The Legal Concept of Cultural Conflict and its Application in International and National Jurisprudence

Scheu, Harald Christian

Veröffentlichungsversion / Published Version
Zeitschriftenartikel / journal article

The Legal Concept of Cultural Conflict and its Application in International and National Jurisprudence[1]

Harald Christian Scheu

Abstract: *Cultural conflicts are a current problem the relevance of which will increase as the proportion of migrants from different cultures will increase as well. The legal concept of cultural conflict is determined by the interpretation and application of fundamental rights and freedoms. The key aspect of a legal notion of cultural conflict is the link between the cultural diversity argument on the one hand and concrete legal claims on the other. Cultural and religious diversity collides with such legal and cultural norms which are considered indispensable by the majority society. Such norms, especially in the field of fundamental rights, are conceived as part of the international ordre public.*

Many cultural conflicts have found an expression in legal disputes before courts. Different cultural standards have been a legal argument in relation to state power, especially in the context of non-discrimination, but also with respect to positive state obligations. Further, there have been a number of cases in which cultural differences influenced the relationship between private individuals. Court practice in Europe, however, has shown that the approach to concrete cases of cultural diversity is quite often inconsistent. In the European migration area the question is becoming more relevant whether besides general human rights principles also concrete issues, such as the wearing of the Islamic scarf in public institutions and private enterprises, should be regulated on the European level rather than on the level of individual states.

Keywords: ***cultural conflict, international law, national jurisprudence, fundamental rights, diversity***

1. Introduction

European states are facing significant migration from non-European areas. Restrictive EU migration policy measures cannot effectively prevent a further increase in the number of migrants with different cultural and legal background. The integration of members of distinct ethnic communities, which have developed and stabilized as a result of recent migrant movements, into majority society is currently one of the key challenges in European countries.

[1] This study has been produced in the framework of a project financed by the Czech Science Foundation (Project No. 407/08/1287).

In practice, integration of different cultural and religious communities is a very complex process affecting fields such as schools, employment, access to the social care system, accommodation, but also concrete relations between minority members and the majority population. In the course of integration collisions between different cultural and legal values occur. Those conflicts call for a solution which is in line with the principles of democracy, rule of law and the protection of fundamental rights and freedoms.

In this context we may recall an international conference which was organized by the Austrian EU-presidency in 2006. Selected representatives of major EU institutions and EU member states met in Salzburg under the headline *The Sound of Europe*.[2] The main topic of the conference was the issue of European identity and the identification with Europe. As expected, the participants of the conference agreed upon the assumption that the main characteristic of Europe is its plurality of traditions and its unique cultural wealth. By means of strong metaphors the speakers put stress upon Europe's ability to bring together variety and unity.

Almost at the end of the conference one of the most famous experts on Islam, Bassam Tibi, raised a question which had been neglected during the event. Tibi reminded the participants of the fact that in Europe there were living about 21 million Muslims, nevertheless, not a single representative of Muslim communities had been invited to the Salzburg conference. To answer Tibi's question whether Islam was a part of European identity and Europe's variety of cultures Dutch Prime Minister Balkenende maintained that European cultural wealth comprises also its Muslim element.[3]

In his many publications Tibi has systematically stressed that its relation to Islam will be Europe's most crucial issue in the 21st century. With regard to radical Muslims calling for the introduction of Sharia law in Europe and the very sensitive question of future Turkish membership in the EU, Tibi identified two main options: either Europe will manage to Europeanize Islam by getting Muslims in Europe to accept European democratic and human rights values, or Europe will be Islamized (Tibi 2006, 57).

As far as the question of standard European values is concerned, Tibi, already in the 1990s, introduced the often discussed and criticized notion of *Leitkultur.* As major elements of *Leitkultur,* Tibi identified the priority of reason over religious concepts (i.e. the rejection of absolute truth), individual human rights (including

[2] For further information on the konference, see http://www.eu2006.at/de/The_Council_Presidency/Conference_The_Sound_of_Europe/index.html.

[3] The transcript of the final discussion session is available at http://www.eu2006.at/includes/Download_Dokumente/transkript_schlussrunde.pdf.

freedom of religion and the separation of State and Church), pluralism and tolerance (Tibi 1996; Tibi, 1998).

Very soon, however, it became apparent that the concept of *Leitkultur,* originally conceived as a defensive strategy for the protection of Europe's key values, was abused by some actors of the political discourse. Especially within the German debate the exponents of right-winged radical groups claimed a need to limit the manifestations of cultural diversity in order to protect "the leading culture" of German society. This deformation of the term *Leitkultur* was quite astonishing given the fact that Tibi's concept of key values comprises among others the principle of non-discrimination and the fight against racial, ethnic and religious intolerance.

Besides this interesting political and philosophical debate, the issues of cultural diversity have become a topic for discussions also among lawyers in Europe. A number of court decisions in European countries clearly demonstrated that cultural conflicts are not only an abstract philosophical or political notion but concern the application of legal norms as well. European courts on several occasions confirmed the specific legal relevance of certain democratic values and principles.

The major goal of this article is to analyze the legal concept of cultural conflict. In the first part of the study cultural conflicts in the legal sense will be determined in relation to other legal disputes concerning the interpretation and application of fundamental rights. We will focus on the question whether the political and sociological notion of *Leitkultur* has its impact on the legal regulation of cultural conflicts. In the second part of the article we will deal with different forms and levels of cultural conflicts which occur in social and legal practice. The starting point to this analysis will be legal disputes before courts since in court proceedings different cultural interests and their rational arguments can be found in a concentrated form.

