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ENVIRONMENT AND SOCIETY

Maarit Jänterä-Jareborg

Family Law in the European Judicial Space – Concerns Regarding Nation-State's Autonomy and Legal Coherence

The European Union and family law statistics

- The EU consists of 27 member states and of a population of approximately 500 million inhabitants.[1] Its two latest enlargements (2004 and 2007) resulted in more than 125 million new EU citizens.
- An estimated 7 million EU citizens live in another member state.
- Around 25 million third state citizens reside in the EU.
- The EU has 23 official languages.
- Various religions confessions coexist.
- The number of divorces pro year with foreign connections (= international divorces) is estimated to be 170 000 which amounts to about 16 % of the total number.[2] No statistics are available regarding families that live split between member states.

These figures come from various sources[3] and are not in all respects accurate. Still, they give an indication of the degree to which family law matters can be expected to have cross-border implications. The figures also indicate EU's cultural diversity in form of various nationalities, languages, and even religions. A fact that is not adequately reflected in the EU rhetoric of *citizens' cross-border Europe* is that third state citizens are far more common immigrants in the member states than citizens of other member states. Although the EU does not directly encourage migration of third state citizens into the territory of the member states, once their residence is legal and habitual, they are covered by the EU's specific instruments on family law.

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1 Situation by 1 January 2009.

2 The accuracy of this figure is disputed. See, e.g., *David Hodson*: "Rome III: Subsidiarity, Proportionality and the House of Lords", International Family Law, March 2007, p. 33.

3 For example from various web-sites, the Commission's Green Papers and studies ordered by the Commission, such as "Étude sur les régimes matrimoniaux des couples mariés et sur le patrimonie des couples non mariés dans le droit international privé et le droit interne des Etats members de Union".

An introduction to the European Union's present engagement in family law

Focus on cross-border family relations

The Amsterdam Treaty[4] entailed two major changes regarding civil law cooperation within the European Union. Firstly, the legal basis for such cooperation was transferred from the multilateral "3rd pillar" into the "1st pillar" of community law. Secondly, the scope of this cooperation was included to cover also matters of family law,[5] on condition that there are cross-border implications. The latter have so far consisted primarily of issues such as marriage dissolution by divorce, parental responsibilities and maintenance, in respect of which special *EU Regulations*[6] have been adopted.[7] Also issues such as inheritance and wills, property relations between spouses and, possibly, even between persons cohabiting together as a couple out of marriage, are on the agenda, awaiting Commission proposals for new regulations.[8] According to the plan, the European Union's family law reform program, including all these issues, should be carried out by the year 2011. Most likely, a certain delay is to be expected.

Nevertheless, the program has many gaps and will not result in a comprehensive system of a cross-border family law for the EU. From point of view of coherence in community law, it could be claimed to be desirable

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4 This Treaty, amending the EC Treaty, dates back to 1997 and entered into force on 1 May, 1999.

5 The previous civil law cooperation within the EU had focused on the law of obligations. Its main achievements were the Brussels Convention on jurisdiction and recognition of judgments in civil and commercial matters (1969) and the Rome Convention on the law applicable to contracts (1980).

6 A Regulation is directly applicable in the member states and does not need to be implemented in any special order. Furthermore, regulations become part of "l'acquis communautaire".

7 Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing regulation (EC) No. 1347/2000 (known as *the Brussels II bis Regulation*), and Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (known as *the EU Maintenance Regulation*).

8 The Hague Programme: strengthening freedom, security and justice in the European Union, adopted by the European Council 4–5 November 2004. See also Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union, Official Journal C 198, 12 August 2005.

with one single and all-embracing EU regulation on family law matters.[9] On the other hand, to the extent the community legislator takes action, the member states correspondingly loose their legislative competence.[10] Once a regulation is adopted, the consequences are far-reaching, on different levels. Member states not only receive common rules, but loose their legislative sovereignty in the concerned subject matter. From then on, the legislative competence in the area covered belongs exclusively to the Community, also in relation to third states.[11] The many ongoing and planned projects confirm that cross-border family law is an area of priority within the EU.

These legislative activities are directly linked with the EU's ambitions to promote integration within the Union and to bring the Union's activities closer to the lives and needs of the citizens of the Union. People shall be able to identify themselves as Europeans,[12] in an ever closer union of the peoples of Europe, in the "European area of freedom, security and justice". The point of departure is, ideologically, the presumption that the existing differences in family law constitute an obstacle to the citizens' free movement. Citizens refrain from moving from one member state to another in fear of that this might negatively affect their family law status and the family law rights they enjoy in their present home-state. With better legal security, in particular relating to the continuity of personal legal relationships,[13]

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[9] See *Katharina Boele-Woelki:* "To be, or not to be: Enhanced cooperation in international divorce law within the European Union", Victoria Wellington University Law Review 2008, Vol 39 No 4, pp. 779–792.

[10] This follows of the community's so-called ERTA case law. In December 2008, the Commission presented proposals for regulations, granting member states the right to, exceptionally, conclude bilateral agreements with third states within certain areas falling under civil law cooperation. Considering the narrow criteria and strict conditions, the practical implications of this initiative seem limited.

[11] If the community measures only cover certain aspects, e.g., questions of jurisdiction, recognition and enforcement, but not choice of law, then the legislative competence is shared between the community legislator and the nation-state legislator, the latter retaining its competence in the area not covered.

[12] For this purpose, launching the concept of "European citizenship" was important. This concept received constitutional status through the 1992 EU Treaty. More generally on concerns regarding European identity, see *Päivi Leino:* "Rights, rules and democracy in the EU enlargement process: Between universalism and identity", Austrian Review of International and European Law 2004, pp. 57–70.

[13] See *Roberto Baratta:* "Problematic elements of an implicit rule providing for mutual recognition of personal and family status in the EC", Praxis des Internationalen Privat- und Verfahrensrechts 2007, pp. 4–11.

the mobility of persons increases and the internal market will function more effectively.[14] The chosen method, so far, is to adopt uniform rules for EU member states regarding *cross-border* family relations. With focus on cross-border relations, common rules of private international law became the tool.

Features

The limitation to cross-border situations is reflected in the relevant legal basis for community measures, contained in Articles 61(c) and 65 of the EC Treaty. The measures must, furthermore, be necessary for the proper functioning of the internal market. In addition, according to Article 67.5, measures of family law must be adopted unanimously by the member states, each member state having a ”veto right”.[15] The importance of having every member state ”on board” in this manner, agreeing to the measures to be adopted, is linked with the wide-spread notion of family law as a mirror of each nation-state’s ”culture”.

At this stage, any reader who is not a specialist of private international law may need concrete guidance. What does this cooperation more concretely entail? What are its main features and objectives? These are short-listed below, by using the prevailing community rules on jurisdiction and recognition in matters of divorce and parental responsibilities (the so-called Brussels II *bis* Regulation)[16] as an example.[17]

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[14] Market integration remains the key concept. See *F. G. Jacobs*: ”The Evolution of the European Legal Order”, 41 Common Market Law Review 2004, p. 304. – The ideology described above appears hollow in light of, e.g., the so-called Citizens’ Directive and its many restrictions regarding the citizens’ right to freely move and reside within the territory of the member states. See Directive 2004/58/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

[15] The necessary clarification as regards family law measures was brought forth by the Treaty of Nice. It should also be pointed out that the United Kingdom and Ireland are not automatically included in this civil law cooperation, but may ”opt into” the adopted instruments. Denmark remains outside, without opt-in possibilities.

[16] See above, note 7.

[17] For an analysis of the EU’s Maintenance Regulation, see *Michael Hellner:* ”The Maintenance Regulation: A Critical Assessment of the Commission’s Proposal”, In: European Challenges in Contemporary Family Law, 2008, pp. 343–378.

(a) *Judgments* and decisions by courts, in matters included in the cooperation, shall *circulate freely* within the EU. Free circulation in this context means that a decision by a member state's court is not only valid in the state where it was given, but will be recognized in the other EU member states. If, e.g., Swedish wife A and French husband B have been granted a divorce by decision of a French court, that decision is recognized in all the member states. This is provided by the rules on recognition of the Brussels II *bis* Regulation. When A later on moves to Sweden, she does not need to have the French divorce decree confirmed by a Swedish court, or initiate new divorce proceedings against B in Sweden. And even if she would wish to do so, she cannot, because of the *res judicata* effect of the French decision!

