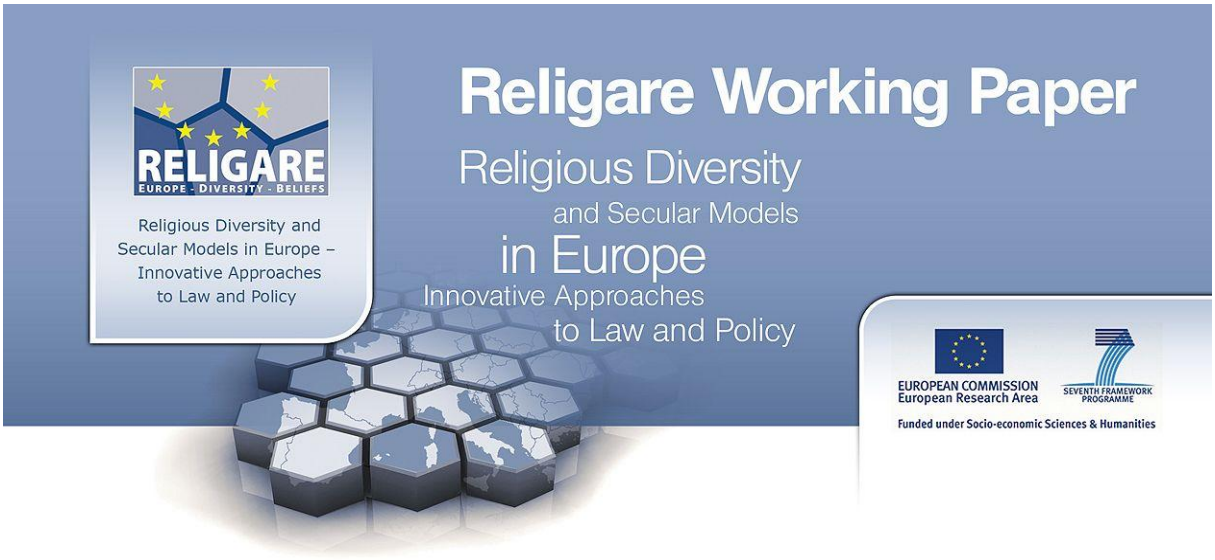

The Family: A State of the Art

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RELIGARE Working Paper No. 2 / September 2010

Abstract

Private international law is mainly concerned with linking private law relations to a national legal system. Its rules are usually only used when the relations at stake have cross-border elements. This legal discipline uses a tight methodology: classifying the legal problem and employing connecting factors to refer to a particular legal system. This paper considers the various elements of private international law that are indicative of the positivistic nature ascribed to it. In doing so, it demonstrates that private international law is not neutral, but often concerned with the outcome.

As private international law is a formal legal discipline, it can be used to keep legal pluralism out. For instance, by the use of connecting factors on the one hand and exceptions (such as public policy) on the other, private international law can prevent the application of certain legal norms. Alternatively, private international law can show itself to be tolerant and allow the application of different norms.

The paper concludes with suggestions for further research.

This State of the Art Report falls within the scope of Work Package 3 on The Family of RELIGARE (Religious Diversity and Secular Models in Europe – Innovative Approaches to Law and Policy), a three-year project funded under the Socio-economic Sciences & Humanities Programme of DG Research of the European Commission's Seventh Framework Research Programme. For more information about the project, please visit: www.religareproject.eu.

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Introduction

This paper has the modest objective of giving a description of the state of the art in current literature that is relevant for RELIGARE's research on *The Family*. Within this sub-topic, RELIGARE partners will conduct research on the way in which religious family law is dealt with and perceived within the legal systems of Europe, and also how it should be dealt with. The sociological research will help us to see where the tensions lie in family law, and why the current solutions are in many instances inadequate. On the basis of both the results of the sociological research and of the case law in different countries, we will formulate recommendations for more appropriate practices.

In this paper, I will first look at the current state of private international law as described and discussed in the literature. I will then turn to discussions about legal pluralism. Throughout the paper, the focus will be on the state of affairs in Europe, as this is the domain of RELIGARE's research. In the last instance the relevance of European Union law will be briefly considered.

Private international law: General

1.1 A positivistic branch of law

Private international law is the branch of law that deals with the clash between legal systems. Its point of departure is the basic notion that a national court cannot in all circumstances apply its own national law to private law disputes. This is because private law relations may be more closely linked to a system other than that of the forum in which the dispute is being heard.

