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Islamic Law Before German Courts

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I. Introduction

German courts do not always apply German substantive law. Instead, whenever a case has a connection to another country and/or legal system, German Private International Law (PIL) decides whether the courts may actually apply German substantive law or whether they must apply the law of another state or country. In particular "old" PIL rules often demand that the court apply a foreign law. In the past, PIL has focused on the parties' nationality as the primary criterion for the applicable law. Today, such a nationality criterion still exists in the area of marriage. If a German court must decide on whether a Moroccan man and a Chinese woman have validly married, Article 13 of the Introductory Act to the German Civil Code contains the relevant PIL provision:

"The requirements for marriage are governed for each fiancé by the law of the state to which he or she belongs."

Thus, for the marriage of a Moroccan man and a Chinese woman, the German court must consider both the Moroccan and the Chinese law.

In the past, this link to nationality was also used for divorce law and inheritance law, but this is no longer the case: the connecting factor of nationality is increasingly being replaced by the connecting factor of a party's habitual residence. For example, the wording of Germany's old PIL provision on the law of succession read:

"Succession upon death shall be governed by the law of the State to which the decedent belongs at the time of his death."[1]

This regulation has now expired. The new provision originates from the European legislator and reads as follows:

"Except as otherwise provided in this Regulation, the entire succession shall be governed by the law of the State in which the decedent had his habitual residence at the time of his death."[2]

The main advantage of this "new" link to habitual residence is that German courts can usually apply the German law with which they are familiar. If someone brings an action before a German court, he (or she) usually has his (or her) habitual residence in Germany: all of us tend to file law suits at home. Thus, on the one hand the habitual residence in Germany leads to the practical likelihood of this party bringing the action before German courts. On the other hand, it leads to the legal consequence that

German (substantial) law is applicable. The result is a synchronism of jurisdiction and applicable law.

In consequence, due to the link to habitual residence, German courts apply Islamic (or more generally: foreign) law in these areas less frequently than in the past. Nevertheless, it does still happen. The main reason is that PIL rules usually allow the parties a choice of law: an Egyptian testator living in Germany can stipulate in his will that the law of his Egyptian homeland should apply, rather than the law of his German habitual residence.[3] The Moroccan-Chinese couple from the previous example can stipulate in the marriage contract (and also at any time afterwards) that a divorce should be possible under the conditions of Moroccan law[4] and that maintenance claims should later be governed by Chinese law.[5]

II. The Limit of the Application of Foreign Law: the Ordre Public Reservation

When Private International Law stipulates that the court must base its decision on a foreign law, this obviously can lead to the decision turning out differently from how it would if German law were applied. After all, it is precisely the purpose of PIL to judge a matter according to the "appropriate" law and not simply blindly according to German law. Therefore, the court is not allowed to examine whether the result corresponds to German law.

However, there is a limit beyond which German courts may (and regularly must) refuse to apply foreign law: the so-called ordre public reservation. A court must not and may not render a decision that violates the German ordre public, i.e. the German public policy. Such an ordre public reservation can be found in every set of PIL rules. The following example stems from Art. 6 Introductory Act to the German Civil Code:

"A rule of law of another state shall not be applied if its application leads to a result that is manifestly incompatible with essential principles of German law. In particular, it shall not be applied if its application is incompatible with fundamental rights."

However, German courts are very reluctant to apply this reservation. It is extremely rare for a court to leave a foreign law unapplied because it violates German ordre public. The German Federal Court[6] of Justice has set a high threshold: German ordre public is violated only when "the result of the application of foreign law is so strongly at odds with the basic ideas of the German regulation and the concepts of justice inherent in them that it appears intolerable to apply it". Even a violation of fundamental rights is not per se contrary to the ordre public, but rather only if "vital elements" of the fundamental right are violated.

The most important word in the cited ruling of the German Federal Court of Justice is "result". German courts will not review the foreign provision as such, but only the result of its application in a specific case. The difference between the foreign rule as such and the result of its application is particularly stark when regarding the possibility of a divorce by ṭalāq. In principle, it is a fundamental violation of German basic rights to equality[7] if a man is allowed to divorce his wife without any material prerequisites, but the woman, conversely, cannot divorce her husband in the same, or at least in an equivalent, way. Nevertheless, in practice it happens more often than not that German courts do consider a ṭalāq divorce to be valid – namely in cases in which the divorce lies also in the woman's interests (or the woman even agreed to be divorced). It would be preposterous to declare a divorce that lies in the interests of both (former) spouses invalid – simply because the divorce procedure as such (repudiation by the husband) violates equality.

