

# Global Citizens and Family Relations

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## Abstract

As globalisation progresses, cross-border movements of people are becoming dynamic and multilateral. The existence of different groups and minorities within the community renders the society multiethnic and multicultural. As individuals acquire new affiliation and belonging, the conventional conflict of laws methods may no longer be viable and should be subject to a thorough re-examination. Against this background, this paper analyses appropriate conflicts rules in international family relations to reflect an individual's identity. Furthermore, in light of the contemporary law fragmentation, this study also analyses interactions between state law and non-state cultural, religious or customary norms.

**Keywords:** global governance, family relations, nationality, habitual residence, party autonomy

## 1 Introduction

As globalisation progresses, cross-border movements of people are becoming frequent, dynamic and multilateral. Immigrants from other regions or continents now render the vast majority of societies on the globe multiethnic and multicultural.<sup>1</sup> The existence of various groups and minority communities with divergent ethnic, cultural or religious backgrounds entails an inherent risk of compromising social cohesion.<sup>2</sup> Especially in Europe, discordant moral concepts and legal institutions aroused by Muslim immigrants result in 'conflicts of cultures'.<sup>3</sup> It is, therefore, a crucial question how best to accommodate cultural diversity and pluralism while upholding social order and fundamental values in the recipient society.

The conventional method of conflict of laws, which goes back to *Savigny* in the mid-nineteenth century,<sup>4</sup> consists in pointing to the law that has the closest connection with the legal relationship concerned. This method focused on localising the legal relationship, departing from the territoriality of legal systems grounded in positive state law.<sup>5</sup> However, the drawbacks and limitations of this method are gradually coming to light in view of the contemporary dynamic diversification of societies and cultures. Once individuals acquire a new, alternative affiliation or belonging,<sup>6</sup> the viability of conventional connecting factors needs to be re-examined. Furthermore, the increasing importance of religious or customary norms leads to a query as to whether and how far non-state norms interact with state law and should be considered or respected in regulating cross-border family relations.<sup>7</sup>

This paper examines from a viewpoint of global governance how conflict of laws should deal with cross-border family relations. It analyses possible solutions grounded on the effectivity of rules, rather than abstract territorial proximity to the legal relationship,<sup>8</sup> seeking a balance between state regulation and individual freedom. While the hegemony of sovereign states is gradually decreasing in globalisation in general, state governance has not lost its primordial importance in cross-border family relations in terms of upholding social order and protecting vulnerable parties through mandatory rules. Against this background, the paper first sheds light on contemporary discussions on the appropriateness of the principle of nationality or the principle of habitual residence in determining personal law. The study particularly contemplates how best to ascertain the law governing international family relations from the perspective of individual identity. Second, in view of cultural diversity and the multiplication of legal sources, the interactions between state law and non-state law and their possible accommodation in conflict of laws will be expounded on the basis of several examples. The results of this study will be summarised in conclusion.

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1. Y. Nishitani, 'Cultural Diversity and the Law: State Responses from around the World' (book review), *ZvglRWiss* 112, at 153 ff. (2013).  
 2. M-C. Foblets and N. Yassari, 'Cultural Diversity in the Legal Framework: Modes of Operation', in Foblets and Yassari (eds.), *Legal Approaches to Cultural Diversity* (Leiden/Boston 2013), at 3 ff.  
 3. See, *inter alia*, L. Gannagé, 'Les méthodes du droit international privé à l'épreuve des conflits de cultures', *Recueil des cours* 357, at 238 ff. (2011); R. Ahdar and N. Aroney, 'The Topography of Shari'a in the Western Political Landscape', in Ahdar and Aroney (eds.), *Shari'a in the West* (Oxford/New York 2010), at 1 ff.

4. F.K. von Savigny, *System des heutigen römischen Rechts*, Vol. 8 (Berlin 1849), at 2 ff.

5. H. Muir Watt, 'Les modèles familiaux à l'épreuve de la mondialisation (aspects de droit international privé)', *Arch. phil. droit* 45, at 272 (2001).

6. Foblets and Yassari, above n. 2, at 3 ff.

7. Cf. P.S. Berman, *Global Legal Pluralism. A Jurisprudence of Law beyond Borders* (New York 2012), at 25 ff.

8. Muir Watt, above n. 5, at 272.

## 2 International Family Law and Identity of Individuals

### 2.1 Premises

In cross-border family relations, the first question to be asked is: Which law should govern an individual's personal status and his or her family relations? In other words, how should the personal law inherent in each individual be determined?

There has long been a dichotomy between *origo* and *domicilium*<sup>9</sup> in this respect, which has been regarded as the largest hindrance to unifying conflict of laws rules worldwide.<sup>10</sup> It is a discrepancy of whether to subject persons settling abroad to the law of their country of origin or to that of the host country. While common law countries traditionally apply the law of domicile or *lex fori* to international family relations,<sup>11</sup> civil law countries in general have relied on the principle of nationality since the nineteenth century. In recent years, however, European continental countries have gradually been moving toward the principle of habitual residence. We therefore face the difficult challenge of how to assess these contemporary dynamics and find a reasonable solution to them.

### 2.2 Individual Identity

Family law is called *siège des différences*,<sup>12</sup> as each legal institution reflects different traditions, religions, customs, values and ethics. While the marriage generally consists in heterosexual monogamy, Islamic law allows polygamy, and a series of European countries provide for same-sex marriage. Divorce is effected by court decree in Western countries, whereas Jewish and Islamic laws provide for a unilateral act of the husband, and Asian countries allow consensual divorce. The Vatican and the Philippines still forbid divorce.<sup>13</sup>

In the globalised world, family relations are built across divergent legal institutions. Once religious or ethnic minority groups seek to observe their own religious or customary rules on polygamy, dower (*mahr*) or repudiation (*talaq*), parallel subsystems may appear. Because individual actors are primarily affected in family relations,<sup>14</sup> conflict of law rules should be geared to reflecting the individual's affiliation or belonging. As *Jayme* states, the law that mirrors the person's identity

will best accommodate their family relations,<sup>15</sup> even if states reserve the authority to exceptionally intervene on the grounds of public policy and human rights.<sup>16</sup> In terms of conflict of laws methods, US revolutionary theories grounded in the state's authority pursuant to governmental interests,<sup>17</sup> substantive better law<sup>18</sup> or contingent *lex fori*<sup>19</sup> are not suited to achieving this objective. Rather, the point of departure needs to be the legal relationship concerned.

An individual's identity is conceived subjectively. According to *Taylor*, the consciousness of self presupposes the existence of others and is established through interactions with them. By finding commonalities or differences, an individual obtains the sense of belonging to a certain collectivity with others.<sup>20</sup> The relevant factors may be ethnicity, nationality, gender, language, religion, customs or any other element.<sup>21</sup> The collectivity to which the individual belongs, therefore, is not only the state but can also comprise an ethnic minority, religious community, professional group, association or any other category including abstract ones.<sup>22</sup> By nature, an individual's identities are necessarily relative and multiple. Since every person initially acquires their identities by birth, forms self-consciousness and develops personality later, identities cannot be fixed, but may alter subsequently and dynamically.<sup>23</sup> In this respect,

9. See Savigny, above n. 4, at 39 ff.  
 10. Y. Loussouarn, 'La dualité des principes de nationalité et de domicile en droit international privé', *Annuaire de l'Institut de droit international* 62-1, at 299 ff. (1987); L.I. de Winter, 'Nationality or Domicile? The Present State of Affairs', *Recueil des Cours* 128, at 357 ff. (1969 III).  
 11. See Dicey, Morris & Collins, *The Conflict of Laws*, 15th edn (London 2012), Vol. 1, paras. 6-166 ff.  
 12. Y. Lequette, 'Le conflit de civilisations à la lumière de l'expérience franco-tunisienne', in *Mélanges Sassi Ben Halima* (Tunis 2005), at 175.  
 13. See, *inter alia*, Staudinger/Mankowski (2011), Art. 17 EGBGB, para. 19 ff.  
 14. B. von Hoffmann and K. Thorn, *Internationales Privatrecht*, 9th edn (München 2007), at 186.

15. See E. Jayme, 'Identité culturelle et intégration: le droit international privé postmoderne', *Recueil des cours* 251, at 33 ff., 167 ff. (1995); *id.*, 'Le droit international privé du nouveau millénaire: la protection de la personne humaine face à la globalisation', *Recueil des cours* 282, at 31 ff. (2000); *id.*, 'Kulturelle Identität und internationales Privatrecht', in Jayme (ed.), *Kulturelle Identität und internationales Privatrecht* (Heidelberg 2003), at 5 ff.; *id.*, 'Die kulturelle Dimension des Rechts – ihre Bedeutung für das Internationale Privatrecht und die Rechtsvergleichung', *RabelsZ* 67, at 216 ff. (2003); *id.*, *Zugehörigkeit und kulturelle Identität. Die Sicht des internationalen Privatrechts* (Göttingen 2012), at 9 ff.; see also H. Gaudemet-Tallon, 'Nationalité, statut personnel et droits de l'homme', in *Festschrift Erik Jayme*, Vol. 1 (Berlin 2004), at 206 ff.  
 16. The same idea underlied the 2005 Krakow Resolution of the Institut de droit international: 'Différences culturelles et ordre public en droit international privé de la famille' (to be downloaded at: <[www.idi-iiil.org/](http://www.idi-iiil.org/)> [last visited 15 October 2014]).  
 17. B. Currie, 'The Constitution and the Choice of Law: Governmental Interests and the Judicial Function', in *Selected Essays on the Conflict of Laws* (Durham/NC 1963), at 188 ff.  
 18. R.A. Leflar, *American Conflicts Law*, 3rd edn (Indianapolis/NY 1977), at 212 ff.  
 19. A.A. Ehrenzweig, *Private International Law. A Comparative Treatise on American International Conflicts Law*, Vol. 1: General Part (Leyden/NY 1967), at 91 ff.  
 20. C. Taylor, 'The Politics of Recognition', in *Multiculturalism. Examining the Politics of Recognition* (Princeton, N.J. 1994), at 25 ff.: 'My own identity crucially depends on my dialogical relations with others.' (*Ibid.*, at 34).  
 21. The same person can be, without any contradiction, an American citizen, of Caribbean origin, with African ancestry, a Christian, a liberal, a woman, a vegetarian, a historian, a schoolteacher, a novelist and a feminist. A. Sen, *Identity & Violence. The Illusion of Destiny* (2006), at xii ff.  
 22. H-P. Mansel, 'Die kulturelle Identität im Internationalen Privatrecht', *BerDGesVO* 43, at 144, 153 (2008); see also A. Mills, *The Confluence of Public and Private International Law. Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge 2009), at 108 ff.  
 23. Sen, above n. 21, at 28 ff.

