

Ilaria Pretelli / Gian Paolo Romano / Tuto Rossi (éds)

Tui Memores

La dimension culturelle du droit international privé

Actes de la Journée en l'honneur de Tito Ballarino
du 13 juin 2014 à Lausanne et Essais recueillis par
ses amis et élèves

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Religious Values and Conflict of Laws: old problems and new perspectives

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1. Preliminary Remarks

Religious values are granted by several international acts.

Article 18 of the Universal Declaration of Human Rights (UDHR) contains the fundamental principles protecting religious liberty as a matter of basic human rights jurisprudence.¹ Article 18 (1) of the International Covenant on Civil and Political Rights (ICCPR)² sets up the fundamental principles which guarantee the *forum internum* of religious belief.³ In a General Comment, the Human Rights Committee (CCPR) explicitly states that the concept of worship also extends “to ritual and

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¹ Universal Declaration of Human Rights, G.A. Res. 217a, 71 U.N. GAOR., 3d Sess., 1st plen. mtg., U.N. Doc. A/810 [Dec. 12, 1948]: “Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance”. See L.D. Wardle, *Marriage and Religious Liberty: Comparative Law Problems and Conflict of Laws Solutions*, *Journal of Law and Family Studies*, 12, 2010, 315.

² International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (no. 16) 49, U.N. Doc. A/6136 at 52 (1966), in force since 3.1.1976; International Covenant on Civil and Political Rights, R.A. Res. 2200 (XXI) 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 at 52 (1966), in force since 23.3.1976.

³ See e.g. Universal Declaration of Human Rights (UDHR), GA Res. 217/A (III), 10.12.1948, U.N. Doc. A/810 at 71.

ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship”.⁴

In recent years, many debates in Europe have concerned religious values.

Studies on the management of the growing religious pluralisation and diversity are increasingly fundamental. In fact, from the perspective of Horizon 2020, it must be pointed out that the consideration of religious values appears to be in keeping with one of the main goals of the EU, within the complex human rights common framework outlined by both the European Charter and by the ECHR. Discrimination based on religious grounds can be penalised by the European Institutions and by the ECtHR. The common framework of these solutions can be found in their neutrality towards the religious values, generally considered “the only possible synthesis through which the European institutions can subsume different national experiences regarding the phenomenon of religion within a common European law of religion”.⁵ However, the accession of the European States to the European Convention on Human Rights and to the European Union did not achieve homogenisation in the protection of rights concerning religious topics. This consideration is confirmed, for example, by the various national rules about religious symbols, as recalled by the European Court of Human Rights, through the national margin of appreciation. In some cases, the state authorizes the displaying of non-proselytizing symbols, (such as the crucifix in Italy);⁶ in others, the state bans the displaying of such symbols (like France, Spain and Italy for the *burqa* and the *niqab*).

Recent decisions of the Strasbourg Court on national bans on the use of the veil and the European rules highlight that two conflicting models seem to be equally accepted:⁷ the multicultural one, in which the community prevails over the individual, on the assumption of the acceptance that all cultures are placed on the

⁴ Human Rights Committee (HRC), General Comment adopted by the Human Rights Committee under Article 40, § 4 of the ICCPR, General Comment No. 22(48), *The right to freedom of Thought, Conscience and Religion*, U.N. Doc. CCPR/C/21/Rev.1/Add. 4 (July 30, 1993), § 4: hereinafter General Comment No. 22.

⁵ A. Ferrari, S. Pastorelli, (eds.) (2013) *The Burqa Affair Across Europe (Between Public and Private Space)*.

⁶ *Lautsi v. Italy*, App. No. 30814/06, § 70 [Eur. Ct. H. R. Grand Chamber Mar 18, 2011], <http://www.echr.coe.int>; in this case, the Grand Chamber reversed the judgment of the Second Chamber [*Lautsi v. Italy*, App. No., 30814/06, Eur. Ct. H. R., Second Section, Nov., 3, 2009, <http://www.echr.coe.int>], holding that “the decision whether crucifixes should be present in State – school classrooms is, in principle a matter falling within the margin of appreciation of the respondent State”. See § 68.

⁷ *Dahlab v. Switzerland* (2001), N. 42393/98, Eur Cour. HR 449; *Leyla Sahin v. Turkey* (2005), N. 44774/98, 2005-XI Eur. Ct. H. R. 173, 165; *Dogru v. France* (2009), N. 27058/05, Eur. H. R. Rep., 182; *Aktas v. France* (2009), N. 43563/08; *Ahmet Arslan and others v. Turkey* (2010), N. 41135/98; *S.a.s. v. France* (2011), N. 43835/11; see C. W. JR. DURHAM, D. M. KIRKHAM, T. LINDHOLM, *Islam and Political – Cultural Europe*, 2012.

same level, having equal relevance;⁸ and the intercultural one, in which the individual prevails over the minority community whose interests are subordinated to those of individuals, as pluralism is limited in the name of the common values of the community-state.⁹

Within the intercultural approach, the problem of religious values in conflict of laws arises.

It must be pointed out that the national systems differ in the way they see the relationship between law and religion: as distinct, as in secular and Western legal systems, or as interconnected as in the Jewish and in the Islamic traditions. Within some systems, religion is the factor to solve the conflict of laws that instead of being inter-territorial become inter-personal, like in India, where, in regard to the Law of Persons (marriage, adoption, legitimacy and legitimation) each of the religious communities inhabiting the subcontinent, namely the Hindu, the Muslim, the Christian, the Parsi, the Buddhist, the Sikh and the Jain (the last three are usually deemed to be part of the Hindu community) is governed by its own personal law, legislative or customary. Personal laws give rise to conflicts in cases of family and succession law which result from the conversion of a spouse from one faith to another (i.e. by marriage), even without any change in the other connecting factors (domicile).¹⁰ In other countries, separate religious or customary courts decide issues relating family matters, alongside state tribunals (such as Israel and many Islamic countries); while finally in some Islamic nations we may find Islam as the state religion.

Generally speaking, problems arise when people cross borders or act in a country other than their own, because of the different nature of institutions and rules. The fact that the same word is used does not mean that the effects are, or ought to be, the same. So, the problem with differences in the ways of formalising relationships among individuals may contrast with their recognition and consequently may frustrate individuals' actions.

The expression "conflict of laws" is used as a result of the fact that national laws with respect to legal relationships differ from state to state, thus giving rise to conflict. Rules of choice of law are devised and applied by courts with the objective of resolving conflicts between the laws so as to render justice to the parties, subject to constitutional limitations and statutory directives of the concerned state.

⁸ *S.a.s. v. France* [2011], Eur. Cour. N. 43835/11, § 87, available at <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-145466>.

⁹ *Lautsi v. Italy*, App. No. 30814/06, § 70 (Eur. Ct. H. R. Grand Chamber Mar 18, 2011), <http://www.echr.coe.int>.

¹⁰ V. C. GOVINDARAJ, *The Conflict of Laws in India*, Oxford, 2011.

In family relationships, religious values are more relevant than in other contexts. For example, in some countries, marriages take place according a religious form, while other countries require a civil marriage: will either system give effect to the other's form of marriage? When a Muslim husband in India repudiates his Italian wife by pronouncing the formula of repudiation "TALAQ" three times, can this repudiation be recognised in Europe? Some marriages take place when the spouses are not in the same country. This often seems to occur within communities dispersed because of war or persecution such as the Somalis. It is not unusual to see the use of proxy or telephone marriages where one or both spouses are not present at the marriage ceremony. Under Muslim law these are perfectly lawful arrangements. According to the British Asylum and Immigration Tribunal, they are not to be recognised for immigration purposes.¹¹

To solve these conflicts, we must deal with the general problem of cultural identity, by answering a simple question: can cultural identity and the various factors connected to it, i.e. religion, "personalise" the conflict of laws, even where conflicts are usually deemed to be inter-territorial?