Before I go further into detail, I should address another aspect that amplifies the German courts' reluctance to employ the ordre public reservation. The German Federal Supreme Court has held that for the decision of whether or not foreign law (i.e. precisely: the application of a foreign rule) violates German ordre public, the "degree of domestic relevance" is decisive. If the facts of a case have occurred entirely abroad and even have had effects primarily abroad, a result that deviates from German notions of justice is more likely to be acceptable than in a case that takes place in or has effects towards Germany. Again, the ṭalāq may serve as an example. As mentioned, this unilateral divorce possibility of the man in itself constitutes a significant violation of German fundamental rights. Nevertheless, German courts recognize the divorce as effective, if at the time of the divorce there was no connection to Germany. As an example: 30 years ago, somewhere in Palestine, a Palestinian man married a Palestinian woman, and 20 years ago, still in Palestine, he divorced her by ṭalāq. Two years ago he moved to Germany, met a new woman, and now wishes to marry her. Such a marriage will only be possible if the man is no longer married to his (old) Palestinian wife; multiple marriages are not allowed in Germany. In other words, the man can marry his new wife only if the ṭalāq divorce from the old wife was effective. In such a case, a German court will indeed recognize the ṭalāq divorce as valid. German ordre public is not violated because the divorce itself has no connection to Germany at all. It took place 20 years ago in Palestine, where both spouses also lived at the time.

In summary, the following apply to the ordre public reservation:

1. Courts do not assess the foreign law in itself but the results of its application in the specific case.

2. There is no rigid standard. Rather, the greater the domestic relevance of a case, the stricter will be the standard, and the smaller the domestic relevance, the more generous it will be.

III. Individual Regulations of Islamic Law

1. Starting Point

Following these basic aspects of the German ordre public, I will now present a few concrete decisions in which German courts have ruled on the question of whether or not Islamic law violates the German ordre public – or more precisely: whether the application of Islamic law in the concrete case violated the German ordre public. Specifically, I will address three areas: the law of succession, the law of divorce, and the law of custody. In all three areas, the issue will be whether it violates the German ordre public that men and women are not treated equally by Islamic law.

The starting point will always be that a corresponding provision in German law would be invalid because it violates the German constitution. Its Art. 3 reads:

(1) All persons shall be equal before the law.

(2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.

(3) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions. No person shall be disfavoured because of disability.

As I mentioned before, that foreign law is not in line with the German constitution does not automatically mean that the court must leave it unapplied. Again: first, it is not the law as such that matters, but the result in the concrete case. Thus, the unequal treatment by the law must have an effect on the concrete case. And second, the "degree of domestic relevance" plays a decisive role.

2. Inheritance Law

In many Islamic legal systems, when the wife dies her husband will inherit more than the wife would if her husband died. About 10 years ago, for example, the Higher

Regional Court of Frankfurt[8] had to deal with such a rule of the Egyptian law. The case involved a German-Egyptian couple (German woman, Egyptian man) who had lived in Paris and remained childless. At some point, the Egyptian husband had died. Under

Egyptian law, the wife received only one quarter of his estate. The man's siblings got the remaining three quarters. If the wife had died, the husband would have received half of her assets (and the wife's siblings the other half). This arrangement violated German ordre public, ruled the Frankfurt Higher Regional Court. Men and women must inherit according to equivalent rules and in identical ways. The court therefore awarded half of the husband's inheritance to his wife/widow.

To reach this decision, however, the court had to solve two problems. The first problem was based on the principle that the subject of the ordre public control is not the foreign law itself, but rather the concrete result in the specific case. In this case, the wife received one quarter of the inheritance. Although this is a smaller portion than German law would have granted her (in Germany she would likely have received three quarters), it is probably not contrary to ordre public. The problem was that the unequal treatment of men and women in inheritance law cannot have any effect. Only one person dies, either the man or the woman. And thus, there is never an actual unequal treatment, because the man does not actually inherit more than the woman. The court therefore considered it sufficient in this case, and as an exception to the general principle, that the concrete result was based on a law which is contrary to the German ordre public. The first problem was thus solved (albeit in a very result-oriented way).

The second problem was due to the fact that under German law it is possible for the husband to stipulate (in his will) that the wife should receive only one quarter of his inheritance. Such a will is effective, even if the wife, for her part, does not stipulate an equivalent provision in her will (i.e. even if the husband would inherit one half or even three quarters of her estate). From this legal situation the court drew the following conclusion: if the man knew that his inheritance would be governed by Egyptian law and that his wife would only inherit one quarter of his estate, and if he even thought this was good and right, i.e. if he wanted exactly this inheritance quota, is this not comparable to the situation in which he ordered this inheritance quota in a will?

