The Application of Iranian Succession Law in German Courts and its Compatibility with German Public Policy

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With almost 90,000 Iranian citizens in Germany, the application of Iranian succession law in German courts has become inevitable. Solving the problems inherent in the application of Islamic-based succession law, however, remains a difficult task. It is in this very field of succession law that the clashes between the German and Iranian legal systems become most visible, when constitutional principles such as freedom of religion, prohibition of discrimination for gender reasons, and the neutrality of the state in religious matters are at stake. In the following I shall explore how Iranian succession law has found its way into the German system through the German conflict of laws rules, and give examples of some significant cases decided by German courts.

A. International Private Law in Succession Cases

I. Jurisdiction of German courts in succession cases

The German courts have jurisdiction in cases of succession whenever German law is the applicable law. If foreign law applies, German courts will be competent to hear the case under the conditions of § 2369 German Civil Code (Bürgerliches Zivilgesetzbuch, hereafter abbreviated BGB)[1].

According to § 2369 BGB, German courts can issue a certificate of inheritance (Erbschein) if the estate of the deceased contains objects situated within Germany. For the purposes of § 2369 BGB, claims that a German court is competent to hear are considered to be situated in Germany.

II. The German conflict of laws rules

According to Article 3 of the Introductory Act to the German Civil Code (hereafter abbreviated EGBGB), international conventions that have been transformed into national German law take precedence over the provisions of domestic conflict of laws rules. We have to consider here the German-Iranian Agreement of February 17, 1929[2], which, as far as it applies, displaces the German conflict of laws rules.

In the field of succession law, we also have to consider other international conventions to which Germany is a party, such as the Hague Convention on the Form of Testamentary Dispositions[3].

III. The German-Iranian Agreement

Generally, the German-Iranian Agreement only applies when all the parties concerned have exclusively one and the same nationality[4]. In the field of succession law, it is only the nationality of the deceased that matters[5]. Since the circle of heirs and beneficiaries is not clear at the moment of death, it would be

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[1] *Palandt(-Edenhofer)* BGB[63] (2004) § 2369 BGB note 3.

[2] Niederlassungsabkommen zwischen dem Deutschen Reich und dem Kaiserreich Persien (German-Iranian Agreement, hereafter abbreviated GIA) RGBl. (Bulletin of Laws of the German Empire) 1930 II, 1002, 1006; 1931 II, 9; affirmed after World War II in BGBl. (Federal Bulletin of Laws) November 4, 1954 II, 829.

[3] Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions, October 5, 1961.

[4] BGH, December 20, 1972, BGHZ 60, 68; *Krüger*, Kollision von Staatsverträgen: FamRZ (1973) 6 (8); *Schotten/Wittkowski*, Das deutsch-iranische Niederlassungs-Abkommen im Familien- und Erbrecht: FamRZ (1995) 264; *Staudinger(-Dörner)* BGB[10] (2000) remarks before Article 25 EGBGB note 147 ff.

[5] Article 8 sect. 3 GIA.

too uncertain to leave the determination of the applicable law to such an indefinite factor. Article 8 GIA reads:

> Sect. 1: The nationals of the contracting states shall enjoy on the territory of the other state the same rights as their own nationals as far as their judicial and magisterial rights and the protection of their person and goods are concerned.
>
> Sect. 2 [...]
>
> Sect. 3: In matters of personal, family and succession law, the nationals of each state will be governed by their respective national laws. The application of this law can only exceptionally be restricted or excluded, and only insofar as such restrictions or exclusions are valid against all foreign states.

According to the final protocol of the German-Iranian Agreement, matters of personal, family, and succession law, i.e., matters of personal status, include the following: marriage (ezdevāğ), matrimonial regime (tartīb-e amval beyn-e zouğeyn), divorce (ṭalāq), separation (efterāq)), dowry (ğeḥīz), paternity (obovat), kinship (nasab), adoption (qabūl-e farzandī), legal capacity to act in law (ahliyat-e ḥoqūqī), puberty (bolūq), guardianship and custody (velāyat va qeymūmat), deprivation of legal capacity (ḥağr), will and intestate succession (ḥaq-e vorāṯat), probate proceedings and division of estate (taṣfīe va taqsīm-e tarake va amvāl), and all matters relating to family law and personal status (masā'el marbūte be ḥoquq-e hānevādegī va ahvāl-e šaḥṣiye)[6].