2. The legal concept of cultural conflict

Although a number of international human rights documents refer to the term *culture*, there is no legal definition of the term. Article 22 of the Universal Declaration of Human Rights of 1948 which was the first universal human rights document stipulates that everyone, as a member of society, is, among others, entitled to the realization of the economic, social and cultural rights indispensable to his dignity and the free development of his personality.

Cultural rights are further laid down with regard to the status of national minorities. According to the crucial provision of Article 27 of the International Covenant on Civil and Political Rights of 1966, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

However, there is no explicit definition of culture and cultural rights neither in the International Covenant on Civil and Political Rights, nor in the International Covenant on Economic, Social and Cultural Rights which was also adopted in 1966.

The drafting of a definition of the term *culture* falls within the agenda of the United Nations Educational, Scientific and Cultural Organization (UNESCO). As one of the major results in this field we may consider the adoption of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions in 2005. The authors of this convention have solved the impossibility of reducing the complexity of culture into one brief definition by introducing seven different terms: cultural diversity, cultural content, cultural expressions, cultural activities, goods and services, cultural industries, cultural policies and measures and interculturality. According to Article 4 paragraph 1 of the Convention the expression "cultural diversity" refers to the manifold ways in which the cultures of groups and societies find expression, and these expressions are passed on within and among groups and societies. The same provision explains that cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used. However, not even those clarifications contained in the UNESCO Convention can lead to a precise legal definition of the term *culture*.

On the other hand, there is, indeed, a broad range of definitions of culture in the field of social sciences and particularly in ethnology. From an ethnological point of view culture is mostly understood as a complex system of different expressions of material and immaterial activities of a given social group or society. Legal rules are a natural part of those manifestations of culture.

However, not every dispute concerning the interpretation and application of legal rules can be conceived as a cultural conflict since such a broad understanding of cultural conflict would not be applicable in practice. Therefore, there is a need to determine specific elements of culture which most typically appear in legal disputes. Only those cultural differences which may serve as an argument in legal disputes constitute characteristic features of cultural conflicts. In practice, disputed interpretations of the freedom of religion, the right to private and family life, the freedom of expression and the principle of non-discrimination are important examples.

This concept of cultural conflict has been inspired by the works of the Dutch sociologist den Hollander who, in a complex study of 1955, identified three forms of cultural conflict: conflicts between cultures, conflicts within one culture and conflicts which appear inside the human being as a result of different cultural influences (den Hollander 1955, 162). Particularly by analysing the second and third

form of cultural conflict den Hollander made it clear that cultures in this sense are not absolutely homogenous and monolith unities, but conflicts may appear, for example, between conservative and progressive members of the group.

In this context the cultural argument will not always be the major motivation of the participants in the dispute. Conflicts arise rather with regard to selected narrow aspects of culture than on the basis of culture as such. Therefore, den Hollander preferred the terms "religious conflict", "language conflict" or "ideological conflict" over "cultural conflict". According to den Hollander the term cultural conflict should be used only in cases where the dominant aspect of the conflict is the collision of a whole set of cultural elements (den Hollander 1955, 162).

In 2000, the link between sociological and legal meanings of cultural conflict was analysed in detail by the Swiss expert on international law, Walter Kälin. According to Kälin cultural conflicts in the legal sense concern such legal disputes over human rights and fundamental freedoms in which members of different ethnic groups raise legal claims against the state by pointing at their specific different culture (Kälin 2000, 24). In other words, the participants of cultural conflicts in disputes with the state claim a right to cultural diversity.

Kälin explained that such understanding of cultural conflicts as a rule derives from the relationship between majority and minority. Not only traditional national minorities who use the argument of cultural diversity in order to claim specific linguistic rights or rights in the field of education and political autonomy are involved. In practice, there is an ever growing number of conflicts affecting members of new minorities, i.e. communities who are the result of recent migration to Europe.

From a legal perspective this concept of cultural conflict seems to be the most useful since it comprises a broad spectrum of situations, such as the building of mosques and minarets, ritual slaughter of animals, religious symbols in schools, religious holidays and the prosecution of criminal acts motivated by cultural traditions. All of those cases may turn into legal disputes before courts, and national and international courts have the task of interpreting fundamental rights with a special view to cultural diversity.

As far as the practical application of cultural diversity in legal disputes is concerned, courts regularly refer to firm legal principles which they consider to be unquestionable. Cultural conflicts, indeed, often lead to a collision between cultural and religious interests of a minority group on the one hand and the key interests and values of the majority on the other hand. Therefore, the idea of *Leitkultur* may be identified within legal concepts as well as in political discourses.

In this context we have to recall the concept of *ordre public* which originally stems from private international law and serves as a defence against undesirable effects of the application of foreign law (Kučera 2004, 193). According to Section 36

of the Czech Act on International Private and Procedural Law,[4] legal provisions of a foreign state must not be applied in cases in which the effect of such application would be in contradiction to those principles of the Czech legal order which do not allow for exceptions. This so-called public order clause does affect not only the application of foreign law in proceedings before domestic courts (substantive law), but also the issue of recognition and enforcement of foreign court decisions (procedural law) (Týč – Rozehnalová 2002, 639).

It should be remembered that the problem of colliding legal orders and legal cultures has quite a long history in private international law. The confiscations of property which were carried out after the October Revolution in Russia and their recognition by national courts in France and Great Britain may serve as an example. Especially French courts referred to fundamental legal principles and recognized only such acts of confiscation which were based on public interest and the rule of appropriate and prompt compensation (Kinsch 2004, 419).