The court avoided answering this question. It was able to do so because in the specific case it was not clear whether the deceased husband actually knew and wanted Egyptian inheritance law to apply. Therefore, the court saw no reason for an exception.[9] It ruled that Egyptian law violated German ordre public because of the unequal treatment of husband and wife and awarded the wife not only a quarter but half of the inheritance.

However, it would presumably have ruled differently if the man had drawn up a will containing a choice of law in favour of Egyptian law. Then the Egyptian rule corresponds to the will of the testator – and then it must be measured against a different standard, namely the question of the extent to which the husband may also

limit the wife's share of the inheritance under German law. As mentioned, a restriction to one quarter is regularly permissible in Germany.

Note that the decision of the Higher Regional Court of Frankfurt also dealt with another provision of Egyptian inheritance law: under Egyptian law, the woman would have inherited nothing at all because she was a Christian. Such a regulation clearly violates German ordre public. Again, Article 3 of the Constitution is violated, according to which no one may be disadvantaged or preferred because of his or her gender, ancestry, race, language, homeland and origin, faith, religious or political views.

3. Divorce Law

I now change the legal field and return to the living, particularly to living spouses who wish to divorce. In probably most Islamic legal systems, the man can divorce very easily – namely by repudiation, by ṭalāq – whereas the woman has a more difficult time bringing about a divorce. She often has a right to divorce only under strict conditions. In some jurisdictions, however, she can "buy herself off" from her husband by waiving all claims against him – the so-called khulʿ divorce. German courts have already had to measure both forms of divorce, the ṭalāq and the khulʿ, against the German ordre public.

The starting point is the same as in inheritance law: a German rule that grants the husband an easier divorce option than his wife would be unconstitutional because it violates Article 3 (2) of the constitution.

Nevertheless – and this is remarkable – if I see it correctly, there is no judgement in which a German court has considered a divorce by ṭalāq to be invalid. This is because it is not the foreign law that is assessed, but the concrete result. And the concrete result in these cases is usually the same as under German law: the husband could divorce his wife. In Germany, it is sufficient that the marriage has failed. As a rule, this is the case if the spouses have been separated for more than one year.[10] Before a ṭalāq divorce ends up in a German court, more than one year has usually passed, so that the divorce requirements under German law would be met – and if the husband could have divorced under German law, a foreign law divorce does not violate the German ordre public.[11]

Additionally, more often than not, the woman has agreed to the divorce or it is at least in her interests that German courts consider the divorce to be effective (e.g. because she wants to marry another man). In such a case, the talaq divorce does not violate German ordre public.[12]

Remarkably, therefore, ordre public control in the area of divorce law becomes relevant primarily when the woman wants a divorce. If Islamic law stipulates strict

requirements for the wife's divorce (and if these requirements are not met in a specific case), this will often violate German ordre public. In these cases, the unequal treatment of men and women has an effect on the concrete case: the man could have pursued a divorce, while the woman could not.

As a consequence of such an ordre public violation, German courts do not apply the foreign (Islamic) law, but German law instead. If the German divorce requirements are met, courts will grant the divorce.[13]

The same applies if the woman can get a divorce but has to give up all maintenance claims against the man in return, i.e. if only the khulʿ divorce is available to her. In this case she is worse off than the man (who has the option of a ṭalāq divorce), which constitutes an ordre public violation. Again, therefore, German courts will apply German divorce law.[14] In other words, if the German divorce requirements are met, the woman does not have to buy herself off, but can divorce according to the German rules.

To summarize: ordre public control in the area of divorce law does not automatically result in a ṭalāq divorce of the husband being invalid, but it will most likely lead to the result that the wife can divorce her husband according to German law.

4. Unequal Treatment of Men and Women in Custody Law

In most Islamic legal systems, there seem to be regulations according to which children are under the sole authority of the father; the mother has only limited custody rights in terms of time and content. In my understanding, a corresponding regulation also applies in Palestine. In both the West Bank and the Gaza Strip, the mother's custody rights end – at least in principle – for daughters when they reach the age of eleven and for sons when they reach the age of nine.[15]

Again, such a law would be unconstitutional in Germany because it does not treat men and women equally. So again, the question arises as to what German courts will hold when the German PIL orders that the custody decision be based not on German, but on Palestinian law – or more generally, on an Islamic law. Will the courts apply Islamic law and award custody to the father of a twelve-year-old child? Or will they leave Islamic law unapplied because it violates German ordre public?

