The impact of the ECHR on private international law: An analysis of Strasbourg and selected national case law
Kiestra, L.R.

Citation for published version (APA):
Kiestra, L. R. (2013). The impact of the ECHR on private international law: An analysis of Strasbourg and selected national case law

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: http://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

UvA-DARE is a service provided by the library of the University of Amsterdam (http://dare.uva.nl)
VI. Applicable Law

1. Introduction

The issue of the applicable law in private international law is concerned with the question of which law should be applied to a case where a court is presented with a claim concerning a foreign element.\(^{680}\) In order to find the applicable law, a national court will refer to the choice of law rules of the forum. The result of the application of these (choice of law) rules will be that either the law of the forum (the *lex fori*), the law of another country, or even uniform rules will be applied to the case.\(^{681}\) If the facts of the case are closely connected to a foreign legal order, there is a good chance that foreign law will be the law applicable to the case. In this chapter the impact of the European Convention on Human Rights (ECHR) on the issue of applicable law will be examined. It will be recalled that, for reasons set out in Chapter I, this chapter will only be concerned with the impact of the rights guaranteed in the ECHR on the actual result of the application of the forum’s choice of law rules – the applicable law; the possible impact on the choice of law rules of the forum will, in principle, not be covered here.\(^{682}\)

What could the impact of the rights guaranteed in the ECHR on the issue of applicable law in private international law be? Remarkably, there is not much case law in which the Court has examined the impact of the rights guaranteed in the ECHR on the applicable law in private international law. The relationship between this issue of private international law and the rights guaranteed in the ECHR has nevertheless spawned a lively debate in the literature, in which several different aspects of the issue have been touched upon.\(^{683}\)

---

\(^{680}\) See also *supra* ch. II.

\(^{681}\) For some areas of the law, international uniform laws have been established by a treaty. One could, for example, think of the United Nations Convention on Contracts for the International Sale of Goods. There is, in principle, a fourth option. A law which is not connected to any State, such as the *lex mercatoria*, may also be found to be the law applicable to the case. The discussion in this chapter on the impact of the ECHR on the applicable foreign law violating one of the rights guaranteed in the ECHR would, in principle, be equally relevant in the event that the application of such an international law would result in a violation of the ECHR.

\(^{682}\) See *supra* ch. I.2.1. It was discussed there that the Court, in its case law, in principle, does not review laws *in abstracto*. But see the discussion of Ammdjadi v. Germany *infra* VI.3, in which the Court briefly touches upon this issue.

Three different aspects of the discussion will be distinguished in this chapter. The classical example of the impact of the ECHR on the issue of applicable law is the scenario in which the application of the forum’s choice of law rules would point to a foreign law whose application would subsequently violate one of the rights guaranteed in the ECHR. The application of a foreign law, as determined by a court of one of the Contracting Parties by virtue of their choice of law rules, could then result in a violation of one of the rights guaranteed in the ECHR. Yet even this relatively straightforward example raises a number of questions with regard to the impact of the ECHR, relating, inter alia, to the level of scrutiny that should be used with regard to the rights guaranteed in the ECHR.

This is, however, but one of the aspects of the debate concerning the impact of the ECHR on the issue of applicable law. In addition to being used as a defensive mechanism against the result of the application of a foreign law, the ECHR could also be invoked in order to promote the application of a foreign law. Related to this usage of the ECHR is, incidentally, the invocation of the ECHR against the application of the lex fori of one of the Contracting Parties in favor of a foreign applicable law. One could argue that some of the rights laid down in the ECHR provide a basis for such an argument.

It is interesting to note in relation to these two aspects of the impact of the ECHR on the issue of the applicable law that the substantive rights guaranteed in the ECHR play the leading role. The impact of the ECHR in this regard is confined to the material result of the application of the choice of law rules. Whereas issues of private international law are mostly thought of as

---

procedural questions, the impact of the ECHR on the issue of applicable law is thus largely a substantive issue – except for issues relating to the ascertainment of the content of the foreign applicable law. This latter issue is the third and final aspect of the debate on the impact of the ECHR on the issue of applicable law and is thus concerned with the act of applying the selected (foreign) law by courts. This may also raise some issues with the ECHR, albeit not substantive ones, but rather procedural problems relating to Article 6 (1) ECHR.

These three different aspects of the impact of the rights guaranteed in the ECHR on the issue of applicable law will be covered in this chapter. Before the examination of these three issues can start in earnest, it is first necessary to briefly return to the the applicability of the ECHR to the issue of applicable law in private international law (in 2). Thereafter, the impact of the ECHR on the result of the application of a (foreign) law will be discussed (3). The next section will feature the discussion of whether the ECHR can also be invoked in favor of the application of a foreign law, in which the invocation of the ECHR against the lex fori will be examined (4). Finally, the impact of the ECHR on the act of applying law itself will be assessed (5). The discussion will be finalized with a conclusion (6).

2. The Applicability of the ECHR to the Issue of Applicable Law

Even though this issue has been discussed at length in Chapter IV, it may be useful to briefly recall the main findings of the discussion of the applicability of the ECHR to the issue of the application of a foreign law.

2.1 Responsibility when a Foreign Law is Applied

As has been discussed, this question of the applicability of the standards guaranteed in the ECHR is particularly interesting in the event of the application of a foreign law originating from a third country, i.e. a non-Contracting Party. It is clear that the applicable law originating from a third

---

684 See with regard to the notion and characteristics of private international law supra ch. II.
685 In this regard one may thus observe a noticeable distinction from the issue of jurisdiction in private international law discussed previously. See supra ch. V. It will, incidentally, be demonstrated in the next chapter that with regard to the third issue of private international law, the recognition and enforcement of foreign judgments, both the procedural right of Article 6 (1) ECHR as well as the substantive rights guaranteed in the ECHR may have an impact. See infra ch. VII-VIII.
686 See for a more detailed discussion supra ch. IV.
country does not need to be in line with the standards provided by the ECHR, as the country responsible for the law is not a Contracting Party to the ECHR. Nevertheless, it has been found that when a court of one of the Contracting Parties applies a foreign law of a third country violating one of the rights guaranteed in the ECHR, it is ultimately this court that causes the violation of the ECHR by applying the repulsive foreign law in question. As Article 1 ECHR obligates the Contracting Parties to ensure all the rights and freedoms guaranteed in the ECHR to everyone within their jurisdiction, it should be clear that the ECHR is indeed applicable to this issue, regardless of whether the applicable foreign law originates from a third country or another Contracting Party.

Insofar as any doubts persisted with regard to the applicability of the ECHR to the issue of the application of a foreign law originating from a third country, the Court has fairly recently, in an admissibility decision in Ammdjadi v. Germany, examined whether the application of Iranian law (a law originating from a third country) to a divorce between two Iranian nationals by the German courts violated the ECHR. Although ultimately no violation of the ECHR was found and the case was held to be manifestly inadmissible for reasons that will be further discussed below, the Court’s examination of the issues in this case implicitly demonstrates that the ECHR is indeed applicable to the issue of the application of a foreign law emanating from a third country. At no point in its examination did the Court suggest otherwise. It would ultimately have been the German courts’ application of the Iranian law (allegedly) violating one of the rights guaranteed in the ECHR that would have led to a violation of the ECHR. One could note that some of the earliest case law of the Strasbourg Institutions in this regard already pointed in this direction.

2.2 Co-responsibility when the Law of another Contracting Party is Applied?

A related question in the sense that the answer is ultimately found in Article 1 ECHR is whether more than one of the Contracting Parties could be held responsible for a violation of the ECHR

687 Ammdjadi v. Germany (dec.), no. 51625/08, 9 March 2010.
688 See infra VI.3.1.
689 In an early case before the Commission, X v. Luxembourg (dec.), no. 5288/71, 10 July 1973, the application of Hungarian law by the Luxembourg courts played a minor role. Hungary was at the time not yet a Contracting Party. In this case the Commission rejected an argument made by the Luxembourg authorities that the Commission was not competent to hear the case, because Hungarian law should have been applied to the case. The Commission quickly dismissed this argument by simply stating that the fact that, according to the Luxembourg rules of private international law, Luxembourg law was not the law applicable to the issue at hand was ‘without relevance’.
in the event that one Contracting Party applies the law of another Contracting Party. This is an issue that has occasionally been brought up in the literature.\textsuperscript{690} As has been noted above, it is clear that the Contracting Party applying the repugnant foreign applicable law is responsible for the resulting breach of one of the rights guaranteed in the ECHR. However, one could in such a scenario wonder whether the Contracting Party whose repugnant law is applied by another Contracting Party could be held co-responsible for this violation. After all, its law should have been up to the standards of the ECHR in the first place. Yet the Commission has in two decisions confirmed that this cannot be the case.

In \textit{X. v. Belgium and the Netherlands}\textsuperscript{691} the Commission gave a first clear indication of its thinking concerning such shared responsibility when it decided \textit{ex officio} to consider the complaint as being directed against Belgium, despite the fact that the applicant had targeted his complaint against the Netherlands. This case concerned an unmarried Dutch national, who lived in Belgium, and who wanted to adopt a child. According to the relevant Belgian choice-of-law rules at the time, the applicant’s request was determined by the application of Dutch law. However, the Dutch law at the time did not permit an unmarried person to adopt. The applicant decided to target his complaint in Strasbourg against the Netherlands.

The Commission considered that this application should have been filed against Belgium. Although the Commission did not give extensive reasoning for its decision, it seems clear that it was of the opinion that, as a Belgian judge by virtue of Belgian choice-of-law rules regarding adoption had applied Dutch law, Belgium bore the responsibility for a possible violation of the ECHR, even though that violation would have been created by (the application of) Dutch law.

In \textit{Gill and Malone v. the Netherlands and the United Kingdom}\textsuperscript{692} the Commission confirmed the above reading of \textit{X. v. Belgium and the Netherlands}. This case concerned a lengthy and complicated procedure regarding the establishment of paternity over a child. The applicants, Gill, a citizen of the United Kingdom, and Malone, an Irish national, were an unmarried couple whose daughter was born in Amsterdam when they unexpectedly had to discontinue their travels to the

\textsuperscript{690} See, e.g., Kinsch 2004 \textit{supra} n. 683, at p. 213-214.
\textsuperscript{691} \textit{X. v. Belgium and the Netherlands} (dec.), no. 6482/74, 10 July 1975, \textit{DR} 6, p. 77.
\textsuperscript{692} \textit{Gill and Malone v. the Netherlands and the United Kingdom} (dec.), no. 24001/94, 11 April 1996.
United Kingdom. When the father went to the Dutch authorities to declare his daughter’s birth and ask that he be registered as the father and that his daughter be registered under the family name ‘Gill’, he was informed that that under British law, as it was known to the authorities, his daughter could not be registered under his name and nor could he be registered as the father. To cut a long story short, this case ended up before the Commission in Strasbourg.

Could the United Kingdom be held responsible in this case? The United Kingdom submitted that regardless of whether the Dutch officials had applied and interpreted UK law correctly, the provisions of Dutch law were being challenged by the applicants. The Commission agreed with the United Kingdom that insofar as the complaint was targeted at the content of British family law, it was the Dutch authorities that, in accordance with the Dutch rules of private international law, took the relevant decisions regarding the recognition of paternity. The responsibility of the United Kingdom was therefore not directly engaged under these circumstances.

The Commission thus essentially confirmed the strong indication it had given in *X. v. Belgium and the Netherlands* that it is solely the Contracting Party applying the law of another Contracting Party that is responsible for a possible violation of the ECHR. There is no shared responsibility for such a possible violation. It ultimately comes down to the fact that the reason for the application – or eviction for that matter – of a foreign law is always found in the (system of private international law of the) forum and that the application – or non-application – of a foreign law is thus always the responsibility of that Contracting Party. In this regard the origin of the applicable law is therefore irrelevant. It is the Contracting Party actually applying the foreign law that could be held responsible for a possible violation of one of the rights guaranteed in the ECHR. However this does not mean that the origin of the applicable law is completely immaterial. As the laws of all the Contracting Parties are supposed to be in line with the rights guaranteed in the ECHR, there is a case to be made that the origin of the law does matter with regard to the level of scrutiny to which Contracting Parties should adhere.

---

694 See with regard to this particular topic *infra* VI.3.2.
3. The Impact of the ECHR on the Applicable (Foreign) Law in a Private International Law Dispute

Having demonstrated that in the case of a court of one the Contracting Parties applying a foreign law violating one of the rights guaranteed in the ECHR, this Contracting Party – and only this Contracting Party – could be held responsible, regardless of the origin of the applicable (foreign) law, it is time to turn to the other issues that surround the invocation of the ECHR against the normally applicable law. To be clear, the normally applicable law is not necessarily a foreign law. The application of the *lex fori* in an issue of private international law could, of course, also result in a violation of one of the rights guaranteed in the ECHR.

However, this situation would not be markedly different from a non-private international law issue before the Court in Strasbourg in which the application of the law of the respondent Contracting Party would result in a violation of the ECHR, and as such this will thus not be discussed further, because it is not uniquely an issue of private international law unless the argument could be made that one of the rights guaranteed in the ECHR could be invoked in order to stave off the application of the *lex fori* in favor of a foreign law. This issue will be discussed below in relation to the invocation of the ECHR in order to *promote* the application of foreign law.695

It is one thing to conclude that nothing stands in the way of holding a Contracting Party responsible for the application of a foreign law violating one of the rights guaranteed in the ECHR by one of its national courts. However, as has been noted in the introduction to this chapter, this starting point raises a number of issues. The fact that a Contracting Party could be held responsible for the application of a foreign law infringing upon one of the rights guaranteed in the ECHR does not necessarily mean that such an act by one of the national courts of the Contracting Party will lead to a violation of one of the rights guaranteed in the ECHR. There may, for example, be good reasons to allow the application of a foreign law possibly interfering with one of the rights guaranteed in the ECHR.

