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Migration and Religion in International law: Research-based Proposals for Inclusive, Resilient, and Multicultural Societies

This focus is the final output of the research project of national interest Migration and Religion in International Law (MiReIL). Research-based Proposals for Inclusive, Resilient, and Multicultural Societies, funded by the Italian Ministry of University and Research and by the European Union – NextGenerationEU in the framework of the “Piano nazionale di ripresa e resilienza (PNRR)”

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RELIGION, GENDER, AND MIGRATIONS THROUGH THE LENS OF PRIVATE INTERNATIONAL LAW

Sara Tonolo *

SUMMARY: 1. Preliminary Remarks. – 2. Religion and Human Rights. – 3. Religion and Conflict of Laws. The Public Policy Exception as a Tool against Gender Discrimination Founded on Religious Grounds. – 4. *Electio iuris* in the Conflict between Religion and Gender-based Human Rights. – 5. The Recognition of Factual Situations as a Tool to Protect Migrant Women’s Rights. – 6. Conclusive Remarks.

1. Preliminary Remarks

It is generally recognized that gender is a crucial factor in the migration journey.¹ This often reflects in discriminatory treatments that accentuate existing inequalities between men and women, as well as in the risk of falling into the network of trafficking, forced labour and/or prostitution.² Migrant women have different reception needs, which manifest particularly when they are pregnant or are single mothers with

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¹ Statistical data show that almost half of migrants are women. Specifically, the percentage of female migrants decreased from 49.4% in 2000 to 48.1% in 2020. Cfr. UN Department of Economic and Social Affairs (UNDESA), Population Division, International Migration Stock 2020, available at the following link: www.un.org/development/desa/pd/content/international-migrant-stock. See A. DI STASI, R. CADIN, A. IERMANO, V. ZAMBRANO (eds.), *Migrant Women and Gender-based Violence in the International and European Framework*, Naples, 2023.

² As highlighted by UN Women, a UN specialized agency that works to promote gender equality and women’s empowerment, “[m]igrant women are commonly subjected to multiple and intersecting forms of discrimination, as women, as migrants, and often on additional grounds such as, inter alia, race, sexuality or belonging to a minority group. Migrant women face higher risks of sexual and gender-based violence (including early and forced marriage, transactional sex/survival sex, domestic violence, rape, sexual harassment and physical assault), psychosocial stress and trauma, health complications, physical harm, injury and exploitation”. Cfr. UN Women, *Making Gender-responsive Migration Laws*, 2017, available at the following link: www.unwomen.org/en/digital-library/publications/2017/7/making-gender-responsive-migration-laws.

newborns or with multiple young children. For all these reasons, it is possible to affirm that migrant women are particularly vulnerable to violations of their rights, being subject to different types of vulnerabilities, which, adding up, accentuate their need for protection.

Furthermore, the gender factor is relevant among the aspects that exacerbate persecution against women in violent contexts. Violence as an instrument of power in Hannah Arendt's ideal construction,³ or as a tool to support power relations that have taken root and reproduce in society, can be considered as a unifying element of various situations, where in the context of "structural" violence situations, the same logic of power reverberates systematically against women. This also occurs when the State tolerates manifestations of violence in private relationships, for example when authorities do not respond immediately to victims' reports or when they do not carry out an adequate risk assessment to prevent the escalation of violent behaviours.

Some situations of generalized violence more seriously affect the women of States affected by such situations, subject to a form of State violence, whose civil rights are constantly trampled upon for the mere fact of being a woman. The number of people living in areas affected by ongoing armed conflicts, the resulting humanitarian needs at a global level, and the consequent risks of trafficking, are data that, read together, help to focus on the dramatic number of people who potentially live today in a condition of slavery determined by war. According to the UN report of 28 January 2022, two billion people currently live in conflict-affected areas, and 274 million of these need humanitarian assistance.⁴ Even before the crises in Afghanistan and Ukraine arose, 12% of trafficking victims came from States at war. More generally, all humanitarian crisis situations, including environmental disasters and the emergency generated by the Covid-19 pandemic, amplify the vulnerability factors that can lead to an increase in violations of women's rights.⁵

³ H. ARENDT, *On Violence*, New York, 1970, p. 90.

⁴ UNODC, *Global Report on Trafficking in Persons*, 2022, available at www.unodc.org/documents/data-and-analysis/glotip/2022/GLOTiP_2022_web.pdf. The majority of armed conflicts recorded between 2020 and 2022 occurred in sub-Saharan Africa, followed by North Africa, the Middle East, Asia, the Americas, and Europe: Stockholm International Peace Research Institute, *SIPRI Yearbook 2022. Armament, Disarmament and International Security*, 2022, p. 2.

⁵ Consider, for example, the well-known case concerning structural and systemic violence against Iranian women, subject to a form of State violence, whose civil rights are constantly trampled upon for the mere fact of being a woman; Mahsa (Jina) Amini, 22 years old, died on 16 September 2022 in Tehran, after being arrested by the police because she was not wearing her veil correctly. The episode sparked revolt throughout the State, as well as harsh repression by the regime. Being a woman in Iran is therefore a condition of persecution – which combines more than one of the reasons indicated by the 1951 Geneva Convention, both belonging to a social group and political condition – that can give rise to a request and subsequent acceptance of a request for international protection. See UN Women, *Statement on Women's Rights in Iran*, 27 September 2022, www.unwomen.org/en/news-stories/Statement/2022/09/un-women-statement-on-womens-rights-in-iran; UN News, *UN Condemns Violent Crackdown against Hijab Protests*, 27 September 2022, news.un.org/en/story/2022/09/1128111.

For the purposes of international protection of women victims of violence in such contexts, since according to the 1951 Geneva Convention,⁶ the main elements present in the definition of refugee are three: a) a well-founded fear of persecution; b) a causal link between this fear and one of the following reasons: race, religion, nationality, membership of a particular social group, political opinion; c) the impossibility or unwillingness of the individual to avail themselves of the protection of their national State or to return there because of this fear. Although Art. 1A(2) of the Geneva Convention does not expressly mention sex or gender, the United Nations High Commissioner for Refugees (UNHCR) has stated that “the refugee definition, properly interpreted, covers gender related claims”.⁷

In the so-called “social group”, a cause of persecution expressly mentioned by the conventional provision in question, victims of gender-based persecution are also included. This assessment originates precisely from an authoritative interpretative practice of the aforementioned provision offered by UNHCR. Members of the social group share a common characteristic other than the risk of being persecuted, or are perceived as a group by society. Frequently, the characteristic in question is an innate, immutable characteristic, or otherwise of fundamental importance to a person’s identity, conscience or exercise of human rights. This definition includes both historical characteristics, which therefore cannot be changed, and other characteristics that, even if not immutable, are so closely linked to the person’s identity or are expressions of fundamental human rights that the requirement of immutability should not be required. It follows, therefore, that gender can properly be considered as a category that identifies a social group, with women being a clear example of a social subset defined by innate and immutable characteristics, and often being treated differently from men.⁸

This naturally does not mean that all women can qualify for refugee status, even if they belong to societies where they are discriminated against. An applicant must demonstrate that she has a well-founded fear of persecution based on her membership in that particular social group, that she does not fall under the exclusion clauses and that she meets the other fundamental criteria, codified in Arts 9(2)(f) and 10(1)(d) of the Qualification Directive.⁹

⁶ See J.Y. CARLIER, *Et Genève sera... la définition du réfugié: bilan et perspectives*, in *La Convention de Genève du 28 juillet 1951 relative au statut des réfugiés 50 ans après: bilan et perspectives*, Bruxelles, 2001, p. 63 ff.; J.C. HATHAWAY, *The Rights of Refugees under International Law*, Cambridge, 2005; H. BATTJES, *European Asylum Law and International Law*, The Hague, 2006; G.S. GOODWIN-GILL, J. MC ADAM, *The Refugee in International Law*, Oxford, 2007; T. GAMMELTOFT-HANSEN, *Access to Asylum, International Refugee Law and the Globalisation of Migration Control*, Cambridge, 2011.

⁷ UNHCR, *Guidelines on International Protection No.1: Gender-related Persecution within the Context of Art. 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002, Para 6.

⁸ See www.unhcr.org/it/wp-content/uploads/sites/97/2020/07/ITA-Gruppo_Sociale-1.pdf.

