possible Revision

- According to the current Italian legislation, after Decree-Law n. 132 of 12th September 2014, it is possible to perform an uncontested divorce through a private act, without any judicial intervention: therefore, nowadays, judicial intervention in divorce cannot be deemed, in itself, as a public policy issue.
- On the other hand, we can still say that Islamic repudiation, being a unilateral power of the husband, contrasts with public policy, making reference again to the gender equality principle.
- But, also in this case, such a new motivation may change the possible concrete outcomes.

Comparing Different Opinions

- A very criticized decision has stated that Egyptian talaq is not against public policy, as the Islamic wife too can access divorce through khola (Court of Cagliari, 16th May 2008): the judgement is wrong because the latter proceeding is much more burdensome than talaq.
- Other lawyers have argued that, if the wife accepts talaq, then it becomes quite similar to a domestic uncontested divorce, and does not contrast with public policy: but it is questionable how really free could be such an acceptance in certain social and familiar contexts.
- Anyway, at least the cited 1967 decision on the Iranian case today would be clearly untenable.

- Indeed, if we deny effects to repudiations just in order to protect the repudiated wife, then we must recognize her the power to avail of the repudiation itself in order to be free to marry again, but also in order to claim for the payments due as a consequence of the divorce (e.g. alimony or the dower stipulate in a mahr contract).

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