The Accommodation of Minority Customs in Sweden

The Islamic Law of Inheritance as an Example*

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Abstract

Sweden, as well as many of the other member states of the European Union, has transformed into multicultural societies. In these increasingly culturally differentiated societies demands are raised by immigrant groups for the recognition of their cultural identity and uniqueness. Minority customs may in some cases conflict with fundamental values in the state law. In this article the author is elaborating on the Swedish private international law rules and the multicultural dilemma in relation to the Islamic law of inheritance, which is often considered to belong to those areas of the Islamic law that express principles that are incompatible with the core values of Swedish law.

Keywords: multiculturalism and law, private international law, Islamic law of inheritance.

A. Introduction

I. General Remarks

During the last 50 years, Sweden has transformed from an emigration country into a pronounced immigration country. This demographic change is shared by most Western European states. What is said in the subsequent statements is relevant not only for these specific states but also for the European Union in its capacity as a key legislative actor in the field of international family and succes-

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sion law.[1] It is remarkable that the European Union has not yet entered into any deliberations on the consequences of its legislation (in the field of international family law) in relation to the transformed landscape of the member states.

Since World War II, the demographic and cultural landscape in Sweden has changed dramatically due to immigration from countries outside 'Christian' Europe. Some of the newcomers to Sweden originate from countries which are religiously, culturally and legally different from the culture traditionally associated with Swedish society. In Sweden's increasingly culturally differentiated society, which may reasonably be described as a *multicultural society*, demands are raised by immigrant groups for the recognition of their cultural identity. An important feature of these demands is the desire to live in accordance with other rules than those reflected in the family law of Sweden.

Swedish society's transformation into a multicultural society and the new citizens' demands to be recognized as groups with a distinct cultural and religious identity poses challenges for the Swedish legal system. In view of the increasing cultural diversity of Europe, this is also a challenge for many other European Union member states.

II. Problems

A general problem associated with a multicultural society is how to combine the interest of recognizing the right of people to live in accordance with their own culture with the state's interest in upholding fundamental values. With the law of inheritance as the point of departure, this means the right of Muslims to distribute their property upon death in accordance with Islamic principles as well as the protection of fundamental values in the majority society if these values conflict with the values of the minority culture as expressed in the Islamic principles.

The multicultural issues in this paper will be discussed in relation to the Islamic inheritance law system.[2] Muslims, as well as Islamic practices and laws

1 The European Union is empowered to take measures in the field of private international law where it is necessary for the internal market, *see* Art. 81 of the Treaty on the Functioning of the European Union (Treaty of Lisbon). For further discussion on the implications of the Treaty of Lisbon in the field of private international law, *see* De Groot & Kuipers, 'The New Provisions on Private International Law in the Treaty of Lisbon', 2008 *Maastricht Journal of International and Comparative Law*, pp. 113-118. The proposal for an EU regulation on inheritance was presented by the Commission in October 2009, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM (2009) 154 final. On the EU legislative process in the field of international succession law, *see* Terner, 'Perspectives of a European Law of Succession', 2007 *Maastricht Journal of European and Comparative Law*, pp. 147-178.

2 Throughout the paper, reference is made to the inheritance provisions in the Koran and not to the inheritance rules in a specific Islamic legal order. With the exception of certain details, however, most Islamic countries have legislated in accordance with the rules in the Koran. In Egypt, for example, the Islamic inheritance system is codified in the Egyptian law of inheritance (Act No. 77 of 1943). The Egyptian law of inheritance is based mainly on the Sunni Hanafi school of law. However, solutions are also taken from the other schools of law. In Islamic jurisprudence, this legal method is called *takhayyur*, meaning to choose or pick legal solutions among different schools of law.

and the challenges that these pose to European legal systems, have been at the forefront of the general multicultural debate. Islamic laws are often considered to express values that are particularly difficult to reconcile with 'Swedish' values. The Islamic law of inheritance is often considered to belong to those areas of the Islamic law that express principles that are arguably incompatible with the core values of the Swedish legal system. At the same time, parts of the Muslim community in Sweden aspire to live by the principles of Islamic religious law, i.e. sharia. The Islamic inheritance system has a central place in Islamic law, closely reflecting the detailed provisions of the Koran and the traditional ways of organizing Islamic family life, at least according to the Islamic sources as interpreted by the school of laws and legal scholars.[3] It follows that inheritance law has a strong religious dimension. The distribution of an estate in accordance with the provisions of the Islamic sharia is regarded by many Muslims as part of their religious duties and as a matter of religious practice.

Discussions on multiculturalism in relation to Islamic law raise controversial issues. I personally experienced this in connection with the defence of my doctoral thesis in January 2010.[4] During the two months following its publication, the thesis was front-page news in the national media. If we ignore the more coarse misconceptions about the content of thesis, the critics' main concern was that I argue in favour of creating scope for the application of the Islamic law of inheritance in private international law cases. In my thesis, I argue that the Swedish courts should apply Islamic law when the deceased's religious and cultural identity and last will and testament coincide with it. If the results of such an application are considered in the light of Swedish inheritance rules contained in Swedish code of inheritance,[5] what is said in the thesis is actually no more remarkable than what may result under the Swedish rules.

The aim of this paper is to discuss the concept of multiculturalism within the field of private international law. In order to do this, it is important to briefly review the application of Islamic law in Swedish courts and to provide a general overview of the Islamic law of inheritance. The Islamic law of inheritance is used in order to illustrate different inheritance norms within a multicultural society.

B. Multiculturalism and Law

I. Multiculturalism as a Legal Framework

Application of foreign law may be fruitfully viewed within the discourse on multiculturalism. This perspective can provide an adequate basis for discussion of the

3 According to Art. 875 of the Egyptian Civil Code (Law No. 131 of 1948), the Egyptian law of inheritance is applied to all Egyptians without distinction of religion, regardless of whether they are Christians, Jews or Muslims.

4 Sayed, *Islam and Inheritance Law in Multicultural Sweden – A Study in Private International and Comparative Law*, Doctoral Thesis, Uppsala, 2009. To enter into any public debate in favour of the inclusion of religiously-influenced norms is a minefield, according to Jänterä-Jareborg, 'Family Law in a Multicultural Sweden – The Challenges of Migration and Religion', *in* Dahlberg (ed.), *De Lege, Uppsala-Minnesota Colloquium: Law, Culture and Values*, Uppsala 2009, p. 152.

5 Ärvdabalken 1958:637.

multicultural society in relation to demands for the recognition of a minority group's cultural identity and uniqueness. The multicultural theoretical debate has mostly been conducted by philosophers and social scientists, and only few lawyers have participated. The discourse on multiculturalism can nevertheless provide useful perspectives and frameworks for dealing with problems relating to private international law and cultural meetings within a multicultural society.

