BOOK REVIEW

Marie-Claire Foblets, *Les familles maghrébines et la justice en Belgique: Anthropologie juridique et immigration* [Maghreb families and the law in Belgium: legal anthropology and immigration]. Paris: Éditions Karthala (1994).

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Of the subcategories of legal pluralism involving modern state laws, two have been subject to substantial research and policy discussion: those in which state laws recognise the customary laws of majority populations (especially in Africa), and those in which state laws recognise, or may soon begin to recognise the customary laws of minority indigenous populations (especially in North America and Australasia). Relatively neglected, despite its potential importance in the west, have been those in which state laws affect the folk laws of minority immigrant populations. Marie-Claire Foblets has made a substantial contribution towards filling this lacuna.

An advocate at the Brussels bar and a university teacher and researcher in anthropology, Foblets has brought both legal skills and anthropological insights to bear on the legal problems and social situations of Moroccan immigrants to Belgium. She summarises the principal objective of this work as being,

> to demonstrate, through examples from life, how delicate and complex it is to determine the desirable degree of openness in Belgian law to legal values and institutions derived from Muslim societies, which will allow us to move beyond a far too antagonistic conception of the different logics and visions which are face to face with each other (24. In this review references are to pages in the book under review, and quotations have been translated by the reviewer).

This is a practical objective which is within the scope of law reform, but which requires a wider social understanding than that which most lawyers display.

This book has two parts. The first consists of two chapters. Chapter 1 sets out the

issues in state law doctrine as it stood at the beginning of 1992, and shows the difficulties of applying the rules of private international law to cases involving Moroccan immigrants. Chapter 2 discusses the ways in which current anthropological thought may contribute to attempts to take account of diversity. This part lays the groundwork for the second part, which consists substantially of a presentation of thirteen histories of cases in which Moroccan and in one case Pakistani immigrants were parties to processes in the Belgian judicial system in the period of fieldwork from 1985 to 1989. Foblets explains the legal steps which she and her colleagues took or proposed on their behalf. She also reports on their life histories and social circumstances, which she investigated in depth, and reflects at length on the ways in which anthropology might illuminate and possibly resolve their problems. She concludes with a strongly argued plea for the replacement of private international law, which she has earlier characterised as "rigid, blind and maladjusted" (177). She looks instead to "a law elaborated by those to whom it is addressed" (347), that is, a law in which solutions to problems would be achieved through negotiation between the parties. An afterward by Étienne le Roy reflects upon aspects of her method and conclusions.

The author displays erudition in the fields of law and anthropology in equal measure. A great deal of learning is to be found in lengthy footnotes containing authoritative summaries of legal and anthropological literature on issues which arise in the argument. The select bibliography consists predominantly of works in French, but contains also many entries in English and not a few in German and in Dutch.

To begin such a study with a chapter on state law doctrine may lay one open to the charge of taking state law as the primary, overriding law. Foblets insists that this is not an attempt to privilege state law, nor to treat it is as category in itself, but only a means to see it in its relations with social fact (9). Indeed, for most of her book the centre of attention is the individual immigrant. But that subject is studied because he or she is caught up in the state judicial system, or seeking to use it strategically in his or her relations with others. Thus it would seem appropriate to examine the rules and principles which, at least in part, motivate the activities of the state officials which so affect the subjects' lives and welfare. A recognition of the importance of legal anthropology does not entail denial of the significance of applied state law doctrine.

Foblets' analysis shows that the recent growth of immigration from the Islamic world has affected Belgian private international law. There has been an increased use of the *ordre public* (in common law terms, public policy) exception, which requires that foreign law which would otherwise be applicable must be excluded if it is inconsistent with fundamental policies of domestic law. Instances of this provoke reflections on the ethnocentrism of the judiciaries of western states.

Foblets also discerns a tendency to substitute domicile for nationality as the factor determining an immigrant's personal law. She seems to see this as increasing the likelihood that Belgian law will be applied to immigrants. In the common law systems, in contrast, increased use of domicile, as that concept has been developed, as a determinant of choice of law would make the application of the immigrant's law of origin more likely. Foblets concludes that a result of recent developments is often doctrinal incoherence and inconsistency, with a tendency for different laws to be applied to matters which are related and should be governed by one, consistent law.

