



Cross-border family cases and religious diversity What can judges do?

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Abstract

This contribution focuses on challenges faced by European judges when examining family disputes in a multicultural context. Why are judges, generally, so uneasy when facing religiously or culturally motivated claims? Under what conditions can religious law be applied in cross-border family cases? What are the limits of Private International Law in this respect? Case law from primarily the Nordic jurisdictions is examined in order to illustrate the points made. Ultimately, the parties' ability to formulate their claims in a legal language is essential for the outcome of a dispute. Where permitted by the rules of procedure of the competent court, the judge should strive to stimulate an active dialogue with the parties for the purpose of acquiring a better understanding of the issues at stake.

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1. Confronting religion and tradition within family law

1.1 The judge's dilemma

The novelty of contemporary multiculturalism is that it has introduced into many European states a kind of “ethno-religious mix”,¹ of which these states had little – if any – previous experience. The ‘legal actors’, that is, the national courts, lawyers, legislators and legal scholars, have only recently come to realise the existence of a previously unthinkable and complex plurality within the field of family life,² namely that society includes minority groups who conduct their family lives in accordance with the customs and traditions originating from another part of the world or another culture. These customs and traditions are often justified on the basis of the parties’ religion. An increasing number of disputes are brought to courts in which a party wishes to rely on a right that a religious norm system allegedly accords to him or her. In court proceedings, religion and religious beliefs are likewise presented as defences or justifications for a person’s action. In yet other cases, religious or cultural motives appear to have guided the parties’ actions, even if such grounds are not pleaded in the litigation. The court is confronted with a new kind of diversity and new challenges.

First, the dispute’s alleged religious dimension is likely to cause unease. The state courts of Europe are commonly seen as *secular courts*. As a result, European judges identify themselves as *secular judges* and tend to regard all matters of faith as falling outside both their professional competence and jurisdiction. In England, this concern was exceptionally clearly expressed by the judge, Munby J. in the case of *Sulaiman v. Juffali*.³ Munby pointed out that he, as a judge, had sworn to do justice “to all manner of people”. He added, “[r]eligion – whatever the particular believer’s faith – is no doubt something to be encouraged but it is not the business of the government or of the secular courts”. I believe that European judges would generally agree with this statement.

Second, the court needs to find a *legal basis* in its own legal system (*lex fori*) in order to be able to adjudicate any request or defence. Claims that in the court’s view are based on purely religious practices, traditions or customs might not qualify⁴ unless they are of legal relevance according to the applicable law. Equally, such grounds in support of a party’s actions or defences might not count. Can justice be done, if no regard is given to these other norm systems?

¹ T. Modood, *Multiculturalism: A Civic Idea*, Cambridge: Polity Press, 2007, p. 8. This has to do with large-scale global migration during the last 40-50 years.

² Earlier, upon migration, ties were gradually cut with the state of origin. In contrast, in the globalised context the world is in many respects borderless (easy travel prospects, the Internet and social media, television, etc.), enabling an individual to live simultaneously under ‘different systems’.

³ *Sulaiman v. Juffali* [2002] 2 FCR 427, at 439, as reported by E.B. Crawford and J.M. Carruthers, “The Place of Religion in Family Law: The International Private Law Imperative”, in J. Mair and E. Örucü (eds), *The Place of Religion in Family Law: A Comparative Search*, Cambridge: Intersentia, 2011, pp. 37 f.

⁴ An example is when a woman whose traditional or religious marriage does not qualify as a ‘marriage’ under forum law requests the court for a divorce or access to a benefit that depends on the validity of the marriage.

Third, the parties to the dispute may turn out to be living under parallel norm systems, whether dictated by states, a religion, traditions or customs.⁵ In cross-border cases, in particular when the persons have their origin in states with religion-based personal laws, the states of origin often demand full compliance with their religiously coordinated family laws, also when the persons concerned reside abroad.⁶ The individual is left no choice in the matter, if he or she wishes to maintain legal or factual ties within that state.⁷ On the other hand, the continued applicability of one's original personal law, or the submission to religious norms, may also be the preference of the individual concerned. Must the court under all circumstances force the applicability of mandatory forum law, even against the wishes of the individuals concerned?

Fourth, a person with economic means can make use of an 'overseas jurisdiction', normally in the state of origin. Alternatively, people seek to make use of faith-based dispute resolution within the forum state, where such is available. Where the parties have different preferences, there is a risk of parallel proceedings, whether religious or legal. These options increase the risk of limping legal relationships and conflicting decisions.⁸ With all these factors in mind, how can a European court do justice to the individuals concerned?

Religion is a daily topic in the media in Europe, with the focus on tensions allegedly caused by religion, such as the wearing and banning of head scarves, political Islam, circumcision of boys, freedom of expression *versus* religion and, as a result, the extremely complicated content of the freedom of religion as such. Sociologists are seeking explanations to religion's new visibility in society.⁹ Judges and lawyers in general, in contrast, appear reluctant to participate in any public discussion on how religion relates to law (or law to religion) or how religion might challenge law (or law religion).¹⁰ Whenever a judge has ventured to enter the debate, calling for the inclusion of multi-

⁵ This can be labelled as a form of normative pluralism in a broad sense, covering not only legal sources of whatever origin but also moral values, ethics, diverse cultural understandings of the family, the expected roles of its members, etc. A point repeatedly made by, e.g. the Swedish Professor of Islamology, Jan Hjärpe, is that families exercise jurisdiction because the state itself in tribal societies is unable to protect the individual or the collective. This justification of the family's jurisdiction loses in strength in another kind of a surrounding.

⁶ In cross-border cases, from the point of view of Islamic law, sharia rules should always take priority over any other rules. See, e.g. W. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Second Edition, Cambridge, MA: Cambridge University Press, 2006, p. 275. Confusingly, *foreign embassies* often exercise powers ('prolonged jurisdiction') in various kinds of matters related to family law, often without the authorisation or permission of the host state. The embassies, for example, may upon delegation of the state of origin appoint officials to celebrate marriages in the host state, certify divorces there as well as various kinds of agreements entered into there. Even if these acts are not recognised in the host state, they may be obligatory for legal validity in the parties' state of origin.

⁷ Giving up that state's citizenship can have, *inter alia*, extensive legal consequences concerning ownership of property in that state. For example, under the law of Iran, an Iranian national renouncing his or her citizenship must transfer all of his or her immovable property to Iranian nationals. See S.N. Ebrahani, "An Overview of the Private International Law of Iran: Theory and Practice", *Yearbook of Private International Law*, Vol. XII, 2010, p. 516. It appears that very few Iranians who are habitually resident abroad renounce their Iranian citizenship. They acquire, instead, a new nationality, i.e. that of their new home state, while maintaining the citizenship of origin.

⁸ The persons concerned risk being the 'eternal losers', unless they are able to take measures ('fix it') in both jurisdictions, in agreement with one another.

⁹ It is asked if this is a new kind of a 'class issue', whereby marginalised groups identify with religion, instead of sharing the values of the majority society. Or whether religious lifestyles are a way of claiming public recognition to what, in particular for minority groups, gives life a purpose, and the guidelines for a good way of living. On the other hand, is not religion something that one, according to the Western notion, *chooses*, with the result that we should avoid 'ethnifying' religions? But can the European secular emphasis stand considering that, globally, it constitutes an exception?

¹⁰ According to Professor of Sociology Grace Davie, lawyers "create and interpret legal frameworks, some of which deal with religion; they are less interested in the messy realities of lived religion as this is experienced in everyday life". See G. Davie, "Law, Sociology and Religion: An Awkward Threesome", *Oxford Journal of Law and Religion*, Vol. 1, No. 1, 2012, p. 235.

faith concerns within the legal system, the media reactions have been widely negative. Any vision of parallel legal systems provokes. In a much-debated and heavily criticised speech of July 2008, Lord Justice Phillips, following the example set by the Archbishop of Canterbury Dr Rowan Williams earlier that year, expressed sympathy for the idea of applying Islamic legal principles to Muslims in some parts of the legal system, for example matrimonial law.¹¹ The vision described by Phillips was not that this should take place in UK courts, but within the framework of agreed mediation or alternative dispute resolution.¹²

1.2 The cultural constraints of family law

Contemporary European states endorse secularism and the principle of confession-neutrality of the state.¹³ For a long time, religion has been regarded as the private matter of the individual. The challenge is how to respond in particular to Islam, which, as Grace Davie explains it, “is essentially a public faith in which religion merges imperceptibly into other areas of society including the law”.¹⁴ Another challenge is to strike a proper balance between the state’s desire to interfere and people’s right to live in accordance with their religion and traditions.