The need to refer to a different legal system has been explained in terms of vested rights.[2]

Private international law is a positivistic branch of law, at least in theory, in that it is in principle composed of rules. Its nature is procedural, i.e. it is concerned with the route to a particular legal system. As will be shown, however, through its exceptions, it can manipulate the route in order to get to the application of another legal system.

Let us first investigate the various elements of private international law that are indicative of its positivistic nature (in theory).

First, it is made up of rules (an element of positivism) about how to find the legal system that will regulate the private law relations in question. The 'connecting factors', as the rules pointing to a particular legal system are called, are rigid. For instance, in order to determine whether a person aged 17 can conclude a valid marriage, one has to look at the legal system of that person's nationality (according to most civil law systems)[3] or of the person's domicile or place of marriage (according to most common law systems).[4]

[2] See, for instance Brilmayer, L. (1989), "Rights, fairness and choice of law" 98 *Yale Law Journal* pp. 1277-1319 and P. Dane (1987), "Vested Rights, 'vestedness' and choice of law" 96 *Yale Law Journal*, pp. 1191-1275.

[3] France: Art 3 of the civil code and its interpretation, see B. Audit, *Droit international privé* (4th edn, Paris: Economica, 2006), 515; Germany: Art 13 I of the *Einführungsgesetz zun Bürgerlichen Gesetzbuch (EGBGB)*, 18 August 1896, see Kropholler, J. *Internationales Privatrecht* (6th edn, Tübingen: Mohr Siebeck, 2006) 330; Belgium: Art 46 of the Code on

The rule of private international law itself is meant to be clear and strict. The purpose of rules of this type is to promote legal certainty:[5] if this branch of law provides us with unambiguous pointers to a particular legal system, people are supposed to know where they stand and can arrange their lives in accordance with the legal rules.

Second, connecting factors refer to state law.[6] Private international law rules will not refer to religious law, unless these rules are part of the official legal system of a particular country (such as in case of Morocco).[7] If a person from Turkey (i.e. having Turkish nationality or being domiciled in Turkey), which has a secular civil code, lives in a European country and wants principles of Islamic law applied to his or her civil status, he or she cannot call upon the rules of private international law to reach such an outcome. Even in the domain of contract law, there is a great reluctance to move beyond state legal systems.[8]

These two elements indicate the rather positivistic nature of private international law. It aims, in theory, to reach legal certainty and has state legal systems as its main 'clients'.

However, in an increasingly complex society, both practice and literature show that the application of the rules of private international law does not always lead to certainty. Literature has indicated how private international law is instrumentalised to reach certain policy objectives.[9] Such instrumentalisation can take place by the adoption of legislation, or by the way in which courts apply private international law rules. In essence, a certain goal is pursued and the rules are applied in such a way as to reach the pre-determined goal.

In fact, the very notion of legal certainty can be questioned: what is legal certainty? Whose certainty? A part of the literature has accepted that legal certainty does not exist, and investigates how individuals confronted with legal problems navigate the uncertainty to gain the maximum for themselves. The next issue to arise is whether these individuals effectively navigate the uncertainty

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Private International Law (Act of 16 July 2004), *Moniteur belge* 27 July 2004; Netherlands: L. Strikwerda, *Inleiding tot het Nederlands internationaal privaatrecht* (8th edn, Deventer: Kluwer, 2005) 97.

[4] For example, England: J. Fawcett & J.M. Carruthers, *Cheshire, North and Fawcett, Private International Law* (14th edn, Oxford: Oxford University Press, 2008) 896. The alternative doctrine that exists in England is that the law of the intended matrimonial home is applicable.

[5] See, for instance, Hoffmann, J., *Internationales Privatrecht* (Munich: Verlag CH Beck, 2002) p. 4.

[6] See Gaudemet-Tallon, H. "Le pluralisme en droit international privé: richesses et faiblesses (le funambule et l'arc-en-ciel" 312 (2005) *Collected course of the Hague Academy of international Law* at 203 explains that for private international law, a connecting factor that refers to a religion is seen as unfavourable for internationally harmonized solutions and for a good coordination of conflict rules.

[7] For instance, the Moroccan family law code, called the *Moudawwana*; see the website of the Moroccan Ministry of Justice: http://www.justice.gov.ma/MOUDAWANA/Frame.htm for the text of the code and a practical guide.