Huntington's thesis of the 'clash of civilizations'<sup>24</sup> was inappropriately grounded in an abstract, collective notion of civilisation and enclosed individuals in firm, inert categories. The limitations of his doctrine consisted in the fact that he disregarded individuals' differences and the possibility of their dynamic developments.<sup>25</sup>

### 2.3 Principle of Nationality

How should we then select the law that mirrors the person's identities?

In the nineteenth century, the principle of nationality was first adopted in France (1804)<sup>26</sup> and Austria (1811).<sup>27</sup> It was bilateralised and theoretically refined in Italy (1865) under the auspices of *Mancini*,<sup>28</sup> and spread to other civil law countries such as Germany (1896),<sup>29</sup> Belgium,<sup>30</sup> Turkey,<sup>31</sup> and Japan (1898),<sup>32</sup> as well as some Latin American countries.<sup>33</sup> The newly-established nation states of the time had obvious interests in emancipating the concept of nationality from its feudal fetters in order to define the membership and place their citizens under direct control, eliminating intermediate collectivities.<sup>34</sup> Regulating citizens' family relations even after emigration had the advantage for nation states of upholding their national integrity.<sup>35</sup> Presuming that each individual is inscribed of characteristics of the nation to which he or she belongs and has the consciousness of nationality, *Mancini* asserted that family relations should be governed by the law of the person's nationality. He held that sovereign states were obliged to reciprocate by respecting the rights of individuals belonging to other states, and therefore need to apply

the law of nationality to their own nationals as well as to foreigners respectively.<sup>36</sup> Needless to say, this argument presupposes the idea that individual identity coincides with nationality.

In this context, it is worth recalling the debate that took place in France when Article 310 Civil Code was adopted in 1975.<sup>37</sup> This unilateral conflicts rule stipulated that divorce was governed by French law, insofar as both spouses were French nationals (para. 1) or domiciled in France (para. 2), or, in the absence of these factors, when none of the spouses' law of nationality recognised its own competence (para. 3). This provision particularly subjected foreign spouses domiciled in France to French law, aiming to enhance their integration into the host society.<sup>38</sup> Not only was this unilateral conflicts rule thoroughly criticised for its theoretical inconsistency,<sup>39</sup> but Morocco also denounced it for imposing French law upon Moroccan nationals, given that their religion, customs and traditions would unduly be disregarded in France. This led to the signing of a bilateral treaty between France and Morocco<sup>40</sup> in 1981 to deviate from this provision and refer to the law of the spouses' common nationality. The treaty eventually ensured the application of Moroccan divorce law to Moroccan nationals in France, as was the case prior to the enactment of Article 310 Civil Code.<sup>41</sup>

Where the parties maintain social, cultural or religious ties with their country of origin of which they are national, applying the law of nationality appears expedient. Indeed, the Japanese legislature decided to retain the principle of nationality in 1989,<sup>42</sup> with a view to respecting the identity of Korean and Chinese nationals who had lived in Japan for decades. This step was cru-

24. S.P. Huntington, 'The Clash of Civilizations?', *Foreign Affairs*, at 22 (Summer 1993); *id.*, *The Clash of Civilizations and the Remaking of World Order* (Japanese edition, Tokyo 1998), at 19 ff.

25. M.-C. Najm, *Principes directeurs du droit international privé et conflit de civilisations. Relations entre systèmes laïques et systèmes religieux* (Paris 2005), at 5 ff.

26. Art. 3(3) Civil Code.

27. Arts. 4 and 34 ABGB.

28. Arts. 6 ff. Disposizioni preliminari del codice civile; see Y. Nishitani, *Mancini und die Parteiautonomie im internationalen Privatrecht* (Heidelberg 2000), at 68 ff.

29. Arts. 7 ff. EGBGB; see H-P. Mansel, *Personalstatut, Staatsangehörigkeit und Effektivität* (München 1986), at 28 ff.

30. Art. 3(3) Civil Code. See G. van Hecke, 'Les projets de Titre préliminaire de Laurent et de la commission de révision', in *Liber Memorialis François Laurent 1810-1887* (Bruxelles 1989), at 1119 ff.

31. See E.E. Hirsch, 'Die Quellen des internationalen Privatrechts in der Türkei', in *Festschrift Hans Lewald* (Basel 1953), at 245 ff.

32. Arts. 3 ff. *Hōrei* [Act on Application of Laws] (Law No. 27 of 21.6.1898); see Y. Nishitani, 'Mancini and the Principle of Nationality in Japanese Private International Law', in *Festschrift Erik Jayme*, Vol. 1 (München 2004), at 630 ff.

33. De Winter, above n. 10, at 373 ff. To enhance the integration of immigrants in the host society, quite a few Latin American countries follow the principle of domicile. Y. Tameike, *Kokusaishihō Kōgi* [Lecture of Private International Law], 3rd edn (Tokyo 2005), at 90.

34. See H. Holzhauser, 'Staatszugehörigkeit in der deutschen Rechtsge-schichte', in *Gedächtnisschrift Albert Bleckmann* (Köln et al. 2007), at 213 ff.

35. Europe consisted mostly of emigration countries at that time. See J. Basedow and B. Diehl-Leistner, 'Das Staatsangehörigkeitsprinzip im Einwanderungsland. Zu den soziologischen und ausländerpolitischen Grundlagen der Nationalitätsanknüpfung im Internationalen Privatrecht', in Jayme and Mansel (eds.), *Nation und Staat* (Heidelberg 1990), at 20 ff.; see also Nishitani, above n. 32, at 633 f.

36. See P.S. Mancini, 'De l'utilité de rendre obligatoires pour tous les États, sous la forme d'un ou de plusieurs traités internationaux, un certain nombre de règles générales du droit international privé pour assurer la décision uniforme des conflits entre les différentes législations civiles et criminelles', *Clunet* 1, at 293 (1874); *id.*, 'Della nazionalità come fondamento del diritto delle genti', in *Diritto internazionale* (Napoli 1873), at 27 ff., 57 ff.

37. Loi n° 75-617 du 11 juillet 1975 portant réforme du divorce. Art. 310 Civil Code was then moved to Art. 309 Civil Code in 2005 (Ordonnance n° 2005-759 du 4 juillet 2005 réformant la filiation) and eventually substituted by the Rome III Regulation (below n. 85).

38. J. Foyer, 'Tournant et retour aux sources en droit international privé? L'article 310 nouveau du Code civil', *JCP* 1976, I-2762.

39. P. Courbe, 'Le divorce international: premier bilan d'application de l'article 310 du Code civil', *Trav. Comité fr. dr. int. pr.* 1988-1990, at 123 ff.; P. Franceskakis, 'Le surprenant article 310 nouveau du Code civil sur le divorce international', *Rev. crit. dr. int. pr.* 1975, at 554 ff.

40. Art. 9 Convention franco-marocaine du 10 août 1981 relative au statut des personnes et de la famille et à la coopération judiciaire; décret n° 83-435 du 27 mai 1983 (*J.O.* du 1<sup>er</sup> juin 1983, at 1643).

41. See F. Monéger, 'La convention franco-marocaine du 10 août 1981 relative au statut des personnes et de la famille et à la coopération judiciaire', *Rev. crit. dr. int. pr.* 1984, at 267 ff.

42. Law No. 27 of 28.6.1989.



cial for the Japanese government to avoid being criticised for assimilation policies.<sup>43</sup>

In their most recent legislations on private international law, Japan (2006),<sup>44</sup> the Republic of Korea (South Korea) (2001)<sup>45</sup> and the Republic of China (Taiwan) (2010)<sup>46</sup> have all upheld the principle of nationality and presumably will adhere to it. In these countries, consensual divorce, simple adoption and other status acts are effected by declaration at a family registration office which is bereft of substantive control, so that the connecting factor needs to be as ascertainable, precise and stable as nationality.<sup>47</sup> Furthermore, the nationality of these countries can generally be assumed to be effective under the *jus sanguinis* principle as well as the traditional sole nationality principle.<sup>48</sup> These countries have divergent cultural backgrounds and family institutions on the basis of a distinctive concept of consanguinity.<sup>49</sup> Because the number of foreign residents is still limited, multiculturalism has not yet been established in these countries.<sup>50</sup> Against this background, nationality is in principle likely to reflect the person's substantial and cultural ties with his or her country of origin. Hence, these East Asian countries have good reason to uphold the principle of nationality,<sup>51</sup> although the People's Republic of China (China) as a multi-unit state decided

to move to the principle of habitual residence in its recent legislation of 2010.<sup>52</sup>

Nevertheless, from the viewpoint of global governance, it is significant that the meaning of nationality is gradually changing in other parts of the world. The traditional notion of nationality is geared toward nation-state membership. *Miller* contends that national identity is supported by the beliefs and common history of the community, based on dynamic political participation and territorial collectivity sharing distinctive characteristics.<sup>53</sup> The nationhood as an ideal and normative collectivity has been defined contrastingly among states, *i.e.*, on the basis of consanguinity in Germany and Japan,<sup>54</sup> territorial community in France<sup>55</sup> and eternal allegiance to the Crown in the U.K.<sup>56</sup> These differences were traditionally reflected in the respective nationality legislation in relation to the conditions of acquisition of nationality by birth (*jus sanguinis* and *jus soli*, either in combination or as alternatives), status acts and naturalisation, because nationality legislation is governed by autonomy of the state in public international law and EU law. The sole nationality principle used to be predominant, so each individual could be defined by his or her belonging to a nation state.<sup>57</sup>