It is hardly surprising that these kinds of tensions appear daily within the ‘culturally constrained’ field of family law. Family law legislation is a primary tool of contemporary European society for promoting equal rights for men and women, as well as children’s rights. The state also uses it for ‘social engineering’ purposes. Recent European legislation introducing same-sex marriages, registered partnerships or civil unions, for example, not only serves the purpose of protecting same-sex couples, but also steering societal attitudes in a direction that the state finds desirable. Since from the point of view of the state, fundamental values of the legal order are at stake, there is little tolerance for any other outlook. It remains, nevertheless, unrealistic to expect that families living in diaspora are able, willing or interested in giving up their own family culture.¹⁵ In the long run, however, no culture exists in isolation of external influences, with a fixed content. In a good society, we are voluntarily influenced by each other.

1.3 Secular law versus religious law

In a contemporary European society, *secular family law* is associated with autonomy for the individual, promotion of equal rights for women in relation to men, children’s rights and the prohibition of discrimination on such grounds as a person’s gender, race, ethnicity, religion or sexual orientation.¹⁶ It finds an ideological background in the ideas of the Enlightenment, further developed

¹¹ “Equality Before the Law”, Speech by Lord Phillips, Lord Chief Justice, East London Muslim Centre, 2 July 2008. “Islam in English Law: Civil and Religious Law in England”, Lecture by the Archbishop of Canterbury, Dr Rowan Williams, Lambeth Palace, 7 February 2008.

¹² The stir created by the respective contributions of Williams and Phillips can at least in part be explained by existing controversies concerning the advantages and disadvantages of religious dispute resolution. According to critics, access to any such alternative takes place at the expense of women’s rights, cementing discrimination and inequality in law. We are not living in a ‘theocracy’, but in a ‘*Rechtsstaat*’. Correspondingly, the justice system should respond to humanitarian and not religious needs. Others see religious dispute resolution as a way of combining different norm systems under which a believer lives, providing a method to prevent limping legal relationships from arising. Decisions by religious bodies might be enforceable in the parties’ country of origin, contrary to decisions emanating from a state court. Both positive and negative experiences are reported. See, e.g. the special issue by S. Glazer on “Sharia Controversy: Is there a place for Islamic law in Western countries?”, *Global Researcher*, Vol. 6, No. 1, 2012.

¹³ The European models of secularism differ widely, however. See S. Ferrari, “Introduction to European Church and State Discourses”, in L. Christoffersen, K.Å. Modéer and S. Andersen (eds), *Law & Religion in the 21st Century – Nordic Perspectives*, Copenhagen: Djof Publishing, 2010, pp. 27-32.

¹⁴ Davie (2012), op. cit., p. 239.

¹⁵ It is often assumed that religion, customs and traditions are strengthened in diaspora.

¹⁶ One of the largely ignored paradoxes of secularity in, e.g. regulations on family law, is nevertheless that the law continues to express values that are in line with the dominating religion in the state. See M. Jänträ-Jareborg,

by the introduction of rights of various kinds, with or without the explicit support of international treaty law. It marks a landmark victory over ‘the chains of religion’¹⁷ and superstition, and is increasingly seen as a kind of a human rights regulation, applicable to everybody within the state’s territory.

Religious family law, by contrast, is associated with supernatural ‘divine’ rules, governing all aspects of (everyday) life and, thus, with a broader scope of applicability than secular law. When regarded as ‘fixed and immutable’, it tends to reflect traditional patriarchal values with strict gender roles, women and children being subordinated to men, and homosexuality being regarded as a sin. Group rights prevail over individual rights. Others emphasise that religious law is ‘the law of the believers’, its authority being the divine will of God. Because its interpretation is ‘the work of man’, no agreement exists on its content.

The risk exists that those with power – religious leaders over the believers, clans over their members, parents over their children, men over their wives – have an interest in expanding religion (and religious law) to cover and sanction interpretations that they themselves prefer.¹⁸ It is often pointed out that the deterioration of women’s rights in many Islamic countries has nothing to do with these states’ adherence to Islam, but with their patriarchal organisation.¹⁹ Yet religious law has the potential to be just as ‘progressive’ as secular law.

In many European societies, religion is regarded as a ‘dark force’, conserving inequalities. Correspondingly, religious family law in Europe is viewed as anti-progressive and seen as a threat to modern European values of equality and other human rights standards.²⁰ There is a growing unease in every European society that the relatively newly-established, progressive rights and values might not be shared by, in particular, the new ‘ethno-religious’ minority groups who might instead wish to follow conservative, religiously-motivated rules, and even cherish alternative loyalties to those of the state of residence. Leading European politicians, such as Angela Merkel, Nicholas Sarkozy and David Cameron, have signalled the importance of assimilating minority cultures into the mainstream culture, thus marking an end to society’s recently more open attitude towards multiculturalism.

1.4 The risk of stigmatising vulnerable groups?

Measures have been initiated in several European states with the aim of putting an end to various kinds of (alleged) discriminatory practices, (allegedly) practised within minority groups. A criminalisation of forced marriages is currently under consideration in England. In Norway, provisions of criminal law that are specially tailored for forced marriages,²¹ as well as marriages concerning a

“The Legal Scope for Religious Identity in Family Matters – The Paradoxes of the Swedish Approach”, in J. Mair and E. Örucü (eds), *The Place of Religion in Family Law: A Comparative Search*, Cambridge: Intersentia, 2011, pp. 79 f.

¹⁷ The alternative expression, used by Professor Stephen Cretney, refers to the “shackles of culture and religion”. See, e.g. S. Cretney, “Breaking the Shackles of Culture and Religion in the Field of Divorce”, in K. Boele-Woelki (ed.), *Common Core and Better Law in European Family Law*, Cambridge: Intersentia, 2005, pp. 3-14.

¹⁸ This remains one of the major arguments against faith-based mediation in family law.

¹⁹ See A. Mashhour, “Islamic Law and Gender Equality – Could there be a Common Ground? A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt”, *Human Rights Quarterly*, Vol. 27, No. 2, 2005, pp. 562-596. See also the Musawah report, *CEDAW and Muslim Family Law: In Search of Common Ground*, Musawah, Sisters in Islam, Selangor, Malaysia, 2011.

²⁰ These rights are continually developing and their content and scope of application may be disputed, just as is the case with religion.

²¹ Norwegian Penal Act § 222.2. The practical application of this provision has turned out to be complicated, and case law is limited. In the Norwegian Supreme Court judgment HR-2006-258-A-Rt-2006-140, the Court pointed out that the crime is fulfilled only when a legally valid marriage has been concluded in the state of celebration. In this case, the woman had been forced into a religious marriage in Iraq, but since the marriage had not been registered there it had not become legally valid in Iraq. The father and the brother of the woman were sentenced to prison for the attempt to carry out a forced marriage.

child under the age of 16,²² have been introduced into legislation. Sweden is considering similar measures, but with a broader scope of application. According to the Swedish proposal, criminalisation should also cover religious and other *informal marriages*, if they are forced or concern a person under 18 years of age.²³ The current possibility of permission, by a competent authority, to marry before the general marriage age of 18, should be abolished according to the proposal. The aim of these proposals is to “underscore society’s reaction more clearly and in a more focused way”.²⁴

There is a visible European trend towards increasing the minimum marriage age for both parties to 18 years old. In European migration law, for example, a marriage conducted abroad with a person under this age does not qualify as a family unification ground, and many European states have increased the required marriage age in this context to 21.²⁵ The justification generally given in support of these restrictions is that society must dissociate itself from any inequality of treatment and from any kind of coercion, force or violence. Importantly, from the point of view of our topic, this development also *sets limits* to the recognition of religious and cultural diversity, as early marriages and arranged marriages commonly occur outside the majority society and are motivated by cultural and, possibly, religious concerns.