[8] For instance, the initial proposal by the Commission for a regulation on the law applicable to contractual obligations (Rome I) COM(2005) 650final (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0650:FIN:EN:PDF) contained the explicit rule that parties may choose non-State law. Art 3(2): *The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community*. The provision was, however, not kept in the final EC Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ* 2008 *L* 177, 6, due to lack of consent. In England, in *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* (No.1) [2004] 1 WLR 1784 the court of appeal considered a contract in which there was a choice for an English court and a choice for sharia law. The Court rejected applying the sharia clause saying that only rules of state jurisdictions are envisaged.

[9] Van Den Eeckhout, V. (2005), "Instrumentalisation and Private International Law", seminar on "Instrumentalisation of and by Migration Law".

and benefit from it, or whether they fall victim to it, never being able to rely on rights that have accrued in a previous home state.

1.2 Characterisation in private international law

Private international law, as has been explained, connects legal issues to a particular legal system. In order to make this connection, a preliminary step is necessary: characterisation, or classification. This means that as a first step when there is a private dispute with cross-border elements, the dispute has to be placed in the correct category of the law. For instance: when a Turkish citizen living in Germany divorces his German wife, various issues arise that must each be attached to a particular category. Relevant issues might be classified as divorce, maintenance, matrimonial property. For each of these categories, the connecting factor has to be determined independently.

As lawyers we can make this classification without too much difficulty, at least if the other legal system in question is structured in more or less the same way as the one which we are familiar. When a legal dispute concerns elements from more than one European country, based on secular law, the classification is relatively simple. Confusion sometimes arises with respect to neighbouring categories, such as maintenance and matrimonial property. Generally, though, the classification is feasible.

However, foreign legal systems do not always follow the same logic as our own. And this goes to the heart of private international law and the limits this discipline might be facing. If the dispute falls under a legal institution that does not as such exist in the legal system doing the classification (the law of the forum), the foreign institution has in some way to be fitted into the categories known in the legal system making the classification. This is sometimes called "substitution" or the "principle of equivalence".[10]

This principle is reverted to when an institution of religious law has to be classified. Classifying an Islamic *Talaq* or *Kohl*, or a Jewish *Get* as divorce, does not require too great a stretch of the imagination. While these forms of marriage dissolution are not divorces in the sense that they are not granted by a judge, private international law rules of classification are sufficiently flexible to overcome this stumbling block.

However, there are other religious institutions that are much more difficult to squeeze into a category of European law. The examples most often found in the literature are *Mahr* and *Kafala. Mahr* refers to the gift that the groom gives to the bride under sharia law.[11] The gift is sometimes (partially) given at the time of marriage, sometimes (partially) given at a later moment, for instance the birth of a child, and sometimes (partially) given at the end of the marriage. This is determined contractually, although spouses sometimes later argue that what was said in the contract was not really meant literally. There are different views about how *Mahr* should be classified. One possibility is maintenance, another is matrimonial property, yet another is simply as a contract.

Kafala refers to the taking into care of a child by (a) person(s) other than his or her biological parents. The care and the parental authority over the child are then transferred to this person. *Kafala* is not adoption, since the concept of adoption as it is known in European legal systems is prohibited by

[10] Professor J. Erauw taught a course at The Hague Academy for International law in the summer of 2010 on "Substitution and Principle of Equivalence in Private International Law". The lectures of this course will be published in The Hague Academy's Collected Courses.

[11] See Nanji, A. (2008), *Dictionary of Islam*, London: Penguin Books, p. 106

sharia law. Here again, the problem of classification is apparent: it looks like adoption, but it's not. Some prefer a classification of adoption-without-inheritance-rights. It looks like foster care, but it is something more than that. So how can we fit it into a European category of law?

Literature on private international law, also when case law is discussed, is often concerned with this problem of classification: what is the best way to fit a foreign legal institution into a European one? The very notion of classification itself is seldom questioned.[12]

1.3 Connecting factors

After the classification, the next private international law step of interest to us is that of connecting factors. Once we have passed the difficulty of characterisation, and we have successfully (or forcibly) chosen the legal category within which the dispute at hand should be dealt with, we have to connect it via the "connecting factor" to the correct legal system.

Connecting factors in family law refer most often to the nationality, domicile (according to the common law definition of this term,[13] or habitual residence of the person(s) concerned.