The following quotation from Parekh may serve as a benchmark for the use of the concept of multiculturalism, also as I understand it:

> A multicultural society, then, is one that includes two or more cultural communities. It might respond to its cultural diversity in one of two ways, each in turn capable of taking several forms. It might welcome and cherish it, make it central to its self-understanding, and respect the cultural demands of its constituent communities; or it might seek to assimilate these communities into its mainstream culture either wholly or substantially. In the first instance it is multiculturalist and in the second monoculturalist in its orientation and ethos. Both alike are multicultural societies, only one of them is multiculturalist.[6]

Multiculturalism should, in other words, be seen as a generic term for the positions that affirm a multicultural society and the cultural pluralism that exists in such a society. Multiculturalism and the affirmation of the multicultural society provide scope for all people in a society to live in accordance with their own preferred culture. Because parts of their culture may conflict with the cultural values of the majority society, the 'challenge of multiculturalism' is particularly striking if we understand multiculturalism as including legal pluralism. The concept of multiculturalism not only includes 'new' food habits and exotic restaurants but also the values and norms that minorities adhere to, such as family and inheritance norms.

A multicultural approach to the legal order may be articulated in different ways. All multicultural approaches share a common position in the sense that the law should reflect the cultural diversity that exists in society. Prior to examining how multiculturalism can be expressed in law, I would like to discuss the ideas behind the multicultural approach.

Why is it important to articulate the cultural diversity that exists in Swedish society in legislation? Why, for example, is a single, generally applicable inheritance law, especially in a liberal, secular welfare state such as Sweden, problematic according to the multiculturalist approach?

6 Parekh, *Rethinking Multiculturalism*, Hampshire, 2006, p. 6.

The dominant political conception in secular Swedish society is that the state must remain neutral in relation to different 'good ways of life' in society.[7] But, even if it would wish to, the state cannot consistently maintain an ideology of neutrality. Kymlicka questions the state's ability to maintain the so-called neutrality ideology in the following words:

> I argue that this orthodox liberal view is not only unfair to certain ethno-cultural groups, but is in fact incoherent. The State cannot help but take an active role in the reproduction of cultures.[8]

Legal rules, conduct and norms constitute an important part of what we consider to be culture. We understand our world through the prism of culture. Culture decides human coexistence and relationships. The various family and inheritance law rules that people in the multicultural society of Sweden observe in their everyday life is part of how the cultural characteristics are manifested.[9] Rules in these areas of law are commonly understood as being linked to the individual as well as to history, culture and the prevailing moral and religious values of every nation.[10] This makes family law and inheritance law regulations an important subject in any legal discourse on multiculturalism.

The views of Kymlicka are reflected in the understanding of the concept of religious freedom in Swedish law. According to the Swedish concept, religious affinity and religious practice belongs to the private sphere of life. Rules relating to matters of family and inheritance law are usually not considered to be part of

7 In the Swedish context, the notion that the state must remain neutral in relation to culture and religion was most recently expressed in *The State and the Imams*, Official Government Report No. 52, 2009, p. 26 (*Staten och imamerna*, SOU 2009:52), concerning imam education for Islamic religious leaders in Sweden. According to the report, the government should not provide specific training for imams. The state should instead remain neutral to different religions by not legitimizing any sort of religious education (p. 105).

8 Kymlicka, *Politics in the Vernacular*, Oxford, 2001, p. 50.

9 The family law rules are generally regarded as closely connected to the concept of culture. Meulders-Klein describes the connection between culture and family law rules by saying: "of all branches of law, family law is as a rule the most autonomous and the most specific, being as it is so deeply 'embedded' in history and a cornerstone of their future development, but also linked with the development of each individual. The values with which it is charged, its role in the attribution of legal personality, bonds of kinship, the identity and the personal status of the individual and the way families are structured, all these place family law at the very crux of society in every country."

Meulders-Klein, 'Towards a Uniform European Family Law? A Political Approach', *in* Antokolskaia (ed.), *Convergence and Divergence of Family Law in Europe*, Antwerp, 2007, p. 272. *Cf.* Antokolskaia, 'Family Law and National Culture: Arguing Against The Cultural Constraints Argument', 2008 *Utrecht Law Review*, pp. 25-34.

10 The succession order is tied to the culture and the cultural values that exist in the nation. Verbeke & Leleu illustrate this by saying: "Perhaps even more than family law, the law of succession is a field reserved to local rules and customs [...]. Since the legal rules for these social problems are, to a larger degree than other problems, determined and dictated by moral and cultural values, there seem to be few general principles, not to speak of a *ius commune*."

Verbeke & Leleu, 'Harmonisation of the Law of Succession in Europe', *in* Hartkamp *et al.* (Eds.), *Towards a European Civil Code*, Amsterdam, 2004, p. 337.

what falls under the concept of religious freedom. This definition is a typically Christian understanding of the issue. From a multicultural point of view, it is unfair to adopt this standpoint, since it excludes faiths that do not share this perception. One result is that religious customs and other cultural customs among the minority groups are not regarded as having any legal relevance, while the dominant majority culture becomes the dictating standpoint for the law.

According to Charles Taylor, recognition may be used to describe two different things. The first type of recognition is described as the 'politics of universalism' or the 'politics of equal dignity'. According to Taylor, it is about "emphasizing the equal dignity of all citizens" and consists of the equalization of rights and entitlements. What needs to be established is an identical basket of rights and immunities.[11] This type of recognition is universal in the sense that all mankind may enjoy the same dignity, respect and rights in their capacity as humans. The basis of universal recognition rests on the common potential shared by all people ('universal human potential').[12]

The second type of recognition is described as 'the politics of difference'. Taylor says that "with the politics of difference, what we are asked to recognize is the unique identity of this individual or group, their distinctness from everyone else". According to Taylor, the idea "is that it is precisely this distinctness that has been ignored, glossed over, assimilated to a dominant or majority identity".[13]

It is in this manner, i.e. the recognition of individuals and groups and their peculiarities and individuality, that the concept of recognition is used in the multicultural context. From this point of view, recognition can be justified by arguments based on the principle of equality.[14] Cultural groups are entitled to exercise their own culture under the same premises as other cultural groups, including the majority group. The two different understandings of recognition are, nevertheless, interrelated. The politics of equal dignity constitutes the structure and the conditions for the multicultural standpoint. Since the politics of equal dignity is understood to guarantee basic human rights, such as the equality between citizens, it constitutes the very foundations for – but also the limitations of – any multicultural discourse advocating legal pluralism.

II. How Can Multiculturalism Be Taken into Account in the Law?

Extensive forms of legal pluralism can be found, for example, in the Islamic legal systems, in Israel and India. In these legal systems, each religious group is, at least at the outset, granted a right to follow the rules of its own religious law. For

11 Taylor, 'The Politics of Recognition', *in* Guttman (Ed.), *Multiculturalism*, New Jersey, 1994, p. 37.

12 *Id.*, at p. 41.