---

695 See *infra* VI.4.
It will be recalled that not every interference with a right guaranteed in the ECHR will necessarily lead to the finding of a violation of that right.\textsuperscript{696} As has been previously discussed in Chapter III, most rights guaranteed in the ECHR are not absolute, but may, under certain circumstances, be restricted. The extent to which it is possible to limit a right guaranteed in the ECHR depends on the nature of the right in question. In principle, the application of a foreign law by a court of one of the Contracting Parties could interfere with any of the rights guaranteed in the ECHR which are relevant in private law issues. Consequently there is possibly a wide range of cases in which this issue could arise. It is submitted here that Article 8 ECHR (the right to private and family life) and Article 1 of Protocol No. 1 ECHR (the right to property) are the rights that are most likely to be invoked against the foreign applicable law, while the role of Article 10 ECHR (freedom of expression) is likely to gain in importance.

As has been noted in Chapter III, both Article 8 ECHR and Article 1 of Protocol No. 1 ECHR are not absolute rights. In fact, the possibility to restrict these rights is already included in the text of the respective rights. One can find in Article 8 (2) ECHR that an interference with this right may be allowed if this restriction has a foundation in national law, pursues a legitimate aim, and is necessary in a democratic society. It will be recalled that these conditions are cumulative.\textsuperscript{697} It has been noted in Chapter III that this latter condition is of particular importance, as the Court will determine whether the restriction concerned a pressing social need, which entails that it was proportionate to the legitimate aim pursued.

It will be further demonstrated below that this condition of the proportionality of a restriction of Article 8 ECHR is the most important factor in determining whether the application of a foreign law results in a violation of this Article. With regard to the proportionality of the interference, Contracting Parties do enjoy a margin of appreciation.\textsuperscript{698} A mostly similar framework applies to restrictions with regard to the right to property \textit{ex} Article 1 of Protocol No. 1 ECHR: a restriction to this right is allowed if the restriction is prescribed by law, is in the public (or general) interest,

\begin{flushright}
\textsuperscript{696} See also \textit{supra} ch. III.
\textsuperscript{697} See \textit{supra} ch. III.5.1.2.
\textsuperscript{698} See \textit{supra} ch. III.5.2.
\end{flushright}
and is necessary in a democratic society. The proportionality of a measure interfering with the peaceful enjoyment of possessions also plays an important part here.

In order to examine the impact of the ECHR on the issue of the applicable foreign law, first the state of the law will have to be identified. Thus, first, the case law of the Strasbourg Institutions on this issue will be discussed (3.1). Next, the impact of the ECHR on the issue of applicable law will be further analyzed by examining some of the ideas that have been developed in the literature, particularly the attenuation of the standards of the ECHR (3.2). Thereafter, a few examples taken from the case law of the national courts of the Contracting Parties will be reviewed. Here one will also find a review of some of the issues surrounding the issue of applicable law identified in the preceding sections, particularly the manner of invocation of the ECHR in these cases (3.3).

3.1 The Case Law of the Strasbourg Institutions

For all the debate on the issue of the applicable law and the impact of the ECHR, the case law of the Strasbourg Institutions that directly deals with this issue is rather limited. It is in effect limited to only a handful of cases, none of which may be regarded as providing a definitive precedent concerning the exact impact of the ECHR on the issue of applicable law in private international law. There are two cases that need to be further discussed. Both merely concern admissibility decisions. Unfortunately the Court has yet to deliver a judgment on the merits on the issue of applicable law. The first case, Zvoristeanu v. France, was concerned with the impact of the ECHR in a case where the applicable foreign law originated from another Contracting Party. The more interesting case is the Court’s fairly recent admissibility decision in Ammdjadi v. Germany. Despite the fact that this latter case also merely concerned an admissibility decision, the Court has offered reasonably extensive reasoning regarding the impact of the ECHR on the issue of applicable law originating from a third country.

---


700 See, in addition to the two cases discussed directly below, the cases of the Commission discussed supra VI.2.1 (i.e. X v. Luxembourg; X v. Belgium and the Netherlands; and Gill and Malone v. the Netherlands and the United Kingdom).


702 Ammdjadi v. Germany (dec.), no. 51625/08, 9 March 2010.
In Zvoristeau the applicant attempted to have her paternity established. The applicant’s mother had married her natural father in Germany in a religious (mosaic) ceremony before a rabbi. Shortly after the marriage the mother returned to France where the applicant was born. The applicant’s birth was registered in France without the name of the father. The French courts applied German law to the applicant’s request to establish paternity and denied it, inter alia, by finding that the (religious) marriage conducted between her parents in Germany was non-existent under German law and thus could not produce any effects.

The applicant filed a complaint in Strasbourg, relying on Article 8 ECHR. The Court’s reasoning to declare this case manifestly ill-founded was rather succinct. The Court first briefly recapitulated its most important findings with regard to private and family life, as guaranteed in Article 8 ECHR. The Court held that the assessment of the French courts’ finding that the applicant could not rely on the effects of the invalid marriage under German law was neither arbitrary nor unreasonable. It noted further that with regard to the validity of a marriage, legal certainty and the security of family relationships have to be considered. Finally, the Court noted that the late initiation of the appropriate legal action had also contributed to the decision.

The Court in Zvoristeau thus did not offer an extensive examination of the issue of applicable law originating from another Contracting Party. It merely set out its standard case law regarding Article 8 ECHR and emphasized that the decision of the French courts was not arbitrary. In support of this latter finding the Court cited a number of reasons, in which the precise weight carried by these factors is uncertain. It is noteworthy that the Court appears to hold the fact that the applicant had waited a long time with her action against her. That the Court found fault in the applicant’s procedural behavior is, remarkably enough, an oft-occurring phenomenon in cases concerning issues of private international law.

---

703 See with regard to the notion of manifestly ill-founded supra ch. III.2.  
704 The Court in this regard explicitly referred to Keegan v. Ireland, 26 May 1994, Series A no. 290 and Kroon and Others v. the Netherlands, 27 October 1994, Series A no. 297-C.  
705 See also, e.g., infra Ammdjadi and MacDonald v. France (discussed in ch. VII.2).
Ammdjadi concerned a divorce before the German courts between two Iranian nationals residing in Germany. At the request of her husband, the couple was divorced by a decision of the district court in Köln. The German court applied Iranian law to the case. No motion for the compensation of pension rights was lodged at that time. Later the former wife brought proceedings before the same court looking for the compensation of pension rights. However, on account of the fact that both parties had Iranian nationality and on the basis of the Agreement on Establishment between the German Reich and the Persian Empire of 17 February 1929, the German court found that Iranian law was applicable to the divorce and all of its consequences. The court further held that the fact that Iranian law did not know the concept of compensation of pension rights did not violate German *ordre public*. This assessment was upheld on appeal. The former wife subsequently lodged a complaint in Strasbourg on the basis of Article 8 ECHR, as well as Article 12 ECHR\(^{706}\) and Article 1 of Protocol No. 1 ECHR, taken alone and in conjunction with Article 14 ECHR.

The Court noted with regard to Article 8 ECHR that although the compensation of pension rights is of a pecuniary nature, it is also the direct consequence of marital life and aims at the strengthening of the position of the weaker partner. It could as such be regarded as an expression of the respect of the State for family life. Therefore the Court assumed that the facts fell within the scope of Article 8 ECHR. The Court further framed the case as raising the issue of whether this notion of respect for family life entailed an obligation for the German courts to disregard the Treaty between Germany and Iran by qualifying the compensation of pension rights as being part of German *ordre public*. The Court observed that the decision to give effect to the Treaty had a basis in national law and pursued a legitimate aim, namely upholding a treaty concluded between two States.

With regard to the proportionality of the decision of the German courts to find that the compensation rights did not form part of German *ordre public* and that the normally applicable foreign law thus should be applied to the case, the Court observed that the compensation of

\(^{706}\) As Article 12 ECHR is merely concerned with the right to marry and found a family, and as it is standard case law of the Court that this right does not entail the right to a divorce, it is clear that this Article is not applicable to this case, which deals solely with the consequences of a divorce. As such, this part of the complaint shall not be further discussed.
pension rights was only fairly recently introduced in Germany, while it is not known in many other countries – there is certainly no European consensus in this regard, as the manner in which financial protection is provided to the non-working partner differs from country to country.

Moreover, Iranian law also provides a form of financial relief in this regard in the form of some alimony or the morning gift, according to the Court. The Court thus found that the ECHR cannot be interpreted as entailing the obligation to qualify the compensation of pension rights as being part of German *ordre public* in order to set aside the Treaty between Germany and Iran. According to the Court, the notion of respect for family cannot entail the obligation to grant a pecuniary privilege to one spouse, particularly where such financial relief would entail a pecuniary disadvantage to the other spouse. The application of Iranian law by the German courts thus did not result in a violation of Article 8 ECHR.

The applicant had also complained that the refusal to compensate the pension rights violated her rights under Article 1 of Protocol No. 1 ECHR, which guarantees the peaceful enjoyment of possessions. Referring to its case law concerning this notion of ‘possessions’, the Court found that the applicant must have had a ‘legitimate expectation’. As the compensation of pension rights was not available under the normally applicable Iranian law, while so far this compensation had not been classified as being part of German *ordre public*, the Court held that the applicant could not claim to have had such a ‘legitimate expectation’. Therefore the Court held this complaint to be incompatible *ratione materiae*.

Finally, with regard to Article 8 ECHR taken in conjunction with Article 14 ECHR, the Court noted that the difference in treatment stemmed from the fact that the applicant and her former husband both had Iranian nationality and that on the basis of the Treaty between Germany and Iran, Iranian law was the applicable law, while the application of German law was excluded. In this regard it was held, in a rather sweeping fashion, that:

‘especially in conflict of laws cases, the differentiation for all family issues according to nationality and not to habitual residence is a well-known principle which aims at protecting a person’s close connection with his or her

707 The Court referred to its case law in *von Maltzan and Others v. Germany* (dec.) [GC], nos. 71916/01, 71917/01 and 10260/02, par. 74(c) and par. 112, ECHR 2005-V, and *Kopecký v. Slovakia* [GC], no. 44912/98, par. 35(c), ECHR 2004-IX.
home country. Therefore, even though the decisiveness of the habitual residence might arguably be considered preferable with regard to pension rights, the decisiveness of a person’s nationality cannot be considered to be without “objective and reasonable justification”. In this respect, it must also be noted that the applicant had been free to choose the application of German law, together with her husband, by notarial certification.

The Court’s decision in *Ammdjadi* contains a number of interesting points. It is, of course, first interesting to note that the Court was of the opinion that pension rights fell within the scope of Article 8 ECHR – pension rights may not be the first thing that come to mind if one considers the notion of family life. More directly relevant to the question of the impact of the ECHR on private international law is the manner in which the Court presented the main issue with regard to Article 8 ECHR in relation to the applicable Iranian law. The Court first noted that the decision to apply Iranian law on the basis of the bilateral treaty between the two countries had a basis in national law and pursued the legitimate aim of complying with an international obligation. In this regard the Court thus appears to follow its regular scheme concerning restrictions under Article 8 (2) ECHR, although it by no means follows its framework carefully.

It is interesting to observe that the Court cites the fulfillment of an international obligation as the legitimate aim. The application of Iranian law indeed followed from a bilateral treaty between Germany and Iran. One should note, however, that if the application of Iranian law had resulted from national German choice of law rules (a national source), a different legitimate aim would have had to have been presented. This could consequently also have had an effect on the assessment of the proportionality, due to the connection between the legitimate aim pursued and the proportionality, which follows from the condition of the interference being necessary in a democratic society.

The Court thereafter turned to the proportionality of the decision of the German courts not to set aside the applicable foreign law following from an international treaty by qualifying pension rights as being part of German *ordre public*. This is a somewhat odd presentation by the Court of the issue at hand. A more logical approach, in my opinion, would have been for the Court to

---


709 See *supra* ch. III.5.1.2.

710 Id.
consider whether the result of the application of Iranian law would infringe upon the applicant’s rights guaranteed in Article 8 ECHR, and if so, whether this restriction of the applicant’s rights would be in conformity with Article 8 (2) ECHR. By immediately turning to whether the decision of the German courts not to qualify pension rights as being part of German *ordre public*, the Court, in my opinion, skips a step. While qualifying pension rights as being part of German *ordre public* would admittedly solve the potential problem of the application of Iranian law (allegedly) violating Article 8 ECHR, the interference with Article 8 ECHR, in principle, results from the application of Iranian law. This is what the Court should have focused on, in my opinion. It may be a subtle difference, and while in the present case this difference would not have led to a different result, this may not always be the case.\textsuperscript{711}

Instead, the Court thus essentially focused on whether Article 8 ECHR obligated the German courts to qualify pension rights as being part of German *ordre public*. In this regard the Court offered a number of arguments: there is no emerging consensus on this issue in Europe, and the protection provided to non-working partners was only fairly recently introduced in Germany.

Furthermore, the applicable Iranian law also provides a measure of financial relief in the form of the morning gift, according to the Court.\textsuperscript{712} It is, unfortunately, difficult to assess how the Court exactly weighs these different reasons. Would the situation be different if one of these factors were missing? If there, for example, had been an emerging European consensus with regard to the compensation of pension rights, would there have been a violation of Article 8 ECHR, or would the presence of a form of financial relief in Iranian law still have sufficed for not finding a violation? This is difficult to tell from the Court’s reasoning.

The Court’s analysis concerning the right to property *ex* Article 1 of Protocol No. 1 ECHR appears to make a successful invocation of this right difficult. The Court found that the applicant should have had a ‘legitimate expectation’. This criterion follows from the Court’s case law concerning the notion of ‘possessions’\textsuperscript{713} and ensures that Article 1 of Protocol No. 1 ECHR not

\textsuperscript{711} See further *infra* VI.3.2.2.

\textsuperscript{712} While the Court simply mentions this as one of the reasons for not having to find that Article 8 ECHR entails the obligation to compensation of the pension rights, it could be noted that domestic courts have struggled with how to deal with the the notion of the morning gift. See R. Mehdi and J.S. Nielsen, eds., *Embedding "Mahr" in the European Legal System* (Copenhagen, DJOF Publishing 2011).