The concept of *ordre public*, however, is not only a matter of domestic legal orders. The current understanding of crucial legal principles has been significantly influenced by the internationalization and Europeanization of the term public order. Jurisprudence of international human rights bodies, such as the European Commission for Human Rights and the European Court of Human Rights, have significantly contributed to the current understanding of *ordre public,* for example, in the field of family law (Thoma 2007). Besides the national *ordre public* an international *ordre public* may thus be identified which is not based on rules of private law but on the key principles of international human rights law (Kokott 1998).

The term *ordre public* in this sense describes a certain minimum standard which does not allow for exceptions, not even in favour of the respect for cultural diversity. In the practice of cultural conflicts it is necessary to define the scope of those aspects of cultural diversity which can be applied in compliance with public order in opposition to the aspects which have to be refused by European courts. The majority of relevant disputes do not result from the collision of different domestic orders. Most cultural conflicts occur on the territory of one country and involve the claims of members of migrant communities.

3. Categories of cultural conflicts

The concept of cultural conflicts described above becomes apparent in different fields of social life. The problem of cultural diversity affects migrant workers who have been living in the country concerned for only a short period as well as migrants

[4] Act no. 97/1963 Coll. from 4th December 1963 concerning international civil and procedural law, in reading of successive norms.

who have already gained the citizenship of their new states as well as their children who were already born on the territory of European states. All of those groups are concerned, for example, with the issue of the Islamic scarf in public institutions or the protection of children against forced marriage.

Drawing inspiration from the theoretical works by Hannah Arendt (Arendt 1992, 27) and the Swiss anthropologist Hans-Rudolf Wicker (Wicker 1997, 143), Walter Kälin in his above mentioned study proposed to divide cultural conflicts into three basic spheres. According to Kälin, in the "state sphere" private individuals are confronted with different manifestations of state power (for example, in the course of military service, in criminal proceedings or during the enforcement of sentences). The main element of the "public sphere" is the balance of different private interests (for example, in the field of employment and public schooling), the "private sphere" is the place of close human relations covered by the notion of private autonomy (for example, family ties, friendship or social mechanisms within ethnic and religious communities) (Kälin 2000, 91). Cultural conflicts in the legal sense may occur in all those three spheres.

Of course, cultural conflicts may be described in other ways as well. For the purposes of this article we will categorize cultural conflicts according to the question against whom the members of ethnic communities claim their rights based on cultural difference. In the sense of traditional human rights concepts the individual is the subject of concrete rights and freedoms in relation to the state. As for the civil and political rights, the relation between the individual and the state is characterized by the prohibition of state interference with the protected interests of the individual, such as life, dignity, personal freedom, private and family life and the freedom of expression. In the field of social standards (employment, housing, health care) the protection of human rights may also imply positive obligations of the state towards the individual. Furthermore, members of ethnic and religious communities often claim their right to cultural diversity in relation to other private individuals and institutions, sometimes even against the members of their own families.

3.1 Cultural conflicts and the prohibition of discrimination

With a view to the prohibition of direct discrimination, international standards are very clear. According to Article 1 paragraph 1 of the International Convention on the Elimination of All Forms of Racial Discrimination the term of racial discrimination comprises "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

Further provisions on non-discrimination can be found, for example, in the International Covenant on Civil and Political Rights (Articles 2 and 26) and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR – Article 14 and Additional Protocol No. 12). It follows from these norms that not every difference in treatment constitutes discrimination.[5] The competent authorities have to examine whether the criteria for a variation are reasonable and objective and if the aim of a concrete measure is to achieve a purpose which is legitimate under the Covenant. Since issues relating to the legitimacy of a purpose and proportionality of a state measure are very complex, international monitoring bodies tend to recognize a certain margin of appreciation in favour of national courts (Čechová 2007, 166).

In legal practice, cases concerning the issue of indirect discrimination are even more difficult to solve than questions of direct discrimination. In cases of indirect or hidden discrimination a state measure seems to be neutral on its face, but, in reality, it has completely different impacts on the members of the majority and a concrete minority. The main features of indirect discrimination have been defined in particular with respect to equality of men and women. But the standards set up by international and national judicial bodies are mostly applicable also where the status of minority and migrant community members is concerned.

The UN approach towards indirect discrimination was rather inconsistent from the very beginning. Whereas, for example, the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women already in the 1990s considered indirect discrimination to be a violation of international obligations, the UN Human Rights Committee has only very lately recognized the concept of indirect discrimination and conceded that indirect discrimination amounts to a violation of the International Covenant on Civil and Political Rights.[6]

Also the approach chosen by the European Court of Human Rights was rather ambivalent. Only in 2001, the Court acknowledged that a general state policy which has disproportional impact on a concrete social group may be considered discriminatory. At the same time, the Court added that pure statistical irregularities would not serve as sufficient proof of discrimination (Henrard 2007, 43).

The inconsistent approach of the European Court of Human Rights has become apparent in the case concerning the complaint of Roma children against the Czech Republic.[7] In that case the applicants claimed that their assignment to special schools resulted in discrimination with respect to the right to education. They

[5] Human Rights Committee, General Comment No. 18: Non-discrimination (10.11.1989).
[6] Althammer et al. v Austria, Communication No. 998/2001 (CCPR/C/78/D/998/2001).
[7] Application No. 57325/00.

alleged a violation of Article 14 of the ECHR and Article 2 of the first protocol to the ECHR.

