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Cultural diversity as a test bench for the future of private international law: What legal treatment for Islamic institutions in Europe?

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SUMARIO: I. Introduction. II. Islamic law and codification. III. Discrimination based on sex and religion. IV. Islamic law and freedom of religion. V. Resizing public policy. VI. Adaptation. VII. The connecting factor. VIII. Final remarks.

ABSTRACT: The possible reception of certain Islamic legal institutions in European legal systems – for instance polygamy and repudiation – may clash with the fundamental rights and values enshrined in the European Convention on Human Rights. Two opposite interests are at stake here: on the one hand, protecting the legal and cultural identity of the forum State and, on the other, respecting the diversity of other legal systems. Neither of these needs can be taken to the extreme. To consider diversity as such a ground for incompatibility would lead to clashes between civilisations and would ultimately be detrimental to the continuity of the legal status of persons. Unconditional adherence to openness and respect for foreign legal systems might lead to legitimising more or less disguised forms of oppression of vulnerable subjects in the name of respect for cultural diversity. This contribution clarifies whether and how it is possible to strike a balance between these opposite interests by means of private international law methods and techniques.

KEYWORDS: POLYGAMY, REPUDIATION, KAFALA , PUBLIC POLICY, CULTURAL DIVERSITY

La diversidad cultural como banco de pruebas para el futuro del Derecho internacional privado: ¿Qué tratamiento legal para las instituciones islámicas en Europa?

RESUMEN: La posible recepción de ciertas instituciones jurídicas islámicas en los sistemas jurídicos europeos –por ejemplo, la poligamia y el repudio– puede chocar con los derechos y valores fundamentales consagrados en el Convenio Europeo de Derechos Humanos. Aquí están en juego dos intereses opuestos: por un lado, proteger la identidad jurídica y cultural del Estado del foro y, por el otro, respetar la diversidad de otros sistemas jurídicos. Ninguna de estas necesidades puede llevarse al extremo. Considerar la diversidad como motivo de incompatibilidad conduciría a choques entre civilizaciones y, en última instancia, sería perjudicial para la continuidad del estatuto jurídico de las personas. La adhesión incondicional a la apertura y el respeto por los sistemas jurídicos extranjeros podría llevar a legitimar formas más o menos disfrazadas de opresión de sujetos vulnerables en nombre del respeto a la diversidad cultural. Esta contribución aclara si es posible lograr un equilibrio entre estos intereses opuestos mediante métodos y técnicas de derecho internacional privado y cómo hacerlo.

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PALABRAS CLAVE: POLIGAMIA, REPUDIO, KAFALA, ORDEN PÚBLICO, DIVERSIDAD CULTURAL.

I. INTRODUCTION

In view of the growing amount of immigration into European countries in recent decades, European legislators and judges need to face ever new challenges. We are witnessing a phenomenon that has been defined as a *fait accompli* in international family relations[1], in the sense that European legislators and judges are increasingly called on to decide the validity of legal situations 'packaged elsewhere' which are often unprecedented or even prohibited in Europe.

In principle, each State is free to determine whether a foreign judgment deserves recognition and in which circumstances foreign law rather than the law of the forum ought to apply. In other words, it is for each State to decide whether in a given set of circumstances the rights asserted in a foreign judgment or resulting from a foreign law should be enforceable locally. In fact, the majority of States apply the national law of the person concerned to personal and family matters, for instance legal capacity and capacity to marry[2]. The use of nationality as a connecting factor has more than one technical advantage. First of all, the operation of rules based on nationality is naturally rigid since nationality is a status objectively conferred by the rules in a State. Judicial authorities enjoy little or no discretion in ascertaining and regulating it[3]. International harmony and stability are further advantages. Indeed, the use of nationality as a connecting factor has the merit of ensuring the 'cross–border continuity' of

[1] Y. Lequette, "De la 'proximité' au 'fait accompli'", in *Mélanges en l'honneur du Professeur Pierre Mayer*, Paris, Lextenso, 2015, pp. 481–518.

[2] For instance, Article 27 of Italian law no. 218 on international private law establishes that matrimonial capacity and other conditions for marrying are governed by the national law of each spouse at the time of marriage. Law no. 218, Riforma del sistema italiano di diritto internazionale privato, 31 May 1995 (GU n.128 del 03–06–1995 – Suppl. Ordinario n. 68).

[3] During the 1930s a proposal was made in the Third Reich to substitute nationality with ethnic belonging – *die Volkszugehörigkeit* – as a connecting factor. Of course, ethnic belonging gives the judge a wider margin of assessment and is less technical than nationality as it is a result of certain characteristics such as ethnicity, language, education and culture (for discussion of this proposal, see H. Müller, "Gedanken zur Neugestaltung des Internationalen Privatrechts", *DJZ*, 1936, pp. 1065–1071, at 1067). According to Kinsch, the proposal never became effective "pour des raisons de prudence dans les relations internationales" (see P. Kinsch, "Sur la question de la discrimination inhérente aux règles de conflit de lois. Développements récents et interrogations permanentes", in B. Cortese (ed.) *Essays in Honour of Laura Picchio Forlati*, Torino, Giappichelli, 2014, pp. 195–203 at 197, footnote). In any case, if this proposal had become effective all ethnic Germans before the Reich's tribunals, even if of Polish citizenship, would have been subjected to German law.

a person's rights and status, which follow the person as his shadow does. If the law of the forum were to apply, the same personal situations would be governed by different laws in different ways depending on the place where the person is. A person might be capable of contracting marriage or making a will in his place of origin and at the same time might be unable to validly perform the same acts in another place – even nearby – just because a different less favourable law applies there. Moreover, the fact that nationality is subject to few or no changes during the lifespan of most individuals implies stability in the applicable law. Finally, nationality takes into account the cultural links of a person with their State of origin better than other factors and this valorises their personal and cultural identity[4]. In fact, shaping connecting factors according to the nationality principle means favouring a multicultural and more open society. The European Court of Human Rights (ECtHR) has recognised that "especially in conflict of laws cases the differentiation for all family issues according to nationality […] is a well–known principle which aims at protecting a person's close connection with his or her home country"[5], and all the more so when the legal system of origin is multi–legislative on a personal basis for historical or religious reasons or for the protection of minorities. As Savigny already pointed out at the beginning of the 19th century, law is closely connected to the culture of people, up to being its mirror: *das Recht als Kulturerscheinung*[6]. Mancini was also well aware of this when he stated: "Comment pourrait–on mettre d'accord les Lapons et les Éthiopiens pour fixer l'âge du mariage et la capacité (...) Et si, par un prodige, on pouvait obtenir ou imposer cet accord, il constituerait la plus manifeste offense aux lois nécessaires de la nature humaine"[7]. The ECtHR links pluralism with

[4] In this sense see also E. Jayme, "Identité culturelle et intégration: le droit international privé postmoderne", *Recueil des cours*, 1995, tome 251, pp. 13–267 at 253. In this regard, see the Resolution of the Institute of International Law 'Cultural differences and *ordre public* in family private international law': "respect for cultural identities has become a goal of international law, a goal which must find an expression in private international law". *Cf.* Resolution of the Institute of International Law 'Cultural differences and *ordre public* in family private international law,' Krakow Session, 2005, Rapporteur: M. Paul Lagarde.

[5] ECtHR, Application no. 51625/08 *Ammdjadi v. Germany*, decision as to the admissibility, 9 March 2010, p. 8.

[6] G. Radbruch, *Grundzüge der Rechtsphilosophie*, Leipzig, Quelle & Meyer, 1914, pp. 6–7.