It should be noted at this point that the use of religion as a connecting factor is infrequent and often disliked by scholars of private international law.[14]

While in civil law countries nationality is often used as a connecting factor, the concept of domicile is more popular in common law countries. In some civil law countries, habitual residence is more popular than nationality, or has become more popular in recent legislation.[15] In common law, in international treaties and in EU law, habitual residence is used more frequently.[16]

The use in private international law of the concept of habitual residence rather than nationality or domicile is not without significance for the application of religious legal systems. When reference is made to the habitual residence of the persons involved in the dispute, this would lead to the application of the legal system of the (European) country in which they are living.

Let us take the example of two Moroccan citizens living in France. If the law of their nationality is applied to a particular matter concerning their marriage, matrimonial property or divorce, Moroccan law would be applied. As has been explained, Moroccan family law is based on the sharia law and therefore a religious legal system would be applied to these persons. However, if the law of their habitual residence is applied to the matter at hand, that would be French law; a secular legal system. If

[12] An exception is Sew Rutten (2009), "Een andere aanpak van de Islamitische bruidsgave" (A different approach to the Islamic bridal gift) *Familie- en Jeugdrecht*, pp. 329-335, arguing that classification does not provide a satisfactory solution for the application of the *Mahr* in a European legal system (in this case that of the Netherlands). According to her, the doctrine of *vested rights* provides a better approach.

[13] According to the common law, *domicile* has a physical and a mental component, i.e. one's domicile is the place where one lives with the intention of living there permanently (for an indefinite period of time). See Fawcett, J. and J.M. Carruthers, *op cit* (fn 4) p. 154 and pp. 157-159. Every person also has a domicile of origin, which he or she receives at birth and which can in certain conditions revive, see Fawcett, J. and J.M. Carruthers, pp. 171-174.

[14] See the Resolution by the ninth Commission of the Institute of international law on Cultural differences and *ordre public* in private international law (adopted in Krakow in 2005; available at http://www.idi-iil.org/idiE/resolutionsE/2005_kra_02_en.pdf, accessed on 11 June 2010), Section A.1.

[15] For instance, when Belgium enacted its Private International Law Code (see above, fn 3), there was a deliberate move away from nationality towards habitual residence in many domains of family law.

[16] See Rogerson, P. (2000), "Habitual residence: the new domicile?", *International and Comparative law Quarterly*, pp. 86-107.

we assume for argument's sake that the persons adhere to the Islamic faith, the connecting factor of nationality facilitates the application of their religious law, while a connecting factor of habitual residence does not.

The choice of habitual residence as connecting factor by legislators is not incidental.[17] It is a policy choice for the integration of newcomers rather than diversification; it is a choice that makes the job of judges easier as they will more frequently be applying their own law rather than the foreign law of the nationality of people living in their country and coming before their courts. The choice of habitual residence rather than nationality as a connecting factor can indicate intolerance towards newcomers, i.e. implying that they should integrate. On the other hand, it can also be based on concern for newcomers, out of a belief that they are more closely connected to the country in which they are now living than to the country of which they have nationality.

1.4 The growing trend towards party autonomy

One of the trends in modern legislation on private international law is a move towards more party autonomy. This means that parties more often have the opportunity to choose the law that will regulate their legal situation. While party autonomy is a widely accepted principle in contract law,[18] it is being extended to other areas of private international law. Thus, the choice by the parties is now also used as connecting factor for other categories of the law. This possibility of choice has in some recent legislation or international instruments been extended to maintenance,[19] divorce,[20] matrimonial property,[21] and succession.[22]

[17] See also Hartley, T.C. "The integration theory v acquired rights. The way forward for matrimonial-property choice of law in the EC" in Venturini, G. and S. Bariatti (2009), *New Instruments of Private International Law. Liber Fausto Pocar* (Milano, Guiffrè Editore), pp. 467-472.

[18] Nygh, P.E. (1995), "the reasonable expectations of the parties as a guide to the choice of law in contract and in tort" vol. 251, *Collected Courses of the Hague Academy of International Law* 271-400 at p. 297.

[19] See for instance Arts 7 and 8 of the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations (http://www.hcch.net/index_en.php?act=conventions.text&cid=133). These provisions allow the maintenance creditor and maintenance debtor to agree on the law that will be applicable to their dispute. The choice is limited to a legal system that is linked to the nationality or habitual residence of the parties, or to the court hearing the dispute, or to the divorce or property regime of the parties. The rules of the protocol have been taken over by EC 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, *OJ* 2009 *L* 7, 1, see Art 15. Neither instrument is yet in force.