⁹ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-State nationals or Stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary

Victims of gender-based violence certainly have well-founded reasons to request and obtain international protection, and such violence takes multiple forms as known. Possible and frequent are, in fact, cases in which a woman suffers from so-called “multiple” discrimination, that is, deriving from a particular status and which is based on racial, religious, ethnic, sexual orientation grounds, for particular conditions such as disability, age, poverty, migration, the circumstance of being an applicant for international protection.¹⁰

Religion is a relevant factor to be considered within this gender-based violence. The intersection between religious vulnerabilities and violence is typical of various contexts and forms of gender-specific inequality and violence. In Iraq for example Christian men and women are equally affected by persecutions, but this happens in different forms: from the most obvious method, which is sexual violence or the threat of sexual violence, to forced marriages. But there is also psychological violence, kidnappings, house arrest, and child abduction. In States like Pakistan, many women are kidnapped to be given as brides, Christian women who, after forced marriage, in addition to the violence suffered, are also forced to convert to their husbands’ religion. Not to mention human trafficking for sexual exploitation and the actual sale of women, as happens for example in China, where women from North Korea and other States are sold, given the shortage of women in China produced by selective abortion, to then become wives of Chinese men.¹¹ In the Middle East, North Africa, and Sub-Saharan Africa, extremists like Boko Haram resort to targeted grooming, forced marriages, and kidnappings as a tool to Islamize Christian girls or Yazidi women.¹²

protection, and for the content of the protection granted (recast) of 20 December 2011. In the Italian case law, see the decisions of the Court of Milan of 28 January 2019 and 4 February 2019: in the second case, the appeal was filed by a woman from Ivory Coast who was forced, while still a minor, to marry and was subjected, from the beginning of her migration journey, to forms of exploitation and violence specifically motivated by her being a woman in conditions of particular vulnerability. Also noteworthy are the decree of the Court of Bologna of 4 May 2018, no. 1111, and that of the Court of Trento of 5 June 2019, no. 1125. Within the Reform of the Common European Asylum System (CEAS), the Directive is going to be replaced (1.7.2026) by the Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14 May 2024 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council, in OJ L 1347/2024, 22.5.2024. On this topic, see *Towards a Common European Framework and a new Governance of Migration and Asylum*, in *Freedom Security and Justice*, 2021, 2.

¹⁰ A. C. HELTON, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, in *Columbia Human Rights Law Review*, 1983-1984, p. 39 ff.

¹¹ T. HESKET, L. LU, Z.W. XING, *The Consequences of Son Preference and Sex Selective Abortion in China and Other Asian States*, in *Canadian Medical Association Journal*, 2011, p. 1374 ff.; C.Z. GUO, M. DAS GUPTA, S. LI, *‘Missing Girls’ in China and India: Trends and Policy Challenges*, in *Asian Population Studies*, 2016, p. 135 ff.; N. SAIKIA ET AL., *Trends in Missing Female at Birth in India from 1986 to 2016: Analysis of 2.1 Million Birth Histories in Nationally Representative Surveys*, in *The Lancet*, 2021, p. 813 ff.; R.L.Y. SHAN, *The Transformation of Abortion Law in China*, in M. ZIEGLER (ed.), *Research Handbook on International Abortion Law*, Cheltenham-Northampton, 2023, p. 260 ff.

¹² A/71/303, Para 33; A/HRC/32/CRP.2, Paras 127 and 174.

However, it must be pointed out that in international sources, the violation of religious freedom is relevant in a different way for the purposes of recognition of international protection. In the application of the discipline of the Geneva Convention, there is a tendency to recognize that persecution for religious reasons is absorbed by the other grounds or more serious violations provided for in Art. 1(A)(2), besides following the indications of the Court of Justice of the European Union (CJEU) on the interpretation of Art. 9 of the Qualification Directive.¹³

In the implementation of the religious freedom enshrined in Art. 9 of the European Convention on Human Rights (ECHR), a cautious line is followed in affirming that the violation of religious freedom cannot justify the application of the *par ricochet* protection of Art. 9 (in the case of two Pakistani Catholic women whose repatriation would have prevented them from freely manifesting their religious belief).¹⁴

In this context, the study of discrimination against women for religious grounds is framed. These discriminations are particularly noticeable in the migratory process, within which women often risk suffering serious discrimination, even because of the application of religious rules in force in the State of origin and operative in other States through the interplay of conflict of laws.

This essay does not aim at exploring the effects of gender-based religious persecution, which are vast and widely studied, but rather the effects of potential persecution, or hidden persecution, that comes into existence as a result of the application of rules based on religion, to investigate if private international law may offer some tool to fight against this type of religious discrimination against migrant women. In fact, the gender perspective in Private International Law is a very timely topic; different issues (such as application of Islamic Law by some national authorities, child abduction in case of gender violence, etc.) show how Private International Law can be a tool to promote equality rights through different perspectives.¹⁵

For example, with regards to the right to marry, it is well renowned that the European Court of Human Rights (ECtHR) found national rules limiting the right to marry on religious grounds discriminatory and in conflict with the ECHR. The regulation set forth by the 2004 Asylum and Immigration Act in UK introduced a requirement for a certificate of approval for marriage. Those who were not EU citizens 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 passing this phase, they could apply to a registrar for a marriage license. People marrying in the Anglican Church were exempt from such requirement. The ECtHR found that these rules violated the right to marry and were

¹³ Court of Justice, judgment of 7 November 2013, *Minister voor Immigratie en Asiel v. X and Y and Z v. Minister voor Immigratie en Asiel*, case C-199/12 - C-201/12, Para 45.

¹⁴ European Court of Human Rights, judgment of 28 February 2006, application no. 27034/05, *Z. and T. v. the United Kingdom*, Para 87.

¹⁵ Such as the sorority – women's solidarity with respect to gender inequality – highlighted by R. ESPINOSA CALABUIG, *Sorority, Equality and Private International Law*, in *Freedom Security and Justice*, 2023, 1, pp. 113-131.

discriminatory in conjunction with the right to marry and freedom of religion.¹⁶ Probably the respect of a private international law rule, such as the domicile, would have prevented this outcome.

2. Religion and Human Rights

Religious values are internationally considered by several acts. Art. 18 of the Universal Declaration of Human Rights (UDHR) contains the fundamental principles protecting the freedom of religion as a matter of basic human rights jurisprudence.¹⁷ Art. 18(1) of the International Covenant on Civil and Political Rights (ICCPR) sets up the fundamental principles which guarantee the *forum internum* of religious belief.

In recent years, many debates in Europe have concerned religious values, gender issues and migrants. The discrimination based on religious grounds could be penalised by the EU Institutions and by the ECtHR. The common framework of these solutions could be found in the 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”.¹⁸ However, the accession of the European States to the ECHR and to the EU did not achieve the 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 ECtHR, through the national margin of appreciation. In some cases, the State authorizes the displaying of non-proselytizing symbols (such as the crucifix in Italy);¹⁹ in others, the State bans the displaying of such symbols in public spaces (like France, Spain and Italy for the *burqa* and the *niqab*).

The decisions of the Strasbourg Court on national bans of the use of the veil and the European rules have affirmed a substantial semantic deconstruction of the symbols themselves, recognizing them as having a dual meaning: active (carried and worn as a statement of one’s faith) and passive (entrusted with a historical-cultural value in reference to the religious roots of a given society). An evaluation that goes hand in hand with the definition of religious experiences on the basis of the faith-practice

¹⁶ European Court of Human Rights, judgment of 14 December 2010, application no. 34838/07, *O’Donoghue and others v. United Kingdom*, Para 87.

¹⁷ See L.D. WARDLE, *Marriage and Religious Liberty: Comparative Law Problems and Conflict of Laws Solutions*, in *Journal of Law and Family Studies*, 2010, p. 315 ff., and G. CILIBERTO, *La Dichiarazione universale dei diritti umani e l’evoluzione della tutela internazionale della libertà religiosa*, in S. TONOLO, G. PASCALE (eds.), *La Dichiarazione universale dei diritti umani nel diritto internazionale contemporaneo*, Turin, 2020, p. 261 ff.

¹⁸ D. FERRARI, S. PASTORELLI, *The Burqa in Europe: European Institutions and the Comparative Interdisciplinary Approach*, in A. FERRARI, S. PASTORELLI (eds.) *The Burqa Affair across Europe (between Public and Private Space)*, London, 2013, pp. 228-248, at p. 231.