Since the 1970s, however, dual nationality started to be accepted in various countries in an attempt to attain gender equality and uphold ties with outbound migrants for economic and sociopolitical reasons.<sup>58</sup> In recent years, inbound migrants have been rapidly increasing in Europe. Immigrants and their offspring constitute

43. T. Minami, *Kaisei Hôrei no Kaisetsu* [Commentary on the reformed *Hôrei*] (1992), at 46 ff.; J. Torii, 'Revision of Private International Law in Japan', *Japanese Annual of International Law* 33, at 54 ff. (1990); A. Kunitomo, 'Das Staatsangehörigkeitsprinzip im japanischen Internationalen Privatrecht', in Kroeschell and Cordes (eds.), *Vom nationalen zum transnationalen Recht* (Heidelberg 1995), at 116 ff. (with further references).
44. Arts. 4 ff. Act on General Rules on Application of Laws (Law No. 78 of 21.6.2006) (*hereinafter* 'PIL'); see, *inter alia*, J. Basedow, H. Baum & Y. Nishitani (eds.), *Japanese and European Private International Law in Comparative Perspective* (Tübingen 2008).
45. Arts. 6 ff. Act on Application of Laws (Law No. 966 of 15.1.1962); Arts. 11 ff. Private International Law Act (Law No. 6465 of 7.4.2001) (*hereinafter* 'PIL').
46. Arts. 9 ff. Act on Application of Laws (Law of 26.5.2010) (*hereinafter* 'PIL').
47. See Y. Nishitani, 'Das japanische Familienregister und grenzüberschreitende Rechtsverhältnisse', *Zeitschrift für japanisches Recht* 14, at 229 ff. (2002); Kunitomo, above n. 43, at 117.
48. Arts. 2-3, 11-16 Nationality Act of Japan (Law No. 147 of 4.5.1950, last amended in 2008); *cf.* Arts. 2, 9 and 20 Nationality Act of Taiwan (Law of 5.2.1929, last amended in 2006). In 2010, South Korea introduced a series of exceptions to the sole nationality principle, alleviating the obligation to renounce original nationality at naturalisation or select one out of multiple nationalities. Arts. 2-3, 10, 12-15 Nationality Act of South Korea (Law No. 16 of 20.12.1948, last amended in 2010).
49. See Y. Nishitani, 'Familienrecht in Ostasien — Tradition und Moderne in Japan und der Republik Korea —', in *Festschrift Dieter Martiny* (Tübingen 2014), at 1179 ff.
50. In Japan, there are 2,049,123 foreign permanent residents (676,696 Chinese/Taiwanese, 526,575 South/North Koreans, 206,769 Filipinos), making 1.6% of the whole population as of 2013. Brazilian nationals, who are mainly the second- and third-generation of Japanese emigrants, reached 313,771 in 2007 but reduced to 185,644 in 2013 due to restrictions to reenter Japan. See <[www.e-stat.go.jp/](http://www.e-stat.go.jp/)> (last visited on 1 March 2014); for South Korea and China, see, e.g., United Nations Department of Economic and Social Affairs Population Division, 'Global Migration: Demographic Aspects and Its Relevance for Development', at 11 (Technical Paper No. 2013/6 [to be downloaded at: <[www.un.org/esa/population/migration/documents/EGM.Skeldon\\_17.12.2013.pdf](http://www.un.org/esa/population/migration/documents/EGM.Skeldon_17.12.2013.pdf)>]; for statistics in South Korea, see <<http://kostat.go.kr/portal/english/news/1/16/3/index.board>> (last visited 15 October 2014).

51. See Kunitomo, above n. 43, at 120 ff. Japan does not recognize North Korea or Taiwan as a legitimate state or government, but courts apply the law of these countries because of its effectiveness in the territory of each. Whether the individual belongs to South Korea or North Korea, or to the People's Republic of China or Taiwan is primarily determined on the basis of their identity, especially their political, social and cultural background. Y. Satoh, 'Law Applicable to Personal Status of Korean and Chinese Nationals before Japanese Courts', *Japanese Yearbook of International Law* 55, at 325 ff. (2012).
52. 2010 Private International Law Act (*hereinafter* 'PIL'); *cf.* R. Huang, 'Chûgoku no Atarashii Kokusaishihô ni tsuite' [On China's New Private International Law], *Tezukayama Hôgaku* 22, at 81 ff. (2011).
53. D. Miller, *Citizenship and National Identity* (Cambridge *et al.* 2000), at 28 ff.
54. See H. Egawa, R. Yamada & Y. Hayata, *Kokusekihô* [Nationality Law], 3rd edn (Tokyo 1997), at 38 ff., 59 ff.
55. R. Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge, MA 1992), at 3 ff.
56. M. Tadokoro, 'Kokusai jinkô-idô to kokka ni yoru membership no governance' [Cross-Border Movements of Persons and the Governance of Membership by the State], in Endo (ed.), *Global Governance no rekishi shisô* [History and Ideas of Global Governance] (Tokyo 2010), at 202 ff. The definition of nationhood can also subsequently change, depending on religious or political factors. Miller, above n. 53, at 34.
57. See, *inter alia*, 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws; 1954 UN Convention on Statelessness; 1961 UN Convention on the Reduction of Statelessness; 1963 European Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality.
58. Brubaker, above n. 55, at 144; for a comparison of France, the Netherlands, Italy and Spain, see O.W. Vonk, *Dual Nationality in the European Union* (Leiden 2012), at 48 ff. As a result, the 1997 European Convention on Nationality left the treatment of dual nationality to each state, abstaining from taking a uniform position. M.M. Howard, 'Variation in Dual Citizenship Policies in the Countries of the EU', *International Migration Review* 39, at 703 ff. (2005).

26.4% of the population aged 25–54 years in France, 23.4% in the UK, 22.9% in Belgium, and 21.9% in Germany (2008).<sup>59</sup> Given these developments, a number of European countries have introduced the *jus soli* principle and abolished the requirement that the original nationality be renounced for naturalisation. They largely admit dual nationality in order to include immigrants among the citizens and enhance their social integration. In this respect, a certain confluence of nationality legislation can be observed among European countries.<sup>60</sup> Germany, which used to strictly adhere to the consanguinity principle, remarkably introduced a generous *jus soli* principle in 1999, requiring only that one parent has habitually resided in Germany for eight years.<sup>61</sup> As a result, 8.6% of immigrants and their offspring were dual nationals, and 94.5% of them possessed German nationality as of 2012.<sup>62</sup> Similarly, France has long combined *jus sanguinis* and *jus soli*.<sup>63</sup> While only 40% of first generation immigrants held French nationality, the ratio rose to 98% among second and third generation immigrants as of 2008 (75% were solely French nationals; 23% held both French and another nationality).<sup>64</sup>

With the increasing number of dual nationals in Europe, as well as in Latin America and Africa,<sup>65</sup> the meaning of nationality is gradually being relativised. Individuals are no longer imprinted with the characteristics of a single nation state or obliged to give unconditional allegiance to it. They rather have multiple affiliations, privileges and obligations, and may even seek to acquire nationality for economic or other utilitarian reasons.<sup>66</sup> Meanwhile the majority of these states consider it a political and economic advantage for the state's own nationals to also belong to another state.<sup>67</sup> As a corollary of the contemporary relativisation and multiplication of individual belongings, nationality can no longer be characterised by *daily plebiscite* in *Renan's* sense, which presupposes constant and conscious political participation in the

decision-making process of the state.<sup>68</sup> In this respect, the so-called *democracy argument* in conflict of laws to justify the application of the law of nationality, on the ground that individuals have the right to political participation and can select and influence the legislators in their home country,<sup>69</sup> may provide legitimacy, but remains all the more fictitious. As *Batiffol* rightly points out, law is primarily enacted for collectivity, not for individuals.<sup>70</sup> Even if a democratic decision-making process is ensured, legislation always entails the risk that the majority's position will be unduly imposed on individuals who only constitute minorities.

From the viewpoint of individual identity, Muslim immigrants in Europe often uphold their consciousness of belonging and close cultural ties with their country of origin through endogamy and traditional large family units. Living abroad amid an unfamiliar social environment, immigrants may well maintain or even strengthen their connection with their home country by idealising their original culture, religion, customs or traditions.<sup>71</sup> In fact, quite a few Muslim women voluntarily start wearing a headscarf in Europe to insinuate their identity, even if they had refused to do so in their country of origin.<sup>72</sup> In these cases, the application of the law of nationality will be justified as respecting the individual's identity, conventional values and moral concepts. Nevertheless, this does not necessarily apply to second or third generation immigrants, who are more responsive to the culture, customs, traditions and fundamental values of the receiving country than first generation immigrants. The younger generations may well have developed their identity to be integrated into the host society. People with immigration background could also be bicultural, *i.e.*, socially and culturally belonging both to the country of origin and the country of residence.<sup>73</sup>

As mentioned above, nationality constitutes only a part of multiple and multi-faceted individual identities. Nationality therefore cannot be the sole, categorical criteria for defining the person's affiliation and belonging.<sup>74</sup> As *Mansel* puts it, it is only in *ideal-typical cases*<sup>75</sup> that a person's identity is reflected in their nationality.<sup>76</sup> Otherwise, the law of nationality fails to materialise individual identity, which is particularly the

59. European Commission, 'Migrants in Europe. A Statistical Portrait of the First and Second Generation (2011)', at 122 (to be downloaded at: <<http://epp.eurostat.ec.europa.eu/>> [last visited 31 March 2014]).

60. For a comparison of 15 European countries, see R. Hansen and P. Weil, 'Citizenship, Immigration and Nationality: Towards a Convergence in Europe?', in Hansen and Weil (eds.), *Towards a European Nationality. Citizenship, Immigration and Nationality Law in the EU* (Hampshire/New York 2001), at 5 ff.; see also Vonk, above n. 58, at 53 ff.

61. § 4(3) No. 1 StAG (BGBl. 1999 I S. 1618); see C. Benicke, 'Auswirkungen des neuen Staatsangehörigkeitsrechts auf das deutsche IPR', *IPRax* 2000, at 171 ff.