(b) Each EU citizen shall have *access to justice* within the EU. This means, primarily, that according to community rules a court will be available for the citizen, within the member states' territory, to examine any legal claims by the citizen. A respondent is protected against a member state's national rules on jurisdiction. When the French-Swedish couple, mentioned under (a) contemplates divorce, the rules of the Brussels II *bis* Regulation decide in which member state(s) divorce proceedings can be initiated.

(c) Effective legal cooperation and special legal mechanisms (e.g. certificates) exist among the member states, enabling citizens to exercise their legal rights. If, e.g., a child habitually resident in a member state is unlawfully removed to another member state by a parent who has moved to that state, the child shall be returned without delay. The Brussels II *bis* Regulation supplements the rules of the 1980 Hague Child Abduction Convention in order to achieve a more efficient return mechanism. Decisions on return shall be taken without delay, and the grounds for refusing to return an abducted child are cut down to the minimum. Any parent who has been granted access rights with his or her children living in a member state shall be able to rely on and exercise those rights also in another member state where that parent resides.

So far, as also the examples demonstrate, the focus of community actions has been on procedural issues: recognition and enforcement of decisions given in other member states, co-ordination of jurisdiction among member states' courts, and legal cooperation among member states' authorities. Many believe that this is also the very limit for unified law.[18] The EU's action

[18] Sections "Extending cooperation to choice of law", "Family law and coherence – cross border challenges" and "What next – future prospects" below show that this author sympathizes with such a view. – In the continental legal scholarship this model is often called "the principle of recognition" of, e.g., an achieved family law status. See, e.g., *Baratta,* above note 13; *Dagmar Coester-Waltjen*: "Das Anerkennungsprinzip im Dornröschenschlaf", In: Festskrift Jayme I, 2004, pp. 121 ff.; *Dieter Martiny*, "Objectives and values of (private) international law in family law", In: International Family Law for the European Union, 2007, p. 72. In multi-national cooperation, e.g., within The Hague Conference on Private International Law, choice of law instruments have remained of secondary importance.

plans enhance, however, a further vision, namely the enactment of unified rules on choice of law. This vision enjoys wide support in continental European scholarship. In this respect, the reasoning is as follows.

(d) The same rules should apply irrespective of in which member state the proceedings take place. This, according to the EU Commission, ”reinforces the mutual trust in the judicial decisions given in another member state”.[19] When, e.g., the French-Swedish couple, mentioned above, is facing divorce, uniform choice of law rules should guarantee that the same state’s law is applied, irrespective of in which member state’s court the proceedings take place. In this manner, the applicable law would be predictable and the parties would have no reason to engage in ”forum shopping”. At present divergent choice of law approaches are followed among the member states, with different outcomes regarding the law applicable.

Analysis

Evidently, the present and planned measures are not aimed to introduce a ”European standard” of substantive family law or to promote a particular European family law policy, save for the exercise of rights across the borders of member states.[20] This may be a disappointment for any truly European-minded person.[21] On the other hand, limiting the joint measures to cross-border situations was the only politically plausible solution in the 1990’s when the Amsterdam Treaty was adopted. Of all fields of law family law is, by reputation, the most ”culturally constrained” field, deeply em-

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[19] See Proposal for a Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters. Brussels 17.7.2006 COM (2006) 399 final, 2206/0135 (CNS).

[20] For a comprehensive analysis, from various perspectives, see International Family Law for the European Union, Meeusen, Pertegás, Straetmans, Swennen (Eds), 2007.

[21] Örücü, e.g., advocates substantive rules setting a European standard, in response to demands of feelings of fairness, justice, security and equality. Issues of family law should be solved at a European level. Spontaneous harmonization, i.e., when national family laws develop in the same direction, it too inefficient and takes too much time. Through community actions, a European identity could be created. See *Esin Örücü*: ”Viewing the work in progress of the Commission on European Family Law”, International Family Law Forum 2005, pp. 222–226. For proposals and guidelines concerning such rules, see *K. Boele-Woelki, F. Ferrand, C. González Beilfuss, M. Jänterä-Jareborg, N. Lowe, D. Martiny and W. Pintens:* Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses, 2004, and [same authors] Principles of European Family Law Regarding Parental Responsibilities, 2007.

bedded in each nation-state's history, culture, any dominating religion, as well as political and societal developments.[22] In the preamble to the EC Treaty, the member states undertake to respect each others' history, culture and traditions. The EC Treaty does not provide any legal ground for substantive harmonization of family law.

Common rules of private international law are, at the outset, a suitable instrument also with regard to the EC Treaty's principles of subsidiarity and proportionality.[23] As basically formal rules, limited to selecting the competent jurisdiction or the law applicable, or stating the conditions for recognition of other states' judgments, they appear less sensitive from the point of view of the member states' cultures and traditions. Transferring legislative competence from the member states to the community is therefore acceptable, because member states retain their legal sovereignty regarding more sensitive fields, such as substantive family law and the law of procedure. Still, even these rules may entail a certain level of harmonization of the law of procedure and carry with them a legal terminology that deviates from established national terminology. An important example of the latter is the Brussels II *bis* Regulation's concept of "parental responsibility" which lacks a counterpart in, e.g., Finnish and Swedish family law.[24]

A further concern is that special community rules for cross-border families add an additional set of rules to the already numerous existing sets of rules in each member state. For example in Finnish and Swedish private international law, four different systems (sets of rules) apply to cross-border relations: a) community rules; b) inter-Nordic rules; c) other treaty-based rules; and, last, d) generally applicable national (autonomous) rules when the criteria for application of any of the other sets of rules are not fulfilled. Even if community rules normally take precedence, they are not

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[22] Opinions like this were very common in the 1960's, and still exist. Meulders-Klein, e.g., emphasizes that European countries must retain "their democratic freedom to choose their own laws in such a fundamental and specific area as family law". According to her, harmonization would destroy cultural identity. See *Marie-Thérèse Meulders-Klein*: "Towards a uniform European family law? A political approach." In: Convergence and Divergence of Family Law in Europe, 2007, p. 272.

[23] Of relevance was also that the Community had previous and, allegedly, positive experience of special cross-border regulations within the law of obligations. If common rules of private international law had worked so well in civil and commercial matters, why not extend them to family law?

[24] See below the preliminary ruling of the EC Court in Case C-435/06.

all-embracing.[25] This requires knowledgeable judges and practitioners who ”master the game” and are able to combine rules from different systems.

My contribution focuses on issues such as a member state’s autonomy (legal sovereignty) and, in particular, legal coherence both on a nation-state level and on a community level. I wish to draw attention to the close links between each nation-state’s private international law and its substantive family law. This link is of particular importance in sensitive areas such as divorce law and *it is most marked in respect of choice of law*. In such areas, each nation-state has an interest in controlling if and to what extent foreign law may replace forum law. Community rules on choice of law can be expected to increase the number of cases where a national court is expected to apply foreign law. This raises both substantive and technical concerns which will be developed in sections ”Family law and coherence” and ”Future prospects”, below. To put it shortly, as a tool of European integration unified rules on choice of law have considerable shortcomings.

Community rules in action – examples from case law

A preliminary ruling from the EC Court – divorce jurisdiction

By the end of 2008 the EC Court had delivered two preliminary rulings, following the normal procedure,[26] concerning the application of the Brussels II *bis* Regulation. One of these cases concerns the Regulation’s rules on jurisdiction, the other its rules on recognition and enforcement and, in particular, the concept of ”civil matters”. Interestingly enough, both of these cases originate from the Nordic States, from Sweden and Finland respectively.

Sundelind Lopez v. Lopez Lizazo[27] concerns the relation between a member state’s national rules on divorce jurisdiction (as residual rules) and the community rules on such jurisdiction. As the case illustrates, national rules tend to favour the jurisdiction of the court where the proceedings are initiated, whereas community rules often are more restrictive.

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[25] The Brussels II *bis* Regulation can be given as an example. It covers matters of marriage dissolution and parental responsibility, so far as jurisdiction, recognition and enforcement are concerned. But it does not include any rules on choice of law. To decide which state’s law is applicable, other sets of rules must be applied in each member state of the EU.

[26] See Article 23 of the Statute of the Court of Justice.

[27] Case C-68/07.