13 *Id.*, at p. 38.

14 Modood explains this by saying: "the appreciation of the fact of multiplicity and groupness, the building of group pride amongst those marked by negative difference [...]. This suggest neither separatism nor assimilation but an accommodative form of integration which would allow group-based racialized, ethnic, cultural and religious identities and practices to be recognized and supported in the public space, rather than require them to be privatized. This is justified by an extended concept of equality, not just equal dignity but also equal respect."
Modood, *Multiculturalism*, Cambridge, 2007, p. 61.

several reasons, legal pluralism of this kind is not feasible in Sweden in relation to Swedish Muslims. One factor that argues strongly against such a scheme is the heterogeneous composition of the Muslim population in Sweden. There is no single inheritance regime that is representative of these groups and that all Swedish Muslims could agree upon. Another reason, perhaps the most important one, is that pluralism of this kind tends to work best in 'close' cultures. Citizens are expected to belong to religious and cultural groups from birth. Since a scheme of this kind presupposes a system in which religious belief is registered, it also contravenes the Swedish constitutional tradition forbidding religious registration.

Another way in which legal pluralism can be achieved is by granting cultural groups some jurisdictional autonomy. Such a solution is advocated, among others, by Canadian lawyer Ayelet Shachar.[15] This solution was also advocated by Marion Boyd, a former Attorney General of Ontario, Canada, and Minister Responsible for Women's Issues, in a report that she delivered on the use of religious law in arbitration in family and inheritance law matters in Ontario.[16] Boyd suggested the use of arbitration procedures as an alternative method of conflict resolution in family and succession law cases. In her opinion, Ontario's Arbitration Act should continue to allow disputes to be arbitrated on the basis of religious law, on condition that certain safeguards are observed.[17]

But even this form of legal pluralism suffers from weaknesses in relation to Sweden's multicultural society. Such a regime presupposes a strong organization of the groups wishing to use arbitration procedures. The Muslim population in Sweden lacks an organizational structure.[18] There is also a lack of national leadership that is trusted by the Muslim population. Against this background, an arbitration system such as the one in Ontario would hardly be feasible in Sweden.

III. Party Autonomy and Private Autonomy

A multicultural legal system does not need to be reflected in parallel legal orders in the field of family and inheritance law or by transfer of jurisdiction to religious groups and institutions. Transfer of jurisdiction, for example through a broader application of Swedish arbitration proceedings, is not an end in itself from a multicultural perspective. A multicultural approach to law, with regard to the special features of Sweden's multicultural society, can and should be achieved in the generally applicable law. For this to be possible, it is necessary to take action on two levels. First, the cultural diversity that exists in society should be considered in the domestic (substantive) laws of Sweden. This means that the substantive inheritance law should be designed in a way that takes into account the multiple succession orders among the population. Second, the same premises should be

15 Schachar, *Multicultural Jurisdictions. Cultural Differences and Women's Rights*, New York, 2001.

16 Boyd, *Dispute Resolution in Family Law: Protection Choice, Promoting Inclusion*, Ontario, 2004.

17 The recommendations given by Boyd in the report were not approved. On the contrary, the Arbitrary Act was amended in the opposite direction. Since 2006, family law disputes cannot be determined through the application of anything other than state laws. Nor can arbitration make use of religious principles with legally binding effect.

18 Alwall, 'Muslimerna och religionsfriheten. Blågul islam?' (Muslims and Religious Freedom: Islam in Blue and Yellow?), *in* Svanberg & Westerlund (Eds.), *Muslimer i Sverige*, Nora, 1999, p. 147.

taken into account on the private international law level, i.e. in designing international inheritance law and in the application of the system of conflicts of law.

In order to meet the demands for recognition that characterize the multicultural society, the legislation should be designed in a way that places individual freedom at the forefront. On the level of substantive law, this can be done through private autonomy and, in succession law cases, by means of extended testamentary freedom.[19] On the level of private international law regulating cross-border cases, increased individual freedom can be achieved by placing a greater emphasis on the principle of party autonomy and, in succession law, by giving each person the right to choose the applicable law to govern the distribution of his or her assets after death.

If legislation, as one of several purposes, desires to observe requests for recognition of multiculturalism, party autonomy or the freedom to choose the applicable law in private international law cases are appropriate solutions. A freedom to choose the applicable law would also serve as an instrument for justice on the individual level.[20] Parties can find a certain country's law more attractive because the law reflects their cultural identity in a more profound way or because it offers legal solutions that are more appropriate for the way the parties have arranged their lives. If a party or parties find the contents of a particular law in a certain country appropriate, there is usually a good reason to allow that law to regulate their legal relations.[21] The Swedish law relating to matrimonial property regimes in international relations from 1990, which relies on party autonomy as a point of departure, is justified by reference to fact that a chosen law can remove any ambiguity and also provide a principle that leads to the application of the law deemed appropriate by the parties concerned.[22]

The solutions put forward in the discussion above can have a positive impact only in cases where people make use of the private autonomy available in the substantive law and, in private international law cases, of the freedom to choose the applicable law. A high degree of efficiency presupposes that people make use of their choices. In light of the fact that people generally only have limited knowledge of the substantive inheritance rules (and the private autonomy that may exist) and know even less about the private international legal framework and the factors that determine the applicable law, it is important that any legislation giving scope to individual freedom is given special public attention, for example on behalf of the Ministry of Justice. The arguments in favour of individual justice and recognition can only be realized if people are also given the opportunity to choose in reality.

19 On the status of and the ongoing European debate relating to imperative inheritance law (such as the law of forced heirship), *see* Castelein, Foqué & Verbeke (Eds.), *Imperative Inheritance Law in a Late-Modern Society – Five Perspectives*, Antwerp, 2009.

20 Jänterä-Jareborg, *Partsautonomi och efterlevande makes rättsställning* (Party Autonomy and the Status of the Surviving Spouse), Uppsala, 1989, p. 84.

21 Jänterä-Jareborg, *Egendomsförhållanden i internationella äktenskap* (Property Relations in International Marriages), SvJT, 1994, s. 445.

22 Official Swedish Government Report No. 18, 1987, p. 95 (SOU 1987:18).

C. The Field of Private International Law

I. Private International Law and Inheritance

Private international law has sometimes been described as a bridge between cultures and legal orders.[23] This is an apt description. If a legal relation in a 'cross-border case' has a strong link to a foreign legal order, private international law rules may allow or even require the court to apply the rules of that country, which sometimes leads to the application of legal rules derived from totally different cultures than that prevailing in the court-country. As long as the situation is regarded as having a strong link to a foreign legal order, foreign customs are upheld by the application of the rules in that country. Based on the permissive approach to foreign solutions under private international law regulations, the discipline has sometimes been described as 'the realm of tolerance'.[24] From this point of view, the private international law system could, in accordance with the language used by Taylor, be considered to express a form of recognition policy.

