Harmonising Human Rights Law and Private International Law through the Ordre Public Reservation: the example of the Norwegian Regulation of the Recognition of Foreign Divorces

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Abstract

This article examines the impact of the protection against discrimination guarantee in family law cases that raise questions related to private international law. The steady incorporation of international human rights protection against gender discrimination into positive Norwegian law implies a stronger focus on human rights in legal cases in which private international law is applied. The focus of the article is on the ordre public reservation as a means of harmonising private international law rules and human rights rules. This is illustrated by assessing the interpretation of the ordre public reservation in the recognition of foreign talaq divorces in Norway. This interpretation rests on human rights law, as it has been understood and implemented in Norwegian law, in legal scholarship and by administrative authorities. The findings suggest that the one-sided focus on connection in private international law should be altered to align better with the unilateral protection against discrimination that follows from international human rights law. Accordingly, the strong focus on the result in the assessment of the ordre public reservation should be altered to capture more fully the procedural and underlying regulations informing cases of a discriminatory nature.

Keywords:

International human rights; private international law; administrative law; protection against discrimination; ordre public; Muslim divorce; talaq divorce; recognition of foreign divorces; transnational marriage.

1. Introduction

In Norway, the discipline of private international law in the area of family law has attracted relatively little attention in recent years from legal scholars or from the Norwegian legal community at large, and it was developed at a time when human rights law played a far lesser role. Demographic developments in Norway over the last few

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1 The article is based on a trial lecture on a prescribed topic for the author’s defence of her PhD thesis on 9 November 2015: Tone Linn Wærstad, "Protecting Muslim Minority Women’s Human Rights at Divorce: Application of the Protection against Discrimination Guarantee in Norwegian Domestic Law, Private International Law and Human Rights Law" (PhD thesis, dissertation series no 91, Faculty of Law, University of Oslo 2015). The author would like to thank Professor Vibeke Blaker Strand for her useful comments while editing the trial lecture to produce this article. The author would also like to thank the referee for her/his thorough review, which significantly contributed to improving the quality of the article.

2 Certain notable exceptions deserve to be mentioned, such as Helge Johan Thue’s work up until the early 2000s (see eg Helge Johan Thue, Internasjonal privatrett: personrett, familierett og arverett [Private
decades show a large increase in immigration to Norway based on family reunification from countries that have different attitudes and laws concerning discrimination. They indicate that an increased focus on private international law in the area of family law, one that embraces the perspective of international human rights law, is called for. The situation in Norway may be seen as part of a larger picture of similar legal trends in other European and Western countries.3

One major objective of this article is to examine the actual implications regarding the interpretation of private international law regulations, taking into account the relatively new incorporation in the Norwegian Human Rights Act4 of the Convention on the Elimination of All Forms of Discrimination against Women5 – with precedence over other domestic law. Human rights protection against discrimination raises complex issues in terms of private international law, yet this aspect has lacked proper legal analysis to date.6

The legal issues that are discussed here therefore relate to family law issues and there is a key focus on non-discrimination rights for women, as stated in the Women's Convention.


3 For examples of such accounts in a European setting, see, for instance: Louwrens Rienk Kiestra, The Impact of the European Convention on Human Rights on Private International Law (Springer 2014); Katharine Charsley (ed), Transnational Marriage: New Perspectives from Europe and Beyond (Routledge 2012); Andrea Büchler and Helen Keller (eds), Family Forms and Parenthood: Theory and Practice of Article 8 ECHR in Europe (Intersentia 2014).


5 Hereinafter ‘the CEDAW’ or ‘the Women’s Convention’.

6 Such a focus on the Women’s Convention as a legal source after it was incorporated into the Human Rights Act is an issue that is still under-researched and there is a need for more studies that examine the application of the international legal instrument in national law. See Anne Hellum, ‘Vern mot sammensatt diskriminering etter internasjonale menneskerettigheter og norsk rett: Kvinner i krysset mellom kjøn og etnisitet’ [Measures to Prevent Complex Discrimination in International Human Rights and Norwegian Law: Women in the Intersection between Gender and Ethnicity] in Anne Hellum and Julia Kühler-Olsen (eds), Like rettigheter – ulike liv: Rettslig kompleksitet i kvinne-, barne- og innvandrerperspektiv [Equal Rights – Different Lives: Legal Complexity in a Women, Children and Immigrant Perspective] (Gyldendal 2014) 39-69; Vibeke Blaker Strand, Diskrimineringsvern og religionsutøvelse: Hvor langt rekker individviret? [Protection against Discrimination and Religious Practice: What is the Scope of the Individual Human Rights Protection?] (Gyldendal 2012); Wærstad (n 1).
Against this backdrop, the main question addressed in this article concerns what challenges international human rights law poses to the interpretation of private international law rules, especially the ordre public reservation, in the area of family law. More specifically, the article offers a critical assessment of the implementation of the ordre public reservation in international and national law and illustrated by the Norwegian case of the regulation of the recognition of foreign divorces.

The article proceeds as follows: in the next section (section 2), the theme is introduced, followed by a general introduction to international human rights law and its impact on private international law in the area of family law, with illustrations from both the international and national contexts. In the subsequent section (section 3), a specific analysis is offered of the regulation of the recognition of foreign divorces in Norway, enabling an examination of the general arguments in more detail. Lastly, section 4 provides a summary of the main findings and concluding remarks.