In a more elaborate language, the so-called *politics of universalism*, emphasising the importance of applying the same laws to all, are claimed to clash with the *politics of difference*, recognising the unique identity of an individual or a group, also at the level of the law.²⁶ As Esin Örüçü puts it, “there is pressure on the legal systems from individuals to be accepted for who they are”.²⁷ Werner Menski reminds us that people will not abandon their ways of life simply because they come to live with us. The legal system should not disregard this social reality but “become more perceptive of the need to account for such differences”.²⁸ In Menski’s opinion, however, we often “instinctively desire more uniformity and certainty”. Menski asks whether such desires are part of the ‘bone marrow’, specifically of lawyers and legal scholars. But on the other hand, as emphasised by Abdullahi Ahmed An-Na’im, terms such as ‘identity’ are often, misleadingly, invoked to indicate something that is “clearly defined, stable and fixed”, whereas “people organize their lives to be open and flexible enough to take advantage of alternative options, which they can justify in terms of their cultural or religious value system and meaning”.²⁹

The groups concerned and individuals themselves are diverse and there are no generally applicable standards of being, for example, a ‘Muslim’, a ‘Jew’ or a ‘Catholic’. The legal system should, consequently, be careful in categorising people. Conflict levels should not be artificially raised and

²² Norwegian Penal Act § 220. The age limit of 16 finds an explanation in that from that age onwards, a dispensation from the general marriage-age requirement in Norway of 18 can, exceptionally, be granted by the competent authority.

²³ See the report by the Swedish Ministry of Justice Committee on *Increased Protection Against Forced Marriages and Child Marriages (Stärkt skydd mot tvångsäktenskap och barnäktenskap)*, SOU 2012:35, pp. 45-47 (summary in English).

²⁴ *Ibid.*, p. 45 (summary in English).

²⁵ This applies, e.g. in the UK, Germany and the Netherlands, whereas Denmark follows the age requirement of 24 years.

²⁶ See, e.g. C. Taylor, *Multiculturalism, Examining the Politics of Recognition*, Princeton, NJ: Princeton University Press, 1994.

²⁷ E. Örüçü, “Introduction to the Place of Religion in Family Law: A Comparative Search”, in J. Mair and E. Örüçü (eds), *The Place of Religion in Family Law: A Comparative Search*, Cambridge: Intersentia, 2011, p. 5.

²⁸ W. Menski, “Islamic Law in British Courts: Do We Not Know or Do We Not Want to Know?”, in J. Mair and E. Örüçü (eds), *The Place of Religion in Family Law: A Comparative Search*, Cambridge: Intersentia, 2011, p. 17. Annelise Riles argues along the same lines: “One should seek to understand other people’s ways of knowing the world, on their own terms, before passing judgment on them according to one’s own moral or legal criteria.” See A. Riles, “Cultural Conflicts”, *Law and Contemporary Problems*, Vol. 71, No. 3, 2008, p. 275.

²⁹ See A.A. An-Na’im, *Islam and the Secular State, Negotiating the Future of Shari’a*, Cambridge, MA: Harvard University Press, 2008, p. 22.

people should not be forced under rules that no party wishes to have applied.³⁰ In certain contexts, the normative plurality of people's lives may need to be taken into account – for example, the parties' need or wish to supplement a secular divorce decree with a religious decree on marriage dissolution.³¹

As demonstrated by the case of *R vs. Secretary of State for the Home Department*, finally decided by the UK Supreme Court (judgment 12 October 2011), in the end it can be up to a court of law to decide whether a national enactment meets the proportionality test of the European Convention on Human Rights and Fundamental Freedoms (ECHR) or, on the contrary, is a violation of conventional rights. In its judgment, the Supreme Court found that the immigration rules of the UK, aimed at protecting against forced marriages, were not proportionate in relation to their effects.

Importantly, the pluralism of a contemporary European society includes a plurality of legal sources. Supranational law (the ECHR, EU Charter of Fundamental Rights and treaty law) sets limits to cultural constraints and popular tendencies in national law. Two supranational courts, the European Court of Human Rights and the Court of Justice of the European Union, have jurisdiction to decide, in a generally binding manner, how the common instruments should be interpreted and whether decisions by national courts live up to the European human rights standard. Their interventions focus on sensitive issues, identifying fundamental European values.³² In the first place, however, national courts are in charge of this test.

2. Private international law as the domain for legally relevant religious diversity in family life

2.1 Criteria and relevant questions to be addressed

Cultural and religious constraints tend to pop up in cross-border family law cases, governed by the rules of private international law.³³ This discipline of law strives at promoting cross-border justice between individuals by coordinating legal systems' (alleged) claims to adjudicate the interests at stake. More recently, this discipline has also been described as a system of law governing "conflicts between civilizations"³⁴ or "conflicts between cultures".³⁵ To qualify as a case of private international law, the case at hand must, according to the Continental European understanding, demonstrate a legally relevant connection to another jurisdiction (or another state's law). This requirement is met where, for

³⁰ As the legal system is constructed, the right of the parties to dispose of the applicable rules varies from jurisdiction to jurisdiction. The stronger the public interest is, the less is the autonomy usually at the parties' disposal.

³¹ Persons who have married in the form of a legally valid religious ceremony may wish to divorce in a similar manner. They may feel that they are not otherwise properly divorced or they may even be prevented from remarrying under their religion and religious law. Catholics, on the other hand, may feel an urgent need to supplement a civil divorce with a religious marriage annulment.

³² From a nation-state's perspective, these interventions by the Court are not always welcomed. They may be regarded as 'too progressive' or 'not progressive enough', or destructive to the coherence of the national legal system, etc. They may also be regarded as mutually inconsistent, depending on the chosen emphasis and the legal system in question. Compare, e.g. the Court's judgment in *Munoz Díaz v. Spain*, judgment of 8 December 2009 (Application No. 49151/07) with that in *Serife Yigit v. Turkey*, judgment of 2 November 2010 (Application No. 3976/05). In the first case, refusal to recognise a Roma marriage was a violation of the conventional rights. In the second case, refusal to recognise a purely religious marriage as equivalent to a civil law marriage did not constitute a violation.

³³ Cultural and religious diversity is, nevertheless, an increasing concern also in situations that do not qualify as cross-border cases but are regarded as purely domestic by the legal system. These important issues fall outside the scope of this paper.

³⁴ See J. Basedow, "Multiculturalism, Globalisation and the Law of the Open Society", *Revue Hellénique de Droit International*, 62, 2009, pp. 733 f. See also K. Kreuzer, "Clash of Civilizations and Conflict of Laws", *Revue Hellénique de Droit International*, 62, 2009, pp. 629-694.

³⁵ See E. Jayme, "Identité Culturelle et Intégration : Le Droit International Privé Postmoderne. Cours Général de Droit International Privé", *Recueil des Cours*, 251, 1995, pp. 52 ff.

example, the parties are nationals of a foreign state but habitually resident in the state of the forum. Often, an event of relevance for the dispute has taken place abroad and the question is what effect – if any – this event can be given in the forum state. Questions of jurisdiction, applicable law and the legal effect of foreign decisions form the core of the discipline.

European case law concerning multicultural cross-border family cases demonstrates that numerous, and from the national court's perspective unusual, legal issues need to be addressed before the competent court can finally decide upon the subject matter of the dispute. Of particular relevance are such issues as how the parties' requests should be legally classified ('qualification'), in particular when forum law lacks a corresponding right. A well-known example is the Muslim institution of *mahr*, also known as the Muslim dower. If a foreign state's law is identified as being applicable to the dispute, how should the court ascertain the foreign law's content and apply it? How, furthermore, should the court deal with situations where the main issue of the dispute, for example the wife's right to *mahr* or maintenance, is dependent on the recognition of the spouses' civil status, for instance the legal validity of their marriage or divorce, when different states' laws might be applicable? Where should the court draw the line for the so-called 'public policy' (*ordre public*), aimed at protecting the fundamental values of the forum state's legal order and setting the limits to the right to enforce foreign laws? These issues are discussed in both this section and in section 3.