A woman of Swedish nationality had married a Cuban citizen. Both spouses were habitually resident in France until the husband moved to Cuba. The wife, who had remained habitually resident in France, wished to initiate divorce proceedings in Sweden. In favour of a Swedish court's jurisdiction she referred to Sweden's residual jurisdiction in accordance with Article 7[28] of the Brussels II *bis* Regulation and to the rules of an autonomous Swedish enactment concerning, i.a., jurisdiction in cross-border divorce cases.[29] According to the last-mentioned rules, Swedish courts have jurisdiction, when the claimant is a Swedish citizen, and is either habitually resident in Sweden *or* had previously, after the age of 18 years, been habitually resident in Sweden. In her case, such requirements were fulfilled. The claimant argued, furthermore, that the Brussels II *bis* Regulation's grounds of jurisdiction could not be interpreted to be exclusively applicable against a respondent who is not a national of a Member State or habitually resident in a Member State.[30]

Since it was not possible to serve the husband in Cuba the wife's application for divorce, the Swedish court, in accordance with Swedish legal practice, appointed a personal representative (so-called *god man*) for him, to protect his interests in the case. The personal representative challenged the jurisdiction of a Swedish court. The first and second instance courts in Sweden declined jurisdiction, by reference to the Brussels II *bis* Regulation. None of the general jurisdictional grounds in its main provision on jurisdiction (Article 3) gave Swedish courts jurisdiction, whereas French courts would have been competent (on several grounds).[31] In the courts'

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[28] Article 7.2 reads as follows: "As against a respondent who is not habitually resident and is not either a national of a Member State or, in the case of the United Kingdom and Ireland, does not have his 'domicile' within the territory of the latter Member States, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State."

[29] Act (1904:25 p. 1) on Certain International Issues Concerning Marriage and Guardianship, Chapter 3. The divorce rules of this Act were thoroughly revised in 1973.

[30] According to Article 6 of the Regulation a spouse who is (a) habitually resident in the territory of a Member State, or (b) is a national of a Member State may be sued in *another* Member State only in accordance with Articles 3–5.

[31] According to Article 3, jurisdiction lies with the courts of a Member State where (i) the spouses are habitually resident, or (ii) the spouses last were habitually resident and one of them still resides, or (iii) the respondent is habitually resident, or (iv) either of the jointly applying spouses is habitually resident, or (v) the applicant is habitually resident if he or she

opinion, residual jurisdiction in accordance with Article 7 is of relevance only when no Member State has jurisdiction under the Regulation.

On appeal, the Swedish Supreme Court (third and last instance) posed the following request for a preliminary ruling by the EC Court:

> ”Where the respondent in a case concerning divorce is neither resident in a Member State nor a citizen of a Member State, may the case be heard by a court in a Member State which does not have jurisdiction under Article 3, even though a court in another Member State may have jurisdiction by application of one of the rules on jurisdiction set out in Article 3?”

Hardly surprisingly, the EC Court's preliminary ruling went against the claimant. Since another member state's courts had jurisdiction under Article 3, Articles 6 and 7 could not be interpreted to give a Swedish court the right to hear the petition on Sweden's national jurisdictional grounds.

Comment and comparison

This case illustrates that the Regulation also works in favour of third state nationals when there is a reasonable link to a member state's territory. I do not dispute the ruling which, correctly, favoured giving full effect to the rules of jurisdiction in the Regulation. But was ”justice” done? According to the claimant it was important for her to have her application examined by a Swedish court, because of procedural differences between French and Swedish divorce laws.[32] A French court could not grant her a divorce, as long as the documents could not be served on the respondent. In Swedish law, in such a case, it would be enough to appoint a personal representative for the respondent; divorce could then be granted.[33]

The jurisdictional grounds of the Brussels II *bis* Regulation are extensive, but still leave certain residual jurisdiction for the member states' courts. I

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resided there for at least one year immediately before the application was made, or (vi) the applicant is habitually resident if he or she resided there for at least six months immediately before the application and is either a national of that State or domiciled there, or where both spouse are nationals or ”domiciled” (as understood under the laws of the United Kingdom and Ireland).

[32] Another reason could, however, well have been that the Swedish divorce rules are far more permissive than the French divorce rules.

[33] If the personal representative objects to the divorce, then a reconsideration period of six months starts running. After that period has lapsed, divorce shall be granted upon a renewed application by the claimant.

would claim that it is not easy for an ordinary person to understand when the community rules apply and when they do not. Contrast the following fictive case with the outcome in the case of *Sundelind Lopez v. Lopez Lizazo*.

A woman of Swedish nationality has married a Cuban citizen. Both spouses were habitually resident in the United States of America until the husband moved to Cuba. The wife, who has remained habitually resident in the USA, wishes to initiate divorce proceedings in Sweden. In favour of a Swedish court's jurisdiction she refers to the previously mentioned jurisdictional ground in Swedish law, granting Swedish courts jurisdiction when the claimant is a Swedish citizen and, after the age of 18 years, had been habitually resident in Sweden. In her case, these requirements are fulfilled.

The Swedish court fails in serving the wife's application for divorce to the husband in Cuba. As a result, the court appoints a personal representative to defend his interests in the case. The personal representative accepts the jurisdiction of the court.[34] As the parties have no children under the age of sixteen, the personal representative consents to the wife's claim. Swedish court grants the divorce, which becomes legally effective after the passing of a period of three weeks for appeal.

In a case like this, the link to the EU member states' territory is as such not sufficient for the Regulation to apply. In other words, the Regulation does not grant jurisdiction for any member state's court. Instead, courts have access to their residual rules on jurisdiction. Different sets of rules apply, resulting in different treatment of litigants.[35] I doubt that ordinary

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[34] Considering the clarity of the law in this respect, this is normal practice in cases where a personal representative has been appointed for an absent respondent, who has not been delivered the summons.

[35] The EU Commission's proposal of 2006 for common rules on choice of law (above note 19) also included amendments of the Brussels II *bis* Regulation's rules on jurisdiction, extending community competence. A new wording of Article 7 was proposed. "Where none of the spouses is habitually resident in the territory of a Member State and do not have a common nationality of a Member State, or, in the case of the United Kingdom and Ireland do not have their 'domicile' within the territory of one of the latter Member States, the courts of a Member State are competent by virtue of the fact that (a) the spouses had their common previous habitual residence in the territory of that Member State for at least three years; or (b) one of the spouses has the nationality of that Member State, or, in the case of the United Kingdom or Ireland, has his or her 'domicile' in the territory of one of the latter Member States." With this wording, there would in practice be no residual jurisdiction left for the national courts. Also our hypothetical case with links to Sweden, USA and Cuba would be consumed.

people understand such differences or find the community rules to be an improvement, when it runs counter to their interests.

A preliminary ruling from the EC Court – ”civil matters” regarding child protection

The case ”C”[36] concerns two small children of Finnish nationality but habitually resident in Sweden together with their parents. Due to serious deficiencies in the children's home environment, risking their health and safety, the Swedish local social welfare board ordered the children to be immediately taken into care, with a view of placing them in a foster family outside their original home. The board's order was confirmed by decision of a Swedish administrative court, as required under Swedish law when children are taken into care without the consent of their parents. Meanwhile, the mother took residence in Finland accompanied by her children. Swedish authorities requested the children to be returned to Sweden from Finland, by reference to Nordic harmonized legislation from 1970 concerning enforcement of administrative decisions relating to the care and placement of persons.[37] A decision to that effect was taken in Finland, but appealed by the mother. When the case reached the Finnish Supreme Administrative Court (third and last instance) this court turned to the EC Court for a preliminary ruling concerning, essentially, whether the measures qualified as referring to ”civil matters” and, as a result, were covered by the Brussels II *bis* Regulation. In Finland, as well as in Sweden, decisions on the taking into care and placement of children against parental consent are governed by public law rules. Such decisions had, so far, also been included within the application of the Nordic harmonized rules.

The EC Court established that the case was exclusively covered by the Brussels II *bis* Regulation, with the result that the Swedish decision could not be enforced in Finland in accordance with the harmonized Nordic rules. In its decision, the Court emphasized, in particular, two factors. Firstly, the Brussels II *bis* Regulation's scope regarding ”civil matters” was to be interpreted in an autonomous manner and, indeed, covered the measures in ques-

[36] Case C-435/06.

[37] All Nordic states have similar enactments, which are based on an agreement between the five concerned states on harmonized rules in the concerned field. The cooperation takes place in form of relative simple executive assistance.

tion irrespective of their qualification in a member state's national law. Secondly, the Regulation set aside any Nordic harmonized rules, save those in respect of which a special exception had been made.[38] The Court also emphasized the member states' duty to give full effect to community rules.