\textsuperscript{713} See, e.g., *supra* n. 707.
only applies to existing possessions, but also to claims, provided that the applicant has a ‘legitimate expectation’, and not mere hope. However, according to the Court, the applicant had no such expectation, because the compensation of pension rights was missing from the applicable Iranian law and it was not part of German *ordre public*. Yet the fact that such compensation was missing made the applicant invoke the right to property in the first place. If the compensation of pension rights had been part of German *ordre public* – resulting in ‘legitimate expectations’ – the applicant’s actions before the German courts would most likely already have been successful. The successful invocation of Article 1 of Protocol No. 1 ECHR therefore appears to be difficult in such cases.

3.2 The Impact of the ECHR on the Applicable Foreign Law: Further Analysis

The virtual absence of directly relevant case law of the Strasbourg Institutions with regard to the issue of applicable law in private international law has certainly not stopped authors from discussing the possible impact of the ECHR on this issue. The prolonged absence of an authoritative decision of the Court in this regard has resulted in important aspects of the debate on the impact of the ECHR on foreign applicable law being mostly developed in the literature. Authors have found inspiration as to the possible impact of the ECHR on the issue of applicable law in private international law cases in the Court’s case law concerning the extra-territorial effects of the ECHR, while a seminal decision by the German *Bundesverfassungsgericht* taken way back in 1971 also appears to have served as a model in this regard.

In this latter case, often referred to as the *Spanierbeschluss*, the German Constitutional Court had to decide whether the application of Spanish law, which would result in a Spaniard not being able to marry a German woman in Germany because of the fact that the man’s earlier divorce would not be recognized under Spanish law, would violate the right to marry, one of the

---

714 See, e.g., the literature cited supra n. 683.
715 See with regard to an overview of the Court’s case law concerning the extra-territorial effects of the ECHR supra ch. IV.2.4.2.2. See also infra VI.3.2.1.
716 *NJW* 1971, p. 1508.
fundamental rights laid down in the German Grundgesetz. The German Constitutional Court held that this was indeed the case and in so finding discussed many issues that are also relevant for the impact of the ECHR on the issue of applicable law. Not only has this decision been cited as evidence of the fact that fundamental rights indeed have an impact on private international law before this issue was ever really raised before the Strasbourg Institutions, but the issue of the manner in which to ensure respect for fundamental rights was also discussed.

Three different facets of this debate may be distinguished. First of all, it has been discussed in relation to this case whether it is possible to invoke one of the rights guaranteed in the ECHR against the normally applicable foreign law, particularly where this foreign law originated from a third country. This issue has already been dealt with in relation to the ECHR above, where it was held that this is indeed the case. The other two aspects will be examined below. They are, respectively, the standard of control that should be used in private international law disputes regarding a foreign applicable law possibly violating one of the rights guaranteed in the ECHR – whether or not the standards of the ECHR may be attenuated in such cases (3.2.1) – and the manner in which the ECHR should be applied, which will be further explored in relation to the case law of national courts of the Contracting Parties (3.3).

This latter issue concerns the question of how the ECHR should be invoked against the applicable foreign law possibly resulting in a violation of the ECHR – what techniques can be used by the national courts of the Contracting Parties. As will be discussed further below, there are, broadly speaking, two approaches: the use of the public policy exception, or the direct application of the right guaranteed in the ECHR against the foreign applicable law. It should be noted, however, that it is difficult to entirely separate the issue of the attenuation from the technique used, as specialists of private international law, who favor the attenuation of the

---


719 See supra VI.2.

720 See further infra VI.3.3.3.
standards of the ECHR, frequently regard the public policy exception as the natural means to achieve this attenuation.

3.2.1 The Standard of Control with regard to the Applicable Foreign Law
An important aspect of the debate on the impact of the rights guaranteed in the ECHR on the issue of applicable law is what the standard of control should be with regard to the scrutiny of the ECHR to the applicable foreign law. The standard of control concerns the issue of whether it is possible, and if so, whether it is desirable, to attenuate the standards of the rights guaranteed in the ECHR in private international law disputes in which a foreign law is the applicable law (either the law of another Contracting Party or the law of a third country). This issue is not confined to the issue of the applicable law in private international law. The same question may also be asked with regard to the recognition and enforcement of foreign judgments, even though this leads to a similar discussion to a certain extent. 721

With regard to the standard of control it would, in principle, appear to be useful to make a distinction based on the origin of the applicable foreign law. 722 One could question how appropriate it is to subject foreign laws originating from third countries to the full scrutiny of the (qualified) rights guaranteed in the ECHR, whereas this may be different if the applicable foreign law emanates from another Contracting Party. In such a case there is less reason to attenuate the standards of the ECHR. 723 After all, the laws of the other Contracting Parties should, in principle, already be in line with the requirements following from the ECHR.

In the development of the idea of the attenuation of the standards of the ECHR regarding the applicable foreign law of a third country, a few cases can be distinguished as the main sources of inspiration. When some of the ideas concerning the impact of the ECHR on issues of private international law were first developed in the literature, there was hardly any case law of the Strasbourg Institutions specifically dealing with issues of private international law. Yet specialists in the area of private international law had noticed the possible analogy between the Court’s case law concerning the extra-territorial effect of the ECHR in Soering v. the United

721 See infra ch. VIII.2-3.
722 Cf. Marchadier supra n. 683, at p. 493ff. But see Matscher supra n. 683, at p. 222.
Kingdom\textsuperscript{724} and Drozd and Janousek v. France and Spain\textsuperscript{725} and the applicability of the ECHR
to issues of private international law.\textsuperscript{726} It will be recalled that in these cases, which were
essentially concerned with international co-operation, the concept of ‘a flagrant denial of justice’
was introduced with regard to Article 6 ECHR.\textsuperscript{727} In these cases a reduced effect of Article 6
ECHR was thus introduced. It has consequently been suggested that a different standard should
similarly be introduced in cases in which the law of a third country is applied.

Why should a different standard of the ECHR be applied to cases concerning private
international law, and particularly to the applicable foreign law, more particularly the law of a
third country? The idea behind the attenuation of the ECHR’s standards in this regard is
manifold, but in short it comes down to the question of whether laws from all over the world
should be held up to European human rights standards, as guaranteed in the ECHR. Respect for
the diversity of the world’s legal cultures is one of the principles of private international law and
thus a certain attenuation of the standards of the ECHR may be preferable. After all, if one were
to insist on the full application of the rights guaranteed in the ECHR in this regard, there may, in
practice, be little room left for the application of a foreign law which fundamentally differs from
the laws of the Contracting Parties. On this point one could also mention another goal of private
international law, the international harmony of decisions, which is arguably predicated on a
certain tolerance towards other legal cultures.\textsuperscript{728} A lack of such harmony brings with it the real
risk of limping legal relationships and could endanger the international mobility of persons.\textsuperscript{729}

It has, additionally, been argued that by not allowing such leeway for a certain tolerance towards
other legal cultures, one would run the risk of creating different blocks of States, each adhering

\textsuperscript{724} Soering v. the United Kingdom, 7 July 1989, Series A no. 161.
\textsuperscript{725} Drozd and Janousek v. France and Spain, 26 June 1992, Series A no. 240.
\textsuperscript{726} See, e.g., Van Loon supra n. 717, at p. 145-147; Mayer supra n. 683, at p. 653ff; A.P.M.J. Vonken, ‘De
reflexwerking van de mensenrechten op het ipr’ [the reflex of human rights on private international law], in: P.B.
Cliteur and A.P.M.J. Vonken, eds., Doorwerking van mensenrechten [The impact of human rights] (Groningen,
Wolters-Noordhoff 1993), p. 172-174. See also supra ch. IV.
\textsuperscript{727} See ch. III.5.1.3 and IV.2.4.2.2.
\textsuperscript{728} Cf. J.H.G.E. van Hedel, ‘Het recht op eerbiediging van het familieleven ex artikel 8 EVRM en het
conflictenrecht’ [The right to respect for family life ex Article 8 ECHR and the conflict of laws], 26 NIPR (2008), p.
132; D. Looschelders, ‘Die Ausstrahlung der Grund- und Menschenrechte auf das Internationale Privatrecht’ [The
\textsuperscript{729} See generally supra ch. II. It should further be noted that this problem is not confined to the issue of applicable
law, but is also relevant with regard to the recognition and enforcement of foreign judgments. See further infra ch.
VIII.
to their own legal values, having little regard for norms originating from outside their legal
atmosphere.\textsuperscript{730} This risk has mostly been described in relation to issues stemming from the
differences between European family law and Muslim law. Some authors have even approached
this issue in terms of a clash of civilizations,\textsuperscript{731} while it is also a driving force behind the debate
on the ‘imperialism’ of the ECHR and fundamental rights in general.\textsuperscript{732}

There are, however, also a number of arguments against the attenuation of the standards of the
ECHR in issues of private international law. Although such attenuation may be justified to an
extent, it should be observed – and this is an argument that perhaps has not been emphasized
enough in the literature – that there are limitations inherent to the ECHR to this attenuation of
standards. Moreover, the attenuation of standards with regard to the applicable foreign law
originating from a third country inevitably creates inequality in the forum State.

The principle argument against attenuation is that it may not be allowed under the ECHR, or
rather that it is only allowed insofar as it is permitted under the ECHR. As has been discussed
extensively in Chapter IV, Article 1 ECHR explicitly guarantees that the rights and freedoms of
everyone within the jurisdiction of the respective Contracting Parties will be guaranteed. This
also applies to the application of a foreign law or the recognition and enforcement of a foreign
judgment emanating from a third country.\textsuperscript{733} The ECHR itself, of course, allows – under
particular circumstances – for a certain attenuation: the so-called qualified rights, for example,
expressly allow for an interference by the Contracting Party in order to secure certain interests,
while an attenuation of the level of scrutiny of the ECHR is also possible and perhaps even
desirable with regard to the limited right of Article 6 (1) ECHR.\textsuperscript{734}

\textsuperscript{730} See, e.g., H. Fulchiron, ‘Droits fondamentaux et règles de droit international privé: conflits de droits, conflits de
logiques?,’ in: F. Sudre, ed., Le droit au respect de vie familiale au sens de la Convention européenne des droits de
\textsuperscript{731} See, e.g., M-C. Najm, Principes directeurs du droit international privé et conflits de civilizations: relations entre
systèmes laïques et systèmes religieux (Paris, Dalloz 2003). See, however, for a critique of this approach K. Zaher,
Conflict de civilisation et droit international privé (Paris, Harmattan 2010).
\textsuperscript{732} See with regard to this debate supra ch. IV.4.1.
\textsuperscript{733} See supra ch. IV.
\textsuperscript{734} See particularly supra ch. III.5.1.2-3. See also ch. IV.4.
Insofar as in issues of private international law these rights are concerned, a Contracting Party has some leeway to attenuate the standards of the ECHR in order to protect certain (private international law) interests and/or the rights of others in private international law cases. Furthermore, the Court has consistently held in reviewing the various obligations of the Contracting Parties under the ECHR that the Contracting Parties enjoy a certain margin of appreciation with regard to the obligations for which they have to strike a balance between the right of an individual (even in an international case) and the interests of society as a whole. One could state that the doctrine of the margin of appreciation is eminently suited for accommodating diversity within Europe.\(^{735}\) It is certainly conceivable that there is room within this margin of appreciation also to protect private international law interests.\(^{736}\) Such interests could therefore presumably be integrated to an extent in the system of restrictions which the Court uses with regard to interferences with qualified rights.

Another argument against the attenuation of the standards of the ECHR is that by attenuating the standards of the ECHR in such cases, one inevitably creates inequality. Cases which are concerned with foreign norms would be treated differently compared to purely domestic cases. One could perhaps argue that such inequality may be justifiable, because such situations are not analogous. However, the fact remains that the human rights guaranteed in the ECHR of some people (those involved in cross-border cases) before the court of a Contracting Party may be less protected than the rights of others (in purely domestic cases). One could wonder whether this creates a double standard with regard to the protection following from the ECHR and whether this is desirable.

3.2.2 Attenuation of the Standards of the ECHR in the Strasbourg Case Law?

As has been stated above, there is little case law of the Court that is directly relevant to the issue of applicable law in private international law.\(^{737}\) What can nevertheless be derived from the Court’s findings in these cases with regard to the possible attenuation of the standards of the


\(^{737}\) See supra VI.3.
ECHR? Does the Court adjust its level of scrutiny in cases concerning the applicable foreign law possibly violating the ECHR? There appears to be little evidence in the Court’s case law directly concerned with the application of foreign law suggesting an attenuation of the standards.

In Zvoristeamu, discussed above, the Court examined the application of German law by the French courts. This was a case where the applicable law originated from another Contracting Party. It has already been stated that there is less reason to insist on the attenuation of the standards of the ECHR in such a case. However, it has been argued that it cannot be completely ruled out that a certain attenuation of the standards may even be required in such cases, as the Court in its case law has generally indicated that the national characteristics should be taken into account.738 This could be taken to mean that the standards of the ECHR even differ somewhat from Contracting Party to Contracting Party. This should then be taken into account with regard to the issue of an applicable law originating from another Contracting Party.