2.2 Selected case law

I will approach these issues with the assistance of examples that, due to my own geographical background, largely come from Scandinavia. They are supplemented by cases from other European jurisdictions. As the chosen examples indicate, the encounter of the European courts with Islamic law and culture has been problematic. Basically, in my opinion, at least four kinds of approaches are visible in the chosen examples, even if the approaches can also overlap. I have divided these approaches under three different categories.

2.2.1 Category I

The Iranian wife's divorce claim in Sweden

An Iranian woman, who had arrived in Sweden as an asylum seeker together with her minor children, applied a few years later for a divorce from her husband who was still living in Iran. Having regard to the fact that the plaintiff's residence in Sweden was lawful, Swedish courts considered themselves to have jurisdiction and granted the wife the divorce after a reconsideration period of six months, in accordance with the provisions on divorce in the Swedish Marriage Code.³⁶ The courts disregarded the objections of the Iranian husband who claimed, inter alia, that there were no grounds for divorce according to Iranian law, and that the Swedish divorce decree would not be recognised in Iran. The courts (the case was finally decided by the Swedish Supreme Court) considered a spouse's unconditional right to divorce according to Swedish law to weigh heavier than any inconveniences for the parties (the children included), resulting from the non-recognition of the divorce in Iran.³⁷

Denmark's forced dissolution of Iraqi polygamous marriages

For humanitarian reasons, Denmark decided to grant asylum rights for Iraqi interpreters who had assisted Danish troops in Iraq and, owing to this cooperation, risked their lives in Iraq. One of the interpreters concerned lived in polygamous marriages with two women; both marriages had been validly concluded in Iraq. Neither the man himself nor his wives were willing to dissolve the

³⁶ NJA 1991 A 2.

³⁷ The starting point, according to Sweden's private international rules on the law applicable to divorce applications in Sweden, is the application of Swedish law as the *lex fori*. If, however, neither of the spouses is a Swedish national and the defendant objects to the divorce, account should be taken of the spouses' law of nationality. In the end, it is still up to the court's discretion whether it will grant the divorce, in accordance with Swedish law. See the Act (1904:26 s. 1) on Certain International Legal Relations regarding Marriage and Guardianship, Ch. 3 § 4.

marriages. Evidence was provided that the wives' social and legal position in Iraq would be extremely vulnerable if they stayed in Iraq without their husband. Consequently, the man and both wives were granted asylum in Denmark, after which the competent Danish authority – *ex officio* – took actions to have the second marriage dissolved, its existence being regarded as manifestly contrary to the Danish notion of *ordre public*. The parties suffered nervous breakdowns and returned to Iraq.³⁸

Muslim women's mahr claims at Swedish courts

Several cases on the Islamic institution of *mahr* are brought each year to Swedish courts, by parties with an origin in a Muslim country. The explanation of the frequency of these cases is most likely that an affirmative Swedish case law,³⁹ confirming agreements on *mahr* and approving the wives' *mahr* claims, has encouraged other Muslim wives to bring similar suits to Swedish courts. I wish to report a couple of more recent cases.

In a case decided in 2011, an Iranian woman requested that her former husband, a national of both Iran and Sweden, be obliged to pay her Muslim dower, *mahr*, consisting of 114 gold coins of the type 'Bahar-e Azadi', agreed by the parties upon the conclusion of their marriage in Iran. The husband contested the request and claimed that the wife had voluntarily, after her arrival in Sweden, remitted the contracted *mahr*, in an agreement signed by her at the Iranian embassy in Stockholm. The husband also claimed that the marriage was basically a 'sham marriage', and concluded only to make it possible for the wife to receive a visa to Sweden and to test the relationship between the parties. He had also made it clear to his wife, before the marriage, that he did not share the traditional Iranian outlook on marriage or the legitimacy of agreements on *mahr*. Their agreement on *mahr* was concluded only for the sake of appearances in Iran.

The first instance court⁴⁰ took special account of the circumstances of the case, particularly the (considerable) size of the agreed *mahr* and the circumstances when negotiating it in Iran, the position of women in the culture from which the parties originated and the wife's total dependency on her husband after her arrival in what was for her a previously unknown country. In the court's opinion, it followed that the wife's remittance of the agreed *mahr* could not have been voluntary but coerced under threats and thus was invalid, also according to Iranian law. The court of appeal⁴¹ questioned the approach of the first instance court. In its opinion, it was for the wife to prove that the remittance was invalid according to Iranian law. In the appellate court's opinion, the wife had failed to show that she had signed the remittance agreement under coercion and threats. As a result, the court refused her claim. This outcome appears exceptional, in the otherwise affirmative Swedish case law.

In another, still pending case (2013), the spouses, who were both nationals of Iran, had agreed on a *mahr* consisting of 700 gold coins in connection with their marriage in Iran. The wife had been habitually resident in Sweden for ten years. The couple separated soon after the husband's arrival in Sweden, and the marriage was dissolved through a Swedish divorce decree upon request by the wife, with the husband objecting to the divorce. After the Swedish divorce decree became final, the wife initiated court proceedings in Sweden requesting the payment of the agreed *mahr*. The husband denied her claim, *inter alia*, on the ground that she had orally agreed not to claim her *mahr*, and on the ground that the *mahr* agreement had only served a symbolic function without having been intended to be legally binding. The husband was neither religious nor traditional, and had made it clear to the wife in advance that he was opposed to the institution of the *mahr*. The agreement had been entered into upon

³⁸ See V. Greve, "Hvornår er bigamy strafbart?", *Festskrift till Suzanne Wennberg*, Stockholm: Norstedts Juridik, 2009, pp. 91 f. For reports on the case see, e.g. "Denmark: Government to study polygamy" (www.islamineurope.com).

³⁹ Two of the judgments, both from an appellate (second instance) court, have been published in law reports, namely RH 1993:116 and RH 2005:66. See M. Sayed, "The Muslim Dower (Mahr) in Europe – With Special Reference to Sweden", in K. Boele-Woelki and T. Sverdrup (eds), *European Challenges in Contemporary Family Law*, Cambridge: Intersentia, 2008, pp. 187-208.

⁴⁰ Solna District Court, judgment 2010-03-05, Case T 2675.

⁴¹ Svea Court of Appeal, judgment 2011-10-19, Case T 2803-10.

insistence by the wife and her family, but only after the husband and his family had been informed by the Iranian embassy in Stockholm that the agreement would not be enforceable in Sweden.⁴² The wife, according to the husband, had in any case lost her right to the *mahr* after the marriage had been dissolved in Sweden upon her initiative.

According to the judgment of the first instance court, the husband had failed to prove both the existence of an oral agreement whereby the wife renounced her *mahr* and the agreement's alleged symbolic nature. The information on Iranian law available to the court provided, furthermore, that the Swedish divorce decree would not be recognised in Iran. With reference to its own understanding of the principle in private international law of *loyal application of foreign law*,⁴³ the court concluded that the wife was entitled to the agreed *mahr*, since the parties according to Iranian law were still married to each other. By doing so, the court assessed the 'preliminary issue' to the *mahr*, namely the marriage's continued existence, in accordance with the law applicable to the claim on *mahr* (that is, Iranian law) and disregarded the Swedish divorce decree. This judgment has been appealed. In the meantime, the husband has taken various measures to have the case debated in the media, attempting to stir public opinion against 'medieval Muslim practices practised in Sweden'.

2.2.2 Comments

The impact of traditions, customs and religion was clearly visible in the disputes at stake, having regard to how the parties presented their claims. Even if the competent authority took its decision within a legal framework, mixing both private international law and substantive law of the forum or the foreign state, the outcome in none of the cases was obvious or predictable. Furthermore, references to religion or to human rights concerns are absent in the rulings.