62. Statistisches Bundesamt, 'Bevölkerung und Erwerbstätigkeit. Bevölkerung mit Migrationshintergrund (2012)', at 123 f. (to be downloaded at: <[www.destatis.de/](http://www.destatis.de/)> [last visited 31 March 2014]).

63. See Arts. 18 ff. and Arts. 21–7 Civil Code.

64. The scope of these statistics is limited to the population aged 18–50 years. Fiches thématiques: Population immigrée, at 115 (to be downloaded at: <[www.insee.fr/](http://www.insee.fr/)> [last visited in March 2014]).

65. Vonk, above n. 58, at 50 ff.

66. Brubaker, above n. 55, at 144 ff.; Vonk, above n. 58, at 48 ff.; G-R. de Groot and H. Schneider, 'Die zunehmende Akzeptanz von Fällen mehrfacher Staatsangehörigkeit in West-Europa', *Festschrift Koresuke Yamauchi* (Berlin 2006), at 65 ff.

67. Vonk, above n. 58, at 3 ff., 48 ff., 62 ff.

68. E. Renan, 'Qu'est-ce qu'une nation?', in Ukai *et al.* (eds.), *Kokumin towa nani ka* (Japanese translation) (Tokyo 1997), at 62.

69. H-P. Mansel, 'Das Staatsangehörigkeitsprinzip im deutschen und gemeinschaftsrechtlichen Internationalen Privatrecht: Schutz der kulturellen Identität oder Diskriminierung der Person?', in Jayme (ed.), *Kulturelle Identität und Internationales Privatrecht* (Heidelberg 2003), at 135 ff.; see also C. Stern, *Das Staatsangehörigkeitsprinzip in Europa* (Baden-Baden 2008), at 48 ff.

70. H. Batiffol, *Aspects philosophiques du droit international privé* (Paris 1956; reedition 2002), at 202 ff.

71. Cf. Maghreb immigrants in France, despite their French nationality. Brubaker, above n. 55, at 148.

72. For headscarf discussions, see J.W. Scott, *The Politics of the Veil* (Japanese translation, Tokyo 2012; original in Princeton University Press 2007).

73. Mansel, above n. 69, at 133.

74. Miller, above n. 53, at 34.

75. Mansel, above n. 69, at 130 ff., 135; *id.*, above n. 22, at 164 ff.

76. Miller, above n. 53, at 35.

case when the person feels that he or she belongs to a religious or any other community different from the state.<sup>77</sup> The same is true when the person is not aware of the content of the law of nationality due to its frequent reforms, as is the case with recent legislations in European countries.<sup>78</sup>

#### 2.4 Principle of Habitual Residence

In the discussions on the determination of personal law in Europe, the principle of nationality has been subject to severe criticism since the 1950s.<sup>79</sup> Nationality as a public law notion was held unsuitable for determining the law governing cross-border family relations, whereas habitual residence – as the person's centre of life – was considered to have a substantial connection with the person and reflect his or her social environment. Moreover, nationality has institutional drawbacks as a connecting factor and needs to be supplemented by habitual residence (or any other factor) in the event of dual nationality, statelessness or refugee status. Nor can nationality serve as a connecting factor in the case of spouses of different nationality when the method of cascading connecting factors is employed with a view to achieving gender equality.<sup>80</sup>

The Hague Conventions notably established the principle of habitual residence, *inter alia*, in relation to child abduction and adoption, protection of children or adults, as well as maintenance obligations.<sup>81</sup> They primarily envisage realising effective protection and implementing necessary measures in light of the best interests of the child and human rights.<sup>82</sup> While the policy of these Hague Conventions could be understood as designating *territorial law* that reflects the conditions of social environment instead of *personal law* governing internal family relations,<sup>83</sup> the extension of the scope of application of habitual residence is obvious in the EU,<sup>84</sup>

particularly in relation to the Maintenance Regulation,<sup>85</sup> the Rome III Regulation<sup>86</sup> and the Succession Regulation,<sup>87</sup> besides the Proposal for a Regulation on Matrimonial Property Regimes.<sup>88</sup>

The EU is seeking to constitute a uniform area of justice. Geared toward policy considerations,<sup>89</sup> the EU opts for habitual residence with a view to its coincidence with jurisdiction under the Brussels II *bis* Regulation<sup>90</sup> and other relevant EU Regulations<sup>91</sup> or domestic rules. The application of *lex fori* will ensure the ascertainability of applicable law and therefore the quality and expeditiousness of court proceedings.<sup>92</sup> Also because people generally possess assets at their habitual residence, it is a particularly expedient connecting factor for succession and matrimonial property regimes.<sup>93</sup> Furthermore, the principle of habitual residence has the advantage of subjecting all inhabitants to the same law, so it can guarantee equal treatment for both EU citizens and immigrants.<sup>94</sup> In fact, by regulating the family relations

77. D. Henrich, 'Parteiautonomie, Privatautonomie und kulturelle Identität', *Deutsches, ausländisches und internationales Familien- und Erbrecht* (Bielefeld 2006), at 440.

78. Henrich, above n. 77, at 439.

79. R. Cassin, 'La nouvelle conception du domicile dans le règlement des conflits de lois', *Recueil des cours* 34 (1930 IV), at 752 ff.; S. Braga, *Staatsangehörigkeitsprinzip oder Wohnsitzprinzip?* (Erlangen 1954), at 9 ff.; E. Wahl, 'Zur Entwicklung des Personalstatuts im europäischen Raum', in Wahl et al. (eds.), *Rechtsvergleichung und Rechtsvereinheitlichung* (Heidelberg 1967), at 123 ff.; P.-H. Neuhaus, *Die Grundbegriffe des internationalen Privatrechts*, 2nd edn (Tübingen 1976), at 210 ff.

80. Vonk, above n. 58, at 118 ff., 120 ff. (for solutions in the case of dual nationalities).

81. See, *inter alia*, 1980 Convention on the Civil Aspects of International Child Abduction; 1993 Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption; 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; 2000 Convention on the International Protection of Adults; 2007 Protocol on the Law Applicable to Maintenance Obligations (to be downloaded at: <www.hcch.net/> [last visited 15 October 2014]).

82. See D. Baetge, *Der gewöhnliche Aufenthalt im internationalen Privatrecht* (Tübingen 1994), at 5 ff., 18 ff.; M.-P. Weller, 'Der "gewöhnliche Aufenthalt" — Plädoyer für einen willenszentrierten Aufenthaltsbegriff —', in Leible and Unberath (eds.), *Brauchen wir eine Rom O-Verordnung?* (Sipplingen 2013), at 302.

83. J. Akiba, 'Horei no Kaisei Kitei to Jōkyōsho Kijunsetsu no Ronkyō ni tsuite', *Kokusaihō Gaikō Zasshi* 90-2, at 113 ff. (1991).

84. The UK and Ireland also substitute habitual residence for domicile in relation to the Hague Conventions and the EU Regulations, so that habitual residence is commonly used as the criteria for determining the local connection of an individual. Dicey, Morris & Collins, above n. 11, paras. 6-166 and 172.

85. Art. 15 of the Council Regulation (EC) No. 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 (reference to the 2007 Hague Maintenance Protocol, above n. 81).

86. Art. 8 (a)(b) of the Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ 2010, L 343/10.

87. Art. 21 (1) of the Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ 2012, L 201/107.

88. Art. 17 of the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011) 126 final (16.3.2011); cf. European Parliament legislative resolution of 10 September 2013 (P7\_TA(2013)0338) (to be downloaded at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0338&format=XML&language=EN> [last visited 15 October 2014]).

89. H. Muir Watt, 'A Semiotics of Private International Legal Argument', *Yearbook of Private International Law* 14, at 55 (2012/2013).

90. Art. 3(1)(a) of the Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ 2003, L 338/1.

91. Art. 3(a)(b) of the Maintenance Regulation, above n. 85, Art. 4 of the Succession Regulation, above n. 87 and Art. 5(1) of the Proposal for Matrimonial Property Regimes Regulation, above n. 88.

92. Weller, above n. 82, at 300.

93. Mansel, above n. 22, at 171.

94. D. Martiny, 'Ein Internationales Scheidungsrecht für Europa — Konturen einer Rom III-Verordnung', in Freitag et al. (eds.), *Internationales Familienrecht für das 21. Jahrhundert* (Berlin 2006), at 127. The application of the law of nationality itself does not run counter to EU law. J. Basedow, 'Le rattachement à la nationalité et les conflits de nationalité en droit de l'Union européenne', *Rev. crit. dr. int. pr.* 2010, at 427 ff.; M.-P. Puljak, *Le droit international privé à l'épreuve du principe communautaire de non-discrimination en raison de la nationalité* (Aix-en-Provence 2003); cf. Stern, above n. 69, at 62 ff.; T. Troge, *Europarecht und das Staatsangehörigkeitsprinzip im Internationalen Privatrecht* (Baden-Baden 2009), at 38 ff.



of all inhabitants pursuant to its own law, the host state is able to enhance social integration and shun creating parallel societies.<sup>95</sup> For the same reasons, countries built through immigration like Brazil (1942)<sup>96</sup> and Switzerland (1987)<sup>97</sup> moved from the principle of nationality to that of domicile.

From the perspective of individual identity, the application of the law of habitual residence is certainly reasonable once immigrants are integrated into the receiving country. Furthermore, children are, in general, acquainted with the social environment where they habitually reside.<sup>98</sup> The subsidiarity principle of international adoption<sup>99</sup> is, therefore, considered to properly respect their cultural identity.<sup>100</sup> Nevertheless, habitual residence cannot always accord with a person's multiple identities. Insofar as immigrants maintain cultural ties with their country of origin and are conscious of their affiliation and belonging, applying the law of habitual residence would unduly inflict discordant rules and values on them. This would also be the case when immigrants remain within their own community in the host society and share their original religion, customs or traditions, establishing *cultural enclaves*.<sup>101</sup> Even diasporas, who are dispersed throughout various countries, may maintain a strong cultural and political allegiance to the country of origin without being integrated into the respective host societies.<sup>102</sup>

## 2.5 Reflections

European countries will increasingly resort to the principle of habitual residence, whereas other countries like Japan and South Korea will presumably adhere to the principle of nationality. Still, neither nationality nor habitual residence is capable of fully meeting the requirement of designating a law that correctly mirrors a person's identity. Because these objective connecting factors are geared toward *collective* identity to be represented by the state of their nationality or habitual residence, they cannot precisely reflect an *individual's* identity by taking different conditions or demands of each person into consideration.<sup>103</sup>

95. H-P. Mansel, 'Stellungnahme anlässlich der Sachverständigenanhörung im Rechtsausschuss des Europäischen Parlaments zum Grünbuch für internationales Erb- und Testamentsrecht' (Bruxelles, 21.11.2005) (<[www.ipr.uni-koeln.de/veranstaltungen/mansel\\_de.pdf](http://www.ipr.uni-koeln.de/veranstaltungen/mansel_de.pdf)> [last visited 15 October 2014]).