The answer to this question is not easy because, national systems of conflict of laws sometimes attempt to prevent reliance on other laws, above all when religious values become relevant. For example, English private international law rules were rewritten in the 1970s to prevent Muslims from using extra-judicial means of divorcing.¹² This contradictory system of rules is accompanied by the well-known regulation set by the Asylum and Immigration Act 2004: the UK introduced a requirement for a certificate of approval for marriage. Those who were not European Economic Area nationals or did not have indefinite leave to remain in the UK were obliged to acquire a certificate of approval upon paying a fee and submitting relevant documents to the Home Office. Only after that could they apply to a registrar for a license to marry. People marrying in the Anglican Church were exempt from such a requirement.¹³

Sometimes national systems forbid the application of the foreign law, focusing on the *lex fori*; recently, several problems have been pointed out by the 2010 *Save Our State Amendment* to the Oklahoma Constitution, as well as by the 2011 *Arizona Foreign Decisions Act*, both focused on the Sharia.¹⁴

¹¹ P. SHAH, *Transnational Family Relations in migration contexts: British variations on European Themes*, *Religare*, 2011, 7, 15.

¹² D. PEARL & W. MENSKI, *Muslim Family Law*, London, 1998.

¹³ The European Court of Human Rights found that these rules violated the couple's right to marry and were discriminatory in conjunction with the right to marry and freedom of religion: *O' Donoghue and others v. the United Kingdom* [2010], Eur. Cour. N. 34838/07, § 87, available at <http://cmiskp.echr.coe.int>.

¹⁴ *Save Our State Amendment*: "The courts...when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the

However, the human rights framework highlights the need to read private international law rules in view of the intercultural approach as a way to achieve legal pluralism,¹⁵ or to say it with Shah, to consider the conflict of law rules a way to achieve the “comity of people” instead of the “comity of nations”.¹⁶ In this context, international harmony, as the main core of private international law, should probably be refocused on the law governing personal identity in multicultural contexts. The emergence of a right to cultural identity, even if still vague and uncertain, can hardly be said to be without impact upon conflict of law rules.¹⁷ The path to reach this solution is long and winding but we have at least three shortcuts to develop a legal strategy that seeks to protect religious values as a part of the individual cultural identity, thereby “personalizing” the conflict of laws rules.

2. Religious values and nationality

In the field of conflict of laws, religious values are usually included within the connecting factor of nationality.

Following Pasquale Stanislao Mancini, and the Italian school of international law,¹⁸ several systems maintain, as a consequence of the assumption that the nation – based upon a unity of culture and will – is the unique, legitimate foundation of any independent state, that every national system of conflict of laws must respect the law of nationality. This is a tribute to the nations’ equal sovereignty, in the fields of civil law strictly connected with the national identity, as defined by language, religion, history, i.e. personal condition, marriage, family relations, succession in movables and immovables.

Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia law”. *Arizona Foreign Decisions Act 2011*: “...a court shall not use, implement, refer to or incorporate a tenet of any body of religious sectarian law”: H.B. 2582, 50th Legis 1st Reg. Sess. (Ariz. 2011).

¹⁵ J. GRIFFITHS, *What is Legal Pluralism? Journal of Legal Pluralism* 24 (1986), 1 – 55.

¹⁶ P. SHAH, *Transnational Family Relations in migration contexts*, 18.

¹⁷ A. MALATESTA, *Cultural Diversity and Private International Law*, in *Nuovi strumenti del diritto internazionale privato, Liber Fausto Pocar*, 2009, II, 653, S. Bariatti, G. Venturini eds., 2009.

¹⁸ S. TONOLO, *L'Italia e il resto del mondo nel pensiero di Pasquale Stanislao Mancini, Cuadernos derecho transn.*, 3, 2011, 178 – 192.

The rules of conflict of laws in matters of personal status have been stated over the last three centuries, in order to consider the diversity of family situations, and to solve the difficulties related to the application of different national laws.

On the one hand, the category of personal status has been broken down into several sub-categories all having their own rules: capacity, name, marriage, divorce, adoption; on the other hand, other rules have been developed, either declining subsidiary connecting factors based on Kegel's ideas (the law of the common nationality, in the absence of which the law of the common habitual residence, in the absence of which the *lex fori ecc...*), or defining a new connecting factor, founded on the choice of the parties: the *electio iuris*.¹⁹

However, in this context, nationality, a connecting factor that is essentially secular, instead becomes necessarily related to religious values when the national system recalled by it is split on a personal basis in many legal systems. In the Continental European system of private international law, when a choice of law rule refers to foreign law, the applicable foreign law is to be treated as *law* by the courts, in all procedural aspects and not as a fact, contrary to the common law approach. The applicable foreign law may be of a religious origin, for example, when it is closely linked with Shari'a and Islam, or with the Canon law of the Roman Catholic Church, or with Talmudic law and Judaism. To be applicable in a dispute, the foreign law must, however, qualify as *the law of a nation-state*. The Shari'a, Talmudic law or Canon law, does not in itself constitute applicable law. A religious law receives the label of state law only to the extent that it is recognized by the state, for example through codification, or is applied by the courts of the state.

In order to choose the specific rule applicable to the case, religion becomes the determining factor, as for example in the Indian subcontinent. In fact, in cross-border cases, in particular when the persons have their origin in states with religion-based personal laws, the states of origin often demand full compliance with their religiously coordinated family laws, including when the persons concerned reside abroad.

Some systems set up religious privileges, like Section 5 of the Hindu Marriage Act, according to which a Hindu marriage can take place only between two Hindus,²⁰ or like the hidden privilege disposed by article 19 – 5 of the Iraqi civil code, affirming that if one of the spouses is Iraqi at the time of celebration of marriage, only Iraqi law shall be applicable. As the Iraqi system is split into several systems defined by individuals' faith, following article 19 – 5, the judge, vested through the religious factor (Muslim Courts for Muslim people, Civil Courts for non-Muslim people

¹⁹ See *infra* 3

²⁰ V. C. GOVINDARAJ, *The Conflict of Laws in India*, 116.

applying the law of the religious community to which the spouse belongs) must apply the religious rules of the Iraqi spouse.²¹

When the functioning of this connecting factor leads to a system containing such privileges contrasting with other fundamental values, i.e. rights of women, rights of children, etc. private international law offers the public policy exception, generally considered as the ultimate guarantee for the protection of the fundamental values of the forum state's legal order.

Public policy is subject to continuous reconsiderations and is influenced by the political trends followed by each national court (relativity of public policy). Family law principles are often regarded as a matter of a country's public policy, since marriage is an institution and a part of the normative reality of a State.²² This is especially seen when we are confronted with the question of applying the family laws of a country belonging to another religious culture than our own. More generally, the coexistence of legal systems reflecting different traditions – including cultural and religious ones – points out the need to investigate the fact that national courts are facing a growing number of cases in which the rules of different legal systems clash, within the well known phenomenon called “clash of civilisations”.²³ This, despite the fact that many Islamic countries are reforming their national systems of family law, by reducing the relevance of religious values within their national systems (Morocco, Algeria, Tunisia).²⁴

Generally speaking, the religious origin of foreign rules should not, as such, have been qualified as an infringement of the public policy of the forum state.²⁵ In fact, there are several cases of contrast with public policy, not determined by the

²¹ For a recent case, see Cass. Irak, 26.3.2007, *Revue critique dr. int. privé*, 2009, 40: H. AL DABBAGH, *Mariage mixte et conflit entre droits religieux et laïque*, 29 – 39.

²² H. THUE, *Connecting Factors in International Family Law*, in *Families Across Frontiers*, 53 – 62, N. Lowe & G. Douglas, (eds.), The Hague, Boston, London, 1996,.

²³ P. MERCIER, *Conflits de civilisations et droit international privé: polygamie et réputation*, Genève, 1972; J. DÉPREZ, *Droit international privé et conflits de civilisations. Aspects méthodologiques. Les relations entre systèmes d'Europe occidentale et systèmes islamiques en matière de statut personnel*, *Recueil des Cours*, 211, 1988 – IV, 9.

²⁴ A. QUINONES ESCAMEZ, *La réception du nouveau Code de la famille marocain (Moudawana 2004) en Europe*, *Rivista di diritto internazionale privato e processuale*, 2004, 877; K. SAIDI, *La réforme du droit algérien de la famille: pérennité et rénovation*, *Revue internationale de droit comparé*, 2006, 121.