The Danish case demonstrates a categorical refusal to recognise a polygamous marriage irrespective of the marriages' original legal validity and lack of connection to Denmark. The cultural constraints of family law, judged on the basis of Danish values,⁴⁴ are evident here. The judgment on the Iranian wife's right to divorce is more balanced, the initiative coming from her as a party to the dispute, even if it also meant disregarding Iranian divorce law and the husband's interests. The *mahr* cases indicate that Swedish courts are flexible enough to recognise a foreign legal institution lacking a counterpart in Swedish (European) law, but strive to adjust it in one way or another to the law of the forum. The favourable outcome for the wife in most of the cases might find an explanation in the general tendency in Swedish family law to protect the weaker party. The *mahr* does not appear as a bargaining tool for the wife's right to divorce⁴⁵ in Swedish case law, obviously because of Sweden's *lex fori* approach to divorce claims also in cross-border cases, as was demonstrated by the first example. The fact that a Swedish divorce will not be recognised in the parties' country of origin (or religious community in Sweden) has not been regarded as a sufficient ground to refuse a divorce claim in Sweden.

Above all, however, the outcome in the Swedish cases on *mahr*, as illustrated by the two examples above, shows the importance of the lawyers' skills regarding how the foreign claims are to be presented to the court. Court proceedings are subject to rules of their own, to a kind of a 'procedural game', defined by the law of the forum state. All the actors must pursue their more or less strictly defined roles. It is the parties' lot to provide the facts that they consider to be of legal relevance for their claims, and it is the courts' duty to find the applicable rules to these facts. When foreign law is applicable, this divide becomes blurred, as the lawyers assisting the parties often are the ones to

⁴² This information had not been shared with the other party.

⁴³ Whether the application of Iranian law qualifies as 'loyal' with reference to the circumstances behind the divorce decree and the content of Iranian divorce law could well be disputed. See also below, sections 3.1 and 3.2.2.

⁴⁴ Until recently, most world religions recognised polygamy (polygyny) with the exception of Christianity.

⁴⁵ For examples on how the *mahr* can be used as a bargaining tool in a European context, see K. Jansen Fredriksen, "Mahr (dower) as a Bargaining Tool in a European Context: A Comparison of Dutch and Norwegian Judicial Decisions", in R. Mehdi and J.S. Nielsen (eds), *Embedding Mahr in the European Legal System*, Copenhagen: Djof Publishing, 2011, pp. 160 ff.

represent that system's content.⁴⁶ Thought-provokingly, in litigation and judgments, the *mahr* agreement is sometimes qualified as providing "maintenance to [the] wife", sometimes as a "contract" or a "gift", and sometimes as a matter of "matrimonial property relations".⁴⁷ In Swedish courts, the husbands are increasingly presented at court as 'modern men', opposed to Muslim legal traditions, whereas the wives are claimed to cherish Muslim traditions and even the religious dimensions of a Muslim marriage. A cynical observer might be tempted to state that it is all about money and nothing else.

2.2.3 Category II

Is it possible to identify judgments that are insensitive to allegedly fundamental values of the forum state in matters of the family? A couple of matrimonial cases from German and French courts, widely reported in international media, come to mind. In these cases, the court allegedly took into account cultural or religious factors, and upgraded them to factors of legal relevance. Wife beating, according to a German judge in a divorce case, was part of the parties' "cultural milieu" and recognised by their religion.⁴⁸ A French court, in turn, acknowledged the outraged husband's right to annul his marriage, once he had come to the insight during the wedding night that his wife was not a sexually untouched "virgin".⁴⁹

These kinds of rulings appear to confirm the otherwise heavily criticised argument of 'cultural defence', but in a manner that cannot be expected to be uncontroversial anywhere in society.⁵⁰ Even if secular law should be careful when intervening in religion and traditions, the legal system must do so under certain circumstances. I wish to quote once again, Munby J., who in a judgment of his stated that religion can "never of itself immunise the believer from the reach of secular law" and an "invocation of religious belief does not necessarily provide a defence to what is otherwise a valid claim".⁵¹ In yet another judgment, Munby pointed out that "the starting point of the law is an essentially agnostic view of religious beliefs and a tolerant indulgence to religious and cultural diversity".⁵²

One of the major difficulties in any discussion concerning family law and religious diversity is that of defining what qualifies as 'religion' and is covered by the special protection provided by national constitutions⁵³ or the ECHR, and what remains to be seen as an established tradition or custom within a certain group, not included within this protection. Religious freedom as a concept becomes particularly problematic when other peoples' rights risk being affected.⁵⁴ This fact alone may in

⁴⁶ The framing of claims as legally protected human rights is an additional challenge, so far seldom employed in Swedish litigation. See M. Jänterä-Jareborg and A. Singer, "Folkrätten i familjerätten – familjerätten i folkrätten" [Public international law in family law – family law in public international law], in R. Stern and I. Österdahl (eds), *Folkrätten i svensk rätt*, Stockholm: Liber, 2012, pp. 95 f.

⁴⁷ In general, this corresponds well to the Continental European case law on *mahr* claims and their qualification. See R. Mehdi and J.S. Nielsen (eds), *Embedding Mahr in the European Legal System*, Copenhagen: Djof Publishing, 2011.

⁴⁸ See *New York Times*, 23 March 2007.

⁴⁹ *The Times*, 31 May 2008.

⁵⁰ A Musawah report on CEDAW emphasises that "family laws that perpetuate inequality in the family cannot be justified on religious grounds" (see Musawah, *CEDAW and Muslim Family Law: In Search of Common Ground*, 2011, op. cit.).

⁵¹ See Munby J. in *R v. Derby City Council* [2011] EWHC 375, as quoted by Crawford and Carruthers (2011), op. cit., p. 69.

⁵² *Sulaiman v. Juffali* [2002] 2 FCR 427, at 439, as reported by Crawford and Carruthers (2011), op. cit., p. 37 f.

⁵³ The Swedish Constitution's protection for freedom of religion, for example, is limited to the right to personal conviction, including the right to worship alone and jointly with others.

⁵⁴ This is demonstrated by the currently (2012) much-debated decision whereby a German court did not consider (the parents') freedom of religion to justify the bodily harm that a religiously motivated circumcision of boys subjects the child. Regard for the child's best interests, and the right to take any such decision himself at a more mature age, weighed heavier. Likewise, women's equal rights are given as justification for the banning of

certain cases call for a narrow understanding. It has been held that those actions required by a religion deserve better protection than those actions merely permitted by a religion. In the case of *Khan vs. United Kingdom*,⁵⁵ the European Human Rights Commission did not consider that the criminal law conviction of a Muslim man, due to his Islamic marriage ceremony with a 14-year-old girl, violated his freedoms of religion and to marry and found a family as protected by the ECHR, with Islam merely permitting early marriages. In *D vs. France*,⁵⁶ the award of damages against a Jewish man who had refused to grant his wife a ‘get’ after a civil divorce, thus preventing her from remarrying under Jewish law, did not qualify as a violation of freedom of religion, as Jewish leaders stated that the husband’s refusal was not mandated by Judaism.

2.2.4 Category III

The third category consists of an approach of placing fundamental rights at the centre, as guaranteed in particular by the ECHR and its Arts. 6, 8, 9, 12, and 14, in addition to Art. 5 of the 7th Protocol to the ECHR (equal rights for men and women). The judgments show that human rights concerns can work ‘both ways’, namely both *in support of* religious and cultural values, as in the first two cases, and *against* such values, as demonstrated by the last cases. The judgments illustrate the courts’ increasing consciousness of human rights, but they are also to be seen against a trend in European litigation to frame not least multicultural issues into claims of legally protected human rights.⁵⁷

*R vs. Secretary of State for the Home Department*⁵⁸

This case, decided in October 2011 by the UK Supreme Court, focused on how the age requirement of 21 years for both spouses, in the immigration rules of the UK, in order for a marriage to qualify as a ground for family reunification, related to the applicants’ right to private life and family life as protected by Art. 8 of the ECHR. The aim of the UK regulation was to prevent forced marriages. In the Court’s opinion, the regulation did not strike a fair balance but interfered unlawfully with young married persons’ right to family life in a cross-border context, beyond the scope of forced marriages and the interests of the community to prevent such marriages. The criteria developed by the Court, in my opinion, provide useful guidance regarding how to approach potentially conflicting human rights concerns.