[20] This possibility would have been introduced in EU law by an EC Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters; see the European Commission's proposal of 17 July 2006, COM(2006) 399 final (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0399:FIN:EN:PDF). Art 20a of the proposed Regulation allowed divorcing parties a (limited) possibility to choose the law that should be applied to their divorce. This Regulation, however, was not enacted because of lack of consensus, while the relevant procedure at the time was unanimity. It is possible that an instrument will be introduced in some EU Member States through the mechanism of enhanced cooperation. However, this instrument highlights the trend towards more party autonomy in private international law, also in the field of family law.

[21] See for instance the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes (http://www.hcch.net/index_en.php?act=conventions.text&cid=87). Art 3 provides that the spouses may choose the law applicable to their matrimonial regime, to a limited extent. This Convention is in force in France, Luxembourg and the Netherlands, and has in addition been signed by Austria and Portugal. The Convention has also influenced Art 49 of the Belgian Code on Private International Law (see above, fn 3), which is almost exactly the same as the Convention's Art 3.

[22] See for instance the Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons (http://www.hcch.net/index_en.php?act=conventions.text&cid=62). Art 5 permits a person to designate the law applicable to the succession of his or her estate. The choice is limited. This Hague Convention has not yet entered into force. It has been signed by Austria, Luxembourg, the Netherlands and Switzerland. This provision has furthermore influenced Art 79 of the Belgian Code on Private International Law (see above, fn 3).

In most cases the choices permitted to the parties are limited to the legal systems that have a link to the dispute or to the parties (such as that of their nationality or their habitual residence). Even if the options are limited, the relevant point here is that private international law no longer merely dictates, but now also offers a say to the parties. Individuals thus can influence which legal system will be applicable to them. Since nationality and habitual residence are often factors upon which individuals can base their choice, this indicates that they can decide which legal system they feel closer to. In this way, private international law no longer applies objective criteria, but allows a form of self-identification to its client.

Allowing more party autonomy is in line with private international law's concern with the outcome. Giving more say to parties erodes the positivistic, methodology-orientated nature of private international law.

The empowerment that this offers for individuals living between two legal systems should be researched in the light of sociological literature on identity.

1.5 The exception of public policy in private international law

Private international law provides exceptions that permit a deviation from the appointed law in certain circumstances.

An important exception for our purposes is that of public policy. This old and well-established principle means that if the legal system which is found to be applicable (through the connecting factors) would have effects that are repugnant, the rules of that legal system can be set aside on the basis that they are contrary to public policy or *l'ordre public.*[23]

Public policy is a way of safeguarding certain moral values in a society. It is also the gateway of human rights protection into private international law, such as the right to equality and children's rights. At the same time, the public policy exception can also be used to play out the conflict between religious and secular laws, although there are voices claiming that public policy should not be used for this purpose.[24]

Matters that have been excluded from application by European courts on the basis that they are contrary to public policy include Islamic repudiations (including *talaq* and *kohl*), the Jewish *get*, polygamy and child marriage.

Repudiations and the *get* have been found to be contrary to public policy on the basis that these legal institutions are by their nature discriminatory to women: they are forms of marriage dissolution that are based on the initiative of the husband while the wife does not have the same rights.

Polygamy is also considered contrary to the right to equality: men are allowed to have more than one wife, but women are not allowed to have more than one husband according to the legal systems concerned. According to some writers polygamy is also considered contrary to public policy because

[23] The French term is sometimes used, because the notion has been often used in cases and legal writings in France.

[24] See the Resolution by the ninth Commission of the Institute of international law on Cultural differences and *ordre public* in private international law, *cit* (fn 14), section A.2., stating that public policy should not be invoked against the applicable foreign law on the sole ground that this law is religious or secular.

one of the essential characteristics of marriage in Europe is that it is monogamous.[25] The difference here seems blurred, but is essential: do Europeans not like polygamy because it is contrary to the essence of their understanding of marriage, or do they not like it because it infringes women's right to equality? In other words, if women were also allowed to have more than one husband, on the same basis as men, would polygamy then be OK, i.e. not contrary to public policy?

Child marriage is contrary to public policy because it infringes children's rights, as embodied in the UN Convention on the rights of the child.[26]

Each of the above-mentioned institutions has been discussed in the literature and has in their own way contributed to the debates. Much ink has indeed flowed concerning the exception of public policy and the extent of its application.