²⁵ S. VRELLIS, *Conflits ou coordination de valeurs en droit international privé*, *Recueil des Cours*, 2007, 328, 175 – 486; K. MEZIOU, *Migrations et relations familiales*, *Recueil des Cours*, 2009, 345, 9 – 386; Z. Combalia, M. P. Diago, A. Gonzáles – Varas (eds.), *Derecho islámico e interculturalidad*, Madrid, 2011; N. Bernard-Maugiron & B. Dupret (eds), *Ordre public et droit musulman de la famille en Europe et en Afrique du Nord*, Bruxelles, 2012.

application of religious values, such as same sex marriage,²⁶ or post-death marriage.²⁷ However, in some cases religious values create a contrast with public policy, such as for polygamous marriage and repudiation, even if in many cases institutions of Islamic law do not give rise to problems, as for example the matrimonial regime of separation of property.

Thus, religious values must be considered as a relevant factor in the conflict of laws' field, but not necessarily as a source of conflicts.

Europeanisation and globalisation of sources of private international law do not preclude the chance that conflict of laws should also deal with individual identities and should offer different solutions.

For example, repudiation has been evaluated by national courts in a number of different ways.

In Italian case law, its recognition has been prevented through the public policy exception, to avoid discrimination against women,²⁸ or for being pronounced without intervention of the court.²⁹ The main problem of this application of the public policy exception is the limping situation concerning the *personal status* of the individuals involved in the repudiation. A possible way to solve this problem is available recalling art. 3, n. 2 letter e) of the l. 898/70 on the dissolution of marriage, literally ruled only for the wife who is Italian, allowing to consider the repudiation pronounced abroad like a ground for the application for divorce in Italy, even in cases of divorce claimed by foreign women domiciled in Italy.³⁰ In other cases a solution is found by recognising the repudiation, due to the principles of the public policy – proximity, like in a case concerning an Egyptian *talaq*:³¹ in this case, Italian judges point out that the notion, put forward to protect the complex of values “that characterise the fundamental ethical and social structure of the national community in a given time in history must be reduced to ‘its core’, to the principles that are really indefeasible and fundamental” to the legal system. This

²⁶ Not allowed in Italy: Cass., 15.3.2012 n. 4184. See the recent ECtHR, *Oliari and o. v. Italy*, App. No. 18766/11 – 36030/11, [Eur. Ct. H. R. July, 21 2015] <http://www.echr.coe.int>.

²⁷ Allowed for example by the Belgian case law: Cass., 2.4.1981, *Rev. cr. Jur. Belge*, 1983, 499.

²⁸ In Italy: App. Roma, 29.10.1948, *Foro pad*, 1949, I, 348; App. Milano, 17.12. 1991, *Riv. dir. int. priv. proc.*, 1993, 109; App. Torino, 9.3.2006, *Dir. fam.*, 2007, 156; Trib. Milano, 24.3.1994, *Riv. dir. int. priv. proc.*, 1995, 853; Trib. Milano, 11 3. 1995, *Riv. dir. int. priv. proc.*, 1996, 129; in France: Cass., 1.6.1994, *Revue critique*, 1995, 103; Cass., 31.1.1995, 569; Cass., 11.3.1997, *Clunet*, 1998, 10.

²⁹ App. Milano, 14.12.1965, *Riv. dir. int. priv. proc.*, 1966, 381.

³⁰ C. CAMPIGLIO, *La famiglia islamica nel diritto internazionale privato italiano*, *R. d. int. priv. proc.*, 1999, 25, 38.

³¹ App. Cagliari, 16.5.2008, www.immigrazione.it.

core content cannot disregard the assertion of the essential rights of defence, as required by article 65 of Law 218/95. In the case, the Court of Appeal emphasises that repudiation ensures a safeguarding of the adversarial principle since, under Egyptian law, the wife has the chance to ask for the dissolution of the marriage through the procedure of the *khola* and the *talaq* does not qualify as “simply a monitoring process, in which the plaintiff is limited to express – in a purely assertive manner – his claim of dissolution, but is structured as a complex procedure, “in which the possibility for the wife to intervene ensures the irreversible dissolution (...) of the sharing of lives and affection between spouses, and regulates the economic rights” of women. Given these considerations, no element of conflict with public order is found by the Court, whose scope overrides the fulfilment of the requirements “of Egyptian law for the validity and irrevocability of the divorce”.

In terms of public policy, proximity is a problematic concept, often leading to opposite solutions: in Belgium, despite the fact that the recognition of foreign repudiation is expressly regulated by the Law of 16 July 2004 holding the code of private international law,³² judges recognised a repudiation under Moroccan law, that did not provide for the wife’s right to alimony, even though the couple had lived in Belgium for more than nine years and since the birth of their children.³³

In France, the relevant case law may be classified into three stages.

After a first stage in favour of recognition of the repudiation, founded on the so-called attenuated effect of the public policy exception, and in the light of some bilateral agreements on judicial cooperation concluded by France and some countries of North Africa,³⁴ acts of repudiation were not recognised for several reasons: on the one hand, the judicial procedure did not ensure sufficiently the

³² Article 57 – Foreign divorce based on the will of the husband: “§ 1. A foreign deed establishing the intent of the husband to dissolve the marriage without the wife having the same right cannot be recognized in Belgium. § 2. Such deed can however be recognized in Belgium after verifying whether the following cumulative conditions are satisfied: 1° the deed has been sanctioned by a judge in the State of origin, 2° neither of the spouses had at the time of the certification the nationality of a State of which the law does not know this manner of dissolution of the marriage; 3° neither of the spouses had at the time of the certification their habitual residence in a State of which the law does not know this manner of dissolution of the marriage; 4° the wife has accepted the dissolution in an unambiguous manner and without any coercion”.

³³ Within the Belgian case law see the leading cases: Cass., 18.6.2007; Cass. 3.12.2007, in J.Y CARLIER, *Quand l'ordre public fait désordre. Pour une interprétation nuancée de l'ordre public de proximité en droit international privé. À propos de deux arrêts de cassation relatifs à la polygamie et à la répudiation, Revue générale de droit civil belge*, 2008, 525.

³⁴ Among these, particularly relevant it is that concluded with the Kingdom of Morocco, *Convention entre la République française et le Royaume du Maroc relative au statut des personnes et de la famille et à la coopération judiciaire, Décret n. 83-435 du 27 mai 1983*, in J.O. 1^{er} juin 1983, p. 1643 [art. 13].

womens' rights of defense (cd. *ordre public procedural*), on the other hand, there was a lack of provisions about maintenance obligations (*ordre public alimentaire*). The leading case is the judgment pronounced in 2004 by the Supreme Court,³⁵ affirming that the provision of divorce – remedy available only to the husband – violates the principle of equality between spouses, as enshrined in art. 5 of Protocol 7 of the ECHR, and it is thus not allowed by French public policy. In this case, we may find an abstract assessment concerning the repudiation, regardless of the woman's consent, supported by the reference to the equality between spouses as enshrined in international acts and more generally by the European public policy. Following this judgment, French judges have repeatedly refused to recognise the divorce requested by the wife,³⁶ according to Moroccan law,³⁷ the *chicqa*, in a case concerning couples resident in France for several years.³⁸

In light of this case law, we cannot be too optimistic about the possible outcomes of the provisions of the Council Regulation (EU) No 1259/2010 of 20 December, implementing enhanced cooperation in the area of the law applicable to divorce and

³⁵ Cass. 17.2.2004, *Revue critique de droit international privé*, 2004, 423: “*Mais attendu que l'arrêt retient que le jugement du Tribunal de Biskra avait été prononcé sur demande de M. X... au motif que "la puissance maritale est entre les mains de l'époux selon la Charia et le Code" et que "le Tribunal ne peut qu'accéder à sa requête"; qu'il en résulte que cette décision constatant une répudiation unilatérale du mari sans donner d'effet juridique à l'opposition éventuelle de la femme et en privant l'autorité compétente de tout pouvoir autre que celui d'aménager les conséquences financières de cette rupture du lien matrimonial, est contraire au principe d'égalité des époux lors de la dissolution du mariage, reconnu par l'article 5 du protocole du 22 novembre 1984, n° 7, additionnel à la Convention européenne des droits de l'homme, que la France s'est engagée à garantir à toute personne relevant de sa juridiction, et à l'ordre public international réservé par l'article 1er d) de la Convention franco-algérienne du 27 août 1964, dès lors que, comme en l'espèce, la femme, sinon même les deux époux, étaient domiciliés sur le territoire français; qu'ainsi, la cour d'appel a légalement justifié sa décision au regard des textes susvisés*”. On this case, see: H. FULCHIRON, “*Ne répudiez point... pour une interprétation raisonnée des arrêts du 17 février 2004*”, in *Rev. int. droit. comp.*, 1, 2006, 7 ss.; M. L. NIBOYET, *Regard français sur la reconnaissance en France des répudiations musulmanes*, in *Rev. int. droit comp.*, 2006, 27, p. 32 ss.; M.C. NAJM, *Le sort des répudiations musulmanes dans l'ordre juridique français. Droit et idéologie(s)*, in *Droit et cultures*, 2010, n. 59, 209.

