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The Austrian Public Policy Clause and Islamic Family Law

I Introduction

Austrian courts, in accordance with the private international law rules applicable in Austria, may be required to apply a law based on the authority of religious sources such as the *Quran* and the *sunna*. Likewise, decisions adopted in jurisdictions designated as Islamic can be recognised by Austrian courts in accordance with the rules of recognition and enforcement. Two cases, one on the application of Saudi-Arabian law in Austria, and one on the recognition of an Iranian decision, were decided by the Austrian Supreme Court in 2011.

In both cases, national private international law rules have been applicable. The case-notes therefore, focus on the Austrian public policy clause. However, public policy clauses can be also found in EU legal instruments such as the Rome III Regulation (Art 12) and the EU Regulation No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations – (Art 24 lit a). None of the EU legal instruments was applicable in the current case. In the consideration of religious sources, similar questions arise as with regard to the invocation of the national public order clause. However, the reflections made below on the Austrian public order clause may only be transposed with great care, considering the difficult nature and context of the public order clauses in EU legal instruments.

Austrian conflicts law, as it is generally constituted, may refer to legislation influenced by Islam and governs the recognition of a decision adopted in a jurisdiction shaped by Islamic authority. It does, however, neither prescribe specific rules for legislation influenced by Islam or for the recognition of decisions adopted in a jurisdiction shaped by Islamic authority, nor outlaw the application or bar recognition. This approach is concise for many reasons. In particular, the variety of situations does not allow a one-size-fits-all approach to legislations influenced by Islam, but requires the flexibility that can be availed of in a balanced private international law system. Hence, if Austrian courts would be forced to ignore any family law decision adopted in a jurisdiction designated Islamic, then women, in a number of instances

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could lose ancillary entitlements to relief and child custody, for example,[1] not to mention the problem of limping marriages, i.e. marriages being recognized in some but not in all jurisdictions.

The law of many jurisdictions is based on the authority of religious sources such as the *Quran* and the *sunna.* However, the different jurisdictions offer a variety of legal rules. Although a number of jurisdictions refer to the abovementioned sources, the different interpretations and the variety of additional rules are part of each jurisdiction. References by the Austrian Private International Law Act ('autIPRG') ought to be understood as references to the law of a particular state. Therefore, for a jurisdiction designated Islamic, it has to be established how the sources are interpreted in the particular state and whether complementary rules are applied.[2]

The application of a so-called Islamic law, i.e. law based on the authority of religious sources such as the *Quran* and the *sunna,* by an Austrian court, could easily attract the attention of a larger public, including politicians and the mass media. In Austria, this is due to a suspicious attitude towards Muslims currently prevailing among large parts of the Austrian population. The foremost reason beyond this suspicion is the steadily growing size of the Muslim population in Austria. Other fears may derive from terrorist attacks committed by Muslims who refer to their religious ambitions. In recent years, especially the activities of the so-called Islamic state and the large number of refugees who have arrived in Austria are deemed to have led to a growing mistrust towards Muslims, including hostility towards Muslim customs[3] and legal traditions.

This general tendency also affects the legislator,[4] legal discussions, and courts. In the US, federal states started to ban Islamic law, even when it would have been applicable in accordance with choice of law rules.[5] On some occasions, this even goes further, and they promote attempts to restrict the application of foreign laws in general.[6] Austrian private international law, in contrast, remains neutral and open to the application of foreign law and the recognition of foreign decisions, including legislation referring to the *Quran* and the *sunna* and decisions in respective jurisdictions. Discussions, therefore, focus on the range of

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1 See Ilias Bantekas, 'Transnational Talaq (Divorce) in English Courts: Law Meets Culture' (2009) 9 (2) Journal of Islamic State Practice in International Law 40–60, 45–46.

2 See Andrea Büchler, *Islamic Law in Europe? Legal Pluralism and its Limits in European Family Laws* (Routledge 2016, Oxon – New York) 10.

3 In 2015, the Austrian supermarket chain Spar withdrew halal meat from the range of its products after massive protests about their offering.

4 Austria e.g. has enacted an Anti-veiling Act *(Anti-Gesichtsverhüllungsgesetz)* that entered into force on 1 October 2017.

5 See Bryan Turner, James Richardson, 'America. Islam and the Problems of Liberal Democracy' in Maurits Berger (ed), *Applying Shari'a in the West – Facts, Fears and the Future of Islamic Rules on Family Relations in the West* (Leiden University Press 2013, Leiden, 47–64) 52–54, 56–57.