For the sake of Article 8 sect. 1 GIA, the word "nationals" refers to sole nationality. If the deceased is an Iranian national only, issues of succession and inheritance will be governed by the German-Iranian Agreement. German courts will then apply Iranian law to all questions of succession, including administration of estate, ability to inherit, and seize of shares.

It has to be noted that the applicable law under the German-Iranian Agreement is practically the same as the applicable law under the German conflict of laws rule of Article 25 EGBGB, since according to Article 25 EGBGB the nationality of the deceased is the connecting factor in succession.

IV. Choice of law

There is, however, a difference between the German-Iranian Agreement and German domestic rules. The German conflict of laws rule in Article 25 sect. 2 EGBGB enables the testator to choose by last will German law to govern real estate located in Germany (Articles 15 sect. 2 and 25 sect. 2 EGBGB)[7]. The German-Iranian Agreement on the other side does not contain such a provision.

Article 8 sect. 3 sentence 1 GIA only refers to the law of the nationality of the concerned party, without mentioning the possibility of a choice of law.

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[6] Final Protocol to the German-Iranian Agreement, RGBl. 1930 II, 1012.

[7] On choice of law in international succession law, see generally *Riering*, Die Rechtswahl im internationalen Erbrecht: ZEV 11 (1995) 404-406.

Taking into account that according to Article 3 sect. 2 EGBGB the German-Iranian Agreement displaces the domestic conflict of laws rules, there is also no room for the application of Article 25 sect. 2 EGBGB; thus no choice of law is possible and it would have to be disregarded[8].

Furthermore, the German-Iranian Agreement refers to the substantive Iranian law, excluding its conflict of laws rules, so that also here there is no room for a choice of law under Iranian conflict of laws rules either.

V. The Hague Convention on the Form of Testamentary Dispositions

It is questionable whether the German-Iranian Agreement also governs the practically very important field of the form of testamentary dispositions. Therefore, the question is this: Is a last will drafted by an Iranian citizen in Germany valid if it observes the substantive German rules of the BGB[9] but does not obey the Iranian rules[10] in this matter? According to Article 3 sect. 2 EGBGB, does the German-Iranian Agreement displace the rules on the form of testamentary disposition of the Hague Convention? This question is insofar relevant as Iran is not party to the Hague Convention, and the rules of the Hague Convention will not be applied in Iran.

The German-Iranian Agreement and its protocol specify that only matters of personal status shall be within the scope of the application of the German-Iranian Agreement. Since this is the explicit wording of the German-Iranian Agreement, it can be argued that the contracting states did not intend to include questions of form into the scope of application of the German-Iranian Agreement[11]. Thus, as far as form is concerned – in the German view – the Hague Convention has to be applied as loi uniforme, that is, regardless of the fact that Iran has not ratified the Hague Convention[12].

According to the Hague Convention, the form of a testamentary disposition will be governed by the law of the state in which the disposition has been established. So in the aforementioned case of an Iranian who disposes in Germany by last will, his will is considered valid if the German rules of the German Civil Code are observed, regardless of its formal requirement under Iranian law.

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[8] See *Erman(-Hohloch)* BGB[10] (2000) Vol. 2 Article 25 EGBGB note 4; *MünchKomm (-Birk)* BGB[3] (1998) Article 25 EGBGB note 295; *Schotten/Wittkowski*, FamRZ (1995) 269. Contrary to this point, *Staudinger(-Dörner)* (n. 4) remarks before Article 25 EGBGB note 149; and the decision of the LG Hamburg from February 12, 1991, where the court did not consider this point and accepted the choice of German law of an Iranian testator; see LG Hamburg, IPRspr. (1991) No. 142, 264-275 (273).

[9] § 2229 ff. BGB.

[10] Iranian Probate Code of June 23, 1940 (qānūn-e umūr-e ḥesbī) Article 276 ff.

[11] *Schotten/Wittkowski*, FamRZ (1995) 265; *Staudinger(-Dörner)* (n. 4) remarks before Article 25 EGBGB note 151.

[12] *Schotten/Wittkowski*, FamRZ (1995) 269; IPG (1997) No. 44, 577-592 (578).

VI. Conclusion

We can thus conclude that the German-Iranian Agreement regulates questions of the application of substantive law. Topics concerning only formal questions are outside the scope of its application. The Hague Convention will govern formal requirements for testamentary dispositions, and the procedure will be governed by the German procedural rules on inheritance certificates[13].