³⁶ Cass., 3.1.2006, *Revue critique dr. int privé*, 2006, 627; Cass. 4.11.2009, *Dalloz*, 2010, 543.

³⁷ *Dahir* n. 1.04.22, 3.2.2004, *Bulletin Officiel du Royaume du Maroc*, n. 5184, 5.2.2004, 418.

³⁸ For some critical remarks to the French decisions, see: K. ZAHER, *Plaidoyer pour la reconnaissance des divorces marocains*, *Revue critique*, 2010, 313 e ss.; H. FULCHIRON, *Droits fondamentaux et règles de droit international privé: conflits de droits, conflits de logiques? L'exemple de l'égalité des époux et responsabilité des époux au regard du mariage, durant le mariage, et lors de sa dissolution*, in F. SUDRE (ed.), *Le droit au respect de la vie familiale au sens de la Convention européenne des droits de l'homme*, Bruxelles, 2002, 353 ss.

legal separation for the states participating (namely, Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia).³⁹ Article 10 targets religious law, to solve the conflicts of laws that arise in cases of repudiation. According to this provision, which is a special and additional kind of public policy provision, the law of the forum shall replace the applicable foreign law when that law “makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex”. Laws not providing for divorce refer primarily to laws of a Canon law origin (until recently this applied to Malta in Europe), whereas laws discriminating on the basis of a spouse’s sex refer to, in particular, Islamic laws. As in the case of the Belgian Code of private international law, it is not certain that judges will follow a strict interpretation of this regulation, whereas equal access to divorce is not granted on equal basis to spouses.

The problems deriving from the application of nationality as connecting factor clearly show the difficult link to religious values.

More recently, the concept of habitual residence has been introduced, especially in EU private international law rules, as an alternative connecting factor to the principles of nationality and domicile. This concept is relatively new as a connecting factor in private international law; originally used in some bilateral conventions on jurisdiction and enforcement of judgments in the second half of the nineteenth century, the notion of habitual residence is found in the Hague Convention of 1902 on Guardianship. Following the Second World War, habitual residence gained greater importance in the Hague Conventions as a connecting factor instead of citizenship. Habitual residence is meant to be different from domicile in that the element of intention is weaker. It is the regular physical presence in a country that constitutes the concept, thus making it easier to apply than the principle of domicile, with its subjective element of intention.

In contemporary private international law, there is a strong trend away from nationality principle and towards domicile or even more habitual residence as decisive for the choice of law in personal matters. The main argument for this shift seems to be that the principle of habitual residence is more suitable and adequate than the nationality for the authorities, since the nationality principle often points to foreign law as being applicable and to foreign institutions. However, Europeanization and globalisation of sources of private international law does not preclude the chance that conflict of laws should also deal with individual identities. To the extent that the European systems have until now allowed the application of foreign laws, we find the problem of survival in Europe of an idea of the personality of laws. In fact, it is generally accepted that conflict of laws faces the individual identities of people involved in international relations. Cultural identity may be considered

³⁹ O.J. 29.12.2010 L 343/14.

collective and individual at the same time, because each member of the group has an identity of its own.

National law as a dimension of culture is part of a person's identity. A person's notion of law is part of the basis upon which expectations are built and choices made. Sometimes, in family matters, legal regulations express culture and religion.⁴⁰ This is the case even in secular societies because the roots of certain institutions like marriage are to be found in religion: seen from a Muslim point of view the Swedish religion – neutral family law legislation is the Swedish version of Christian marriage.⁴¹ While nationality cannot be changed overnight, neither habitual residence nor domicile, used as connecting factors for choice of law, satisfy the requirements of a personal law, due to their instability and changeability. The law of nationality is the law of a person's cultural origin. So, it is clear that a person moving from one religious culture to another will find it strange and unacceptable to be subjected to the family laws of the new country of domicile or habitual residence upon arrival or shortly after.

3. *Electio iuris* and religious values

Among the shortcuts available to “personalise” the conflict of laws rules, respecting religious values, the first one is given by the well-known connecting factor of the *electio iuris*.

In fact the *electio iuris* is a connecting factor generally used in the field of contracts. The parties of a contract usually make a selection as to the applicable law that can be explicit, implied but unambiguous (i.e. in case of the choice of forum), and not opposed to public policy. Such is the case even if the selected legal system has no real connection with the contract.

To give effect to religious values within the field of conflict of laws, some authors suggest adapting the selection available to individuals.⁴²

National judges are not usually in favour of this solution, for instance in the case of spouses who get divorced by mutual consent according to Thai law and registered the divorce at the Thai embassy in Bonn. The BGH applied the German law as *lex fori*, instead of the Thai law and declared the divorce null and void.⁴³ Subsequently the solution of the BGH became the codified rule of art. 17 EGBGB.⁴⁴ If the choice

⁴⁰ H. THUE, *Connecting Factors*, 59.

⁴¹ H. THUE, *Connecting Factors*, 59.

⁴² L. GANNAGÉ, *La pénétration de l'autonomie de la volonté dans le droit international privé de la famille*, *Revue critique de droit international privé*, 1992, 425; J. Y. CARLIER, *Autonomie de la volonté et statut personnel*, 1992.

⁴³ BGH, 14.10.1981, BGHZ 82, 34, *IPRax*, 1983, 37.

⁴⁴ G. KEGEL, *Scheidung von Ausländern im Inland durch Rechtsgeschäft*, *IPRax*, 1982, 22.

of law could have worked in the case, the solution would have been different, as in the case of the Rome III Regulation. The non-application of the Thai law of the couple – thus forcing them to obtain a judicial decision to get divorced – is against the protection of the cultural identity of the person.⁴⁵

Another paradigmatic illustration of the courts' reluctance to enter into the religious sphere is the case concerned a bank loan dispute decided by the English Court of Appeal. In the case, *Shamil Bank*, the choice of court in the loan contract was in favour of an English Court, but the clause stipulating the law to govern the contract referred to *Shari'a*. The Court of Appeal decided the dispute only on the basis of the English Law, affirming, among other dicta, that Islamic rules were really only religious principles and far too imprecise to be applied, while the international rules applicable to contracts envisaged only the law of a particular state legal system.⁴⁶

Likewise, against the application of Islamic Law there is the consistent American case law concerning *mahr*,⁴⁷ the compulsory gift from husband to wife, the amount of which is normally agreed upon in relation to the marriage contract, paid either at the time of marriage, on demand, or at the dissolution of marriage by divorce or death. For example in 2001, the California Court of Appeal refused to apply the Islamic law in a case concerning an Egyptian couple married in Egypt, according to a pre-nuptial agreement, because of the difficulty of regulating the *mahr*, as “the legal system in various Islamic countries will often be influenced by one school or the other”.⁴⁸ In 2007, the Washington Court of Appeals applied the Washington Law, in a case concerning Jordanian citizens, resident in US, because there is no “written separation contract or prenuptial agreement” and “if the marriage certificate is a prenuptial agreement, it is invalid because it was economically unfair on its face” (the exchange of 19 pieces of gold for equitable property rights is unfair under the Wash. Rev. Code § 26.09.080).⁴⁹

In the opposite direction we may find only the French jurisprudence about cases concerning *mahr*.⁵⁰ In 1995, the Cour d'Appel de Paris classifies *mahr* as an

⁴⁵ E. JAYME, *Menschenrechte und Theorie des Internationalen Privatrechts, Jahreshft der Internationalen Juristenvereinigung*, Osnabrück 1991/1992, 2, 8.

⁴⁶ *Beximco Pharmaceuticals v. Shamil Bank of Bahrain EC* [2004] Part 12, Case 9 [CAEW], available at www.ipsufactoJ.com/international/index.htm.