On the other hand, it may not be appropriate for certain aspects of a person's life to be regulated by the same law as other aspects. In relation to the criterion of nationality Foblets notes a fundamental objection to private international law as it now stands. By assigning a personal law to each individual and holding that a wide range of legal relations are governed by personal law, the rules fail to take into account that immigrants frequently adhere to some aspects of the systems of social relations in their societies of origin, but in other aspects of their lives adopt the ways of their host country. In neither respect is their choice necessarily dependent on the factors which determine nationality, although it could in some cases be related to the factors in domicile. But equally domicile may in other cases be assigned on misleading grounds because an immigrant may maintain ties with his or her country of origin only in matters of little immediate practical importance, and sometimes only as a symbolic assertion of an identity distinguishing him or her from the bulk of the host society. (She gives an interesting account of the development in France and Belgium of claims by Muslim women and girls to the right to wear the *foulard* (headscarf). She argues that this practice is not required by classical Islamic law, and had not been widely followed by Moroccan Muslims until it came to be seen as means of maintaining 'identity' (117-119).)

An important feature of the present instance is that Moroccan law is a codified form of Islamic law. Foblets has not conducted empirical research in Morocco, but has closely studied the literature on Moroccan law and society. Islamic law makes claims which are difficult to reconcile with existing doctrines of private international law in Europe. Thus Foblets shows in one footnote that in the Moroccan view a Moslem can never validly abandon an obligation to follow Islamic law. This produces differences of opinion on the law applicable to Moroccans who settle in Belgium or France. Treaties which those countries have concluded with Morocco on the subject may be quite unrealistic when they fail to recognise the Islamic view (46-48, note 27). Developing the implications, she argues that the nationality of the host country may be taken on primarily to gain material advantages, for example in respect of social security. But in Islamic jurisprudence nationality and national laws are immaterial. A Muslim is governed

by Islamic law in all respects, and permanently.

Since, in Foblets' view, Belgian private international law enables judges to apply Belgian domestic law in an unduly high proportion of cases, they do not often have to try to understand the foreign law, or immigrants' conduct motivated by foreign law. The courts' methods of ascertaining immigrants' laws of origin, in those cases where they do seek to apply them, are the subject of a detailed, and highly critical section (56-72). In North America some use has been made of expert witnesses, who are familiar with the indigenous and immigrant communities whose folk laws are to be taken into account. In the Belgian system the court conducts research into "the proper law of the person", it would appear, by examining the state legal system of the other jurisdiction. She argues that the latter system does not enable a court to determine the extent to which laws of origin may in practice be followed in modified forms in the special circumstances of immigrants' lives, nor to participate in the development of such modified laws. She acknowledges that there are considerable obstacles to change in this respect. Very many types of foreign laws could potentially be applicable, and the development ab initio of an understanding of the law of even one foreign culture is difficult.

Foblets possibly takes an unjustifiedly favourable view of common law judicial systems. Private international law throughout the world seems to proceed on the assumption that the legal universe consists exclusively of state laws, one of which must be applied to each issue before a court. In common law jurisdictions the expert witness, called in a case in which foreign law is to be applied, is required to give evidence of how the state courts of the foreign country would decide an issue. This may have the merit of recognising modifications which the courts in practice make to the letter of the written law. But it opens no possibility of recognising the folk law of a population within the foreign country when that folk law differs from the law applied in the state courts. Equally it takes no account of the special case of the folk law of an immigrant population which does not adhere fully to the Islamic or other law of the country of origin, but rather combines it with that of the country of settlement. Foblets provides evidence that such mixing of laws is particularly likely to happen among second-generation immigrant groups - who may in any case lack a clear knowledge of the "customs" of their countries of origin. Common law jurisdictions have given or are beginning to give effect in particular, defined cases to customary laws of specific indigenous populations, nearly always at the prompting of legislative injunction. But beyond this, the common law has as much difficulty as the civil law in acknowledging the social significance of customary laws.

The case-studies are both intrinsically fascinating and of wide significance. We may glance at four.