96. See Y. Nishitani, 'Divorce of Brazilian Nationals in Japan', *ZJapanR/J. Jap. L.* 18, at 227 (2004).

97. Botschaft zum Bundesgesetz über das internationale Privatrecht (IPR-Gesetz) vom 10.11.1982 (Nr. 82.072, BBl 1983 I 263), at 315 ff.

98. Weller, above n. 82, at 302.

99. Art. 4 UN Convention on the Rights of the Child; Art. 4(b) 1993 Hague Adoption Convention, above n. 81.

100. E. Jayme, 'Kulturelle Identität und Kindeswohl im internationalen Kinderschutzrecht', in Henrich *et al.* (eds.), *Ehe und Kindschaft im Wandel* (Frankfurt a.M. 1998), at 50 ff.; C. Lima Marques, *Das Subsidiaritätsprinzip in der Neuordnung des internationalen Adoptionsrechts* (Frankfurt a.M. 1997), at 37 ff.

101. Mansel, above n. 22, at 173.

102. Berman, above n. 7, at 70 f.

103. See Gannagé, above n. 3, at 243 ff.

## 3 Dichotomy between Nationality and Habitual Residence

### 3.1 Methods of Coordination

It is hard to avoid contingency of justice if some persons' identity is better reflected in their nationality, while others have closer links with their habitual residence. *Renvoi*, as adopted in the 1955 Hague Convention,<sup>104</sup> cannot assist in resolving this impasse, as it only grants priority to one of the objective connecting factors in an abstract way. Nor can the principle of recognition in the EU bridge this schism, as it simply requests, like the *vested rights* theory,<sup>105</sup> the recognition of a person's name (or status) established in one of the EU member states as such without inquiring which law was applied.<sup>106</sup> The conflicts rules of the first member state, in which the legal situation has been constituted, remain intact and prevail over those of the recognising member state. The only question that matters is to decide in which member state to create the legal situation first.<sup>107</sup> With frequent cross-border movement of persons and the accompanying exchange of values, the inherent bond between individual identity, cultures and territory is gradually weakening nowadays.<sup>108</sup> The *proper law of an individual or family*<sup>109</sup> can hardly be sought solely by

104. 1955 Convention relating to the settlement of the conflicts between the law of nationality and the law of domicile; cf. Baetge, above n. 82, at 18 f.

105. See J.H. Beale, *A Treatise on the Conflict of Laws*, Vol. 1 (New York 1935), at 53 ff.; for a thorough theoretical analysis, see R. Michaels, 'EU Law as Private International Law? Re-conceptualising the Country-of-Origin Principle as Vested Rights Theory', *Journal of Private International Law* 2, at 195 ff. (2006).

106. Arts. 18 and 21 TFEU (Arts. 12 and 18 TEC); see CJEU, 2.10.2003, Case C-148/02 [*Carlos Garcia Avello v. Belgian State*], Rep. 2003, I-11613; CJEU, 14.10.2008, Case C-353/06 [*Stefan Grunkin and Dorothee Regina Paul*], Rep. 2008, I-07639; CJEU, 22.12.2010, Case C-208/09 [*Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*], Rep. 2010, I-13693; CJEU [*Malgozata Runevič-Vardyn et al. v. Vilniaus miesto savivaldybės administracija et al.*], Rep. 2011, I-03787; for the principle of recognition, see, *inter alia*, D. Coester-Waltjen, 'Das Anerkennungsprinzip im Dornröschenschlaf?', *Festschrift Erik Jayme*, Vol. 1 (München 2004), at 121 ff.; M. Grünberger, 'Alles Obsolet? Anerkennungsprinzip vs. klassisches IPR', in Leible and Unberath (eds.), *Brauchen wir eine Rom O-Verordnung?* (Sipplingen 2013), at 81 ff.; H-P. Mansel, 'Anerkennung als Grundprinzip des Europäischen Rechtsraums. Zur Herausbildung eines europäischen Anerkennungs-Kollisionsrechts: Anerkennung statt Verweisung als neues Strukturprinzip des Europäischen internationalen Privatrechts?', *RabelsZ* 70, at 651 ff. (esp. 705 ff.) (2006); K. Funken, *Das Anerkennungsprinzip im internationalen Privatrecht* (Tübingen 2009); J. Leifeld, *Das Anerkennungsprinzip im Kollisionsrechtssystem des internationalen Privatrechts* (Tübingen 2010).

107. Coester-Waltjen, above n. 106, at 123 ff.; Grünberger, above n. 106, at 158 f.; C. Kohler, 'L'autonomie de la volonté en droit international privé: un principe universel entre libéralisme et étatisme', *Recueil des Cours* 359, at 402 f. (2012); Mansel, above n. 106, at 717 ff. Bucher qualifies it as 'droit à l'identité' to have one's personal and family status recognized within the EU in view of the free movement of persons. A. Bucher, 'La dimension sociale du droit international privé', *Recueil des cours* 341, at 377 (2009).

108. Cf. Berman, above n. 7, at 63 ff.

109. See J-Y. Carlier, *Autonomie de la volonté et statut personnel* (Bruxelles 1992), at 252.

means of objective territorial links. Rather, personal connection, which is best defined by the person himself or herself, should be the controlling factor in determining the applicable law, as private actors are most affected in cross-border family relations. Considering that individual identity is conceived subjectively, it would be consistent and reasonable to allow the parties to select the law governing family relations themselves.

By virtue of party autonomy, albeit the law of habitual residence is objectively applicable, the parties can substitute it by the law of nationality when they have a closer tie with their country of origin. Conversely, even if nationality is the primary objective connecting factor, the parties can refer to the law of habitual residence instead when they are integrated in the host society where they reside. Korean immigrants in Japan whose forebears had settled in Japan during the colonial period are a good illustration of this latter case. Today, second- and third-generation Korean immigrants regularly uphold family ties in North or South Korea but are socially integrated into and culturally adapted to Japan due to their permanent centre of life in that recipient country. The optional application of the law of habitual residence instead of that of nationality enables them to constitute their family relations in conformity with their primary identity.<sup>110</sup>

Arguably, the dichotomy between nationality and habitual residence will be appropriately overcome by employing the method of the parties' choice of law.<sup>111</sup> Indeed, party autonomy will render nationality and habitual residence complementary connecting factors, rather than mutually inconsistent criteria for determining personal law that hamper international harmony of decisions.<sup>112</sup>

### 3.2 Party Autonomy in Family Relations

Apart from respecting individual identity, party autonomy has the advantage of ensuring flexibility, ascertainability and predictability of applicable law. Family relations are becoming increasingly complex and diverse due to the frequent and dynamic cross-border movement of persons. If the governing law alters depending on which nationality they hold, where they live or where litigation is instituted, the parties can no longer reasonably foresee the validity and effects of their family relations, constitute rights and obligations, or agree upon disposition of assets. Hence, party autonomy is an appropriate conflicts rule for guaranteeing legal certainty and enhancing the mobility of global and EU

citizens.<sup>113</sup> From the viewpoint of conflict of laws order, party autonomy will facilitate international harmony and consistency of applicable law. If the law of the forum state can be chosen, it will particularly serve to circumvent the application of foreign law and reconcile divergent procedural rules in civil law and common law jurisdictions on whether to apply foreign law *ex officio* or leave it to the parties' pleading and proof. This will, in turn, enhance the integration of the EU.<sup>114</sup>

Legislative policy favouring party autonomy will arguably be supported by the trends toward contractualisation and individualisation in substantive family law, which is a corollary of the diversification of family models in society.<sup>115</sup> However, unlike contracts or torts, legal relationships in substantive family law consist of fixed categories and mandatory rules with limited disposition of the parties. Consequently, the eligible laws that can be selected by the parties should reasonably be restricted to the laws that indicate durable and substantive connection, *i.e.*, the law of nationality and habitual residence, and possibly *lex fori* and/or *lex rei sitae*.<sup>116</sup> In case of intra-community dual nationality in the EU, all laws of nationality should qualify to be selected, as granting priority to the nationality of the forum state or the effective nationality will run counter to the ECJ rulings in *Garcia Avello* and *Hadadi*.<sup>117</sup>

Party autonomy in family relations is a recent development.<sup>118</sup> It was first approved for succession in the form of the testator's *professio juris* and<sup>119</sup> then extended to matrimonial property regimes and lately also to maintenance obligations in proprietary relations, as in domestic

110. H-C. Lee, 'Zainichi-Kankokujin no Zokujinhō' [Personal Law of Korean Immigrants in Japan], *Jurist* 1025, at 98 ff. (1993); Kunitomo, above n. 43, at 121 ff.

111. Carlier, above n. 109, at 246 ff.; Foblets and Yassari, above n. 2, at 45 ff.; Kohler, above n. 107, at 411 ff.; Mansel, above n. 22, at 174 ff.; A.E. von Overbeck, 'La *professio juris* comme moyen de rapprocher les principes du domicile et de la nationalité en droit international privé', *Liber Amicorum Baron Louis Frédéricq*, Vol. 2 (Gent 1966), at 1096 ff.; M-P. Weller, 'Die neue Mobilitätsanknüpfung im Internationalen Familienrecht — Abfederung des Personalstatutenwechsels über die Datumtheorie', *IPRax* 2014, at 228; see also 1987 Cairo Resolution and 2005 Krakow Resolution of the Institut de droit international, above n. 16 (to be downloaded at: <www.idi-ii.org/> [last visited 15 October 2014]).