6 See e.g. State of Arkansas House Bill 1471 'An act to protect the rights and privileges granted under the United States Constitution and the Arkansas Constitution; to declare American Laws for American Courts; and for other purposes' (2015). Similar provisions have been enacted in a number of other US states.

application for the public policy clause. As such Austrian courts are also straddling between suspicion of laws designated as *sharia* law and the belief in the basic equality of legal orders supporting judicial harmony. Whereas the public policy clause is easily invoked in order to avoid the application of law designated as *sharia* law, the original intent was to award only a limited role to the public policy clause, merely focusing on the effects of the application of foreign law or on the effects of the recognition of a foreign judgment. The decisions illustrate the variety of treating law designated as *sharia* law in family matters by Austrian courts.

II Post-marital Maintenance

1 Facts of the Case

The Austrian Supreme Court decision dated 28 February 2011,[7] concerned an action for spousal and post-marital maintenance. The action was brought by the wife of a couple married in Medina, Saudi Arabia, in 1983. At the time of the marriage, both spouses were Saudi Arabian citizens. The permanent residence of the wife before as well as after the marriage was in Austria, whereas the husband moved to Austria after the marriage. In 2003, the wife acquired Austrian citizenship, whereas the husband remained a citizen of Saudi Arabia. The marriage ended in divorce in 2007.

The Austrian courts dealing with the case first had to determine the applicable law in accordance with Austrian private international law rules. The Hague Protocol on the Law Applicable to Maintenance Obligations was not yet applicable, since the procedure had already started before its entry into force in Austria.[8] The Austrian Supreme Court distinguished between spousal and post-marital maintenance, since the calculation of spousal maintenance remained uncontested in the revision. In order to determine the law applicable to post-marital maintenance, the Austrian Supreme Court rightfully applied § 20 s 1 and § 18 s 1 no 1 autIPRG. In accordance with § 20 s 1 autIPRG, 'the prerequisites and effects of a divorce shall be judged according to the law governing the personal legal effects of the marriage at the time of the divorce'. It is stated in § 18 s 1 no 1 autIPRG that these effects shall be judged 'according to the personal status law which the spouses have in common, and, in its absence, according to the last common personal status law of the spouses, provided one of the spouses has retained it'.[9] Austrian private international law rules referred in the given case to the law of Saudi Arabia. References in the Austrian Private International Law Act, in

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7 Austrian Supreme Court ('OGH') 9 Ob 34/10f.

8 See Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L 7/1, art 75. For details see OGH 7 Ob 116/12b; OGH 10 Ob 35/12p; OGH 5 Ob 152/15m; Brigitta Lurger, Martina Melcher, *Handbuch Internationales Privatrecht* (Verlag Österreich 2017, Vienna) para 2/200–2/205.

9 Translations by Edith Palmer, 'The Austrian Codification of Conflicts Law' (1980) 2 (28) The American Journal of Comparative Law 197–234, 226–227.

accordance with § 5 s 1 autIPRG, include the conflicts rules of a foreign legal order. Saudi Arabian conflicts law however accepted the reference.[10]

Nonetheless, Austrian courts are entitled to apply Austrian law as the *lex fori,* if and only if (1) 'despite intensive efforts the foreign law cannot be ascertained within a reasonable time',[11] or (2) the application of foreign law 'would lead to a result irreconcilable with the basic tenets of the Austrian legal order'.[12]

In the present case, the first instance court with regard to spousal maintenance applied Austrian law referring to § 4 s 2 autIPRG. In relation to post-marital maintenance, the first instance court again applied Austrian law but referred to the public policy clause, stating that the rules on post-marital maintenance applicable in Saudi Arabia are contrary to the basic tenets of the Austrian legal order. The second instance court confirmed this decision and made it explicit that a three-month limitation of post-marital maintenance, as provided by Saudi Arabian law, is irreconcilable with the basic tenets of the Austrian maintenance law. Applying Austrian maintenance law in accordance with § 6 autIPRG, the second instance court awarded maintenance on grounds of equity and fairness, e.g. in consideration of the spouses' financial abilities, in accordance with § 68 Austrian Marriage Act. This provision applies if no fault by the spouses has been established

This decision was amended by the Austrian Supreme Court with regard to post-marital maintenance. It first established, with reference to an expert opinion, that applicable Saudi Arabian law provides for maintenance only during a waiting period, which is up to three months after divorce.[13]

2 The Application of the Public Policy Clause

The Austrian Supreme Court emphasised that the public policy clause must be regarded as an exception, being in conflict with the system of private international law, particularly regarding the acceptance of the principle of equality of legal systems.[14] In this regard, the Austrian Supreme Court confirmed that the public policy clause must be applied cautiously.[15]

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[10] See with further references Marco Nademleinsky, 'Unterhaltsbefristung der Scharia verstößt nicht gegen inländischen ordre public' [2011] Zeitschrift für Familien- und Erbrecht 103–104, 104.

[11] § 4 s 2 autIPRG, translation by Palmer (n 9) 223.

[12] § 6 autIPRG, translation ibid.

