Early marriages in German domestic and international private law

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1 Introduction

Since 2015 over 2.5 million people have fled to Europe, more than 1.2 million of whom have sought refuge in Germany, with a high number of Syrians and Iraqi nationals.[2] This influx of refugees from the Middle East has not only sparked demands for tighter border controls and asylum laws but also for changes in private international law. Calls have been made for a stricter take on 'conflict of laws' rules regulating the application of foreign law, in particular laws emanating from an Islamic value system to cross-border family relations. Since the mid-2000ies legislatures across Europe have already been particularly sensitive to marriage law, amending domestic law and private international rules to exclude the application of foreign law through overriding mandatory provisions or escape clauses.[3]

This legislative activism occurred in a political climate which perceives Islamic law as significantly alien and the application of Islamic-inspired Middle Eastern law, as well as the recognition and enforcement of judgments applying this law, as a potential threat to European values. What is however peculiar to this discussion is the inaccurate portrayal of the situation as being completely unprecedented. While it is undoubtedly true that the sheer number of migrants has increased, it is also the case that since the 1960s German courts have been continuously adjudicating Islamic-inspired family law including unilateral divorces, polygynous unions, and underage marriages.[4] Courts have been confronted with practical proof problems related to false or missing documents, to uncertainties regarding the ascertainment of the age of the parties as well as conflicting cultural points of views. From

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[2] Cf. Table with asylum seekers' nationalities from 2011-2020: Bundesamt für Migration und Flüchtlinge, Das Bundesamt in Zahlen 2020: Asyl, https://www.bamf.de/SharedDocs/Anlagen/DE/Statistik/BundesamtinZahlen/bundesamt-in-zahlen-2020-asyl.pdf;jsessionid=7DD92E69FEF10A1E137EB5FFA9889935.internet542?__blob=publicationFile&v=3 , 17. In 2015, 35,9% of asylum seekers in Germany were from Syria, 6,7% from Iraq. In 2020, 35,5% were from Syria and 9,6% from Iraq, *ibid.*, 19.
[3] Examples of legal reforms regarding marriage law in Europe: France (2006), Switzerland (2012), Spain (2015), the Netherlands (2015), Denmark (2017), Norway (2007/2018), Sweden (2004/2019) and Finland (2019); See also Ralf Michaels, 'Gut gemeint und schlecht gemacht,' Verfassungsblog (04.02.2021), https://verfassungsblog.de/gut-gemeint-und-schlecht-gemacht/
[4] Regarding unilateral divorces see: Bayrisches ObLG (Bavarian Higher Regional Court) 13 January 1994, NJW-RR 1994, 771; Bayerisches ObLG 07 April 1998, NJW-RR 1998, 1538 (1539) (recognized talaq divorce); BGH (Federal Supreme Court) 06 October 2004, DNotI-Report 2004, 210; OLG (Higher Regional Court) Frankfurt am Main 05 April 2019, NJW 2019, 3461 (para. 12: German ordre public does not apply where a divorce is also possible under German law in the specific case); regarding polygynous unions see: LG (Regional Court) Hamburg, 10 January 1990, NStZ 1990, 280 (281); BGH 10 January 2001, FamRZ 2001, 991; OLG Frankfurt am Main 03 August 2005, LSK 2006, 080334; regarding underage marriage see: Appelate Court (KG) 07 June 1989, FamRZ 1990, 45; AG (District Court) Hannover 07 January 2002, FamRZ 2002, 1116; AG Offenbach 30 October 2009, FamRZ 2010, 1561; KG 21. November 2011, NJOZ 2012, 165 (166).

this perspective Islamic law in European courts is an old story. However, what is potentially new is the perception of the function of private international law in this context.

Private international law is meant to be an impartial set of norms created to determine the closest connection of a legal system to any given family relation through the selection of connecting factors. While policy choices do inform this selection, and for that matter are not neutral, the determination of the applicable legal system until now has not asked whether the envisaged connecting factor will lead to any particular legal system but – in theory – seeks to identify the closest connected jurisdiction to the case. Value choices become relevant only later, since courts have discretion to discard the otherwise applicable foreign law – of whatever provenance – if the result of its application in the particular case appears to be intolerable with respect to the fundamental values of the domestic legal framework. This procedure is seen as both inherently acknowledging the international character of cross-border family relations and at the same time respecting and safeguarding the boundaries of the fundamental frame of the domestic legal system.