Comment

The EC Court's preliminary ruling in this case runs counter to how the Brussels II *bis* Regulation's scope of applicability was envisaged (at least by Finland and Sweden) when it was under negotiation. The Regulation mirrors largely the 1996 Hague Convention for the international protection of children.[39] The Regulation is, nevertheless, according to its wording limited to "civil matters" (Article 1) whereas the Hague Convention covers both private law and public law measures. Concluding that public law measures are excluded, the Nordic EU member states saw no reason to request any exception in relation to the harmonized Nordic *public* law rules.

The Hague Convention contains a special article (Article 52) which, i.a., gives contracting states with special regional links the right to continue to apply in their mutual relations, e.g., harmonized law. With a more narrow interpretation by the EC Court, the Nordic public law measures on child protection would have remained a "regional" affair, also after the Nordic states have ratified the Hague Convention.

The Court's ruling illustrates the potential of EC law, to "pop up" where least expected, as well as community rules' lack of transparency concerning what they in fact entail.[40] In this concrete case, the ruling sets aside a simple, well-established and more flexible model of (Nordic) cooperation

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[389] Article 59 grants an exception in respect of continued application between Finland and Sweden of the 1931 Nordic Convention on rules of private international law concerning marriage, adoption and guardianship. Denmark does not participate in the civil law cooperation opened by the Amsterdam Treaty, see above note 15.

[39] Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children. In the field of this Convention, legislative competence is shared between the Community and the member states. It is expected that all EU member states will have ratified this Convention by mid 2010 (by special permission of the Community). Also the Nordic states outside of EU (= Iceland and Norway) or its civil law cooperation (Denmark) are expected to ratify it.

[40] See *Thomas Wilhelmsson*: "Jack-in-the-box theory of European community law". In: Krämer, Micklitz and Tonner (eds), Law and Diffuse Interests in the European Legal Order, 1997, pp. 174–194.

which is based on an automatic recognition of the other concerned states' decisions with no requirements of exequatur.[41]

A new procedure for urgent preliminary rulings: child protection as a test case

In January 2008, the EC Court amended its rules of procedure to enable urgent preliminary rulings in exceptional cases.[42] The new procedure was applied in case C-195/08, concerning the return of an abducted child to the child's member state of origin, in accordance with the Brussels II *bis* Regulation (Article 11).[43]

A child (then 1,5 years old) habitually resident in Germany was unlawfully retained by her mother in Lithuania. The left-behind father applied for the return of the child to Germany at a Lithuanian court. The first instance court refused his application. That decision was overruled by the next instance court which ordered the return of the child to Germany. The order to return the child was, however, suspended several times. On the other hand, the mother's application to re-open the proceedings in Lithuania, on the basis of new circumstances and the child's best interests, was dismissed on the ground that jurisdiction belonged exclusively to German courts.[44] In connection with a subsequent divorce decree in Germany between the parents, the German court awarded the father permanent custody of the child and ordered the mother to return the child to Germany to the care of her father. The mother's appeal was dismissed in Germany. The mother then applied to a Lithuanian court for non-recognition of the German judgment in so far as it concerned the custody of the child and the return of the child to Germany. In its request for a preliminary ruling, the Lithuanian court

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[41] Theoretically, this case could also have qualified as a case of unlawful removal of children, falling under the 1980 Hague Convention on civil aspects of unlawful removal of children. When the children were taken from Sweden to Finland, they were in the care of the social welfare board which also had the authority to decide on their place of residence.

[42] See OJ, L 24/39 29.1.2008.

[43] In its judgment the EC Court emphasized the need to act urgently where any delay would be unfavourable to the relationship between the child and the left-behind parent, risking to damage the relationship irreparably. The Court's decision to apply the urgent procedure to a case relating to the care of a child is praiseworthy.

[44] This follows of the rules of jurisdiction in the Brussels II *bis* Regulation, see in particular Article 10.

posed, i.a., the question whether it was possible to apply for non-recognition of a judgment when no application had been submitted for the recognition of that judgment. According to the EC Court "opposition to the recognition of the decision ordering return of the child is not permitted and it is for the requested court only to declare the enforceability of the certified decision (= the German order) and to allow the immediate return of the child".

By the time of the ruling the child had been unlawfully retained in Lithuania during a period of two years. The ruling gives at hand that it is not possible to refuse enforcement of a return order from the child's member state of origin and that the member state of refuge must allow the immediate return of the child. Also this ruling raises certain basic concerns. Namely, the Brussels II *bis* Regulation does not regulate how (or on what conditions) the enforcement is to take place. Following the model of the 1996 Hague Convention, the Brussels II *bis* Regulation only provides for enforcement of other member states' judgments. This has been interpreted in, e.g., Sweden to mean that the member state where enforcement is sought will apply its own domestic law to the enforcement as such.[45] Judgments from other member states will be enforced – or refused enforcement – on exactly the same grounds as similar domestic judgments. According to the point of departure in Swedish law, the child's best interests shall be of paramount interest in all enforcement.[46] In certain cases, enforcement must be refused with regard to these interests. This position is difficult – or even impossible – to combine with the EC Court's ruling in the present case. Whereas the Court admits that "the object of the Regulation is not to unify the rules of substantive law and of procedure of the different member States", it is, nevertheless, "important that the application of those national rules does not prejudice its (= the Regulation's) useful effect". The conclusion to be drawn is that member states' domestic law must give way for maximum effect of community rules. Jack came out of the box, again!

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[45] See *Maarit Jänterä-Jareborg*: "European Family Law for Cross-border Situations – Some reflections concerning the Brussels II Regulation and its planned amendments", Yearbook of Private International Law, Vol. IV, 2002, pp. 75–76. See also SOU 2005:111: Föräldraansvar och åtgärder till skydd för barn i internationella situationer – 1996 års Haagkonvention m.m., p. 231.

[46] See, e.g., the Swedish Code on Parents and Children, Ch. 21 § 1.

Extending cooperation to choice of law

Responses so far

Generally speaking, the EU's activities so far have been positively received or at least accepted, both by the scientific community and politicians of the member states. Although there has also been criticism,[47] this criticism has mainly focused on the EU's first choices of fields for family law measures, namely divorces, parental responsibilities and issues of maintenance, and on the piecemeal character of the legislative processes.[48] The chosen fields overlapped with areas where, primarily, the Hague Conference on Private International Law had already adopted conventions or was in the process of drafting such conventions. As the argument goes, additional measures by the community legislator have added very little of value in relation to what already was available for member states to ratify in form of international conventions.[49]

Nevertheless, once the legal ground for community measures had been granted, the EU needed to start somewhere. An area of freedom, security and justice within the EU can be achieved only progressively. Today, the community legislator is proceeding in a determined manner,[50] also in good cooperation with the Hague Conference. The Statute of the Hague Conference has been revised to enable the EU's present membership in the organ-

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[47] This criticism comes mainly from scholars in the UK, the Netherlands, Sweden and Finland. Also in the negotiations within the EU, these countries have been more reluctant than member states generally.

[48] The turns around the EU's regulation on divorces and parental responsibilities are an illustrative example of the lack of a comprehensive approach. The first Brussels II Regulation came into force in 2001 and replaced a EU Convention on the same topic from 1998 which, however, had never entered into force. Already in 2003, the first Regulation was replaced by a new amended and extended Regulation, which is commonly called "the Brussels II *bis* Regulation". In 2006, the EU Commission proposed amendments to this Regulation (its rules on jurisdiction) as well as rules on choice of law to divorce, to supplement it (above, note 19). This proposal has been negotiated for years but has not been adopted. See below, section "The Rome III proposal on divorce".

[49] There have also been concerns of quality of the community instruments compared, not least, with those adopted by The Hague Conference, with its more than one century long top-level expertise in the field.

[50] See *Dieter Martiny*: "Die Entwicklung des Europäischen Internationalen Privatrechts – ein juristischer Hürdenlauf?", Zeitschrift für die Anwaltspraxis: Familie, Partnerschaft, Recht, 2008, pp. 187–188.

ization.[51] This gives the EU the advantage of promoting European values in a global context in addition to promoting European integration.[52]

The Rome III proposal on divorce

The measures so far have been of a procedural nature. The EU plans also to adopt uniform rules on choice of law, not least to prevent alleged *forum shopping*. This raises special concerns, not least because of these rules' close link with each member state's substantive family law.