[13] This result is in line with reports of many observers. See e.g. Lena-Maria Möller, 'No Fear of Talaq: A Reconsideration of Muslim Divorce Laws in Light of the Rome III Regulation' (2014) 10 (3) Journal of Private International Law 461–487, 472.

[14] For Austria see Fritz Schwind, *Internationales Privatrecht* (Manz 1990, Vienna) para 15; Bea Verschraegen, 'Internationales Privatrecht' in Peter Rummel (ed), *ABGB – Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (3rd edn, Manz 2004, Vienna) § 6 autIPRG para 1; Marco Nademleinsky, Matthias Neumayr, *Internationales Familienrecht* (2nd edn, Facultas 2017, Vienna) para 01.25.

[15] See also 6 Ob 242/98a; OGH 3 Ob 221/04b; OGH 9 Ob 70/10z; OGH 7 Ob 200/10b; Alfred Duchek, Fritz Schwind, *Internationales Privatrecht* (Manz 1979, Vienna) § 6 para 2; Nademleinsky, Neumayr (n 14) para 01.23; Schwind (n 14) para 155–156; Bea Verschraegen, *Internationales Privatrecht* (Manz 2012, Vienna) para 1310.

It interpreted § 6 autIPRG as requiring an analysis of the effects of the application of Saudi Arabian law with regard to the particular circumstances of the case. In the given case, divorce was observed to be confirmed based on mutual fault for the break-up of the marriage. Maintenance after break-up of the marriage due to mutual fault is awarded under Austrian law in accordance with the principle of equity and fairness. Limitations subject to a number of considerations may be set by the court, applying Austrian law as well. In this regard, the Austrian Supreme Court did not accept the decisions of the lower instance courts, which stated that the three-month limitation of the post-marital maintenance in this particular case was irreconcilable with the basic tenets of the Austrian legal order. Similarly, *Stone* already observed in the 1980's that, for legal regimes, which favour the destruction in law of marriages which have irretrievably broken down in fact and enable a divorce to be obtained with little difficulty, 'neither the grounds on nor the procedure by which a foreign divorce is obtained should be relevant to its recognition in England.'[16]

The Austrian Supreme Court rightfully observed that the result of the application of the foreign law regarding the particular case, and not the foreign law as it is generally constituted, must be considered.[17] This interpretation of § 6 autIPRG is consistent with the prevailing Austrian doctrine[18] and a number of decisions by the Austrian Supreme Court in family law and other areas of the law.[19] However, in the given case, *Fucik* rightfully mentioned that the suspicion of law designated as *sharia* law resulted in public attention regarding the case and not the restriction of maintenance as such, and he added that other legal orders, e.g. Swedish law, although they would have denied any right to post-marital maintenance if it would have been applicable to the given case, would not have been tested against the public policy clause.[20]

The present case, however, illustrates the disadvantage of the reference in § 20 s 1 and § 18 s 1 no 1 autIPRG to maintenance obligations. Clearly, Saudi Arabian law does not have a close connection with the legal relationship and obligation that was the subject of the claim. Today, Art 3 of the Hague Protocol on the Law Applicable to Maintenance Obligations would refer to the 'law of the State of the habitual residence of the creditor' and Austrian law would therefore apply.[21]

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16 PA Stone, 'The Recognition in England of Talaq Divorces' (1985) 14 (4) Anglo-American Law Review 363–378, 371.

17 See also Christian von Bar, Peter Mankowski, *Internationales Privatrecht I. Allgemeine Lehren* (Beck 2003, Munich) § 7 para 265–277; Verschraegen, *Internationales Privatrecht* (n 15) para 1314.

18 See Michael Schwimann, *Internationales Privatrecht* (3rd edn, Manz 2001, Vienna) 44–45; Verschraegen in Rummel (n 14) § 6 para 3; Barbara Egglmeier-Schmolke, *Internationales Privatrecht* (2nd edn, NWV 2016, Vienna–Graz) 42–43.

19 OGH 4 Ob 199/00v; OGH 5 Ob 131/02d; OGH 3 Ob 242/05t; OGH 9 Ob 70/10z.

20 Robert Fucik, Scharia und ordre public [2011] Interdisziplinäre Zeitschrift für Familienrecht, 180–181, 181.

21 See Willibald Posch, 'Die Anwendung des islamischen Rechts in Österreich heute – und morgen?' [2012] Zeitschrift für Rechtsvergleichung 71–80, 76; Harun Pacic, 'Islamisches und islamisch geprägtes Recht in Österreich' [2013] Zivilrecht aktuell, 111–114, 112–113.