However, as a result of the presence of a great number of Muslim foreigners in various European countries this order is being questioned with far-reaching consequences. Also, one has to bear in mind that this is not a process that started in 2015 with Syrian or Muslim refugees coming to Europe, it is a process that has left its mark in European private international law as is illustrated in particular by Art. 10 of the Rome III Regulation regarding the application of foreign divorce laws in European courts. According to Art. 10 Rom III Regulation, foreign divorce laws are not to be applied in European courts, where the applicable law "does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex". This rule was meant to be a protective rule to exclude discriminatory laws from European courts, a so called positive ordre public clause. However, contrary to the nature of ordre public clauses so far, Art. 10 solely focuses on an abstract evaluation of the foreign law disregarding the facts of the concrete case.[5] The drafting process shows that Article 10 was the result of long-standing debates, during which Scandinavian countries in particular voiced its reluctance to apply what it perceived to be discriminatory Islamic divorce laws.

In this short piece, I want to explore how this paradigm shift took place and how the narratives of Islamic law and Muslims have shaped new legislation in Germany. I shall exemplify this with the new German regulations on early marriages.

[5] See *Gössl, Susanne,* Family Law and Successions, Open Issues in European International Family Law: *Sahyouni*, "Private Divorces" and Islamic law under the Rome III Regulation, The European Legal Forum Issue 3/4, 2017, 68-74; *Möller, Lena-Maria,* No Fear of Ṭalāq: A Reconsideration of Muslim Divorce Laws in Light of the Rome III Regulation, Journal of Private International Law, Vol. 10 (2014), 461−487.

2 Muslim migration to Europe

In Europe, Islam is the second largest religious belief after Christianity. The majority of Muslim communities in continental Europe are of recent migrations, but there are also Muslim-majority European countries such as Albania, Kosovo, and Bosnia-Herzegovina. Since the 1960s, the number of Muslim immigrants to Europe has significantly increased, along with the overall increase of immigrants to Europe. These were in particular Turkish nationals followed by nationals from Northern African countries. Since the 1970s, Muslim communities have begun to stabilise and grow in Europe as first and second-generation migrants have become more settled. During the 1970s and 1980s, Muslim foreigners already living in Europe had opportunities to gain citizenship, by which Muslim populations in Europe increased once again.[6]

The very recent increase of Muslims in Europe and here in particular in Germany is a result of the refugee crisis since 2010. According to statistics the number of Muslims living in Germany has risen from 3.3 million (4.1% of the population) in 2010 to nearly 5 million (6.1%) in 2016, while the rest of the population shrank modestly from 77.1 million to 76.5 million.[7]

Although demographical evidence shows that Germany has a long history of immigration and has de facto been a country of immigration for decades,[8] one has to see that German society has not grown to become a society of immigration yet. There are still many prejudices and stereotypes that have a negative impact on living together in society. This is becoming visible in particular in the views of some that the state has not reacted adequately to this 'wave' of refugees, perceived mainly as an overkill leading to feelings of insecurity in the population. The combination of diffuse anxieties and existential fears matched with a perceived inadequate political reaction have facilitated the rise of xenophobia and the call to safeguarding inherent values that are seemingly under threat.

Interestingly, these fears are articulated in particular in the East of Germany, a region where there have hardly been any foreigners living in the last decades. It seems that a disconnect is occurring between social realities and the perception of these realities by the people. As a consequence, demands have been put forward to take these fears seriously and translate them into policy and to ultimately generate law.

[6] Cf. www.bpb.de/politik/grundfragen/deutsche-verhaeltnisse-eine-sozialkunde/138012/geschichte-der-zuwanderung-nach-deutschland-nach-1950?p=all

[7] See https://de.statista.com/statistik/daten/studie/72321/umfrage/entwicklung-der-anzahl-der-muslime-in-deutschland-seit-1945/

[8] *Feld*, *Doerr*, *Hirsch et al.*, Zuwanderung nach Deutschland von 1945 bis heute, Malteser Migrationsbericht 2017, 8-27, www.malteser.de/fileadmin/Files_sites/malteser_de_Relaunch/Angebote_und_Leistungen/Migrationsbericht/Kapitel1_Zuwanderung_nach_Deutschland__aus_Malteser_Migrationsbericht_2017_es.pdf

3 The rationale of private international law

3.1 Religion as a connecting factor

In the context of the private international law of European countries, being a Muslim or for that matter having any religion is actually irrelevant.[9] That is not to say that religion does not play a role at all, but at the first level of the construction of European private international law religion is not an issue, because it is not a connecting factor.