In Swedish international inheritance law, the nationality principle is applied in matters of international succession.[25] This means that, in matters of succession in cross-border cases, the applicable rules follow the law of the country where the deceased was a citizen at the time of his or her death. In an immigration country like Sweden, which includes a large number of persons who are citizens of foreign countries, the principle of nationality often leads to the application of foreign law.[26] When a person who dies in Sweden is a citizen of a country that applies the Islamic inheritance system, the Swedish courts are expected to apply the Islamic inheritance system in questions relating to the distribution of the deceased's estate.

23 Jänterä-Jareborg, *supra* note 4, at, p. 150.

24 Thue, 'Internasjonal privatrett – toleransens rett', *in* Lødrup (Ed.), *Rettsteori og rettsliv, Festskrift til Carsten Smith*, Oslo, 2002, p. 866. Thue borrows this description from Werner Goldschimdt, an Argentine private international law scholar.

25 International succession is regulated in the Act (1937:81) on international legal relations concerning estates of deceased persons (IDL).

26 There are around 500,000 foreign nationals living in Sweden. Of these foreign nationals, 100,000 have their origins in a Muslim country. There are no precise figures on questions relating to dual citizenship. According to some figures, there are up to 800,000 people with dual citizenship in Sweden. Since Swedish law forbids the registration of religious belief, it is very difficult to say how many Muslims live in Sweden. The latest public information indicates that there are around 400,000 Muslims in Sweden. *See The State and the Imams*, Official Swedish Government Report No. 52, 2009, p. 26 (*Staten och imamerna*, SOU 2009:52). The following can be said about the corresponding figures in some other EU states. In Britain, the Muslim community consists of over 1.6 million people (2001), *see* Modood, 'British Muslims and the Politics of Multiculturalism', *in* Modood, Triandafyllidou & Zapata-Barrero (Eds.), *Multiculturalism, Muslims and Citizenship – A European Approach*, London, 2006, p. 37. Over 5 million Muslims live in France, *see* Nielsen, *Muslims in Western Europe*, Edinburgh, 2003, p. 11. In Germany, over 4 million people are Muslims, *see* Savage, 'Europe and Islam: Crescent Waxing, Cultures Clashing', *The Washington Post Quarterly*, 2004, p. 24. According to Savage, the total number of Muslims in Western Europe is around 23 million people, *see id.*, at p. 27. If Turkey joins the European Union, the number of Muslims in the Union will amount to just below 100 million.

II. Private International Law and the Multicultural Society

Although the nationality principle in Swedish international inheritance law in a certain respect preserves cultural diversity and reflects a form of recognition policy, private international law as a legal discipline has some weaknesses in relation to the multicultural society. It is also important to note that, in the current Swedish situation, private international law is the only tool for applying foreign laws in Swedish courts.[27] The shortcomings of this situation are articulated both in concrete, technical legal terms and in general terms. On the concrete, technical legal level, it can be said that there will be cases where the parties' personal relation to the designated law does not coincide with their cultural background, religious beliefs, etc. For example, one shortcoming of the nationality principle relates to the issue of how to solve the situation of dual citizenship. In other cases, a person may be a Swedish national living in Sweden who nevertheless follows the rules of a culture that differs from the culture upheld in Swedish legislation in his or her daily life. In such cases, citizenship might have no more than a formal meaning for the person concerned.

On a general level, it can be said that private international law is a legal framework intended to regulate private law relationships that are connected to more than one state. The private international legal discourse is built upon a structure or an idea of the world that distinguishes between issues relating to the international/external sphere and the domestic/internal sphere. Private international law is characterized as belonging to the first category. Only in these cases can legal relations be determined with the application of foreign law. The second category of issues, those relating to the internal sphere, does not have private international law implications, with the result that foreign law is not applicable.

Multicultural legal issues belong to the internal as well as the external realm. If one considers the current situation in Sweden from the perspective of the dichotomy between internal and external legal issues, it becomes hard to assimilate the fact that some third-generation Muslims are requesting the right to conduct their family lives in accordance with their religion. This generation may not have the relevant legal connections to a foreign country that activate private international law and the possible application of foreign law. Although these Muslims may lack these connections, they can still live in accordance with other norms than those expressed in Swedish legislation.[28] For that reason, it is too optimistic to believe that private international law rules can solve the multicultural challenge. Private international law as an instrument can only cover those cases that have a strong link to a foreign legal order.

III. Islamic Law in Swedish Courts

Until today, there have been no published cases from higher Swedish courts concerning the application of Islamic inheritance law. Informal talks with representa-

27 Jänterä-Jareborg, *supra* note 4, at p. 157.

28 If "family law is intimately linked with a person's or group's cultural identity, then that person or group may wish to carry that law with him or her/the group everywhere". *See* Jänterä-Jareborg, *supra* note 4, at p. 156.

tives of Swedish Islamic organizations reveal that individual Muslims rarely refer inheritance disputes, for example, to Islamic faith communities in Sweden, although these communities otherwise play an important role (unofficially) in other family law disputes. It seems that Muslims in general settle questions relating to inheritance informally without the involvement of the Swedish authorities or Islamic communities.

Although inheritance disputes seem to have been few, Swedish courts have repeatedly ruled on matters relating to *mahr*, the Muslim dower. The *mahr* is an agreement whereby the husband promises or gives property to his wife as a result of the forthcoming marriage.[29] *Mahr* may be relevant to inheritance, since the fulfilment of the agreement can occur at the death of the husband. The fact that nearly all marriages between Muslims contain agreements on *mahr* also shows that many Muslims in Sweden actually comply with Islamic family law.

In the two leading cases relating to *mahr*, both decided by two different Swedish courts of appeal (RH 1993:116 and RH 2005:66), the parties had a strong legal connection with a country with a Muslim legal order. In RH 1993:116, two Israeli citizens of Muslim faith had entered into marriage in Israel, in accordance with the family law rules applicable to Muslims in Israel. After the marriage ceremony, the husband returned to Sweden, where he was habitually resident at the time of marriage. The wife was soon to follow. Only five months after the wife's arrival in Sweden, she returned to Israel and the husband applied for divorce in a Swedish court. The wife asked the court to oblige the man to fulfil the agreement on *mahr*. In accordance with the Swedish private international law rules relating to maintenance, which the court deemed relevant to the issue of *mahr*, the applicable law should follow the law of the country where the spouse entitled to maintenance is habitually resident. Since the wife at the time of the decision lived in Israel, the dispute relating to *mahr* was decided in accordance with the relevant (Muslim) rules in Israel. The court obliged the husband to fulfil the *mahr* agreement.