- i) Is a *legitimate objective* (in this case, deterring forced marriages) *sufficiently important* to justify limiting a fundamental right (in this case, the right to private life and family life)?
- ii) Are the *measures* that have been designed to meet this objective *rationally connected* to it?
- iii) Are the *measures proportionate*, that is, no more than is necessary to accomplish the objective?
- iv) Do the measures *strike a fair balance* between the rights of the individual and the interests of the community?

*The Pastor Green case*⁵⁹

headscarves in, e.g. France, which others, on the contrary, wish to justify by reference to freedom of religion or freedom of religious expression.

⁵⁵ *Khan v. United Kingdom*, Application No. 11579/85, 48 European Commission on Human Rights Decision, as reported by C. Evans, *Freedom of Religion under the European Convention on Human Rights*, Cambridge, MA: Oxford University Press, 2003 (reprint), p. 116.

⁵⁶ *D vs. France*, Application No. 10180/82, 35 European Commission on Human Rights Decision, as reported by C. Evans (2003), *op. cit.*, p. 116.

⁵⁷ See T. Loenen, W. van Rossum and J. Tigchelaar, “Introduction: Human rights law as a site of struggle over multicultural conflicts – Comparative and multidisciplinary perspectives”, *Utrecht Law Review*, Vol. 6, No. 2, 2010, pp. 1-16.

⁵⁸ Judgment, 12 October 2011; for thought-provoking criticism concerning decision-making in immigration cases in the UK, see P. Shah, “Inconvenient marriages, or what happens when ethnic minorities marry trans-jurisdictionally”, *Utrecht Law Review*, Vol. 6, No. 2, 2010, pp. 17-32.

⁵⁹ NJA 2005 p. 805.

As another example of a judgment ‘confirming diversity’, with reference to the standards of the ECHR, I wish to refer the Swedish Supreme Court’s judgment of 2005 in the so-called ‘Pastor Green’ case. This case made international headlines and focused on the protection of religious freedom of expression, as contrasted to the prohibition of agitation against homosexual persons as a group. The events leading to the criminal law charges in this case followed after Sweden had taken various kinds of legislative measures aimed at eliminating discrimination on the basis of sexual orientation, *inter alia*, by giving same-sex couples the right to formalise their relationship and to acquire joint parental rights. The case as such had no cross-border elements.

In a sermon delivered in 2003 in his church, in front of approximately 50 persons, a Pentecostal pastor (Green) labelled homosexuality as fornication, with the catastrophic effects of a cancerous tumour in society, spreading AIDS and other sexually transmitted illnesses, in manifest breach with the Bible’s creation narrative and God’s commandments. The sermon also insinuated that homosexuality was linked with sexual intercourse with children and animals. The pastor’s sermon was entitled “Is homosexuality an inborn instinct or the evil forces’ trick upon people”. In support of his thesis, the pastor referred to numerous passages in the Bible. Afterwards, the pastor took comprehensive efforts to spread knowledge of his sermon to a broad public. The public prosecutor brought criminal law charges against him, on the ground that, in his sermon, he had disseminated statements of contempt for homosexuals on the basis of their sexual orientation and that his sermon had received extensive publicity. The pastor denied the charges and referred to his literal understanding of the word of the Bible. His actions were aimed at informing and guiding people, in particular young people, about the Bible’s and the free churches’ outlook on homosexuality, in addition to his wish to provide homosexual persons with pastoral care, but not to condemn or disgrace homosexuals. He had also wished to add another, in the Swedish debate hitherto absent, dimension to homosexuality.

In the end, the pastor was acquitted (by both the court of appeal and the Supreme Court). The Swedish Supreme Court paid special attention to the proportionality test of the ECHR and to the case law of the European Human Rights Court, and concluded that a conviction of the pastor “probably” would not meet the intended “European standard”.⁶⁰

European judgments disqualifying religious law

European scholars, such as Marie-Claire Foblets, have drawn attention to a new trend in Continental European courts to refuse to recognise *talaq* divorces that have validly taken place in the parties’ country of origin.⁶¹ Whereas previously European courts decided on these issues on a case-by-case basis with regard to the specific circumstances of each situation, its links with the forum and the fairness of the outcome,⁶² recent case law in France,⁶³ for example, demonstrates a more or less categorical refusal with reference to fundamental rights recognised by the forum state.⁶⁴ This approach

⁶⁰ A later judgment, now by the European Court of Human Rights (after a Swedish Supreme Court judgment of 2006) in *Vejdeland and Others v. Sweden*, 9 February 2012 (Application No. 1813/07), assesses the limits of freedom of expression in relation to hate speech concerning homosexuals and homosexuality. The offence (agitation against homosexuals) for which the defendants had been committed by the Swedish Supreme Court consisted of distributing leaflets in a Swedish high school to which they had no connection. Their conviction was found reasonable with regard to the necessity in a democratic society for the protection of the reputation of others. In my opinion, this judgment is not in conflict with the outcome in the *Pastor Green case*, where the statements were made in a religious setting and not in a vulnerable school environment.

⁶¹ See, e.g. M.-C. Foblets, “The admissibility of repudiation: Requirements in private international law, recent developments in France, Belgium and the Netherlands”, in R. Mehdi (ed.), *Integration & Retsudvikling*, Copenhagen: Jurist- og Okonomforbundets Forlag, 2007, pp. 151-170.

⁶² The Swedish Supreme Court, for example, has held that a *talak* divorce can be recognised in Sweden on condition that at least one of the spouses had a close link to the state where the divorce took place and that a public authority of that state had been involved in some manner, e.g. in the registration of the divorce. See the Supreme Court judgments, NJA 1989 p. 95 and NJA 1989 C 83.

⁶³ See the judgments mentioned by Foblets (2007), *op. cit.*, p. 152, note 1.

⁶⁴ *Ibid.*, pp. 152-154.

aims at promoting equal rights for women, in addition to safeguarding the right to a due process of law. Consequently, any legal measure in respect of which the woman did not enjoy an equal legal footing to that of the man is at risk of not being recognised.

Similarly, we can notice tendencies in Europe towards a complete dissociation with all polygamous marriages, all forced marriages, all proxy marriages and all child marriages, irrespective of their validity in the country of celebration, the parties' links to that state, the circumstances of the marriage conclusion and the time that has passed, the parties' interest in maintaining the marriage, etc.⁶⁵ Human rights concerns are interpreted as calling for a more or less total disregard of the laws, customs and even religious practices prevailing in the parties' country of origin.

European judges should know better. It appears justified to ask, in the light of the otherwise dynamic interpretation of the right to private life and family life in particular by the European Human Rights Court, why the family life in these cases should not qualify for protection when, for example, the parties themselves consider themselves as family and wish to be recognised as such? Having regard to the contents of the laws and customs concerned, this kind of a marriage – or divorce – was possibly the only option available.⁶⁶ A refused recognition in such a case can amount to discrimination against particular ethnic and religious groups and contribute to the creation of limping legal relationships. A categorical 'non-recognition' of any foreign law, without regard to the circumstances of the case, does not meet the standards to be required of the legal system in an increasingly pluralistic society.⁶⁷

3. European courts and foreign religious law

3.1 Von Savigny's system of choice of law resolution

In large parts of the Western world (common law excepted), cross-border conflict resolution follows a model originally created by the prominent 19th century German scholar, Friedrich Carl von Savigny.⁶⁸ The aim is to identify the *territorial legal system* to which an international (cross-border) legal relationship between private parties is most closely connected, by using established objective criteria, such as the nationality (citizenship) or habitual residence (domicile) of the persons concerned, and increasingly, the subjective test of the expressed preference of the persons concerned on the law

⁶⁵ Among the Nordic (Scandinavian) states, this trend is visible particularly in Denmark and Norway. Sweden has chosen a slightly more moderate approach. Since 2004, a marriage entered into under foreign law does not qualify for recognition in Sweden if, at the time of the marriage conclusion, one of the parties was a Swedish citizen or habitually resident in Sweden *and* there would have been an impediment to the marriage according to Swedish law. The impediments focus, primarily, on 'child marriages', i.e. marriages where at least one of the parties was under the age of 18, and bigamy. Forced marriages should always fall outside of recognition. Foreign marriages by proxy are not as such restricted.

