Cross-border Family Cases and Religious Diversity:
What can judges do?

Maarit Jänterä-Jareborg
Abstract

Disputes, in which a party wishes to rely on a right that allegedly follows from a religious norm system or from a tradition originating from another part of the world or another (than mainstream) culture, are increasingly brought to western courts. In court proceedings, religious beliefs and traditions are likewise presented as defenses or justifications for a person’s actions. This Working Paper 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 law cases? Case law from primarily the Nordic countries is examined in order to illustrate the points made. The importance of the parties’ ability to formulate their claims in a legal language turns out to be essential for the outcome. The analysis takes account of general European developments and discourses on the topic.

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Cross-Border Family Cases and Religious Diversity
What can judges do?

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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”, of which these states had little – if any – previous experience. The “legal actors”, it is, the national courts, lawyers, legislators and legal scholars, have only recently come to realize the existence of a previously unthinkable and complex plurality within the field of family life; 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 which a religious norm system allegedly accords to him or her. In court proceedings, religion and religious beliefs are likewise presented as defenses 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, namely, 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. This concern


1 T. Modood, Multiculturalism A Civic Idea, Policy 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. The globalised world, on the contrary, is in many respects borderless (easy travel prospects, the internet and social media, television, etc.), enabling an individual to live simultaneously under “different systems”.

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was exceptionally clearly expressed by the English judge Munby J., in the case of Sulaiman v. Juffali.3 Munby J. pointed out that he, as a judge, had sworn to do justice “to all manner of people”. “Religion – whatever the particular believer’s faith – it 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 defense. Claims, which in the court’s view are based on purely religious practices, traditions or customs, might not qualify,4 unless they are of legal relevance according to the law applicable. Equally, such grounds in support of a party’s actions or defenses might not count. Can justice be done, if no regard is had to these other norm systems?

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 on the mat-

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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 divorce or access to a benefit which depends on the validity of the marriage.
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, Shari’a 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 University Press 2006, p. 275. Confusingly, foreign embassies often exercise powers (“prolonged jurisdiction”) in various kinds of matters related to family law, often without authorization or permission by 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 there. Even if these acts
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ter, if he or she wishes to maintain legal or factual ties within that state. On the other hand, the continued applicability of one’s original personal law, or the submission to religious norms, may be also the concerned individual’s own preference. Must the court under all circumstances force the applicability of mandatory forum law, even against the wishes of the concerned individuals?

Fourth, a person with economic means can make use of “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 for parallel proceedings, whether religious or legal. These options increase the risk for limping legal relationships and conflicting decisions. Having 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, the focus lying 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. Judges and lawyers in general, on the contrary, appear reluctant to participate in any public discussion on how religion relates to law – or law to religion – and how religion might challenge law – or law

are not recognized in the host state, they may be obligatory for legal validity in the parties' state of origin.

To give up that state’s citizenship can, i.a., have 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 his or her immovable property, to Iranian nationals. See S. N. Ebrahani, “An Overview of the Private International Law of Iran: Theory and Practice”, XII Yearbook of Private International Law, 2010, p. 516. –It appears that very few Iranians, 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.

The concerned persons risk being the “eternal losers”, unless they are able to take measures (“fix it”) in both jurisdictions, in agreement with each other.

It is asked if this is a new kind of a “class issue”, whereby marginalized groups identify with religion, instead of sharing the values of the majority society. Or whether religious life styles 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?
religion. Whenever a judge has ventured to enter the debate, flagging for the inclusion of multi-faith concerns within the legal system, the medial reactions have been widely negative. Any vision on parallel legal systems provokes. In a much debated and heavily criticized 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. Phillips’ vision was not that this should take place in UK courts, but within the framework of agreed mediation or alternative dispute resolution.

1.2 The cultural constraints of family law
The contemporary European states endorse secularism and the principle of confession-neutrality of the state. Since long, religion is 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 im-

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”. G. Davie, “Law, Sociology and Religion: An Awkward Threesome”, 1 Oxford Journal of Law and Religion 2012, p. 235.
12 The stir created by Williams’ and Phillips’ contributions 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 number on “Sharia Controversy, Is there a place for Islamic law in Western countries?”, 6 Global Researcher 2012, No 1.
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perceptibly into other areas of society including the law”. Another challenge is to hit a proper balance between the state’s desire to interfere and people’s right to live in accordance with their religion and traditions.