112. Vonk, above n. 58, at 118 ff.

113. Cf. Kohler, above n. 107, at 425 ff.

114. E. Jayme, 'Party Autonomy in International Family and Succession Law: New Tendencies', *Yearbook of Private International Law* 11, at 3 (2009).

115. K. Hilbig-Lugani, *Nomos Kommentar BGB*, Vol. 6: Rom-Verordnungen (Baden-Baden 2014), Art. 5 Rom III-VO, para. 3; K. Kroll-Ludwigs, *Die Rolle der Parteiautonomie im europäischen Kollisionsrecht* (Tübingen 2013), at 171 ff.; similarly, D. Coester-Waltjen and M. Coester, 'Rechtswahlmöglichkeiten im Europäischen Kollisionsrecht', in *Festschrift Klaus Schurig* (München 2012), at 33 f.; for discussions in substantive law, see, e.g., S. Hofer, D. Henrich & D. Schwab (eds.), *From Status to Contract? — Die Bedeutung des Vertrages im europäischen Familienrecht* (Bielefeld 2005), at 1 ff.

116. H-P. Mansel, 'Parteiautonomie, Rechtsgeschäftslehre der Rechtswahl und Allgemeinen Teil des europäischen Kollisionsrechts', in Leible and Unberath (eds.), *Brauchen wir eine Rom O-Verordnung?* (Sippligen 2013), at 263.

117. *Garcia Avello* case, above n. 106; CJEU, 16.7.2009, Case C-168/08 [*Laszlo Hadadi v. Csilla Marta Hadadi*], Rep. 2009, I-06871; see S. Barriatti, 'Dual Nationality: Between EU Citizenships', *Yearbook of Private International Law* 13, at 1 ff. (2011); Mansel, above n. 106, at 693 ff.; Vonk, above n. 58, at 127 ff. In this sense, also Art. 22(1) Succession Regulation, above n. 87; for criticism against Recital 22 Rome III Regulation leaving the solution to each member state's rules, see E. Jayme, 'Kodifikation und Allgemeiner Teil im IPR', in Leible and Unberath (eds.), *Brauchen wir eine Rom O-Verordnung?* (Sippligen 2013), at 40 ff.; Kohler, above n. 107, at 424.

118. Kroll-Ludwigs, above n. 115, at 99 ff.

119. See, *inter alia*, A.E. von Overbeck, 'L'irrésistible extension de l'autonomie en droit international privé', in *Nouveaux itinéraires en droit. Hommage à François Rigaux* (Bruxelles 1993), at 628 ff.



conflicts legislations,<sup>120</sup> Hague Conventions,<sup>121</sup> and EU Regulations.<sup>122</sup> Party autonomy appears expedient for the sake of estate planning or the management of assets and pecuniary claims, insofar as necessary protection of weaker parties and third parties is guaranteed. Furthermore, party autonomy is now prescribed in relation to divorce and legal separation as the core principle in the Rome III Regulation,<sup>123</sup> broadening the scope of choice of law compared with some previous domestic legislations.<sup>124</sup> Also for countries like Japan and South Korea that stipulate consensual divorce based on the parties' disposition on dissolution of marriage,<sup>125</sup> it is worth contemplating introducing the parties' choice of law, as has already been done in China.<sup>126</sup> Party autonomy should also be admissible in determining the law governing the first and last name that constitutes personality rights, enabling the person to select the law that best reflects his or her multiple identities.<sup>127</sup> The requirement of the EU law for recognition of a name granted in an EU member state, as understood by the ECJ,<sup>128</sup> can also be appropriately fulfilled by allowing the party to designate the applicable law.<sup>129</sup>

On the other hand, with regard to kinship and parental responsibilities, it is crucial to provide necessary protection for children. A choice of law by parents, custodians or guardians has potential risk of leading to an unfavourable law jeopardising the best interests of the child. Even though the state reserves the right to frustrate an inappropriate choice of law that contravenes public policy or human rights, it would be more reasonable to exclude party autonomy from the outset to avoid systematic substantive control of the designated law.<sup>130</sup> As to kinship, it would be expedient to refer to alternative connecting factors in principle to constitute legal parentage in the child's interests.<sup>131</sup> For the sake of effective protection, parental responsibilities and measures for the protection of the child should be governed objectively by the law of the child's habitual residence,

which reflects his or her social environment and generally coincides with the forum.<sup>132</sup>

### 3.3 Limitations of Party Autonomy

Despite the advantages and importance of party autonomy in contemporary private international family law, it entails certain institutional drawbacks in terms of realising an individual's identity. In the case of matrimonial property regimes or divorce, the spouses need to agree upon the applicable law. If agreement cannot be reached between the spouses due to discordances of their preference, party autonomy would remain ineffective. Furthermore, for the sake of legal certainty, choice of law cannot be granted every time an individual's identity changes, but needs to be subject to a certain time frame. While a child acquires their first and family name at birth following a decision of the custodian parents, it cannot be altered subsequently solely because the child has acquired different identity.<sup>133</sup>

What is more important from the viewpoint of global governance is to inquire how to deal with cases in which the individual has affiliation or belonging to an ethnic minority or religious community rather than the state. In these cases, the choice between the law of nationality and that of habitual residence does not reflect the person's identity, given that the conventional conflict of laws method is geared to state law conflicts and disregards conflicts with or among non-state laws. This leads to the question of whether there are any alternative conflict of laws methods that enable to take into account non-state religious, cultural or customary norms.

## 4 Interactions between State Law and Non-State Law

### 4.1 Premises

Viewing the relativity and multiplicity of individual belonging and affiliation, the relevant legal institutions and norms within minorities, religious communities or any collectivities other than the state may be controlling upon individuals. Indeed, family law has particularly become a crucial platform for religious minorities in secular states to define their memberships and demarcate their non-territorial communities. By prescribing marriage, divorce and lineage of their members, religious minorities seek to uphold and unify the group and maintain its values, practices and distinct ways of life. For individuals belonging to such a community and living in its social environment, civil marriage, divorce or paternity authorized by the state may solely have limited meaning.<sup>134</sup> In view of the current challenges of cultural diversity and plurality of legal norms, due regard should

120. For succession, e.g., Arts. 90(2) and 91(2) Swiss PIL; Art. 25(2) EGBGB, Art. 49(2) Korean PIL; for matrimonial property regimes, e.g., Art. 15 Austrian PIL, Art. 52 Swiss PIL, Art. 15(2) EGBGB, Art. 26(2) Japanese PIL, Art. 38(2) Korean PIL, Art. 48(1) Taiwanese PIL.

121. Arts. 3 and 6 of the 1978 Convention on the Law Applicable to Matrimonial Property Regimes; Arts. 5 and 6 of the 1989 Convention on the Law Applicable to Succession to the Estates of Deceased Persons; Arts. 7 and 8 of the 2007 Maintenance Protocol (see n. 81).

122. Art. 15 Maintenance Regulation, above n. 85; Art. 22 Succession Regulation, above n. 87; Arts. 16 and 18 Matrimonial Property Regimes Proposal, above n. 88.

123. Art. 5(1)(a)-(d) Rome III Regulation, above n. 86.

124. Art. 55(2) Belgian PIL; Art. 1(2)(4) Netherlands International Divorce Law; Arts. 17(1) and 14 EGBGB.

125. See Nishitani, above n. 50, at 1196 ff.

126. Art. 26 Chinese PIL. On the other hand, judicial divorce is simply governed by the *lex fori* (Art. 27 *ibid.*).

127. Art. 10 EGBGB, Art. 37(2) Swiss PIL; cf. Grünberger, above n. 106, at 159.

128. See *supra* n. 106.

129. Arts. 47-48 EGBGB; Mansel, above n. 116, at 288 ff.

130. Foblets and Yassari, above n. 2, at 49.

131. Art. 19(1) EGBGB, Art. 68(1)(2) Swiss PIL, Arts. 28-30 Japanese PIL, Arts. 40-42 Korean PIL.

132. Arts. 15-22 of the 1996 Hague Convention, above n. 81.

133. Cf. Kohler, above n. 107, at 415.

134. A. Shachar, 'State, Religion, and the Family: The New Dilemmas of Multicultural Accommodation', in Ahdar and Aroney (eds.), *Shari'a in the West* (Oxford/New York 2010), at 120 f.

be given to interactions between state law and non-state law.<sup>135</sup>

In 2008, the District Court of Lille in France rendered a decision that widely attracted attention.<sup>136</sup> In this case, two French Muslims of Moroccan origin celebrated marriage in France. The husband sought to annul the union after he discovered that his wife was not a virgin, contrary to the tenets of the Islam, and had lied to him on this matter. The judge acceded to his claim and acknowledged serious mistake about the *fundamental qualities* of his wife (Art. 180 (2) Civil Code), on the grounds that she consented to the claim and knew that her virginity was a decisive factor for her husband to enter marriage. According to leading authors, however, the wife's virginity is not a *fundamental quality* of the spouse under the present French law, as it does not render marital life impossible or unbearable, unlike impotency or mental disorder. Obligating only the wife retroactively to chastity and fidelity would also run counter to gender equality and dignity of individuals.<sup>137</sup> At the end of the day, the husband's claim was dismissed by the Court of Appeal of Douai.<sup>138</sup>

In the underlying case, both spouses were French nationals, so the conditions of marriage were governed by French law (Art. 3 (3) Civil Code). The question was whether and how far Islamic moral concept should be taken into account in interpreting French law. Although the judge at first instance was inclined to take Islamic morality into account, the Court of Appeal ruled that it was not feasible to sublime religious norms into the construction and application of state law. As *Malaurie* argues, the interpretation of the positive French law was held to depend not on the spouses' intent or the social environment where they live but on the general conscience of the nation.<sup>139</sup>

This interplay of state law and non-state law indicates that the phenomena of conflict of laws may well shift from territory-bound cross-border cases to domestic cases, in light of the multiplying sources of legal norms. In fact, the number of third-state immigrants who hold the nationality of the host state is rapidly increasing in Europe.<sup>140</sup> Even if there is no *conflict of laws* due to a lack of internationality of the case in the traditional sense, there could still be a *conflict of norms* between state law and non-state religious, cultural or customary

norms. Similarly, while *lex fori* will regularly be applicable in the capacity of the law of habitual residence under the Hague Conventions and EU Regulations,<sup>141</sup> a *conflict of norms* may yet occur in relation to non-state norms. It is arguably expedient to carefully contemplate methods of accommodating the plurality of legal sources to respect cultural diversity and individual identities.