## 2. The Implications of Human Rights Law for Private International Law

### 2.1. Introduction

Private international law is traditionally concerned with the regulation of private law issues that stem from the concurrence of the legal systems of different countries. General and comparative works on private international law normally apply this ‘wide’ definition, including within its ambit questions on jurisdiction, the recognition and enforcement of foreign legal acts as well as the theme of the choice of law. The main issues that will be examined in depth in this article, however, concern the recognition of foreign judgments and how the ordre public reservation may be affected by the protection against discrimination guarantee. The ordre public reservation is a general exception to applying foreign law or to recognizing foreign legal acts, when to do so would run contrary to the public order (ordre public) of the forum state, i.e. the state where the decision is made. The ordre public reservation is a general legal principle that,

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7 Kiestra (n 3) 1; G.C. Cheshire and others, Private International Law (OUP 2010) 3-5.
8 See, for instance, Gerhard Kegel, ‘Introduction’ in Kurt Lipstein (ed), International Encyclopedia of Comparative Law, Volume III: Private International Law (Brill 2011) ch 1, 1-2, where it is stated that a wider definition including these three issues is increasingly adopted in legal scholarship. It is, however, the latter element that has been the main focus when private international law has been defined in Norwegian legal scholarship. Here, the legal discipline is normally presented as ‘the set of rules that decide which country’s law applies when a case has a relevant attachment to more than one legal system’ (author’s translation): see Hans Petter Lundgaard, Gaarders innføring i internasjonal privatrett [Gaarder’s Introduction to Private International Law] (Universitetsforlaget 2000) 19. However, the standard works on private international law in Norway include questions of jurisdiction and recognition in their analysis. Thus, this article is written on the basis of the broader definition of private international law.
in many instances, has been codified in different international treaties as well as in national legislation.\(^9\)

As explored in this article, human rights law and private international law overlap and human rights law influences private international law in different ways. One of the main points of this article is that, even though the mechanism of ordre public in principle takes human rights into consideration, there is still a need to examine more closely how private international law gives effect to human rights in \textit{practice} – in light of the legal developments that have occurred in human rights law as well as the demographic developments of an ever-increasing movement across borders, a process known as ‘transnationality’. I argue that there is a need for the two legal disciplines to ‘communicate’ better. Certain apparent differences in the origins and characters of the two disciplines should be questioned in order to facilitate a better application of human rights obligations within assessments of the ordre public reservation.

International human rights flow directly from a perspective that places the individual human being at the centre, whereas private international law is based on regulation where states are the central participants. The focus on private international law is very much to do with the \textit{tolerance} of other states’ law when cases have a connection to foreign states.\(^10\) This creates a potential tension between the interest in acknowledging the law of a foreign state, to be found within private international law, and the interest of an individual to be protected against that same law when its application may result in a violation of their human rights.

There are also apparent differences in the language and terminology of the two legal disciplines that pose certain challenges when these legal frameworks intersect. The conceptual framework provided for in private international law appears old-fashioned and complicated. It uses legal concepts that are difficult for ordinary people to understand and make use of. This terminology makes it easier for legal professionals within the field of private international law to communicate across borders and legal languages, using, for instance, Latin or French terminology. This practice, however, raises issues regarding the interaction between language and terminology on the one hand and the accessibility of human rights on the other, as these concepts are hard to understand and make use of for those who lack expertise in private international law. This feature is well worth bringing to the fore from a human rights perspective, as the accessibility of human rights is a central aspect of human rights law itself.

However, this article examines a specific part of the intersection between human rights and private international law; namely, the impact of the protection against

\(^9\) Thue (n 2) 167; Jørg Cordes and others, \textit{Hovedlinjer i internasjonal privatrett} [Main Lines in Private International Law] (Cappelen 2010) 165

\(^{10}\) See Thue (n 2) and Torstein Frantzen and others (eds), \textit{Rett og toleranse: Festskrift til Helge Johan Thue} [Law and Tolerance: Festschrift to Helge Johan Thue] (Gyldendal 2007). In these works, private international law is referred to as ‘the law of tolerance’.

discrimination guarantee in family law cases that raise questions related to private international law.

2.2. Applying the Protection of Discrimination Guarantee in Private International Law

2.2.1. Introduction

In light of the demographic development Norway has seen over the last few decades, human rights questions arise that also have relevance for private international law. In a world where people move, travel, marry and divorce across borders in ever-increasing numbers, the relevance of private international law has risen accordingly. Statistics show a large increase in immigration to Norway from Asian and African countries based on family reunification. Compared to Norway, many of these countries have significantly different legal systems in terms of the protection they offer against discrimination. This is interesting because when both the number and the character of marriages with connections to other legal cultures increase, vulnerable parties in these marriages risk having their rights violated.

From a legal viewpoint, the steady incorporation of international human rights protection against discrimination based on gender into positive Norwegian law necessitates a stronger focus on human rights in legal cases concerning private international law.

Furthermore, there is reason to highlight the strong formal status of the right to protection against discrimination in the Norwegian legal system, both in the Constitution (section 98) and in the Human Rights Act, and how that right applies to ordinary law. The Human Rights Act section 3 reads: ‘The provisions of the conventions and protocols mentioned in section 2 shall take precedence over any other legislative provisions that conflict with them’. Therefore, in a Norwegian legal context, human rights law – and CEDAW is one of the incorporated conventions – should be applied independently in relevant private international law cases. In the next paragraph (2.2.2), the right to protection against discrimination in CEDAW will be presented, followed by an examination of the challenges that this poses and the potential this right has in relation to private international law (2.2.3).