In contrast to the above case, the court of appeal in RH 2005:66 qualified *mahr* as an institution within the area of spouses' matrimonial property relations. In this case, the marriage had been concluded in Iran between a man habitually resident in Sweden (with both Swedish and Iranian citizenship) and an Iranian woman habitually resident in Iran. The marriage was conducted by proxy (the mother of the wife represented the husband in the marriage ceremony). In relation to the marriage agreement, the spouses-to-be agreed on a *mahr* amounting to €25,000, due to be paid at the request of the wife. A couple of days after the wife's arrival in Sweden, the husband explained that he wished to terminate the marriage. In the framework of the divorce proceedings, the wife asked the court to oblige the husband to fulfil the agreement on *mahr*. The court of appeal regarded the *mahr* as an institution that adjusts the property relations between the spouses and that falls within the ambit of the Act (1990:272) on questions of an inter-

29 Sayed, 'The Muslim Dower (*Mahr*) in Europe – With Special Reference to Sweden', *in* Boele-Woelki & Sverdrup (Eds.), *European Challenges in Contemporary Family Law*, Antwerp 2008, pp. 187-208.

national character relating to spouses' and cohabitees' (matrimonial) property relations (LIMF).[30] According to LIMF, questions relating to spouses' matrimonial property relations are decided in accordance with the law of the country where the spouses are habitually resident. Since the spouses had not acquired a habitual residence in the same country at the time of the marriage, the court had to determine which law had the strongest connection to their legal relationship. Since both spouses were citizens of Iran, the wife was also habitually resident in Iran at the time of the marriage and both parties had relatives in Iran, the court considered Iranian law to have the strongest connection to the legal relationship.

The main difference between the two cases seems to be that, in the second case, in accordance with the Iranian provisions, the *mahr* had become the property of the wife immediately upon the conclusion of the marriage contract (ceremony), granting her full disposal rights over the property from this moment onwards. In the first case, however, the marriage contract stated that the *mahr* was payable only upon divorce. Since the wife was not able to dispose of the *mahr* before the termination of the marriage, the court regarded the *mahr* as having a function similar to that of maintenance paid as lump sum upon divorce.

Since the two cases were adjudicated, disputes concerning *mahr* have escalated in Swedish courts. One reason may be that lawyers have gained greater awareness of how to embark upon litigations relating to the application of Islamic institutions. Another explanation may be the so-called 'snowball effect'. The knowledge that courts have reacted positively to demands relating to *mahr* in some cases may trigger the willingness to initiate litigations concerning *mahr*. It is not unlikely that Muslims will seek to obtain inheritance rights based on Islamic law through the Swedish legal system once they become aware of the possibility of doing so. In those cases where Swedish law would otherwise be applicable, this will require a testamentary disposition. Nevertheless, considering that under the Swedish Code of Inheritance only the descendents of the deceased are protected through the right to a forced share (*laglott*), which is half of the otherwise available legal share, there are ample prospects to stipulate a will in accordance with Islamic principles.

D. Islam and Inheritance

I. The Islamic Law of Inheritance

The Sunni Islamic law of inheritance consists of a complex set of rules and is very rich in detail. It is based on Islamic sources and legal traditions, which in turn originate from the principles of the pre-Islamic society on the Arabic peninsula at the time of the prophet Muhammed's message. The system is largely a compulsory inheritance regime, in which testamentary inheritance is limited to one-third of the total estate of the deceased. In addition, a bequest cannot be made in

30 Lag (1990:272) om internationella frågor rörande makars och sambos förmögenhetsförhållanden.

favour of a heir.[31] This contribution is not intended to treat all technicalities of the Sunni Islamic succession order. Instead, the aim is to provide a general view of the system, in order to explain the sociological implications of the Islamic system with regard to family structure and the organization of family life. Only through this more holistic perspective can the system's underlying ideas be explored.

The Sunni Islamic law of inheritance consists of two classes of heirs. While the first class consists of two groups of heirs, the so-called sharers and residuary heirs, the second class consists of the deceased's cognates. The deceased's cognates are entitled to inherit only in the absence of heirs in the first class.[32] In real life, this means that the second class, the cognates, seldom inherit due to the fact that in the overwhelming majority of cases the deceased will leave behind heirs in the first class. The cognates and their rights of inheritance will therefore not be addressed in this contribution.

II. The Heirs in the Islamic Law of Inheritance

Sharers refers to heirs stipulated by the Koran or those who have received the right of inheritance by analogy with the rules in the Koran. The sharers are often classified as the first group of heirs in the first class. This classification is based on the fact that the division of inheritance according to the Sunni inheritance law always begins by giving consideration to these heirs. Depending on the heir in question and the other heirs whom the deceased has left behind, the share for each sharer can be 2/3, 1/3, 1/4, 1/6 or 1/8 of the estate. Although a share can be divided among several heirs, the Koranic shares cannot be changed. According to the Koran, the shares "are settled portions ordained by God" (Chapter 4, Verse 11). The sharers include the deceased's father, mother and grandfather on the father's side, grandmothers on both the father's and mother's side, husband, wife, daughters, son's daughters, full sisters, consanguine sisters as well as uterine brothers and sisters.

The second group of heirs in the first class consists of the deceased's paternal agnates.[33] They can be both male and female, although the group usually is

31 The modern laws in Sunni Islamic countries have sometimes departed from the ban to bequeath in favour of an heir in accordance with the classical Shia interpretation (e.g. in Iran). However, the limit of 1/3 is strictly maintained.

32 Pursuant to Chapter 4, Verse 12 of the Koran, the uterine collaterals (the deceased's half-brothers and half-sisters on mother's side) are in some cases allowed to inherit alongside the heirs in the first class.

33 Unlike sharers, the inheritance rights of the male agnates are not based on the Koran but on the traditions (Sunna) of the prophet Muhammed. According to the Sunna, the prophet commanded to "give the Farāid (the shares of the inheritance that are prescribed in the Koran) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased". *See* Muhsin Khan, *The Translation of the Meanings of Sahih Al-Bukhāri*, Arabic-English, Vol. 8, Hadith 6732, p. 385.

defined as the deceased's male agnates.[34] The male agnatic relatives are, in contrast to the sharers, not entitled to prefixed shares of the inheritance. Instead, they inherit whatever remains after the sharers have received their allotted shares. In practice, the residuary entitlement of the male agnates means that if the deceased does not leave any sharers, or if there are sharers but their shares do not consume the total estate, the estate or the remainder thereof passes to the male agnates. The primary heirs among the male agnates are the sons or, in the absence of sons, other male agnatic descendants of the deceased. If a person dies without leaving descendents, ascendants, such as the father or the paternal grandfather of the deceased, will enter as residuary heirs. In the absence of descendents and ascendants, any agnatic collateral (such as consanguine brothers, paternal uncles, paternal cousins or, sometimes, a relation as remote as a paternal uncle of the deceased's father) will enter as *asaba* and inherit whatever remains after the sharers have received their part. When male agnatic relatives inherit alongside females (who are Koranic heirs) related to the deceased with the same blood-tie – such as when the deceased leaves behind sons and daughters or brothers and sisters – the agnatic females will lose their Koranic shares and inherit in the same manner as their male counterparts. In these cases, the estate is divided in such a way that the man receives an amount that corresponds to that which two women jointly inherit in the same situation.