B. Public Policy

I. Applicability of public policy clause in Iranian succession cases

Once we have detected the applicable law, which in the case of a deceased Iranian is Iranian substantive law, its application can be restricted or excluded where matters of public policy are involved[14].

Since it is an international contract – the German-Iranian Agreement – that determines the applicable law, we have to turn to it to see whether its regulation or the absence of regulation allows, restricts, or excludes the intervention of public policy. This is a matter of interpretation of the specific rules of the German-Iranian Agreement.

II. The public policy clause of Article 8 sect. 3 sentence 2 GIA

According to Article 8 sect. 3 sentence 2 GIA, the application of the substantive law of any of the two contracting states can only exceptionally be restricted or excluded, and only insofar as such restrictions or exclusions are valid against all foreign states. That means that the non-application of a foreign rule can only be justified if its application would equally be unacceptable in the German view if it resulted from the application of any other (other than the Iranian) legal system.

Article 8 sect. 3 sentence 2 GIA thus contains a general rule allowing for the introduction of public policy considerations. Exceptional rules for the purpose of Article 8 sect. 3 sentence 2 GIA are the general and specific rules on public policy of the contracting parties[15]. The judicature of the German Federal Supreme Court and the high courts and the legal literature have emphasised and confirmed the applicability of the public policy clause of Article 6 EGBGB to be within the scope of Article 8 sect. 3 sentence 2 GIA. In other words, Article

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[13] *Palandt(-Edenhofer)* (n. 1) § 2369 note 12.

[14] See generally *Rohe*, Rechtsfragen der Eheschließung mit muslimischen Beteiligten: StAZ (2000) 161; *Scholz*, Islam-rechtliche Eheschließung und deutscher ordre public: StAZ (2002) No. 11, 321-324.

[15] *Staudinger(-Dörner)* (n. 4) remarks before Article 25 EGBGB note 157.

8 sect. 3 sentence 2 GIA opens a door for Article 6 EGBGB to control the result of the application of the foreign rules for public policy reasons[16]. These public policy rules are particularly relevant in the field of succession law.

III. Conditions under which the German public policy clause is applicable

Article 6 EGBGB provides that a foreign legal provision shall not be applicable if the result of its application is obviously incompatible with essential principles of German law. The foreign rule shall not be applicable, especially when it is incompatible with the German Basic Law, the Grundgesetz (hereafter abbreviated GG).

Public policy thus strikes generally under two conditions: first, if the result of the application of the foreign rule is in an unbearable discordance with fundamental principles of justice, or the German constitution[17]; and second, there must be a strong connection to Germany. This can be a German domicile, the German citizenship of the heirs, the fact that the deceased lived in Germany for a long time, planned his/her life here, married a German citizen, had children that were born and raised in Germany, and so on[18].

Furthermore, every case has to be considered by itself; it is the concrete case that matters, not abstract considerations on the possibility of infringement of a constitutional right. And finally, all this stands under the principle that public policy shall be applied within very narrow limits and used very scarcely and cautiously.

The field of international private law includes an acknowledgement of the principle of equality of legal orders from whatever origin. Public policy within the framework of private international law is not a tool to scrutinise foreign legal rules on the basis of their compatibility with domestic rules[19]. The argument of public policy can only be raised exceptionally and, considering the extremely different regulations in German and Iranian succession laws, only insofar as the result of the application of the foreign rule would be incompatible with the German constitution and where there is a strong enough connection to Germany[20].

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[16] OLG Hamm, IPRspr. (1992) No. 159, 340-346 (342); OLG Hamm, IPRax (1994) 49-55 (52).

[17] *Staudinger(-Blumenwitz)* BGB (2000) Article 6 EGBGB note 86; *MünchKomm (-Sonnenberger)* BGB[3] Article 6 EGBGB note 47.

[18] *Palandt(-Heldrich)* (n.1) note 6.

[19] So *Hohloch*, Versagung nachehelichen Unterhalts und deutscher ordre public: JuS 2000, 403; OLG Zweibrücken FamRZ (2000) 32.

[20] BGH, October 14, 1992, BGHZ 120, 29-38 (34); OLG Düsseldorf FamRZ (1998) 1113-1115 (1115).

C. Cases

I. OLG Hamm, ruling from April 29, 1992

One of the most debated cases with regard to the application of Iranian succession law and its compatibility with German public policy was decided by the High Court of Hamm on April 29, 1992[21].