The difficulty of reaching agreement and pursuing pure community goals became evident when the European Commission proposed in 2006 common rules on the law applicable to divorce, to supplement the present Brussels II *bis* Regulation on, i.a., divorce jurisdiction and recognition of divorces.[53] Under this proposal, member states' courts would be obliged to apply foreign law to divorce, if the closest connection was to a foreign state, irrespective of whether this state is a member state of the EU or a third state.[54] Member states such as Finland, Ireland, The Netherlands, Sweden and the UK advocated application of forum law.

After years of negotiations, no final compromise could be reached on this point. (As was pointed out earlier in section "Features", measures in matters of family law need to be taken unanimously by the EU member states.) The UK and Ireland decided not to opt into the instrument.[55] The

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[51] Instruments adopted at The Hague Conference on private international law can be enforced on a regional EU level, instead of scattered ratifications by some but not all member states.

[52] See *Ulla Liukkunen*: "Kansainvälinen yksityisoikeus ja Euroopan integraatio", Lakimies 2006, pp. 359–360. – As an example one can refer to the new Hague Convention (2007) on the recovery of maintenance, and the annexed Protocol on the law applicable to maintenance. The Convention's solutions served as the model for the EU's Maintenance Regulation (above note 7). The Protocol is planned to be integrated into the Regulation.

[53] Proposal for a Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters. Brussels 17.7.2006 COM (2006) 399 final, 2206/0135 (CNS).

[54] Such choice of law rules are commonly called "universal" rules. The model for such rules comes from the EU's Rome Convention on the law applicable to contractual relations (1980).

[55] See *David Hodson*, note 2 above, pp. 32–34. The position of the UK and Ireland is special in that they, according to the Amsterdam Treaty, are not automatically covered by this kind of cooperation, but may "opt into" it, if they so wish. Nevertheless, from a community perspective, it remains essential that they are included in the adopted instruments.

Netherlands[56] and Finland[57] reluctantly agreed. Sweden, on the other hand, refused to compromise and to accept any proposal that would oblige Swedish courts to apply foreign law to divorce applications. Through its opposition, Sweden demonstrated that a member state may cherish higher values ”than the uniformity of rules and a coherent (EU) approach”.[58] Furthermore, the argument of forum shopping carries little weight in the context of divorce in Sweden.[59]

At the core of this state of affairs lies that fact that member states are far from united in their outlook on divorce.[60] Many member states emphasize marriage stability and their laws make divorce difficult or ”ugly” (= guilt-based) to achieve. Malta, even, refuses to permit divorce. The laws of some other member states are based on the vision of marriage as a voluntary union which each spouse shall be free to enter *and leave*, without any special hardships or difficulties. This ideology is, probably, most marked in the Swedish and Finnish divorce laws.

These divergences on substantive law are reflected in the member states' equally divergent choice of law rules on the law applicable to divorce. They extend from the regular application of forum law (*lex fori*) to the application of either the law of the spouses' citizenship, or the law of their habitual residence or the law with ”the closest connection”.[61]

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[56] See *Boele-Woelki* 2008.

[57] Finland's strategy is said to have included a request to be permitted to declare that Finland would not apply any foreign law which requested a specific ground to dissolve the marriage by divorce. If this request would not be admitted, then Finland would refuse to apply the foreign law by reference to public policy. (Finnish divorce law contains no grounds of divorce, save a spouse's wish to dissolve the marriage.) This is thought-provoking considering that reference to public policy is to be applied as ”a last resort”. An exception to application of foreign law would, thus, risk becoming the rule!

[58] *Boele-Woelki* 2008.

[59] See *Maarit Jänterä-Jareborg*: ”Jurisdiction and Applicable Law in Cross-Border Divorce Cases in Europe”, In: Japanese and European Private International Law in Comparative Perspective, 2008, p. 339.

[60] See Commission Staff Working Paper, Annex to the Green Paper on applicable law and jurisdiction in divorce matters, COM(2005)82 final, Brussels 14.3.2005, SEC(2005) 331, as regards the table on the Member States' laws on the grounds of divorce. – The Working Paper rightly points out that a certain convergence is noticeable in European divorce law, demonstrated in particular through the increasing role that consent plays in divorce matters and the reduced emphasis on fault.

[61] See Commission Staff Working Paper, above note 60.

Sweden's opposition crashed the Commission's proposal which aimed to overcome the prevailing discrepancies. What the next steps are likely to be will taken be discussed below under section "What next – future prospects".

Why there is broad support for common choice of law rules

The most enthusiastic support for unified choice of law rules comes from continental European scholars of private international law.[62] Finally, after 150 years have passed since the fundaments for the present system of choice of law (conflicts law) were laid down by the German scholar Friedrich Carl von Savigny, his visions of a supra-national system are about to materialize. For the first time in history, the legislative decisions relating to choice of law will not be taken by a national legislator but by a community legislator. The community legislator acts on a supra-national level, and can concentrate on promoting community objectives and goals which overrule national interests and preferences. The strait-jacket of (national) private international law, linking it to each nation-state's substantive law and national values, will finally be let loose.

> The conflicts' system constructed by von Savigny in the mid-nineteenth century has influenced not only the continental European approach but also that of many other countries of the world. It focused on choice of law, the point of departure being the notion that every legal relationship has its closest connection in a certain legal order, which can be established by using objective, generally applicable criteria. Every state is obliged to evaluate a legal relationship in accordance with that law. Legal orders are equivalent and interchangeable. Since every state will apply the same criteria, the legal relationship will be assessed according to the same state's law (= the state of the closest connection) irrespective of where the assessment takes place. Contrary to von Savigny's expectations, every nation-state has followed its own criteria. Private international law became, thus, a national body of law aimed for international (cross-border) relations of a private law nature.

This enthusiasm is, nevertheless, not shared by all, as became painfully clear during the extended negotiations and – finally – failure to adopt com-

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[62] See, e.g., *Christian Kohler*: "Einheitliche Kollisionsnormen für Ehesachen in der Europäischen Union: Vorschläge und Volbehalte"; *Jürgen Basedow*: "The recent development of the conflict of laws – some comparative observations", In.: Japanese and European Private International Law from a Comparative Perspective, 2008, pp. 8–9.

mon EU rules of choice of law regarding divorce.[63] This attempt showed that rules of choice of law can be so deeply embedded in each nation-state's substantive family law that it is simply not possible to disregard this link. In other words, rules of private international law and in particular choice of law rules are not immune to legal diversity and the cultural constraints of family law. This argument will be developed further, in particular with regard to aspects of coherence.

Family law and coherence – cross-border challenges

Coherence on a domestic nation-state level

Coherence is of fundamental importance for each legal system. For the sake of unity, legal security and predictability it is important that all rules and principles are in line and consistent with each other (= coherent), at least in closely related areas. New legislation should not contradict older laws that remain in force. Once a law has been enacted, it is the responsibility of courts and other competent authorities to enforce it in a manner coherent with the legal system as a whole.[64]

Coherence and cross-border cases

The importance of legal coherence does not have the same weight in the legal regulation and administration of cross-border cases or, alternatively, it takes another form. Firstly, there are parallel sets of rules on the same issues[65] and the choice between the applicable rules depends on factors such as the case's connection to the territory of a member state. Secondly, in these cases, application of foreign law is, in theory, widely recognized. Application of foreign law is justified by concerns of international intercourse, the interests of the concerned parties and the interests of the interna-

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[63] By June 2008 it was clear that no compromise could be reached.

[64] See *Kaarlo Tuori*: Critical Legal Positivism, 2002, p. 138. In many respects, concepts such as legal coherence, internal rationality and logical consistency coincide.

[65] In Swedish private international law, four different systems (sets of rules) apply: 1) EU rules; 2) Nordic rules; 3) other treaty-based rules, and 4) generally applicable national (autonomous) rules when the criteria for the application of any of the other sets of rules are not fulfilled.

tional legal community. In these cases, administration of justice is open for a special kind of legal pluralism. On the other hand, the legal basis for the application of foreign law is found in the choice of law rules of the forum. For this reason, it is common to claim that foreign law is applied not in the interests of the foreign state of the origin of the law but because the legislator of the forum state has found it most suitable to "locate" a cross-border case under another state's law.[66] Thus, basically, a cross-border case is referred to foreign law only when this is in conformity with the forum's legal order and the values this seeks to promote.