[7] *Cf.* P.S. Mancini, "De l'utilité de rendre obligatoires pour tous les Etats, sous la forme d'un ou de plousieurs traités internationaux, un certain nombre de règles générales du Droit international privé pour assurer la décision uniforme des conflits entre les différents législations civiles et criminelles, Rapport à l'Institut de Droit International, Geneva, 31 August 1874", in E. Jayme (ed.), *Della nazionalità come fondamento del diritto delle genti, di Pasquale Stanislao Mancini*, Torino, Giappichelli, 1994, p. 129.

recognition of, and respect for, diversity, and sees the latter as an essential means to achieve social cohesion[8].

In the past, the choice of nationality as a criterion for connection found justification in the aim to keep European emigrants tied to their State of origin[9]. However, European social reality has radically changed since the period when Mancini exalted the principle of nationality. With Europe rapidly becoming a continent of immigration, the use of this connecting factor entails a multiplication of situations in which European judges must apply foreign rules which are inspired by concepts either of the family or of the relationship between men and women which are very different to those on which European legislations are based[10]. Indeed, many people settling in European States come from countries where religious laws – above all Islamic law – are applied and where religious authorities are entrusted with exclusively administering some important aspects of social life, mainly family ones, so much so that in some States a multi–confessional legal system remains, which is therefore multi–legislative on a personal basis.

This raises a number of sensitive issues as some rules in religious law are inherently discriminatory and unavoidably cause conflicts with European legal systems. This is particularly true of Islamic law, which is the focus of the present analysis. The reverse is also true, in the sense that compatibility problems also arise when European institutions 'ask' to be recognised in legal systems on the other side of the Mediterranean Sea. Adoption, recognition of natural filiation by the father and marriage of a Muslim woman with a non–Muslim man clash with the principles of Sharia and have no effect in Islamic States.

Public policy (*ordre public*) is the traditional means available in all States to protect the values of the forum as they result from the national constitution 'in osmosis' with human rights treaties that the State of the forum is a party to[11]. Through this exception, referral to foreign law can be

[8] ECtHR, Application no. 44158/98, *Gorzelik and others v. Poland*, 17 February 2004, para. 92.

[9] On political strategies underpinning the use of nationality as a connecting factor, see P. Franzina, "The Evolving Role of Nationality in Private International Law", in A. Annoni and S. Forlati (eds.), *The Changing Role of Nationality in International Law*, New York, Routledge, 2013, pp. 193–209 at 195–197.

[10] In *Schalk and Kopf v. Austria* the ECtHR observed that marriage has deep–rooted social and cultural connotations which may greatly differ from one society to another. See, ECtHR, *Schalk and Kopf v. Austria*, no. 30141/04, 24 June 2010, para. 62; *M. and Others v. Italy and Bulgaria*, Application no. 40020/03, 31 July 2012, para. 161.

[11] Lauterpacht argues that "in the sphere of private international law the exception of *ordre public*, of public policy, as a reason for the exclusion of foreign law in a particular case is generally – or, rather, universally – recognized [...] On the whole, the result is the same in most countries – so much so that the recognition of the part of *ordre public* must be regarded as a general principle of law in the field of private international law". ICJ, Judgement concerning

made inoperative and recognition of foreign judgments and acts can be excluded. The centrality of this notion is therefore apparent. It works like a compass and defines the degree of openness or closure of each legal system to foreign laws, judgements and acts and thus represents the degree of tolerance of diversity which is implicit in any system of private international law. Systematic or over–frequent setting aside of foreign laws by means of the public policy exception leads to frustration of private international law, to the extent that it implies dismantling its techniques and aims and gives rise to a multiplication of those limping situations that the ECtHR itself is inclined to condemn in the name of the right to transnational continuity of personal and family status, which is protected by Article 8 ECHR. If the limit of public policy were systematically triggered, a conflict of laws would stiffen and turn into a clash of civilizations.

The terms of the problem have already been defined. On the one hand, nationality as a connecting factor takes into account the cultural links a person has with their State of origin better than other factors. On the other hand, recognising the validity of certain foreign legal acts or applying foreign laws can give rise to problems of compatibility with the fundamental values of a western forum and very often with human rights as codified in the ECHR, such as the principle of equality between spouses. Can respect for cultural diversity legitimise oppression?

This paper examines cultural diversity from a private international law perspective with reference to more than one issue. It starts by determining whether it is really possible to deal with Islamic law as a uniform and monolithic body of law. It then goes on to establish the extent to which Islamic law can be protected by freedom of religion. Limits to the use of the public policy exception are then clarified, the adaptation technique as a form of dialogue between different legal cultures is described and finally the choice of the most adequate connecting factors is discussed. All these issues reveal themselves to be crucial for a correct and balanced reception of foreign values.

II. ISLAMIC LAW AND CODIFICATION

Sharia is the sum of the principles and rules of Islam. The basic source of law in the Islamic legal tradition is the holy book of the Quran. From this

Application of the Convention of 1902 governing the Guardianship of Infants (*Netherlands v. Sweden*), Judgment of 28 November 1958, Separate Opinion of Judge Sir Lauterpacht, p. 92, *ICJ Reports* 1958.

source all other rules enshrined in customary practice or turned into legislation can be derived[12]. This implies that the Quran is understood as a body of rules for rulers, in that it lays down the principles that should inspire legislation to be adopted and its interpretation. Immediately below the Quran, Sharia precepts are drawn from the *Sunnah*, i.e. the collection of actions and sayings of the Prophet Mohammad, with which any believer should comply in their daily life. *Qiyâs* and *Istihsân* should instead be understood as methods to read Sharia rather than as sources thereof. Indeed, *Qiyâs* consists in analogical reasoning which demands compliance with precedents, in that a case should be decided consistently with similar cases decided in the past. *Istihsân* is the art of departing from precedent and finding a novel way to decide a given case in the light of its particularity.

The scope of Sharia is quite wide and may in theory extend to any aspect of human life. In reality, the areas of law influenced by Sharia vary significantly from country to country. The field of contracts, for instance, is often scarcely affected by Sharia and is today almost fully shaped following the European legal tradition. However, examples may be encountered such as Saudi Arabia, where Sharia pushes its boundaries to encompass this matter too[13].

In Muslim countries the law of family and persons, *e.g.* status, marriage, maintenance and succession, is instead always inspired by Sharia. Therefore, origin in Sharia is what unites the law of family and persons across the borders of Islamic States[14]. However, this uniqueness of origin does not produce uniform results. The normative solutions to specific problems adopted in different countries are significantly different and sometimes even opposite. This is easy to explain.

First, what shapes different implementations of Sharia are schools of legal thought (*Fiqh*), which offer different understandings of Islamic precepts. In the world of Sunni Islam (one of the main branches of Islam), there are the Hanafi, Mālikī, Shafi'ì and Hanbali schools[15]. Each of these schools has created

[12] On sources and methods of Islamic law, see W.B. Hallaq, *An Introduction to Islamic Law*, Cambridge, Cambridge University Press, 2009; M.A. Baderin, *International Human Rights and Islamic Law*, Oxford, Oxford University Press, 2003, pp. 32–47.

[13] See E. Van Eijk, "Sharia and National Law in Saudi Arabia", in J.M. Otto (Ed.), *Sharia incorporated*, Leiden, Leiden University Press, 2010, pp. 139–180 at 167–168.

[14] R. Aluffi Beck–Peccoz, *Le leggi del diritto di famiglia negli Stati arabi del Nord–Africa*, Torino, Edizioni della Fondazione Giovanni Agnelli, 2004, p. 2.

[15] For an overview of the different schools, see F–J. Pansier and K. Guellaty, *Le droit musulman*, Paris, Presses Universitaires de France, 2000, pp. 41–45.

its own legal jurisprudence and often proposes divergent interpretations of the principles of the Quran on points that are anything but marginal.

Second, the attitudes of national legislators codifying Sharia rules are very diverse[16]. This specification is particularly pertinent here because it is obvious that there is no place in European courts for the application of abstract and general Sharia. This only applies if it is part of the national legal system invoked by the private international law rule which the European court triggers.