1. Facts of the case

In 1988 an Iranian citizen died intestate in Germany. He had come to Germany at the age of 20 in 1952, had studied medicine and had become a surgeon, establishing his permanent residence in Germany. He also owned a carpet business and considerable land property in Germany. In 1962 he married a German woman and had three sons. On his death, his father had died, but his mother, who also lived in Germany, was still alive[22]. Because he had only Iranian citizenship, the German-Iranian Agreement had to be applied, leading to the application of Iranian succession law.

2. Iranian inter-religious law

The formulation of succession rules is not only considered one of the most outstanding achievements of Islamic legal science, but also the part of law with a particularly strong religious significance, mainly for the reason that it is largely based on numerous qur'ranic provisions[23].

As such, it is inter-religiously divided, meaning that each religious community has its own succession law. Iranian family and succession law is thus divided across religious lines[24]. That means that Shī'ī Muslims are governed by the Iranian Civil Code (hereafter abbreviated CC), which is a reflection of Shī'ī succession law. Officially recognised religious communities such as the Christians, the Jews, and the Zoroastrians are governed by their own religious rules

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[21] High Court of Hamm, Decision of April 29, 1992, reference number 15 W 114/91. OLG Hamm, IPRax (1994) 49-55 = JMBl NW (1992) 259-262 = FamRZ (1993) 111-116; *Dörner*, Zur Beerbung eines in der Bundesrepublik verstorbenen Iraners: IPRax (1994) 33-37; *Lorenz*, Islamisches Ehegattenerbrecht und deutscher ordre public: Vergleichsmaßstab für die Ergebniskontrolle: IPRax (1993) 148-151.

[22] OLG Hamm, IPRax (1994) 49-55 (49).

[23] On the Iranian law of succession, see generally *Emāmī,* ḥoqūq-e madanī[3] [Civil Law] Vol. 3, (1985); *Kātūzīān,* erṯ (succession) (2001).

[24] On the law of religious minorities in Iran, see: *Fahīmī,* barresī-e aqalīyathāy-e dīnī dar ḥoqūq-e eslām va Irān [comparative studies of the successions laws of religious minorities in Islamic and Iranian Law] (2003); *Sanasarian,* Religious Minorities in Iran (2000).

(Principle 12 and 13 of the Constitution of the Islamic Republic of Iran of 1979 as amended in 1989, hereafter abbreviated IRI Constitution 1979).

In 1933 a law was passed called the Act on the Observance of the Personal Status of non-Shī'ī Iranians in the Courts from August 1, 1933. It provides that in matters of personal status and intestate and testamentary succession of non-Shī'ī Iranians whose religion has been officially recognised, the courts must apply the religious rules and customs of their respective communities[25].

In this case, the deceased Iranian was not Muslim but belonged to the Baha'i religion, which is not officially recognised in Iran. Adherents to the Baha'i religion are officially considered to be misguided Muslims[26], and in matters of family and succession law they are treated as Shī'ī Muslims.

3. *Ruling of the court*

The court applied the provisions of the Iranian civil code for the division of the estate. It found inter alia that the mother of the deceased was considered an heir with a share of one-sixth of the estate, the widow was entitled to one-eighth of the movable estate, and the sons would inherit equally the remaining estate[27].

The ruling concerning the share of the widowed wife was based on the Iranian succession rule of Article 913 CC, which reads:

> In all cases mentioned in this subsection, whichever of the spouses survives the other takes his or her share and this share means one half of the estate for the husband and one fourth for the wife if the deceased has left no children or children's children, and one fourth of the estate for the husband and one eighth for the wife if the deceased has left children or children's children; the remainder of the estate will be divided among the other heirs in accordance with the preceding articles.

Thus under Iranian law a widowed wife will get half of what a widowed husband would get if his wife had died[28]. The family of the deceased appealed and argued that German law should be applied[29]. Alternatively, if Iranian law was to be the applicable law, they argued, the provision concerning the share of the widowed wife, which was lower than the share of a widowed husband would be, contradicted Article 3 sect. 2 and sect. 3 GG, which stipulates equality of gender and the prohibition of discrimination against any person for gender reasons.

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[25] See *Parvin,* Conflit interpersonnel de droit iranien en matière de statut personnel, in: Religion in Comparative Law at the Dawn of the 21st Century, *Caparros/Christians* (eds.) (2000) 336 f.