The key problem of this case which affects several aspects of cultural diversity was the question of how to prove indirect discrimination. Whereas according to official statistics Roma children made up to 80–90% of all pupils in special schools, the Czech Republic maintained that the ethnic criterion had no influence on the assignment of pupils to those schools. In February 2006, the Chamber of the European Court of Human Rights reached the conclusion that official statistics were not sufficient evidence of indirect discrimination and that consequently there had been no violation of the ECHR in this case.

A different approach was applied by the Grand Chamber of the European Court of Human Rights (seventeen judges) to which the case was referred according to Article 43 of the ECHR. In its judgment of November 13, 2007 the Grand Chamber found that as soon as a *prima facie* evidence of different treatment is identified it is upon the state to present legitimate reasons for that differentiation. With regard to very clear statistics showing the proportion of Roma children in Czech special schools the Grand Chamber accepted a shift of the burden of proof from the complainants to the Czech Republic and ruled that the differentiation between Roma and non-Roma children had not been based upon reasonable arguments. Therefore, the Czech Republic was responsible for the violation of the applicants' rights under the ECHR.

The final judgement of the Grand Chamber in the case of Roma children against the Czech Republic will have enormous impact on future cases concerning indirect discrimination. The new standard regarding the burden of proof will be of particular relevance for those ethnic and migrant communities which are on the periphery or edge of the society and are facing social and economic marginalization. Statistics showing significant disadvantages of such groups may be taken as an indicator of indirect discrimination in individual cases.

Other cases of indirect discrimination against members of different religious groups concern the issuing of official documents. The largest Islamic organisation in Germany Milli Görüs (IGMG) informs on its web page that German authorities in quite a number of cases refused to issue identity cards to Muslim women who attached to their applications photographs showing them with the Islamic headscarf.[8] The authorities referred to a governmental regulation according to which the applicant had to attach a photo without headdresses.[9] Although the relevant provision

[8] http://www.igmg.de/muslime-recht/bekleidungsgebote-und-erziehungswesen/fotos-in-ausweispapieren.html.

[9] Verordnung zur Bestimmung der Muster der Reisepässe der Bundesrepublik Deutschland (BGBl. I 2000, 1165).

granted a certain margin of appreciation to the authorities, some of them did not use their discretion in favour of Muslim applicants.

The Administrative Court in Wiesbaden already in 1984 held that a headdress does not prevent the clear identification of a person. According to the Court the principle of religious freedom calls for the consideration of the specific needs of different religious communities. Therefore, the granting of a legal exception concerning the Islamic headscarf was regarded as a necessary measure.[10] In 1989 the Administrative Court in Berlin reached a similar conclusion stating that freedom of religion comprises the respect for religious traditions and customs, including religious norms regulating clothing in public.[11]

Despite those leading cases discussions about headscarf photos of Muslim women continued on the level of administrative bodies in Germany. In 2003 the competent authority in the town of Baunatal refused to issue a passport to a German national of Turkish origin who attached a headscarf photo. When the applicant appealed to the Administrative Court in Kassel, the Court confirmed that freedom of religion did apply in such a case. The Court ruled that the administrative authority was under a legal duty to issue the document.[12] The town of Baunatal was reluctant to accept this conclusion and used further legal remedies. The higher instance, i.e. the Administrative Court for the Federal Country Hessen, however, ruled in line with the lower instances and confirmed the right of Muslim women to attach headscarf photos to applications for identity cards and passports.[13]

The general prohibition of headscarf photos is a typical example of indirect discrimination because, though neutral at its face, it has a disproportional effect on the members of a religious community. German courts rightly considered the problem of discrimination in the light of the principle of religious freedom. A strict prohibition of headscarf photos amounts to a violation of human rights.

3.2 Cultural conflicts and positive state obligations

The reference made to cultural diversity in practice does not serve only as a defence against state interference, but also as an argument in favour of positive state obligations. Kälin in his above mentioned study listed cases in which Muslim migrants to Switzerland and other European countries raised concrete claims with regard to the execution of punishments. The authorities had to solve issues such as the right of prison inmates to attend the regular Friday Prayers. As regards the Friday Prayers the Swiss Federal Court did not interpret religious freedom as a limitation

[10] Verwaltungsgericht Wiesbaden, 10.7.1984 (Az. VI/1 E 596/82).
[11] Verwaltungsgericht Berlin, 18.1.1989 (Az. 1 A 146/87).
[12] Verwaltungsgericht Kassel, 4.2.2004 (Az. 3 G 1916/03).
[13] Verwaltungsgerichtshof Hessen (Az. 7 TG 448/04).

of state interference, but as a basis for positive state obligations (Kälin 2000, 123). If the authorities grant prison inmates the possibility to attend the Friday Prayers, in practice this means a number of positive measures, such as the preparation of suitable facilities and additional guards. Also the question whether to grant prison inmates the right to food prepared according to religious norms falls within the category of positive obligations.

Thomas Lemmen argued that Muslim spiritual care in state institutions should comprise the compliance with prescriptions concerning food, the preparation of a certain space for spiritual events, the attendance at the Friday Prayer and consultations with Muslim clerics. However, Lemmen at the same time criticized German prison authorities which delegate the issue of Muslim spiritual care to members of official Turkish organizations working under the surveillance of Turkish consular offices in Germany (Lemmen – Miehl 2001, 55). Indeed, it is doubtful whether the involvement of official representatives of foreign states in the solution of problems regarding ethnic and religious communities is a suitable measure, especially in situations when those states definitely do not meet the criteria of democracy and cultural pluralism in all aspects.