Some Islamic States proclaim Sharia as 'a source' or even 'the source' of the national legal system or declare that all legislation must be tested for its compliance with Sharia. The paradigmatic example is Saudi Arabia, where the "constitution shall be the Book of God and the Sunnah (Traditions) of His Messenger, may God's blessings and peace be upon him"[17]. Other Islamic States have taken steps to modernise their legal systems to a greater or lesser extent, in the sense that they have gradually adapted the interpretation of Sharia precepts to cope with socio–economic changes, often to the benefit of women. For instance, Tunisian law tends to merge Sharia with the European legal tradition. Statutes are inspired by Sharia, and more specifically by the Mālikī tradition, but no reference is made to it as a source of law or to fill normative voids[18]. Nevertheless, it may play a role whenever – in the absence of a specific provision governing a case – courts are called on to refer to customs and traditions. Moroccan family law is also heavily inspired by Sharia. Nevertheless, since the end of the last century, it has undergone several reforms aimed at promoting equality between spouses, paired with the adoption of a new family code: the *Moudawana*[19]. Other areas of civil law are instead shaped in accordance with the French legal tradition[20].

Let us take some concrete examples of different 'implementations' of the Quranic precept. According to Sura IV, 3, a man can have up to four wives at the same time on condition that he acts fairly towards them[21]. In some

[16] On the crucial issue of the relationship between Sharia and State rules, see R. Aluffi Beck–Peccoz, *La modernizzazione del diritto di famiglia nei paesi arabi*, Milano, Giuffré, 1990, pp. 44–49.

[17] Article 1 of the Basic Law of Saudi Arabia.

[18] An official French translation of the Tunisian Personal Status Code may be found at www.ilo.org/dyn/natlex/docs/ELECTRONIC/73374/74946/F–1287339442/TUN–73374.pdf

[19] An unofficial English translation of the statute is available at the following link: https://mrawomen.ma/wp–content/uploads/doc/Moudawana–English_Translation.pdf

[20] L. Buskens, "Sharia and National Law in Morocco", in J.M. Otto, (ed.), *loc. cit.*, pp. 89–138.

[21] 'If you fear that you will not deal fairly with orphan girls, you may marry whichever [other] women seem good to you, two, three or four. If you fear that you cannot be equitable [to them], then marry only one, or your slave(s): that is more likely to make you avoid bias'. Sura IV, 3. The

Islamic States a man can effectively freely marry a second, third or fourth wife on his own authority and without any restrictions or formalities. However, some contemporary interpreters read Sura IV, 3 in combination with Sura IV, 129, according to which a man is unable to act fairly towards his wives even if he so desires. Therefore, according to this interpretation the exercise of polygamy is subject to a condition that God himself declares to be unfeasible. These interpreters therefore deduce that polygamous marriage is in normal cases virtually forbidden. Legislators in the majority of Islamic States rely on this combined interpretation of the Quranic text to introduce measures of deterrence and more or less invasive forms of control against the conclusion of polygamous marriages. Some States, such as Tunisia, have banned polygamy.

The Quran also contemplates and regulates in detail the man's right to repudiate his wife unilaterally at will and without having to give any reason (*talāq*)[22]. Although repudiation is very common in the Islamic world, regulation of it is not uniform. While in some States a man can still on his own authority cast off his wife with no or hardly any restriction[23], the majority of States strive to control and limit the use of repudiation, which by its nature makes married life unstable and insecure. They submit repudiation to authorisation or control by a judge, and in this manner they remove it from the private sphere of men[24]. They involve wives in the procedure, or at least ensure that they are informed of their repudiation. They contemplate a right of women to be reimbursed for damages deriving from repudiation or to receive a 'consolation gift' (*mut'ah*). In a few States – for instance Tunisia – repudiation is prohibited.

translation used in this contribution is by M.A.S. Abdel Haleem, *The Qur'an*, Oxford, Oxford University Press, 2015.

[22] "Prophet, when any of you intend to divorce women, do so at a time when their prescribed waiting period can properly start, and calculate the period carefully: be mindful of God, your Lord. Do not make them leave their homes – nor should they themselves leave – unless they commit a flagrant indecency. These are the limits set by God – those who overstep God's limits wrong their own souls – for you cannot know what new situation God may perhaps bring about". Sura LXV, 1. On repudiation, see L. Milliot and F–P. Blanc, *Introduction à l'étude du droit musulman*, Paris, Dalloz, 2001, pp. 350–383.

[23] This is the case of repudiation as practised in Jordan under the 2019 Personal Status Statute (see Article 80 and the following), where repudiation may take place merely with the husband pronouncing a specific formula, not even in the wife's presence, with no other formality required. The official text (in Arabic) of the piece of legislation is available at aliftaa.jo/ShowContent.aspx?Id=205#.Y–n2VseZOUk.

[24] Under the Moroccan Moudawana, repudiation is able to terminate marriage only if it is authorised preemptively by the authority, and hence when an assessment of the merits of the divorce has been made. See K. Zaher, "Plaidoyer pour la reconnaissance des divorces marocains. À propos de l'arrêt de la première chambre civile du 4 novembre 2009", *Revue critique de droit international privé*, 2010, pp. 313–332.

III. DISCRIMINATION BASED ON SEX AND RELIGION

Sharia–based family and succession law is inspired by the superiority of Islam over all other religions and of men over women. It therefore discriminates on grounds of religion or sex on a number of issues. Even where national constitutions of Islamic States embrace the principle of equality, a host of particular rules in national laws and case law conflict with the principle, not to mention social practices on the ground.

First, not being Muslim is both an impediment to marrying a Muslim woman and an impediment to succession. Muslim women can only marry Muslim men. This impediment has a Quranic basis and even much reformist thought considers it insurmountable[25]. In contrast, Muslim men can marry non–Muslim women on condition that they are 'people of the Book,' that is Jews or Christians[26]. A non–Muslim woman who marries a Muslim man can continue to freely practice her religion, but her choice is not without consequences. In the case of death of her husband she has no right of succession.

A further issue is so–called *privilège de religion*. Islam is tolerant of foreign law being applied to non–Muslim foreigners. What matters is that Sharia applies to Muslims regardless of their nationality[27]. Therefore, in the case of mixed relationships Sharia rules as codified in the *lex fori* prevail over the national law of non–Muslim foreign spouses. Along the same lines, if the foreigner is a Muslim his secular national law is set aside and he is submitted to Sharia rules, as codified in the *lex fori*. In sum, when a Muslim is involved the conflict of rules mechanism is automatically excluded and the *lex fori* applies.

As far as discrimination based on sex is concerned, modern legislators have remained faithful to the Sharia principle of supremacy of the man within the couple, even though they have tried to mitigate its most extreme manifestations[28]. Recognition of polygamous marriages and repudiation have traditionally been the most contentious issues in Europe. As has been

[25] "Do not marry idolatresses until they believe". Sura II, 221.

[26] "So are chaste, believing, women as well as chaste women of the people who were given the Scripture before you, as long as you have given them their bride–gifts and married them, not taken them as lovers or secret mistresses". Sura V, 5.

[27] R. Aluffi Beck–Peccoz, *Le leggi del diritto di famiglia negli Stati arabi del Nord–Africa*, *op. cit.*, p. 1.