Concerns of public policy

In a pure "savignyan" system choice of law rules are drafted in a formally "neutral" manner. They refer each cross-border case to the law of the state to which the party most concerned has the concerned type of closest connection. In this sense, they do not favour the law of the forum at the expense of any foreign law. In this kind of a system, foreign law is regarded as equal to and interchangeable with forum law (*lex fori*). Excepted are situations where application of foreign law would result in a manifest incompatibility with forum law. Basically, this limit to the application of foreign law, widely known as the *public policy or ordre public reservation*, aims at safeguarding respect for fundamental principles of the *lex fori*, and a certain basic coherence. When foreign rules would risk this coherence, they do not qualify for application.

> The instrument of public policy is known in every nation-state's system of private international law. David McClean defines it as an "automatic mechanism of self-defense, a way of preserving the autonomy or the essential interests of a country's own legal system".[67] In the famous Boll case,[68] the

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[66] See, e.g., *Michael Bogdan*: Svensk internationell privat- och processrätt, 7th Edition, 2008, pp. 31–32. Choice of law rules are also commonly seen as "co-ordinators" of transfrontier issues under the most suitable law.

[67] *David McClean*, "De Conflictu Legum. Perspectives on private international law at the turn of the century", 282 Rec. des Cours 2000, p. 206.

[68] In this case, Swedish child-care authorities had taken measures in Sweden to protect a minor Dutch citizen residing in Sweden. The Netherlands denied Sweden's jurisdiction and accused Sweden of violation of the 1902 Hague Convention Governing Guardianship of Infants to which both States were parties. According to this Convention, jurisdiction to take measures belonged to the courts in the state of the child's citizenship. The ICJ ruled in

> first and only ”private law” case tried by the International Court of Justice, Sir Hersch Lauterpacht resembled it to a ”safety valve” that has made private international law possible at all, and which, if kept within proper limits, would guarantee its continued existence and development.[69]

Generally speaking, it is widely acknowledged that the public policy exception should be applied restrictively in cross-border cases. Today, rights protected by the European Convention on Human Rights, probably, constitute a common European standard regarding what should always be safeguarded. Otherwise, public policy is interpreted in divergent manners, depending on the ”fundamental values” of the forum state. In Sweden, e.g., foreign family rules giving relevance to grounds such as a spouse's ”quilt” or ”fault” to divorce have been qualified as contrary to Swedish public policy. Obviously, this outlook is not shared in a state that considers spousal behaviour in relation to divorce to be of relevance, when assessing issues of maintenance rights and custody of children.

The ”materialization” of private international law

Public policy is, however, not the only method to safe-guard policies that are considered essential in the forum state. Family law may be closely linked with essential social policies, such as promotion of equal rights for men and women, the child's best interests, protection of the weaker party, etc. These policies may be of such a dignity that the legislator may strive to promote them also in cross-border cases. In many jurisdictions, the rules on choice of law have been drafted to pay regard to such aims. This requires further clarifications.

One way of expressing and explaining such a special link between the substantive law of the forum and its choice of law rules is by calling it ”materialization” of choice of law. It is not the closest connection to a certain jurisdiction that alone decides what law is to be applied. In addition, or instead, a certain kind of result is found preferable. The natural standard is found in the substantive law of the forum. For example, according to § 10

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favour of Sweden, admitting that the Swedish measures were based on such rules that must be applied in a state irrespective of the otherwise applicable law. See *Maarit Jänterä-Jareborg*: ”Foreign Law in National Courts – a Comparative Perspective”, 304 Recueil des cours 2003, pp. 334–335.

[69] Judgment of 28 November 1958, ICJ Reports 1958, p. 95.

of the Swedish Act (1990:272) on international questions concerning property relations of spouses and cohabitees, the outcome of a property division carried out in Sweden may be adjusted in accordance with Swedish domestic law even if foreign law is applicable. The level and degree of materialization is decided on the basis of the forum's substantive law which, in essence, strives at a certain coherence with the *lex fori*. This kind of coherence is not as fundamental as that safe-guarded by *ordre public*. But it is important enough to legitimize exceptions from the applicability of foreign law and adjustments to forum law.

Another example which, basically, excludes application of foreign law is the international divorce law in the five Nordic states. Due to the fundamental importance of not only treating men and women alike, but *all* men and women alike in those states' courts, the right to divorce is examined in accordance with the substantive law of the forum, *lex fori*.

> One of the earliest Conventions adopted at the Hague Conference on private international law (1902) contained choice of law rules on divorce, based on the then prevailing principle of nationality.[70] If the spouses were nationals of different states, to grant a divorce in a contracting state required that a divorce ground existed under the national laws of both spouses. This resulted in a growing sensation of "selective and unequal justice" in Sweden, a state party to the Convention, after Sweden had thoroughly liberalized its domestic divorce legislation in 1915. Unlike other Swedish citizens, Swedish citizens married to citizens of states with more restrictive laws could not be granted a divorce in Sweden. In 1934, Sweden withdrew from the said Convention. When Sweden's rules on international divorces were revised as late as in 1973, application of Swedish law became the norm.

Much criticism has in the literature of private international law been addressed towards different forms of so-called "homeward trend", i.e., the legislators' and the courts' preference for the application of forum law. Legislators prefer a pure *lex fori* approach or choose connecting factors that in the great majority of cases will lead to the application of forum law.[71] Courts tend to qualify legal issues in such a manner that they fall under forum law or, worse, simply disregard the foreign connections of cross-border cases

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[70] Convention relating to the settlement of the conflict of laws and jurisdictions as regards divorce and separation.

[71] Normally this is achieved when the parties' habitual residence is decisive for what country's law shall be applicable.

and treat them as domestic cases. Another way of looking at these tendencies is to relate them to a natural strive towards coherence, judged on the basis of domestic standards. Nor should one forget that a judge is bound by the forum's law of procedure, which creates various kinds of limitations.[72] Substantive law and the corresponding law of procedure may be well coordinated in each nation-state, but this coherence is absent when the decision is to be based on a foreign law.

> Imagine that a Swedish or a Finnish court would be under the obligation to examine a divorce claim in accordance with Polish law. Polish law requires that the breakdown of the marriage is irreparable and complete, and that all legal consequences of divorce are settled between the spouses. Swedish and Finnish divorce laws, on the other hand, contain no grounds of divorce, except a spouse's desire to dissolve the marriage. Legal consequences of divorce may be settled after a divorce decree. Consequently, the spouses are not required to appear in court during the divorce proceeding and divorce is normally obtained on the basis of written documentation. Should the forum state's law of procedure be adjusted to the Polish divorce law, requiring establishment of a certain divorce ground and settlement of the legal consequences (maintenance issues, property division, child custody)? Or should Polish law be adjusted to Swedish (or Finnish) law on divorce proceedings, with the result that a divorce application as such is proof of an irreparable breakdown and that any decision on the connected issues can be postponed?

Coherence on a community level

Once the Community had taken legislative action, cross-border measures are no longer within the nation-state's sovereignty. Those rejoicing in this transference of competence from the nation-state to the EU emphasize in particular the community legislator's independence of nation-state interests and legislation. Supra-national rules pursue wider "community objectives and goals", which may run counter to interests and preferences of individual member states. But how does such a change of perspective relate to the issue of coherence?

An obvious problem is that the EU does not have a complete legal system, or legislative competence to draft such an all-embracing system. As a

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[72] According to a universal praxis, courts always follow the rules of procedure of their own state.

result, EC law forms only a part of each member state's legal order. Any reference to community objectives and goals (e.g. strengthening the free movement of persons or non-discrimination on grounds of nationality) is abstract. In concrete situations, it may be difficult for a national court to establish how those goals and objectives should be promoted.

A national court is likely to strive at coherence with its own legal system, whereby domestic law becomes central. The EC Court, on the other hand, is free to act from a supra-national community perspective.[73] The preliminary rulings described in section "Community rules in action" above demonstrated an aspiration to give greatest possible effect to community rules. Community law's independency of any domestic law may offer a new kind of flexibility, guided, e.g., by "materialized" supra-national standards. In cross-border cases, there can, e.g., be more scope for party autonomy, for application of the "most favourable law" to the weaker party, and for internationally mandatory rules judged by general community standards.[74] Nevertheless, the many gaps in community law force the EC Court to seek guidance, i.a., in the national laws of the member states. Mainstream positions risk taking over, to the detriment of modern diversity in family law in the more progressive member states.[75] This is also reflected in the preliminary rulings of the Court.[76]

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[73] An example is the Court's ruling in the case C-148/02 (Garcia Avello) setting, in effect, aside member states' rules relating to the law applicable to names when they do not respect cultural diversity. The Belgian law and practice to subject individuals, who in addition to Belgian nationality also possessed the nationality of another member state (Spain), to the Belgian law of names against their will to follow the rules of the other state's law, were in contradiction to the principle of non-discrimination on the grounds of nationality.