The principle of *tasib*, meaning that the male heir takes the double share of what a female heir takes, is applied only in relation to agnates. If the deceased leaves a uterine brother and sister as heirs, the sister will, according to the Koran (Chapter 4, Verse 12), inherit the same portion as the brother. In fact, the principle whereby a male heir inherits the double share of what his female co-inheritor takes, only applies where agnatic brothers and sisters and male and female descendents of the same rank (related to the deceased in the same way) inherit together.

It has often been held that the Islamic law of inheritance and the Sunni interpretation of the Koranic rules only mitigated, but did not challenge the male agnatic relatives' prominent position in respect of inheritance in the pre-Islamic society of the Arabic peninsula.[35] To some extent, the detailed inheritance provisions in the Koran only limited the pre-Islamic succession order. The patriarchal family organization that was typical of Bedouin life in pre-Islamic times prevails

34 An agnatic heir is a male or female who is related to the deceased by male links from a common male ancestor. In Arabic terminology, the agnatic heirs are called *'aṣaba*. The terminology has its roots in Pre-Islamic times and is closely related to the tribal society that dominated life on the Arabic peninsula. The deceased's *'aṣaba* were those relatives who were supposed to defend and fight for the honour of the tribe. In order to strengthen the defence (and the possibility to live a free life in the desert), the right of inheritance belonged to the male agnates that could carry weapons. These male agnates are called the *asaba* of the deceased. The Koran modified the succession order in the pre-Islamic time by introducing the sharers, consisting of those relatives who were not entitled to inherit in the pre-Islamic times.

35 According to Anderson, the advent of Islam only introduced "certain outstanding reforms" in the field of succession. *See* Anderson, *Islamic Law in the Modern World*, New York, 1959, p. 61.

in the Sunni Islamic law of inheritance.[36] Even in the case of the sharers, who typically have a Koranic right to inherit, the agnatic blood-tie still has a privileged status.[37]

III. Inheritance Rights in Pre-Islamic Times – An Historical Background

Islamic law and particularly the Islamic law of inheritance have their roots in the pre-Islamic society. In fact, one is only able to fully grasp the Islamic succession order by reference to the social order of the Arabic peninsula at the time of the Islamic revelation.[38] As delineated above, the succession order consists of two different but parallel inheritance systems merged together into the Sunni Islamic law of inheritance. On the one hand, the system consists of the detailed regulations in the Koran that guarantee inheritance rights for certain close relatives who were not entitled to inherit during the pre-Islamic period. On the other hand, the system corresponds to and reflects the dominating tribal system in Arabic society before the advent of Islam by retaining the agnatic succession order as an important feature of the system.

On the Arabic peninsula where the Prophet spread the Koranic message, there were no state formations or any comprehensive legal systems that were generally applicable to the people who lived in the area.[39] The pre-Islamic society was instead a tribal organization with limited space for the individual, the clan being considered to be more important than the individual.[40] The clans were patriarchal and mainly organized by blood-ties. The smallest unit of the clan could consist of a father with sons and grandsons together with families. A clan could in turn consist of hundreds of such units with the same number of tents lined up in one place.[41] Each tribe was an autonomous political entity, and violations of 'law'

36 A significant difference between Sunni and Shia (for the majority of the population in Iran and Iraq) as regards the succession order is the absence of *asaba* (the residuary heirs). For the Shia, the inheritance rules in the Koran are interpreted as reforms that were to be superimposed on the pre-Islamic system of agnatic succession. According to the Shia, the Koran constructs "a wholly new system based (in theory) exclusively on these innovations". *See* Anderson, 'Recent Reforms in the Islamic Law of Inheritance', 1965 *The International and Comparative Law Quarterly*, p. 351.

37 Brothers and sisters on the father's side have a more privileged position than brothers and sisters on the mother's side (*cf.* Chapter 4, Verse 12 in the Koran for the uterine brothers and sisters and Chapter 4, Verse 176 for the consanguine brothers and sisters). By analogy with the provisions in the Koran, the son's daughters are entitled to inherit as sharers, but at the same time a daughter's daughter is not (she will inherit as a distant kindred, in the absence of sharers and residuary heirs). However, in many contemporary Islamic legislations, the position of the cognate descendants has to some extent been improved through the obligatory testament.

38 Tyabji motivates the study of the pre-Islamic order by saying that the "pre-Islamic customs alone can explain the reason why different classes of rights are given to the different classes of kin, and why some who might be supposed to be entitled to similar rights, are placed on different footings".

Tyabji, *Muhammedan Law*, Bombay 1940, p. 821.

39 Schacht, 'Pre-Islamic Background and Early Development of Jurisprudence', *in* Khadduri & Liebesny (Eds.), *Law in the Middle East*, Vol. I, Washington 1955, p. 29.

40 Smith, *Kinship and Marriage in Arabia*, London, 1990, p. 2.

41 Lapidus, *A History of Islamic Societies*, Cambridge, 2002, p. 12.

and conflicts between different tribes had to be settled according to the *lex talionis*, the law on revenge.[42] Group solidarity (*al-asabiyya*) among the members of the tribe was therefore crucial for the survival of the tribe in the Arabian desert.

It was therefore natural that the tribe in various ways attempted to maintain and strengthen the internal group solidarity among it members. One way was to develop a succession order that met the needs of the tribal society. In view of the tribal nature of the pre-Islamic society, it was natural that the succession order gave precedence to descendents of the deceased and also that ascendants were more prioritized than collaterals. Nor was it surprising that women and children were excluded from inheritance rights, since they did not participate in tribal warfare. This task belonged to the *asaba*.

IV. Distribution of Estate in Accordance with Islamic Law – Some Examples

The Koranic shares can sometimes give rise to difficult mathematical calculations. In what follows, the distribution of inheritance will be illustrated through some simple examples in order to describe the application of the Islamic rules. The many technical issues that the system generates will not be discussed. The examples are above all intended to show the succession order among the deceased's 'closest' relatives in order to provide an overview of how the most common situations of succession are solved in the Sunni Islamic law of inheritance.