[28] See Sura IV, 34: 'Husbands should take good care of their wives, with [the bounties] God has given to some more than others and with what they spend out of their own money'. On the relationship between husband and wife, see R. Aluffi Beck–Peccoz, *La modernizzazione del diritto di famiglia nei paesi arabi*, *op. cit.*, pp. 94–103.

mentioned, in several Islamic countries it is possible for a man to enter into marriage with more than one woman. On the contrary, a woman is never allowed to enter into marriage with more than one man[29]. Moreover, the Quran contemplates and regulates in detail the man's right to repudiate his wife unilaterally at will and without having to give any reason (*talāq*)[30]. This is while in traditional Sharia, women basically cannot end their marriage at will[31]. Sharia sexually discriminates in the succession of agnates: a female heir inherits half of what a male heir in a similar position would inherit and this rule is codified in the majority of Islamic countries. The roles played by fathers and mothers in raising children are precisely delimited and ultimately unbalanced. The father has the exclusive power to make decisions relating to education, access to work, marriage and the administration of a child's assets. He is the legal representative of the child. All these powers are aspects of *wilāya*, paternal authority. The mother, on the other hand, must look after, supervise and care for the child (*hadāna*). Legal reforms regarding the powers of parents over their children go in the direction of shortening the distance between *wilāya* and *hadāna*. The audacity of legislators, however, varies greatly from State to State. In the light of the above it is possible to understand why when Islamic countries ratify conventions that sanction the principle of equality between men and women they make reservations[32]. Precisely this disavowing of the principle of equality on a religious and gender basis represents the greatest challenge for Western pluralism.

[29] L. Milliot and F–P. Blanc argue that the rationale for this asymmetry was the need to ensure the certainty of paternity, which would be impossible if a woman were married with more than one man. See L. Milliot and F–P. Blanc, *op. cit.*, pp. 279–280.

[30] Sura LXV, 1. On repudiation, see L. Milliot and F–P. Blanc, *op. cit.*, pp. 350–383.

[31] The Mālikī school admits that when a ground for dissolution has been proved to the satisfaction of the Mālikī qādī, he invites the husband to divorce the wife. If the husband fails to do so, the qādī pronounces the talāq on the husband's behalf. Therefore, this mode of judicial divorce is based on the legal fiction that the qādī exercises the husband's power to unilaterally divorce the wife. On judicial divorce at the initiative of the wife, see R. Shaham, "Judicial Divorce at the Wife's Initiative: The Shari'a Courts of Egypt", *Islamic Law and Society*, 1994, pp. 217–257.

[32] See Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women, 10 April 2006, CEDAW/SP/2006/2. See, for example, the reservation of Saudi Arabia: "In the case of contradiction between any term of the Convention and norms of Islamic law, the Kingdom of Saudi Arabia is not under obligation to observe the contradictory terms of the Convention". Therefore, it is difficult to argue that the prohibition of discrimination based on sex, between spouses, and between legitimate and out of wedlock children is a customary rule. In contrast, see G. Carella, *Diritti umani, conflitti di legge e conflitti di civilizzazione*, Bari, Cacucci Editore, 2011, p. 50. The interested reader may learn more from P. McDonough, *Human Rights Commitments of Islamic States*, Oxford, Hart, 2020.

IV. ISLAMIC LAW AND FREEDOM OF RELIGION

Before assessing how Europe has taken up the challenge of disavowal of the principle of equality, it is necessary to first clarify an issue. Given its origin in Sharia, in fact, doubt may arise as to whether Islamic law falls within the protection of freedom of religion in Article 9 ECHR. Of course, from the perspective of private international law a religious law is applicable as a foreign law not under the cloak of a religious law but only to the extent that it receives the label State law, in the sense that it is recognised by that State through codification or is applied by the courts of that State. However, its religious significance cannot *a priori* be neglected.

The European Commission of Human Rights clarified this issue for the first time in a case relating to the marriage capacity of a young English woman of Islamic religion[33]. The applicant was a Muslim man of 21 who had undergone an Islamic marriage ceremony with a Muslim girl of 14 and a half against her father's will. The British court had charged him with abduction of the girl from the custody of the father and with sexual intercourse with a girl under the age of 16. He claimed before the European Commission of Human Rights that under Islamic law a Muslim girl may marry without her parents' consent on attaining the age of 12[34]. Therefore, he argued that with the application of the legislation which makes it an offence to have sexual intercourse with a girl under the age of 16 he had been prevented from manifesting his religion through his marriage under Islamic law, in violation of Article 9 ECHR, which protects freedom to manifest one's religion or beliefs "in worship, teaching, practice and observance". Starting from the premise that "the term 'practice' as employed in Article 9 para. 1 does not cover each act which may be motivated or influenced by a religion or belief"[35], the Court rejected the applicant's argument. Indeed, "marriage cannot be considered simply as a form of expression of thought, conscience or religion, but is governed *specifically* by Article 12", which refers to the domestic law of the Member States for regulation of the right to marry[36]. In

[33] Decision of 7 July 1986, *Khan v. United Kingdom*, Application no. 11579/85.

[34] According to Sharia law, every person has the capacity to get married regardless of age, including new–born children. If due to immaturity the individual is unable to decide, someone will decide for him: the marriage guardian, who is normally the father. However, modern reforms have set a minimum age for marriage and prohibited the guardian from forcing a woman into marriage. On this issue, see R. Aluffi Beck–Peccoz, *Le leggi del diritto di famiglia negli Stati arabi del Nord–Africa*, *op. cit.*, p. 3; L. Milliot, F–P. Blanc, *op. cit.*, pp. 286–287.

[35] In this sense, see also ECtHR, *Kalaç v. Turkey*, Application no. 20704/92, 1 July 1997, para. 27.

[36] Emphasis added. Decision of 7 July 1986, *Khan v. United Kingdom*, Application no. 11579/85, p. 255.

short, the Commission resolved this case through application of the *lex specialis* principle, which clarifies the limits of the protective umbrella of Article 9 ECHR beyond the specific case.

Some years later, the ECtHR had the opportunity to pronounce on the legitimacy of the dissolution by the Turkish authorities of a party aiming to set up a theocratic regime based on Sharia and a plurality of legal systems on the grounds of belief. The Court was quite trenchant in stating that "[i]t is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values"[37] and further added: "such a system would undeniably infringe the principle of non–discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy. A difference in treatment between individuals in all fields of public and private law according to their religion or beliefs manifestly cannot be justified under the Convention, and more particularly Article 14 thereof, which prohibits discrimination"[38]. Each Member State, so the Court continued, "may ['*peut*' in the French version] legitimately prevent the application within its jurisdiction of private–law rules of religious inspiration prejudicial to public order and the values of democracy for Convention purposes (such as rules permitting discrimination based on the gender of the parties concerned, as in polygamy and privileges for the male sex in matters of divorce and succession)"[39]. At the end of the day, far from being unlimited, freedom of religion can be subject to limitations as long as they are necessary and proportional to achieve one of the legitimate aims listed in Article 9 para. 2. The verb 'may'/'*peut*' used by the Court should not mislead. If foreign rules of religious inspiration are prejudicial to the 'values of democracy' protected by the ECHR, such as rules permitting discrimination based on gender, Member States enjoy no margin of appreciation. Indeed, it is the national

[37] ECtHR (Third Section), *Refah Partisi* (The Welfare Party) *and Others v. Turkey*, Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98, 31 July 2001, para. 72. This position was then confirmed by the ECtHR Grand Chamber in its judgment of 13 February 2003, para. 123.

[38] ECtHR (Third Section), *Refah Partisi*, cit., para. 70. See also the Council of Europe Resolution 2253 (2019), 'Sharia, the Cairo Declaration and the European Convention on Human Rights', adopted on 22 January 2019, in particular paras. 5 and 6. For this reason the proposal to elaborate a European Code of Islamic law to apply to Muslim foreigners residing in Europe should be carefully assessed. For this proposal, see F. Riad, "Pour un Code européen de droit musulman", in Y. Carlier, M. Verwilghen (eds.), *Le statut personnel des musulmans. Droit comparé et droit international privé*, Bruxelles, Bruylant, 1992, pp. 379–382. For a critical stance against this proposal, see A. Mezghani, "Le juge français et les institutions du droit musulman", *Journ. dr. int.*, 2003, pp. 721–765 at 742–744.