III Divorce

1 Facts of the Case

The Austrian Supreme Court decision dated 13 October 2011[22] concerned an application for divorce. The application was brought on 12 September 2007 by the wife of an Iranian couple living in Austria. The husband, who had Iranian-Austrian dual citizenship, opposed that application, contending that they had been divorced in Iran. The application for divorce was brought in Teheran by the husband earlier in 2007. The Iranian first instance court decided in favour of the application by a judgment issued on 20 October 2007. This decision was appealed by the wife and confirmed by the Iranian second instance court on 22 January 2008. This decision was again appealed by the wife and on 30 August 2008 the Iranian Supreme Court finally rejected the appeal. On 8 March 2009, the Iranian family court issued the respective official divorce acknowledgement.

In the meanwhile, the Austrian courts continued the divorce proceedings in Austria. The first instance court decided on 31 May 2010 that the marriage was divorced in Iran and accordingly dismissed the application brought in Austria. The dismissal of the Austrian application was based on the recognition of the Iranian court decision. The second instance court confirmed this decision and declared that the Iranian decision must be recognised in accordance with § 97–99 Austrian Non-Contentious Proceedings Act (*Außerstreitgesetz,* 'autAußStrG').[23] § 97 s 1 autAußStrG allows the recognition of foreign divorce judgements if they are final and if there is no reason to reject recognition. Possible reasons for rejection are indicated in § 97 s 2 autAußStrG. In accordance with § 97 s 2 no 1 autAußStrG, recognition must be rejected if the foreign judgment is manifestly irreconcilable with the basic tenets of the Austrian legal order. More specifically, § 97 s 2 no 2 autAußStrG bars recognition if the proceedings infringed the right to a fair hearing of one spouse, unless the spouse was evidently in agreement with the decision. Finally, § 97 s 2 no 4 autAußStrG bars recognition if, by hypothetical application of Austrian law on international jurisdiction, the foreign court would have lacked jurisdiction.[24]

The Austrian Supreme Court lifted the decisions of the first and second instance court, with reference to § 97 s 2 no 1 autAußStrG and stating that the Iranian judgement was irreconcilable with the basic tenets of the Austrian legal order. It thus refused to recognize the foreign divorce judgment. The application for divorce brought subsequently by the wife in Austria was admissible.

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[22] OGH 6 Ob 69/11g.

[23] See for the legislative history Marco Nademleinsky, 'Die Anwendung von Anerkennungsregeln auf familienrechtliche Entscheidungen' [2016] Österreichische Juristenzeitung 1063–1070, 1065–1066. Brussels IIbis does not apply to divorces obtained outside the EU.

[24] See OGH 1 Ob 21/17w; Thomas Garber, 'Zur Reichweite der österreichischen Jurisdiktionsformel' [2017] Zeitschrift für Familien- und Erbrecht 233–237, 235–236.

2 Recognition of a Talaq

A *talaq* can be subject to recognition in Austria. However, Austrian courts can only consider a *talaq* to be a decision in the meaning of § 97 autAußStrG if a foreign authority has to some extent participated in the proceedings; hence a contribution of the foreign authority with formal constitutive effect on the *talaq* is not required.[25] Therefore, the *talaq,* as it is constituted in many jurisdictions, where it has lost some of its unilateral character, can be regarded as a decision in the meaning of § 97 autAußStrG. Separate proceedings for recognition are no longer required in accordance with the introduction of the new Austrian Non-Contentious Proceedings Act in 2003.

In Austria, the recognition of a *talaq* and the applicable law on divorce are fully separate matters. Thus, irrespective of whether the Iranian court applies the same substantive law as the Austrian court, Austrian courts may recognise that a marriage is divorced. If an Austrian court is dealing with a divorce application, it must assess whether the marriage has already ended in divorce, e.g. by a final foreign *talaq.* Upon recognition of a foreign *talaq,* the later divorce application in Austria would be inadmissible.

In the present case, it has been assumed by the Austrian Supreme Court that the husband used his entitlement under Iranian law to repudiate his wife without requiring her consent. It was found that the husband under Iranian law was entitled to declare repudiation, whenever he wanted to, by spelling out the necessary phrase in front of two just men. The disagreement of the wife regarding the divorce was inferred from the fact that the wife brought a divorce claim in Austria.[26] However, the proceedings that actually took place in Iran are not described accurately by referring to repudiation. The facts of the case, moreover, include that the husband brought a claim to the Teheran court, which was forwarded to an arbitrator, who tried to reconcile the spouses and save the marriage. It was established that the spouses nominated representatives to participate in the reconciliation procedure but the arbitrator finally failed to reconcile the marriage.

a) References to prior decisions on talaq

The question whether a *talaq* is irreconcilable with the basic tenets of the Austrian legal order has been considered by the legal doctrine in Austria,[27] in many other European jurisdictions,

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25 OGH 6 Ob 189/06x; OGH 1 Ob 138/09i; OGH 6 Ob 69/11g.