Hardly surprisingly, these kinds of tensions appear daily within the “culturally constrained” field of family law. Family law legislation is a primary tool of the contemporary European society for promoting equal rights for men and women, as well as children’s rights. The state uses it also 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 which 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 to give up their own family culture. In the long run, however, no culture exists isolated 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, prohibition of discrimination on grounds such as a person’s sex, gender, race, ethnicity, religion or sexual orientation. One of the largely ignored paradoxes of secularity in, e.g., regulations of family law is, nevertheless, that the law continues to express values which are in line with the dominating religion in the state. See M. Jänneri-Jareborg, “The Legal Scope for Religious Identity in Family Matters – The Paradoxes of the Swedish Approach”, The Place of Religion in Family Law: A Comparative Search, J. Mair & E. Örücü (Eds.), Intersentia 2011, p. 79 ff.

14 G. Davie, ibid. (note 10), 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 of family law is, nevertheless, that the law continues to express values which are in line with the dominating religion in the state. See M. Jänneri-Jareborg, “The Legal Scope for Religious Identity in Family Matters – The Paradoxes of the Swedish Approach”, The Place of Religion in Family Law: A Comparative Search, J. Mair & E. Örücü (Eds.), Intersentia 2011, p. 79 ff.
over “the chains of religion” 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, on the contrary, 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 patriarchic 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 emphasize that religious law is “the law of the believers”, its authority being the divine will of God. Since 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 of expanding religion (and religious law) to cover and sanction interpretations which they themselves prefer. 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 organization. On the contrary, religious law has the potential of being 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. 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

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18 This remains one of the major arguments against faith-based mediation in family law.
20 These rights are continuously developing and their content and scope of application may be disputed, just as is the case with religion.
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 signaled the importance of assimilating minority cultures into the mainstream culture, thus marking an end to society’s recently more open attitude towards multi-culture.

1.4 The risk for stigmatizing 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) practiced within minority groups. A criminalization of forced marriages is currently under consideration in England. In Norway, provisions of criminal law, specially tailored for forced marriages,\(^{21}\) as well as marriages concerning a child under the age of 16 years,\(^{22}\) have been introduced into legislation. Sweden is considering similar measures, but with a broader scope of application. According to the Swedish proposal, criminalization should cover also 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 competent authority, to marry before the general marriage age of 18 years should, according to the proposal, be abolished. 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 to increase the minimum marriage age for both parties to 18 years of age. 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

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\(^{21}\) 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-AR-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 into prison for the attempt to carry out a forced marriage.

\(^{22}\) Norwegian Penal Act § 220. The age limit of 16 years finds an explanation in that from that age on, a dispensation from the general Norwegian marriage age requirement of 18 years can, exceptionally, be granted by the competent authority.

\(^{23}\) See Committee Report ”Increased Protection Against Forced Marriages and Child Marriages” (Stärkt skydd mot tvångsäktenskap och barnäktenskap), SOU 2012:35, pp. 45-47 (Summary in English).

\(^{24}\) SOU 2012:35, p. 45 (Summary in English).
European states have increased the required marriage age in this context to 21 years.\textsuperscript{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, so-called \textit{politics of universalism}, emphasizing the importance of applying the same laws to all, are claimed to clash with \textit{politics of difference}, recognizing the unique identity of an individual or a group, also on the level of law.\textsuperscript{26} As Esin Örücü puts it, “there is pressure on the legal systems from individuals to be accepted for who they are”.\textsuperscript{27} Werner Menski reminds us that people will not abandon their ways of life simply because they come to life with us. The legal system should not disregard this social reality but “become more perceptive of the need to account for such differences”.\textsuperscript{28} In Menski’s opinion we often, on the contrary, “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 emphasized 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 alterna-

\textsuperscript{25} This applies, e.g., in the United Kingdom, Germany and The Netherlands, whereas Denmark follows the age requirement of 24 years.