[39] ECtHR Grand Chamber, *Refah Partisi* (The Welfare Party) *and Others v. Turkey* case, Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003, para. 128.

court of the European State which applies the foreign law referred to through domestic private international law, with the consequence that violation of the ECHR is induced by the foreign law but is directly attributable to an act by an authority of the State of the forum, which is a party to the ECHR. Application of the discriminatory rules referred to would therefore expose the State of the forum to responsibility for violation of the ECHR[40]. Not even respect for cultural diversity can justify discrimination[41]. Therefore, national judges shall from time to time assess whether foreign rules referred to through the connecting factor of nationality, including religious rules and rules of religious inspiration, are in contrast with the system of values contained in the ECHR, and in the affirmative if they have the power and at the same time the duty to prevent their application[42].

V. RESIZING PUBLIC POLICY

If European judges are called on to apply legal norms which are discriminatory on a religious or gender basis, they have the public policy escape at their disposal. However, reference to public policy cannot be considered to give *carte blanche* for any measure[43]. From the perspective of the ECHR, activation of the public policy clause is a measure interfering in individuals' rights. Therefore, each Member State is required to carefully assess the concrete impact of activation of the public policy escape on individuals on the one hand and on society on the other, and to verify whether a refusal to enforce a foreign measure or to apply a foreign law is necessary and proportionate to satisfaction of the imperative needs of the

[40] See, European Commission of Human Rights, Application n. 6482/74, *X. v. Belgium and the Netherlands*, 10 July 1975.

[41] A significant consensus at the international level can be identified regarding the subordinate nature of the right to cultural identity compared to traditional civil rights. See Article 2 para. 1 of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Paris, 2005): "cultural diversity can be protected and promoted only if human rights […] are guaranteed". See also CCPR General Comment No. 28, Article 3 (*The Equality of Rights Between Men and Women*), 29 March 2000, para. 5: "States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights". Finally, see Article 42 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul, 2011).

[42] This is without prejudice to the balance to be made in terms of effects. See *infra* section V.

[43] ECtHR, *Paradiso and Campanelli v. Italy*, Application no. 25358/12, 27 January 2015, para. 80.

State of the forum[44]: "l'interprétation par le juge [...] de la notion d'ordre public ne doit pas être faite de manière arbitraire et disproportionnée"[45].

Let us take some examples. As was mentioned, in several Islamic countries it is possible for a man to enter into marriage with more than one woman. On the contrary, a woman is never allowed to enter into marriage with more than one man. This clashes with the principles of equality between men and women, and more specifically between spouses, which are respectively enshrined in Article 14 ECHR and in Article 5 of additional Protocol no. 7 to the ECHR, and with the principle of monogamy of marriage, which for instance in Italy is imposed by a rule of necessary application (Article 86 of the civil code, which requires the free status of spouses as a condition to get married)[46]. Recognition of a polygamous marriage would therefore expose European States to responsibility for violation of the ECHR. There are, however, some limits to respect for a refusal to be proportional. First of all, the focus must be on the concrete situation, with the consequence that polygamous marriages are not recognisable for public policy reasons but only when they are effectively polygamous, not if they are monogamous but celebrated according to a law allowing polygamy.

Moreover, since the rationale of the public policy exception is to prevent foreign laws or judgments from producing effects in the State of the forum which are contrary to its fundamental principles, effects which are not contrary to such fundamental principles should remain safe. In particular, elimination of all the effects of a polygamous marriage could be detrimental for the weak party in the relationship, the woman. It would be unfair and disproportionate to reject the claim of a second spouse in a polygamous marriage concluded abroad seeking maintenance from her former husband after repudiation. Similarly, denial of the legitimacy of children born from a second marriage would be disproportionate in the light of the internationally sanctioned principle of the best interests of the child[47]. As a

[44] ECtHR, *Wagner and J.M.W.L. v. Luxembourg*, Application no. 76240/01, 28 June 2007, paras. 123–124; ECtHR, *Negrepontis–Giannisis v. Greece*, Application no. 56759/08, 3 May 2011, paras. 60–61.

[45] ECtHR, *Negrepontis–Giannisis v. Greece*, *cit.*, para. 90.

[46] Article 116 of the Italian civil code makes it clear that Article 86 is a rule of necessary application since it states that "even a foreigner is [...] subject to the provisions contained in Articles [...] 86" [anche lo straniero è [...] soggetto alle disposizioni contenute negli articoli [...] 86].

[47] The ECHR does not in fact include any provision dedicated to the principle of the superior interest of children. However, pursuant to Article 31 para. 3 c) of the Vienna Convention on the Law of Treaties and starting with the Convention on the Rights of the Child, the ECtHR considers the principle of the superior interest of children applicable and qualifies it as paramount in cases involving children. See ECtHR, *Wagner and J.M.W.L. v. Luxembourg*, Application no. 76240/01, judgement of 28 June 2007, para. 133; *E.B. v. France*, Application no. 43546/02, 22 January 2008, para. 95; *Mennesson v. France*, Application no. 65192/11, judgment of 26 June 2014, paras. 81

result there have been doctrinal and jurisprudential efforts to draw up techniques aimed at mitigating the impact of public policy, namely the theory of the *effet atténué de l'ordre public* and exclusion of the application of public policy to preliminary questions.

By means of the theory of the *effet atténué de l'ordre public*, domestic tribunals block unwanted legal situations but not the legal effects which stem from them. The objective of this theory and its main merit are crystal clear: to achieve a compromise able to decrease the number of conflicts between legal systems and to avoid unreasonable and ultimately unfair results which might derive from automatic and trenchant refusals to recognise foreign situations clashing with fundamental values of the forum State. For instance, through the application of this notion, some if not all the legal effects deriving from a polygamous marriage can be kept if this is necessary to protect the vulnerable party. From this perspective, a polygamous marriage is merely considered a *datum*, a historic fact which produces legal effects without being recognised as a valid marriage.

Mitigation of the impact of public policy is also achieved whenever the existence of an institution which is in itself contrary to public policy – for instance a polygamous marriage – becomes relevant as a preliminary issue in legal proceedings in which the main question is another one, for instance succession[48]. This seems crucial in our field whenever situations validly established according to an Islamic legal system (i.e. marriage) are not valid according to the European system, where they are required as necessary grounds for other effects. The premise of the reasoning is that resolution of a preliminary or incidental question is part of the interpretation process[49]. Therefore, it does not involve insertion of any foreign rules in the legal system of the forum, and so it does not involve a public policy assessment[50]. In this manner, for example, second or further wives are protected and vested with rights deriving from their marital status. Once again, this appears to be of paramount importance in the field of filiation, as it allows

and 99; *X v. Latvia*, Application no. 27853/09, 26 November 2013, para. 95; *Paradiso and Campanelli v. Italy*, Application no. 25358/12, 27 January 2015, para. 80.

[48] This has also been defined as a 'substitution problem,' i.e. a problem inherent in replacing the term 'marriage' in the material rules applicable to the matter in question (succession, filiation): cf. T.S. Schmidt, "The Incidental Question in Private International Law", *Recueil des Cours*, t. 233, 1992, vol. II, pp. 335–341.

[49] In this sense, see Italian Court of Cassation, judgement of 2 March 1999, no. 1739.

[50] This idea dates back to R. Ago, *Teoria del diritto internazionale privato*, Padova, Cedam, 1934, p. 322. Framing the 'preliminary question' correctly is one of the most difficult tasks for a private international lawyer. On this issue, see *ex multis* P. Picone, *Saggio sulla struttura formale del problema delle questioni preliminari nel diritto internazionale privato*, Napoli, Jovene, 1971; P. Lagarde, "La règle de conflit applicable aux questions préalables", *Revue critique de droit international privé*, 1960, pp. 459–484.

children born from a second or further marriage to be recognised as legitimate[51].