As described above, the division of inheritance always begins by giving consideration to the heirs who are entitled to prescribed shares (comprising most of the deceased's close female relatives). The inheritance rights of the deceased's descendants are set out in detail in the Koran (Chapter 4, Verse 11). A daughter is entitled to inherit 1/2 of the total estate, while two or more are entitled to 2/3 of the estate. With regard to spouses, the Koran imposes different rules depending on whether it is the wife or the husband who is the surviving spouse and whether the deceased has left behind any children (Chapter 4, Verse 12).[43] The husband is entitled to 1/2 of the estate if his wife did not leave behind any children. Under the same circumstances, the wife will receive 1/4 of her deceased husband's inheritance. If the first deceased spouse has left behind children, the surviving spouse's inheritance is reduced by half. The mother and the father of the deceased are both Koranic sharers, although the father sometimes also inherits as a residuary heir. If the deceased left behind any children, the parents will inherit 1/6 each of the total estate. If there are no children, the mother will inherit 1/3 of the estate

42 Watt, *Muhammed at Medina*, Oxford, 1956, p. 261. Anderson elucidates the situation by saying that outside the tribe "there was no security other than the unwritten law of the blood feud, under which a man must be avenged, if killed by one of another tribe, by his agnatic relatives, while it was the agnatic relatives of the killer who must, if the wanted to avoid further bloodshed, provide the bloodwite by way of compensation of the heirs of blood".

Anderson, *Islamic Law in the Modern World*, New York, 1959, p. 60.

43 If there are non-direct children, an agnatic grandchild is treated as a child with respect to the heirs who are affected by the presence of children.

while the father inherits what remains.[44] The paternal grandfather will, for the most part, take the same inheritance position as the father. The 'true' grandmother, in Islamic terminology the paternal grandmother (no matter of generation), and grandmothers that are related to the deceased through female links take the position of the mother. As far as the collaterals are concerned, the right to inherit through prescribed shares is limited to consanguine sisters and uterine brothers and sisters. As a rule, they are also entitled to inherit only in the absence of agnatic male descendents and agnatic male ascendants (interpreted as the father of the deceased).[45] The collateral heirs are entitled to inherit as secondary heirs, in the same way as grandparents and granddaughters, meaning that their inheritance rights are dependent on the absence of other more closely related heirs.

The male agnates, who inherit as residuary heirs, take part in the estate after the sharers have received their allotted shares. Suppose that a man dies and leaves behind as his only heirs his wife, one daughter and (consanguine) brothers as the closest male agnates. In this case, the wife is entitled to 1/8 and the daughter to 1/2 of the total estate. After the distribution to the wife and the daughter, the remaining 3/8 will pass to the brothers in their position as closest male agnates. The outcome of the case is that the sharers and the residuary heirs will inherit approximately the same amount of the total estate. However, if there had been more than one daughter, the balance between these two categories of heirs would have been displaced.

As mentioned, when male agnatic relatives inherit alongside females (who are sharers) related to the deceased by the same blood-tie – in the above example, if there were sisters alongside the brothers – the female heirs would inherit the same as their male counterparts. This means that the residual 3/8 would be divided so that the brothers received two portions and every sister received one portion. The same division would occur if there were sons together with daughters. In the above example, the surviving spouse would still inherit the 1/8, while the remaining 7/8 would be divided among the children in accordance with the principle of one share to the daughters and two shares to the sons. The deceased's brothers would be excluded due to the existence of the sons, who are regarded as more closely related male agnates.

44 If the only heirs are the parents and a surviving spouse, a literal interpretation of the Koranic text would lead to a situation where the mother inherits twice as much as the father. Imagine that a woman dies and leaves her husband and her parents as the only heirs. In this case the surviving spouse will inherit 1/2 (3/6) the mother 1/3 (2/6) and the father whatever remains after the sharers taken their prescribed shares (1/6). The early scholars considered this literal interpretation of the Koran as inconsistent with the fundamental principles in the inheritance scheme. The verse in the Koran was reinterpreted so that the mother's 1/3 share was allotted after the surviving spouse had taken his share (and not from the total estate). In this particular situation, the mother will take 1/3 and the father 2/3 of what remains after the surviving spouse has taken his share. This means that the mother will inherit 1/6 and the father 2/6 of the total estate.

45 The inheritance rights of the siblings are prescribed in Chapter 4, Verse 12 (uterine brothers and sisters) and Verse 176 (consanguine brothers and sisters).

V. Problems Related to the Islamic Law of Inheritance

Due to its agnatic succession rules and the principles that sometimes favour male heirs over female heirs, the Islamic law of inheritance is problematic in the light of various fundamental values that also enjoy constitutional protection in Sweden.[46] The safeguarding of equal rights for men and women constitutes one of the fundamental principles in the Swedish legal order, and rules that contravene this principle may be regarded as contravening Swedish public policy. For example, according to Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, religion or birth. The Convention's ban on discrimination in Article 14 in conjunction with Article 8 concerning the right to respect for family life and the First Protocol regarding protection of property would thus probably be a hindrance for the member states to apply the Islamic rules in question.[47] However, the European Court of Human rights recognizes the testator's right to settle his or her property through a last will and testament, even though the settlement might not be in agreement with the principles outlined in the Convention.[48] It is likely that the freedom of testament, as recognized by the European Court of Human Rights, can be extended to include the right of the deceased to choose the law applicable to succession. Under all circumstances, it is important that the discussion regarding these issues, which many Muslims regard as part of their religion, is conducted in a tolerant manner and on the basis of mutual respect.[49] One way to approach the unfamiliar is to try to understand it by evaluating the underlying principles of the system.

So, what principles lie behind the rules that govern the agnatic succession in the Islamic law of inheritance? First and foremost, these principles must be

46 This contribution discusses these problematic issues, although there are also other aspects of the Islamic inheritance order that could be discussed from this point of view.

47 For the case law of the European Court of Human Rights relating to the application of Article 14 in inheritance cases, *see Marckx v. Belgium* (Application No. 6833/74, 13 June 1979), *Inze v. Austria* (Application No. 8695/79, 20 October 1987), *Mazurek v. France* (Application No. 344406/97, 1 May 2000) and *Merger and Cros v. France* (Application No. 68864/01, 22 December 2004).

48 *Pla and Puncernau v. Andorra* (Application No. 69498/01, 15 December 2004).