#### 4.2 Data-Theory

While the primacy of state law over religious norms was retained in the above-mentioned virginity case in France, referring to non-state religious, cultural or customary norms within the framework of the applicable state law may well make sense and even be desirable in other cases. This method is called the *data theory*. It has, in particular, been advocated by *Jayme* to deal with contemporary challenges of conflict of cultures.<sup>142</sup> A good example was provided by *Hoekema* and *van Rossum* based on their empirical study in *Hamid's* case.<sup>143</sup>

*Hamid* and his wife, both of Turkish origin, were living in the Netherlands with their two children. When the wife became depressed, left the marital home and disappeared for some 18 months, the children were raised by *Hamid's* sister and parents in Turkey. On her return, however, his wife successfully obtained sole custody rights for their children subsequent to their divorce, in accordance with the criteria of the *best interests of the child* under Dutch law. The Dutch Child Protection Board and the judge gave priority to the mother who showed affectionate behaviour and could provide living arrangements to personally take care of the children, despite having abandoned them and disappeared for a period.<sup>144</sup>

The authors indicate that children frequently grow up in an extended family and are looked after by an aunt or grandmother, while the father earns a living in Turkish custom and tradition. Had the Dutch authority and the judge properly considered such Turkish cultural background in assessing the best interests of *Hamid's* children, the outcome of the case could have been different.<sup>145</sup> The *best interests of the child* is an abstract notion that is subject to further interpretation and supplementation of meaning in concrete cases. It could have served in the underlying case as a gateway for cultural or customary norms to be taken into account in applying the governing state law. The same reasoning could also apply to other general notions in family law, such as the *irretrievable breakdown of marriage* as a ground for

135. Berman, above n. 7, at 45.

136. Tribunal de grande instance de Lille, 1<sup>er</sup> avril 2008, *Droit de la famille* 2008-2009, n° 111.91; *JCP* 2008, II-10122.

137. F. Terré, *JCP* 2008, act. 439; P. Malaurie, *JCP* 2008, act. 440; cf. F. Chénéde, *Droit de la famille* 2008-2009, n° 111.91; P. Labbé, *Dalloz* 2008, 1389; G. Raoul-Cormeil, *JCP* 2008, II-10122; G. Raymond, *Droit de la famille* 2008, comm. 98; see also the appel submitted by the prosecutor (below n. 138). They also point out that the wife's consent to the claim is not determinative, as the status issue is beyond the parties' disposition.

138. Cour d'appel de Douai, le 17 novembre 2008, *Dalloz* 2010, 728; *JCP* 2009, II-10005; *Rev. trim. dr. civ.* 2009, 98; see P. Malaurie, *JCP* 2009, II-10005. The argument of the husband in favour of annulling the marriage was shifted on appeal from lack of virginity to the character of the wife in telling a lie, which was held insufficient grounds for annulment.

139. Cfr. Malaurie, above n. 137 and 138.

140. See *supra* 2.3.

141. See *supra* 2.4.

142. E. Jayme, 'Kulturelle Identität und Internationales Privatrecht', in Jayme (ed.), *Kulturelle Identität und Internationales Privatrecht* (Heidelberg 2003), at 10 f.; see also Weller, above n. 111, at 229 ff.; for 'data-theory' in general, see A. Armin Ehrenzweig and E. Jayme, *Private International Law*, Vol. 1 (Leyden 1967), at 77 ff.; J. Kropholler, *Internationales Privatrecht*, 6th edn (Tübingen 2006), at 41.

143. A.J. Hoekema and W.M. van Rossum, 'Empirical Conflict Rules in Dutch Legal Cases of Cultural Diversity', in Foblets et al. (eds.), *Cultural Diversity and the Law. State Responses from around the World* (Bruxelles 2010), at 851 ff.; see also Y. Nishitani, above n. 1, at 153 ff.

144. Hoekema and van Rossum, above n. 143, at 853.

145. Hoekema and van Rossum, above n. 143, at 864 ff.

divorce.<sup>146</sup> Arguably, the *data-theory* permits moderate and reasonable interactions between the applicable state law and non-state norms within the framework of the traditional conflict of laws system.

### 4.3 Substantive Law Methods

In view of multicultural aspirations in society, states may also incorporate religious or other non-state norms into their substantive law system. For historical and institutional reasons, Italian law recognises concordat marriage celebrated under Canon law,<sup>147</sup> whereas Spanish and UK laws provide for, *inter alia*, Islamic and Jewish marriage with civil effects in an effort to accommodate the spouses' faith.<sup>148</sup> Since Islamic law prohibits adoption and only acknowledges *kafala*, Spain and the UK introduced a corresponding institution of guardianship to protect Muslim children and ensure them stable family relations.<sup>149</sup> The recent German legislation on the circumcision of male infants sought to legalise the established Muslim and Jewish ritual and custom.<sup>150</sup> In these countries, religious family institutions have been transformed and translated into the state legal system for the sake of cultural accommodation and respect for individual identity.

On the other hand, states may well have interests in exercising necessary control in an effort to preserve social order and protect vulnerable parties, mostly women and children. In fact, a number of states have adopted special rules to deter or sanction the forced marriage of Muslim women, notably Sweden,<sup>151</sup> Germany,<sup>152</sup> Switzerland,<sup>153</sup> and the UK<sup>154</sup> They have subjected the celebration of marriage under foreign law to a *lex fori*

control,<sup>155</sup> introduced penal sanctions and other regulatory mechanisms or facilitated the annulment of marriages.<sup>156</sup>

Jewish divorce is also a good example. Jewish divorce is effected in a ritual where the husband hands in a *get*, a bill of divorce, to the wife in front of the Rabbinat. If the husband refuses to do so in order to seek retaliation or circumvent maintenance obligations, the wife is bound to the religious marriage forever. Even after obtaining civil divorce, she cannot remarry in Judaism, and her children born from another man are severely disadvantaged.<sup>157</sup> As a remedy for a distressed Jewish wife, the French Cour de cassation ordered the husband to pay damages on ground of *abuse of rights* in 1972.<sup>158</sup>

The New York Court of Appeals took a different tack in 1983.<sup>159</sup> In this *Avitzur* case, the wife sought to enforce *ketubah* signed at marriage celebration, under which the husband had promised to appear at Beth Din, a religious tribunal, for advice and consultation on their marriage including the granting of a *get*. The judge held that the spouses had agreed to refer disputes to a non-judicial forum in *ketubah*, which is not a religious issue and therefore enforceable under neutral principles of contract law, analogously as a prenuptial agreement. As a result, the husband was ordered by the court to appear before the religious tribunal to fulfil his contractual obligation.<sup>160</sup> Following this decision, the New York legislature adopted the so-called *get* statute, which stipulates that a spouse needs to take all necessary measures to eliminate any hindrance for the other spouse's remarriage before applying for a divorce in the courts.<sup>161</sup> Although formulated in gender and religion-neutral language, it envisages indirectly obliging a Jewish husband to submit a *get* to his wife. Comparable statutes have been adopted in Ontario, Canada (1986),<sup>162</sup> South Africa (1996),<sup>163</sup> and the UK (2002).<sup>164</sup> States will regulate family relations and guarantee fundamental rights where

146. Hoekema and van Rossum, above n. 143, at 867.

147. Art. 82 Italian Civil Code; Art. 8(1) Concordat ('Accordo tra la Repubblica Italiana e la Santa Sede') of 18.2.1984; cf. E. Jayme, 'Ordre public, droit de l'homme et droit religieux', in von Bar (ed.), *Islamic Law and its Reception by the Courts in the West* (Köln 1999), at 226.

148. Art. 49 Spanish Civil Code; cf. E. Jayme, IPRax 1997, 376 f.; Sec. 46 UK Marriages Act, 1949; cf. W. Menski, 'Law, State and Culture: How Countries Accommodate Religious, Cultural and Ethnic Diversity. The British and Indian Experiences', in Foblets et al. (eds.), *Cultural Diversity and the Law. State Responses from around the World* (Bruxelles 2010), at 440 ff.

149. Art. 173 bis Spanish Civil Code; cf. L.Z. Sánchez-Ezarrriaga, *Derecho de familia y de la persona*, Vol. 2 (Barcelona 2007), at 682 ff.; E. Jayme, 'Kulturelle Relativität und internationales Privatrecht', in Schulze (ed.), *Kulturelle Relativität des internationalen Privatrechts* (Baden-Baden 2014), at 63 f.; Sec. 115 UK Adoption and Children Act, 2002; Sec. 14A-G UK Children Act, 1989; cf. Menski, above n. 148, at 442 ff.

150. § 1631d German BGB (Gesetz über den Umfang der Personensorge bei einer Beschneidung des männlichen Kindes vom 20.12.2012 [BGBl. 2012 I 2749]).

151. Cf. M. Bogdan, 'Die Reform des schwedischen IPR zur Vermeidung von Kinder- und Zwangsehen', IPRax 2004, at 546 ff.

152. § 1317(1) BGB; § 237 StGB (Gesetz zur Bekämpfung der Zwangsheirat und zum besseren Schutz der Opfer von Zwangsheirat sowie zur Änderung weiterer aufenthalts- und asylrechtlicher Vorschriften vom 23.6.2011 [BGBl. I, 1266]).

153. Arts. 105 Ziff. 5 and 6 Civil Code; Arts. 44-45a PIL; Art. 181a Penal Code (Bundesgesetz über Massnahmen gegen Zwangsheiraten vom 15.6.2012 [AS 2013 S. 1035]).

154. Forced Marriage (Civil Protection) Act 2007. Further law reform is being contemplated: see <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/157829/forced-marriage-response.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/157829/forced-marriage-response.pdf)> (last visited 15 October 2014).