⁴⁷ Several words are used as synonymous: *sadaq*, which means friendship, present, gift (Qu'ran verse 4:4); *farida*, which means “a gift or disposition instituted by God” (Qu'ran verses 2:236; 2: 237; 4:24); sometimes the *mahr* has a religious object: the gift of Koran, the gift of some lessons on Koran. See the Encyclopedia of Islam online.

⁴⁸ *In re Marriage of Shaban*, 105 Cal. Repr. 2d 863 (Cal. Ct. App. 2001), *Lexis Nexis Academic*, n. 349.

⁴⁹ *In re Marriage of Souhail Altayar and Sarah Assawad Muhyaddin*, n. 57475-2-1 (Wash. Ct. App., July 23, 2007), *Lexis Nexis Academic*, n. 2102.

⁵⁰ Several words are used as synonymous: *sadaq*, which means friendship, present, gift (Qu'ran verse 4:4); *farida*, which means “a gift or disposition instituted by God” (Qu'ran

indicator of the choice of property regime, in a case concerning a Lebanese citizen of the Greek Catholic confession, already married according to the Lebanese law, and subsequently married to a Polish citizen in Lebanon according to the Muslim rites – the only way to marry the new girlfriend as he could not get a divorce according to the Lebanese law. At the moment of the divorce from the second wife, he had to pay his wife 3,000 Lebanese pounds. The Court of Appeal of Paris' judgment considers *mahr* as an indicator of the choice of property regime: "the existence of a dower excludes the choice of a regime of community of property, and (...) in signing this marriage contract Mr. T and Mrs. K. have expressed their wish to place themselves under the regime of separate estates, which is the only regime recognised by Muslim law, with a clause concerning dower, and also in accordance with the laws of Lebanon according to which the matrimonial regime is that of separate estates, as well as the custom certificate presented".⁵¹ Likewise, in the case of a Muslim couple of Indian origin, married in India in 1969 and resident in France where they divorced in 1990, claiming, on the one hand the division of property, following the French *régime legal* (the wife), and on the other hand, the agreement on the adoption of separate estates (the husband), the Cour de Cassation, overruling the judgment of the Cour d'Appel de Lyon, stated that the "act called *mahr* is a convention establishing the spouses' consent to marry to which the payment of dower is added and which is not against the French *ordre public*".⁵²

Nowadays, following the well-known process of Europeanisation of private international law, some tentative indications of a change towards the consideration of cultural identity in conflict of laws through the choice of law may be found, in family matters, in the so called Rome III Regulation. To solve many problems in terms of legal certainty and predictability for the parties, the regulation offers to the States participating in the enhanced cooperation (Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia) a set of uniform conflict of laws rules, among which the choice of the law applicable to divorce or separation is a very important one. In fact, the regulation No 1259/2010 enables the spouses to designate the law of the country of which one of them is a national (Article 5(1)(c)), and provides for the residual application of the law of the spouses' common nationality when they have not chosen the applicable law (Article 8(c)). So within the countries participating in the Rome III Regulation, couples asking for divorce or separation, may choose the applicable law to these proceedings, avoiding the conflict of cultures determined by the *lex fori* application.

verses 2:236; 2: 237; 4:24); sometimes the *mahr* has a religious object: the gift of Koran, the gift of some lessons on Koran. See the Encyclopedia of Islam online.

⁵¹ App. Paris, 14.6.1995, *Revue critique de droit international privé*, 1997, 41.

⁵² Cass. 22.11.2005, *Journal du droit international*, 2006, 1365-1377.

Moreover, regarding the conditions of the choice of law clause, article 6 par. 2 of the Rome III Regulation states that: “Nevertheless, a spouse in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence at the time the court is seized if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1”. This rule seems specially conceived for the case of a choice of law agreement, between Muslim spouses, for the application of the law of a Muslim country. Through par. 2 of Article 6 of the Rome III Regulation, Muslim women may avoid the effects of an agreement, which they were once forced to sign, claiming the application of the law of the country where they are domiciled at the time the procedure for divorce begins.⁵³

4. Public policy and religious values

Another shortcut on the path towards legal pluralism and consideration of religious values within conflict of law rules, is the approach affirming the necessary recognition of factual situations, a social need for continuity and stability.⁵⁴

What is actually at stake is whether the court’s obligation to apply the foreign law according to the principle *iura novit curia* – which in the continental system is frequently extended to also cover applicable foreign law – can include foreign religious law. If the parties are not able to provide the court with reliable information on the content of religious laws as approved by state law, how should the court proceed? According to settled European case law, in situations of failure to sufficiently prove the content of the applicable foreign law, the claim is, normally, either dismissed or rejected. Alternatively, it is decided in accordance with the substantive law of the forum state. A third model is the application of a “closely related law”, either that of a very similar legal system within the same legal family or a presumably similar regulation of another state. When a religious law is at stake, it is not evident that any of these solutions is truly suitable.

Another problem concerns the loyal application of foreign law. As pointed out by Michael Bogdan, “a court applying foreign law should be cautiously conservative and it must resist the temptation to ‘improve’ the foreign rules by interpreting them according to its own preferences”.⁵⁵ But as the selected case law shows, national

⁵³ R. ESPINOSA CALABUIG, *Elección de una ley por las partes al divorcio y a la separación judici*, al: *la solución “limitada” del Reglamento Roma III*, in I. QUEIROLO, A. M. BENEDETTI, L. CARPANETO, *Le nuove famiglie tra globalizzazione e identità statuali*, 2014, 235.

⁵⁴ R. BARATTA, *La reconnaissance des situations en droit international privé*, *Recueil des Cours*, 2010 (348), 253 – 499.

⁵⁵ M. BOGDAN, *Private International Law as Component of the Law of the Forum*, 348 *Recueil des Cours*, 2010, 113.

courts tend to interpret the foreign rules in line with forum law or to adjust them to fit the values underlying their own legal system. An additional challenge posed by religious law is that its traditional interpretation, according to the sacred sources, is increasingly questioned.

In this context we may find the German case law concerning the *mahr*.

In 1987, the BGH dealt with the problem of the legal validity of an arrangement between an Arab woman (an Israeli citizen) and her German husband, converted to Islam. At the moment of the divorce, the woman asked for the *mahr* (100000 DM) but the husband claimed that the arrangement was invalid according to German law. The BGH at first solved the conflict of laws, applying German law as the law where the couple had their residence, but qualified the *mahr* as a maintenance agreement valid under the Islamic law applicable to the marriage, considering the marriage as a condition of the agreement.⁵⁶

Likewise, it is well known the consideration of the *mahr* in the case law of the High Court of England in the case *Qureshi v. Qureshi*,⁵⁷ concerning a Pakistani citizen and his Indian wife, who had got married in Britain and divorced through a *talaq* procedure, pronounced also in Britain. In the case, the conflict of laws problems was solved applying the English law, but the Court stated that “it is only if the marriage is recognised and dissolved that the wife is entitled to dower. Whatever the judgment of this court, the husband will not return to the wife. I trust that it will not be thought cynical if I feel that she is really better off with a judgment for a considerable sum of money, which is likely to be more easily enforceable while the husband is in this country, than with a largely meaningless right to be recognised locally as his wife”.⁵⁸ The court decided to apply Pakistani law on a *talaq* pronounced in England as a condition to enforce the wife’s claim for *mahr*.

Within this approach, a different interpretation of public policy is possible.⁵⁹

Under the influence of human rights, the new notion of public policy exception, not only and not necessarily national, sometimes leads to a refusal to recognise foreign decisions and sometimes to impose it on procedural grounds related to the right to a fair trial. The public policy exception may be applied as an instrument of integration of the diversities within a common concept of justice.

⁵⁶ BGH, 28.1.1987, *IPRax* 1988, 109; H. J. HESSLER, *Islamisch-rechtliche Morgengabe: vereinbarter Vermögensausgleich im deutschen Scheidungsfolgenrecht*, *IPRax*, 1988, 95.

⁵⁷ *Qureshi v. Qureshi* (1972), Probate Division, *Weekly Law Reports*, 173.

⁵⁸ *Qureshi v. Qureshi* (1972), Probate Division, *Weekly Law Reports*, 201.

⁵⁹ J. Y CARLIER, *Diversité culturelle et droit international privé. De l'ordre public aux accommodements reciproques?*, *Diritto internazionale e pluralità delle culture*, SIDI, 2014, 125 ss.