49 In this regard, Judge Kovler's concurring opinion in the well-known case of *Refah Partisi (The Welfare Party) and others v. Turkey* (Application Nos. 41340/98, 41342/98, 41343/98 and 41344/98) at the European Court of Human Rights is of interest. Although Judge Kovler shared the findings of the Court, he made the following comments: "What bothers me about some of the Court's findings is that in places they are unmodulated, especially as regards the extremely sensitive issues raised by religion and its values." He continues, "I would prefer an international court to avoid terms borrowed from politico-ideological discourse". Furthermore, "This general remark also applies to the assessment to be made of sharia, the legal expression of religion whose traditions go back more than a thousand years, and which has its fixed points of reference and its excesses, like any other complex system. In any case legal analysis should not caricature polygamy (a form of family organisation which exists in societies other than Islamised peoples) [...]".

understood against the background of the maintenance rules in Islamic law.[50] In contrast to the essential ideology in Swedish family law, which emphasizes individual autonomy and self-sufficiency, Islamic family law takes the opposite starting point. In Islamic law, the obligations are clearly defined, and some family members are responsible for the financial support and maintenance of their relatives.[51] The obligation to support falls mainly upon the men, more precisely on the category of heirs who in the Islamic law of inheritance are categorized as the *asaba*, e.g. the agnatic relatives.[52] According to Zainab Chaudhry, the underlying justification for a 2:1 ratio in estate distribution when male agnates and female agnates (Koranic sharers) inherit together is that the males have greater financial responsibilities towards the female agnates with whom they inherit.[53] She clarifies this further by stating:

> "This burden of support for all family members falls upon fathers, sons, husbands, and brothers, depending on the circumstances. For example, in case of the death of father, an unmarried or divorced daughter will have the right to care and maintenance by her male agnate relatives. A brother has the duty to maintain his sister. A son has the duty to maintain his widowed mother and other dependents of his deceased father."[54]

The inheritance principle that gives precedence to male agnatic heirs over their sisters should therefore be seen in a broader context. These principles correspond to and balance the maintenance rules in the Islamic sharia. It is simply a way to create coherence in the Islamic family system as a whole.[55]

For some of the Muslims living outside the Islamic world, for example Muslims living in European countries such as Sweden, the gap between the underlying ideas of the Islamic law and the realities of daily life that the general law reflects are considerable. Both society at large and Swedish family law promote individualistic values. Swedish society elevates individual autonomy, self-sufficiency and the individual's freedom from dependence on others. This is reflected in the

50 According to the legal anthropologist Marie-Claire Fobbles, "this apparent legal inequality must be considered within a wider legal framework: inheritance rules under Islamic law are, as it were, only one means, albeit an important one, for women to acquire property".

Fobbles, 'Legal Anthropology', *in* Castelein, Foqué & Verbeke (Eds.), *Imperative Inheritance Law in Late-Modern Society – Five Perspectives*, Antwerp, 2009, p. 58.

51 Islamic society is sometimes described as a 'dual sex' society, where each sex has pre-decided duties and responsibilities, Chaudhry, 'The Myth of Misogyny: A Reanalysis of Women's Inheritance In Islamic Law', 1998 *Journal of Islamic Law*, p. 80.

52 According to Chapter 4, Verse 34 of the Koran, "Men are the protectors and maintainers of women, because God has given the one more (strength) than the other, and because they support them from their means."

53 Chaudhry, *supra* note 51, at p. 83.

54 *Id.*, at p. 82.

55 Upon marriage, apart from the obligation of support and maintenance, a man is obliged to give a dower (*mahr*) to the bride. The deferred *mahr* functions as a financial safeguard for the wife upon divorce or the death of the husband. It is not uncommon for spouses to agree on a deferred *mahr* of considerable value. *See* Sayed, *supra* note 29.

Swedish maintenance rules. According to the Swedish Marriage Code,[56] maintenance obligations between former spouses can arise only under certain exceptional circumstances. Parents' duty to support their children ends when the child has attained the age of 18 (or 21 if he or she is still completing primary and secondary education).[57] The Swedish family law rules do not recognize maintenance obligations among blood-relatives apart from the claims children have towards parents. Compared to Islamic family law, it is a completely different outlook on how to organize family life and how to distribute the financial burdens among the 'family' members. In the Swedish welfare state, the state is expected to meet the needs of the citizens.

VI. International Succession Rules in the Multicultural EU – Concluding Remarks

Swedish international inheritance legislation will in the near future be replaced by EU legislation for cross-border cases of inheritance. The choice of law rules in the forthcoming regulation are expected to be universally applicable. This means that the regulation can lead to the application of inheritance rules derived from an EU member state or from a third country. The regulation is also expected to allow party autonomy. According to the proposal, in order to be valid, a party's choice of law requires that the deceased is a citizen of the country designated by the choice. In the absence of a choice of law clause, the applicable law will follow the rules in the country where the deceased was habitually resident at time of his or her death.

From a Swedish private international law perspective, the forthcoming EU regulation enables a person to plan the distribution of his or her inheritance to a greater extent than today. Thus, the regulation has direct positive implications for the multicultural countries in the EU. The EU has failed to show explicit interest in the multicultural challenge and demands for the recognition of differences within each member state, the preparation of the inheritance regulation being based on the rhetoric of the internal market and free movement of persons within the Union. Still, many cases can be foreseen where the regulation may lead to the application of Islamic inheritance rules.

It is possible that the new international succession regulation will also stretch the limits of the application of foreign inheritance law in national courts. This can be illustrated with an example. Suppose that a person – a citizen of a country that applies the Islamic law of inheritance – dies and has left behind a choice of law clause that favours the law of the country of citizenship. Suppose that he is survived by his spouse, a daughter and a son. In such a case, according to the Islamic rules, the surviving spouse will receive 1/8 of the total estate and the children will inherit the remainder in accordance with the principle of the 2:1 ratio (the son inheriting 2/3 and the daughter 1/3 of what remains after the wife has taken her share). If the same situation is viewed in the context of the testamentary freedom in substantive Swedish inheritance law, the deceased is allowed

56 Äktenskapsbalken (1987:230).

57 The Swedish rules relating to the parental maintenance obligation are found in the Parental Act (1949:381).

to completely disinherit the surviving spouse and by way of testament appoint 3/4 of the total estate to the son and 1/4 of the estate to the daughter. According to the Swedish Inheritance Act, the forced share (*laglott*), constituting half of the total inheritance, is reserved for the children of the deceased. When the deceased himself has designated the applicable law, it is difficult to reject the designated law with reference to public policy. In those 'internal' situations where the relationship is not linked to a foreign country in the private international law sense, many of the results that the Islamic law can lead to may be achieved by a will that relies on the testamentary freedom prevailing in the member states of the European Union.

The multicultural challenge, meaning the demands of minority groups to be recognized as groups with a distinct cultural and religious identity, raises challenges for the legal system. However, as the above discussions illustrate, these challenges are perhaps less profound in the field of succession. Compared to the rules relating to child custody, marriage and divorce, which are regarded as upholding fundamental values, inheritance rules (both on the substantive level and on private international law level) are largely of non-mandatory character. Nevertheless, the ongoing European debate on multiculturalism and Islamic law demonstrates that the subject concerns controversial issues.