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12 Waerstad (n 1) ch 5.
14 Kongeriket Norges Grunnlov av 17. mai 1814 [The Constitution of the Kingdom of Norway of 17 May 1814].
15 The Human Rights Act s 3.
16 It should be noted that it is also in line with the normal application in private international law that fundamental rights shall be reflected in the use of the ordre public reservation. The point I want to make here is that Norwegian human rights law itself will require such an approach.
2.2.2. The prohibition against discrimination guarantee in CEDAW

The main elements of the protection against discrimination guarantee based on gender require elucidation. Prohibited discrimination against women is defined in CEDAW Article 1 as ‘any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose’ of violating a woman’s human rights. The concept consists of two main types (direct and indirect discrimination), referred to in the definition as ‘purpose’ and ‘effect’.

Direct discrimination is when a person, on prohibited grounds, is treated worse than another is treated, was treated, or will be treated, in a comparable situation. Direct discrimination entails the meting out of differential treatment without an objective and reasonable justification. Direct discrimination is prohibited in all international human rights conventions, which state that there shall not be differential treatment on the basis of certain specified grounds such as sex, race, sexual orientation or religion.

Indirect discrimination, on the other hand, is when an otherwise neutral treatment disadvantages people in practice who share a characteristic, such as sex, race, sexual orientation or religion, which constitutes a prohibited ground.

The wording of CEDAW Article 1 refers to the whole spectrum of human rights: both in the civil and political area as well as in the arena of economic, social and cultural rights. Furthermore, there is, in line with Article 3, an additional obligation for states parties to ensure the full development and advancement of women ‘for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men’. The protection against discrimination guarantee is thereby both broad and finely meshed. And it is further developed in the prohibition against structural discrimination and gender stereotypes in CEDAW Articles 2(f) and 5(a).

The concept of structural discrimination denotes structures such as ‘laws, regulations, customs and practices which constitute discrimination against women’ as mentioned in the CEDAW Convention Article 2(f). Furthermore, Article 5(a) states that state parties shall take all appropriate measures:

- to modify the social and cultural patterns of conduct of men and women,
- with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the

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18 This was, for instance, stated by the European Court of Human Rights (hereinafter ‘the ECtHR’) in Nachova and Others v Bulgaria [GC], nos 43577/98 and 43579/98, § 145, ECHR 2005-VII: ‘Discrimination is treating differently, without an objective and reasonable justification, persons in relevantly similar situations...’.

19 Prominent examples are the European Convention on Human Rights (hereinafter ‘ECHR’) Article 14, International Covenant on Civil and Political Rights (hereinafter ‘ICCPR’) Articles 2(1) and 26 and the International Covenant on Economic, Social and Cultural Rights Article 2(2).
superiority of either of the sexes or on stereotyped roles for men and women.

The starting point for the prohibition against structural discrimination is thus taken to be the foundation of discrimination – where the assumed difference in character between individual acts and structures that cause discrimination is decisive for how discrimination should best be understood. The aim is to make progress towards the elimination of discrimination.

The concept of structural discrimination is important for understanding the character of discrimination. It illuminates the underlying forms of discrimination that otherwise may have remained invisible, were the direct and indirect tests to be applied alone. It also facilitates a more general and societal analysis of the nature and scope of discrimination. In my view, the concept of structural discrimination should therefore be applied in tandem with the direct/indirect tests. It is useful because of its attention to underlying structures, which are often the sources for discrimination. The CEDAW Committee has, on several occasions, found violations of Article 5(a) in individual views. These judgements demonstrate the usefulness of the concept of structural discrimination. Where intrinsic structures are present in cases concerning women, they become visible through the lens of Article 5(a) (as well as the more general Articles 2(d–f)).

The right to protection against discrimination in marriage and family life is asserted specifically in CEDAW Article 16, which includes a general demand for states parties to eliminate discrimination within marriage and family life. This is followed by a list of specific demands the states parties must meet. Alternative (c) prohibits discrimination against women upon the dissolution of marriage, stating that:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(c) the same rights and responsibilities during marriage and at its dissolution.

Article 16, read in conjunction with the general provisions in Articles 1–5, as highlighted above, provides the normative framework for the further examination below of the impact of the assessment of the ordre public reservation in Norwegian family law.

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2.2.3. Challenges in applying the protection of discrimination guarantee in private international law frameworks and concepts

2.2.3.1 Introduction

In private international law, as outlined in the introduction, some typical questions arise when a human rights perspective is applied. The key issue is when the application of a law, or the recognition of a foreign act, may lead to a violation of a protected human right. The private international law mechanisms for ensuring the respect of basic rights are the application of the ordre public reservation and the use of overriding mandatory rules.

A central concern is the recognition of foreign judgments and legal acts. Should the foreign judgment in question be recognised and enforced in the forum state? Rules regarding the status of foreign judgments vary from country to country. However, the main rule regarding the status of foreign judgments is the same in many states and also coincides with many international treaties that regulate the matter: foreign judgments should in principle be recognised and enforced as long as certain requirements are met.\(^{21}\) In Norwegian law, in contrast, the main rule is that foreign judgements shall not be recognised, unless regulated in law or treaty. But in private international law, concerned with foreign legal acts about the status of people, these acts are recognised.\(^{22}\)

And this recognition is the starting point of Norwegian law. In relation to human rights law, there may be conflicting obligations: some point towards the recognition and enforcement of foreign judgments while others deny such recognition and enforcement. The key issue, in Norway as elsewhere, arises when the non-recognition or recognition of foreign legal acts will lead to a violation of a protected human right.\(^{23}\) This article focusses on the obligation to not recognise foreign legal acts when such recognition may violate a woman’s right to protection against discrimination. This question is further explored in the next section of the article (part 3) concerning the recognition of foreign divorces in Norway.