⁶⁶ In this respect the circumstances differ from that in the case of *Pellegrini v. Italy*, decided by the European Court of Human Rights on 20 July 2001 (Application No. 30882/96). In that case, the Italian husband intentionally chose ecclesiastical marriage-annulment proceedings in the Roma Rota of the Vatican, to avoid the costly consequences (on maintenance) of a secular decree on judicial separation, granted by an Italian court upon initiative of the wife. The Vatican court, which annulled the marriage due to the spouses' being close relatives, did not give the wife the chance of a fair hearing. By recognising the Vatican decree, Italy violated Art. 6 of the ECHR.

⁶⁷ For constructive proposals regarding how human rights should be approached in cross-border cases, see P. Kinsch, "Recognition in the Forum of a Status Acquired Abroad – Private International Law Rules and the European Human Rights Law", in K. Boele-Woelki, T. Einhorn, D. Girsberger and S. Symeonides (eds), *Convergence and Divergence in Private International Law, Liber Amicorum Kurt Siehr*, The Hague: Eleven 2010, pp. 272-275. Where the application of EU law is at stake, it can be expected that Art. 21 of the EU Charter of Fundamental Rights will be relied upon frequently.

⁶⁸ The system was presented in the 8th volume, published in 1849, of von Savigny's magnificent work, *Das System des heutigen Römischen Rechts*. By 1869, it had already appeared in an English translation, by William Guthrie, under the title *A Treatise on the Conflict of Laws and the Limits of their Operation in respect of Place and Time*, Edinburgh: T&T Clark, Law Publishers. The common law systems have not followed this approach towards the application of foreign law.

applicable. The legal system thus identified shall govern the legal issue at stake, irrespective of whether it is the law of the forum state (*lex fori*) or the law of another state. The private law systems of different states are regarded as *equal and interchangeable*. Consequently, when the applicable conflicts rule refers to the law of a foreign state, the court should strive to apply the foreign law as it would be applied by a foreign court of the state of the law's origin. This, inevitably demanding standard, is labelled the principle of *loyal application of foreign law*.⁶⁹ Under this approach, foreign law can qualify for application only on condition that it qualifies as *the law of a nation-state*.

Originally and as envisaged by von Savigny, this system was aimed at legal conflicts within the community of civilised, independent *Christian nations*, meeting on equal terms and bound together by communication, mutual needs and shared values.⁷⁰ Von Savigny wished to dissociate his system from any system of personal laws, and emphasised each state's sovereignty over its territory.⁷¹ In cross-border cases, a choice would have to be made between conflicting *territorial laws* of different states.

3.2 The challenges of religious law

3.2.1 Only a nation-state's law qualifies for application

By the time the 'Savignyan conflicts model' became generally established on the European continent, at the turn of the 19th century, there was little need to explicitly limit its application to 'the laws of civilised Christian nations'. Regulations on private international law largely originated from international conventions adopted at The Hague Conference on Private International Law and were directly applicable only among the contracting states. The forum state's right to refuse the application of foreign law, if manifestly incompatible with its public policy, enabled states to extend the convention rules to cover relations with other states too.⁷² In Continental European courts, encounters with the laws of a non-Christian state could have been expected to remain highly extraordinary.

In the Continental European system of private international law, when a choice of law rule refers to foreign law, the applicable foreign law, as a starting point in all procedural aspects, is to be treated as *law* by the courts, and not as a fact contrary to the common law approach. The applicable foreign law may be of a religious origin, for example, when it is closely linked with sharia and Islam or with the canon law of the Roman Catholic Church, or with Talmudic law and Judaism. To be applicable in a dispute, however, the foreign law must qualify as *the law of a nation-state*. The sharia, Talmudic or canon law does not in itself constitute applicable 'foreign law'. A religious law receives the label of state law only to the extent that it is recognised by the state, for example through codification, or is applied by the courts and other competent authorities of the state. If the applicable law, on the other hand, grants the parties a freedom to agree on other norms, the agreed norms should qualify for application irrespective of their label as 'law', 'customs' or 'religion'. Their enforcement takes place namely by authorisation of the applicable foreign law.

In the world of a believer, religious law supersedes any laws enacted by the state. A state codification of religious law remains, necessarily, *a selection* of solutions and interpretations, as pointed out by An-Na'im.⁷³ This explains in part the lack of consensus in the Muslim world regarding the true

⁶⁹ The 'loyalty' in question is not towards the foreign sovereignty whose law is applicable, but towards the legislator of the forum by striving to do justice in accordance with the law applicable under the forum state's rules on conflicts.

⁷⁰ See M. Jänträ-Jareborg, "Foreign Law in National Courts: A Comparative Perspective", *Recueil des Cours*, 304, 2003, pp. 206 ff. See also Kreuzer (2009), op. cit., p. 692.

⁷¹ Von Savigny was of the opinion that the religiously-oriented rules, applicable to Jews in the Christian states of Europe, would gradually vanish (English translation, *ibid.*, p. 16).

⁷² In Sweden, for example, The Hague Conventions ratified by Sweden in the early 1900s were made generally applicable in relation to all states.

⁷³ The codification and enactment of certain principles as interpreted within a certain Muslim school of law (primarily the Hanafi school) became the norm in the post-colonial Muslim world, at least in family law matters, and legitimised and institutionalised state selectivity among the competing views of sharia without genuinely

content of sharia law in different situations. It also demonstrates the difficulty of codifying any religious law and demanding obedience to the codified law. The constitutions of several Islamic states explicitly recognise that state law remains subordinated to sharia. Muslim states' reservations with regard to international human rights instruments, stating that the state shall not be bound by any violations of Islamic sharia law, must be seen against this background.⁷⁴

What the believer expects to be the content of the applicable 'law' does not necessarily find support in the authoritative legal sources of the law's state of origin. In that case, equally with any other 'mistakes' on the content of law, it cannot count in a foreign court either. The treatment of foreign law as 'law' in the Continental European system also means that the parties' agreement on its content is not as such binding on the court.

3.2.2 *Iura novit curia* and loyal application of foreign law

The European court's obligation to know the law according to the principle of *iura novit curia*, which in the Continental system is frequently extended to also cover applicable foreign law, cannot reasonably include foreign religious law.⁷⁵ If the parties are not able to provide the court with reliable information on the religious law's content as approved by state law,⁷⁶ how should the court proceed? According to settled European case law, in situations of failure to sufficiently prove the content of the applicable foreign law, the claim is normally either dismissed or rejected.⁷⁷ Alternatively, it is decided in accordance with the substantive law of the forum state.⁷⁸ A third model is the application of a 'closely related law', whether that of a very similar legal system within the same legal family or a presumably similar regulation of another state. When a religious law is at stake, it is not evident that any of these solutions is truly suitable. One might argue, nevertheless, that the application of 'a closely related law' within the same orientation of the religion and the same school of law provides the most appropriate way out.