\textsuperscript{28} W. Menski, “Islamic Law in British Courts: Do We Not Know or Do We Not Want to Know?”, \textit{The Place of Religion in Family Law: A Comparative Search}, J. Mair & E. Örücü (Eds.), 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.” A. Riles, “Cultural Conflicts, Transdisciplinary Conflict of Laws”, \textit{71 Law and Contemporary Problems}, 2008, p. 275.
tive options, which they can justify in terms of their cultural or religious value system and meaning”.

The concerned groups and individuals themselves are diverse and there exist no generally applicable standards of being, for example, a “Muslim”, a “Jew” or a “Catholic”. The legal system should, consequently, be careful in categorizing people. Conflicts levels should not be artificially raised and people should not be forced under rules which no party wishes to have applied. 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.

As the case of *R vs. Secretary of State for the Home Department*, finally decided by the Supreme Court of the United Kingdom (judgment 12 October 2011) demonstrates, 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 United Kingdom, aimed to protect 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. Supra-national law (ECHR, EU Charter of Fundamental Rights, Treaty Law) sets limits to cultural constraints and popular tendencies in national law. Two supra-national courts, The European Court on Human Rights and The Court of the European Union (EUCJ) have jurisdiction to decide upon, 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

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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 autonomy is 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 are even 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.
focus on sensitive issues, identifying fundamental European values. 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. 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 been described also as a system of law governing “conflicts between civilizations” or “conflicts between cultures”. 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 example, the parties are nationals of a foreign state but habitually resident in the

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 8 December 2009 (Application No. 49151/07) with that in Serife Yigit v. Turkey, judgment 2 November 2010 (Application No. 3976/05). In the first case, refusal to recognize a Roma marriage was a violation of the conventional rights. In the second case, refusal to recognize 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 which 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.


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 multi-cultural 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 issues such 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*, known also as the Muslim dower. If a foreign state’s law is identified to be 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 dependant on the recognition of the spouses’ civil status, for example the legal validity of their marriage or divorce, when different states’ laws might be applicable? Where should the court draw the lines for the so-called public policy (*ordre public*), aimed to protect the fundamental values of the forum state’s legal order and setting the limits to the right to enforce foreign laws? These issues will be discussed both in this Section and in Section 3.

### 2.2 Selected case law

I will approach these issues with the assistance of examples which, 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 European courts’ encounter 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 also can overlap. I have divided these approached under three different categories.
2.2.1 Category I

a) The Iranian wife’s divorce claim in Sweden

An Iranian woman, who had arrived to Sweden as an asylum seeker together with her minor children, applied a few years later for 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 recognized 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

b) 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, due to this cooperation, risked their lives in Iraq. One of the concerned interpreters 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 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

36 NJA 1991 A 2.
37 The starting point, according of the Swedish 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, regard should be had to the spouses’ law of nationality. In the end it is, nevertheless, up to the court’s discretion whether it will grant the divorce, in accordance to Swedish law. See Act (1904:26 s. 1) on Certain International Legal Relations regarding Marriage and Guardianship, Ch. 3 § 4.
dissolved, its existence being regarded as manifestly contrary to the Danish notion of ordre public. The parties’ suffered nervous breakdown and returned to Iraq.\(^{38}\)

c) Muslim women’s mahr claims at Swedish courts

Several cases on the Islamic institute of mahr are each year brought to Swedish courts, by parties with an origin in a Muslim country. The explanation to 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 on 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 to 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 court\(^{40}\) took special account to the circumstances of the case, in particular the (considerable) size of the agreed mahr and the circumstances when negotiating it in Iran, the position of women in the culture the parties originated from and the wife’s total dependency of her husband after her arrival to a,

\(^{38}\) See V. Greve, “Hvornår er bigamy strafbart?”, Festskrift till Suzanne Wennberg, Norstedts Juridik 2009, pp. 91 f. For reports on the case see, e.g., www.islamineurope – Denmark: Government to study polygamy.