Returning to the Court’s assessment in Zvoristeamu, it is difficult to infer much from this case in relation to the level of scrutiny concerning the applicable foreign law, as the Court’s reasoning is rather limited. However, by merely finding that the decision of the French courts was neither arbitrary nor unreasonable, the Court does not appear to introduce a very rigorous test with regard to the issue of the application of a foreign law emanating from another Contracting Party.739 This approach suggests quite the opposite, as the decision of the French courts escaped the strict scrutiny the Court usually applies to cases concerning Article 8 ECHR, whereby in the event of an interference with this right the Court would assess the conditions summed up in Article 8 (2) ECHR and eventually turn to the proportionality of such a decision.740 Here, the Court only quickly reviewed whether the decision of the French courts was arbitrary or unreasonable, which is quite a detached approach, but not incomprehensible, given the fact that this case concerns an admissibility decision. Moreover, the applicable law in question originated

738 Marchadier supra n. 683, at p. 495ff. The author cites Podkolzina v. Latvia, no. 46726/99, ECHR 2002-II as an example. One could in this regard also mention the doctrine of the margin of appreciation, which is (also) predicated on the idea that the national authorities are, in principle, better suited to evaluate local issues. See supra ch. III.5.2.
740 See with regard to restrictions to Article 8 ECHR and the notion of proportionality in the Court’s case law supra ch. III.5.1.2.
from another Contracting Party and thus should be in conformity with the rights guaranteed in the ECHR.\textsuperscript{741}

The Court appears to use a different approach with regard to the applicable law originating from a third country in \textit{Ammdjadi}. The Court’s reasoning in this case has already been examined above.\textsuperscript{742} What could one say specifically as to the level of scrutiny used in this case by the Court? The Court focused mostly on the complaint concerning Article 8 ECHR. It will be recalled that in its assessment of Article 8 ECHR the Court presented the issue at hand as whether the decision of the German courts not to qualify compensation of pension rights as being part of German \textit{ordre public} (which would have meant that such compensation would be deemed a fundamental value within Germany) was proportionate. The Court noted, \textit{inter alia}, that there is no European consensus on the compensation of pension rights and that Iranian law also provided for some sort of financial protection of the other spouse in order to reach the conclusion that the application was manifestly ill-founded.

One could say that in this case the Court at least scrutinized the decision of the German courts more closely compared to \textit{Zvoristeanu} discussed above. The Court appeared to look more closely at the facts of the case and more or less followed its usual scheme with regard to the assessment of the conditions of Article 8 (2) ECHR\textsuperscript{743} by finding that the decision to apply foreign law had a basis in national law (section 3 (2) of the Introductory Act to the German Civil Code) and that this pursued a legitimate aim (giving effect to a treaty between Germany and Iran). It thereafter considered the proportionality of the decision.\textsuperscript{744} However, the Court did find that the application was manifestly inadmissible. In this regard one could state that those in favor of attenuation could, of course, be satisfied with the rejection of the invocation of the ECHR against the result of the normally applicable foreign law.

\textsuperscript{741} Cf. the reasoning used by the Court in \textit{Gill and Malone v. the Netherlands and the United Kingdom} in the text following \textit{supra} n. 692.
\textsuperscript{742} See \textit{supra} VI.3.1.
\textsuperscript{743} See \textit{supra} VI.3.1. See generally ch. III.5.1.2.
\textsuperscript{744} Even though the Court does not mention this explicitly in its decision, the test of the proportionality of the decision follows from the requirement of whether a restriction is ‘necessary in a democratic society’, which can be found in Article 8 (2) ECHR. See further \textit{supra} ch. III.5.1.2.
Is it, however, possible to really discern an attenuation of the standards of the ECHR in this case – something which one may suspect, given the fact that the applicable law emanates from a third country? The Court clearly did not expressly mention an attenuation of the standards of the ECHR in this regard, such as, for example, it has done with regard to Article 6 (1) ECHR and the recognition and enforcement of foreign judgments by introducing the notion of a ‘flagrant denial of justice’. One could argue, though, that by framing the relevant question as whether the German courts had violated Article 8 ECHR by finding that compensation rights did not form part of German *ordre public*, the Court raises the bar for finding a violation, as compared to when it would have merely required that the result of the application of Iranian law would not be in conformity with Article 8 ECHR. Moreover, the Court pointed to the fact that a form of financial relief for the other spouse is also available under Iranian law, a possibility of which it subsequently scarcely elaborates. This may suggest that any equivalent provision in the normally applicable foreign law would suffice for not finding a violation with regard to the ECHR.

It is questionable, though, whether this case lends itself to far-reaching conclusions with regard to the level of scrutiny. After all, the Court’s reasoning is succinct. Moreover, while the Court notes that there is no European consensus as to the compensation of pension rights, one could question whether such compensation should be regarded as falling within the scope of Article 8 ECHR in the first place, even though the Court starts from the assumption that it does. The fact that the Court was unwilling to find a violation of Article 8 ECHR with regard to a right which is not generally deemed to be part of Article 8 ECHR is not that surprising. This case may simply not be the best example for finding a violation with regard to the foreign applicable law.

In conclusion, one could say that while there may be something to be said for the idea of the attenuation of the standards of the rights guaranteed in the ECHR with regard to the normally applicable foreign law originating from a third country possibly violating one of the rights guaranteed in the ECHR, there is not yet much evidence to be found in the Court’s case law for such a stance. However, I would argue that even though some flexibility may be necessary in order to account for private international law interests, the room for maneuvering is limited. Such

---

745 Although one should add that the Court has not consistently used this attenuated standard. See further *infra* ch. VIII.2.
attenuation is only permitted insofar as it is allowed under the ECHR itself. In my opinion, the obligation following from Article 1 ECHR means that the room for attenuation is limited, even where the applicable law originates from a third country. This does not mean that there is no room at all here. It is, however, difficult to establish in abstracto what the limits inherent in the ECHR are in this regard. Nevertheless, this room should be sought within the system of restrictions possible under the right concerned that is guaranteed in the ECHR. What is thus clear is that the extent to which restrictions, and therefore attenuation, of a right guaranteed in the ECHR is allowed ultimately depends on which of the rights guaranteed in the ECHR is concerned in an issue of applicable law.

3.3 Jurisprudence of National Courts of the Contracting Parties

While in the case law of the Strasbourg Institutions no example of a case can yet be found in which the ECHR is successfully invoked against the normally applicable foreign law violating one of the rights guaranteed in the ECHR, there are some such examples in the jurisprudence of the national courts of the Contracting Parties. Moreover, the principle of the setting aside of the normally applicable foreign law violating fundamental rights has, for example, been accepted in the three legal orders, England, the Netherlands, and Switzerland, which will receive the most attention here, as the case law discussed in this section will demonstrate.

Below, one will first find a brief overview of the case law of national courts in which the principle of human rights guarantees standing in the way of the application of a foreign law violating such rights has been established (3.3.1). Thereafter, the jurisprudence of national courts on the establishment of paternity will be discussed. This is an area of the law where the ECHR has successfully been invoked against the normally applicable foreign law. In this discussion the issue of attenuation will also be further explored (3.3.2). In conclusion, one will find a discussion on the manner in which fundamental rights, and the rights guaranteed in the ECHR in particular, are dealt with in issues relating to the applicable foreign law in private international law disputes before national courts of the Contracting Parties (3.3.3).
3.3.1 The Invocation of the ECHR against the Applicable Foreign Law in the Jurisprudence of National Courts

While there may not be many concrete examples of the invocation of one of the rights guaranteed in the ECHR against the applicable foreign law – particularly not in English case law, and nor is it a frequent event in Swiss or Dutch case law – the principle of human rights standing in the way of the application of a foreign law violating such values seems to be generally accepted in England, the Netherlands, and Switzerland.

The classical example of the invocation of human rights in an issue of private international law in England may be *Oppenheimer v. Cattermole*.\(^\text{746}\) In this case the issue arose as to whether effect should be given in English law to a decree of the German government of 1941 stating that all Jewish refugees should be deprived of their German citizenship. In deciding whether giving effect to such a decree would violate English public policy, Lord Cross held that ‘to my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognize it as a law at all.’\(^\text{747}\)

In *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)*\(^\text{748}\) Lord Cross was cited approvingly by Lord Nicholls, who mentioned foreign laws encompassing ‘[g]ross infringements of human rights’ as an example of laws that would be contrary to English public policy.\(^\text{749}\) It has been held with regard to foreign confiscatory decrees in *Williams & Humbert Ltd v W&H Trade Marks (Jersey) Ltd*\(^\text{750}\) that such foreign laws will be disregarded if they would offend principles of human rights.

In the Netherlands, the ECHR has occasionally been invoked against the normally applicable foreign law in a number of different contexts, particularly in cases concerning the establishment

---

\(^{746}\) *Oppenheimer v. Cattermole* [1976] AC 249.

\(^{747}\) *Oppenheimer v. Cattermole* [1976] AC 249, 278 (per Lord Cross).

\(^{748}\) *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883.


of paternity, but one could, for example, also mention a case regarding the denial of paternity.

In Switzerland the Tribunal fédéral has stated in the Bertl case that human rights are part of Swiss ordre public. Even though this case was concerned with procedural public policy, it has generally been accepted that human rights are fully integrated in the public policy exceptions regarding both applicable law and the recognition and enforcement of foreign judgments.

The principle that human rights in general, and by extension the rights guaranteed in the ECHR, may be invoked against the normally applicable foreign law is well established in all three legal orders. The discussion therefore is, also, not so much whether the rights guaranteed in the ECHR can be invoked against the applicable foreign law, but rather to what extent the rights guaranteed in the ECHR are protected. Nevertheless there are not many cases in which the ECHR is actually invoked with regard to the issue of applicable law in private international law. For English case law this may, incidentally, be explained to a large part by the fact that England adheres to the lex fori tradition in international family law, which takes away a good number of potential cases. Most of the instances in which the ECHR is successfully invoked against the normally applicable law, and also the examples given here, pertain to issues of international family law. This is not unusual considering the fact that in this area of the law cultural differences are most clearly reflected. In particular the possible incompatibility of family law originating from Muslim countries has been the subject of extensive debate.

---

751 See infra VI.3.3.2.
753 ATF 103 Ia 199, 205.
While national courts in both the Netherlands and Switzerland are, in principle, inclined to apply foreign law in international family law issues, England adheres to the *lex fori* tradition, which means that English courts apply the *lex fori*, English law, in such matters. English courts will thus not be confronted with issues relating to the foreign applicable law in international family law cases, as foreign law will simply not be the law applied to such cases. This also explains why no English cases will be discussed in the next section.

3.3.2 The Judicial Establishment of Paternity – and the Issue of Attenuation

In the Netherlands in recent years a series of cases has been decided concerning the judicial establishment of paternity in which Article 8 ECHR was invoked against the normally applicable foreign law, because it was not possible to judicially establish paternity over the child(ren) under the respective applicable foreign laws originating from third countries. In all these cases the facts were more or less similar. All concerned a mother who wanted to establish the paternity of a man over her child. The relevant Dutch choice of law rules determined that a foreign law was applicable to the request. However, under the relevant applicable foreign laws it was not possible to judicially establish paternity over a child. In all these cases it was consequently argued that the application of the normally applicable foreign law, which would lead to a denial of the request, would violate Dutch public policy and/or Article 8 ECHR.

It is interesting to note that the various Dutch courts did not come to the same conclusion in these cases, and even the courts which did reach similar conclusions did not use the same reasoning to reach that result. In all these cases it was decided that the fact that the application of the normally applicable foreign law would result in a violation of the ECHR.

---


758 The issue of whether the application of the *lex fori* (instead of foreign law) may result in a violation of the ECHR will be discussed infra VI.4.


760 The relevant Dutch choice of law rules with regard to the (international) establishment of paternity could at the time be found in the ‘Wet conflictenrecht afstamming’ 14 March 2002, *Stb.* 2002, 153. Nowadays, they may be found in the new codification of Dutch private international law in Boek 10 BW.

761 Although it is not explicitly mentioned in all the afore-mentioned cases, the Dutch courts appear to rely, with regard to the applicability of Article 8 ECHR to the judicial establishment of paternity, on the Court’s findings in *Mikulić v. Croatia*, no. 53176/99, ECHR 2002-I. See particularly par. 52-55.
applicable (foreign) law would result in a denial of the request did indeed violate Article 8 ECHR – with the notable exception of the one case that came before the Dutch Hoge Raad. Before turning (again) to the latter decision, I will first examine the reasoning used by the lower courts that did find a violation of Article 8 ECHR.

In assessing whether the normally applicable foreign law would violate Article 8 ECHR, the Gerechtshof Amsterdam did not examine whether the application of the normally applicable Moroccan law would result in a violation of Article 8 ECHR, but instead chose to examine whether the relevant Dutch choice of law rule violated Article 8 ECHR. This is odd reasoning, as possible violations of a right guaranteed in the ECHR are usually raised through the public policy exception, which in Dutch law is normally only used against the result of the choice of law rules and not against the choice of law rules themselves. The Gerechtshof Amsterdam ultimately found that the Dutch choice of law rules amounted to an unjustifiable infringement of the right to respect for family life following from Article 8 ECHR and subsequently applied Dutch law on the basis of Dutch public policy. The Rechtbank in The Hague found that the application of the normally applicable foreign law – in this case also Moroccan law – would violate Dutch public policy ‘also seen in the light of Article 8 ECHR.’ The Gerechtshof ‘s-Hertogenbosch used reasoning similar to the appeal court in Amsterdam and also examined the relevant Dutch choice of law rule, but ultimately used more conventional reasoning by also finding that the normally applicable foreign law following the application of the Dutch choice of law rules violated Article 8 ECHR and that on the basis of Dutch public policy, Dutch law should be applied.

In the case that reached the highest court in the Netherlands, no violation of either Dutch public policy or Article 8 ECHR was ultimately found with regard to the application of Surinamese law,

---

762 See supra ch. IV.1.1.
which led to the denial of the request to judicially establish paternity. It should be noted that the complaint before the Hoge Raad was rejected – in conformity with the Advocate General’s conclusion – on the basis that the complaints put forward could not lead to cassation. The appeal court had found that the normally applicable Surinamese law could only be set aside under exceptional circumstances and, according to the court, there were no such circumstances in this case, as the father could have recognized the child abroad.