The case of Abdelmounem concerns "illegitimate affiliation in Islamic law and in immigration" (189). Abdelmounem was born to a Moroccan man settled in Belgium and a Moroccan woman who was visiting Belgium. His parents were not married. Moroccan law incorporates the Islamic principle according to which the father of an illegitimate child can never establish legal paternity. The relationship between the parents broke down, but Abdelmounem's mother wished to regularise her continued residence in Belgium. She married another Moroccan with rights of residence in Belgium. She was content for Abdelmounem to remain with his father. However, two years after the marriage her husband registered Abdelmounem as his own child with the Belgian office of civil status. This registration should not have been accepted, because by Belgian law the question of affiliation should have been determined according to Moroccan law as the law of the parties' nationality.

The true father sought legal advice. He was by then living with a woman of Belgian nationality, with whom he had had three further children. The advice, which he followed, was that he marry this woman; then exercise his right as the her spouse to acquire Belgian nationality, and so make Belgian law his personal law; and then exercise his right under that personal law to claim legal paternity of Abdelmounem. It appeared that his claim would not be contested by Abdelmounem's mother or her husband. Thus the problem caused by the erroneous act of the Belgian official was solved by manipulation of the legal rules of nationality and private international law, ousting, for the purposes of Belgian law, the application of Islamic law.

The case of Soufia (307) arose from the absence in Islamic law of any possibility of adoption of a child, at least in the sense of the process established in western state laws. Soufia was born of an unknown father in a Moroccan hospital. The mother signed a statement abandoning the baby to the welfare department of the hospital. By a notarial act executed before a Moroccan court Soufia was confided to the care of Monsieur and Madame M, a childless couple of Moroccan origin who had been resident for some years in Brussels. They had long attempted in vain to overcome a problem of infertility, and had travelled to Morocco on learning through relatives that this baby might be available. When they applied to the Belgian consulate in Tangier for a visa to enable them to bring Soufia with them on their return to Brussels, they were refused. The Belgian state was at that time much concerned that sham adoptions were allegedly being used to circumvent the immigration laws. In the case of Soufia there was not even a formal legal adoption, and officialdom deemed that this was a case which should not pass.

The problem for the couple was eventually solved by employing the law of tutelage. Moroccan law constituted the khadi tutor to Soufia in the circumstances of her birth. This law empowered the khadi to grant the powers and functions of

official tutelage to another suitable person. In this case the khadi conferred the powers upon Monsieur M, and the Belgian courts consented to endorse this. The Belgian Foreign Office was then persuaded by this Belgian judicial act, after "ten long months of study of the file", to grant permission for Soufia to reside with Monsieur and Madame M in Belgium.

This case prompts reflection on the difficulties which can arise from conceptual differences in the laws of family relations, and the rigidity of western laws not only in immigration matters but more generally in the recognition of non-western legal concepts. Islamic law does not recognise the possibility of adoption as the artificial creation of the parent-child relationship. But it does provide means, through a procedure designed to safeguard the welfare of the child, whereby a person may assume the legal powers and duties of a parent. It is arguable that a humane immigration policy will focus on these legal powers and duties, rather than the nominal parent-child relationship created by western adoption.

When such cases are considered in a wider context than that of Islamic law there are further conceptual problems. Cases are currently arising in Britain from applications by Africans settled in the country to bring infant relatives, who were not their biological children, to join them. The ground is often that, under the customary laws of their ethnic groups, the full range of parent-child legal rights and duties subsist between the applicants and the children. The difficulty which arises here, as in the case of Soufia, is that British law asks whether there has been "adoption" of a type analogous to that under the current British Adoption Act. The difficulty in these cases may be even greater than that in the case of Soufia. The legal relationship claimed is derived not from a formal decision of an official, but from a consensus within a lineage, which may not even be embodied in a specific ceremony or document. To convey the principle of this type of legal process to a British tribunal, and to show its relevance to a decision in British law is a heavy task. The tendency at present is to decide such cases by the exercise of discretion on compassionate grounds. That is less satisfactory than principled decisions based on understanding of the customary laws of the social orders in question.

In the case of Aicha (319) a Moroccan man with a right of residence in Belgium married a woman from Morocco and brought her to live in Belgium. In such a case if the woman leaves or is driven out of the matrimonial home before she has gained a right of residence in the country, she can be required to return to Morocco. Such is the concern with the possibility of evasion of the immigration laws through sham marriages, that the tendency in Belgium, as elsewhere in western Europe, is for increasing periods of cohabitation to be required to "prove" that a marriage is genuine. Aicha's husband after one turbulent year of marriage deserted her and divorced her by unilateral repudiation under Islamic law during a

visit to Morocco. While this divorce was not recognised by Belgian law, it formed a legal ground for the authorities then to order Aicha to leave Belgium, since she no longer satisfied the condition of entry, that she live with her spouse. The issue was resolved by the fact that, during the long period in which she contested the order by legal means, she formed a liaison with a man of Belgian origin, and became both pregnant and engaged to marry him. The case is used to examine the difficulty in the context of immigration laws of distinguishing genuine marriages in legal systems which have different conceptions of marriage from that of the host country.