[74] This includes a dynamic interpretation of rights guaranteed by the European Convention on Human Rights.

[75] For example, EU's directives on the free movement of persons and on family reunification are based on narrow concepts of family and pay respect to member states' traditional outlooks. See *Clare McGlynn*: "Family Reunion and the Free Movement of Persons in European Union Law", International Law Forum 2005, pp. 159–166.

[76] See, e.g., C-59/85 (Reed), C-249/96 (Grant), and C-122/99 as well as C-125/99 (D). The first two cases concern rights of a "partner"(opposite-sex/same-sex) when the couple is cohabiting together outside of marriage. In the last mentioned cases, a partnership registered in Sweden did not entitle the registered partner, in the application of EC staff regulations, to the same benefits as applicable to married spouses. A more recent ruling by the Court in C-267/06 (Maruko) took surprisingly, the opposite position. A surviving registered partner was to be considered entitled to the pension rights of a surviving spouse. Where the situations are equivalent, national pension rights laws should not treat registered partners differently from spouses, according to the Court.

Once common rules of choice of law are adopted, problems of coherence are likely to increase. According to Ted de Boer, unless judges are robots, ”they will try to escape a choice-of-law result that does not sit well with the standards and values cherished in the forum state”.[77] This observation fits well into Kaarlo Tuori’s construction of ”the multi-layered nature of law” which, in my opinion, is well-suited to demonstrate the problems created by the EU legislator’s planned activities concerning cross-border family relations. Until a truly European standard has been established, national judges will be influenced by their own state’s legal culture and by what Tuori calls ”the deep structures of law” of that state. In their interpretation and application of community rules, the judges will strive to achieve coherence with their own state’s law. Unity of result on a community level remains an illusion.

The multi-layered nature of law

According to Tuori, modern law is by its nature multi-layered.[78] On the top we find a ”surface level” which consists of express regulations (in statutes, codifications of law) and court decisions. Underneath are the deeper layers of law, consisting of the legal culture in the concerned nation-state and the so-called deep structure of law. In Tuori’s construction the fundamental principles of law are found here.[79] Although a judge bases a decision, es-

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[77] *Ted de Boer*: ”The second revision of the Brussels II Regulation: jurisdiction and applicable law”. In: European Challenges in Contemporary Family Law, 2008, p. 337. – See also *Thomas Wilhelmsson*: ”Europeiseringen av privaträtten: för ett fragmentariskt utbyte av erfarenheter”, Tidsskrift for Rettsvitenskap 2001, pp. 11–14 (p. 12). According to Wilhelmsson, harmonization on a community level is limited to the surface level of law. Thus, community law remains ”surface level law”, without a legal culture of its own. This forces lawyers in each state to apply the law through their national cultural spectacles.

[78] Similar metaphors and constructions of law are advocated also by other legal scholars, e.g., Pierre Legrand. In Legrand’s construction, law is culture and remains unbridgeable, under surface level. (This applies at least when common law is contrasted with civil law.) See *Pierre Legrand*: ”European systems are not converging”, International and Comparative Law Quarterly 1996, pp. 52–81. See also *Mark van Hoecke – Mark Warrington*: ”Legal Cultures, Legal Paradigms and Legal Doctrine. Towards a New Model For Comparative Law”, International and Comparative Law Quarterly 1998, p. 513.

[79] Instruments such as the European Convention on Human Rights work in favour of convergence of values. Still, they also provide for a margin of appreciation by each member state, which leaves scope for different interpretations. It can, therefore, be questioned to what extent (if at all) there exists a shared European notion of human rights relating to the family.

sentially, on surface level sources, decision-making is also influenced by the judge's knowledge of the legal culture and the deep structure of the law.

Legal culture can be defined as "the practices and tacit knowledge of the legal profession",[80] in a given state, by a legal actor trained in that system. Such knowledge is in Europe basically limited to the legal actor's own system of law. Therefore, community legislation risks being misinterpreted. Furthermore, where community rules refer to the application of foreign law, any knowledge that the judge will be able to acquire of that law will, necessarily, remain on a surface level.[81] As Werner Goldschmidt once expressed it, applying foreign law is like taking a photograph. Applying forum law is the work of an architect!

The foreign law problem

Common EU rules on choice of law also raise further concerns, often labelled as the foreign law problem.[82] This notion stands for all the difficulties and uncertainties connected with the application of the law of a foreign country. According to the theory of conflict of laws, these problems consist, primarily, of a diversity of practices concerning

(a) the conditions for the application of foreign law, for example, whether such law is to be applied *ex officio* or only upon party request;
(b) whether the court or the parties are to establish the foreign law's content, what quality is required of the delivered information on the foreign law; and
(c) what solution is to be chosen if the content of the applicable foreign law cannot be established.

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[80] See *Thomas Wilhelmsson*, In: Private Law and the Many Cultures of Europe, 2007, p. 6.

[81] *Annelise Riles*: "Cultural Conflicts", Law and Contemporary Problems, 71 (2008) No. 3, p. 298, makes more or less the same point: "any description of another culture is always implicitly a description of one's own. In conflict cases, for example, the description of foreign law turns on a set of assumptions about what the domestic law is, since it is only the differences between domestic law and foreign law – and the differences that are relevant according to standards of domestic law – that are of legal interest".

[82] See *Jänterä-Jareborg* 2008, pp. 341–342, and *Maarit Jänterä-Jareborg*: "The Foreign Law Problem: Choice of Law and European Integration", In: Essays on Tort, Insurance, Law and Society in Honour of Bill W. Dufwa, 2006, pp. 629–643.

Studies have revealed that there is no uniformity or even harmony in the member states' approach to these issues.[83] In fact, each member state follows its own procedural rules and traditions, with varying outcomes as regards the law applicable. The expected benefits of unified choice of law rules remain limited if no attention is paid to the conditions upon which foreign law is applied and how it is applied.

Concerns of coherence, discussed above, add an additional problematic dimension. A court may be faced with considerable difficulties in trying to ascertain the applicable foreign law's "real" content. Errors in interpretation are claimed to be the rule rather than the exception. Max Rheinstein, one of the leading comparatists ever, analyzed once, on the basis of 40 cases in an American casebook on conflict of laws, how the United States' courts had succeeded in applying the law of a sister state. The results were discouraging. In 32 cases the courts had applied the foreign law wrongly. In four cases the courts' conclusion was dubious. Only in four cases had the court reached the right result and then only by chance![84] Later European studies have confirmed similar problems.[85] Dominantly, when the content of foreign law remains uncertain, courts assume that it coincides with the content of the *lex fori*!

What next – future prospects

The failure to carry out the Commission's proposal for common rules on choice of law to divorce justifies the following conclusion. When it turns out that member states have fundamentally conflicting interests, the EU should refrain from action. As the situation is, this is not the conclusion drawn by the community legislator.[86] In this section, I will touch upon the various models, which most likely will guide the EU's future activities in family law.

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[83] See, e.g., *T. C. Hartley*: "Pleading and Proof of Foreign Law: The Major European Systems Compared", International and Comparative Law Quarterly 1996, pp. 271–292, *Maarit Jänterä-Jareborg*: "Foreign Law in National Courts, A Comparative Perspective", 304 Rec. des Cours 2003, pp. 181–385.

[84] See *Ole Lando*: "Lex fori in foro proprio"; In: Festskrift till Ole Due, 1994, p. 218.

[85] See *F. Mélin*: "Vers un alourdissement de l'office du juge à l'égard de lois étrangers?", Petites affiches, 2003, No. 27, p. 20.

[86] In Baratta's words: "The EC does not encourage legislative diversity among Member States' PIL regimes, insofar as it prevents the achievement of the EC objectives." *Baratta* 2007, p. 5.