However, religion or at least religiously based law may enter the arena of family law, where the law of the nationality of a person or the place of the celebration of a marriage or any other relevant connecting factor points to the family law of jurisdiction that is based on a religious foundation. Family law is based on religious foundations in all countries of the Middle East, and this is certainly true for Syria, Iraq, and Afghanistan, which are the countries of origin of the majority of the refugees.[10] At the same time, German courts have been adjudicating foreign Islamic-inspired law for decades now. Despite this regular practice, however, an unease is felt and demands to tighten the private international law rule to exclude Islamic law or – as it is put in popular media – to discard the sharia from Germany have been put forward. Thus, German private international law lawyers were faced with questions such as: Are we sufficiently equipped with the known techniques of private international law to handle the situation? Do we need new instruments to prevent unwanted laws and traditions of these foreigners to be applied?

3.2 Early marriages and marriageable age

Early marriages are a global phenomenon cutting across nations, religions, cultures, and ethnicities. Minors, in the majority young girls and adolescents, are being married in every region of the world, from the Middle East to Latin America, from South Asia to Europe.[11] The reasons for these early marriages are manifold, including poverty, insecurity, and political and financial instability. Although statistically early marriages are decreasing globally,[12] UNICEF estimates that over a quarter of all marriages worldwide still involve a person under the age of 18 years today.[13]

In Germany, until 2017, the question of the marriageable age was addressed differently in domestic and in private international law. According to German domestic law (i.e. § 1303 BGB old

[9] For an exception under Greek law, see *Assimakopoulou*, Applicable Religious Rules according to the Law of the State in Greece, RHDI 67 (2014) 731; see also the case *Molla Sali v. Greece* (Application no. 20452/14), judgement of the European Court of Human Rights of 19 December 2018.
[10] Concerning Germany (See *supra* note 1) as well as the European Union, where almost one third of asylum seekers in 2020 originated from Syria, Iraq and Afghanistan, See: EU Commission, Statistics on migration to Europe, Top 15 nationalities of first time asylum applicants (2020), https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en
[11] See www.girlsnotbrides.org/where-does-it-happen/
[12] See https://data.unicef.org/topic/child-protection/child-marriage/
[13] See www.pbs.org/now/shows/341/facts.html

version), a marriage should not be entered into before the parties reach the age of majority (i.e. 18 years). The family court could however, on application, grant exemption from this where one to-be-spouse had reached the age of sixteen and the other was of full age.[14] The consequences of an infringement led to the voidability of the marriage. Private international law on the other hand regulated the way in which an early marriage performed abroad or by foreign citizens should be treated in a domestic court differently. According to Art. 13 old version of the Introductory Act to the Civil Code (EGBGB) the conditions for the conclusion of marriage were, as regards each person engaged to be married, governed by the law of the country of which he or she is a national. Also, according to Art. 11 EGBGB the form of the celebration of the marriage was governed either by the law of the country in which the marriage was performed or by the law which was applicable to the legal relationship forming the subject matter of the legal act. If the marriage was valid according to this test, the last hurdle it had to pass was that of public policy. According to Art. 6 EGBGB a provision of a foreign law may be discarded where its application would lead to a result which is manifestly incompatible with the fundamental principles of German law. In particular, inapplicability ensues if its application would be incompatible with civil rights. Also, there must be a strong connection of the case to Germany. Finally, the German ordre public requires an evaluation in the present, not in the past: the fact that a person married at a very early age is just the starting point, the situation must still be unbearable at the moment it is being examined in court for the sword of ordre public to strike. In other words, it is a narrow window based on an *in concreto* consideration of the current situation of the persons involved that has to be considered, not abstract considerations of right and wrong alone.

The consequence of a public policy infringement is the invalidity of the marriage in Germany leading to limping situation where the parties are married in one and unmarried in another jurisdiction. Clearly, this situation is an unpleasant one for the parties, but it is the logical consequence of a system where each case is considered on its own merits.