¹⁹ European Court of Human Rights, Grand Chamber, judgment of 18 March 2011, application no. 30814/06, *Lautsi v. Italy*, Para 70. In this case, the Grand Chamber reversed the judgment of the Second Chamber of 3 November 2009, holding that “the decision whether crucifixes should be present in school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State”.

binomial, and with the attempt to circumscribe the spaces of legitimacy in which the democratic State can set limits to the exercise of the associated freedoms of religion, conscience, association, worship, etc. The free choice of a Muslim woman to wear the veil, with its different fashions hiding as many geopolitical representations, can be perceived as an expression of Islamicity lived in adherence to the moral values of Islam and a means through which she intends to communicate her diversity and autonomy in the public space. At the same time, the same situation may be an indication of homologation to a traditional religious model imposed and adopted uncritically.

These decisions clearly highlight that two conflicting models seem to be equally accepted:²⁰ the multicultural one, in which the community prevails over the individual, on the assumption of the acceptance that all cultures are placed on the same level, having equal relevance;²¹ the intercultural one, in which the individual prevails over the minority community whose interests are subordinated to those of the individuals, as pluralism is limited in the name of the common values of the community-State.²²

Within the intercultural approach, religion and human rights may conflict in some cases. As for the protection of gender equality, for example, the ECtHR found that the protection of this value and of human dignity cannot legitimately imply a restriction of the freedom of religion. Although recognising the importance of such objective, the ECtHR found that allowing a State to invoke gender equality to ban a practice which a woman wants to perform by exercising the rights enshrined in the ECHR would imply to accept the idea that “individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms”.²³

This is confirmed by the outcomes of the same approach in the case law of the CJEU. Consider the solution followed by the CJEU in the 2022 case of *X v. Belgische*

²⁰ European Court of Human Rights, judgment of 15 February 2001, application no. 42393/08, *Dahlab v. Switzerland*; Grand Chamber, judgment of 10 November 2005, application no. 44774/98, *Leyla Sahin v. Turkey*; judgment of 4 December 2008, application no. 27058/05, *Dogru v. France*; judgment of 30 June 2009, application no. 43563/08, *Aktas v. France*; judgment of 23 February 2010, application no. 41135/98, *Ahmet Arslan and others v. Turkey*; Grand Chamber, judgment of 1 July 2014, application no. 43835/11, *S.A.S. v. France*; judgment of 11 July 2017, application no. 37798/13, *Belcacemi et Oussar v. Belgium*; Second Section, judgment of 11 July 2017, application no. 4619/12, *Dakir v. Belgium*; judgment of 18 September 2018, application no. 3413/09, *Lachiri v. Belgium*. In literature, see K. BENNOUNE, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality under International Law*, in *Columbia Journal of Transnational Law*, 2007, p. 366 ff.; A. VAKULENKO, “Islamic Headscarves” and the European Convention on Human Rights: an Intersectional Perspective, in *Social and Legal Studies*, 2007, p. 196 ff.; P. CUMPER, T. LEWIS, *Empathy and Human Rights: The Case of Religious Dress*, in *Human Rights Law Review*, 2018, p. 61 ff.; M. FERRI, *The Freedom to Wear Religious Clothing in the Case Law of the European Court of Human Rights*, in A. SANTINI, M. SPATTI (eds.), *Freedom of Religion in a Pluricultural context. Essays of International and European Union Law*, Vatican City, 2022, p. 33 ff.

²¹ European Court of Human Rights, Grand Chamber, *S.A.S. v. France*, cit., Para 87, and *Lachiri v. Belgium*, cit., Para 45. On this last case, see J. RINGELHEIM, *Lachiri v. Belgium: Headscarf Ban Imposed on a Civil Party in a Courtroom in Violation of Religious Freedom*, in *Strasbourg Observers*, 2018, www.strasbourgobservers.com.

²² European Court of Human Rights, Grand Chamber, *Lautsi v. Italy*, cit., Para 70.

²³ European Court of Human Rights, Grand Chamber, *S.A.S. v. France*, cit., Para 119.

Stadt, concerning a Palestinian girl, who married at fifteen in Lebanon a Lebanese citizen who then acquired a residence permit in Belgium.²⁴ Upon the girl's arrival in Belgium, where she went to join her husband, the marriage was not recognized as it was contrary to public policy, as provided for in the 2004 Belgian Code of Private International Law,²⁵ because it was a child marriage. The minor was therefore considered an unaccompanied minor (as she had a *de facto* but not legally relevant relationship with her spouse) and obtained the refugee status as a member of a social group. Her mother and siblings requested family reunification at the Belgian embassy in Lebanon, pursuant to Family Reunification Directive.²⁶ The reunification was denied, based on the consideration that the minor “ (...) is no longer a member of her parents' nuclear family”²⁷ (following a marriage valid in the State where it was contracted, i.e., Lebanon). In the Belgian legal system, child marriage is thus considered differently, depending on the purpose for which recognition is relevant (personal status or residence permit). The girl's mother insisted on reunification, and during the proceedings initiated in Belgium, the CJEU was asked how to interpret the notion of an unaccompanied minor in order to allow the application of Art. 10(3)(a) of Family Reunification Directive and thus allow her to reunite with her refugee daughter.

The CJEU, also following the indications of Advocate General Szpunar, rules that it is not necessary for the minor to be unmarried in order to acquire the status of resident, necessary for reunification, thereby assuming that the marriage – funded on religious rules – exists, despite the lack of recognition of the same, due to conflict with public policy. Consistent with the jurisprudence developed on the subject of unaccompanied minors, the CJEU considers the vulnerability of the minor as a relevant prerequisite on which to base the extensive interpretation of the provision of the Family Reunification Directive regulating the reunification of ascendants of this category of refugees, in light of what Art. 24 of the European Charter of Fundamental Rights provides, “dans l'intérêt des enfants concernés et dans le souci de favoriser la vie familiale”.²⁸

In this case, the marriage – ruled by religious rules – certainly is in conflict with human rights, exposing the girl to a severe form of violence, which makes her vulnerable in terms of international protection.

The CJEU thus seems to move in a different direction from national jurisprudence, which invokes the limit of public policy, since the two lines of reasoning lead to two

²⁴ Court of Justice, judgment of 17 November 2022, *X v. Belgische Stadt*, case C-230/21.

²⁵ *Loi portant le Code de droit international privé, du 16 Juillet 2004*, available at <https://www.ejustice.just.fgov.be/eli/loi/2004/07/16/2004009511/moniteur>. See: M. FALLON, *Le droit international privé belge dans les traces de la loi italienne dix ans après*, in *Rivista di diritto internazionale privato e processuale*, 2005, p. 315 ff., and J.Y. CARLIER, *Le code belge de droit international privé*, in *Revue critique*, 2005, p. 11 ff.

²⁶ Directive 2003/86/EC of the Council on the right to family reunification of 22 September 2003.

²⁷ Court of Justice, judgment of 17 November 2022, *X v. Belgische Stadt*, cit., Para 20.

²⁸ Court of Justice, *X v. Belgische Stadt*, cit., Para 47.

opposite results (valid marriage/invalid marriage). However, this corresponds to the need to achieve the same objective: to avoid the implicit exploitation of the vulnerability of minors, which the institution of early marriage carries with it. This is consistent with what is also recognized within other legal systems regarding the marriage of children and their recognizability in other States.

Furthermore, 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.²⁹ Within some systems religion is the factor to solve the conflict of laws that instead of 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 a faith to another (i.e. by marriage), even without any change in the other connecting factors (domicile).³⁰ In other States, separate religious or customary courts decide issues relating family matters, alongside State tribunals (such as Israel and many Islamic States). Finally in some Islamic States Islam is the State religion.

Furthermore problems arise when people cross borders or act in a State other than their own, because of the different nature of institutions and rules governing their fundamental rights. 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 formalizing relationships among individuals may contrast with their recognition and consequently may frustrate individuals' exercise of fundamental rights.

In family relationships, religious issues are more relevant than in other contexts and they intersect very frequently migration rules. For example, in some States, marriages take place according to a religious form, while other States require a civil marriage: will either system give effect to the other's form of marriage? Some marriages take place when the spouses are not in the same State. This often seems to

²⁹ When we deal with the legal tradition of Islam, even in its transposition into the positive laws of contemporary States, we are faced with three different levels of normative production: the body of religious precepts revealed by God (*sharia*), Muslim law resulting from the interpretation of religious jurisprudence (*fiqh*) and the law of administrative production (*siyasa*), which, with the creation of modern States, has acquired the form of law and the rank of primary source of law (*qanun*). Despite the absolute immutability of the *sharia*, whose primary source of knowledge is the Quran, accompanied by the tradition of the Prophet Muhammad (*sunna*), Islam has managed to build a complete corpus of rules of both a religious and political nature by developing a constantly evolving process of interpretation (*ijtihad*), which has allowed it to translate its fundamental values and legal principles into enforceable norms. In Islamic States, the *sharia* retains the role of an explicit or tacit source of legislation, thus drawing, at least partially, its contents. See E. GIUNCHI, *From Jurists' Ijtihad to Judicial Neo-ijtihad: Some Introductory Observations*, in E. GIUNCHI (ed.), *Adjudicating Family Law in Muslim Courts*, Abingdon, 2014, p. 1 ff.