26 On the contrary, Bea Verschraegen, 'Scheidung nach iranischem Familienrecht' [2012] Österreichische Juristenzeitung 260–263, 262 observed that the Austrian divorce claim illustrated consent of the wife, except for the financial consequences of the divorce. See also for this opinion Lydia Fuchs, '§ 100 autAußStrG' in Edwin Gitschthaler, Johann Höllwerth (eds), *Kommentar zum Außerstreitgesetz* (Manz 2013, Vienna) para 19.

27 See for instance Schwind (n 14) para 156–157; Willibald Posch, '"Islamisierung" des Rechts?' [2007] Zeitschrift für Rechtsvergleichung 124–133; Bea Verschraegen, 'Ordre public in einer Gesellschaft kultureller Vielfalt aus der Perspektive des Zivilrechts' [2012] Richterzeitung 216–227, 218; Posch 'Die Anwendung des islamischen Rechts in Österreich heute – und morgen?' (n 21) 71; Wolfgang Wieshaider, 'Religious Rules Under Austrian State Law' in Rossella Bottoni, Rinaldo Cristofori, Silvio Ferrari (eds), *Religious Rules, State Law, and Normative Pluralism*

and was tackled in discussions on the EU legal instruments as well.[28] In Austria, the recognition of a *talaq* had already been subject to decisions of the Austrian Supreme Court as well as prior decisions of the Austrian Ministry of Justice, which was competent to recognise foreign divorce judgments until 2001.[29] The Austrian Ministry of Justice determined that a divorce effectuated by the husband's unilateral declaration is contrary to Austrian public policy, unless (1) there was consent from the wife,[30] or (2) the same legal conditions for the spouses to declare the divorce unilaterally would apply.[31] Thereafter, the Austrian Supreme Court issued three decisions. In a decision dated 31 August 2006,[32] the Austrian Supreme Court held that 'repudiation in accordance with Islamic law *(talaq)* is contrary to national public policy'. In a decision dated 28 June 2007,[33] the Austrian Supreme Court dismissed the applications of both spouses, who requested the recognition of an Egyptian *talaq,* stating that foreign decisions which violate Austrian public policy cannot be recognised based on consent to it by the parties.[34] This decision can be brought in line with the prior statement of the Austrian Ministry of Justice and the prevailing doctrine, both stipulating that, upon the consent of the wife, a unilateral declaration of divorce is feasible, but only by referring to the fact that, in the given case, the wife did not know about the divorce in Egypt and only found out about it later. As such, Austrian courts may even require consent in advance, which typically would not be formally documented. It can furthermore be added, that in both cases decided by the Austrian Supreme Court, the spouses were Austrian citizens, and thus there was greater margin of discretion to refer to Austrian public policy. In a decision dated 7 February 2008,[35] the Austrian Supreme Court confirmed that a *talaq* (in this case, Pakistani) is contrary to Austrian public policy. In this case, the wife was still a citizen of Pakistan. Regardless of her

– *A Comparative Overview* (Springer 2016, Switzerland, 77–90) 83–84; Nademleinsky, 'Die Anwendung von Anerkennungsregeln auf familienrechtliche Entscheidungen' (n 23) 1066–1068.

28 The literature on the issue is innumerable. See for instance Zoé Papassiopi-Passia, 'The Applicable Law on Divorce and the "Ordre Public" Reservation in Greek Conflict of Laws' (2000) 60 (4) Louisiana Law Review 1227–1239; Thomas Rauscher, 'Talaq und deutscher ordre public' [2000] IPRax 391–394; Marie-Elodie Ancel, 'Islamic Repudiations before the French Cour de cassation' in Petar Šarčević, Paul Volken, Andrea Bonomi (eds), *Yearbook of Private International Law,* Vol VII (Sellier 2006, Munich, 261–268); Möller (n 13) 461; Susanne Gössl, '"Annerkennung" ausländischer Ehescheidungen und der EuGH – Lost in Translation?!' [2016] StAZ Das Standesamt 232–235; Roberto Mazzola, 'Modifications et Contradictions de la Réalité Socioreligieuse en Italie. Profiles Juridiques et Sociales' in Bottoni, Cristofori, Ferrari (n 27) 229–249, 237–238.

29 See Nademleinsky, 'Die Anwendung von Anerkennungsregeln auf familienrechtliche Entscheidungen' (n 23) 1065.

30 Recognition in all situations in which the wife had consented was also deemed admissible in France. For references see Susan Rutten, 'Recognition of Divorce by Repudiation (talaq) in France, Germany and the Netherlands' (2004) 11 (3) Maastricht Journal of European and Comparative Law 263–285, 272.

31 Austrian Ministry of Justice 251.273/1-I.9/1998 = Zeitschrift für Rechtsvergleichung [1999] 193.

32 OGH 6 Ob 189/06x.

33 OGH 3 Ob 130/07z.

34 See for this approach also Regional Court of Salzburg 21 R 430/14b = Ehe- und familienrechtliche Entscheidungen LII 147.874; Regional Court of Linz 15 R 81/14h = Ehe- und familienrechtliche Entscheidungen LI 144.428.