A first issue that has been debated is whether public policy should be regarded in abstract or concrete terms.[27] It is again the phenomenon of polygamy that provides material for the debate. While there is agreement in European legal systems on the fact that polygamy is contrary to public policy, there is disagreement about the extent to which this is the case. The disagreement pertains, for instance, to whether a potentially polygamous marriage is contrary to public policy, or whether a marriage is only contrary to public policy if it is effectively polygamous.

Second, public policy is a broad notion rather than a strict rule, and its application is said to be relative. This can be illustrated by child marriage. A marriage between two 17 year-olds will not necessarily be considered contrary to public policy, while a marriage of a girl aged 12 or 13 is much more likely not to be recognised in Europe as it will be considered contrary to public policy.

A similar illustration can be drawn from repudiation. In some countries a repudiation will be accepted if the wife had explicitly consented to the dissolution of the marriage and her rights of defence had not been infringed.

When considering this relativity of public policy, account is taken of the extent to which the situation is linked to the European legal system in question. For example, if the repudiation took place a long time previously when neither of the parties had the nationality or was habitually resident in Europe, the chances are higher that the repudiation will be recognised.

Third, and linked to the second issue, is the fact that the impact of the rule is considered in the determination of whether it is contrary to public policy. A good example is again found in polygamy. When the question concerns a pension (or part of a pension) for the second wife of a deceased man, the effects of recognising the polygamous marriage is rather small. The second wife can in many legal systems be accepted as a spouse and receives half of the pension. This route taken by the case law has been accepted in the literature.

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[25] See for instance, Lagarde, P., "Reference to public order ('ordre public') in French Private International law" in Foblets, M-Cl., J-F. Gaudreault-Desbiens and A. Dundes Renteln (2010), "Cultural Diversity and the Law. State responses from around the world" (Brussels: Bruylant) 521-546 at p. 529.

[26] Concluded in New York in 1989 and currently having 193 Contracting States (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en).

[27] See, for instance Foblets, M-Cl. And S. Rutten, "De toelaatbaarheid van de verstoting: recente ontwikkelingen in Nederlands, Frans en Belgisch internationaal privaatrecht" (The permissibility of repudiation: recent developments in Dutch, French and Belgian private international law) in Van Der Grinten, P. and T. Heukels (2006), *Crossing Borders. Essays in European and Private international law, Nationality law and Islamic Law in Honour of Frans van der Velden* (Deventer: Kluwer), pp. 195-213.

Fourth, human rights are considered when public policy is discussed. However, as has been explained above, this human rights discourse sometimes becomes blurred with aspects of morality. In this sense, there is sometimes reference in literature on private international law to the principle of *favor divortii* (i.e. that a solution that favours divorce, rather than one that prevents parties from divorcing, should be chosen). Divorce can hardly be classified as a human right in itself. However, the right to be able to divorce is embedded in most European legal systems[28] and as such has had implications for the notion of public policy.

Fifth, the matter of so-called 'limping' legal situations has been discussed in the literature. This refers to situations in which a couple is considered as married in one country, but divorced in another, because there has been a repudiation in one country, but that repudiation is not being recognised in the other country with which the persons concerned have links. Being stuck in a limping legal situation causes innumerable and insoluble problems for individuals. This has been acknowledged in the literature and there is a consensus that limping situations should be avoided as much as possible. This can hardly be contested. But the way in which one can avoid limping situations has been discussed in the private international law logic, i.e. taking classification and connecting factors and the exception of public policy into account.

For the purposes of this state of the art paper, it is also worth mentioning elements that have not been explicitly, or in any event not extensively, discussed in the literature.

First, the idea of *reasonable accommodation* has had little resonance in private international law literature. This notion is often used in discussions about religion in the work place.[29] Even though the discourse is different, it is worth posing the question whether the concept of *reasonable accommodation* underlies the idea of the relativity of the public policy exception. Can we speak of reasonable accommodation when Europeans recognise some of the effects of polygamy, while they are actually against it? This seems similar to the idea that the work place is neutral, but accommodation can be made for certain practices.

Second, the principle of the secular nature of the state does not seem to be defended by the public policy exception. This issue has cropped up in the United States, where it has been found inappropriate for courts to investigate matters of religion, on the basis of the doctrine of entanglement. As private international law is in essence concerned not with religion, but with state law, religious law can only be applied if a foreign state's law is based on that religion. Thus, state law rather than religious law is applied. This approach is in line with the positivistic and state-oriented nature of the discipline of private international law. The result seems to have been that the question of entanglement has not really come up.