³⁰ V.C. GOVINDARAI, *The Conflict of Laws in India*, Oxford, 2011, p. 21.

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. Different rights and duties between spouses are often attached to the contract, due to the effects of a strongly patriarchal interpretation of revealed sources. An interpretation that, through the influence of the Islamic legal tradition, as well as a sociological resistance to overcoming that family model, may also come to influence the application of family codes (personal status) by judges in Muslim States.

There are some stumbling blocks that are difficult to remove, such as the Muslim woman's sole impediment to marriage with a non-Muslim, since the child always inherits the father's religion and must be educated in that religion, or the male potestative right to repudiation³¹. It is evident, in both cases, the potential conflict with public policy for violation of the principle of moral and legal equality between spouses and the prohibition of discrimination on the basis of gender. An issue that also involves the potential polygynous bonds that may result from the recognition of Islamic marriage. The recognition of Islamic marriage may be relevant for migrant women, but problematic in some States. For example, according to the UK Asylum and Immigration Tribunals, Islamic marriages are not to be recognized for immigration purposes.³²

This confirms that the application of family law institutions based on religion may highlight some kind of gender-based discrimination or persecution, and this is why it is necessary to investigate if private international law may offer tools to fight against it.

3. Religion and Conflict of Laws. The Public Policy Exception as a Tool against Gender Discrimination Founded on Religious Grounds

Following Pasquale Stanislao Mancini, and the Italian School of Private International Law,³³ 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, personal condition, marriage, family relations, etc.

³¹ P. SHAH, *Transnational Family Relations in Migration Contexts: British Variations on European Themes*, in *Religare*, 2011, p. 10 ff.; E. OLMOS ORTEGA, *Mujer, Matrimonio y religión*, in E. MARTINEZ GARCÍA (ed.), *Mujer y Derecho. Jornadas de igualdad de la Facultad de Derecho, Universidad de Valencia*, Valencia, 2011, pp. 74-75.

³² P. SHAH, *Transnational Family Relations in Migration Contexts: British Variations on European Themes*, in *Religare*, 2011, p. 15 ff..

³³ S. TONOLO, *L'Italia e il resto del mondo nel pensiero di Pasquale Stanislao Mancini*, in *Cuadernos de derecho transnacional*, 2011, p. 178 ff.

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 have been broken down into several subcategories 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*, etc.),³⁴ or defining a new connecting factor, founded on the choice of the parties: the *electio iuris*.

However, in this context, nationality, a connecting factor essentially secular, instead becomes necessarily related to religion, 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 Sharia 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 Sharia, 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, also when the persons concerned reside abroad.

Some systems set up religious privileges like Sect. 5 of the Hindu Marriage Act, according to which a Hindu marriage could take place only between two Hindus,³⁵ or like the hidden privilege disposed by Art. 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 Art. 19(5), the judge, vested through the religious factor (Muslim Courts for Muslim people, Civil Courts for non Muslim people applying the law of the religious community to which the spouse belongs) must apply the religious rules of the Iraqi spouse.³⁶

³⁴ G. KEGEL, *The Crisis of Conflict of Laws*, in *Recueil des Cours*, Vol. 112, 1964, p. 91 ff.

³⁵ V. C. GOVINDARAJ, *The Conflict of Laws in India*, cit., p. 116.

³⁶ See, on this point, the judgment issued on 26 March 2007 by the Iraqi Court of Cassation, available, with a comment by H. AL DABBAGH, in *Revue critique de droit international privé*, 2009, p. 29 ff.

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 influenced by the political trends followed by each national court (relativity of public policy). Family law principles are often regarded as a matter of State's public policy, since marriage is an institution and a part of the normative reality of a State.³⁷ This is especially seen when we are confronted with the question of applying the family laws of a State 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 of investigating about 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 civilizations”.³⁸ This, despite the fact that many Islamic States are reforming their national systems of family law, by reducing the relevance recognized to religious values within their national systems (Algeria, Morocco, Tunisia).³⁹

The religious origin of foreign rules should not, as such, be qualified as an infringement of the public policy of the forum State.⁴⁰ In fact, there are several cases of contrast with public policy, not determined by the application of religious values, like the same sex marriage,⁴¹ or the *post mortem* marriage.⁴²

However, in some cases religion creates a contrast with the public policy, like for polygamous marriage and repudiation⁴³, even if in many cases, institutions of Islamic

³⁷ H. THUE, *Connecting Factors in International Family Law*, in N. LOWE, G. DOUGLAS (eds.), *Families Across Frontiers*, The Hague/Boston/London, 1996, p. 53 ff.

³⁸ P. MERCIER, *Conflits de civilisations et droit international privé: polygamie et répudiation*, Genève, 1972; J. DEPREZ, *Droit international privé et conflits de civilisations. Aspects méthodologiques. Les relations entre systèmes d'Europe occidentale et systèmes islamiques en matière de statut personnel*, in *Recueil des Cours*, 1988, Vol. 211(IV), p. 9 ff.

³⁹ A. QUINONES ESCAMEZ, *La réception du nouveau Code de la famille marocain (Moudawana 2004) en Europe*, in *Rivista di diritto internazionale privato e processuale*, 2004, p. 877 ff.; K. SAIDI, *La réforme du droit algérien de la famille: pérennité et rénovation*, in *Revue internationale de droit comparé*, 2006, p. 121 ff.; D. ENGELCKE, *Reforming Family Law*, Cambridge, 2019, p. 10 ff.

⁴⁰ S. VRELLIS, *Conflits ou coordination de valeurs en droit international privé*, in *Recueil des Cours*, 2007, Vol. 328, p. 175 ff.; K. MEZIOU, *Migrations et relations familiales*, in *Recueil des Cours*, 2009, Vol. 345, p. 9 ff.; Z. COMBALIA, M.P. DIAGO, A. GONZÁLES-VARAS (eds.), *Derecho islámico y 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.

⁴¹ Not allowed in Italy: Italian Court of Cassation, judgment of 15 March 2012 n. 4184. On this issue see also European Court of Human Rights, judgment of 21 July 2015, applications no. 18766/11 and 36030/11, *Oliari and others v. Italy*.

⁴² Allowed for example in Belgium: see Belgian Court of Cassation, judgment of 2 April 1981, available in *Revue critique de jurisprudence belge*, 1983, p. 499.

⁴³ P. DIAGO DIAGO, *El Islam en Europa y los conflictos ocultos en el ámbito familiar*, in *Revista electrónica de estudios internacionales (REEI)*, 2015, n. 30.

law do not give rise to problems as for example the matrimonial regime of separation of property.

Europeanization 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.

Repudiation has been evaluated by national courts differently. In France, the relevant case law may be classified into three stages. After a first stage in favour for 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 States of North Africa,⁴⁴ acts of repudiation were not recognized because of several reasons: on the one hand, the judicial procedure not ensuring sufficiently the women's rights of defence (*ordre public procédural*), on the other hand, the lack of provisions about maintenance obligations (*ordre public alimentaire*). The leading case is the judgment pronounced in 2004 by the Supreme Court, 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 Prot. 7 of the ECHR, and it is not allowed by the French public policy.⁴⁵ 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, several times French judges refused to recognize the divorce requested by

⁴⁴ Among these, particularly relevant is that concluded with the Kingdom of Morocco, namely the *Convention entre la République française et le Royaume du Maroc relative au statut des personnes et de la famille et à la coopération judiciaire*.

⁴⁵ French Court of Cassation, judgment of 17 February 2004, in *Revue critique de droit international privé*, 2004, p. 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 *Revue internationale de droit comparé*, 2006, p. 7 ff.; M.L. NICOLET, *Regard français sur la reconnaissance en France des répudiations musulmanes*, in *Revue internationale de droit comparé*, 2006, p. 32 ff.; M.C. NAJM, *Le sort des répudiations musulmanes dans l'ordre juridique français. Droit et idéologie(s)*, in *Droit et cultures*, 2010, p. 209 ff.

the wife,⁴⁶ according to Moroccan law,⁴⁷ the *chicaq*, in a case concerning couples resident in France for several years.⁴⁸

The public policy exception is a problematic concept, often leading to opposite solutions, when declined through the principle of proximity: in Belgium, despite the fact that the recognition of foreign repudiation is expressly regulated by Law of 16 July 2004 holding the Code of Private International Law,⁴⁹ judges recognized the repudiation under the Moroccan law, not providing for the wife's right to alimony, even though the couple had been living in Belgium for more than nine years, or since the birth of their children.⁵⁰ In this case the fundamental rights of the wife were not taken into consideration when the rules of private international law were applied.