The German Federal Supreme Court has answered this question twice and in two different ways. The first decision dates back to 1970,[16] when equality in Germany was much less pronounced than it is today. The Supreme Court noted that the regulation of Egyptian (more specifically: Ḥanafī) law violated Article 3 (2) of the Constitution. However, it negated the follow-up question of whether this violated German ordre public. It held that it was not inevitable that courts base their custody decisions on the

concrete circumstances (i.e. the child's welfare) of each individual case. Rather, it was legitimate that the law itself decides the custody question on a general basis e.g. depending on the age of the child. The Supreme court even found the latter (i.e. the Egyptian) solution more practical because it relieves the judge of the difficult examination as to whether the child is better off with the father or the mother. A violation of ordre public would only exist if the child were so badly off with the father that there was reason to fear that his or her development would be endangered. As this was not the case at the time, the Federal Supreme Court applied Egyptian law and awarded custody to the father.

However, that decision is almost 50 years old. Today, the German Federal Court of Justice would decide quite differently. More precisely: the German Federal Court of Justice has already decided differently – in 1992.[17] Its reasoning is as surprising as it is remarkable: it does not matter at all whether the application of foreign (in this specific case: Iranian) law violates the principle of equal rights for men and women. With regard to custody over a child, the parents' interests are of lower priority. Instead, the child's welfare is paramount. A regulation that awards custody to the father without taking the child's best interests into account violates the child's fundamental right to a free development of his or her personality. The same would, of course, also apply to a regulation that awards custody to the mother across the board.

It may indeed be difficult for the courts in many cases to find out where the child is better off, with the father or with the mother. Law and justice are not always easy to establish. But it is the courts' responsibility to surmount these difficulties.

IV. Conclusion

Regulations of Islamic law have repeatedly been put to the test of ordre public scrutiny in Germany, usually because they treat men and women unequally, which is unconstitutional in Germany. But this does not automatically mean that a violation of ordre public must also be assumed because it is not the abstract law that matters, but the concrete individual case. And, in such an individual case, the result of a discriminatory foreign rule may serve well the woman's interests.

The discrimination of women is sometimes not even the decisive aspect. Whenever children are involved, it is not only the interests of men and women that matter, but also – and above all! – the interests of the children.

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[1] Art. 25 Introductory Act to the German Civil Code.

[2] Art. 21 European Regulation No. 650/2012.

[3] Art. 22 Art. 21 European Regulation No. 650/2012.

[4] Art. 5 European Regulation No 1259/2010 (Rome III Regulation).

[5] Art. 8 Hague Protocol on Law Applicable to Maintanance Obligations.

[6] German Federal Supreme Court, 4.6.1992 – IX ZR 149/91, NJW 1992, 3096; German Federal Supreme Court, 2.9.2009 – XII ZB 50/06, NJW 2010, 153.

[7] Art. 3 German Constitution.

[8] Higher Regional Court Frankfurt, 10.5.2010 – 20 W 4/10, BeckRS 2010, 28916.

[9] Likewise Higher Regional Court Düsseldorf, 19.12.2008 – 3 Wx 51/08, NJW-RR 2009, 732.

[10] § 1565 German Code Civil.

[11] German Federal Supreme Court, 6.10.2004 – XII ZR 225/01, NJW-RR 2005, 81; recently Higher Regional Court Frankfurt, 5.4.2019 – 4 UF 35/19, NJW 2019, 3461.

[12] German Federal Supreme Court, 6.10.2004 – XII ZR 225/01, NJW-RR 2005, 81.

[13] Cf. e.g. Higher Regional Court Hamm, 11.10.2010 – 6 UF 59/10, FamRZ 2011, 1056; Higher Regional Court Stuttgart, 24.7.2003 – 17 UF 142/03, FamRZ 2004, 25.

[14] Cf. e.g. Higher Regional Court Koblenz, 19.9.2012 – 13 UF 1086/11, NJW 2013, 1377.

[15] Art. 161 Jordanian Personal Status Law of 1976 (West Bank); Art. 118 Law of Family Rights 1954 (Gaza Strip).

[16] German Federal Supreme Court, 18.6.1970 – IV ZB 6/70, NJW 1970, 2160.

[17] German Federal Supreme Court, 14.10.1992 – XII ZB 18/92, NJW 1993, 848.