35 OGH 7 Ob 10/08h.

foreign citizenship, the court aligned to the prior issued judgements and emphasised that even if the wife had agreed to the divorce in the recognition proceedings, an agreement which would have been achieved after the *talaq,* i.e. subsequent approval of the *talaq* by the wife, would not have made it possible to recognise the divorce in Austria.

In all three abovementioned cases, the *talaq* was initiated and completed without notifying the wife. In contrast, in the present case on the recognition of an Iranian judgment, a procedure attempting to reconcile the marriage preceded the divorce, and the wife used the possibility of appealing the decision. Nevertheless, the Austrian Supreme Court applied the same two-step mode of reasoning as in the prior cases concerning a *talaq,* which were achieved without notice to the wife. First, it concluded that the proceedings qualify as unilateral expulsion. Second, it stated that the decision is contrary to the Austrian public policy clause in family law and cannot be subject to recognition under § 97 autAußStrG. The Austrian administrative courts apply the two-step mode exemplified by the Austrian Supreme Court as well.[36] This two-step approach, however, ignores the developments and actual legislation and practice in Iran. Contrary to the simplistic method of the Austrian Supreme Court, with regard to jurisdictions designated Islamic, constant awareness of developments is crucial.[37]

b) Abstract or case-based analysis of the foreign decision

It can be criticized that the Austrian Supreme Court did not accurately distinguish between the result of the recognition of the foreign decision regarding the particular case and the observation of the foreign law as it is generally constituted. The two-step approach used by the Austrian Supreme Court primarily consists of an abstract assessment of the foreign law as it is generally constituted.[38] In addition, it must be emphasised that, in recognition cases, it is the effect of recognition that should be taken into consideration rather than the way a decision has been achieved.[39] In order to invoke the Austrian public policy clause in accordance with § 97 s 2 no 1 autAußStrG, the foreign decision must be manifestly irreconcilable with the basic tenets of the Austrian legal order. As such, the wording of § 97 s 2 no 1 autAußStrG also underlines the focus on the judgment instead of putting the emphasis on the procedure.[40] This rule, however, is accompanied by § 97 s 2 no 2 autAußStrG, which, in contrast, would bar recognition if the proceedings have infringed the right to a fair hearing of one spouse, unless the spouse was evidently in agreement with the decision. However, the Austrian Supreme Court only referred to § 97 s 2 no 1 autAußStrG. The present case, actually

36 Bundesverwaltungsgericht W161 2136831-1.

37 See Rutten (n 30) 269; Nademleinsky, Neumayr (n 14) para 05.146 criticising the method of the Austrian Supreme Court.

38 This is also observed by Susanne Gössl, 'The public policy exception in the European civil justice system' [2016] The European Legal Forum 85–92, 91.

39 OGH 3 Ob 221/04b.

40 Fuchs (n 26) para 18. The same approach can be observed in English case law, focusing on whether the *talaq* is effective in the country obtained [Bantekas (n 1) 43].

was not suitable to apply § 97 s 2 no 2 autAußStrG, since the wife could even use an entitlement to file an appeal against the *talaq*. However, this ground could be more appropriate in other *talaq* cases, in which a husband in an Islamic couple living in Austria travels abroad in order to receive a *talaq* and seeks recognition in Austria.

Austrian doctrine rightfully distinguishes between a situation in which Austrian courts would have to apply foreign divorce law and recognition of a foreign divorce decision, and stresses that, when applying the public policy clause in recognition cases, the courts must be even more cautious.[41] When (not) recognising the *talaq,* the Austrian Supreme Court was particularly concerned that the husband used his entitlement under Iranian law to repudiate his wife without requiring her consent. Focusing on the effect of recognition, one cannot ignore the fact that divorce without the consent of one of the spouses is attainable under Austrian law as well.[42] And, as it has been observed, this is similarly possible in many other European jurisdictions as well, with little difficulty.[43] It is therefore not surprising that doctrine is hesitant to apply the public policy clause and deny recognition as a rule, even in cases of unilateral expulsion.[44] To the contrary, legal regimes that allow divorce in an uncomplicated manner have a reason to refuse to recognise a divorce only in the most exceptional cases.[45] Moreover, German courts assess whether, under German law, divorce would have been feasible for the husband.[46] In these cases in particular, notwithstanding whether discriminatory access to divorce would have been established by foreign law, German courts tend to recognise the foreign decision.[47] This approach is in compliance with the principle that it is not the foreign law as it is generally constituted which must be assessed,[48] but whether it is manifestly irreconcilable with the basic tenets of the Austrian legal order where the focus must be made.