It is interesting to note that the Dutch courts came to different results despite ostensibly applying the same criterion to the issue at hand: does the fact that the normally applicable foreign law makes it impossible for the child to judicially establish his or her paternity require that this result should be set aside on the basis of Article 8 ECHR and/or the public policy exception? The Hoge Raad had no problem with the assessment that Article 8 ECHR would not be violated, because it would be possible for the man in that case to establish paternity within a reasonable time in Surinam. This is also how this case differs from the other cases, where it appeared that there really was no alternative to establish paternity.

Can one speak of attenuation of the standards of Article 8 ECHR in the cases discussed above? At first sight there is little evidence of attenuation in the Dutch cases, with perhaps the exception of the case that came before the Hoge Raad. In the decision of the lower Dutch courts the normally applicable law, which did not allow for the establishment of paternity, was set aside, as this result was deemed to violate Article 8 ECHR. There was no noticeable attenuation introduced by the lower Dutch courts. Only in the decision of the Gerechtshof Den Haag, which was not dismissed by the Hoge Raad, may one discern a form of attenuation in the sense that the result of the application of the normally applicable foreign law was not set aside due to it not being entirely impossible to establish paternity under the applicable foreign law. In this regard ‘exceptional circumstances’ were introduced as a guideline.

One could thus say that the latter court was attentive to the internationality of the case. However, this is, of course, also where the facts of the discussed cases differed: under the normally

769 Art. 81 RO states that if the complaint before the HR cannot lead to cassation and no important questions of law are brought up, the HR may dismiss the complaint without stating further reasons.
applicable law in the latter case it was possible to establish paternity, while the applicable laws in
the other cases did not provide for this possibility at all. Thus, one could say that the principle of
Article 8 ECHR standing in the way of the application of a foreign law rejecting the
establishment of paternity was also accepted in the Surinam case, and that no real attenuation of
the standards of Article 8 ECHR was introduced in this case.

In Switzerland it has also been recognized that a child’s right to know his or her filiation, which
may be derived from Article 8 ECHR, could occasionally require the normally applicable law
being set aside, where the result of the application of this foreign law following from the relevant
choice of law rules\(^{770}\) would lead to the non-recognition of this right.\(^{771}\) Here it is interesting to
note that this right can not only be derived from Article 8 ECHR, but also from Article 7 of the
Convention on the Rights of the Child,\(^ {772}\) as the right of a child to be raised by his or her parents
implies the establishment of a paternity link.\(^ {773}\)

The Tribunal fédéral has held in two cases that Article 7 of the Convention on the Rights of the
Child has direct effect in Switzerland.\(^ {774}\) It would thus also be possible to rely on this provision
in Switzerland – at least for children under 18 years old. The issue of the establishment of
paternity appears not to have arisen often in Swiss case law. An exception is an unpublished case
of the Tribunal cantonal Neuchâtel,\(^{775}\) reported on by Bucher, in which according to him the
invocation of Article 8 ECHR could have provided a more elegant solution. Instead, the court
manipulated the relevant choice of law rules by referring to the notion of renvoi in order to apply
a foreign law, which made it possible to establish paternity.\(^ {776}\)

It will be recalled that the French Cour de Cassation has also examined a case concerning the
establishment of paternity of an Algerian child residing in Algeria against a Frenchman residing

\(^{770}\) See with regard to the provision concerning the applicable law on the establishment of paternity art. 68 of the
Swiss Private International Law Act.
\(^{771}\) A. Bucher 2011 supra n. 754, at p. 588-589.
\(^{772}\) Convention on the Rights of the Child, entry into force 2 September 1990. (UNTS)
\(^{773}\) A. Bucher 2011 supra n. 754, at p. 588-589.
\(^{774}\) ATF 125 I 257, see 262; ATF 128 I 63, see 70ff.
\(^{775}\) Tribunal cantonal, Neuchâtel, Ile Cour civile, 26 July 2001. See A. Bucher, ‘Jurisprudence suisse en matière de
\(^{776}\) Bucher 2002 supra n. 775, at p. 290ff. Bucher notes that referring to renvoi was actually not permissible in this
in France.\textsuperscript{777} In this case the highest French court found that it was not possible to invoke the public policy exception against the applicable Algerian law, under which it is impossible to establish paternity, because it deemed that there was an insufficient connection of the case with the French legal order to do so.\textsuperscript{778} This finding raises a number of issues. Below, the manner in which the rights guaranteed in the ECHR are applied to the issue of applicable law in private international law will be further examined,\textsuperscript{779} but for the moment the discussion will be confined to the notion of attenuation.

One could say that in this case at least some attenuation of fundamental rights has been achieved. What is, however, the result of such attenuation of the fundamental rights concerned? In this particular case the child is unable to establish paternity, resulting in the child not having a father, which will, of course, have further legal consequences. The other side of the coin is that by not setting aside the normally applicable Algerian law, the international harmony of solutions has been preserved. If French law had been applied in this case, there is more than a good chance that the resulting French decision would not have been recognized in Algeria. This would thus have resulted in the child having a father in France, but not in Algeria – a limping legal relationship. Private international law is also concerned with avoiding such limping relationships, and restraint in the application of fundamental rights, and the rights guaranteed in the ECHR in particular, helps avoid such situations. This could, for example, be accomplished by allowing Contracting Parties a wide margin of appreciation in the determination of whether under the particular circumstances – the internationality of the situation – the restriction of establishment of paternity would be proportionate to the legitimate aim pursued. However, in this particular case one could seriously question whether a child not having a father in either country is an ideal solution from the perspective of individual justice.\textsuperscript{780}

It will finally be recalled that the Cour de Cassation appears to have altered its course with regard to the establishment of paternity, as in a similar case concerning the law of the Ivory

\textsuperscript{777} Cass. 1\textsuperscript{e} civ., 10 May 2006. This case has also been discussed infra ch. IV.
\textsuperscript{778} This was, incidentally, not the first time such a decision had been taken. The principle was established in Cass. 1\textsuperscript{e} civ., 10 February 1993, Rev.crit dr.int.priv. 1993, 620 (note J. Foyer). See Lagarde supra n. 756, at p. 541-542.
\textsuperscript{779} See infra VI.3.3.3.
Coast, the requirement of there being a link with the French legal order was no longer used.\textsuperscript{781} The measure of attenuation, which was thus previously used, appears to be no longer in vogue and as a result the application of the foreign law emanating from a third country was denied based on its incompatibility with Article 8 ECHR.

The discussion above on the impact of the ECHR on the establishment of paternity, where this is impossible under the normally applicable foreign law, is an attempt to provide further insight into the consequences of the attenuation of the standard of control of the ECHR. Admittedly, Article 8 ECHR and the establishment of paternity is perhaps not the best example in this regard. There is not really a middle road to be taken for the establishment of paternity. One either establishes a family link, fully aware of the fact that this will probably lead to a limping family relationship because such a decision is unlikely to be recognized, particularly in the country of origin of the normally applicable foreign law, but possibly also in other countries, or one does not establish a family link – essentially interfering with a right guaranteed in Article 8 ECHR.

Yet this is invariably where the proposed attenuation of the standards guaranteed in the ECHR will lead. The attenuation of the standards of the ECHR will eventually lead to an infringement of a right deemed important enough to be protected in the ECHR. This may be permissible where such an infringement of the right in question would also be allowed in a purely internal matter. However, if one were solely to deviate from the standards of the ECHR for private international law purposes (with regard to third countries), one would create an inequality in the protection under the ECHR, which is, in my opinion, too high a price for any consideration relating to the protection of the system of private international law.

3.3.3 The Manner of Invocation of Human Rights against the Applicable Foreign Law

It is at this point of the discussion prudent to return to the issue of the manner of the invocation of human rights in cases before the national courts of the Contracting Parties concerning the issue of applicable law. Above, it has been stated that there are, broadly speaking, two different paths that national courts could follow regarding the manner of invocation of the rights guaranteed in the ECHR against the foreign applicable law violating these rights – the indirect

\textsuperscript{781} Cass. 1\textsuperscript{er} civ., 26 October 2011, \textit{JDI} 2012, p. 176 (note Guillaumé). See also \textit{supra} ch. IV.4.3.3.
route of use of the public policy exception, and the direct route of the direct application of the ECHR against the applicable foreign law. In this section, first the techniques used in private international law will be further elaborated. Thereafter, the techniques used by the national courts of the Contracting Parties will be examined.

One should note that the manner in which the ECHR is applied by the national courts of the Contracting Parties to the applicable foreign law violating one of the rights guaranteed in the ECHR is, in principle, of no concern to the Strasbourg Institutions, as they are not concerned with the means used by the Contracting Parties to fulfill their obligations. This would only be different if the method used by the national courts in one of the Contracting Parties would somehow lead to a violation of one of the rights guaranteed in the ECHR – if, for example, the method would offer insufficient protection.

The two possible techniques open to the national courts with regard to the applicable foreign law possibly violating one of the rights guaranteed in the ECHR were already distinguished by the German Bundesverfassungsgericht in the famous Spanierbeschluss. The first solution – direct application – is modeled on the public law model of the direct application of the hierarchically higher norm, while the second solution – use of the public policy exception – is the traditional method of private international law.

These two models could be regarded as the two extremes in the discussion. There are conceivable variations of these two solutions; variations positioned in between these two extremes. It will be recalled that the question of the manner of invocation of human rights standards in issues of applicable law is to a certain extent related to the issue of the standard of control. As will become clear from the discussion below, authors fearing too much of an impact of the rights guaranteed in the ECHR on private international law will usually prefer the solution of the public policy exception as a gateway for human rights’ concerns in private

---

782 See supra VI.3.2.
783 See supra ch. III.
784 See supra n. 716.
785 Kinsch 2007 supra n. 683, at p. 207ff.
786 See supra VI.3.2.
international law. Authors concerned about human rights’ protection in private international law becoming too lenient, however, will usually prefer the direct application of the ECHR. The public policy exception has historically been the preferred means of protection of fundamental rights in issues of private international law. The choice to use this instrument to protect the rights guaranteed in the ECHR in issues of private international law is, therefore, in principle, rather obvious. Some authors have invoked this to justify the (continued) use of the public policy exception, by pointing out that this traditional method has proven itself to be effective over time in finding a balance between the protection of individuals and private international law interests. The reason for using the public policy exception that is most often cited is that this instrument allows for more flexibility. Recourse to this technique will allow the national courts of the Contracting Parties to consider the impact of the ECHR on a case by case basis. It has been argued in a similar vein that the use of the public policy exception would ultimately leave more room for the application of foreign law.

It is also possible to directly apply one of the rights guaranteed in the ECHR in order to protect human rights’ concerns in private international law. It should be understood that direct application in this regard only refers to the possibility to directly scrutinize the result of the applicable foreign law against one of the rights guaranteed in the ECHR without the intervention of the public policy exception. This discussion should therefore be separated from the manner in which the rights guaranteed in the ECHR are protected in the national legal orders and the differences between monist and dualist approaches in this regard. It is, strictly speaking, not necessary to consider the rights guaranteed in the ECHR in the context of the public policy exception. In Chapter IV it has been explained that due to the characteristics of the public policy exception, particularly its relative character, there may be – in cases in which there is only a

---

787 See, e.g. Lequette supra n. 683, at p. 112-117.


790 Kinsch 2007 supra n. 683, at p. 207ff.

791 See, e.g., Van Hedel supra n. 728, at p. 132; Mayer supra n. 683, at p. 651ff; Najm supra n. 731, at p. 525ff.

792 See on the status of the ECHR in the national legal order supra ch. III.3.
weak link between the forum and the issue at hand – the possibility that the use of this instrument could lead to a violation of the ECHR.\footnote{See supra ch. IV.4.3.2.} The direct application of the rights guaranteed in the ECHR would eliminate this risk. This solution is, moreover, not entirely alien to private international law, as the direct application of the ECHR is reminiscent of the well-known (in private international law) instrument of (internationally) mandatory rules, or priority rules.\footnote{Cf. L. Gannagé, \textit{La hiérarchie des normes et les méthodes du droit international privé: étude de droit international privé de la famille} (Paris, L.G.D.J. 2001), particularly p. 227ff. See also Kiestra \textit{ supra} n. 759; Kirsch 2007 \textit{ supra} n. 683, at p. 207-208.}

Finally it has also been suggested that both the traditional use of the public policy exception and direct application of the rights guaranteed in the ECHR are inadequate for the proper protection of the rights guaranteed in the ECHR in private international law, as the public policy exception would not be strict enough, while direct application would lead to a too rigorous defense of human rights.\footnote{See, e.g., P. Hammje, ‘Droits fondamentaux et ordre public,’ \textit{86 Rev.crit.dr.int.priv.} (1997), p. 1-31} The proposed solution to all this would be a refinement of the public policy exception – aimed at finding the middle ground.\footnote{Hammje \textit{ supra} n. 795, at p. 19ff.}

Before further discussing the solutions set out above, it is first necessary to observe that there can be no discussion on how human rights are actually implemented by national courts in issues of private international law. One need only to refer to the cases of national courts discussed above to demonstrate that in virtually all cases, reference was made to the public policy exception (\textit{ordre public}) when assessing the foreign applicable law in relation to the rights guaranteed in the ECHR.\footnote{See also, e.g., the French (and German) case law discussed by I. Thoma, ‘The ECHR and the \textit{ordre public} exception in private international law,’ \textit{29 NIPR} (2011), p. 13-18.} The method of the direct application of one of the rights guaranteed in the ECHR is almost never used in the case law of the national courts of the Contracting Parties. Rare exceptions can be found in France\footnote{\textit{Cour de Paris} 14 June 1994, \textit{Rev. crit.dr.int.priv.} 1995, 308 (note Y. Lequette). The reasoning in this case has generally been negatively received, though, in the French literature. See, e.g., Lequette \textit{ supra} n. 683, at p. 113ff; \textit{Najm supra} n. 731, at p. 563ff.} and in the Netherlands.\footnote{HR 15 April 1994, \textit{NJ} 1994, 576. This appears to be the only case relating to an issue of an applicable foreign law in which Article 8 ECHR was directly considered, instead of by way of the use of the public policy exception. Cf. Van Hedel \textit{ supra} n. 728, at p. 131ff.} It is clear that the manner of reasoning in these latter cases has attracted few followers.
One could, incidentally, note that even though the issue is not of its direct concern, the Court in its decision in *Ammdjadi* does not appear to be troubled by the use of the public policy exception to guarantee human rights in private international law. The Court after all explicitly referred to the use of German *ordre public* in its assessment of whether there had been a violation of Article 8 ECHR in this case.\(^{800}\) However, one could question whether this should really be regarded as an endorsement of the use of the public policy exception. One could also say that in its reasoning the Court merely follows the route that is followed in the respondent Contracting Party. Then again, one may want to infer from this reasoning that the Court does not *a priori* reject its use either, for it could have chosen a different approach to the matter.