A similar reasoning can be developed for repudiation (*talāq*). The right to repudiate is an unlimited right that the husband is exclusively entitled to. The woman has no right to repudiate and can at the most reserve for herself the right to autonomously trigger the dissolution of marriage through provision in the contract of marriage of a sort of right to self–repudiate[52]. In the absence of this contractual provision, the woman can resort to divorce by seising a court to an extent which is, however, different from State to State[53]. One could argue that equality between men and women is restored if divorce is easily accessible for women, with the consequence that a single answer in terms of the compatibility of repudiation with public policy is not possible. Regardless of this, a repudiation might be issued with the genuine consent of the wife. The woman might even ask for recognition of her repudiation in the State of the forum, possibly in order to re–marry. In these cases, dissolution of marriage takes on a consensual nature and the principle of equality is in practice unprejudiced[54]. In sum, defence of the principle of equality requires taking into account the concrete positions of both spouses. A similar case–by–case approach is necessary concerning guarantees. While in some Islamic States repudiation is a private act, in others the repudiation procedure involves intervention by a judge or a notary. Therefore, a negative reaction by means of activation of public policy would only be proportionate if repudiation were issued without guarantees of defence for

[51] Against this, C. Campiglio argues that the rules of necessary application of the forum – Article 86 of the civil code is one of them – must also apply to solve a preliminary question, with the consequence that a polygamous marriage cannot have any effects in Italy even when its validity is assessed as a preliminary question, regardless of whether the national law of the spouses contemplates this institution. According to Campiglio, a different path of reasoning could be followed but with the same result by arguing that a polygamous marriage is not a marriage as monogamy is an essential requirement of marriage. See C. Campiglio, "Il diritto di famiglia islamico nella prassi italiana", *Rivista di diritto internazionale privato e processuale*, 2008, pp. 43–76 at 61–62.

[52] In Islamic law marriage is a contract that can be integrated with terms and conditions provided they are compatible with the essential features of the institution. This power is explicitly sanctioned, for example, in Art. 47 of the Moroccan Moudawana and in Article 11 of the Personal Status Code in Tunisia. In mixed marriages, for example, particular clauses regarding religious education of the offspring, in contrast with the principle that children must be educated in the paternal (Islamic) religion, are to be considered null and void. See L. Milliot and F–P. Blanc, *op. cit.*, pp. 266–267; R. Aluffi Beck–Peccoz, *Le leggi del diritto di famiglia negli Stati arabi del Nord–Africa*, *op. cit.*, pp. 3–5.

[53] R. Aluffi Beck–Peccoz, *La modernizzazione del diritto di famiglia nei paesi arabi*, *op. cit.*, pp. 121–135.

[54] C. Campiglio, "Identità culturale, diritti umani e diritto internazionale privato", *Rivista di diritto internazionale*, 2011, pp. 1029–1064 at 1061–1062.

the woman[55]. In conclusion, the absence of equality between the spouses and the absence of essential rights of defence for the woman are legitimate grounds for refusing recognition of repudiation according to an assessment of the concrete circumstances of the case. However, if these fundamental principles are in practice respected, a repudiation should be considered equivalent to a divorce on a unilateral request or to a consensual divorce in the State of the forum[56].

A different reasoning is possible. It has been argued that repudiation is in no way comparable to divorce because the latter is based on an objective situation –failure of the marriage– which is evidenced by a prolonged separation of the spouses or is ascertained by a judge while the former consists of the discretional faculty of a man to free himself from marriage and creates a situation of submission for the woman which jeopardises her dignity because she is subject to a perennial threat of being repudiated if she does not comply with the authority of her husband. It is therefore a prerogative that has no equivalence for the bride, not even when she is recognised to have a right to unilaterally apply for a divorce[57]. However, even if one follows this path of reasoning and concludes that repudiation cannot be adapted to divorce[58], this does not exclude effects resulting from it which have already been produced in the legal system of origin being recognised. From this perspective, and according to the theory of the *effet atténué de l'ordre public*, repudiation will have legal relevance not as an act but as a fact producing legal effects in the State of the forum.

Further theories, namely *ordre public de proximité*, and *Inlandsbeziehung*, have been drawn up with the aim of mitigating the impact of public policy. They make this impact proportional to the intensity of the connection between the case and the State of the forum. While permitting recognition of situations created abroad with no connection with the forum, they block and do not recognise the same situation if it has some connection with the State (in practice, the domicile of either of the parties or citizenship). The *Institut de droit international* has endorsed these theories in its resolution

[55] On this issue, see O. Lopez Pegna, "L'incidenza dell'art. 6 della Convenzione Europea dei diritti dell'uomo rispetto all'esecuzione di decisioni straniere", *Rivista di diritto internazionale*, 2011, pp. 33–58 at 33–43.

[56] In this sense, see also O. Vanin, "Ripudio islamico, principio del contradditorio e ordine pubblico italiano", *La nuova giurisprudenza civile commentata*, 2015, pp. 1029–1038 at 1036. On adaptation, see *infra* section VI.

[57] G. Carella, *Diritti umani, conflitti di legge e conflitti di civilizzazione*, *op. cit.*, pp. 52–53. However, Carella then mitigates this position and argues that if the wife applies for recognition of the repudiation she renounces the right to claim infringement of the principle of non–discrimination. *Ibid.*, pp. 71–72.

[58] On adaptation, see *infra* section VI.

'Cultural differences and *ordre public* in family private international law,' in which it invites States to limit the use of the public policy exception only to the extent that, in the circumstances of the case, application of that law would infringe the principles of equality, non–discrimination and freedom of religion[59]. According to the Institute, this happens when a particular link exists between the parties concerned and the State of the forum. For instance, "public policy *may* be invoked against the recognition of the unilateral repudiation of the woman by her husband if the woman has or has had the nationality of the recognising State or of a State not allowing such repudiation, or if she has her habitual residence in one of these States"[60]. However, the thesis that the intensity of public policy depends on the degree of connection of the case with the State of the forum is difficult to accept. According to Article 1 ECHR, the fundamental rights provided in the ECHR must be recognised for each individual within the jurisdiction of the Member States, with the consequence that a distinction between citizens and foreigners cannot have any relevance[61]. It is inadmissible to say, for example, that repudiation can be recognised if it is carried out against a foreign woman and should not be if it is carried out against a national. To admit this different treatment would only add discrimination based on nationality to discrimination based on sex.

It is submitted that the impact of public policy should instead be different depending on whether the object of the assessment is recognition of effects which an act has already validly produced abroad or constitution *ex novo* of a personal and family status in the legal system of the forum. In the second case there is no continuity of status to be protected. Think of a case in which the State of origin of a future bride is requested to declare that "giusta le leggi a cui è sottopost[a] nulla osta al matrimonio" [in accordance with the laws to which she is subject, nothing prevents the marriage][62] and submits this clearance to a declaration of conversion to Islam by the future husband. European courts regularly trigger the public policy exception and set aside the impediment of the different religions of the spouses due to its contrast with Article 12 combined with Article 14 ECHR. In this manner they exempt

[59] See the Resolution of the Institute of International Law 'Cultural differences and ordre public in family private international law', Krakow Session, 2005, Rapporteur: M. Paul Lagarde.

[60] *Ibidem*, para. C (2).

[61] See A. Malatesta, "Cultural Diversity and Private International Law", in G. Venturini and S. Bariatti (eds.), *Nuovi strumenti del diritto internazionale privato*, *Liber Fausto Pocar*, Milan, Giuffré, 2009, pp. 643–657 at 649–650. See also F. Mosconi and C. Campiglio, *Diritto internazionale privato e processuale. Parte generale e contratti*, vol. I, Utet Giuridica, 2007, p. 239 against the idea of varying public policy.