2.2.3.2 The legal status of the protection against discrimination guarantee in Norwegian private international law

In Norway, the ordre public reservation in cases concerning family law remains an undeveloped area. It has been given little scrutiny either by legislators, the courts or legal scholarship, and there are many unanswered questions as regards the application of the protection against discrimination guarantee. However, in Norwegian law, some arguments concerning the relevance and impact of the right to protection against

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21 Kiestra (n 3) 200.
22 Thue (n 2) 369.
23 There is a considerable amount of case law on the matter from the ECtHR, especially concerning the rights in the ECHR about a fair trial (Article 6), property rights (Article 1 of Protocol No. 1) and the right to respect for private and family life (Article 8). See Kiestra (n 3) ch 8 for a review of this case law.
discrimination may be found in a Supreme Court case from 2009. Even though the case concerned other human rights than the right to protection against discrimination, it is still of interest, as it clearly underlines the status of human rights in relation to choice-of-law rules in Norwegian law.

In the judgment, it was stated that another human right – the right to freedom of expression – was of such fundamental value in Norwegian society that Norwegian principles of freedom of expression were overriding mandatory rules and should be applied to their fullest extent, no matter what legal system the general rules on the choice of law pointed to. The right to protection against discrimination will, in many aspects, be equivalent to the right to freedom of expression, in that both rights follow directly from the Human Rights Act. This means that if a foreign law were to be chosen, due consideration would have to be given to the limits that follow from the rules of protection against discrimination as stated in Norwegian law.

On a more general level, a key question concerns what legal alternatives exist if a risk of a violation of human rights is revealed. There are two possible answers within the framework of private international law: either to apply human rights law as an overriding mandatory rule (seen as the most correct legal alternative in the 2009 case) or to apply human rights law as part of the ordre public reservation.

Mandatory rules are rules that are immediately applicable in the national legal system. They are rules that shall be applied independently of whether or not the case has an attachment to a foreign country. In the ordre public approach, by contrast, the foreign law provides the overall structure of the case from the outset, and it is only when it proves impossible to reach a result by applying the foreign law in line with Norwegian public policy, that the result will be struck down. The protection against discrimination guarantee is used to decide whether the outcome of a chosen foreign law has to be struck down because it conflicts with the Norwegian ordre public. The ordre public approach is more in line with the spirit of private international law – that of respect for, and tolerance of, the attachment of the case to another legal system. It necessitates an inquiry into whether the protection against discrimination guarantee could be upheld within the framework of the foreign law. If not, the result would be deemed contrary to the Norwegian ordre public because of the protection against discrimination, as stated in the Human Rights Act.

In practice, the two approaches are very similar. The difference is that when a Norwegian law is deemed the overriding mandatory rule, such rules will be used to their full extent throughout the case. With the ordre public approach, the foreign law provides

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25 ibid para 39.
26 The case was resolved in the end based on a different reasoning for choosing Norwegian law, not relevant to the theme of this article.
27 Thue (n 2) 200.
the overall framework of the case from the beginning. It is only when the foreign law proves incompatible with the protection against discrimination guarantee that the result will be struck down, as it goes against the Norwegian ordre public. In this sense, the ordre public approach may be preferred when taking into consideration the principles of respect and tolerance for foreign legal systems to which the case has an attachment.

In summary, where the choice-of-law rule points to another jurisdiction and its application results in or risks discrimination, the protection against discrimination guarantee must be applied either as a mandatory rule or as a limit for the enactment of the ordre public reservation. As regards the recognition of foreign divorces that may discriminate against women (the theme of this article), the relevant Norwegian rules contain a specific ordre public reservation. Therefore, in the analysis below, I focus on the ordre public reservation as a way of harmonising private international law rules with human rights rules, and not on the alternative of applying Norwegian rules as mandatory rules.

3. Private International Law Rules in Light of the Protection against Discrimination Guarantee in the Recognition of Foreign Divorces in Norway

3.1. Introduction

So far this article has outlined some of the general features and challenges that occur when the legal disciplines of private international law and human rights law intersect. The following section discusses specific questions that arise regarding Norwegian private international law rules seen in the light of the protection against discrimination guarantee. I do this by examining the recognition of foreign divorces in Norway. As further explained below, I assert that the right to due process is an integral part of the right to protection against discrimination in this area.

In the Norwegian experience, it is the recognition of talaq divorces performed in Pakistan that appears especially problematic from the woman’s perspective. The talaq divorce is an exclusive and unilateral right for the husband to repudiate his wife, without judicial proceedings.\(^\text{28}\) Talaq is part of a broader system of separate divorce rules for men and women in Muslim laws and traditions, where men usually have easier access to divorce than women do.\(^\text{29}\) The talaq divorce is practiced differently in different Muslim countries, and possibilities exist to amend the discriminatory effects through legal developments in women’s divorce rights.\(^\text{30}\) However, women in Pakistan do not


\(^{29}\) See Wærstad (n 1) chs 3.5, 3.6.

have equal access to divorce; they have to go through judicial proceedings by petitioning for dissolution on certain specified grounds under the Pakistani Dissolution of Muslim Marriages Act.\(^\text{31}\) In addition to the unequal regulation of divorce in Pakistan, there are practical barriers to women's access to formal rights. Pakistani lawyers have reported on cases where the wife was not aware of the *talaq* divorce. The notice may, in line with the law, be given to members of her close family, and there have been incidents where the family has refused to accept any notice out of fear that it could be a notice of a *talaq* divorce.\(^\text{32}\) These barriers exist in a context where divorce is seen as shameful for women, thereby making claims for equality and the right to a fair trial even harder to pursue in practice.\(^\text{33}\)