Legal pluralism: Unreigned chaos?

Legal pluralism embraces diversity. In this field, authors advocate in favour of permitting the existence of various legal norms alongside each other. Some of these norms can be cultural or

[28] Of all EU countries, Malta is the only in which divorce is not possible. However, divorces proclaimed in other countries can in certain circumstances be recognised in Malta.

[29] See the state of the art paper for Work package 4: Religion and the workplace, by K. Alidadi.

religious in origin. Law is, in the end, not a static set of rules imposed from above, but rather an organic way in which people give structure to their lives and societies.

In most cases it is not the same authors that write on private international law and on legal pluralism.

As private international law is a formal legal discipline, it can be used to keep out legal pluralism. For instance, by the use of connecting factors on the one hand and exceptions (such as public policy) on the other, private international law can prevent the application of certain legal norms. Alternatively, private international law can show itself to be tolerant and allow the application of different norms.

Private international law seeks, through its connecting factors, which foreign legal system should be applied to a particular situation. Normally private international law comes into play only in cases with a foreign element, i.e. cases in which a choice should be made between the application of different legal rules. If private international law retains this definition, it can be used to prevent the application of other (religions') rules in many cases. By the determination that a case is not international, the conclusion is made that the particular state's legal rules should govern a situation. Other legal systems, be they foreign, state or religious, are not granted entry through the door of private international law.

Similarly, by using (instrumentalising?) private international law, the reality of the existence of various legal systems alongside each other (and alongside the formal legal system) in a single state can be disregarded. Yet again, the door is simply not open.

Private international law can also be used to guard over the secular nature of the state. In response to questions about the extent to which the state can permit the application of norms that are religious, private international law can be used to answer that only formal state legal systems can be applied. Although the secular nature of the state has not explicitly entered private international law discussions, the discipline is part of that reality and implicitly keeps it in place.

In the last instance, reference should be made to the debate of conflicting rights.[30] The relationship between the freedom of religion and the right to equality is at the centre of the distinction between strong and weak pluralism. The debate is difficult because it soon faces its limits: if one right is found (or presumed) to be more fundamental than another by one party to the debate, while the opposite is found by the other, the parties cannot see eye to eye and no longer speak to the same issue.

The relevance of European Union law

The European Union has gained competence in the field of private international law (judicial cooperation in civil matters) through the Treaty of Amsterdam.[31] Since that time, several instruments have been adopted under the new competence, among others concerning family law.

The EU's competence is relevant in several ways.

[30] See, for example, Brems, E. (ed) (2008), *Conflicts between Fundamental Rights* (Antwerp: Intersentia).

[31] See Title IV "Visas, Asylum, Immigration and Other Policies related to the Free Movement of persons" of Part 3 of the Treaty Establishing the European Community (Amsterdam version); *OJ* 1997 *L* 340, 1. In the Lisbon Treaty these matters can be found in Title V "Area of Freedom, Security and Justice" of Part 3 of the Treaty on the Functioning of the European Union; *OJ* 2010*C* 83, 47. See also Carrera, S. and J. Parkin, "The Place of Religion in European Union Law and Policy", RELIGARE working paper published at www.religareproject.eu.

Most notably, in these fields the EU Member States[32] have to an extent unified their rules, especially in the field of jurisdiction. Also, judgments and authentic acts emanating from one Member State can be easily recognised in other Member States. Rules to this effect exist on divorce, parental responsibility[33] and maintenance.[34] This means that a divorce validly pronounced in one Member State will in principle[35] be recognised in the others.

However, there are as yet no EU rules on the recognition of marriage. Thus, a marriage (whether civil or religious) concluded in one Member State will not automatically be recognised in the others. The recognition or non-recognition in France of a religious marriage concluded in the United Kingdom is a question for French law.

Moreover, EU rules have their limits: a divorce obtained in a third state (non-Member of the EU) will be recognised in the EU Member States according to the national private international law rules of each Member State. According to the maxim *exequatur sur exequatur ne vaut* (no enforcement of enforcement proceedings), the fact that one state recognises an act of divorce does not have any bearing upon another state considering such recognition. The result is that a person who has divorced outside the EU might be in a situation where one EU Member State recognises the divorce while another does not.