4 The judicature of German courts

Over the last decades German courts have regularly been seized with regards to underage marriages and have come to develop fairly differentiated guiding principles to assess each case on its own merits. First, the courts have assessed the intellectual maturity of the spouses and their ability to understand and foresee the consequences of their will and actions.[15] Further, the courts have been cautious in weighing the consequences of the application of public policy in view of avoiding as much as possible limping statuses, protecting the trust of the spouses in the validity of their union, [16] avoiding any undue hardship

[14] §1303 para 1 and 2 Civil Code (BGB) old version.
[15] See KG Berlin 21 November 2011, NJOZ 2012, 165 (166); AG Wuppertal 18 April 2016 – 64 F 154/15 (on file with author); AG Offenbach 30 October 2009, FamRZ 2010, 1561.
[16] See AG Hannover 7 January 2002, FamRZ 2002, 1116 (1118); AG Schwerin 14 December 2007 – 19 III 19/06 (on file with author).

for them, and taking into account the possible consequences on the relations of a father to his child and the interest of the child in a stable family.[17] Finally, courts have been willing to listen to the spouses' own wishes.

One has to bear in mind, that foreign marriages do not need a formal recognition in Germany. The existence of a marriage is always an auxiliary question where its existence is a pre-requisite for another claim, for example for a divorce or more practically the registration of a common child or the determination of the child's name. In any case the evaluation of a marriage concluded abroad with an underage spouse was always considered *in concreto* relying on the circumstances of each individual case. As a result, outcomes differed and while one could criticise that an objective direction cannot be identified, this is the only adequate way to do justice in each individual case.

5 The Act to combat child marriages of July 2017

The Act to Combat Child Marriages was enacted in a very short time in July 2017.[18] Although a broad debate was intended and announced and expert opinions were written on a circulated draft in April 2017, in the end the Act did not take up any of the critical points. The Act orders amendments to Art. 13 EGBGB as well as to domestic marriage law in the German Civil Code (BGB). According to the new Art. 1303 BGB a marriage can only be concluded in Germany where both spouses have reached the age of majority, ie 18 years. The option of concluding a marriage earlier with the permission of the court was abandoned. Further the Act treats domestic and foreign underage marriages alike and subordinates both to domestic law disregarding the applicable foreign law. While Art. 13 para 1 EGBGB remained untouched and continues to determine the substantive conditions of the validity of a marriage according to the law of nationality of each spouse, a new para 3 has been inserted that allows to discard the applicable foreign law. According to the new Art. 13 para 3 EGBGB, if foreign law governs the marriageable age of one party, a marriage where one party had not reached the age of 16 at the time of the conclusion of the marriage shall be considered as invalid under German law, while the marriage of a person that has reached the age of sixteen but not eighteen at the time of the conclusion of the marriage shall be mandatorily voidable. This new paragraph operates as a positive public policy clause, setting aside foreign law, regardless of its content, and more importantly generalising public policy considerations without regard to the individual circumstances of the case.

The Act also contains temporal law limiting the scope of application of Art. 13 para 3 EGBGB to spouses born after 22 July 1999, by that excluding spouses that are already major at the time of the enactment of the Act, even if they were underage at the time of the conclusion of the marriage.[19]

[17] AG Wuppertal 18 April 2016 – 64 F 154/15 (on file with author); KG 21 November 2011, NJOZ 2012, 165 (166).
[18] Gesetz zur Bekämpfung von Kinderehen, BGBl. 2017 Part I no. 48, 21. Juli 2017, 2429-2433.
[19] Art. 2 Act to Combat Child Marriages.

6 Critical appraisal of the Act

Non-compliance with § 1303 BGB is very rare. Also, raising the age of marriage in Germany was certainly reasonable as it reflects the practice of the vast majority of people. Typically, religiously conservative and poor people as well as foreigners have used this exemption provided in the former version of § 1303 BGB. In practice, the age of (first) marriages has considerably gone up and not marrying is an equal option. But there is a significant difference between national and international cases.

First, considerable contextual and legal differences have to be considered when adjudicating on a marriage that has been already been concluded abroad or one that is to be concluded in Germany. Second, the new law stripes the parties of any autonomy to intervene and have a voice in the process to decide for their own. As a consequence, an underage spouse that has been forced into a marriage by one system is being forced out of it by another system. Autonomy is also declined to relevant state organs. The administrative organs, youth centres and other public officials are under the obligation to refer cases involving persons married before reaching the age of 16 to the courts and the courts are obliged to invalidate the marriage, without any option to exert discretion. Third, all early marriages concluded abroad that fall under the ambit of the new law will be limping marriages – valid in the country where the marriage was concluded and non-existent or rescinded in Germany. While limping status are - as mentioned above – a unavoidable consequence of the application of the public policy as a corrective tool of private international law in individual cases, the abolition of the public policy test will lead to 100 percent of those marriages being in a limbo with far-reaching consequences for the couples.