As regards the protection against discrimination guarantee in human rights law, it is clear that a system that preserves its own methods of divorce based on gender, posing stricter requirements for women to be granted a divorce than men, is not in line with the right to protection against discrimination in CEDAW.\(^\text{34}\) This has been stated clearly by the CEDAW Committee. In several of its comments to state reports, the CEDAW Committee has regarded a Muslim divorce system where women must establish grounds and also go through a court procedure in order to be granted a divorce, and where the same requirements do not apply to men, as a breach of CEDAW Article 16.\(^\text{35}\) In their concluding observations to Pakistan's third report, the Committee made it clear that the Pakistani system was discriminatory and asked Pakistan to change the law to give men and women equal rights.\(^\text{36}\)

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\(^{31}\) Act no. VIII, 1939.


\(^{34}\) Discrimination against women and lack of procedural guarantees in proceedings of divorce, as well as divorce through repudiation, have been regarded as a breach of other human rights’ instruments as well. The Human Rights Committee has considered the *talaq* divorce to be a breach of ICCPR Article 3, in General Comment 28, equality of rights between men and women (Article 3), (UN Doc CCPR/C/21/Rev.1/Add.10), 2000 para 26. The ECtHR has set strong requirements for the fulfilment of Article 6(1) of a fair trial in the underlying divorce proceedings, before a foreign judgment of divorce may be recognised in a member state to the ECHR, see *Pellegrini v Italy*, no 30882/96, § 20, ECHR. Analysis of these provisions in the ICCPR and the ECHR is not, however, examined further here due to the limited frame of the article.


My focus is therefore on immigrant women who have been divorced in Pakistan, and where the divorce is later sought to be recognised in Norway. As examined below, these women may face violations of their human rights both in the foreign country and in Norway. As regards the general ordre public reservation, this study indicates that the present legal situation is not adequately sensitive to the fact that the Pakistani *talaq* divorce may be informed by procedural and material rules that, in varying degrees, discriminate against women. The authorities’ overarching focus on the attachment the couple has to Norway, as well the omission of all party rights outlined in the Public Administration Act,\(^{37}\) means they are not adequately informed of the true nature of the cases before them. They therefore cannot make a correct assessment of whether the ordre public reservation should be enacted. Given the human rights protection against discrimination, as stated in the Human Rights Act, such a differentiated protection, based on attachment, is difficult to reconcile with human rights requirements. These aspects of the procedure of the recognition of foreign divorces will be examined in the following sections.

One particular phenomenon requires further examination. This is where women who immigrate to Norway on the basis of family reunification are later taken back to their country of origin and left there against their will when marital life has become difficult.

Empirical studies show that women experience being taken back to their country of origin under false pretences (for example, that they are going for a vacation), while the true intention of their husbands is to divorce them.\(^{38}\) Their stories speak of great challenges and vulnerabilities. Their accounts illustrate some of the great difficulties that women who are left in their country of origin against their will are exposed to. The Norwegian authorities should possibly pay more attention to these experiences when deciding on cases of the recognition of foreign divorces. It appears that the phenomenon of dumping women in this way, particularly following problems with *talaq* divorces, is so widespread that it merits further research.

It is a theme that has not received much scholarly or public attention. One reason for this is the vulnerability of these women and the obvious barriers that prevent them effectively responding to such treatment. If a woman is in such a vulnerable situation that her husband or family are able to force her to move back to her country of origin,

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then it is obvious that she would not likely be able to return and to speak up against what has happened to her.

The legal regulation and administrative practice concerning these cases is presented below (sections 3.1.1–3.1.2) and then analysed in the light of the protection against discrimination guarantee (section 3.2).

3.1.1. Regulation of foreign divorces in Norwegian law

A case of recognition of a foreign divorce in Norway arises when a marriage – that has been contracted or recognised in Norway – is dissolved in a foreign country and recognition for the divorce is sought in Norway. 39

The starting point in Norwegian law is that a foreign divorce is recognised. 40 This general unwritten rule was codified specifically regarding foreign divorces in 1978 through the Foreign Divorce Act. 41 The law was a result of the ratification of the Hague Convention on the Recognition of Divorces and Legal Separations. 42

The question of the recognition of foreign divorces is therefore regulated by international law through both international private law regulations as well as international human rights law. Article 10 of The Hague Convention contains an ordre public reservation which is formulated, as is common in the Hague conventions, as a narrow exception; in that the contracting states may refuse recognition when 'such recognition is manifestly incompatible with their public policy' ('ordre public'). Furthermore, there is a separate section for the refusal of recognition based on procedural grounds in Article 8 of the Convention. It is possible, therefore, to apply the protection against discrimination guarantee, as stated in international human rights law, in the interpretations of the reservation clauses of the Hague Convention. However, the Convention was drafted prior to the UN's Women’s Convention and before the theme of women’s human rights was put on the international human rights agenda, and there has been (in Norway, as elsewhere) little focus on human rights regulations in the assessments of the ordre public reservation. The ordre public reservation is a dynamic category, however, and this means that in principle there is no obstacle to considering these human rights as part of the ordre public. 43

According to section 1 of the Norwegian Foreign Divorce Act (which incorporates the Hague Convention into Norwegian law), a divorce or separation obtained in a foreign country that has binding force there is also valid in Norway, in so far as at least one of

40 Thue (n 2) 369.
42 Convention on the Recognition of Divorces and Legal Separations 1 June 1970 (hereinafter ‘the Hague Convention’).
43 Moss, Avoidance of Mandatory Law by Claiming Choice of Law as Ground of Invalidity? (n 2) ch 3.
the spouses had either domicile, residence or citizenship in the foreign state when the case for divorce was admitted there.