In Italian case law, the recognition of repudiation has been prevented through the public policy exception, because of discrimination against women,⁵¹ or for being pronounced without intervention of the court.⁵² The main problem of this application of the public policy exception is the limping situation concerning the *personal status* of the women involved in the repudiation. A possible way to solve this problem is available recalling Art. (3)(2)(e) of Law 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

⁴⁶ French Court of Cassation, judgment of 3 January 2006, in *Revue critique de droit international privé*, 2006, p. 627; French Court of Cassation, judgment of 4 November 2009, in *Dalloz*, 2010, p. 543.

⁴⁷ *Dahir* no. 1.04.22, *Bulletin Officiel du Royaume du Maroc*, no. 5184, 5 February 2004, p. 418.

⁴⁸ For some critical remarks on the French decisions, see: K. ZAHER, *Plaidoyer pour la reconnaissance des divorces marocains*, in *Revue critique*, 2010, p. 313 ff.; 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, p. 353 ff.

⁴⁹ Art. 57 – Dissolution du mariage à l'étranger fondée sur la volonté du mari: "(1) Un acte établi à l'étranger constatant la volonté du mari de dissoudre le mariage sans que la femme ait disposé d'un droit légal ne peut être reconnu en Belgique. (2) Toutefois un tel acte peut être reconnu en Belgique après vérification des conditions cumulatives suivantes: 1 l'acte a été homologué par une juridiction de l'Etat où il a été établi; 2 lors de l'homologation, aucun époux n'avait la nationalité d'un Etat dont le droit ne connaît pas cette forme de dissolution du mariage; 3 lors de l'homologation, aucun époux n'avait de résidence habituelle dans un Etat dont le droit ne connaît pas cette forme de dissolution du mariage; 4 la femme a accepté de manière certaine et sans contrainte la dissolution du mariage; 5 aucun motif de refus visé à l'article 25 ne s'oppose à la reconnaissance".

⁵⁰ Within the Belgian case law see the leading cases: Belgian Court of Cassation, judgment of 18 June 2007; Belgian Court of Cassation, judgment of 3 December 2007. See also the comment by 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*, in *Revue générale de droit civil belge*, 2008, p. 525 ff.

⁵¹ In Italy: Court of Appeal of Rome, judgment of 29 October 1948, in *Foro padano*, 1949, c. 348; Court of Appeal of Milan, judgment of 17 December 1991, in *Rivista di diritto internazionale privato e processuale*, 1993, p. 109; Court of Appeal of Turin, judgment of 9 March 2006, in *Diritto di famiglia*, 2007, p. 156; Tribunal Milan, judgment of 24 March 1994, in *Rivista di diritto internazionale privato e processuale*, 1995, p. 853; Tribunal Milan, judgment of 11 March 1995, in *Rivista di diritto internazionale privato e processuale*, 1996, p. 129. In France: Court of Cassation, judgment of 1 June 1994, in *Revue critique*, 1995, p. 103, and judgment of 11 March 1997, in *Clunet*, 1998, p. 10.

⁵² Court of Appeal of Milan, judgment of 14 December 1965, in *Rivista di diritto internazionale privato e processuale*, 1966, p. 381.

claimed by foreign women domiciled in Italy.⁵³ In other cases, the solution is found recognizing the repudiation, due to the principles of the public policy and proximity, like in a case concerning an Egyptian *talaq*: in this case, Italian judges point out that “(...) si intende per ordine pubblico il complesso dei principi fondamentali che caratterizzano la struttura etico-sociale della comunità nazionale in un determinato momento storico, ed i principi inderogabili immanenti nei più importanti istituti giuridici”⁵⁴. This core content cannot disregard the assertion of the essential rights of defence, as required by Art. 65 of Law 218/95 (the Italian Law of Private International Law). In this case, the Court of Appeal emphasizes 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 *kholā* and “(...) il provvedimento di divorzio di cui trattasi interviene al termine di una procedura in cui è salvaguardata la possibilità della moglie di intervenire; si accerta la irreversibile dissoluzione del vincolo, ovvero il venir meno della comunione di vita e di affetti tra i coniugi; e si regolano i diritti economici della stessa moglie”.⁵⁵ Given these considerations, no element of conflict with public policy is found by the Court, whose scope overrides the fulfilment of the requirements of Egyptian law for the validity and irrevocability of the divorce.

The unpredictability of the outcomes resulting from the application of the public policy exception is confirmed by the analysis of two more recent cases, in which the position of women was considered differently, also in light of their status as migrant women. In these cases, the fundamental rights of women are differently considered through the public policy exception.

The Italian Supreme Court of Cassation has ruled on the non-recognition of a judgment whereby a Palestinian religious court had acknowledged the severance of the matrimonial ties between a Muslim couple, on the grounds that the judgment offended public policy.⁵⁶ Proceedings were brought by a woman of Italian and Jordanian nationalities against the recording, in Italy, of a judgment rendered, upon an application made by her husband, by the Sharia court of Western Nablus (West Bank). The husband had repudiated the woman in accordance with Islamic law, and subsequently, the Sharia court, taking note of the repudiation (*talaq*), had certified that the couple had ceased to be bound by marriage. The woman argued that the judgment was at odds with the public policy of Italy. Firstly, she claimed that Islamic law, as applied in the West Bank, failed to provide equal rights to spouses in relation to divorce, and, secondly, that she was not given an opportunity to present her case in the

⁵³ C. CAMPIGLIO, *La famiglia islamica nel diritto internazionale privato italiano*, in *Rivista di diritto internazionale privato e processuale*, 1999, p. 38.

⁵⁴ Court of Appeal Cagliari, judgment of 16 May 2008, in *Rivista di diritto internazionale privato e processuale*, 2009, p. 647 ff., Para 2.9.

⁵⁵ Court of Appeal Cagliari, judgment of 16 May 2008, in *Rivista di diritto internazionale privato e processuale*, 2009, p. 647 ff., para. 2.9.

⁵⁶ Italian Court of Cassation, judgment of 7 August 2020, n. 16804, available at www.questionegiustizia.it/data/doc/2727/ripudio-16804_09_2020_oscurata_no-index.pdf.

proceedings which resulted in the judicial declaration. For his part, the man claimed that *talaq* merely constituted a process of revocable separation, and that the judgment was passed following an unsuccessful attempt by the Sharia court to reconcile the couple. The Italian Supreme Court of Cassation held that, in the case at issue, the basic procedural rights of the wife had been violated. Indeed, the woman did not take part in the proceedings instituted by her husband before the Sharia court, in the framework of which he irrevocably repudiated his wife. In fact, the woman was notified of the procedure after the judgment was given, and only to enable the court to ascertain that no reconciliation had occurred in the three months following the decision. The Supreme Court ruled that the judgment was also incompatible with public policy exception as Stated in Arts 16 and 64 of Law 218/95, since the *talaq* could only be exercised by the male spouse, thus violating the principle of the equality of rights between husband and wife established both by the Italian Constitution and in various international treaties ratified by Italy, such as Prot. 7 of the ECHR. In order to apply the national rules concerning public policy exception, the Supreme Court recalled, in the case in question, the relevant *Sahyouni* Judgment of the CJEU,⁵⁷ excluding the applicability of Rome III Regulation⁵⁸, implementing enhanced co-operation in the area of the law applicable to divorce and legal separation for participating States,⁵⁹ in spite of the provision of Art. 10 of this Regulation apparently focused on repudiation. The fundamental rights of women, the right to a fair trial, as well as the equality of rights are very well highlighted in the judgment of Italian Supreme Court of Cassation here commented and they are necessarily implemented through public policy exception.