[26] *Bergmann/Ferid*, Internationales Ehe- und Kindschaftsrecht Iran (1989) 8.

[27] OLG Hamm, IPRax (1994) 49-55 (49).

[28] On the inheritance shares of woman, see generally *Mehrpūr*, barresī-e mīrāṯ-e zouğe dar ḥoqūq-e eslām va Irān[3] [The examination of the wife's inheritance according to the Islamic and Iranian law] (1997); ḥoqūq-e zan [the rights of the woman] (2000).

[29] OLG Hamm, IPRax (1994) 49-55 (50).

The court held that the application of the Iranian rule was not against public policy, since it was the concrete case that had to be considered and not abstract ideas of incompatibility of foreign rules with the GG[30]. The unequal share of the widowed wife as compared to the share of a widowed husband was deemed acceptable, since a share of one-eighth of an estate could not be considered to be negligible[31]. Furthermore, in the specific case of a mixed marriage, the surviving woman's share increases by one-fourth of the estate. This augmentation results from the application of § 1371 BGB which provides for a round-off sum for the surviving spouse[32], an outflow of German marital regime which, in cases of mixed marriages, is governed by German law[33].

The court also denied a strong enough connection to Germany for public policy to strike, despite the fact that the deceased had lived most of his life in Germany, had married a German woman, and all the estate was situated in Germany.

II. LG Hamburg, decision from February 12, 1991[34]

1. Facts of the case

In another case decided by the Court of First Instance of Hamburg, the deceased man was an Iranian who had married an Iranian woman and had six children, five daughters and one son. Here again the sole Iranian nationality of the deceased led to the application of Iranian succession law.

2. Ruling of the court

One of the issues discussed in this case was the matter of the diverging shares of daughters and sons. According to Article 907 sentence 3 CC, if there are several children, some of whom are sons and some of whom are daughters, each son will inherit twice as much as a daughter.

The court applied this rule and held that the rule did not contravene the German public policy rule of Article 6 EGBGB. They said: "It is true that the result of the application of this rule is against the GG, and does not correspond to the German consideration of justice, which has eliminated such discrimi-

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[30] OLG Hamm, IPRax (1994) 49-55 (52); OLG Hamm, IPRspr. (1992) No. 159.

[31] IPRax (1994) 49-55 (53).

[32] For a debate on the application of § 1371 BGB, see *Erman*(*-Hohloch*) (n. 8) Article 15 EGBGB note 37; *Soergel*(*-Schurig*) BGB[12] Article 15 note 38-41; *Palandt*(*-Heldrich*) (n. 1) Article 15 EGBGB note 26, *MünchKomm*(*-Siehr*) BGB[3] (1998) Article 15 note 102 f.; *MünchKomm*(*-Birk*) (n. 8) Article 25 EGBGB note 159.

[33] OLG Hamm, IPRax (1994) 49-55 (53).

[34] Court of First Instance of Hamburg, Decision of February 12, 1991, reference number 302 T 88/90. LG Hamburg, IPRspr. (1991) No. 142, 264-275.

natory provisions from its legal order. The result in this specific case is however not unbearable." The court argued that the deceased and his children had not turned away from their religion and had been raised in that religious tradition. As such they had a connection to Iran and Islam as a religion and this had to be considered in the context of private international law. The court continued that "[t]hose traditions they are connected to cannot be eliminated just because they do not fit into the German system. The German constitution does not claim for itself to be the ultimate criteria of justice, especially not when there are strong connections to a different worldview"[35]. Here the court deemed the connection to Germany to be not strong enough to apply the ordre public clause.

III. Conclusion

As a whole, the attitude of the courts towards eliminating a foreign rule for public policy reasons is extremely cautious, and the courts have shown themselves to be quite reluctant to apply it, particularly in succession law[36]. However, this attitude is not shared by the legal literature and has thus been subject to criticism.

D. Reactions and Views

The legal literature received these rulings critically and took up the opportunity to discuss the issue of public policy in regard to the application of Islamic succession law[37]. The Iranian succession rules potentially threatened by public policy were thus identified as: a. the inequality of shares due to gender in two cases: first, the diverging shares for widowed wives as compared to widowed husbands that would be against the principle of equality of gender, and second, the diverging shares for daughters and sons that would be against the principle of equality of gender; and b. the exclusion from succession for religious reasons that would be against the prohibition of discrimination, freedom of religion, and the principle of neutrality of the state in religious matters.