Another challenge is posed by the principle of loyal application of foreign law. As pointed out by Michael Bogdan, "a court applying foreign law should be cautiously conservative and it must resist the temptation to 'improve' the foreign rules by interpreting them according to its own preferences".⁷⁹ But as the selected case law shows, national courts tend to interpret the foreign rules in line with forum law or to adjust them to fit the values underlying their own legal systems. An additional

opening the basis of family law legislation to debate as a matter of public policy. This created a tension. According to An-Na'im, this tension has continued into the modern era, with sharia remaining the religious law of the community of believers and independent of the authority of the state, while the state seeks to enlist the legitimising power of sharia in support of its political authority. But "since modern states can operate only on officially established principles of law of general application, Shari'a principles cannot be enacted or enforced as a positive law of any country without being subjected to selection among competing interpretations". See An-Na'im (2009), *op. cit.*, pp. 16 f.

⁷⁴ Kreuzer (2009, *op. cit.*), mentions reservations to the Covenant on Civil and Political Rights (1966) and the Convention on the Elimination of All Forms of Discrimination against Women (1979) as examples. An additional example of relevance to our topic is the United Nations Convention on the Rights of the Child; on these reservations, see, e.g. M.A. Baderin, *International Human Rights and Islamic Law*, Cambridge, MA: Oxford University Press, 2003, pp. 155 f.

⁷⁵ See section 1.3 above regarding why religion is a complicating factor from the point of view of a court of law.

⁷⁶ It appears to have become increasingly common in Continental European litigation that the parties not only request the application of rules belonging to a Muslim legal system, but also provide the court with information about that law, in the form of text of the codification, case law, experts' opinions and, increasingly, the hearing of witnesses in the country of origin through telephone conferences, etc. This is definitely the case in Sweden, not least in the light of the disputes on *mahr*.

⁷⁷ See Jänterä-Jareborg (2003), *op. cit.*, pp. 324-333.

⁷⁸ *Ibid.*

⁷⁹ M. Bogdan, "Private International Law as Component of the Law of the Forum", *Recueil des Cours*, 348, 2010, p. 113. The explicit attempt by the Swedish court in one of the *mahr* cases described in section 2.2.1 to apply 'loyal application of the law of Iran' demonstrates the difficulties and pitfalls.

challenge posed by religious law is that its traditional interpretation, according to the sacred sources, is increasingly questioned. There exists, for example, no universal understanding of any Islamic family law that all Muslims would share.⁸⁰ A feminist Islam, for example, is under development. Yet to qualify for application in a European court, such interpretations must find support in the authoritative sources of law in the foreign state concerned.

3.2.3 Considerations of public policy

The public policy reservation of private international law is the ultimate defence for the protection of the fundamental values of the forum state's legal order. Public policy constitutes the 'policy of the day', meaning that it is subject to continual reconsiderations and influenced by political trends. Ultimately, unless 'overruled' by one of the supranational European courts by reference to supranational sources, it is for each national court to set the standard. The foreign rules' religious origin should not as such qualify as an infringement of the public policy of the forum state. But it cannot be denied that, for example, Art. 10 of the EU's Regulation on the law applicable to divorce and legal separation,⁸¹ is targeted at religious law. According to this provision, which is a special and additional kind of public policy provision, the law of the forum shall replace the applicable foreign law when that law "makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex". Laws not providing for divorce primarily refer to laws of a canon law origin (until recently this applied to Malta in Europe), whereas laws discriminating on the basis of a spouse's sex refer to, in particular, Islamic laws.

4 Concluding remarks

4.1 Case law or legislation, or both?

It is important to emphasise that the challenges brought forth by religious and cultural diversity are not only, or even primarily, to be solved by European courts. In a legal context, the first-hand tool should be legislation, to prevent and solve situations that are commonly experienced as problematic, to define what the mandatory fundamental values of society consist of and to bring the law in line with the needs of a modern pluralistic society. In the end, however, the application of any legislation is in the hands of judges who may need to demonstrate a greater degree of wisdom and sense of proportionality than the national legislator, acting under political and populist pressures.⁸² In its decision-making, a national court must increasingly take into account supranational legal sources, in particular the ECHR. European courts can be expected to encounter ever more often situations where human rights are allegedly in conflict with each other or where human rights instruments appear to collide.

4.2 The 'foreign law problem'

Cross-border cases are inevitably connected with the application of foreign law. This raises the so-called 'foreign law problem', consisting of the difficulties connected with the application of the law of a foreign state.⁸³ There exists considerable uncertainty regarding the conditions for the application of foreign law, for example whether such law is to be applied *ex officio* or only upon a party's request,

⁸⁰ See An-Na'im (2009), op. cit., p. 19.

⁸¹ Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, in force since June 2012 in 15 member states of the EU.

⁸² Regard for the interests of the parties may call for creative solutions. An example, reported at the Religare judges' seminar, is that of German divorce decrees, adjusted in formal respects not only to German law, but also, in addition, to Islamic practices in order to prevent any limping family law status from arising as regards divorce and child custody. It was also argued that European courts should make greater efforts to protect *bona fides* claimants, whereas a party's *mala fides* should not qualify for protection.

⁸³ See, e.g. M. Jänterä-Jareborg, "Jurisdiction and Applicable Law in Cross-Border Divorce Cases in Europe", in J. Basedow, H. Baum and Y. Nishitani (eds), *Japanese and European Private International Law in Comparative Perspective*, Tübingen: Mohr Siebeck, 2008, p. 341.

whether the court or the parties are to establish the foreign law's content, what quality is to be required of the information provided on the foreign law's content, and what solution is to be chosen when its content is not proved to the court's satisfaction. An additional problem is adjusting the applicable foreign law to the forum's rules on procedure, having regard that these rules are tailored to match the substantive law of the forum in each field. The particular links between the foreign law and a certain religion can be expected to increase the challenges facing the court.

Very different approaches are at present followed by European courts in all these respects.⁸⁴ Yet commonly, in the end much depends on the parties' own activities and the efforts they are prepared (or not prepared) to make in order to have foreign law applied to the case at hand. This state of affairs has not contributed to any 'unity of result', which common rules on the choice of law (where such exist) could otherwise achieve.⁸⁵ Where religious rules are at stake, it is nevertheless difficult to perceive any other solution than placing all these burdens on the parties, having regard to the European courts' lack of knowledge of such rules and, presumably, the religion itself. The final interpretation remains the court's responsibility.

4.3 Directing the litigation

A final point to make relates to how the litigation should be directed by the court in a cross-border dispute. Also in this respect, jurisdictions follow very different approaches, from active court interventions and supervision of the parties to a much more passive role, adjusted to the parties' pleadings, in line with the general law of procedure applicable in the forum state.⁸⁶ The currently topical demand for cultural competence among judges only makes sense, in my opinion, if its aim is to enable the judge to identify what truly matters in the dispute for the parties concerned, also with regard to the parties' cultural or faith background. It follows that whenever a court has reason to suspect, on the basis of the requests made during the litigation or the evidence or documentation provided to the court, that such a link is of relevance in the dispute, a dialogue between the court and the parties should take place also on this aspect before the court decides on the case. Such a dialogue would additionally give the parties the opportunity to supplement and amend their claims to fit into the structure of the legal system of the forum, its conflict rules included.⁸⁷ In the end, however, it is not only the law applicable to the dispute but also the law of procedure of the forum that sets the limits to what the court may take into account in its judgment.

⁸⁴ See Jänterä-Jareborg (2003), op. cit., pp. 236-306. See also C. Esplugues, "General Report on the Application of Foreign Law by Judicial and Non-Judicial Authorities in Europe", in C. Esplugues, J. L. Iglesias and G. Palao (eds), *Application of Foreign Law*, Munich: Sellier, 2011, pp. 8-78.

⁸⁵ It remains to be seen what measures the EU will be prepared to take to bring forth more uniformity in the procedural application of the Union's choice of law rules. Such rules exist in the Rome I, II and III Regulations as well as in the Protocol on the Law Applicable to Maintenance Obligations and the recently (4 July 2012) adopted Inheritance Regulation.

⁸⁶ See Jänterä-Jareborg (2003), op. cit., pp. 258-264.

⁸⁷ Equally, a secular-minded person is safeguarded such that he or she is not involuntarily locked into a religious set of norms. The other party's legally protected claim may, nevertheless, result in giving such norms effect, as exemplified by the many affirmative *mahr* judgments in Europe.

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