The fundamental rights of women are differently considered in another recent judgment, where the Italian Supreme Court of Cassation developed a different notion of public policy exception enabling the recognition of an Iranian divorce (*rojee*) between two Iranian Citizens⁶⁰ on the assumption that, in this case, public policy could not contrast the effects deriving from this act, as the content evaluation of the act to be

⁵⁷ Court of Justice, judgment of 20 December 2017, *Soha Sahyouni v. Raja Mamisch*, case C-372/16. See A. DUTTA, *Private Divorces Outside Rome III and Brussels II bis? The Sahyouni Gap. Case C-372/16, Soha Sahyouni v. Raja Mamich, Judgment of the Court (First Chamber) of 20th December 2017*, in *Common Market Law Review*, 2019, p. 1661 ff.; E. ADOBATI, *Il Regolamento (UE) no. 1259/2010 non trova applicazione in caso di divorzi privati*, in *Diritto comunitario e degli scambi internazionali*, 2017, pp. 627-628; R. DI MEO, *Il diritto europeo e il divorzio privato islamico*, in *Foro italiano*, 2018, c. 282 ff.

⁵⁸ 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, in OJ L. 343, 29.12.2010, pp. 10-16.

⁵⁹ On this topic, see A. FIORINI, *Harmonising the Law Applicable to Divorce and Legal Separation – Enhanced Co-operation as the Way Forward?*, in *International and Comparative Law Quarterly*, 2010, p. 1143 ff.

⁶⁰ On public policy exception within Italian case law, see: Italian Court of Cassation, judgment of 11 November 2014, no. 24001, in *Rivista di diritto internazionale privato e processuale*, 2015, p. 427 ff.; judgment of 30 September 2016, no. 19599, *ivi*, 2016, p. 813 ff.; judgment of 15 June 2017, no. 14878, *ivi*, 2018, p. 408; judgment of 5 July 2017, no. 16601, *ivi*, 2017, p. 1049; judgment of 6 November 2018, no. 12193, *ivi*, 2019, p. 1225.

recognized which would have highlighted the disparities between man and woman. Stated in the Iranian Civil Code had been excluded.⁶¹

Thus, in two apparently similar cases, the Supreme Court adopted two different solutions for the recognition of foreign acts of repudiation, confirming the flexibility of public policy exception: it both acknowledges unilateral Iranian divorce and denies it with respect to repudiation pronounced by the Sharia court in Palestine.

There is another aspect to consider, which perhaps implicitly may have influenced the considerations of the Supreme Court: the different citizenship of the subjects involved. In the case of the Iranian divorce, both spouses were foreign citizens,⁶² while in the case of the Palestinian *talaq*, they had joint Italian and Jordanian citizenship.

It is clear that public policy exception could be applied with less intensity in the cases that are not strictly connected with the Italian legal system, as in the Iranian divorce case between the two Iranians married abroad and only residing in Italy, as stated, albeit not so frequent in the case law of other States.⁶³

Therefore, it could be questioned whether the Supreme Court, in this case, intended to recall the theory of the attenuated operativity of public policy, supported in many countries,⁶⁴ by the consideration that, as the situation was created abroad, or in a past moment, leading to the acquisition of certain rights, or whether it could lead to a future conflict, the public policy exception could be applied less strictly, without any impediment to the recognition of the effects of certain institutes (vested rights theory).⁶⁵

Following this reasoning, in the second judgment of the Italian Supreme Court of Cassation there would be no contradiction with the previous one, as here, the theory of the attenuated effect of public policy would be superseded by the proximity public policy,⁶⁶ according to which the functioning of the exception cannot be attenuated with regard to cases exclusively connected to the forum system, as in the case of the Italian citizenship of both spouses, among other things, prevailing over other citizenships, according to what is provided for in Art. 19 of Law 218/95.

⁶¹ Italian Court of Cassation, judgment of 14 August 2020, no. 17170, cit., paras. 6-7.

⁶² With regard to alternative solutions on recognition of Iranian divorces, see Court of Appeal of Milan, judgment of 17 December 1991, in *Rivista di diritto internazionale privato e processuale*, 1993, p. 109.

⁶³ As in France: Court of Cassation, judgment of 3 November 1983, in *Revue critique*, 1984, p. 325.

⁶⁴ P. LAGARDE, *Recherches sur l'ordre public en droit international privé*, Paris, 1960, p. 73 ff.; A. FERRER CORREIA, *La doctrine des droits acquis dans un système de règles de conflit bilatérales*, in *Mélanges Wengler*, 1983, p. 285; P. PICONE, *Les méthodes de coordination entre ordres juridiques en droit international privé*, in *Recueil des Cours*, 1999, Vol. 276, p. 227; A. BUCHER, *La famille en droit international privé*, in *Recueil des Cours*, 2000, Vol. 283, p. 131; C. STAATH, *La excepción de orden público internacional como fundamento de denegación del reconocimiento del repudio islámico*, in *Anuario Español de Derecho Internacional Privado*, X, 2010, pp. 717-729.

⁶⁵ Court of Appeal of Cagliari, judgment of 16 May 2008, cit., p. 647: in this case, the rules of the 1970 Hague Convention are relevant, with respect to an Egyptian provision, the *talaq*, taken in a procedure which, although based on the husband's unilateral pronouncement of divorce, provides for the wife's consent and the protection of her rights, as well as having little connection with Italian law.

⁶⁶ See A. BUCHER, *La famille*, cit., p. 62 ff.; H. GAUDEMET-TALLON, *Le pluralisme en droit international privé: richesses et faiblesses (le funambule et l'arc-en-ciel)*. *Cours général*, in *Recueil des Cours*, 2005, Vol. 312, p. 424 ff.

4. *Electio iuris* in the Conflict between Religion and Gender-based Human Rights

Among the shortcuts available to overcome the conflict between religion and gender-based human rights it is possible to consider *electio iuris*, which is a connecting factor generally used in the field of contracts. The parties of a contract usually do a selection as to the applicable law that can be explicit or 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, someone suggests to adapt the selection available to individuals.⁶⁷

National judges are usually not in favour of this solution, for instance in the case of the spouses who get divorced by mutual consent according to the 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 null and void the divorce.⁶⁸ Subsequently the solution of the BGH became the codified rule of Art. 17 EGBGB.⁶⁹ If the choice 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.⁷⁰

Another paradigmatic illustration of the courts' reluctance to enter into the choice of law by the parties, when human rights are at stake, is the case *Molla Sali v. Greece*,⁷¹ in which Greece is condemned for violating Art. 14 and Art. 1, Prot. 1, of the ECHR, for having accepted the request to annul a will drafted by a Greek citizen of Muslim faith, with which he, choosing Greek law to regulate his succession, appointed his wife as universal heir. The Greek Court of Cassation had, in fact, accepted the claim of the deceased's sisters who assumed that the religious rules derived from Sharia law were applicable and non-derogable. These rules were applicable to the Muslim minority residing in Thrace, according to the 1923 Treaty of Lausanne,⁷² which stated that the widow should be deprived of three quarters of the deceased's estate, which should be devolved to their advantage. The Court held, however, that the choice of law of the deceased would have ensured respect for fundamental rights,

⁶⁷ L. GANNAGE, *La pénétration de l'autonomie de la volonté dans le droit international privé de la famille*, in *Revue critique de droit international privé*, 1992, p. 425; J. Y. CARLIER, *Autonomie de la volonté et statut personnel*, Bruxelles, 1992.

⁶⁸ BGH, judgment of 14 October 1981, in *IPRax*, 1983, p. 37.

⁶⁹ G. KEGEL, *Scheidung von Ausländern im Inland durch Rechtsgeschäft*, in *IPRax*, 1982, p. 22.

⁷⁰ E. JAYME, *Menschenrechte und Theorie des Internationalen Privatrecht*, in *Jahresheft der Internationalen Juristenvereinigung*, 1991/1992, p. 8 ff.

⁷¹ European Court of Human Rights, Grand Chamber, judgment of 19 December 2018, application no. 20452/14, *Molla Sali v. Greece*. For a comment, see D. MC GOLDRICK, *Sharia Law in Europe? Legacies of the Ottoman Empire and the European Convention on Human Rights*, in *Oxford Journal of Law and Religion*, 2019, p. 517 ff.

⁷² The 1923 Treaty of Lausanne can be read in *American Journal of International Law*, 1924, p. 1.

despite the presence of mandatory religious rules, not applicable to the case as in conflict with the fundamental rights of the widow.

It therefore appears conceivable that, in the States where religious rules discriminating against women's inheritance rights are in force, the choice of law may intervene to limit such patrimonial damage. Likewise, the choice of the forum could help migrant women to avoid discriminatory legal systems.⁷³

Nowadays, following the well-known process of Europeanization 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 Rome III Regulation. To solve many problems in terms of legal certainty and predictability for the parties, this Regulation offers to the States participating in the enhanced cooperation 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 Art. 5(1)(c) of the Regulation enables the spouses to designate the law of the State of which one of them is a national and Art. 8(c) provides for the residual application of the law of the spouses' common nationality when they have not chosen the applicable law. So within the States 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.