The line between passive respect for cultural autonomy on the one hand and the need for active contributions in favour of different cultural communities on the other hand cannot always be drawn precisely. The principle of state neutrality in religious matters and the concept of positive measures overlap in a number of areas, such as the construction of mosques and the setting up of cemeteries according to Muslim norms. In the Czech Republic the construction of mosques has not been dealt with by courts so far, but the two mosques in Brno (1998) and Prague (1999) caused, at least at the beginning, several protests by the local population (Tretera 2005, 114).

The majority of mosques in Germany, indeed, are not an eye-catching place and neutral observers would hardly recognize sacred architecture in a backyard building. However, the construction of representative mosques in the Oriental style, sometimes together with minarets, has led to excitement in some European states. It is understandable that the construction of mosques became an important topic of the so-called German Islam Conference (*Deutsche Islam Konferenz*) which was established in 2006 by the Federal Ministry of the Interior as a discussion forum dealing with the integration of Muslims. 15 representatives from German state bodies and 15 members of Muslim communities participate in this formal dialogue presided by the German Minister of the Interior.[14] At its third meeting in March 2008, the German Islam Conference agreed that the construction of new representative mosques

[14] Further information available at http://www.bmi.bund.de/nn_1018358/Internet/Content/Nachrichten/Pressemitteilungen/2006/Einzelseiten/Islamkonferenz__Kurzinfo.html.

is a very important step towards the integration of Muslims since those mosques are symbols of the permanent presence of different religious communities.

However, the concrete decision on the construction of a mosque, which falls within the competence of administrative authorities, is in legal practice more complicated than a general political declaration. Very often the local population, potentially affected by mosques and minarets, uses the available legal remedies in order to prevent the construction of mosques.

Jurisprudence of German courts is not consistent in this matter. In 1992, an administrative court examined a case in which the neighbour used legal remedies against the decision of the local authorities to permit the construction of a mosque in a residential quarter of the town. The neighbour alleged that the operation of the mosque would lead to a dramatic increase of traffic since the town was not prepared for such an object. The administrative court found that the disturbance caused by the operation of a mosque would not be substantial and that religious freedom in this case prevailed over the interests of the neighbours. The second instance, i.e. the Federal Court of the Federal Country of Baden-Württemberg, however, repealed this judgment as it considered the disturbance caused by the Morning Prayer to be disproportional. The final decision in this case had to be given by the German Constitutional Court which agreed with the arguments of the Muslim community. The Constitutional Court found that the neighbours had to accept such degree of disturbance which was usual for the surrounding area of religious buildings. The negative consequence of the operation of the mosque would be very limited (only three months per year and only 30 minutes per day) (Muckel 2004, 55).

Whereas discussions about mosques have become more emotional in the past years, the traditional battle field of cultural conflicts can be found in public schools. Disputes concerned, for example, the Islamic scarf and the use of religious symbols in class rooms as well as dispensation of Muslim pupils from swimming lessons and excursions. Conflicts have occurred in states which in line with the policy of *laicité* enforce a strict separation of state and church as well as in states in which schools openly impart religious values. In the field of education the collisions of different cultural concepts obviously cannot be avoided (Kälin 2000, 140). In such situation legal solutions should be based upon the right balance between the interests concerned.

The issue of the Islamic headscarf in public schools has been discussed in a number of European countries. Whereas France applies the principle of *laicité* and strictly forbids the wearing of the Islamic scarf and other religious symbols by teachers and pupils in public schools, the approach of other states is more liberal. In Austria Muslims were recognized as a religious society already in 1912 and since then the use of Islamic symbols in public institutions is a legal right. The Islamic

scarf today is a natural part of clothing for many young Muslim women in Austria (Schmied 2008, 197). A generous approach in this context is also typical for Scandinavian countries.

The situation in Switzerland and Germany is more complicated. In 1997 the Swiss Federal Court dismissed an action by a Muslim teacher in Geneva who was not allowed to wear the Islamic headscarf at school. The Court reached the conclusion that the Islamic scarf was a very strong religious symbol which may offend the religious feelings of pupils. At the same time the Court stressed the importance of state neutrality which, in the area of public education, prevails even over religious freedom.[15]

The case of the Muslim teacher continued before the European Court of Human Rights which in February 2001 found that the prohibition of the Islamic headscarf was not in contradiction with religious freedom laid down in Article 9 of the ECHR. According to the European Court of Human Rights the measure applied by the Swiss authorities was in accordance with a legal provision, served a legitimate purpose and was proportional to this purpose. The Court further explained that in this concrete case pupils aged four to eight years had to face the headscarf of their Muslim teacher and this could have easily influenced their future attitude to questions of religion.[16]

Already in 1988 the problem of the Islamic scarf had been dealt with by a German administrative court which explained that the wearing of the headscarf may have a religious significance and fall within the notion of religious freedom. However, as far as the wearing of the headscarf in public schools is concerned, the Court held that such manifestation of religious conviction by the teacher collides with the negative religious freedom of the pupils not to be confronted with such symbols (Kälin 2000, 151). This judgment left quite a broad space for further clarifications since in practice it may be disputable whether a symbol in a given situation interferes with the rights of the pupils. In the following years jurisprudence of German courts was inconsistent.