The fact that the public policy exception appears to be widely used as the point of entry of fundamental rights, and the rights guaranteed in the ECHR in particular, does not, of course, mean that this is the ideal method. The fact that national courts may be tempted on the basis of the relative character of the public policy exception to disregard the rights guaranteed in the ECHR without first fully examining the relevance of these rights is an important drawback of the use of the public policy exception. The direct application of the ECHR against the applicable foreign law would protect against possible shortcomings, and would thus be my preference.

However, the sharp distinction between these two solutions may be moot. As will be demonstrated below, there are indications to be found in the case law of the national courts of the Contracting Parties, as well as the doctrine, suggesting that the public policy exception would lose its relative character if it were to be used to protect human rights. If this were indeed to be the case, the most important argument against using the method of the use of the public policy exception would be eliminated. Yet this would also essentially remove the differences between these two solutions.

In, for example, the English cases of *Oppenheimer v. Cattermole*\(^{801}\) and *Kuwait Airways Corp v. Iraqi Airways Co (Nos 4 and 5)*\(^{802}\) it was held that foreign laws leading to grave infringements

---

\(^{800}\) See supra VI.3.1.
\(^{801}\) *Oppenheimer v. Cattermole* [1976] AC 249.
\(^{802}\) *Kuwait Airways Corp v. Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883.
of human rights should not be accepted at all.\textsuperscript{803} One could thus state that in these cases there was little left of the relative character of the public policy exception, if anything at all. It could be observed, though, that both these cases did not specifically concern an issue with regard to the rights guaranteed in the ECHR, but rather human rights in general. However, in the Dutch doctrine, it has also been suggested that under certain circumstances, the public policy exception would assume an absolute character.\textsuperscript{804} This has been described as the ‘iron core’ of the public policy exception.\textsuperscript{805} In the Swiss doctrine, it has similarly been argued that while the public policy exception usually has a relative character and that its application then depends on the links of the case with the forum, the exception would be where it is used to protect values that are international in their scope, such as human rights.\textsuperscript{806}

If one were to include the rights guaranteed in the ECHR in this ‘iron core’ of the public policy exception, which would result in the public policy exception always being applied when such rights are involved in a case, regardless of the links of this case with the forum, then the demarcation between the methods of the public policy exception and direct application essentially disappears. However, the proponents of the use of the public policy exception value the flexibility which the use of this medium provides in cases concerning fundamental rights in private international law. This flexibility would obviously be largely gone if one were to accept that the rights guaranteed in the public policy exception would be part of the unwavering core of the public policy exception.

The problem in this debate is not so much the existence of this core of the public policy exception, but rather that not everyone would agree that (all of) the rights guaranteed in the ECHR are part of this core. This essentially brings this discussion back to the debate on the absoluteness of the rights guaranteed in the ECHR, considered earlier in Chapter IV.\textsuperscript{807}

\textsuperscript{803} See with regard to these cases supra VI.3.3.1.
\textsuperscript{804} See Strikwerda supra n. 755, at p. 53ff.
\textsuperscript{806} A. Bucher, \textit{Le couple en droit international privé} (Bâle, Helbing & Lichtenhahn 2004), p. 18.
\textsuperscript{807} See supra ch. IV.4.1-4.2.
In conclusion of this debate on the manner in which the rights guaranteed in the ECHR are guaranteed with regard to the issue of applicable law in private international law, I should first reiterate that this is, in principle, a matter for the Contracting Parties themselves. The Court would only take action in the event that the technique used would lead to a result falling short of the required protection following from the ECHR. Thus, in most cases the manner of application is not important. Where the public policy exception is used as an intermediary to invoke one of the rights guaranteed in the ECHR, an issue is not likely to arise. Such an issue with the ECHR would only arise if the public policy exception would not lead to the setting aside of the foreign law violating one of the rights guaranteed in the ECHR, because of the insufficient connection between the case and the legal order. It is for this reason that I would favor a more direct application of the rights guaranteed in the ECHR against the normally applicable foreign law violating one of the rights guaranteed in the ECHR. If there was a need for some room for maneuvering with regard to specific private international law concerns, such room should be sought within the system of the ECHR. However, one should, in my opinion, be careful not to go too far in this regard, as this would lead to the diminished protection of individuals in cases concerning issues of private international law, which is difficult to justify.

4. The Application of the ECHR Promoting the Application of Foreign Law

Up to this point the ECHR has only been discussed as a correcting device to the applicable foreign law. However, the application of a foreign law is, of course, not the only possible outcome when a country applies its choice of law rules in a private international law dispute. It is also possible, and arguably more likely, that the choice of law rules of the forum will determine that its own law, the *lex fori*, is the applicable law to the case. This leads us to the issue of whether it is also possible to invoke one of the rights guaranteed in the ECHR against the application of the *lex fori*, and argue that instead a foreign law should be applied.

In order to examine this issue two separate streams that ultimately flow in the same waters have to be followed. On the one hand, there are some examples to be found in both the case law of the Strasbourg Institutions and the jurisprudence of national courts in the Contracting Parties of the invocation of one of the rights guaranteed in the ECHR against the application of the *lex fori*. In such cases the argument is made that the application of the *lex fori* would violate one of the
rights guaranteed in the ECHR. Of course, such an argument is not made in a vacuum. There has to be a law applicable to the case and by arguing against the application of the *lex fori* one thus ultimately ends up with an argument in favor of the application of foreign law. In the literature the argument has been developed that some of the rights guaranteed in the ECHR actually entail the obligation to apply foreign law.\(^{808}\) Even though this concerns a different line of argumentation to some extent, these lines eventually blend into each other somewhat, as the intended result of both arguments is the same: the application of foreign law instead of the *lex fori*.

Below, the case law of the Strasbourg Institutions will first be examined (4.1). This will be followed by a review of some examples taken from the national jurisprudence of the Contracting Parties (4.2). Thereafter, one will find an elaboration of the argument that some of the rights guaranteed in the ECHR could be interpreted as entailing the obligation to apply foreign law as it has been developed in the literature and the observation that there are few indications for such an interpretation of the ECHR (4.3).

### 4.1 The Case Law of the Strasbourg Institutions

In *Batali v. Switzerland*,\(^{809}\) the Commission had to examine several complaints of a Togolese man relating to his divorce, pronounced by the Swiss courts in accordance with Swiss law, from a Togolese woman. The marriage had been celebrated at the Togolese Embassy in Germany. The applicant, *inter alia*, argued that the Swiss courts had made serious errors by assuming jurisdiction and applying Swiss law to the divorce. He added that the Swiss divorce decision left him being divorced in Switzerland while he was still married in Togo, and that his family was split up according to two different legal orders.

Although the applicant thus admittedly raised some interesting issues, particularly with regard to application of the *lex fori*, which would allegedly lead to the divorce not being recognized in Togo, it should be noted that he did not rely on any specific provisions of the ECHR. The fact that the Commission made short shrift of the complaint may thus not be surprising. The

---


Commission held in relation to the complaint concerning the Swiss divorce that – working on the assumption that the complaints raised an issue at all with regard to Articles 8 and 12 ECHR – it simply saw no lack of respect for the guarantees contained in these rights in this case.

It is unfortunate that the Commission did not really examine this case, as important questions of private international law regarding limping legal relationships were raised. The Strasbourg Institutions have never examined this issue and its response to the complaints raised in this case would have been interesting.

A much more recent case of the Court, *Losonci Rose and Rose v. Switzerland*,\(^{810}\) concerning the right to a name, provides us with an example of one in which the ECHR was successfully invoked against the application of the *lex fori*. This case concerned a couple, Laszlo Losonci Rose, a Hungarian national, and Iris Rose, who had both Swiss and French nationalities. The couple lived in Switzerland at the time. The applicants, who intended to get married, wanted to keep their own names after marriage, citing the difficulties of changing their names, respectively, under Hungarian and French law and the fact that the wife was well-known under her maiden name as reasons. The husband therefore applied for the application of Hungarian law to his surname. However, the couple’s request and subsequent appeal were denied. Thus the applicants decided, in order to be able to marry, to choose the wife’s surname as the family name under Swiss law. The couple got married and their names were thereafter registered as ‘Rose’ for the wife and ‘Losonci Rose, né Losonci’ for the husband.

After the marriage the husband requested that his name be replaced by the single surname ‘Losonci’, as permitted under Hungarian law, while his wife’s name would remain unchanged. However, the Swiss *Tribunal fédéral* ultimately found that after choosing the wife’s surname, he no longer had the opportunity to have his name governed by Hungarian law. With regard to the applicants’ complaint that the refusal was unconstitutional, as it violated the principle of equal

\(^{810}\) *Losonci Rose and Rose v. Switzerland*, no. 664/06, 9 November 2010.
treatment of the sexes, the Tribunal found that it was not permitted to introduce amendments that had already been rejected by the Federal Parliament.811

Relying on Articles 8 and 14 ECHR the applicants claimed in Strasbourg that they had been discriminated against in the enjoyment of their family and private life. They argued in particular that had their sexes been reversed, there would not have been a problem, as they then could have chosen their preferred names: in the case of a woman of foreign origin, Swiss law would allow the woman’s surname to be governed by her national law. It was clear before the Court that there was an inequality of treatment in this case. The Swiss authorities, however, claimed to have pursued the legitimate aim of reflecting family unity by way of a single ‘family name’.

In assessing this argument the Court noted that while Contracting Parties, in principle, have a wide discretion with regard to measures reflecting family unity, there had to be compelling reasons to justify a difference in treatment based on the ground of sex alone. The Court noted that there is a consensus emerging amongst the Contracting Parties concerning equality between spouses in the choice of the family name, while the activities of the United Nations are also heading in this direction. The Court thus concluded that there had been a violation of Article 14 ECHR taken in conjunction with Article 8 ECHR.812

Although this case at first sight may appear to be an example of the successful invocation of one of the rights guaranteed in the ECHR against the lex fori, and thus simultaneously promoting the application of foreign law, one should be cautious in drawing this conclusion. It should be noted that this is first and foremost a discrimination case.813 The Court ultimately did not per se find that people with a double nationality have on the basis of the ECHR the right to have their surname after marriage governed by their national law instead of the lex fori. The Court merely found that the Swiss rules on the determination of a person’s name were discriminatory on the ground of sex alone, as the Swiss law did offer the opportunity to have the surname governed by

812 The Court further noted, in response to the fact that the Tribunal fédéral had held that it could not introduce any amendments that had previously been rejected by Parliament (see supra n. 811), that this had no bearing on Switzerland’s international responsibility under the ECHR.
813 See also Kinsch 2011 supra n. 708, at p. 39, 41.
the national law to a woman, but not to a man. However, it is worth emphasizing that it was the
Swiss rules in this regard that offered this opportunity in the first place – at least to a woman, that
is. Thus the Court could find that there had been an unjustified difference in treatment regarding
the right of a person’s name based on sex alone. However, it is doubtful that had Swiss law not
offered this opportunity to women having a double nationality that on the basis of Article 8
ECHR a successful argument could have been made that a foreign law should have been applied
instead of the lex fori.

4.2 Jurisprudence of the EU and the National Courts of the Contracting Parties

There is not much case law in which one of the rights guaranteed in the ECHR is invoked in
order to argue in an issue of private international that the lex fori should be set aside in favor of
foreign law. The argument raised in Batali that the application of the lex fori would lead to a
limping legal relationship appears not to have been developed in the case law of national courts
with regard to the rights guaranteed in the ECHR. However, one could say that the Court’s case
law in Losonci has found some support in national case law, although this national case law is
not based on the rights guaranteed in the ECHR. Additionally, there have been some instances in
which the ECHR has been invoked against the application of the lex fori in entirely different
circumstances, albeit without much success.

There have been a number of cases in European and national case law regarding the law
applicable to a name.814 These cases particularly concerned the names of newborns where there
were some facts linking the situation to more than one EU Member State. In these cases the
rights guaranteed in the ECHR could arguably have been invoked, but the decisions were based
on the case law of the ECJ in Garcia Avello815 and Grunkin-Paul.816 In a Dutch case, for
example, the applicants, a Polish couple, succeeded in having Polish law applied to the last name
of their children, who had both Dutch and Polish nationalities, even though the normally
applicable law was the lex fori, Dutch law. The Polish couple had, inter alia, invoked Article 8

---

814 See with regard to the right to a name, human rights, and EU law also G. Rossolilo, ‘Personal Identity at a
Crossroads Between Private International Law, International Protection of Human Rights and EU Law,’ 11
815 ECJ 2 October 2003, Case C-148/02, Garcia Avello, ECR 2003, I-11613.
ECHR in this regard, but the Dutch court ultimately decided in their favor based on the ECJ’s judgment in *Garcia Avello*.\(^{817}\)

In a case before the English High Court, *NG v KR*,\(^{818}\) Article 1 of Protocol No. 1 ECHR, the right to property, was invoked against the application of the *lex fori* to a prenuptial agreement. This case concerned the aftermath of a breakdown of the marriage between a (former) husband and wife, where the latter was very rich. At issue was the validity of a German prenuptial agreement between the parties which made no provision for either spouse upon divorce. The wife argued that under both the laws of Germany (where she was originally from) and France (where he was originally from) the agreement would be valid and enforced. Yet under English law the agreement was invalid. She submitted that it would be a violation of her human rights, particularly Article 1 of Protocol No. 1 ECHR, if the English court were to apply English law to the agreement and declare the agreement invalid.