[62] Article 116 para. 1 of the Italian civil code.

women from delivering this clearance[63]. The same goes for Islamic norms that put limitations on the capacity to succeed on the ground of religion. The judge must set aside the rule that excludes non–Islamic individuals from succession because of its patent contrast with the principle of non–discrimination grounded on religion.

A clear–cut position is likewise adopted on the prohibition of ascertaining natural filiation. In Islamic law biological generation is necessary and sufficient for the relationship of filiation between a mother and a child to be established by the simple fact of childbirth. On the other hand, for the relationship of filiation with the father to be established biological generation is not enough. The man must have generated the child within a lawful relationship[64]. This means that either you are a legitimate son or you are not a son. There is no relationship between a father and a child born from fornication. Therefore, a mother has no right to ask for natural paternity to be ascertained. A father can recognise his son on condition that he does not reveal the unlawfulness of his behaviour, but he is not obliged to recognise him. In other words, a man can decide whether to take responsibility for his child. These rules are inapplicable in Europe as they contrast with Article 8 of the ECHR, which protects the right to identity and personal development and therefore also the right to obtain information necessary to discover the truth concerning the identity of one's parents[65].

VI. ADAPTATION

The application of foreign rules and institutions is not always easy, in particular when the State of the forum does not contemplate in its legal system foreign institutions, which are therefore 'unknown' there. To trigger the public policy exception against any unknown institution would not be proportional and would lead to a multiplication of those limping situations that the ECtHR is inclined to condemn in the name of the right to

[63] With circular no. 46 of 11 September 2007 the Italian Ministry of the Interior required civil status officers not to take into account conditions relating to the Islamic faith of the future husband possibly contained in the authorisation to marry.

[64] This rule has no explicit basis in the Quran, but results from an interpretation of Sura XVI, 72. See R. Aluffi Beck–Peccoz, *La modernizzazione del diritto di famiglia nei paesi arabi*, *op. cit.*, pp. 152–155; L. Milliot, F–P. Blanc, *op. cit.*, p. 411.

[65] The ECtHR has recognised the right to obtain information in order to discover one's origins and the identity of one's parents as an integral part of identity protected under the right to private life. See ECtHR, *Gaskin v. the United Kingdom*, application no. 10454/83, 7 July 1989, para. 39; *Odièvre v. France*, application no. 42326/98, 13 February 2003, para. 29; *Çapın v. Turkey*, application no. 44690/09, 15 October 2019, paras. 33–34; *Boljević v. Serbia*, application no. 47443/14, 16 June 2020, para. 28.

transnational continuity of personal and family status as protected in Article 8 ECHR. Diversity is not always contrast and a compromise should always be sought through so–called adaptation. If a measure or an institution is not known in the law of the State addressed, that measure or institution is, as far as possible, adapted to a measure or an institution known in the law of that State. For instance, repudiation is unknown in European legal systems. However, considering its objective and effects, it seems possible to adapt repudiation to a consensual divorce when it substantially corresponds to a situation of effective dissolution of the marital bond and there is genuine consent of the wife[66].

Of course, adaptation of a rule or a decision in the end means obscuring its authenticity, proposing a hybridisation. However, this is to a certain extent unavoidable in any translation operation and is subject to a limit which derives from the *raison d'être* of adaptation: to facilitate dialogue between legal systems. This implies that an original rule or decision must necessarily be adapted to a rule or decision of the forum with equivalent effects and pursuing similar aims and interests. In short, what is irreconcilable cannot be reconciled and particular caution is required to prevent the flexibility that characterises adaptation becoming arbitrariness. For this purpose it is necessary to be respectful of the meaning and aims the relevant rules and institutions have in the legal system of origin. If this were not the case, legal certainty and continuity of status would be compromised, adaptation would become distortion and dialogue would become self–referential monologue.

An example will show the complexity of adaptation. On the basis of a combined reading of two verses of the Quran, Muslim law prohibits adoption[67]. The rationale behind this prohibition is to avoid confusion between biological parents and those taking care of a child. Islamic law instead contemplates a specific institution – *kafala* – through which in the presence of a judge or a notary a *kafil* (usually, a couple of *kafils*) undertakes the obligation to provide for the care of a minor in a state of need (*makful*)[68].

[66] See *supra* section V.

[67] "God does not put two hearts within a man's breast. […] nor does He make your adopted sons into real sons". Sura XXXIII, 4; "Name your adopted sons after their [real] fathers: this is more equitable in God's eyes". Sura XXXIII, 5. The Covenant on the Rights of the Child in Islam establishes that "the child of unknown descent or who is legally assimilated to this status shall have the right to guardianship and care but without adoption". Article 7 para. 3 of the Covenant on the Rights of the Child in Islam, adopted at the 32nd Islamic Conference of Foreign Ministers, 28–30 June 2005.

[68] On the differences between judicial and contractual kafala, see M. Orlandi, *La kafala di diritto islamico, tra diritto internazionale privato e diritto europeo*, Torino, Giappichelli, 2021, pp. 77–113.

However, unlike adoption, and in accordance with Sura XXXIII verse 6, *kafala* does not break the legal link between the child and the family of origin, and does not create a relationship of filiation between the *kafils* and the *makful*. *Kafala* usually ends when the *makful* reaches the age of majority and has no effects regarding inheritance. The *makful* does not receive the surname of the *kafil*.

On the one hand, kafala was conceived to protect minors who are orphans or are abandoned and therefore responds to the same needs and has the same objective as adoption: to ensure alternative care for a child who is without it. The Convention on the Rights of the Child consistently lists *kafala* together with adoption among the forms of care which are 'alternative' (to the family or origin) for children temporarily or permanently deprived of their family environment, or in whose best interests cannot be allowed to remain in that environment[69]. On the other hand, the features of the two institutions are different, in particular in terms of the parent–child relationship which is created with adoption but not with kafala[70]. It is unsurprising that the case law in Europe on qualification and recognition of *kafala* is not well–established and sometimes even contradictory depending on whether the judge focuses on the objective which is similar or on the effects which are different. While respect for the foreign legal system of origin might lead to excluding adaptation, adaptation into adoption might better satisfy the needs of the child in concrete cases[71].

In *Harroudj*, the ECtHR dealt with an Algerian *kafala* order which might not have been converted into adoption, as a French couple requested, due to a French legal prohibition. In this regard, the Court recognised the existence of a "broad margin of appreciation" for Member States in view of the considerable differences between the private international law systems of the various Member States of the Council of Europe on the proper approach to the choice of law in adoption matters generally and specifically to the role of a pre–existing *kafala* in an adoption[72]. At the same time, however, the Court stated there was a need to recognise the factual situation

[69] Art. 20, para. 3, Convention on the Rights of the Child, *UNTS* 1577, p. 3.

[70] See the opinion of Advocate General Campos Sanchez–Bordona delivered on 26 February 2019, Case C-129/18 *SM v. Entry Clearance Officer*, UK Visa Section, para. 43.

[71] The Hague Conference on Private International Law drew up the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (19 October 1996) also with the purpose of mitigating the issue of recognition of *kafala*. Article 33 of the Convention requires cooperation and preventive agreement between the central authorities of both the State of origin and the receiving State. The 1996 Hague Convention is in force in all Member States of the European Union. See Council Decision 2008/431/EC of 5.6.2008.

[72] ECtHR, *Harroudj v. France*, application no. 43631/09, 4 October 2012, paras. 47–48.

and to accommodate the law of the country of origin to the law of the forum. In particular the Court adopted a substantive approach and excluded violation of Article 8 ECHR by focusing on the fact that French law provided the means to alleviate the effects of the prohibition of adoption: "[i]n 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"[73].