155. In the case of Sweden, see C. Kohler, 'Der Einfluss der Globalisierung auf die Wahl der Anknüpfungsmomente im Internationalen Familienrecht', in Freitag et al. (eds.), *Internationales Familienrecht für das 21. Jahrhundert* (Berlin 2006), at 19 ff.

156. See *supra* n. 152-154.

157. T. Einhorn, 'Jewish Divorce in the International Arena', in *Liber Amicorum Kurt Siehr* (The Hague 2000), at 137; K. Siehr, 'Die Berücksichtigung religiösen Rechts bei gerichtlicher Scheidung jüdischer Ehepaare', in *Festschrift Peter Schlosser* (Tübingen 2005), at 885 ff.; C. Herfarth, *Die Scheidung nach jüdischem Recht im internationalen Zivilverfahrensrecht* (Heidelberg 2000), at 17 ff.

158. Art. 1382 Civil Code: Cour de cassation, 13 December 1972, *Dalloz* 1973, 493; Cour de cassation, 21 November 1990, *Dalloz* 1991, 434.

159. Court of Appeals of the State of New York, 15 February 1983 [*Avitzur v. Avitzur*], 58 N.Y. 2d 108, 446 N.E. 2d 136, 459 N.Y. S.2d 572; cf. 14 September 1981 [*Shapiro v. Shapiro*], 442 N.Y. S.2d 928 (1981).

160. See F. Hötte, *Religiöse Schiedsgerichtsbarkeit. Angloamerikanische Rechtspraxis, Perspektive für Deutschland* (Tübingen 2013), at 73 ff.; cf. Supreme Court of Canada, 14 December 2007 [*Braker v. Marcovitz*], 3 S.C.R. 607, 2007 SCC 54.

161. § 253, § 236(b)(5)(h) and § 230(B)(6)(d) New York Domestic Relations Act; cf. Herfarth, above n. 157, at 311 ff.

162. Chap. 4, § 2(4)-(7), § 56 (5)-(7) Family Law Act 1990, as amended in 1986.

163. Sec. 5A Divorce Act 1979 (Act N° 95 of 1996, Sec. 1).

164. Sec. 10A Matrimonial Causes Act 1973, as amended by the Divorce (Religious Marriages) Act 2002.



necessary, even if doing so set certain restrictions on moral concepts of religious communities and individual identities.

Nevertheless, a troubling movement is currently being observed in the USA. By the 2010 amendment of the Oklahoma Constitution, a provision was introduced that banned state courts from considering Shari'a law. Even after it was held unconstitutional in 2013 under the First Amendment of the US Constitution,<sup>165</sup> other state legislatures joined the movement by extending the prohibition to all foreign laws and international law.<sup>166</sup> Such excessive control, partly caused by lack of knowledge or ungrounded fear of Islam, may negatively impact US overseas business transactions and unduly deny the validity of any religious family relations constituted abroad, including Jewish marriages celebrated between US nationals in Israel.<sup>167</sup>

#### 4.4 Religious Arbitration

The interactions between state law and non-state law examined so far consist in integrating non-state norms into the state law system through appropriate interpretation or substantive legislation. These methods fit into the long-established conflict of laws system and can be accommodated without difficulty. It is, however, a different question whether religious or other non-state norms qualify as the law governing family relations as such. While the choice of non-state law in commercial contracts has gained support to a certain extent,<sup>168</sup> conflicts lawyers have been reluctant to apply the same policy to family relations, in which objective connecting factors have traditionally dominated and the parties' disposition has been limited both in conflict of laws and substantive law.<sup>169</sup> Nevertheless, there have been remarkable attempts to acquiesce autonomy of religious institutions in conducting alternative dispute resolution and recognise their effects in the state.

In Ontario, Canada, Shari'a arbitration was introduced in 2004 by the Islamic Institute of Civil Justice to decide family disputes between Muslims.<sup>170</sup> Although there had already been other religious arbitration for Men-

nonites, Catholics, Jews and Ismailites,<sup>171</sup> only the Shari'a arbitration polarised public opinion due to fears of Islamic fundamentalism and the oppression of women. Even the legitimacy of the multiculturalism provided for in the Canadian Constitution<sup>172</sup> was queried.<sup>173</sup> The debate eventually came to an end when the Ontario legislature enacted Family Statute Law Amendment Act 2006, requiring all family arbitrations to be conducted in accordance with Canadian law to the exclusion of religious law.<sup>174</sup> As a result, the state primacy has been warranted in regulating family relations and precluding the autonomous decision-making authority of religious institutions in arbitration.<sup>175</sup>

To maintain state regulation, Ontario took an all-or-nothing approach, eliminating all religious arbitrations as competing normative systems.<sup>176</sup> Religious tribunals, however, could indeed afford better protection to women than state courts in certain circumstances, as in the case of Islamic mediation in the UK. In Islamic law, divorce is unilaterally effected by the husband's *talaq* pronouncement in principle. Muslim women who have obtained a civil divorce but have failed to persuade their husbands to declare *talaq*, or who have only celebrated an Islamic marriage and cannot seek civil divorce at state courts often refer to mediation at Islamic councils in the UK. For many devout Muslim women, mediation within the religious community is the only viable path to being released from religious marriage, even if this is lacking in coercive measures and gender equality.<sup>177</sup>

In this respect, the faith-based tribunals are capable of complementing the state legal system without substituting it. For the sake of shared responsibility, *Shachar* advocates *regulated interaction* between state and religion, providing the religious institutions with sub-matter jurisdiction in arbitration, while reserving the regulatory authority of the state to exercise *ex ante* control and *ex post* judicial review.<sup>178</sup> If one could carefully depart from the premise that state is able to provide necessary control and put appropriate constraints, it would presumably be worth contemplating institutionalising alternative dispute resolution of religious communities. The conventional dichotomy between state and religion could eventually be mitigated, even though

165. US District Court for the Western District of Oklahoma, 15 August 2013 [*Awad v. Ziriax*], 966 F. Supp. 2d 1198.

166. For example, see F. Patel and A. Toh, 'Commentary: The Clear Anti-Muslim Bias behind Anti-Shariah Laws', *Washington Post*, 22.2.2014.

167. *Ibid.*

168. For the latest discussion, see the draft Hague Principles on Choice of Law in International Commercial Contracts (<[www.hcch.net/](http://www.hcch.net/)> [last visited 15 October 2014]).

169. In relation to Art. 10 Rome III, above n. 86 that replaces the applicable foreign law which violates gender equality by *lex fori*, there have even been lively discussions among academics about the eligibility of Egyptian state law to be chosen by the spouses. Jayme, above n. 149, at 64 f.

170. M. Boyd, 'Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion December 2004', at 4 ff. (to be downloaded at: <[www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf)> [last visited 15 October 2014]).

171. K. Johnston, G. Camelino & R. Rizzo, 'A Return to "Traditional" Dispute Resolution: An examination of Religious Dispute Resolution Systems', Chap. II-III (to be downloaded at: <[www.cfcj-fcjc.org/sites/default/files/docs/hosted/16173-trad\\_dr.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/hosted/16173-trad_dr.pdf)> [last visited 15 October 2014]); Hötte, above n. 160, at 129.

172. Sec. 27 of the Canadian Charter of Rights and Freedoms (Canadian Constitution Act, 1982).

173. Hötte, above n. 160, at 134 ff.

174. Family Statute Law Amendment Act 2006 (amending the Arbitration Act 1991).

175. For further detail, see M. Rohe, 'Muslimische Identität und Recht in Kanada', *RabelsZ* 72, at 475 ff., 502 ff. (2008).

176. Shachar, above n. 134, at 127 ff.

177. A. Phillips, *Multiculturalism without Culture* (Princeton/Oxford 2007), at 172 ff.; N. Bialostozky, 'Volition and Religion: A Rights-Based Appraisal of Islamic Arbitration in England', in Foblets and Yassari (eds.), *Legal Approaches to Cultural Diversity* (Leiden/Boston 2013), at 603 ff.

178. Shachar, above n. 134, at 123 ff.

religion could not thwart or supersede the regulatory authority of state.

around the world when dealing with this challenging task.

## 5 Conclusion

In the contemporary world, the global governance of family relations needs to presuppose the diversity and multiplicity of a person's belonging and affiliation, as well as the plurality of legal norms. Even the meaning of nationality, which used to indicate an individual's unique membership and allegiance to a nation state, is gradually changing due to the increasing number of dual nationals and frequent cross-border movement of persons in the time of globalisation. These current conditions of cultural diversity and law fragmentation challenge the conventional conflict of laws methods for determining the law governing family relations. This also leads to the question of whether and how far the interrelations between state law and non-state law should be taken into consideration in dealing with conflict of laws issues.

In order to reflect a person's belonging and affiliation when determining the applicable law, this paper analyses the viability of relying on objective connecting factors, *i.e.*, nationality and habitual residence. In light of the contingency of justice in relying on one of these objective connecting factors, this paper suggests transcending this dichotomy by enabling the parties to designate the applicable law themselves. At the end of the day, this study indicates that, when reflecting on appropriate conflicts rules for cross-border family relations, an all-encompassing notion of *personal law*, as employed by *Savigny*,<sup>179</sup> is no longer feasible. Rather, a distinct, separate determination of applicable law is necessary, tailored to the characteristics of each category of legal relationship and appropriately adjusted by the parties' choice of law.

With regard to the interplay of state law and non-state law, this paper expounds several examples to delineate the way these alternate normative systems interact and analyses the possible impact on the functioning of conflict of laws. This study suggests relativising the conventional notion of the conflict of state laws and including religious, cultural or customary non-state norms in its scrutiny. While this study limits itself to addressing these core issues, it points out that adopting a plurality of methods when dealing with the conflict of cultures is an inevitable consequence of the contemporary multiplication of legal sources and law fragmentation. From a viewpoint of global governance, it should further be examined where the limitations of the current conflict of law system lie, and whether and to what extent alternative methods are viable to consider the interrelations of state law and non-state law. It remains to be seen whether a certain confluence of solutions can be sought

179. See *supra* n. 9.