The court, however, found that it is a central pillar of the English system of private international law that in the field of family law, England is a *lex fori* country.\(^{819}\) It further held that while Article 1 of Protocol No. 1 ECHR was generally applicable, the right guaranteed in this Article was not infringed. It is interesting to observe that the English court explicitly relied on the margin of appreciation, the width of which it derived from *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom*\(^{820}\) While the Court in Strasbourg is not a proponent of national courts allotting themselves a margin of appreciation,\(^{821}\) there is little evidence in this case to suggest that the English court should have found a violation of Article 1 of Protocol No. 1 ECHR in this case, as the interference with the wife’s right to property would appear to meet the requirements set out in Article 1 of Protocol No. 1 ECHR.

---


\(^{819}\) At 87.

\(^{820}\) At 134. The English court particularly referred to *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, par. 71, 74 and 75, ECHR 2007-III. It is interesting to note that *J.A. Pye* and the case law considered in this case with regard to the margin of appreciation are all concerned with the right to property, but cover a wide variety of subjects.

\(^{821}\) See *supra* ch. III.5.2.
A case before the Swiss Tribunal fédéral between a husband and a wife, both Kosovo residents, concerned the appeal of the husband against the decision of a lower Swiss court to award the wife custody of their child. In earlier criminal proceedings the husband had been convicted and imprisoned for sexual acts with children, sexual coercion, and rape. The husband, inter alia, invoked Articles 8 and 14 ECHR against the decision to award the mother custody, arguing, inter alia, that under their national law young children are usually awarded to their father.

The Swiss court found that awarding a child to one of the parents is a serious infringement of the right of the other parent to respect for his family life. Under certain circumstances such interference may be allowed, and the Tribunal found that Swiss law is, in this regard, up to the standards of the ECHR. With regard to the argument that the parties’ national law usually awards children to their father, the Tribunal found that it matters little that the national law of the parties – which was not applicable to the case because Article 62 (2) of the Swiss Private International Law Act determined that Swiss law was the applicable law – provided another solution. The Tribunal thus held that Article 8 ECHR had not been violated. The Tribunal further held that it was unable to see how any of this could lead to a difference in treatment between the parties and that the invocation of Article 14 ECHR had not been substantiated.

The prospects of the invocation of one of the rights guaranteed in the ECHR against the application of the lex fori in favor of a foreign law remain uncertain at best. This may not be altogether surprising, though. It is not difficult to see why national courts of the Contracting Parties would be less than inclined to find that the applicable lex fori would fall short and that the application of a foreign law would be required from the perspective of the ECHR. It follows from the Court’s case law in Losonci that this is only different where in a private international law dispute the application of the lex fori would lead to a discriminatory result. However, in this case a violation of the ECHR was only found because the possibility to apply foreign law to a name depended on the sex of the applicant, a discriminatory situation which could not be justified by the authorities.

4.3 The Application of the ECHR promoting the Application of Foreign Law: Debate in the Literature

In the literature the thesis has been developed that Article 8 ECHR could also be regarded as entailing a right to the application of a foreign law. Contrary to the situation concerning the issue of the recognition and enforcement of foreign judgments, where the Court has found in several cases that the ECHR may also entail the obligation to recognize foreign judgments, this issue has mostly been a theoretical discussion with regard to the issue of applicable law. Even though there are some examples to be found of the invocation of the ECHR against the lex fori in national case law, the argument that Article 8 ECHR would entail a right to the application of foreign law appears not to have been made. In support of this claim a little known decision by the Commission, G. and E. v. Norway, has been pointed to by Jayme, the developer of the theory.

The applicants were two Norwegian Lapps. They were part of a group that had protested in the vicinity of the Norwegian Parliament against the decision of the Norwegian government to construct a hydroelectric power station on their land. After refusing to leave the site of the protest, the police eventually removed the group by force and the two applicants were subsequently prosecuted and ultimately convicted for refusing to obey an order of the police. The applicants filed a number of complaints in Strasbourg, ranging from their arrest being an infringement of their right to freedom of expression (Article 10 ECHR) to complaints against the lack of protection of the Lapps as a minority.

The most important part of the decision, for our purposes, is the fact that the Commission considered that the applicants’ complaints had to be partly examined under Article 8 ECHR. In this regard the Commission found the following:

---

824 See infra ch. VII.
825 See the case law discussed supra VI.4.1-4.2.
The Commission is of the opinion that, under Article 8, a minority group is, in principle, entitled to claim the right to respect for the particular lifestyle it may lead as being “private life”, “family life” or “home”.827

This consideration relating to Article 8 ECHR has been seized upon to pose the question of whether the ECHR also guarantees the right – or at least strengthens a claim thereto, one could add – to have a specific law applied to a judicial matter out of respect for the cultural identity of a person.828 Others have added that one could easily extend such a right to legal cultures in general.829 Thus a person could then argue that his or her law should be applied to a certain case out of respect for his or her legal culture.830 It is interesting to note that this would essentially mean a return to the first principle that was used in Europe to determine what law should be applied to a person, namely that everyone had the right to have his or her own law applied to him or her.831

It should be noted, though, that the Strasbourg Institutions have never really moved the discussion in this direction. The Court has admittedly since confirmed that the protection of minority lifestyles is protected under Article 8 ECHR and it has even held that there are positive obligations for the State in this regard.832 Thus the Contracting Parties not only have to abstain from interfering with minority lifestyles, but they also have to actively help preserve such lifestyles. Yet the Court has never stated that this respect for the cultural identity of a person could also entail the right to have a specific law applied. It would indeed be difficult to argue that this right to a cultural identity on the basis of Article 8 ECHR would take precedence over the laws of the forum.833

829 Van Loon supra n. 717, at p. 139.
830 If one were to follow this line of reasoning, one could perhaps in the case of a religious-based law even attempt to base such a claim on Article 9 ECHR, which guarantees the right to freedom, thought, and religion. However, to my knowledge no such attempts have been made. I would, incidentally, argue that this line of reasoning offers little chance of success. The Court in its case law on Article 9 ECHR has given no indication that this right could entail the right to have one’s religious-based law applied instead of the normally applicable law.
832 See in this regard particularly Chapman v. the United Kingdom [GC], no. 27238/95, par. 93 and 96, ECHR 2001-I. The principles found in Chapman have been further developed in Muñoz Díaz v. Spain, no. 49151/07, ECHR 2009.
5. The Impact of the ECHR on the Act of Applying Foreign Law

In this part an entirely different aspect of the issue of applicable law in private international law will be discussed, namely the act of applying foreign law. Problems related to the identification of the content of the applicable foreign law are a well-known problem of private international law.\(^{834}\) A court, after having found in consultation with the choice of law rules of the forum that a foreign law is the law applicable to the case, is then faced with the question of how to find this foreign law. Even though this could be a difficult process, which may even require the help of third parties, courts have to be wary of unnecessary delays, which may result in a violation of the right to have a trial within a reasonable time, as prescribed by Article 6 (1) ECHR.

In this part the impact of the ECHR on this process will be discussed. First, the case law of the Strasbourg Institutions will be reviewed (5.1). Next, a few examples taken from the case law of national legal orders will be discussed (5.2). Finally, the practice regarding the act of applying foreign law by national courts of the Contracting Parties will be assessed in light of the requirements following from the ECHR (5.3).

5.1 The Case Law of the Strasbourg Institutions

There is only one case in which the Strasbourg Institutions were specifically concerned with procedural issues relating to the application of foreign law. In *Karalyos and Huber v. Hungary and Greece*\(^{835}\) the Court examined certain aspects of the act of applying foreign law. The Court decided that a Contracting Party – in this case Hungary – cannot rely on the difficulties relating to the ascertainment of the foreign applicable law to explain very lengthy proceedings – in this particular case the length of the proceedings had risen to nine years, without the case even reaching an appeal court.

---


\(^{835}\) *Karalyos and Huber v. Hungary and Greece*, no. 75116/01, 6 April 2004.
The case concerned a claim by a Hungarian illusionist and his wife, who entered into a contract with a Greek company to perform a show onboard a cruise ship. Unfortunately, on the same day that the Greek company shipped the illusionist’s equipment onboard there was a fire which destroyed the applicants’ equipment. The Greek company refused to pay for the damages. The illusionist subsequently brought an action before a Hungarian court. The court needed information on Greek law and a request was made through the appropriate Hungarian authorities to gather this information from their Greek counterparts on the basis of the Greek-Hungarian bilateral Treaty on Legal Assistance and the European Convention on Information on Foreign Law.

This started a back and forth between the Hungarian and Greek authorities, which yielded little. After several unsuccessful attempts by the Hungarian authorities to gather the required information, they suggested to the court that Hungarian law should be applied to the case. However, the court found that the information on Greek law was still required, as it held that the Greek authorities’ refusal to provide information on a complex legal issue did not render it impossible to establish the content of the foreign law. The case was still pending before the Hungarian court during the proceedings in Strasbourg, where the applicants complained about the length of the proceedings against both Hungary and Greece.

Only the complaint against Hungary was held to be admissible. The Court found, while acknowledging that there may have been difficult legal issues of foreign law, that the length of the proceedings could not be explained by this fact alone. The Court considered that the defendants could not be reproached for their (in)action, as the Hungarian court was responsible

---

836 One may note that the application was directed against both Hungary and Greece. However, the Court made short work of the complaint against Greece, as it declared the application inadmissible ratione personae. It noted in this regard that the proceedings were instituted in Hungary and not in Greece, and insofar as the complaint was directed at the reluctance of the Greek authorities to cooperate with the Hungarian authorities on the basis of the relevant international treaties, the Court held that any possible failure in this regard could not be the subject matter of a case before the Court. See Karalyros and Huber v. Hungary and Greece, no. 75116/01, par. 40, 6 April 2004. The Court repeated that it is only competent to review the ECHR and not any other international agreement, as it had stated in Calabro v. Italy, judgment of 21 March 2002, No. 59895/00. Although the Court correctly decided that Greece could in this case not be held responsible for its failure to cooperate under these treaties, it should be noted with regard to international treaties that the Court has previously interpreted the ECHR in light of other international agreements. A pertinent example of this practice would be the Court’s case law concerning international child abduction and the Hague Convention.
for the proper administration of justice. The Court noted that it was ‘regrettable’ that the content of the relevant Greek law could not be established after a period of nine years.\textsuperscript{837} It was unclear to the Court why the Hungarian court did not try to locate an expert on this matter in Hungary, or why the Hungarian court did not apply Hungarian law as is allowed under the Hungarian International Private Law Decree. The Court also observed that the attempts made by the Hungarian authorities to gather the relevant information had not been conducted very efficiently.\textsuperscript{838} All this led the Court to conclude that the delays in the case were mainly attributable to Hungary and that there had been a violation of Article 6 (1) ECHR.

5.2 Jurisprudence of the National Courts of the Contracting Parties

There is little specific national jurisprudence relating to issues of the establishment of the applicable foreign law and the impact of the ECHR. In the Netherlands a case before the Gerechtshof Arnhem concerned a claim regarding a loan.\textsuperscript{839} Australian law, particularly the law of Queensland, was the law applicable to the case. Before the appeal court issues concerning the gathering of evidence in Australia arose. Invoking the 1970 Hague Convention on the Taking of Evidence Abroad,\textsuperscript{840} the claimant applied to have evidence heard in Australia by an Australian judge. The defendant argued that this would cost a lot of extra time and would be expensive. He argued that the costs of the proceedings should remain reasonable. The Dutch court considered that although it is the basic principle in the Netherlands that the judge should hear witnesses himself, under these circumstances an Australian judge performing these duties would have to suffice. Such a request cannot be dismissed solely on the basis of costs. The claimant was not abusing his procedural rights, according to the appeal court. The defendant’s rights guaranteed in Article 6(1) ECHR which consisted of, \textit{inter alia}, a fair trial, including effective access to a judge and a trial within a reasonable time, would not be violated by having an Australian judge gather evidence in Australia, according to the appeal court.

While this case is not really concerned with the establishment of the content of foreign law, but rather with the more general issue of hearing experts abroad (although these experts may also

\textsuperscript{837} Karalyros and Huber v. Hungary and Greece, no. 75116/01, par. 35, 6 April 2004.
\textsuperscript{838} The authorities had, for example, made some administrative errors, and did not resort to alternative and faster methods of communication than regular mail until five years had passed.
\textsuperscript{839} Hof Arnhem 4 November 2003, \textit{NIPR} 2004, 43.
\textsuperscript{840} Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 18 March 1970, entry into force 7 October 1972 (UNTS).
advise the requesting court on issues of Australian law), it does demonstrate some of the issues with which a national court may be concerned when establishing the content of foreign law. Namely, there are two parties in a dispute, both of whom have procedural rights, *inter alia*, following from Article 6 (1) ECHR. Where one party may want to get to the bottom of the exact content of the foreign law and would argue a denial of justice in the case of anything less, the opposing party may feel that such a search may lead to unreasonable costs and an unreasonable length of the proceedings. It is up to the courts of the national legal orders in the first place to find a balance in this regard, guided by the requirements following from Article 6 (1) ECHR, even though the Court in Strasbourg will ultimately decide such issues.

In Switzerland the *Tribunal fédéral* has dealt with an interesting issue regarding the establishment of the content of foreign law. This case concerned a dispute over the management of a family foundation, which had been set up by Swiss lawyers in Liechtenstein at the request of an Egyptian resident. The two lawyers became members of the board. After the Egyptian man passed away, one of the heirs filed a request before the Swiss courts to obtain all the records relating to the establishment of the foundation. The heir based his standing before the court on a report by the Swiss Institute of Comparative Law, which recognized his quality as an heir according to Egyptian law. The two lawyers were ordered to hand over the documents. The lawyers appealed against this decision. On appeal, the appeal court also turned to the Swiss Institute of Comparative Law to answer a question of Egyptian law. The two Swiss lawyers opposed the choice of the Institute as an expert, invoking, *inter alia*, Article 6 (1) ECHR. Their protest against this decision was set aside by the appeal court.