Moreover, regarding the conditions of the choice of law clause, Art. 6(2) of the Rome III Regulation states that "a spouse in order to establish that he did not consent, may rely upon the law of the State 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 State. Through Art. 6(2) 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 State where they are domiciled at the time the procedure for divorce begins.⁷⁴

⁷³ L. VÁLKOVÁ, *Choice of Court Agreements under the EU Regulation in Family and Succession Matters*, Milan, 2022.

⁷⁴ R. ESPINOSA CALABUIG, *Elección de una ley por las partes al divorcio y a la separación judicial: la solución "limitada" del Reglamento Roma III*, in I. QUEIROLO, A.M. BENEDETTI, L. CARPANETO (eds.), *Le nuove famiglie tra globalizzazione e identità statuali*, Roma, 2014, p. 235 ff.

5. The Recognition of Factual Situations as a Tool to protect Migrant Women's Rights

Another shortcut on the path towards the compromise between religion, conflict of laws and gender human rights is the approach affirming the necessary recognition of factual situations, a social need for continuity and stability.⁷⁵

What is actually at stake is if 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 cover also 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 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”.⁷⁶ But as the selected case law shows, national 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*, the compulsory gift – founded on religious rules⁷⁷ – 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. In 1987 the BGH dealt with the problem of the legal validity of an arrangement between an Arab woman, Israeli citizen, and her German husband, converted to Islam. At the moment of the divorce, the woman asks for the *mahr* (100000 DM), but the husband claims for the invalidity of the arrangement according to the German law. The BGH at first solves the conflict of laws applying the German law, as the law where the couple has the residence, but qualifies the *mahr* as a maintenance agreement valid under the

⁷⁵ R. BARATTA, *La reconnaissance des situations en droit international privé*, in *Recueil des Cours*, 2010, Vol. 348, p. 253 ff.

⁷⁶ M. BOGDAN, *Private International Law as Component of the Law of the Forum*, in *Recueil des Cours*, 2010, Vol. 348, p. 113 ff.

⁷⁷ Several words are used as synonymous: *sadaq*, which means friendship, present, gift (Quran verse 4:4); *farida*, which means “a gift or disposition instituted by God” (Quran verses 2:236; 2: 237; 4:24); sometimes the *mahr* has a religious object: the gift of Quran, the gift of some lessons on Quran.

Islamic law applicable to the marriage, considering the marriage as a condition of the agreement.⁷⁸ In 2020 the BGH examined four alternative characterizations for the *mahr*, consisting in a *Hajj*, a pilgrimage to the Kaaba in Mecca, promised by a Libyan national married to a German national converted to Islam.⁷⁹

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*,⁸⁰ concerning a Pakistani citizen and his Indian wife, who had got married in the UK and divorced through a *talaq* procedure, pronounced there. In this case, the conflict of laws problem is solved applying the English law, but the Court States 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 State, than with a largely meaningless right to be recognised locally as his wife”⁸¹.

In this case it is relevant the decision to apply Pakistani law on a *talaq* pronounced in the UK as a condition to enforce the wife’s claim for *mahr*. There is a preference to recognize a unilateral act of dissolution of marriage in which the woman’s position is not equal to that of the man, rather than to sacrifice the woman’s property rights, which would otherwise leave her, in a condition of vulnerability as migrant women, without any means of support.

Within the French jurisprudence about cases concerning *mahr* a different approach may be found. In 1995, the *Cour d’Appel de Paris* classifies *mahr* as an indicator of the choice of property regime, in a case concerning a Lebanese citizen of Greek Catholic confession, already married according to the Lebanese law, and subsequently married with a Polish citizen in Lebanon according to the Muslim rites – the only way to marry the new girlfriend as he could not get the 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 judgment considers *mahr* as an indicator of the choice of property regime.

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 légal* (the wife), and on the other hand, the agreement on the adoption of separate estates (the husband), the *Cour de*

⁷⁸ BGH, judgment of 28 January 1987, in *IPRax*, 1988, p. 109; H. J. HESSLER, *Islamisch-rechtliche Morgengabe: vereinbarter Vermögensausgleich im deutschen Scheidungsfolgenrecht*, in *IPRax*, 1988, p. 95.

⁷⁹ BGH, judgment of 18 March 2020, available at the following link: juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&az=XII%20ZB%20380/19&nr=106581.

⁸⁰ English High Court of Justice, Divorce and Admiralty Division, judgment of 1 January 1972, *Qureshi v. Qureshi*, p. 173.

⁸¹ English High Court of Justice, *Qureshi v. Qureshi*, cit., p. 201.

Cassation, overruling the judgment of the *Cour d'Appel de Lyon*, stated that the *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*.⁸²

Within this approach, it's clear that a different interpretation of public policy is possible.⁸³ Under the influence of human rights, the new notion of public policy exception, not only and not necessarily national, sometimes leads to refuse recognition of 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, protecting women's fundamental rights.

A very significant application of this approach seems recently suggested also by the ECtHR with regard to the *kafalah*, another highly problematic institution set up on religious rules whose recognition is very difficult in Western States. *Kafalah* is 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.⁸⁴ In *Harroudj*, the ECtHR states that a violation of Art. 8 of the ECHR may be ascertained when personal status legally and stably constituted abroad are denied transnational continuity. Even if in the case, the Algerian *kafalah* 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 recognize the factual situation, accommodating the law of the State of origin with the nationality law. Furthermore:

“the Court notes that the judicial grant of *kafalah* is fully recognised by the respondent State and that it produces effects in that State 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 *kafalah* 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

⁸² Court of Cassation, judgment of 22 November 2005, in *Journal du droit international*, 2006, p. 1365 ff.

⁸³ J. Y. CARLIER, *Diversité culturelle et droit international privé. De l'ordre public aux accommodements réciproques?*, in G. CATALDI (ed.), *Diritto internazionale e pluralità delle culture*, Napoli, 2014, p. 125 ff.

⁸⁴ Quran, Sura XXXIII, *Al – Ahzab*, 4 – 5. In many States adoption is forbidden with the exception of Tunisia where the adoption is provided by the Act n. 58-27 of 4 March 1958: see the Algerian *Code de la famille*, law no. 84-11 of 9 June 1984, regulating *Kafalah* in the Chapter VII, while adoption is forbidden by Art. 46 (“L'adoption (tabanni) est interdite par la sharia et la loi”); in the Moroccan Moudawana (*Code du statut personnel et successoral*) reformed on 3 February 2004, adoption is forbidden by Art. 83.3; *kafalah* is ruled by the *Dahir portant loi* no. 1-02-172 of 13 June 2002.

child to inherit from the applicant and to appoint a legal guardian in the event of the foster parent's death".⁸⁵

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 Art. 370-3 of the *Code Civil* but that French law provides the means to alleviate the effects of that prohibition, based on the objective signs of a child's integration into French society. Firstly, the choice-of-law rule is expressly set aside by the same Art. 370-3 in cases where "the minor was born and habitually resides in France".

Likewise, the considered approach has gradually taken place with regard to recognition of polygamous marriages, given that many States have passed from denying any effect at all of such acts – as in conflict with public policy – to a partial recognition.

Problems arise in the European States as the general rule is that marriages celebrated here cannot be other than monogamous. In fact in Art. 11 of the Family Reunification Directive it can be read that "[t]he 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 adds 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 registrations of foreign acts contrary to public policy. While polygamous marriages are not recognized for public policy reasons, only when they are effectively polygamous, not if they are monogamous but celebrated according to a law allowing polygamy,⁸⁶ the acts of birth of kids born within these marriages must be recognized 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's necessary to point out that this solution may be attained also through the consideration of the attenuated effect of the public policy exception, according to which it is possible to recognize 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 recognized to the second wife and children of the same (to be recognized as legitimate however)

⁸⁵ European Court of Human Rights, judgment of 4 October 2012, application no. 43631/09, *Harroudj v. France*, para. 51.

⁸⁶ Italian Court of Cassation, judgment of 2 March 1999, no. 1739, in *Rivista di diritto internazionale privato e processuale*, 1999, p. 613.

succession and maintenance rights, social security, residence rights,⁸⁷ to protect second or further wives, to protect children, according to the principle of the best interest of the child,⁸⁸ affirmed by Art. 3 of the 1989 UN Convention on the Rights of the Child, and by Art. 24 of the European Charter on Fundamental Rights, and strongly applied by the ECtHR in several cases,⁸⁹ and to grant them the rights deriving from marital status.