The fact that the EU has taken up its competence on a certain matter also means that the EU gains (exclusive) external competence on the matter. This is relevant for research on the family in the context of the religion-secular divide, as well as for any policy advice RELIGARE might wish to give. The principle is that a Member State cannot conclude a treaty with a third state for matters in which the EU has exclusive external competence. However, the EU has become aware of the difficulties this poses, since some Member States have treaties with third states, but wish to amend these treaties. Others want to conclude treaties with particular third states with which they (or the people living on their territory) have special links. A Regulation was therefore adopted to create some room (and a particular procedure) for Member States that wish to conclude new treaties or amend old ones with third states.[36]

Apart from the EU legislation that has been referred to above, EU law can also play a role through its principle of free movement of persons. The European Court of Justice (ECJ) guards this freedom (along with the other freedoms of EU law) and ensures that there is no infringement of it due to particular national rules.

[32] With the exception of Denmark: see Protocol (No 22) to the Lisbon Treaty on the position of Denmark. Ireland and the United Kingdom have a special regime in matters concerning the area of freedom, security and justice, allowing them to opt in or out of measures taken in these matters: see Protocol (No 21) to the Lisbon Treaty on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice.

[33] See the so-called Brussels II bis Regulation, EC Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, *OJ* 2003 *L* 381, 1.

[34] EC Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, *OJ* 2009 *L* 7, 1. Note that this Regulation has not yet entered into force.

[35] Subject to certain exceptions, such as public policy, respect for the defendant's procedural rights, and previous contradictory judgments etc (see Arts 22-23 of the Brussels II bis Regulation).

[36] See EC Regulation 664/2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations, *OJ* 2009 *L* 200, 46.

Private international law has not escaped this scrutiny by the Court, for instance concerning national rules on the name a child can take.[37] The ECJ has ruled that national rules may not have the effect that a persons' free movement is hampered because they would have a different name in different EU Member States.

It is not inconceivable that the principle of free movement of persons may also be relied on by a citizen wishing equal recognition of his or her civil status (i.e. married or divorced) in all EU Member States. The European Court of Justice might have to consider such a demand, in light of the free movement of persons.

Conclusion: Where do we go from here?

There are several untrodden, or barely trodden, routes that are interesting to explore for RELIGARE's Work Package 3. They include:

1. Can private international law rules be used in a more flexible way?
2. Can the clash between religious and secular legal systems at the international level and at the national level be compared, and common solutions found?
3. What is the place of the principle of the separation of religion and state in private international law? What is the relevance of *reasonable accommodation*?
4. How do individuals navigate between the different options? Do they choose strategically?
5. How do other jurisdictions perceive the legislation and case law in Europe on family matters where there are elements of religious legal systems at play?

[37] See ECJ case C-353/06, *Grunkin*, *ECR* 2008, I-7639 and ECJ case C-148/02, *Garcia Avello*, *ECR* 2003, I-11613.

Project Identity	
Title:	RELIGARE - Religious Diversity and Secular Models in Europe. Innovative Approaches to Law and Policy
Funding Scheme:	Collaborative Project (CP): small or medium-scale focused research project
Coordinator:	K.U. Leuven (Faculties of Law and Canon Law), Prof. Marie-Claire Foblets
Project Managers:	Dr. Jogchum Vrielink Dr. Myriam Witvrouw
Duration:	1 February 2010 – 31 January 2013 (36 months)
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Short Description:	The RELIGARE project is about religions, belonging, beliefs and secularism. It examines the current realities in Europe, including the legal rules protecting or limiting (constraining) the experiences of religious or other belief-based communities. Where the practices of communities or individuals do not conform to State law requirements, or where communities turn to their own legal regimes or tribunals, the reasons behind these developments need to be understood.
Partners:	13 (10 countries)
Consortium:	Centre for European Policy Studies (CEPS), Belgium Université Catholique de Louvain (UCL), Belgium International Center for Minority Studies and Intercultural Relations (IMIR), Bulgaria University of Copenhagen (UCPH), Denmark Centre National de la Recherche Scientifique: Politique, religion, institutions et societies: mutations européennes (PRISME), France Universität Erlangen-Nürnberg (UEN), Germany Università Degli Studi di Milano (UNIMI), Italy Vrije Universiteit Amsterdam (VUA), The Netherlands Universiteit van Amsterdam (UvA), The Netherlands Universidad Complutense Madrid (UCM), Spain Middle East Technical University (METU), Turkey Queen Mary, University of London (QMUL), U.K.
Website:	www.religareproject.eu
EC Funding:	2,699, 943 €
EC Scientific Officer:	Mrs. Louisa Anastopoulou (Project Officer)