This should not mean ignoring the fact that the possibility for a husband to repudiate his wife unilaterally provides men with a perception of cultural and legal superiority over women.[49] The undesirable dynamics, resulting from the provision of the unequal distribution of the entitlement to initiate divorce proceedings, should be addressed by conflict rules. In this regard, the Rome III and the Brussels II bis Regulation largely confer Muslim women living

41 Nademleinsky, Neumayr (n 14) paras 01.29, 05.125; Schwind (n 14) para 159; Verschraegen, 'Scheidung nach iranischem Familienrecht' (n 26) 262–263; Egglmeier-Schmolke (n 17) 43.

42 § 55 Austrian Marriage Act.

43 See already Stone (n 16) 371.

44 Rauscher (n 28) 391-392; von Bar, Mankowski (n 17) § 7 para 281; Verschraegen in Rummel (n 14) § 20 para 13; for a dissenting opinion see Fuchs (n 26) para 19 and Martin Weber, 'Die Brüssel IIa-Verordnung' in Peter Mayr (ed), *Handbuch des europäischen Zivilverfahrensrechts* (Manz 2017, Vienna) para 4.247.

45 See Stone (n 16) 370.

46 German Supreme Court XII ZR 225/01 para 44; Higher Regional Court of Zweibrücken 2 UF 80/00; Higher Regional Court of Frankfurt 5 WF 66/09 para 21.

47 Higher Regional Court of Munich 2 UF 1696/86.

48 See Marco Nademleinsky, 'Wieder keine Anerkennung der talaq-Scheidung' [2012] Zeitschrift für Familien- und Erbrecht 134–135, 135.

49 See Bantekas (n 1) 43.

in Austria with the possibility to initiate divorce proceedings before Austrian courts applying Austrian law.[50] This clearly causes a highly deserved insecurity to some men's perception of cultural and legal superiority over women and thus addresses the undesirable dynamics resulting from the provision of the unequal distribution of the entitlement to initiate divorce proceedings.

c) The Iranian proceedings in the present case

The assumption that a *talaq* would in any case be manifestly irreconcilable with the basic tenets of the Austrian legal order cannot be derived from § 97 s 2 no 2 autIPRG. A more comprehensive approach towards foreign law, which irritates such a one-sided negative appraisal of *talaq*, at least in Iran, must be applied.[51] In the present case, the Iranian court decreed binding conditions on the husband and referred to provisions in the marriage contract. Iranian family law, that is to say, considers marriage as being a contract, which also enjoys a certain degree of party autonomy.[52] This flexibility could have been used, for instance, to nominate the wife as representative and thus make it possible for her to initiate a *talaq* as well.[53] In addition, in the present case, the spouses had been ordered to undergo reconciliation proceedings.

d) The Austrian nexus of the case

In the present case, little attention was given to the Austrian nexus of the case. The Austrian Supreme Court declared the fact that the spouses have their common and habitual place of residence in Austria as sufficient to create a domestic nexus for the application of the Austrian public policy clause. Undoubtedly, the domicile of the spouses constitutes a strong nexus. Domestic nexus, however, is a flexible instrument for the application of the Austrian public policy clause, particularly if the couple has been married for only a short period before the divorce or regularly changes its domicile where the duration of its stay in Austria should be considered.[54]

Proximity is an important factor to be observed in order to avoid a wife from being unfairly deprived of her opportunity to obtain financial or proprietary relief. Especially English

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[50] For the scope of application of the Iranian-Austrian Friendship Treaty see Nademleinsky, Neumayr (n 14) paras 05.94–05.96.

[51] See Verschraegen, 'Scheidung nach iranischem Familienrecht' (n 26) 262; Pacic (n 21) 112.

[52] See also German Supreme Court XII ZR 225/01 para 41.

[53] See Möller (n 13) 471. In addition, women may apply for divorce by means of a judicial decree. Dissolution of marriage may also be permissible through a judicial rescission of the marriage contract. The conditions for a woman to apply for divorce significantly vary in different jurisdictions (for an overview see Javaid Rehman, 'The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq' (2007) 21 International Journal of Law, Policy and the Family 108–127, 118–119). However, in conclusion, equal access to divorce is achieved by neither of the possible forms.

[54] Verschraegen, 'Scheidung nach iranischem Familienrecht' (n 26) 262; Fuchs (n 26) para 18; for general consideration see Nademleinsky, Neumayr (n 14) para 01.25. For Germany, see Rutten (n 30) 278.

courts refer strongly to proximity, in particular to the domicile of the spouses, and may refuse recognition of the divorce through the application of English public policy.[55] A divorce which has been obtained and is effective in a country in which neither of the spouses is habitually resident is a sensitive issue, because it could have been achieved by way of *forum* shopping or *forum* tourism. This can be best avoided by (1) using a flexible notion of the concept of domestic nexus, (2) applying § 97 s 2 no 2 autAußStrG, requiring a fair hearing for both spouses, and (3) limiting the scope of recognition of a divorce decision to the status issues.[56]