In Italy the leading case has been decided by the Supreme Court in 1999.⁹⁰ However, it must be pointed out that it is a specific one, concerning the succession of an Italian citizen, a widower, married in Somalia with a Somali woman who claims her hereditary rights in conflict 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 generalize the validity of the marriage celebrated according to Islamic law, when it is object of a preliminary question of the hereditary devolution. In this case the validity of the marriage does not involve insertion of foreign provisions in the rules of the law of the forum, and so it does not affect the Italian public policy.

The suggested approach is undoubtedly interesting as an inclusive tool of religious values. 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. Anyway, 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; Art. 45 of the 1987 Swiss Statute on Private International Law⁹¹ expressly States that a marriage validly celebrated abroad is recognized in Switzerland.⁹²

Moreover, we may find judgments of other States that open new chances of recognition, considering the personal laws of the spouses not banning this kind of marriage.⁹³ The aim of these solutions is clear: to protect second or further wives and to grant them the rights deriving from marital status⁹⁴. The real problem is that the first

⁸⁷ Court of Appeal of Turin, judgment of 18 April 2001, in *Diritto della famiglia*, 2001, p. 1492; *contra* see Court of Cassation, judgment of 28 February 2013, no. 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.

⁸⁸ C. FOCARELLI, *La Convenzione di New York e il concetto di best interests of the child*, in *Rivista di diritto internazionale*, 2010, p. 981 ff.; P. ALSTON, *The Best Interest of a Child: Reconciling Culture and Human Rights*, Oxford, 1994.

⁸⁹ European Court of Human Rights, Grand Chamber, judgment of 4 December 2007, application no. 44362/04, *Dickson v. United Kingdom*.

⁹⁰ In Italy see: Court of Cassation, judgment of 2 March 1999, no. 1739, p. 613.

⁹¹ *Legge federale sul diritto internazionale privato (LDIP)*, 18 December 1987, RU 1988, p. 1776. The German text of the Statute appears in *Bundesblatt*, 1988, I, 5-60; the French text in *Feuille federale*, 1988, 5-56; the Italian text in *Foglio federale*, 1988, I 5-56.

⁹² In Italy see: Court of Cassation, judgment of 2 March 1999, no. 1739, p. 613.

⁹³ In Belgium: Constitutional Court, judgment of 4 June 2009, no. 96/2009, *El Haddouchi*, available at https://www.stradalex.com/fr/sl_src_publ_jur_be/document/cconst_2009-96.

⁹⁴ R. ESPINOSA CALABUIG, *Sorority, Equality*, cit., p. 119 ff.

wife is strongly prejudiced when she is required to share her succession's portion of the deceased husband. The approach aiming at considering the factual situation leads in these cases to the accommodation of religious values, recognizing the effects of polygamous marriages, and suggesting the division of estates or of the survivor's pension among the wives of the deceased husband.⁹⁵

6. Conclusive Remarks

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

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 hitherto offered to 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.

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, funded on religious rules (polygamy, repudiation, *kafalah*, *mahr*), may develop solutions in conflict with the fundamental rights enshrined in the ECHR, and in some cases with gender fundamental 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.

Treaty law does not seem able to provide effective remedies to these problems, above all to problems concerning complex and religious systems, because Islamic States traditionally do not join the Hague Conventions, with some exceptions.⁹⁶

⁹⁵ In Belgium: Court of Cassation, judgment of 18 March 2013, in *Revue trimestrielle du droit de la famille*, 2013, p. 861.

⁹⁶ For example Morocco ratified the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, India ratified the 1993 Convention on the Protection of Children and Cooperation in respect of Interstate Adoption. This Convention is very important because it states that the recognition of *kafalah* requires the cooperation of the Central Authority of both the State of origin and the receiving State. Italy finally joined this Convention, here in force since 1 January 2016. See Council Decision 2008/431/EC of 5 June 2008 *authorizing 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*. In literature see M.C. BARUFFI, *La Convenzione dell'Aja del 1996 sulla tutela dei minori nell'ordinamento italiano*, in *Rivista di diritto internazionale privato e processuale*, 2016, p. 975; F. SALERNO, *The*

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 on the Recognition of Divorces and Legal Separations, as it sets up the conditions under which foreign divorces 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, the ones valid in one State but not in another. So, to make repudiations recognizable abroad, the Convention states that they must “follow judicial or other proceedings officially recognised” (art. 1 of the 1970 Hague Convention) in the State where they take place. Even if the 1970 Hague Convention 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.⁹⁷ Moreover, 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 State or before a religious authority here would not be considered to comply with the 1970 Hague Convention. Finally, to recognise repudiation according to the 1970 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.

Different problems are posed by Art. 6(2), which reads that “[t]he 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”. This rule is a clear attempt to overcome the conflict between religious rules and gender human rights, and for this reason probably it does not motivate the ratifications by States with legal systems funded on religious rules. 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 is granted must be in accordance with the matrimonial law (namely Hindu law) under which the parties are married”.⁹⁸ 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.

Identity and Continuity of Personal Status in Contemporary Private International Law, in *Recueil des Cours*, 2019, Vol. 395, p. 55 ff.; M. ORLANDI, *La kafala di diritto islamico, tra diritto internazionale privato e diritto europeo*, Torino, 2021; C. HONORATI, M.C. BARUFFI, *EU Private International Law in Family Matters*, Cambridge, 2022.

⁹⁷ H. VAN LOON, *The Accommodation of Religious Laws in Cross-border Situations: The Contribution of the Hague Conference on Private International Law*, in *Cuadernos de derecho transnacional*, 2010, p. 263.

⁹⁸ Indian Supreme Court, judgment of 9 July 1991, *Y. Narashima Rao v. Y. Venkatalakshmi*, available at indiankanoon.org/doc/989920.

Choice of law in family issues may be a solution to overcome mandatory religious rules, as suggested by the ECtHR.⁹⁹

Recognition of factual situations, in which the woman's position is not equal to that of the man may be a solution – as in the case of the *mahr* connected to a repudiation – rather than to sacrifice the woman's property rights, which would otherwise leave her, in a condition of vulnerability as migrant women, without any means of support.¹⁰⁰

Likewise, a new interpretation of the public policy exception seems to be gradually developing as a way to achieve the respect of fundamental rights, and of gender fundamental rights. The application of the public policy exception points out 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, and especially in view of the protection of women's rights, 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,¹⁰¹ or the inheritance rights of the relatives.¹⁰²

The suggested solution is interesting as an inclusive tool of religious values, and as a way to achieve legal pluralism.¹⁰³ Within this solution, new interpretative approaches, such as “sorority” (women's solidarity in respect to private international law issues) may help to empathize and to appreciate the gender perspective.¹⁰⁴ 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, even for their effects on immigration issues.¹⁰⁵

⁹⁹ European Court of Human Rights, *Molla Sali v. Greece*, cit., para. 57.

¹⁰⁰ See *supra* para. 5.

¹⁰¹ In Belgium: Court of Cassation, judgment of 18 March 2013, in *Revue trimestrielle du droit de la famille*, 2013, p. 861.

¹⁰² In Italy see: Court of Cassation, judgment of 2 March 1999, no. 1739, p. 613.

¹⁰³ See on this point the suggestions of the European Court of Human Rights, *S.A.S. v. France*, cit., para. 120, affirming that “the veil is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy”.

¹⁰⁴ R. ESPINOSA CALABUIG, *Sorority, Equality*, cit., p. 129.

¹⁰⁵ Many doubts may arise in order to the recognition of marriages of Muslim women with Italian citizens in their national State, even if authorized by the Italian judges for public policy reasons. 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 Tribunal of Turin, decree of 24 February 1992, in *Rivista di diritto internazionale privato e processuale*, 1992, p. 985; Tribunal of Turin, decree of 24 June 1993, in *Diritto della famiglia*, 1993, p. 1181; Tribunal of Naples, decree of 29 April 1996, *ivi*, 1996, p. 454.

ABSTRACT: The wide evolution of private international law is currently recalling attention to the general aspects of the discipline. Europeanization and globalisation of sources of private international law do not preclude the chance that conflict of laws should also deal with individual identities. To the extent that the European systems have hitherto offered to 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's 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 States, cultures, values, civilization, religion, are never absent from the solutions of personal status. Stepping back from the analysis of some cases where religious values are relevant, this article aims at a theoretical analysis of the subject, involving the contrast between value pluralism, conflict of laws and fundamental rights of migrant women.

KEYWORDS: conflict of laws – fundamental rights – gender rights – public policy – migrant women – *electio iuris*.