As regards the Foreign Divorce Act section 1 therefore, a valid *talaq* divorce from a foreign country would be valid as long as the attachment requirements in section 1 were fulfilled. The main rule in section 1 is modified in section 2, which states that a *[f]oreign divorce is not valid in the realm if this would appear manifestly offensive to Norwegian public policy (ordre public)* (author’s translation).44

The decisive question therefore is whether a *talaq* divorce should not be recognised because it is ‘manifestly offensive’ to the ordre public reservation.

Normally, it is the result of the foreign rule that must be assessed as far as the ordre public reservation is concerned. This is a well-established rule that is recognised both internationally and in Norwegian law.45 This doctrine makes it necessary to look at each case separately, since it is not the rule itself that is of the essence, but the result that the rule is used to justify.46 This starting point is modified, however, when it comes to certain aspects of procedural law when the foreign decision is produced by unacceptable procedural rules. This is in line with an ordre public reservation demanding that the principle of due process be upheld.47 As will be further explained below, it is often the underlying reasons for the *talaq* divorce as well as procedural elements of how the *talaq* divorce is regulated, rather than the direct result of the regulation of *talaq* divorce, that is problematic when compared to the Norwegian public order.

Moreover, the attachment of the case to Norway is normally seen as crucial to the ordre public assessment in general: the case in hand must have an attachment to Norway.48 However, this line of reasoning does not always correspond well with the principle of universal application in human rights law, as will be further examined below.

3.1.2. Administrative practice regarding the recognition of foreign divorces

In addition to a traditional legal analysis of the situation, I have examined the actual administrative practice of the recognition of foreign divorces at the County Governor of

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44 However, if one of the parties has remarried, the divorce will, according to section 3, still be valid without fulfilling the requirements of sections 1 and 2, unless the other party can prove that the remarried spouse obtained the divorce in a ‘fraudulent manner’ (author’s translation). This raises interesting questions as to who is then protected by the law, but because of the frame of this article, only the general ordre public reservation in section 2 of the Foreign Divorce Act is discussed.

45 The doctrine was first developed by Ludwig Von Bar in *Theorie und Praxis der internationalen Privatrechts I* (Scientia Verlag 1862). For the doctrine in Norwegian law, see Thue (n 2) 183.

46 Thue (n 2) 184.

47 See Moss, *Avoidance of Mandatory Law by Claiming Choice of Law as Ground of Invalidity?* (n 2) ch 3.

48 Thue (n 2) 184.
Oslo and Akershus (CGOA): in Norway, the County Governors are the delegated authority that decides whether a foreign divorce is valid. 49

The research was carried out by examining all of the case files involving the recognition of divorces that had been decided on at the CGOA over the previous five year period. There were only a few cases relating to Pakistani divorces; approximately two each year out of a total case load of approximately 400 annual cases. However, these cases raised important questions relating to the protection against discrimination guarantee.

Furthermore, an important legal document in relation to the assessment made by the County Governor in these cases is Circular 19/2004 concerning the application of the Foreign Divorce Act. 50 Circulars are guidance documents from the governing ministry regarding the interpretation of laws and regulations. The circulars possess little interpretative weight, but may still have a considerable impact on administrative practice concerning the laws and regulations. Circular 19/2004 examines the talaq cases that are more closely related to the ordre public. The administrative practice of the County Governor is in accordance with the guidelines of the circular on this point. These materials (the law, the circular and the administrative practice) constitute the subject of the next section, where the procedure for the recognition of talaq divorces in Norway is analysed closely in the light of the right to protection against discrimination.

3.2. The Recognition of Talaq Divorces in Norway in Light of the Protection against Discrimination Guarantee

3.2.1. Introduction

The examination of the regulation and practice of the talaq divorce in the Pakistani legal system, presented earlier, indicates that there is considerable insecurity around a woman’s right to protection against discrimination and the right to a fair trial in Pakistani talaq divorce proceedings. Moreover, there are practical barriers for women to divorce and features of the procedure of divorce are problematic. This highlights the importance of examining the situation of the women involved in divorce cases from Pakistan in order to gain information about the risk for discrimination in each case.

The problematic features of the talaq divorce have traditionally not been regarded as sufficient reason not to recognise the divorce in Norwegian law, however. The preparatory works of the Foreign Divorce Act consider that, as a main rule, the talaq

49 The responsible ministry is the Ministry of Children, Equality and Social Inclusion, which has delegated the authority to the County Governors through decision 292 of 27 March 1992 (in force since 1 January 1993).

divorce should be recognised. However, this was modified in Circular 19/2004, and administrative practice changed in certain respects. It is to these issues I now turn.

Two themes arise in what follows. Firstly, I examine the elements that have been given decisive weight in the assessment of the ordre public in the recognition procedure; that is, the parties’ connection to Norway and consideration of the procedural guarantees of the underlying foreign divorce case. Secondly, I examine more closely the procedural guarantees afforded to women in the recognition cases in Norway. The lack of procedural guarantees in these recognition cases (guarantees that are normally granted to parties to administrative cases in Norwegian law) is examined for its effects on the correctness of the ordre public assessment of the foreign divorce.