A leading judgment was issued by the German Constitutional Court only in 2003. The Court had to solve a case in which a German national of Afghan origin sued the federal state of Baden-Württemberg because she was refused the post of a teacher at primary schools. The competent school authorities argued that the applicant used the Islamic scarf as a religious and political symbol which is not in compliance with the principle of state neutrality in school matters. Before the Constitutional Court the applicant alleged that her religious freedom had been infringed by this

[15] BGE 123 I 296.
[16] Dahlab v Switzerland (application No. 42393/98).

decision. The Court reached the conclusion that the wearing of the headscarf can be forbidden only by an explicit legal provision. As in the concrete case the authorities did not refer to such an explicit ban on the headscarf the approach of the school authorities towards the Muslim teacher was illegal.[17] As a reaction to this judgment, several federal countries (e.g. Baden-Württemberg and Nordrhein-Westfahlen) very soon adopted new laws explicitly prohibiting the wearing of the headscarf by teachers. Other federal countries did not follow this example and kept applying a more liberal approach. Therefore, in Germany today there is no uniform regulation of this problem, but the situation differs according to the legislation adopted on the level of federal countries.

In one of its leading cases the European Court of Human rights dealt with the question whether also students may be forbidden to wear the headscarf at public universities in Turkey. In the case Leyla Şahin v. Turkey[18] the applicant, a student of medicine, had been punished by the university for not respecting the ban on the headscarf laid down in Turkish laws. In 2005 the Grand Chamber of the European Court of Human Rights found that in this concrete case the restriction on religious freedom was in line with the ECHR since secularism in Turkey is a guarantee of democratic values and the democratic system as such. According to the Court the ban on the headscarf does not only protect the individual against arbitrary interference by the state, but also against pressure exercised by Extremist movements within the community. Those considerations of the Court do not mean that all contracting parties to the ECHR have to ban the headscarf in public schools. However, a ban which is motivated by the protection of traditional democratic values will not be regarded as a violation of human rights and freedoms.

3.3 Cultural conflicts and the horizontal effect of human rights

Cultural conflicts in the private sphere regularly lead to very complicated disputes. Collisions of different private interests occur most typically in the field of employment and in the family. At work, like in public schools, there have been conflicts relating to the Islamic scarf. Employees also used the argument of cultural diversity in the context of religious holidays and dispensations from certain obligations.

In 1990 the competent court in the Swiss town of Arbon ruled in favor of a Turkish applicant who had been dismissed by her employer due to the fact that she had been wearing the headscarf at work. The Court found that the employee had been exercising her religious freedom in a manner which did not lead to the violation of her obligations set out in the employment contract (Kälin 2000, 178).

[17] 2 BvR 1436/02.
[18] Application No. 44774/98.

A similar case was handled by German courts in different ways. In 2001 the competent court in Frankfurt dealt with the case of a Turkish Muslim who in the 1990s had been working as a shop assistant in a German supermarket.[19] At the beginning there had been no legal problems as the woman concerned did not wear any religious symbols at work. However, in 1999 she informed her employer that in the future she would need to wear the headscarf as this was prescribed by religious norms. When she insisted on this standpoint she was dismissed from her work.

Before court the plaintiff explained that the employer had not proven any economic disadvantages linked to the headscarf. According to the Muslim woman the clients readily accepted a shop assistant wearing the Islamic headscarf. The Court in Frankfurt, however, did not refer to concrete economic losses but stressed the employer's right to define the public presentation of the company and its public image. The Court added that religious freedom is no absolute right and does not prevail over the principle of freedom of contract guaranteed by the German Constitution. In this case of conflicting constitutional principles the Court considered the termination of the employment contract to be the most suitable solution.

This judgment was overturned by the Federal Labor Court ("Bundesarbeitsgericht"). Though accepting the argument that the collision of constitutional principles has to be solved by balancing the conflicting values, the Federal Labor Court reached the conclusion that freedom of religion is of special importance.[20] With a view to this importance the Court demanded a clear proof that the wearing of the headscarf had been influencing the economic results of the supermarket. As such evidence could not be presented by the defendants the Court decided that the dismissal of the employee was illegal. This judgment makes it clear that the right to cultural diversity may be used as a legal argument not only in cases in which the state is the employer, but also in relations between private individuals. In other words, in cases of cultural diversity there is a horizontal effect of human rights.

With regard to the situation inside migrant communities the sphere of family life is under a very strong influence of cultural diversity. On the one hand, international and national human rights standards provide for broad private and family autonomy. This autonomous space, however, does not mean that the state has to remain completely passive with respect to family matters. According to international norms for the protection of children, i.e. especially the UN Convention on the Rights of the Child of 1989, states have the obligation to interfere in favor of the children's best interest whenever their rights are being violated or endangered by their own parents. This approach can be generalized: in principle, private and family autonomy ends where fundamental rights of family members are at stake (Scheu 2008).

[19] LAG Hessen, 21.6.2001 (3 Sa 1448/00).
[20] BAG, 10.10.2002 (2 AZR 472/01).