A very significant application of this approach seems to have recently been suggested by the ECtHR with regard to another highly problematic institution set up on religious rules whose recognition is very difficult in Western countries: the *kafala*, a measure of child protection that neither terminates the pre-existing relationship between the child and the parents, nor establishes a legal parent-child relationship with the new parents, as adoption is not legally possible, according to a generally accepted interpretation of the Koran.⁶⁰ In *Harroudj*, the ECtHR states that a violation of Article 8 of the European Convention may be ascertained when a personal status legally and stably constituted abroad is denied transnational continuity.⁶¹ Even if the *kafala* Algerian order might not have been converted into adoption, as asked by a French couple – due to a French law provision – the Court states the need to recognise the factual situation, accommodating the law of the country of origin with the nationality law: “Furthermore, the Court notes that the judicial grant of *kafala* is fully recognised by the respondent State and that it produces effects in that country that are comparable in the present case to those of guardianship, since the child, Hind, had no known parentage when she was placed in care. In that connection, the domestic courts emphasised the fact that the applicant and the child had the same surname, as a result of the relevant legal procedure, and that the applicant exercised parental authority, entitling her to take any decision in the child’s interest. Admittedly, as *kafala* does not create any legal parent-child relationship, it has no effects for inheritance and does not suffice to enable the child to acquire the foster parent’s nationality. That being said, there are means of circumventing the restrictions that stem from the inability to adopt a child. In addition to the name-change procedure, to which the child was entitled in the present case on account of her unknown parentage in Algeria, it is also possible to draw up a will with the effect of allowing the child to inherit from the applicant and to appoint a legal guardian in the event of the foster parent’s death”.⁶²

The various points examined above show that the respondent state, applying the international conventions that govern such matters, has put in place a flexible arrangement to accommodate the law of the child’s state of origin and the national law. The court notes that the prohibition of adoption stems from the choice-of-law rule in Article 370-3 of the Civil Code but that French law provides the means to alleviate the effects of that prohibition, based on the objective signs of a child’s

⁶⁰ Koran, Sura XXXIII, *Al – Ahzab*, 4 – 5. In many countries adoption is forbidden with the exception of Tunisia where the adoption is provided by the Act n. 58 – 27, 4.3.1958: see the Algerian Code de la famille, law n. 84-11, 9.6.1984, regulating *Kafala* in the Chapter VII, while adoption is forbidden by Article 46 (“*L’adoption (tabanni) est interdite par la chari’a et la loi*”); in the Moroccan Moudawana [Code du statut personnel et successoral] reformed on 3.2.2004, adoption is forbidden by Article 83.3; *kafala* is ruled by the Dahir portant loi n. 1-02-172, 13.6.2002.

⁶¹ *Harroudj v. France* [2012], Eur. Cour. N. 43631/09, § 51.

⁶² *Harroudj v. France* [2012], Eur. Cour. N. 43631/09, § 51.

integration into French society. Firstly, the choice-of-law rule is expressly set aside by the same Article 370-3 in cases where “the minor was born and habitually resides in France”.

Likewise, the so-called accommodation approach has gradually taken place with regard to recognition of polygamous marriages, given that many countries have passed from denying any effect at all of such acts – as being in contrast with public policy – to a partial recognition.

Problems arise in the European countries as the general rule is that marriages celebrated here cannot be other than monogamous. In fact within the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (O.J. L 251/12, 3.10.2003) we can read: “ (11) The right to family reunification should be exercised in proper compliance with the values and principles recognised by the Member States, in particular with respect to the rights of women and of children; such compliance justifies the possible taking of restrictive measures against applications for family reunification of polygamous households”. Art. 4 states that the family reunification cannot be allowed to a second spouse when the first spouse is already resident in a member State.

Moreover, in Italy Art. 18 of the Regulation of the Civil Status forbids the registration of foreign acts that are contrary to public policy. While polygamous marriages are not recognised for public policy reasons,⁶³ but only when they are effectively polygamous, not if they are monogamous but celebrated according to a law allowing polygamy,⁶⁴ the acts of birth of children born within these marriages must be recognised because in this case the best interests of the child prevail, even if it is debatable if this fundamental principle may be read as an exception to the public policy clause, or as a basic value of this. On this concern, it is necessary to point out that this solution may be attained also through consideration of the attenuated effect of the public policy exception, according to which it is possible to recognise situations constituted abroad: since the polygamous marriage has been celebrated abroad, the public policy exception can be applied less rigorously in the Italian system, and therefore it cannot be used to avoid the recognition of the effects of this institution. In particular, it has been recognised to the second wife and children of the same (to be recognised as legitimate however) succession and maintenance

⁶³ See T.A.R. Emilia Romagna, n. 926/94, *Gli Stranieri*, 1995, II, 613: in this case the *status* of wife has not been allowed to the second wife of a foreign citizen for public policy reasons against the recognition of the polygamous marriage for purposes of family reunification.

⁶⁴ Cass., 2.3.1999, n. 1739, *Riv. dir. int. priv. proc.*, 1999, 613; for a similar case decided in UK see *Hussain v. Hussain* [1982], 1 All ER 369 [1983] 4 FLR 339.

rights, social security,⁶⁵ residence rights.⁶⁶ The reason of these solutions is clear: to protect second or subsequent wives, to protect children, according to the principle of the best interest of the child,⁶⁷ affirmed by Art. 3 of the UN 1989 Convention, and by Art. 24 of the European Charter on Fundamental Rights, and strongly applied by the ECtHR in several cases,⁶⁸ and to grant them the rights deriving from marital status. In Italy, the leading case was decided by the Supreme Court in 1999;⁶⁹ anyway it must be pointed out that is a specific one, concerning the succession of an Italian citizen, a widower, married in Somalia with a Somali woman who claims her successorial rights in contrast with those of the daughters born from the first marriage of the deceased. The judgment confirms the validity of the marriage in accordance with what has already been stated by the Tribunal of Lodi and by the Court of Appeal of Milan. The judgment is also interesting because it seems to generalise the validity of the marriage celebrated according to Islamic law, when it is the object of a preliminary question of the hereditary devolution. In this case, the validity of the marriage did not involve insertion of foreign provisions in the rules of the law of the forum and so it did not affect the Italian public policy.

The suggested approach is undoubtedly interesting as an inclusive tool of religious values. Moreover, it seeks to attain the most equitable result, using the comparative legal method, aiming at respecting cultural identity and legal pluralism. The main problem of this approach is, however, the unpredictability of the solutions, depending at first on the choice of law solution and in a subsidiary way on the law regarded as a fact. In any event, according to many systems a marriage celebrated abroad is not void on the grounds that it is entered into under a law which permits polygamy; article 45 of the 1987 Swiss Statute on private international law expressly states that a marriage validly celebrated abroad is recognised in Switzerland.⁷⁰

Moreover, we may find judgments of other countries that open new opportunities for recognition, considering the personal laws of the spouses not banning this kind of marriage.⁷¹ The reason is, as above, clear: to protect second or subsequent wives

⁶⁵ In Italy see: Cass., 2.3.1999, n. 1739, Riv. dir. int. priv. proc., 1999, 613.

⁶⁶ App. Torino, 18.4.2001, Dir. fam pers., 2001, 1492; *contra* see Cass. 28.2.2013, n. 4984: in this case the claim to the family reunification of the second wife has been dismissed, even if supported by the presence of the son of the woman, for the presence of the first wife of the father of the son in Italy.

⁶⁷ C. FOCARELLI, *La convenzione di New York e il concetto di best interests of the child*, Riv. dir. int., 2010, p. 981 ss.; P. ALSTON, *The best interest of a child: reconciling culture and human rights*, Oxford, 1994.

⁶⁸ 18.4.2006, *Dickson v. United Kingdom*, n. 44362/04; *concurring opinion* Bonello, par. 15: "The particular circumstances of this case lead me to believe that permitting offspring to be born to the applicants would not be fostering the best interests of the desired child. It would, on the contrary, be injurious to the 'rights of others'".

⁶⁹ In Italy see: Cass., 2.3.1999, n. 1739, Riv. dir. int. priv. proc., 1999, 613.

⁷⁰ In Italy see: Cass., 2.3.1999, n. 1739, Riv. dir. int. priv. proc., 1999, 613.