3.2.2. The focus on the attachment of the parties to Norway

Circular 19/2004 considers the attachment the parties have to Norway as the most important factor when deciding whether a talaq divorce should not be recognised due to the Norwegian ordre public. A strong attachment indicates that the talaq divorce should be struck down as contradictory to the Norwegian ordre public, whereas a weak attachment points towards its recognition. Additionally, it is stated that every case must be considered from different aspects. It is difficult to make an exhaustive list of these, but a factor such as how long the different spouses have lived in Norway and Pakistan is seen to be decisive.

Such an explicit and overarching focus on attachment in the assessment of the ordre public reservation has been criticised in private international law scholarship. This attachment doctrine – known in private international law theory as the doctrine of ‘relative territoriality’ of ordre public – has been regarded as unsatisfactory, because, for example, the nature of fundamental principles should be independent of the criterion of geographical connection. Theories within human rights law, namely the doctrine of the universality of human rights and the nature and scope of obligations of member states to human rights conventions, underline the arguments behind this critique.

In general, the focus on geographical connection does not correspond well with the basic idea that those who are most vulnerable must receive extra attention in order for their rights to be adequately secured. The longer a woman has stayed in Norway, the more likely it is she speaks Norwegian and is acquainted with her rights according to the Norwegian legal system and society. In view of such a picture, and in view of the state’s


52 Circular 19/2004, 12-13. This is supported by Thue (n 2) 377.

53 Moss, Avoidance of Mandatory Law by Claiming Choice of Law as Ground of Invalidity? (n 2) 139-142.

54 ibid 141.

obligation to fulfil the human rights of women without discrimination based on gender, the decisiveness of the attachment criterion in the assessment of the ordre public reservation in section 2 of the Foreign Divorce Act is problematic.

Norway, as a state party to different human rights conventions, has a responsibility for its actions, even when those actions have consequences outside of Norway. Most relevant to this issue of how far state obligations reach, are CEDAW Article 2 and ICCPR Article 2. The CEDAW Committee General Recommendation no 28 (2010) para 12 states: 'States parties are responsible for all their actions affecting human rights, regardless of whether the affected persons are in their territory.' This is also the understanding of the UN Human Rights Committee concerning the ICCPR, as stated in General Comment no 31.56

3.2.3. The procedural ordre public reservation

Furthermore, the procedural ordre public reservation is of relevance to the recognition of talaq divorces because such divorces often come into being without due process. Women may not have access to the relevant information and—unlike men—cannot dispute the divorce.57 The Hague Convention has a separate article (Article 8) concerning the procedural ordre public:

If, in the light of all the circumstances, adequate steps were not taken to give notice of the proceedings for a divorce or legal separation to the respondent, or if he was not afforded a sufficient opportunity to present his case, the divorce or legal separation may be refused recognition.

The two procedural elements that are required are therefore the right to be notified of the proceedings for the divorce and the right to contradiction. The talaq divorce has, in legal documents and legal literature, been looked upon as problematic in this regard.58 Proceedings of the Pakistani system may contradict the right to protection against discrimination and the principles of due process. This shows that it is necessary to look at each case in its own right to determine whether it is contradictory to the ordre public norm.

Circular 19/2004 recognises that a legal system containing the talaq divorce is contradictory to general rules for administrative and court procedures, such as the principle of contradiction, procedural notification, the right to appeal and other rights of the party [partsrettigheter].59 However, notwithstanding these denials of due process, it

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56 Para 10 states: ‘This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.’
57 See Wærstad (n 1) chs 9-10. The main point here is that the wife cannot dispute the divorce solely because she is a woman, whereas a man would be given the means to dispute the divorce if it was the wife who wanted to have the marriage dissolved.
58 See 3.1 and Wærstad (n 1) chs 3, 9-10.
is the attachment of the parties to Norway that is seen as the essential element when deciding whether the divorce should still be recognised.

The question arises as to whether the divorce itself is contradictory to the ordre public – because it is reserved for men only, and there is no equivalent access to divorce granted to women in the Pakistani legal system. Due to its inherently discriminatory nature, the Pakistani *talaq* divorce should still be discussed in relation to the ordre public reservation. Otherwise, how could the basic underlying principle of the Norwegian ordre public of non-discrimination be upheld in these cases?

This indicates that the doctrine of looking solely at the result of the case in hand or whether the rules of due process have been fulfilled is not adequate. After all, the ordre public reservation is supposed to uphold basic values underpinning the legal system, of which the protection against discrimination constitutes a central part. It is important to consider that other *indirect* results from the decision, not normally regarded as relevant for the assessment of the ordre public, may in fact be crucial in determining whether the protection against discrimination guarantee has been upheld.

There is a parallel line of reasoning that has been applied in another field of law – that of commercial arbitration. This concerns the ordre public doctrine with regards to the principle of immorality and its effects in private international law. The underlying idea is that an arbitral award that gives effect to an illegal contract may still be deemed to violate the ordre public, even though the direct effect of the award is simply to move money from one party to another and in itself is not in conflict with the ordre public.

Applying this reasoning to the recognition of *talaq* divorces by Norwegian authorities, one may look upon such divorces as an acknowledgment of men’s unique access to divorce, which in turn may contribute to upholding social norms that women are less worthy of a divorce than men. These social conceptions of men and women are in stark contrast to the gender stereotypes that Norwegian authorities, according to CEDAW Articles 2(f) and 5(a), are obliged to combat with all appropriate measures.

3.2.4. **Procedural guarantees afforded in the recognition procedure**

An examination of the case files, as well as empirical data on women who have been taken back to their country of origin and left there against their will, reveals a palpable need to see the situation of the individual woman more fully in order to decide if the ordre public reservation should be invoked in divorce recognition cases.