Before the *Tribunal fédéral* the lawyers again questioned the impartiality of the Institute, based on Article 6 (1) ECHR. The *Tribunal fédéral* first emphasized that Article 16 of the Swiss Private International Law Act contains the obligation for the judge to establish *ex officio* the content of foreign law. For neighboring countries the judge should not, according to the *Tribunal fédéral*, routinely seek the advice of an expert, as the application of foreign law to concrete cases is within its expertise and not that of the expert. However, with regard to the law originating

---

841 See with regard to the denial of justice supra ch. V.
from non-neighboring countries, the advice of experts, such as the Swiss Institute, may be necessary, the Tribunal fédéral acknowledged. The appeal court had held that the scientific contribution of the Swiss Institute, which consisted of giving information on foreign law and responding to questions of the court, could not be compared to the advice given to a litigator. The Tribunal fédéral did not find this reasoning to be unsustainable and held that while generally speaking it is untenable that the same person would first give advice to one of the parties and thereafter would be asked to function as an independent expert in the same procedure, the Swiss Institute of Comparative Law cannot be equated with private counsel.

In this case the role of expert institutes in establishing the content of foreign law was thus examined. The problem for courts, which are expected ex officio to establish the content of foreign law, is that they virtually cannot do so without the help of such institutes. However these institutes may also assist other parties in proceedings, which could lead to the awkward situation in which such an institute functions both as a witness for one of the parties and as an independent expert of the court. In Switzerland the Federal Tribunal has decided that such a situation may be tenable, given the specific position of the Swiss Institute for Comparative Law.

5.3 The Practice in National Legal Orders and the Impact of Article 6 (1) ECHR

With regard to the particular issue of the establishment of the content of the foreign applicable law by national courts, it should be noted that there is a clear distinction in Europe regarding the position that foreign law has in the legal order. In continental Europe the starting point is generally that a court must apply foreign law ex officio, as foreign law is considered law just like the lex fori, while in England foreign law is treated as fact, which means that parties have to plead foreign law and offer proof. Thus, if in England parties fail to argue that foreign law should be applied, the court will apply the lex fori, i.e. English law, while in continental Europe such failure, in principle, should have no effect, as the court is obligated to ex officio apply the

843 Examples of such institutes are the ‘Internationaal Juridisch Instituut’ (International Legal Institute) in the Netherlands and the Swiss Institute for Comparative Law.
844 See supra n. 842, at consideration no. 2.3.
This does not mean, however, that courts in continental Europe may not ask the parties to assist them in establishing the content of the foreign law. In the Netherlands, for example, courts may ask the parties for help in their task of establishing the content of the foreign law. Switzerland has a similar practice for family law cases, and for pecuniary claims the judge can even impose the burden of proof on the parties.

Given the status of foreign law in England, one would expect the possible impact of Article 6 (1) ECHR on the issue of the establishment of the content of foreign law to be limited. If one of the parties were to plead that foreign law is applicable in a certain situation, but is unable to prove the content of this foreign law within a reasonable time, this should not lead to a delay in the proceedings, as an English court could simply apply English law without much further ado. However, this may be too simple. It should be noted that one of the prevalent methods of proof of foreign law – by way of expert witnesses – has been criticized, because this method may lead to excessive delays and costs. In order to prevent unnecessary delays and costs, English domestic courts have been given the power to control all expert evidence under the Civil Procedure Rules.

In the Netherlands and Switzerland, however, the issue of a possible delay in the proceedings and the resulting issue with Article 6 (1) ECHR due to a national court’s inability to expeditiously establish the content of the applicable foreign law is more likely to arise, as in both countries the judge, in principle, has to apply foreign law ex officio. However, in both countries there are several mechanisms to prevent such issues. As has already been discussed

---

846 One could note that this difference has also led to issues regarding EU instruments on applicable law. As the issue could, e.g., not be resolved in relation to the Rome II Regulation, a review clause has been added providing for a further study on the effect of this issue. See art. 30 of Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007, L 199/40. The treatment of foreign law is also being monitored by the Hague Convention. See, e.g., Information Document no. 10 of April 2012 on Access to Foreign Law in Civil and Commercial Matters, <http://www.hcch.net/upload/wop/gap2012info10en.pdf>, visited October 2012. See for an interesting study on this issue also Th.M. De Boer, ‘Facultative Choice of Law. The Procedural Status of Choice-of-Law Rules and Foreign Law,’ 257 Recueil des Cours (1996), p. 223-427.

847 However, national courts are in such an event not obligated to follow the parties’ lead. See Strikwerda supra n. 755, at p. 32-33 and the case law cited there.

848 See Article 16 (1) of the Swiss Private International Law Act.

849 See generally with regard to how foreign law is proved Fentiman supra n. 845, at p. 173ff.


851 In Switzerland this has, incidentally, fairly recently been confirmed in a number of judgments of the Tribunal fédéral. See ATF 131 III 153; ATF 131 III 511; ATF 132 III 609 and ATF 132 III 661.
above, in both countries it is possible for national courts to ask for the assistance of the litigating parties in the establishment of the content of the applicable foreign law, whereby it should be noted that Swiss courts can be more forceful in claims for financial interest.853

There is also the European Convention on Information on Foreign Law,854 a treaty of the Council of Europe that has been ratified not only by the Netherlands and Switzerland, but also by the United Kingdom.855 Although the treaty is open for signature of all the Member States of the Council of Europe, and for accession by non-Member States, its impact is somewhat limited by the fact that only three non-Member States have ratified the treaty.856 National courts in both countries may also enlist the assistance of institutes specialized in issues of foreign law.857 If, despite the above-mentioned mechanisms, it proves to be impossible to establish the content of the foreign applicable law, the Swiss Private International Law Act stipulates that Swiss law applies.858 In the Netherlands, however, there is no such solution. Multiple solutions to this problem have been defended, but up until this point none of these have prevailed.859 In light of the requirements following from Article 6 (1) ECHR, and particularly the obligation to have a fair trial within a reasonable time, it may be useful to introduce a similar rule in the Netherlands.

6. Conclusion

In this chapter the impact of the rights guaranteed in the ECHR on the issue of applicable law in private international law has been examined. This chapter has only been concerned with the impact of the ECHR on the result of the application of the forum’s choice of law rules – the applicable law – as the Court’s case law is the starting point of this research and the Court, in principle, does not concern itself with the examination of (private international law) rules in abstracto. Three separate issues relating to the impact of the ECHR on the issue have been distinguished: the invocation of the ECHR against the foreign applicable law; the invocation of

853 See supra n. 848.
855 A list of all signatories may be found at [conventions.coe.int].
856 Belarus, Costa Rica, and Mexico.
857 In the Netherlands the ‘International Juridisch Instituut’ (International Legal Institute) is frequently asked for assistance, while in Switzerland the Swiss Institute of Comparative law is often asked for advice.
858 See Article 16 (2) of the Swiss Private International Law Act.
859 Strikwerda supra n. 755, at p. 32-33.
the ECHR *promoting* the application of foreign law and against the *lex fori*; and, finally, the impact of the ECHR on the act of applying foreign law. This latter issue differs from the first two as it is concerned with a procedural issue, while the first two issues are concerned with the impact of the ECHR on the material result of the application of a foreign law. Consequently, the rights guaranteed in the ECHR that are concerned vary. With regard to the procedural issue of the act of applying foreign law, the procedural guarantees of Article 6 (1) ECHR are relevant, while in principle any substantive right guaranteed in the ECHR could be invoked against either the result of the application of a foreign law or the *lex fori*.

Before turning to these three main questions regarding the impact of the ECHR on the issue of applicable law in private international law, first the question of whether the ECHR can be applied at all to this issue, particularly where the foreign law originates from a third country, has been revisited. In addition to confirming that this is indeed the case, some case law of the Commission regarding the responsibility of Contracting Parties for the application of a foreign law violating one of the rights guaranteed in the ECHR originating from another Contracting Party has been examined in this chapter. It has been demonstrated that solely the Contracting Party whose courts have applied the repugnant foreign law can be held responsible in such a case. There can be no co-responsibility, even in the event of the foreign applicable law originating from another Contracting Party.

Even though the Court has yet to deliver a judgment on an issue of private international law in which the application of foreign law resulted in a violation of one of the rights guaranteed in the ECHR, it has generally been accepted that the application of a foreign law could result in a violation. However, a number of interesting issues remain open. These issues, such as the level of scrutiny of the Court, the possible attenuation of the standards of the ECHR with regard to a foreign applicable law, in that there would remain more room for the application of an aberrant foreign law, and the techniques the national courts of the Contracting Parties could use in this regard, have been examined in this chapter.

The Court’s case law concerning the impact of the ECHR on a foreign applicable law possibly violating one of the rights guaranteed in the ECHR is not yet crystallized. It has been argued that
the best approach to such an issue would be to regard the foreign applicable law as interfering with one of the rights guaranteed, as a restriction to the right guaranteed in the ECHR. Whether such a restriction is permissible would consequently depend on the particular right concerned. Article 8 ECHR (the right to private and family life) and Article 1 of Protocol No. 1 ECHR (the right to property) are the most frequently invoked rights of the ECHR concerning the issue of applicable law. Both these rights are qualified rights and therefore not absolute. In assessing whether a foreign applicable law violates one of these rights guaranteed in the ECHR, the Court should follow its usual approach with regard to restrictions under these Articles. In relation to a restriction following from a foreign applicable law, the most important requirement would be the necessity in a democratic society and, in particular, the proportionality of the decision to apply foreign law. The margin of appreciation which Contracting Parties enjoy in this decision could then be used to properly weigh possible private international law concerns.

It has been argued by many that the standards of the ECHR should be attenuated with regard to a foreign applicable law, particularly where this foreign law would originate from a third country. While there may be good reasons for some attenuation, it is my contention that such an attenuation of the standards can only be allowed insofar as it is permissible under the ECHR. The extent to which such attenuation is thus possible with regard to a particular right guaranteed in the ECHR is therefore decisive here. It could also be noted that the few cases of the Court directly concerned with the invocation of one of the rights guaranteed in the ECHR against the applicable law do not offer much evidence for an attenuated standard in this regard.

The observations on Article 1 ECHR should also guide the discussion on the technique used by the national courts of the Contracting Parties. National courts can still use the public policy exception in deciding whether to set aside the normally applicable foreign law violating one of the rights guaranteed in the ECHR. There is no formal need to change course, as the Court in examining whether there has been a violation of the ECHR will only look at the result the national courts have reached in a certain case and not the method leading up to this result. However, the fact that attenuation of the standards of the ECHR in the issue of applicable law in private international law is only allowed insofar as permitted under the ECHR does entail that national courts would do well to take the ECHR into account, as the setting aside of the ECHR
on the basis of the public policy exception for lack of a significant link with the forum could result in a violation of the ECHR. A form of the direct application of one of the rights guaranteed in the ECHR against the applicable foreign law would therefore appear to be a good idea, because such a technique would force national courts to put human rights concerns to the forefront and would consequently decrease the risk of human rights not being emphasized enough.

The rights guaranteed in the ECHR may not only be invoked against the normally applicable foreign law, but they could also be invoked against the most frequent outcome of the application by a court of the choice of law rules of the forum: the lex fori. However, it could be observed that the invocation of the rights guaranteed against the lex fori has not had much success before the Strasbourg Institutions or the national courts of the Contracting Parties. A notable exception is the Court’s judgment in Losonci, although this case was more concerned with the discriminatory nature of the relevant Swiss private international law rules on names, as the application of the lex fori essentially took away a substantive result (a certain name) which could have been reached by applying a foreign law; this option would have been available if the applicant had been a woman. Under those circumstances it is possible to invoke the ECHR against the lex fori. However, in principle, the application of the lex fori over a foreign law would appear not to result in a violation of the ECHR.

The final part of this chapter has been concerned with an entirely different aspect of the impact of the ECHR on the issue of applicable law in private international law, namely the impact of the ECHR on the act of applying foreign law. It follows from the Court’s case law on this subject that national courts should establish the content of the foreign applicable law in an expeditious manner. Otherwise, the Contracting Parties may be held responsible for the length of the proceedings, regardless of the difficulties national courts may face in the identification of the content of the foreign law. If all else fails, national courts should resort to the application of the lex fori. A review of the practice in the national legal orders under analysis has demonstrated that national courts generally have the tools to prevent such violations of Article 6 ECHR.
What, in conclusion, follows from the discussion on the impact of the ECHR on the issue of applicable law in this chapter is that the Convention’s impact is mostly incidental. What I mean by that is that while it is certainly conceivable that the application of a foreign law could result in a violation of one of the rights guaranteed in the ECHR, this is an isolated occurrence which would not appear to have any long-term effects on the system of private international law. In fact, the private international law regimes of States have always taken into account the possibility to set aside a foreign applicable law.

Nevertheless, a reconsideration of the technique used by national courts of the Contracting Parties to scrutinize a foreign applicable law with regard to the rights guaranteed in the ECHR, or at least an increased awareness of the impact of these rights in relation to the use of the public policy exception, may be necessary. The observation on the impact of the ECHR being an isolated occurrence also applies to the invocation of the ECHR against the lexis fori, albeit that it has been demonstrated that this is an even more rare scenario, as there is little evidence that the ECHR can be successfully invoked against the lexis fori, except in cases where the invocation of the lexis fori leads to a discriminatory result.

This may only be different with regard to the third aspect which has been distinguished in this chapter – the impact of the ECHR on the ascertainment of the applicable foreign law. While the national courts of Contracting Parties that have been examined in this chapter appear, in principle, to have the tools to deal with issues relating to the finding of the content of the foreign applicable law, this remains a difficult problem of private international law in general, and thus also deserves attention from the point of view of Article 6 (1) of the ECHR.