⁷¹ In Belgium: Cour Const., 4.6.2009, n. 96/2009, *El Haddouchi*.

and to grant them the rights deriving from marital status. The real problem is that the first wife is strongly prejudiced when she is required to share her inheritance from the deceased husband. The approach aiming at considering the factual situation leads in these cases to the accommodation of religious values, recognising the effects of polygamous marriages, and suggesting the division of estates or of the survivor's pension among the wives of the deceased husband.⁷²

5. The Conventional approach

Religious values in cross-border cases are inevitably connected with the application of foreign law. There is considerable uncertainty regarding the conditions for the application of religious law, for example, whether such law is to be applied *ex officio*, whether the court or the parties are to establish the foreign law, and what solution is to be chosen when its content is not proven.

An additional problem is adjusting the applicable foreign law to the rules of the forum on procedure. The links between the foreign law and a certain religion can increase the problems facing the court.

At present, very different approaches are being followed by European courts in all these respects. However, having foreign law applied to the case generally largely depends on the parties' activities and the efforts they are prepared to make. This state of affairs has not contributed to any "unity of result", which common rules on choice of law (where such exist) could otherwise achieve.⁷³

Common rules on choice of law may become a way to take into account religious values. Multilateral treaties, as those developed by the Hague Conference on Private International Law, since its inception in 1893, afford a high degree of legal certainty. When countries with complex legal systems joined the Conference, such as Egypt in 1961, Israel in 1964, Morocco in 1993, Jordan in 2001, Malaysia in 2002, India in 2008 and Singapore in 2014, the need to develop rules considering the personal systems became relevant.

Three problematic issues strongly affected by religious values may be solved under the rules developed by the Hague Conventions.

First of all, cases of unilateral divorce, for which the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations (in force for Albania, Australia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Slovakia, Sweden, Switzerland, United Kingdom) sets up the conditions under which foreign divorces

⁷² In Belgium: Cass. 18.3.2013, *Rev. trim. dr. fam.*, 2013, 861.

⁷³ M. JÄNTERÄ-JAREBORG, *Cross - border family cases and Religious Diversity: What can Judges do?* WP 2013, Uppsala faculty of Law, available at <http://www.jur.uu.se>.

will have effect in each State party: the Convention provides an effective strategy to give effect to divorces and legal separations, including religious unilateral divorces, avoiding the problems deriving from limping divorces, being ones that are valid in one country but not in another. So, to make repudiations recognisable abroad, the Convention states that they must “follow judicial or other proceedings officially recognised” in the State where they take place. To answer to a question posed in § 1, it is not enough that the Muslim husband pronounces *talaq* three times in India to get validly divorced. Even if the Hague Convention 1970 has not reached many ratifications, we may see its influence over some national systems, i.e. the Moroccan one as the New Moroccan Civil Code adopted in 2004 has placed divorce under strict judicial control.⁷⁴ Regarding the second condition, it is necessary to consider that the State where proceedings take place must officially recognise such proceedings: so repudiation pronounced by a husband at his consulate in a Western country or before a religious authority here would not be considered to comply with the Hague Convention. Finally, to recognise repudiation according to the Hague Convention rules, it is necessary a genuine link between the State where the divorce was obtained and the divorced spouses, and that both spouses have had the opportunity to present their case.

Other problems are posed by the *kafala*, the well-known institution in Muslim countries to protect children without a family. As already pointed out,⁷⁵ the recognition of it is problematic in Western countries and in order to solve the problem and the possible contrast with public policy, the Hague Conference drew up the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children. This Convention states that the recognition of *kafala* or an analogous institution requires the cooperation of the Central Authority of both the State of origin and the receiving State. Italy finally joined this Convention, in force as of 1.1.2016.⁷⁶

In Italy, *kafala* has sometimes been recognized as a condition for the decree of adoption in special cases (art. 44, lett. d law 4.5.1983, n. 184).⁷⁷ Following the

⁷⁴ H. VAN LOON, *The accomodation of religious laws in cross – border situations: the contribution of the Hague Conference on private international law, Cuadernos der. trans.*, 2010, 263.

⁷⁵ See supra § 4.

⁷⁶ Council Decision 2008/431/EC of 5.6.2008 authorising certain member States to ratify or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, L 151, 11.6.2008. See the Italian Law 18 giugno 2015, n. 101, finally enforcing in Italy the 1996 Hague Convention.

⁷⁷ Trib. Min. Trento, d. 5.3.2002, Riv. dir. int. priv. proc., 2002, 1056; Trib. Min Trento, Nuova giur. civ. comm., 2003, I, 149; Cass., 4.11.2005 n. 21395, *Giur. it.*, 2007, 611.

general acceptance of *kafala*, Italian Judges have pronounced the adoption of children entrusted to intended parents through *kafala*,⁷⁸ recalling art. 44 of the l. 1983/184. More often, *kafala* is recognized within the family reunification context, through the case law aimed at broadening the scope of Article. 29 § two of T.U. on immigration, putting on the same foot for the purposes of family reunification, adopted children, children subject to custody or to *kafala*.⁷⁹ However, the *kafala* has been recognized in Italy very slowly for purposes of family reunification, “as suitable for abandoned children without creating parent–child ties”,⁸⁰ even because a ruling which excludes *kafala* as a protocol for reuniting families would “penalise (...) all children from Arab countries, illegitimate, orphaned or otherwise in a state of neglect, it represents the only institutionalised form of protection provided by Islamic law”.⁸¹ Sometimes, *kafala* has been recognised through judicial recognition,⁸² sometimes it has been automatically recognised through administrative procedures (within a claim for family reunification).⁸³ On this concern, the Italian judges pointed out very clearly the compatibility of *kafala* with the public policy, above all in view of the aforementioned provision of the UN Convention.⁸⁴ Differently from what happens in other countries where *kafala* sometimes is considered contrary to public policy (as in Switzerland and in Luxembourg), in Italy we may find only one recent case in which *kafala* has been deemed in contrast with public policy, notwithstanding the consideration for the best interests of the child

⁷⁸ Trib. Min. Trento, d. 5.3.2002, Riv. dir. int. priv. proc., 2002, 1056; Trib. Min Trento, Nuova giur. civ. comm., 2003, I, 149.

⁷⁹ Cass., 20.3.2008, n. 7472, Riv. dir. int. priv. proc., 2008, 809; Cass., 2.7.2008 n. 18174, 17.7.2008, n. 19734; Cass. 2.2.2015, n. 1843.

⁸⁰ Trib. Biella, 26.4.2007, Dir. fam pers., 2007, IV, 1824.

⁸¹ Cass., 17.7.2008, n. 19734, Dir. imm. citt., 2009, 2, 198.

⁸² See Trib. Biella, 7.3.2000, Dir. imm. citt., 2000, 1, 121; Trib. Milano, 12.3.2000, in Dir. imm. citt., 2000, 2, 127; Trib. Firenze, 9.11.2006, Dir. imm. citt., 2007, 1, 169; Trib. Torino, 26.2.2009, Dir. imm. citt., 2009, 2, 216; Trib. Rovereto, 21.5.2009, www.asgi.it; Trib. Brescia, 3.8.2009; App. Firenze, 2.2.2007, Dir. imm. citt., 2007, 4, 139; App. Torino, 30.5.2007, Dir. imm. citt., 2008, 1, 191; App. Torino, 28.6.2007, Dir. imm. citt., 2007, 3 142; App. Torino, 18.7.2007, Dir. fam. 2008, 1, 143; App. Trento, 1.10.2009, www.asgi.it; Cass. 3.3.2008, n. 7472, Fam. dir., 2008, 675.

⁸³ App. Bari, 16.4.2004, Fam. dir., 2005, 62; Trib. Min. Reggio Calabria, 10.10.2006, Fam. min., 2006, 2, 86.