VII. THE CONNECTING FACTOR

As premised, nationality as a connecting factor takes into account the cultural links of a person with their State of origin better than other factors and this valorises their personal and cultural identity. However, this only works on a presumptive basis. Think of second or third generation immigrants who retain their citizenship of origin but are culturally assimilated in the new State. The use of nationality as a connecting factor also has a shortcoming as it splits family regulations and for this reason may lead to discrimination and to a certain degree of social instability[74]. In any case, the identification and application of rules belonging to other legal systems involves significant difficulties of identification and interpretation, particularly in the case of unwritten rules of a customary nature[75].

From this perspective, the opportunity should be considered either to facilitate the acquisition of citizenship by naturalisation, marriage or birth in the territory or to allow a person permanently resident and/or domiciled in a European country to opt – in cases and conditions to be determined – for the application of the law of that State instead of the national law[76]. The underlying idea here is that the right to diversity is not a duty to be different[77]. Therefore, if people feel at ease with the legal system of the country where they live they should be free to claim for it to be applied. Application of the law of the forum State instead of the national law would

[73] *Ibíd.*, para. 51.

[74] On this issue, see P. Kinsch, *op. cit.*, pp. 195–203.

[75] See, for example, Article 15 of Italian law no. 218/95, according to which the foreign law is applied according to its own interpretation and application criteria over time ["la legge straniera è applicata secondo i propri criteri di interpretazione e di applicazione nel tempo"].

[76] On this issue, see H. Gaudemet–Tallon, "Nationalité, statut personnel et droits de l'homme", in H.P. Mansel and others (eds) *Festschrift für Erik Jayme*, Band I, München, Sellier European Law Publishers, 2004, pp. 205–221 at 206–210.

[77] See, ECtHR, *Molla Sali v. Greece*, application no. 20452/14, 19 December 2018, para. 157.

lead to uniform application of that law to people living within the boundaries of a country and so would satisfy the most general interest of a society in having a uniform social structure and ensuring that domestic legislative choices – the notion of marriage, access to divorce – are the same and shared by all. Moreover, application of the law of a European State to foreigners permanently residing in that State as an alternative to their national law could enhance their awareness of being part of a community, with a view to facilitating their integration. Finally, if one considers that the 'factual' criterion of habitual residence is frequently used as a default ground for jurisdiction, the coincidence between *forum* and *ius* would often lead the judge to apply his own law in practice.

In the light of the above it is possible to understand why nationality is progressively being replaced or coupled with more flexible connecting factors such as domicile and habitual residence. Individuals can often choose between the two alternative laws. This shows that even in the delicate area of family law State interests are gradually losing ground to the interests of the person and their freedom to choose[78]. Indeed, of the two alternative laws the individual chooses the one which is more in line with their idea of the person and family. In this way, from a private international law perspective the choice of law ends up integrating the right to private and family life enshrined in Article 8 of the ECHR without prejudice to *ex post* control through the public order clause.

Habitual residence is the most widely used connection criterion in the uniform rules of private international law enacted by the EU on family matters[79]. It is often contemplated together with other connecting criteria at the disposal of the individual (*electio iuris*). For example, as a general rule Regulation (EU) No. 650/2012 on jurisdiction and applicable law in matters of succession contemplates that the law applicable to succession as a whole is the law of the State in which the deceased had his habitual residence at the time of death[80]. As an alternative, a person can choose the law of the

[78] P. Gannagé, "La pénétration de l'autonomie de la volonté dans le droit international privé de la famille", *Revue critique de droit international privé*, 1992, pp. 425–454, in particular at 426; T.M. Yetano, "The Constitutionalisation of Party Autonomy in European Family Law", *Journal of Private International Law*, 2010, pp. 155–193.

[79] The Court of Justice has established that the criterion of habitual residence is a complex criterion consisting of two cumulative elements: an objective one (the qualified presence of a person in a certain place) and a subjective one (so–called *animus residendi*). See *ex multis* Judgment of the Court (First Chamber) of 22 December 2010. *Barbara Mercredi v. Richard Chaffe*. Case C–497/10 PPU, European Court Reports 2010 I–14309, paras. 53–56.

[80] Article 21 of Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession OJ L 201, 27.7.2012, p. 107–134.

State the nationality of which he possesses at the time of making the choice or at the time of death[81]. Regulation (EU) No. 1259/2010 on the law applicable to divorce and legal separation[82] contemplates a limited *optio legis* that spouses can exercise, by agreement between them, to designate one of the listed laws as applicable to divorce or separation. Among these are the law of the State of nationality of either spouse at the time the agreement is concluded and the law of the State where the spouses are habitually resident at the time the agreement is concluded[83]. In the absence of a choice by the parties, the main criterion is the habitual residence or last habitual residence of the spouses[84]. The impact of these instruments on the private international law systems of EU Member States has been significant because they have a universal scope: they replace domestic conflicting rules even where the law which is identified as applicable is of a State that is not a Member State of the European Union[85].

VIII. Final remarks

By definition the conflict of laws method deals with different legal notions and values. For this reason it appears to be a more appropriate tool than unification of substantive rules in order to guarantee respect for diversity and to bridge the existing divides between cultures. Since the origin of private international law there has been a possibility inherent in the system for judges to assess the effects that would derive from application to specific cases of laws referred to or decisions issued abroad and to reject them insofar as application or execution of them would produce effects incompatible with fundamental principles of the forum. This 'reaction of rejection' occurs more frequently when nationality is used as the connecting criterion because with this criterion foreign laws governing sensitive matters, such as the status of persons and family relationships, are brought into the legal system.

Nevertheless, integration of human rights in private international law reasoning nowadays offers the possibility of giving a new interpretation to

[81] Article 22 of Regulation (EU) No. 650/2012.

[82] Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation OJ L 343, 29.12.2010, p. 10–16. This Regulation only applies in EU Member States participating in enhanced cooperation in the area of the law applicable to divorce and legal separation.

[83] Article 5 of Regulation (EU) No. 1259/2010.

[84] Article 8 of Regulation (EU) No. 1259/2010.

[85] See Article 20 (*Universal Application*) of Regulation (EU) No. 650/2012; Article 4 (*Universal Application*) of Regulation (EU) No. 1259/2010.

this exception. While legal pluralism and public policy were traditionally considered to be antithetical principles, public policy read through the lens of human rights takes on a 'pluralistic' connotation because many opposite 'pushes' must be balanced. Protecting European values cannot lead to sacrificing the rights and interests of the individuals concerned beyond what is strictly necessary. From this perspective the efforts of both doctrine and jurisprudence to reduce the effects of public policy and to relativise its impact by means of theories of attenuated public order and of the inapplicability of public policy to preliminary questions can be appreciated. With these techniques, foreign laws and institutions clashing with European values cannot enter Europe, but refusals to recognise their effects are admitted only in so far as they are proportionate to the intended purpose.

A further instrument for dialogue between legal cultures is adaptation, through which unknown institutions are 'translated' into known institutions and made intelligible in the forum. Even here there is a limit. What is irreconcilable cannot be reconciled and particular caution is required to prevent the flexibility that characterises adaptation from becoming arbitrariness. For this reason, adaptation is only possible to the extent that the effects produced and the aim pursued by the original rule or decision are respected. Otherwise, adaptation would become distortion, and dialogue between legal systems would become a self–referential monologue.

Finally, in line with an increasing tendency to value less and less the roots of the individual and to favour instead the 'here and now' of the person with a view to facilitating their integration, it has been emphasised that the shortcomings of the use of nationality as a connecting factor could be overcome or at least reduced if a 'domiciliary' connection criterion – domicile and/or habitual residence – could be contemplated as an alternative to nationality at the disposal of the individual concerned.

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