\(^{40}\) Solna District Court, judgment 2010-03-05, Case T 2675.
for her previously unknown country. It followed, in the court’s opinion, that the wife’s remittance of the agreed mahr could not have been voluntary but coerced under threats and, thus, invalid, also according to Iranian law. The court of appeal \textsuperscript{41} questioned the first instance court’s approach. 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 (2012), the spouses who both were nationals of Iran, had agreed on a mahr consisting of 700 gold coins, in connection with their marriage in Iran. The wife was habitually resident in Sweden since ten years. The couple separated soon after the husband’s arrival to Sweden, and the marriage was dissolved through a Swedish divorce decree, upon request of the wife, the husband objecting to the divorce. After the Swedish divorce decree had become final, the wife initiated court proceedings in Sweden requesting the payment of the agreed mahr. The husband denied her claim, \textit{inter alia}, on the ground that she had, orally, agreed not to claim her mahr, and on the ground that the mahr agreement only had 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 upon 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.\textsuperscript{42} The wife had, in any case, according to the husband, 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 recognized in Iran. With reference to its own under-

\textsuperscript{41} Svea Court of Appeal, judgment 2011-10-19, Case T 2803-10.
\textsuperscript{42} This information had not been shared with the other party.
standing of the private international law principle of *loyal application of foreign law*, 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 meanwhile, the husband has taken various measures to have the case debated in the media, attempting to stir the public opinion against “medieval Muslim practices practiced 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 and predictable. References to religion or to human rights concerns are, furthermore, absent in the rulings.

The Danish case demonstrates a categorical refusal to recognize 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, 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 recognize a foreign legal institution, lacking a counterpart in Swedish (European) law, but strive to adjust it, in one way or the other, to the law of the forum. The favorable outcome to 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

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 recognized polygamy (polygyny) with the exception of Christianity.
right to divorce\textsuperscript{45} 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 recognized 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 which 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 represent that system’s content.\textsuperscript{46} Thought-provokingly, in litigation and judgments, the mahr agreement is sometimes qualified as providing “maintenance to wife”, sometimes as a “contract” or a “gift”, and sometimes as a matter of “matrimonial property relations”.\textsuperscript{47} In Swedish courts, the husbands are, increasingly, presented to 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.


\textsuperscript{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 & A. Singer, “Folkträten i familjerätten – familjerätten i folkträten” (Public international law in family law – family law in public international law), *Folkträten i svensk rätt*, R. Stern & I. Österdahl (Eds.), Liber 2012, pp. 95 ff.

\textsuperscript{47} This corresponds in general well to Continental European case law on mahr claims and their qualification. See *Embedding Mahr in the European Legal System*, R. Mehdi & J.S. Nielsen (Eds.), Djof Publishing 2011.
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, can be brought to mind. In these cases the court, allegedly, took into account cultural or religious factors, and upgraded them into factors of legal relevance. Wife-beating was, according to a German judge in a divorce case, part of the parties’ “cultural milieu” and recognized by their religion.48 A French court, in turn, acknowledged the outraged husband’s right to annul his marriage, once he during the wedding night had come to the insight that his wife was not a sexually untouched “virgin”.49

These kinds of rulings appear to confirm the otherwise heavily criticized “cultural defense” argument, but in a manner which cannot be expected to be uncontroversial anywhere in society.50 Even if secular law should be careful when intervening with 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 defense to what is otherwise a valid claim”.51 In yet another judgment Munby J 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 the difficulty of defining what qualifies as “religion” and covered by the special protection provided by national constitutions53 or the ECHR, and what remains to be seen

50 A report of the CEDAW emphasizes that “family laws that perpetuate inequality in the family cannot be justified on religious grounds”. *CEDAW and Muslim Family Law, In Search of Common Ground*, Sisters in Islam, Musawah 2011.
53 The Swedish Constitution’s protection for freedom of religion, e.g., is limited to the right to personal conviction, including the right to worship alone and jointly with others.
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. This fact alone may in certain cases call for a narrow understanding. It has been held that actions which are required by a religion deserve better protection than actions which are merely permitted by a religion. In the case of *Khan vs. United Kingdom*, 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, Islam merely permitting early marriages. In *D vs. France*, 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 center, as guaranteed by in particular the ECHR and its Articles 6, 8, 9, 12, and 14, in addition to Article 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 to be seen also against a