If proximity is affirmative, it becomes easier to invoke public policy concerns. However, this is a two-sided approach. Likewise, women shifting their domicile to Austria, in order to access Austrian divorce rules, cannot easily invoke Austrian public policy in consideration of a divorce pronounced in the country of the couple's former usual residence. Thus, the Austrian courts must also consider the duration of stay in Austria when invoking the Austrian public order clause, e.g. in relation to recognition of a foreign decision.

e) Limited scope of § 97 autAußStrG

Courts have to be sensitive when *forum* shopping or *forum* tourism by Muslim husbands could deprive the wife of her financial or proprietary relief. After a divorce, measures need to be taken in relation to finances, which are linked to the divorce itself. Divorce and financial arrangements are usually intertwined. Nevertheless, conflict of law rules may refer the questions of divorce and financial arrangements, such as compensation and alimony, to separate recognition regimes. So does § 97 autAußStrG, which does not apply to decisions on the separation of property, maintenance and other financial or proprietary entitlements, even if these are linked to the divorce itself.[57] Accordingly, Austrian law even provides for recognition of a foreign *talaq* in parts, if financial or proprietary questions are part of the foreign decision.[58]

Although this may result in limping decisions, there are good reasons to apply separate recognition regimes especially with regard to *talaq*.[59] Since the foreign *talaq* and its recognition in Austria would not determine property, maintenance, and other financial or proprietary entitlements, the main incentive to invoke the Austrian public policy clause can be eliminated and likewise the main incentives for a husband travelling to get divorced abroad should not apply.

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[55] Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 (2) Journal of Private International Law 201–236, 226.

[56] See text to n 57.

[57] Fuchs (n 26) para 10.

[58] OGH 6 Ob 62/03s; OGH 7 Ob 199/06z; Regional Court of Wels 21 R 40/11y = Ehe- und familienrechtliche Entscheidungen XLVIII 133.183. Similarly for France and the Netherlands, see Rutten (n 30) 283–284.

[59] See for a similar approach Rutten (n 30) 283.

3 Special Issues of Concern?

Notwithstanding the general suitability of the solutions provided by § 97 autAußStrG with regard to the recognition of foreign *talaq,* several issues raise concerns and require separate assessment.

Reportedly, in a larger number of cases, young Muslim women marry abroad and face a *talaq* also pronounced abroad,[60] although the Muslim couple permanently resides in Austria. Such conflict rules, that one spouse is able to escape binding national rules in order to deprive his wife of her legal rights and entitlements and thus uses transnational mobility to circumvent the closest connected law, should be avoided. These issues are addressed by § 97 autAußStrG, which offers three barriers to *forum* shopping in international family law. First, under § 97 autAußStrG only the status issue are recognised and financial or proprietary entitlements are left aside; second, § 97 s 2 no 2 autAußStrG bars recognition if the wife has no opportunity to be heard in the proceedings, and third, § 97 s 2 no 4 autAußStrG bars recognition if by hypothetical application of Austrian law relating to jurisdiction, the foreign court would have lacked jurisdiction.

Another issue giving rise to concerns is that, reportedly, some jurisdictions, which refer to the religious sources of the *Quran* and *sunna,* allow unilateral divorce pronounced via electronic communication, such as e-mails, over the telephone or by text messages sent from mobile devices.[61] Notwithstanding such divorces being permissible under the applicable legal order, they would in most cases lack the involvement of a state institution and, thus cannot be regarded as a decision in the meaning of § 97 autAußStrG. Only situations in which foreign state institutions register a unilateral divorce pronounced via electronic communication could this be a decision which leads to recognition in Austria. § 97 s 2 no 2 autAußStrG bars recognition if the wife has no opportunity to be heard in the proceedings, which would certainly be the case with regard to any *talaq* pronounced via e-mail, over the telephone or by text message. Hence, even these cases do not require invoking the public policy clause.

IV Conclusion

The Austrian public policy clause requires an examination of the circumstances of each particular case. It provides sufficient means to avoid strikingly unjust results and circumvention of the law, be it in cases applying family law designated as Islamic law or recognition of a foreign *talaq,* for example. In contrast, measures barring the recognition of decisions issued by a court in a state applying a law designated Islamic or outlawing the application of any law designated Islamic *per se* is neither necessary nor reasonable.

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60 See for instance Bantekas (n 1) 43.

61 See Nehaluddin Ahmad, 'A Critical Appraisal of "Triple Divorce" in Islamic Law' (2009) 23 International Journal of Law, Policy and the Family 53–61, 56.

In particular, the recognition of a foreign decision regarding simply the existence and continuation of a marriage is suitable of underlining that the public policy clause focuses on the effects of the recognition of a foreign decision. Whether the fact that a marriage shall be divorced is contrary to the basic tenets of the Austrian legal order cannot usually be subject to the application of a public policy clause.