Finally, and most importantly the very principle that has allegedly incited politicians and lawmakers to take up these cases, namely the principle of the best interests of the child, has been completely left aside. Rather, it has been substituted by an objective view of the welfare of children in disregard of any individual case. The judgment of the best interests of a child on an abstract level only is paradoxical and might in many cases lead to result not suitable for the particular case. This regards the underage spouse as much as potential children born into the marriage.

Fortunately, these criticisms have not gone unheard: The case that has sparked the attention of the media and the judicature was referred to the Federal Court of Justice (BGH).[20] It concerned a Syrian refugee couple who had come to Germany in 2015. At the time of the marriage in Syria, the husband was 21 and the wife 14 years old. After lower courts had held the marriage to be effective under existing law, the legislature tightened the law such that recognition of the marriage would be precluded. The BGH considered the case under both the old legal situation and the new Act and, instead of applying the new law, referred the case to the Federal Constitutional Court (BVerfG) for determination whether the

[20] See the judgement rendered in the case by the BGH, BGH 14 November 2018, FamRZ 2019, 181 (181).

new legal provisions combating child marriages were constitutional. The case is still pending with the Constitutional Court, as of 1. August 2021.

7 Evaluation by the Max Planck Institute

In December 2019 the Max Planck Institute was asked by the Constitutional Court to give its opinion on the constitutionality of Art. 13 para 3 no. 1 EGBGB. We examined, in particular, the question of whether some foreign marriages that do not comply with the requirements of German law are nevertheless worthy of protection. We constituted an ad hoc team of 30 scholars to examine the legal and practical treatment of early marriage in around 60 legal systems worldwide. In addition to many Muslim jurisdictions, the survey includes European countries inside and outside the EU, the USA, Japan and various countries in Latin America.[21]

The empirical part of the study examines the practice of early marriages. Our paper shows how different value judgments about marriage and family, as well as the role of minors and the sexes, shape the practice of early marriages. In many countries and cultures, only the status of being married enables sexual contact. Also, sometimes it is only marriage that allows one to assume a recognised position in society that cannot otherwise be achieved simply by attaining a certain age or by completing an education. The diversity of social and economic reasons for concluding an early marriage must be considered when assessing whether any particular early marriage is worthy of legal protection.

Further, we compared legislation on the age of marriage and the ways in which courts have been evaluating early marriages. Entering into a marriage presupposes the capacity to marry. Its legal regulation reflects the judgments of legislatures as to the point in time when people have the necessary physical and mental maturity to foresee – and accept – the consequences of a marriage. In some legal systems, this point in time is generally prescribed and pegged to fixed age limits. In other countries, it is determined on the basis of variable criteria, such as physical or mental maturity or the best interests of the child. Often, authorities have a margin of discretion in individual cases when determining the capacity to marry. The laws of all legal systems aim to protect people, in particular vulnerable ones. This principle is interpreted and implemented in a variety of ways. Finally, we juxtaposed the conflict of law rules of various countries to understand how foreign early marriages are seen in each jurisdiction.

Our international comparison showed that the German legislation is unusually strict and may lead to exceptional hardship in individual cases. The Act to Combat Child Marriages does not allow any leeway for the assessment of individual circumstances, nor does it permit married couples to assert their position within the framework of a formal legal process. The non-recognition of a marriage that has already been

[21] See *Max-Planck-Institut*, Die Frühehe im Rechtsvergleich: Praxis, Sachrecht, Kollisionsrecht, Rabels Zeitschrift für ausländisches und internationales Privatrecht 84 (2020) 705-785; see for an updated report (as of April 2021) and all country reports, *Nadjma Yassari, Ralf Michaels* (eds), Die Frühehe im Recht, Praxis, Rechtsvergleich, Kollisionsrecht, höherrangiges Recht, 2021.

concluded withholds this status from exactly those minors who are being deemed in need of protection. The prohibition of early marriage may well prevent the celebration of marriages by minors in Germany (which, however, had already been rare), but there is no evidence that the non-recognition of such marriages by the German state will lead to their being concluded less frequently abroad. A deterrent effect cannot therefore be expected.

So, is the Act unconstitutional? We think that private international law usually protects the legitimate expectations that come from an effective status. Withholding legal effect from marriages otherwise effectively concluded abroad can represent an assault on the constitutional protection of marriage and the family – as it must be recalled that, according to the Basic Law, this protection is available to all people regardless of origin and age.