Finally, the case of Khalid (333) concerned a second-generation immigrant, the son born in Belgium of Moroccan parents. His father had turned towards an orthodox Islam which he endeavoured to impose on his household. His mother was overindulgent and protective. When Khalid was 15 his father became alarmed at the influence on him of members of a local gang and, seeking to regain control, brought him before a juvenile judge. Matters proceeded steadily downhill thereafter. At the end of the account two years later, Khalid, isolated, confused, unstable and delinquent, had been referred to the criminal justice system. Foblets sees his fate as arising from his alienation from his parents' culture of origin combined with his failure to find an alternative social identity. She finds that the possibility of saving him was lost at the point when the juvenile judge decided that measures for his care, protection and rehabilitation had been exhausted, and handed his case to the criminal system. She argues that the most constructive way to handle such a case would have been to engage in negotiation with him. The object would have been to enlist his action in formulating his needs and devising arrangements for living in which he could find an identify and his personality could flourish.

The case studies are ordered in terms of the concept of *espaces d'autorité sociale* (areas of social authority). Foblets sees three such areas: the parental area (into which the cases of Abdelmounem and Soufia fell), the area of territorial authority (including the case of Aicha), and the contractual area (into which the case of Khalid fell - or perhaps would, if handled properly, have fallen, the problem there being a lack of social location, and so of authority). In developing this concept Foblets acknowledges a debt to Sally Falk Moore and her notion of the semi-autonomous social field.

In his comments Le Roy approves Foblets' concept, but remarks that she does not "sufficiently stress the fact that the social field in Moore's analysis exists only through the type of solution (and of law) that it permits to be put into effect" (392). This distinction between Foblets' and Moore's concepts is important, but it may be suggested that Moore's is more likely to produce comprehensive analyses of instances of law. If an area of research for a project in legal anthropology is

defined in terms other than those referring to the generation of a body of law, the study will not necessarily reveal a complete body of law. Le Roy follows the principle of Thomas Hobbes that "[i]t is not Wisdom, but Authority that makes a law" (Hobbes 1971: 55), taking the view that all laws are generated by authority. It may be replied that, if that were the case, every semi-autonomous social field would be an area of social authority. But studies of customary law raise questions about the claimed indispensability of authority to lawmaking. If laws may emerge from social sources other than specific "authorities", and if we search for law according to areas of authority, we are liable to overlook some instances of law.

Foblets' critique of the case of Khalid, placed in the contractual area, introduces her argument that the best means of progress in situations of culture conflict lies in "negotiated law", or law "elaborated by those to whom it is addressed" (347-387; also 177-187). She is clearly not convinced that a radical reform of private international law is a sufficient answer to the problems she depicts. This might result in less unsatisfactory solutions to situations of culture conflict, but they would still be solutions imposed upon the parties. She argues that negotiation and mediation must replace the present approach. Anthropology may make a considerable contribution to this development, since it has accumulated extensive knowledge of these processes. She proposes the use of negotiated, contractual arrangements not only to settle existing disputes, but also to determine in advance questions arising from culture contact. Thus she suggests that on a marriage between immigrants whose personal law is at that time the law of their country of origin the parties may agree that they will each continue to be bound by that law even if one or both acquire Belgian nationality (381). If Belgian law were to hold such a contract valid, contrary to its current view, this would seem a means of avoiding the inconvenience and artificiality of the rule by which personal law follows nationality.

The argument is clearly not based on a crude view of contract as permitting the unrestricted exercise by the parties of total autonomy. Le Roy argues that contract in communitarian societies [sic] "is a type of judicially validated accord which always operates in a relation with two neighbouring notions, those of gift... and *dation*". (394. *Dation* connotes a surrender of something in lieu of payment, and seems to convey something of the notion of contractual consideration in common law.)