Enhanced cooperation in form of "flexible integration"

The Treaty of Amsterdam (Article 43a) introduced an option of "closer cooperation" among interested member states, often called "enhanced co-operation" or even "flexible integration". The failure to adopt common choice of law rules to divorce brought this option on the table, as the first test case.[87] At present (January 1, 2009) it still remains open whether the Commission is interested in submitting a proposal to this end and, in that case, which member states will be willing to take part. It cannot be excluded that the Commission plans to re-open negotiations and bring all the member states on board, with a less ambitious revision in mind or (hopefully) a greater readiness for the application of forum law (*lex fori*).[88]

The idea of closer cooperation has been described as a "failure masquerading as an achievement".[89] When carried out, each member state is "free to pick and choose which bits of European integration they would like to support, at what speed they might like to integrate, and to what extent".[90] The Commission's delay to submit a proposal demonstrates a reluctance to recognize this as a true option as regards community rules on divorce.[91]

Family law measures no longer qualify as "family law"

Another thought-provoking development in the legislative activities of the EU is a tendency to classify measures qualifying as family law in a more

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[87] A formal request to this end was put forward by nine member states of the EU, namely Austria, France, Greece, Hungary, Italy, Luxembourg, Romania, Slovenia and Spain. The developments and the complicated procedure involved, when making use of this option, is described by *Boele-Woelki* 2008.

[88] See also *Boele-Woelki* 2008.

[89] See *Ian Ward*: "Europe in search of 'meaning and purpose'", In: Europe in Search of 'Meaning and Purpose', 2004, p. 9.

[90] *Ward*, ibid., p. 9. – Accordingly, Boele-Woelki is astonished that in the EU rhetoric the nine EU member states' declaration has been characterized as an "action which allows a group of member states 'go further than others' with the aim of streamlining and simplifying divorce law"! "From these kinds of one-liners one easily gets the impression that the Member States which support the *enhanced cooperation* procedure belong to the frontrunners in terms of modernity and liberalism in the field of (international) divorce law. – – On the contrary. The unsuccessful Rome III proposal truly follows a traditional approach." *Boele-Woelki* 2008.

[91] The "choice" of international divorce law as the first test of this option has widely been ridiculed in newspaper articles around the world.

restrictive manner. Consequently, it is reported that the Commission, supported by the Council, advocated defining the new Maintenance Regulation[92] as a measure of civil law, the purpose being that it could be adopted by decision of a qualified majority of member states. In the end, however, the Regulation was adopted unanimously. A similar interpretation is pursued in respect of the planned EU Regulation on succession and wills. This is even more surprising considering that the ”cultural constraints flavour” of succession law is commonly believed to exceed that of ordinary family law. In this manner, the EU wishes to facilitate community measures, but in effect changes the power structures of decision-making as member states loose their right of veto.

Harmonized substantive European family law as a supplement?

According to the prevailing opinion, the community legislator lacks competence in the field of substantive family law. A drawback with this position is that it does not promote development in a special (progressive) direction, in line with fundamental rights and freedoms.[93] Citizens (and others) have to suffer ”bad laws” in member states. The operation of any rules on private international rules remains too abstract for any ordinary person to predict the results. An additional drawback is that community rules do not cover all situations of a certain kind but co-exist in the member states with other sets of rules. In the long run, the community legislator cannot avoid taking position regarding basic family law standards, at the ”expense” of family law diversity. A certain degree of harmonization of substantive family law will become necessary, as a supplement to private international law.[94] The increasing emphasis given in community law to human rights which, in turn, are interlinked with families and family law

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[92] See above, note 7.

[93] The Brussels II *bis* Regulation, e.g., makes it possible for a member state to refuse recognition of another member state’s decision on parental responsibility when the child had not been heard (Article 23). The Regulation does not impose a common standard on the member states’ substantive child law in this or any other respects. The EU’s Citizen’s Directive (2004/58/EC) leaves it to the domestic law of each host member state to decide whether partners in registered partnerships can be treated equivalently with married spouses. Etc.

[94] An inevitable problem will be bridging conceptual differences between common law (= UK, Ireland, Malta, Cyprus) and civil law jurisdictions (= the other member states). See *Martiny* 2008, p. 191.

should also work in this direction. As Nigel Lowe points out, already at present the numerous provisions of the EU Charter on Fundamental Rights embodying family law principles seem to suggest a community engagement in family law.[95]

The impact of the Lisbon Treaty on family law co-operation

After the negative outcome of the Irish referendum, the future of the Lisbon Treaty[96] is uncertain. Still, it requires no oracle to expect that the ideas put forward there will re-emerge, sooner or later.[97]

In the proposal, the focus of civil law cooperation remains on cross-border situations, but the community legislator is granted more flexibility and discretion. Under prevailing law, measures may be taken when they are "necessary for the proper functioning of the internal market". This prerequisite is maintained but modified by the word "particularly" (when necessary). In effect, this is an extension or at least a confirmation of community competence, as interpreted by the community legislator.[98] The relevant article (Article 81) seems also, in effect, to pave the way for decisions with qualified majority.[99] In essence, it confirms the development described above under section "Family law measures qualify no longer as 'family law'".

Depending on the chosen outlook and objective, it is possible to claim that the Lisbon Treaty will not change anything in relation to the present state of arts. Substantive family law remains in the exclusive domain of the

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[95] *Nigel Lowe*: "The growing influence of the European Union on international family law – a view from the boundary", Current Legal Problems 2003, pp. 448–450.

[96] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, Official Journal 2007/C 306/01.

[97] Today (January 2009), the year 2010 is mentioned as a possible date for the Lisbon Treaty to enter into force. By then, according to the Commission's website, the special "Irish concerns" such as military neutrality, taxations policies and ethical issues such as abortion have been dealt with.

[98] Under prevailing law, community measures in family law have been challenged on grounds such as a basically weak link between family law and the internal market. The measures are claimed not to be "necessary" for the proper functioning of the internal market. If the proposal is adopted, this criticism is no longer relevant.

[99] Art. 81.3 of the proposal explicitly addresses family law measures, and refers both to a special legislative procedure (unanimous decision) and to an ordinary legislative procedure (qualified majority decision). See further *Martiny* 2008, p. 189.

member states.[100] But it is as well possible to claim that the incorporation of the EU Charter into the Treaty will legitimize and even require community actions in family law.[101] Uncertainty prevails. In the past, uncertainty has worked in favour of community rules.

Concluding remarks

The EU's legislative measures have changed the legal landscape as regards cross-border family matters. Ultimately, perhaps already within a period of 10-20 years, all such matters and existing gaps will be covered by special community rules. This, in turn, leaves little or no scope for other, parallel sets of rules, for example unified Nordic rules.[102] It is the EU that enters into international treaties on behalf of the member states. In addition, there will probably be community level registers on personal status, matrimonial property agreements, wills and testaments. Still, any true success will depend on having all the member states on board.

In this contribution I have tried to demonstrate, by using divorce law as an example, that there are areas of family law where community choice of law rules should not be the first option. A more natural first measure should be harmonizing[103] the underlying substantive rules or, simply, letting forum law govern (*lex fori* -approach). A further drawback with choice of law rules, as a tool for promoting legal integration, is that they remain an expert's instrument, unknown and incomprehensible to any ordinary citizen.

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[100] See in particular Article 67.1 in the Treaty concerning the Functioning of the European Union. Here it is explicitly stated that the Union shall constitute an area of freedom, security and justice with respect to the fundamental rights, and the various legal systems and traditions of the member states. Of relevance is furthermore Art. 81, restricting civil law cooperation to situations with trans-border implications.

[101] See Article 3 para. 2. See also Communication of the EC Commission: Towards the Strategy of the EU on the Rights of the Child (Brussels 4.7.2006, adopted by EU Parliament on 16 January 2008).

[102] Since early 1930's several inter-Nordic private international law Conventions on matters of family law have been adopted and are in force between the five Nordic countries. They have been relatively regularly revised. They aim at facilitating Nordic citizens' movement from one Nordic state to another. The Nordic citizens make much more use of inter-Nordic mobility than EU-mobility.

[103] In this context, harmonization does not mean "unification", but brings certain basic solutions more in line with each other.

Results become easily arbitrary when choice of law rules' symbiotic relation to substantive law is disregarded. Problems related with application of foreign law should be taken more seriously.

The community actions in family law have so far been justified by reference to what promotes the market. Such a focus is narrow, formal and even artificial from the citizens' perspective. Measures should be increasingly taken to promote progressive European family law values. Such measures are by necessity closely linked with human rights and fundamental freedoms. Such measures can be expected to better contribute to European welfare and also increase the Union's appeal in the eyes of its (critical) citizens (and other inhabitants) and promote a sense of belonging to Europe.