In this lies a demand to ensure that the woman’s rights, both according to internal Norwegian law and human rights law that Norway is party to, are respected. We also need to determine whether there are specific aspects of the cases in question that

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60 Wærstad (n 1) 156ff and 201ff.
61 Moss, Avoidance of Mandatory Law by Claiming Choice of Law as Ground of Invalidity? (n 2).
62 This may occur even though the result of a specific case does not discriminate against the woman in question because that particular case was to her benefit.
contravene the prohibition against discrimination. However, when examining the guidelines in Circular 19/2004, which actual administrative practice follows, it becomes clear that women who are parties to Pakistani talaq divorces and who no longer reside in Norway, will be given no party rights to the case, as is customary in administrative law cases.

The Public Administration Act contains specific procedural requirements concerning party rights: the party’s right to advance notification, the right to acquaint themselves with the documents in the case, the right to be notified about the administrative decision and the right to appeal, for instance. However, these rights are severely limited when it comes to the other spouse in cases of the recognition of foreign divorces.

In Circular 19/2004 (18), it is simply stated that it is seen as ‘obviously unnecessary’ to notify the other spouse of the case, when the divorce in question is final in the country where it has been issued. Additionally, it is stated that it has not normally been seen as necessary to notify the other spouse of the divorce recognition decision either. The responsible ministry maintains that these exemptions to party rights are made because it would be ‘obviously unnecessary’ to notify the other party and furthermore that the decision ‘does not cause any harm or inconvenience to the party concerned’. No further reasons are given to substantiate these assessments.

This means that the wife, in practice, is not able to challenge the foreign case when it ‘travels’ to Norway as an acknowledgment case. Indeed, she will have no notification of the case whatsoever. This nullifies the means by which Norwegian authorities can determine whether the ordre public reservation in the Foreign Divorce Act should be applied. As previously noted, often the divorce is not struck down as contradictory to the ordre public because of the assumed lack of attachment of the wife to Norway. She is regarded as having made a change of domicile due to the move back to Pakistan, whereas in reality there may have been no change of domicile, as the move may not have happened voluntarily. Therefore, the lack of information about the situation of the wife may result in an incorrect assessment of the ordre public reservation, despite the authorities faithfully following the original guidelines of Circular 19/2004 on this matter.

A notification of the case would enable the wife to pursue the rights she has according to Norwegian law. Such a notification would enable the wife to contact the County Governor’s officials, who have an independent duty to help her safeguard her own interests in the best possible way. Such steps may include her right to come back to Norway, to secure an independent stay permit, rights regarding the partition of assets in the Norwegian legal system, opportunities to get in contact with the police or other agencies – to report violence, for instance. The County Governor could direct her

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63 See Wærstad (n 1) ch 3.
64 The words (author’s translation) stem from the Public Administration Act s 16(1)(c).
65 As is the normal procedure according to the Public Administration Act s 27(1), first alternative.
towards other government agencies or branches, such as the Norwegian Embassy in Pakistan or the Directorate of Immigration (UDI), which might provide her with assistance and information regarding her rights.

These omissions indicate that the reasoning for exempting party rights in these cases – based on this not being to the party’s disadvantage – is incorrect.

4. Concluding Remarks

In this article, I have examined the potential of private international law, in the Norwegian family law context, to reflect better human rights law as set out in the Human Rights Act, both in terms of regulation and interpretation. Demographic developments, connections to other legal systems and developments in international law have been examined in order to make a more accurate evaluation of the ordre public reservation. Recent decades have seen the increasing internationalisation of law. Developments in international human rights law are of particular relevance and these developments have specific implications in a Norwegian context. The article has demonstrated that the system of private international law can contribute to the implementation of human rights – if, that is, the ordre public reservation is interpreted in line with relevant human rights regulations and the apparent differences between the legal reasoning and conceptual frameworks of private international law and human rights law, are better aligned.

The second part of the article has analysed these points in more detail by assessing concerns over the interpretation of the ordre public reservation in the recognition of foreign *talaq* divorces. These concerns relate to human rights law, as it has been understood in the sources of law and legal scholarship in Norway. The findings suggest that the one-sided focus on *connection* in private international law should be amended to align better with the *unilateral* protection against discrimination that follows from international human rights law. The strong focus on the result of the specific case in the assessment of the ordre public reservation should also be broadened to include the procedural and underlying regulations present in cases of a discriminatory nature.

Lastly, a need was demonstrated to ensure that procedural guarantees normally afforded to parties to administrative cases under the Public Administration Act, are also granted in cases of the recognition of a foreign divorce. This would not only give better protection of women’s human rights in these cases, but also provide much needed information for the recognition procedure in respect of the connection of the parties to Norway.

Overall the analysis reveals that aspects that appear problematic in the light of the protection against discrimination norm are not the *direct* result of the Norwegian administrative procedure concerning the recognition of foreign divorces. Rather, the
problems arise from a complex interplay between the reality of transnational marriages, aspects of foreign legal systems that the Norwegian legal system and authorities are not aware of, the complex reality of the lives of the people involved and an uneasy relationship between the different branches of law. An increased awareness of both the legal and real-world complexity that these cases embody is required. A more conscious application of human rights law in the assessment of the ordre public reservation may not only result in more correct legal solutions and a better upholding of human rights standards. It may also bring nuances and clarity to the ordre public assessment as a concept in private international law, as there may be broad and in-depth reviews in case law and scholarship regarding the human right in question that will be of relevance in corresponding assessments of the ordre public.