It may be suggested that in many cases the greatest differences between the laws of different cultures, as well as the causes of the strongest condemnations of unfamiliar laws, are differences in the areas within which choice is permitted. All laws recognise areas within which the subject, the lawmaker, and the law enforcer may exercise degrees of choice. But different laws confer these powers in respect of different areas of social activity. Thus in many laws the subject is often under

an obligation to enter a contract, and a further obligation to agree upon terms which are legally specified as appropriate in the circumstances. In these laws judges, arbitrators and mediators may be empowered to require or to urge changes in the terms of contracts after their conclusion. Western state laws, in contrast, in the name of autonomy of the individual, impose few formal restrictions on the subject in contractual matters, and give judges and legislators few powers to change or control the terms of contracts.

Foblets' notion of the settlement of conflict by contract clearly differs from the imposition of settlement by adjudication, but it does not assume that the unfettered choice of the parties will produce satisfactory solutions. It does not exclude the role of the mediator, who, as much anthropological research shows, may to a greater or lesser degree exert authority to drive the parties towards an agreement on terms consistent with certain social values. Foblets looks to the negotiation of disputes under the guidance of advisors or mediators with a deep knowledge of the society of origin of the immigrants, and a requirement of ratification of the solution in some cases by a judge who is also sensitive to that normative order.

This argument has practical value, but one must ask whether Foblets' proposals, if adopted, would prove as effective as she supposes. It is not possible to develop here a full critique of her argument, nor to present a detailed assessment of the many respects in which it is fully convincing and of those in which it seems open to question. Just a few comments are possible.

First, it is not at all clear how parties to these disputes could be induced to negotiate seriously and to agree on solutions. We are concerned with particularly intractable disputes, in which frequently the parties rely on widely different, conflicting bodies of social norms; or which arise precisely because one of them is seeking radically to change an existing relationship based on strongly held cultural practices. Moreover, in many cases one party will be content with the existing situation and will have no incentive to agree to any solution. Anthropology has seen the success of mediation in particular social settings. Parties can be induced to settle when they are both know that they will be compelled to continue living in a relatively small, homogenous social field. Disputes involving immigrants often arise when and because those conditions are absent. Skilful mediators can assist if they hold some degree of authority over both parties. But whence would derive the authority of Foblets' mediator? How would the mediator avoid those other outcomes noted by anthropologists and classified as "exit" and "lumping it"?

Secondly, there is little indication that there might be limits on freedom to contract. Particularly disturbing issues arise when settlements of family disputes crucially affect the welfare of children. To require the endorsement of a judicial officer of the host state is to set the means, but not the terms of an answer to this

difficulty. Foblets would not have the endorsing official impose the current rules of public policy, nor indeed many of the other principles of the "rigid, blind and maladjusted" private international law which her proposals are designed to replace. But it would be essential to reach a decision about where to draw the line on the spectrum which begins with the rigid imposition of the values of the host state and ends with unlimited freedom for disputing individuals to agree on the terms of a settlement.

Thirdly, assuming that contractual settlements can be negotiated, to what extent and by what means would they be binding? Foblets states simply that they could on the advice of the mediator be made binding by judicial injunction. She seems to assume that, because settlements would be consensual, this would not often be a problem. Yet anthropological study of disputing processes teaches that the most apparently conclusive settlement is often not the end of a dispute, and is apt to last no longer than the next change in the powers of the parties in relation to each other. In conflicts involving immigrants the situations of the parties are in constant change. To insist that an agreement, once judicially endorsed, was immutable would be unrealistic and unjust. What will happen if one party demands to open negotiations for a contractual revision of the original contract? Again, to take the case of the preemptive contract, can we really believe that a wife who agreed at the time of marriage to be subject to the matrimonial law of her country of origin would be held to this agreement for the rest of her life, if it were spent in Belgium?

However, to express some doubts about the programme advocated by Foblets is not to deny the significance of this work. The study of situations of legal pluralism arising from immigration will become an increasingly pressing task in western Europe. Much remains to be done. Foblets observes, for example, that there has been no methodical survey of second-generation immigrants' perceptions of their personal laws, and of how far these differ from those of their parents. Moreover, the study of immigration through the insights of legal anthropology is but one part of the wider field of the study of systems of state law with reference to their effect on non-state laws. This book will repay detailed study by anyone working in this field.

References

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