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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 which a religiously motivated circumcision of boys subjects the child. Regard to the child’s best interests, and right to take any such decision by himself at a more mature age, weighed heavier. Likewise, women’s equal rights are given as justification for the banning of headscarves in, e.g., France, which others, on the contrary, wish to justify by reference to freedom of religion or freedom of religious expression.


trend in European litigation to frame not least multicultural issues into claims of legally protected human rights.57

a) R vs. Secretary of State for the Home Department58
This case, decided in October 2011 by the Supreme Court of the United Kingdom, focused on how the age requirement of 21 years for both spouses, in the immigration rules of the United Kingdom, for a marriage to qualify as a ground for family reunification, related to the applicants’ life to private life and family life, as protected by Article 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 provide, in my opinion, 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, which have been designed to meet this objective, rationally connected to it?

iii) Are the measures proportionate, it is, no more than 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?

b) The Pastor Green Case59
As another example of a judgment “confirming diversity”, with reference to the standards of the ECHR, I wish to refer the Swed-

ish 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 formalize 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) labeled homosexuality as fornication, with the catastrophic effects of a cancerous tumor 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 he, in his sermon, 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 (both by 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 European Human Rights Court’s case law, and concluded that a
conviction of the pastor “probably” would not meet the intended “European standard”.  

c) 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 recognize *talak* divorces which validly have taken place in the parties’ country of origin.  

Whereas previously European courts decided on these issues on a case to case basis, with regard to the specific circumstances of each situation, its links with the forum and the fairness of the outcome, recent case law in, for example, France demonstrates a more or less categorical refusal with reference to fundamental rights recognized by the forum state.  

This approach aims to promote 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 risks not to be recognized.

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,

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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 on homosexuals and homosexuality. The offence (agitation against homosexuals) for which the defendants had been convicted 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.


62 The Swedish Supreme Court, e.g., has held that a *talak divorce* can be recognized 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*.


64 See M.-C. Foblets, ibid., (note 61), pp. 152-154.
Human rights concerns are interpreted to call 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 recognized as such? Having regard to the contents of the concerned laws and customs, this kind of a marriage – or divorce – was possibly the only option available. A refused recognition can in such a case 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.

65 Among the Nordic (Scandinavian) states, this trend is visible in particular in Denmark and Norway. Sweden has chosen a slightly more moderate approach. Since 2004, marriages entered under foreign law do not qualify for recognition in Sweden if, at the time of the marriage conclusion, either party 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 years, 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 recognizing the Vatican decree, Italy violated against Article 6 of the ECHR.

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 conflicts 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 concerned persons’ nationality (citizenship) or habitual residence (domicile) and, increasingly, the subjective test of the concerned persons’ expressed preference on the law applicable. The thus identified legal system 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 at applying 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 labeled 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 for legal conflicts within the community of civilized, 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 emphasized each state’s sovereignty over its terri-

68 The system was presented in the eight volume, published in 1849, of von Savigny’s magnificent work Das System des heutigen Römischen Rechts. It appeared in an English translation already in 1869, 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. T. & T. Clark, Law Publishers, Edinburg 1869. The common law systems have not followed this approach towards application of foreign law.

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 conflicts rules.

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 within the European continent, at the turn of the 19th century, there was little need to explicitly limit its application to “the laws of civilized Christian nations”. Regulations on private international law originated, largely, from international Conventions adopted at the Hague Conference on Private International Law and were directly applicable only between the contracting states. The forum state’s right to refuse 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. In Continental European courts, encounters with the laws of a non-Christian state can be expected to have remained 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 is, as a starting point, in all procedural aspects 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 Shari’a and Islam, or with the Canon law of the Roman Catholic Church, or with Talmudic law and Judaism. To be applicable in a dispute, the foreign law must, however, qualify as *the law of a nation-state*. The Shari’a, Talmudic law 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 recognized 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

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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. (note 68), p. 16.