In the framework of family relations concrete manifestations of cultural diversity concern the problem of forced marriage, child marriage, crimes in the name of honor and disputes over child education. Different forms of forced marriage are a part of social reality not only in quite a number of non-European countries, but also in Europe. The current dimension of the problem is demonstrated by a resolution of 2005 in which the Parliamentary Assembly of the Council of Europe expressed its concerns over issues of forced marriage and child marriage which occur particularly in migrant communities. The Parliamentary Assembly harshly criticized those states which had been tolerating the phenomenon with a view to respect for diverse cultures and traditions.[21]

The Council of Europe Committee on Equal Opportunities for Women and Men contributed to this discussion by pointing at the necessary balance between the respect for general human rights on the one hand and the respect for cultural diversity on the other. The Committee stressed that cases of human rights violation never fall within the notion of private and family autonomy.[22]

In a very similar way also the European Parliament of the European Union in 2004 adopted a Resolution on the Situation of Women from Minority Groups in which it called upon the EU member states to effectively protect Muslim women from human rights violations, such as the practice of genital mutilation and forced marriage. The European Parliament recommended the member states to recognize those forms of persecution as legitimate reasons for granting asylum.[23]

There is no doubt that different activities linked to forced marriage and child marriage constitute criminal acts under the penal law of European states. The prosecution of those acts, however, remains a huge problem. Only exceptionally have the criminal courts dealt with cases of forced marriage. There are only vague estimations regarding the real extent of the problem. Children and young women who are forced into marriage by their own parents mostly do not contact the state authorities due to fear, shame and lack of confidence. A study carried out by the Council of Europe concluded that in European states there have been very few court decisions concerning forced marriage. The author of the study also criticizes the light punishments of the convicted offenders (Rude-Antoine 2005, 9).

In 2005, after the intervention of social workers, a 17 years old girl in Norway opposed her parents who had decided that she should marry a man from northern Iraq. Her father and her brother were indeed sentenced by the competent criminal court to 10 and 8 months imprisonment respectively. However, the Muslim girl lost contact

[21] Resolution 1468 (2005), Forced marriages and child marriages.
[22] Doc. 10590 (20.6.2005), rapporteur: Rosmarie Zapfl-Helbling.
[23] European Parliament Resolution on the Situation of Women from Minority Groups in the European Union (2003/2109(INI)).

with her family and social community.[24] This is a huge dilemma. The state which rightly interferes in favor of community members and protects them from violence caused by their own families, is, at the same time, not able to guarantee lasting family ties which, from the perspective of the protected individuals, are key elements of their private and family life. In other words, the protection of human dignity and personal freedom is guaranteed at the price of the destruction of family ties.

In Germany, a rather recent court case has caused a lot of media and public attention. In this case a German national of Moroccan origin had married a Moroccan national according to Islamic law. When her husband began to physically mistreat her, the wife applied for an immediate divorce. As the spouses were living in Germany the case was dealt with by the competent German court.

In German law the only ground for divorce is the breakdown of marriage. The relevant legal rules provide for two conclusive presumptions for the failure of marriage: firstly, if the spouses have been separated for one year and both of them agree to divorce and secondly, in disputed cases, if the spouses have been separated for three years. Apart from this combination of failure and consent German law provides for an exception in such cases in which the spouses have been separated for less than a year, but the continuation of the marriage would result in unreasonable hardship to the petitioner owing to cause attributable to the other spouse.

In the case concerned the petitioner referred to this exception clause. The competent judge in Frankfurt, however, dismissed her petition as the judge found that in Moroccan culture, to which the spouses belonged, it was not unusual for the husband to use physical violence against his wife. The judge, indeed, explicitly quoted from the Koran according to which the husband stands over his wife and has the right to beat her. The judge concluded that the lasting of the marriage would not be an unreasonable hardship under these circumstances. Therefore, according to the judge, divorce would be possible only if the period set out in German law was respected.[25]

It is no surprise that this decision has evoked a wave of protests and criticism not only among German lawyers. Some comments even found that a German court for the first time admitted the priority of Koran over the German Constitution. Of course, there was not such an excess because in the case concerned the wife had already been protected by a court decision ordering the husband to leave the dwelling and to avoid meetings and contacts with the applicant. The debate, however, showed that cultural conflicts appeal to a broad public and are a highly topical from the perspective of legal norms and court disputes.

[24] http://www.aftenposten.no/english/local/article1044225.ece.
[25] http://www.sueddeutsche.de/,tt5l4/deutschland/artikel/778/106672.

4. Conclusions

With a view to the intensive philosophical and political debate about the integration of members of different cultural communities in Europe it was the goal of this article to present the legal dimension of cultural conflicts. We have identified cultural conflicts as a current problem the relevance of which will increase as the proportion of migrants from different cultures will increase as well.

In the first part of the study we focused on the legal concept of cultural conflict which is determined by the interpretation and application of fundamental rights and freedoms. The key aspect of a legal notion of cultural conflict is the link between the cultural diversity argument on the one hand and concrete legal claims on the other. In practice, members of migrant communities very often refer to the freedom of religion. In cultural conflicts, cultural and religious diversity collides with such legal and cultural norms which are considered indispensable by the majority society. Such norms, especially in the field of fundamental rights, are conceived as part of the international *ordre public*.

In the second part of this contribution we have analyzed different situations in which cultural conflicts found an expression in legal disputes before courts. The focus was on cases in which members of minority communities brought legal claims linked to cultural diversity. Different cultural standards have been a legal argument in relation to state power, especially in the context of non-discrimination, but also with respect to positive state obligations. Further, there have been a number of cases in which cultural differences influenced the relationship between private individuals.

Court practice in Europe has shown that the approach to concrete cases of cultural diversity is quite often inconsistent. In the European migration area the question is becoming more relevant whether besides general human rights principles also concrete issues, such as the wearing of the Islamic scarf in public institutions and private enterprises, should be regulated on the European level rather than on the level of individual states. Would it be desirable to adopt a general European solution for problems concerning the status of members of different ethnic and religious communities?