⁸⁴ App. Firenze, d., 2.2.2007, Dir., imm. citt., 2007, 4, 139, App. Torino, 30.5.2007, Dir. imm. citt., 2008, 1, 191; Cass., 16.9.2013, n. 21108, Fam. Dir., 2014, 2, 122: “Non può essere rifiutato il nulla osta all’ingresso nel territorio nazionale per ricongiungimento familiare richiesto nell’interesse di minore cittadino extracomunitario affidato a cittadino italiano residente in Italia con provvedimento di kafalah pronunciato dal giudice straniero nel caso in cui il minore stesso sia a carico o conviva nel paese di provenienza con il cittadino italiano ovvero gravi motivi di salute impongano che debba essere da questi personalmente assistito”.

involved in the case.⁸⁵ The only unsolved problem concerned the *kafala* in cases of family reunification with an Italian citizen: in these cases the reunification to an Italian *Kafil* could not be pronounced because of the mandatory rules provided by the Law 184/1983. The family reunification of a foreign minor entrusted to an Italian citizen was deemed as possible only through adoption procedures in many cases.⁸⁶ Recently, the Italian Supreme Court solved this problem with a very important statement in the judgement adopted on 16.9.2013, n. 21108:⁸⁷ the right to family reunification is allowed to the minor entrusted in *kafala* to the Italian citizen when the minor is living or dependent on the Italian citizen, or when the minor needs special assistance.

The Italian Supreme Court states this solution applying the d. lgs. 6.2.2007 n. 30 (implementing the EU Directive 2004/38/EC of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC – O. J. L 158/77, 30.4.2004), through a broaden interpretation of the notion ruled in Article 2 lett. B n. 3: the minor dependent on the Italian citizen is not only a descendent but also the minor entrusted through a foreign judicial act of *kafala* (not through a contractual act). It is clear that the Italian Supreme Court is affirming the relevance of *kafala* to the recognition of the fundamental rights of children only when the Italian public policy is not a fence against this recognition; otherwise – as in case of *kafala* contractually stated – the solution might be different.

The problematic case law about *kafala* highlights the relevant role of the conventional approach in considering religious values in conflict of laws. Notwithstanding the fact that the Conference continues to promote wide ratification of its principal acts, very few Islamic countries have already joined them. Religious values may be considered, in this case, as an obstacle to the development of Conventional rules. In fact, several problems are posed about the 1970 Hague Convention by the rule of Article 6, par. 2, which reads “The recognition of a divorce or legal separation shall not be refused because a law was applied other than that applicable under the rules of private international law of that state”. In India, for example, this rule is against the general solution stated by the Supreme Court, according to which “the jurisdiction assumed by the foreign court as well as the grounds on which the relief

⁸⁵ Trib. Reggio Emilia, ord. 9.2. 2005, Dir. Imm. Citt., 2005, 2, 183: in this case the claim for family reunification is founded on a *kafala* concerning a girl living in Morocco with her own parents and entrusted to an uncle domiciled in Italy.

⁸⁶ Trib. Torino, 11.7.2008, Dir. imm citt., 2009, 2, 209; App. Torino, 19.11.2009, Fam. Dir., 2010, 787; Cass., 1.3.2010, 4868, Dir. fam., 2010, 1629; Cass., 7.10.2011, n. 20722.

⁸⁷ Cass., 16.9.2013, s.u., n. 21108, Fam. Dir., 2014, 2, 110.

is granted must be in accordance with the matrimonial law (namely Hindu law) under which the parties are married".⁸⁸

It is clear that much more work needs to be done here – probably through the other aforementioned approaches.

6. Concluding Remarks

The wide evolution of private international law is currently recalling attention to the consideration of religious values within the general aspects of the discipline.

Europeanisation and globalisation of sources of private international law do not preclude the chance that conflict of laws will need to deal with individual identities. To the extent that the European systems have hitherto offered the application of foreign laws, we are faced with the problem of survival in Europe of an idea of the personality of laws. In fact, it is generally accepted that conflict of laws faces the individual identities of people involved in international relations. Cultural identity may be considered collective and individual at the same time, because each member of the group has an identity of its own.

Religious values contribute to defining the cultural identity of individuals: be it in Europe or other countries, cultures, values, civilization, religion, are never absent from the solutions of personal status. The personality of the law, the assertion of a link between law and morals, and religion, resulting in Europe from the ideas of Pasquale Stanislao Mancini can be found in Islam too. In fact, although these theses now seem out-dated, as they were supported in the nineteenth century, there is a clear convergence with the Islamic concept of personal status.

However, coordination of legal systems under different individual identities is complex, in terms of European systems as well as of the Muslims systems. As for European systems, the possible reception of certain institutions of Islamic law (polygamy, repudiation, kafala) may develop solutions in contrast with the fundamental right enshrined in the European Convention on Human Rights. In systems of Muslim tradition, the recognition of foreign decisions involving nationals of the forum State may not comply with mandatory and religious requirements of family law.

The Treaty law does not seem able to provide effective remedies to these problems, above all to problems concerning complex systems, because Islamic states traditionally do not join the Hague Conventions (with the exception of Morocco, which has ratified the 1996 Convention on Jurisdiction, Applicable Law, recognition, enforcement and Cooperation in respect of Parental Responsibility and Measures for the protection of Children, and of India which ratified the 1993 Convention on the

⁸⁸ *Y. Narashima Rao v. Y. Venkatalakshmi*, AIR 1991 SC 821.

Protection of Children and Cooperation in respect of Intercountry Adoption). Religious values may be rightly considered the main reason why Muslim countries do not typically accept the convention approach.

It is therefore necessary to consider different methods in order to overcome cultural differences, because the challenges posed by Islamic institutions confirm the relevant role of conflict of laws, offering appropriate treatments of cultural differences.

Likewise, a new interpretation of the public policy exception seems to be gradually developing as an inclusive tool of religious values and as a way to achieve legal pluralism. At a first glance, legal pluralism and public policy seem to be antithetical principles. The application of the public policy exception points out, on the contrary, a possible different interpretation of the exception, aimed at considering religious values and the principles of the forum in view of the protection of fundamental rights of individuals, as in the case of the recognition of some effects deriving from the polygamous marriage i.e. the division of estates of the survivor's pension among the wives of the deceased husband,⁸⁹ or the inheritance rights of the relatives.⁹⁰

The suggested interpretation is interesting as an inclusive tool of religious values, and as a way to achieve legal pluralism. Moreover, it seeks to attain the most equitable result, using the comparative legal method, aiming at respecting cultural identity and religious values. The main problem of this approach is, however, the definition of the borders of the public policy exception, in view of the unpredictability of the solutions, depending at first on the choice of law solution and in a subsidiary way on the law regarded as a fact. Moreover, the problem of limping situations produced by Italian judges applying the public policy exception cannot be underestimated:⁹¹ for example, many doubts may arise in relation to the recognition of marriages of Muslim women with Italian citizens in their national country, even if authorised by the Italian judges for public policy reasons.

⁸⁹ In Belgium: Cass. 18.3.2013, *Rev. trim. dr. fam.*, 2013, 861.

⁹⁰ In Italy see: Cass., 2.3.1999, n. 1739, *Riv. dir. int. priv. proc.*, 1999, 613, concerning the case of the succession of an Italian citizen, a widower, married in Somalia with a Somali woman who claims her successional rights in contrast with those of the daughters born of the first marriage of the deceased.

⁹¹ About the proceeding, available against the decision of the civil registrar not to proceed with the publication, [art. 98 of the Civil Status Regulation], to get the authorization to publications, see Trib. Verona, d. 6.3.1987, *Stato civile it.*, 1987, II, 201; Trib. Torino, d. 24 febbraio 1992, *Riv. dir. int. priv. proc.*, 1992, 985; Trib. Torino, d. 24.6.1993, *Dir. fam.*, 1993, 1181; Trib. Napoli, d. 29.4.1996, *Fam. Dir.*, 1996, 454; Trib. Treviso, 15.4.1997, *R. d. int. priv. proc.*, 1997, 744 e ss.; Trib. Treviso, d. 24.9.2008, www.asgi.it.

In light of these considerations, we may ask if within the notion of public policy considered by the ECtHR a “*charte blanche justifiant toute mesure*”,⁹² we may include fundamental values, like religious values, personal rights and status rights.

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⁹² ECtHR, 27.1.2015, *Paradiso e Campanelli v. Italy*, ric. n. 25358/12: «*l'ordre public ne saurait toutefois passer pour une charte blanche justifiant toute mesure, car l'obligation de prendre en compte l'intérêt supérieur de l'enfant incombe à l'État indépendamment de la nature du lien parental, génétique ou autre*» (*Paradiso e Campanelli v. Italie*, cit., par. 80).

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