72 In Sweden, e.g., the Hague Conventions ratified by Sweden in the early 1900s were made generally applicable in relation to all states.
agreed norms should qualify for application irrespective of their label as “law”, “customs” or “religion”. Their enforcement takes, namely, place by authorization 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. This explains in part the lack of consensus in the Muslim world regarding the true content of Shari’a 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 recognize explicitly that state law remains subordinated to Shari’a. Muslim states’ reservations to international human rights instruments, stating that the state shall not be bound by any violations of Islamic Shari’a law, must be seen against this background.

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 means also that the parties’ agreement on its content is not as such binding on the court.

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 legitimized and institutionalized state selectivity among the competing views of Shari’a without genuinely opening the basis of family law legislation to debate as a matter of public policy. This created a tension, since rulers are supposed to safeguard and promote Shari’a without creating or challenging it. According to An-Na’im, this tension has continued into modern era, Shari’a remaining the religious law of the community of believers and independent of the authority of the state, while the state seeks to enlist the legitimizing power of Shari’a 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”. A.A. An-Na’im, ibid. (note 29), pp. 16 f.

74 Kreuzer, ibid. (note 34), 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 for 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, Oxford University Press 2003, pp. 155 f.
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 cover also applicable foreign law, cannot reasonably include foreign religious law. If the parties are not able to provide the court with reliable information on the religious law’s content as approved by state law, how should the court proceed? According to settled European case law, in situations of failure to sufficiently prove the content of the applicable foreign law, the claim is, normally, either dismissed or rejected. Alternatively, it is decided in accordance with the substantive law of the forum state. A third model is the application of a “closely related law”, 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, nevertheless, argue 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”. 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 its own legal system. An additional challenge posed by religious law is that its traditional interpretation, according to the sacred sources, is increasingly questioned. There exists, for example, no universal

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75 See above, Section 1.1 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 M. Jänterå-Jareborg, ibid. (note 70), pp. 324-333.
78 M. Jänterå-Jareborg, ibid.
79 M. Bogdan, “Private International Law as Component of the Law of the Forum”, 348 Recueil des Courts 2010, p. 113. The explicit attempt by the Swedish court in one of the mahr cases described in Section 2.2 to “loyal application of the law of Iran” demonstrates the difficulties and pitfalls.
understanding of any Islamic family law which all Muslims would share.80 A feminist Islam, for example, is under development. But to qualify for application in a European court, such interpretations must find support in the concerned foreign state’s own authoritative sources of law.

3.2.3 Considerations of public policy

The public policy reservation of private international law is the ultimate defense for the protection of the fundamental values of the forum state’s legal order. Public policy constitutes of the “policy of the day”, meaning that it is subject to continuous reconsiderations and influenced by political trends. Ultimately, unless “overruled” by one of the supra-national European courts by reference to supra-national 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, Article 10 of EU’s Regulation on the law applicable to divorce and legal separation81 targets on 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 refer primarily 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.

80 See A.A. An-Na’im, ibid. (note 29), 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.
4 Concluding Remarks

4.1 Case law or legislation or both?

It is important to emphasize 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 on par 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 wisdom and sense of proportionality than the national legislator, acting under political and populist pressures. In its decision-making, a national court must, increasingly, take into account supra-national legal sources, in particular the ECHR. European courts can be expected to encounter situations more and more often 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 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. There exists a 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 party request, whether the court or the parties are to establish the foreign law’s content, what quality is to be required of the delivered information on the foreign law’s content, and what solution is to be

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

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 to 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. Commonly, however, in the end much depends on the parties’ own activities and the efforts they are prepared (or not prepared) to make 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 choice of law (where such exist) could otherwise achieve. 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, still, 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. 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 concerned parties, 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 documents-

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85 It remains to be seen what measures the European Union will be prepared to take to bring forth more uniformity in the procedural application of the union choice of law rules. Such 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 (July 4, 2012) adopted Inheritance Regulation.

tion 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 also give the parties the opportunity to supplement and amend their claims, to fit into the structure of the legal system of the forum, its conflicts rules included. In the end, however, not only the applicable law to the dispute but also the law of procedure of the forum set the limits to what the court may take into account in its judgment.

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