In this context it needs to be remembered that there is not even a common European approach towards traditional national and linguistic minorities. As a matter of fact, legally binding conventions, such as the Council of Europe Framework Convention on the Rights of National Minorities, did not lead to legal solutions accepted by all European states. There are still different standards of national minority protection in Europe. A common political and legal approach toward the problematic issue of new cultural and religious communities is therefore not very likely to be found.

Without political consensus on this difficult matter no international or European convention on the solution of cultural conflicts will be adopted.

Cultural conflicts thus remain first of all in the hands of domestic courts in European countries and, in exceptional cases, in the hands of the European Court of Human Rights. Those judicial bodies interpret legal principles in different ways although the key to a legal solution of cultural conflicts should always be the determination of the right balance between the respect for cultural diversity on the one hand and the protection of crucial democratic values on the other hand. As far as cultural conflicts are concerned, the road to common standards is still very long.

References

Arendt, Hannah (1992): *Vita Activa oder Vom tätigen Leben*, 7. Aufl., München/ Zürich.

Čechová, Blanka (2007): Rovnost a zákaz diskriminace v judikatuře Evropského soudu pro lidská práva, in: Bobek, M. et alii (ed.), *Rovnost a diskriminace*, Praha, 155–174.

Den Hollander, A. N. J. (1955): Der Kulturkonflikt als soziologischer Begriff und als Erscheinung, *Kölner Zeitschrift für Soziologie und Sozialpsychologie*. Quoted in Schulte, Axel: Multikulturelle Einwanderungsgesellschaften in Westeuropa. Soziale Konflikte und Integrationspolitiken, Bonn, 1998 (electronic edition) na stránkách http://library.fes.de/fulltext/asfo/00801003.htm.

Henrard, Kristin (2007): *Gleiche Rechte oder Sonderrechte. Der Minderheitenschutz und das Diskriminierungsverbot*, Luxemburg: Amt für Veröffentlichungen der Europäischen Gemeinschaft.

Kälin, Walter (2002): *Grundrechte im Kulturkonflikt*. Freiheit und Gleichheit in der Einwanderungsgesellschaft, Zürich.

Kinsch, Patrick (2004): Sklavenbesitz, religiöse Ehehindernisse und entschädigungslose Enteignungen. Zur Vorgeschichte der Frage nach der Einwirkung der Grund- und Menschenrecht auf die Anwendung ausländischen Rechts, in: Mansel, Heinz-Peter et alii (ed.), *Festschrift für Erik Jayme*, Band I, München, 419–435.

Kokott, Juliane (1998): Grund- und Menschenrechte als Inhalt eines internationalen ordre public, in: Coester-Waltjen, D., Kronke, H., Kokott, J.: Die Wirkungskraft der Grundrechte bei Fällen mit Auslandsbezug, *Berichte der Deutschen Gesellschaft für Menschenrechte*, Bd. 38, Heidelberg.

Kučera, Zdeněk (2004): *Mezinárodní právo soukromé*, 6. opravené a doplněné vydání, Brno.

Lemmen, T., Miehl, M. (2001): *Islamisches Alltagsleben in Deutschland*, Bonn: Friedrich-Ebert-Stiftung.

Muckel, Stefan (2004): Islam in Germany, in: Potz, R., Wieshaider, W. (ed.), *Islam and the European Union*, Leuven: Peeters, 41–77.

Rude-Antoine, E. (2005): *Forced marriages in Council of Europe member states. A comparative study of legislation and political initiatives*, Strasbourg.

Scheu, H. C. (2008): Trestní právo v napětí kulturního konfliktu, *Jurisprudence*, 5/2008, 3–7.

Schmied, Martina (2008): Islam in Österreich, in: Feichtinger, W., Wentker, S. (ed.), *Islam, Islamismus und islamischer Extremismus*, Wien: Böhlau, 189–206.

Thoma, Ioanna (2007): *Die Europäisierung und die Vergemeinschaftung des nationalen ordre public*, Studien zum ausländischen und internationalen Privatrecht, Tübingen.

Tibi, Bassam (2006): Der Islam und der EU-Beitritt der Türkei, *Europäische Rundschau*, 1/2006 (Sondernummer), 49–61.

Tibi, Bassam (1996): Multikultureller Werte-Relativismus und Werte-Verlust, *Aus Politik und Zeitgeschichte*, 52–53/1996, 27–36.

Tibi, Bassam (1998): *Europa ohne Identität? Die Krise der multikulturellen Gesellschaft*, München, 1998.

Tretera, Jiří Raimund (2005): Právní postavení islámské menšiny v České republice, in: *Náboženská sloboda a jej aspekty. Islám v Európe*, Bratislava, 109–115, 114.

Týč, V., Rozehnalová, N. (2002): Kolizní smluvní právo, výhrada veřejného pořádku a mezinárodně kogentní normy, *Právník*, 6/2002, 634–661.

Wicker, Hans-Rudolf (1997): Multiculturalism and the Sphere Theories of Hannah Arendt and John Rex, in: Wicker, Hans-Rudolf (ed.), *Rethinking Nationalism and Ethnicity, The Struggle for Meaning and Order in Europe*, Oxford/New York, 143–162.

Harald Christian Scheu *is associate professor at the Department of European Law at the Faculty of Law of Charles University in Prague. He specializes in international and European human rights law and European constitutional law.*

E-mail: scheu@post.cz