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[35] LG Hamburg, IPRspr. (1991) No. 142, 264-275 (271).

[36] See also LG Stuttgart, FamRZ (1998) 1627.

[37] *Dörner*, IPRax (1994) 33-37; *Lorenz*, IPRax (1993) 148-151.

I. Inequality of shares due to gender

1. The diverging shares for widowed wives as compared to widowed husbands

a) Mixed marriages

Under German law, a rule such as Article 913 CC and the result of its application would clearly be considered to be against German law. Since it breaches the principle of equality of gender and the prohibition of discrimination for gender reasons, it would not stand a judicial review of its constitutionality under German law[38]. That is – it is argued – because the only reason why a widowed wife inherits less than a widowed husband is that she is a woman.

In an international setting involving spouses with different nationalities, such as a deceased Iranian husband and a German widowed wife, the German wife will be subject to Iranian succession law and will thus get a lesser share. Some authors maintain that the result of the application of the Iranian succession rule is therefore in discordance with the German constitution. They argue that in the hypothetical case that the wife had died and the husband would have been her heir, his share would be double, and thus the unequal treatment of the gender is apparent and unacceptable. In the setting of international private law, however, not all breaches of the German GG lead automatically to the application of public policy and the elimination of that foreign rule.

If we consider the opposite hypothesis that the German wife had died and the Iranian husband would inherit, the applicable law would have been German law since she was a German citizen, with the result that the husband would inherit according to German law, that is, one-fourth of the estate. As a result, he would have inherited more than she would have if he had died. However, this inequality is not the result of her being a women; instead, in the hypothetical case that she had died, the diverging share would have resulted from the application of German law and not because of gender discrimination[39]. It is doubtful, however, whether such argumentation can logically be raised, since the woman is discriminated against in any case because she is a woman[40].

The High Court of Hamm did not validate this argument. It furthermore denied a strong enough connection of the case to Germany[41]. This view has been clearly criticised. The court's ruling in this matter seems short-sighted if one considers that the deceased had lived in Germany for 36 years as opposed to 20 in Iran, had married a German wife in Germany, and his children were born and raised in Germany. This is the strongest connection one can think of. The only connection to Iran was his nationality[42].

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[38] See *Pauli*, Islamisches Familien- und Erbrecht und ordre public (1994) 172.
[39] With this argumentation IPG (1998) No. 35, 527-541 (536).
[40] *Lorenz*, IPRax (1993) 148-151 (149)
[41] OLG Hamm, IPRax (1994) 49-55 (53).
[42] *Dörner*, IPRax (1994) 33-37 (36).

In cases where the connection to Germany is very strong, the mere fact that the foreign rule itself infringes on the German constitution is sufficient as such to eliminate the foreign rule. A test for whether the result is unbearable or not is not necessary. This seems to be quite reasonable in a constellation like the one decided by the OLG Hamm where the only foreign element was the nationality of the deceased; all other elements – nationality of the surviving family, place of domicile, establishment of life – were German. And one should also take into account the actual religion of the family: as Baha'i, they did not even consider themselves Muslims[43].

b) Purely Iranian cases

In purely Iranian cases, where all the parties are Iranian citizens, the argument of gender discrimination is also very prominent. Whichever of the spouses dies, the applicable law will always be Iranian succession law, and the inequality of shares is due to gender reasons. In purely Iranian cases, however, the courts tend to dispute the close connection of the case to Germany, denying thus the scope of application of public policy. One might want to dispute this argument for Iranians who have lived all their lives in Germany, planned their lives, and raised their children in Germany.

Another argument put forward for the acceptance of the discriminatory foreign rule in purely Iranian cases is the argument that the Iranian family and succession law build a coherent system in which the duties and rights of the family members are divided fairly[44]. Thus the provision that widowed wives get half the share of a widowed husband is counterbalanced by her entitlement to a dower and the fact that the maintenance duties towards children are always shouldered by the father, whereas mothers don't have such duties[45].

According to Article 1199 sect. 1 CC, it is only the father who owes maintenance to his children. According to Article 1199 sentence 2 CC, this duty devolves after the father's death to the paternal grandparents (male ascendant), and only if they fail to provide for the children is the mother obliged to maintain the children.

It is true that Iranian family and succession law provisions are connected strongly to one another and that the system is coherent within itself. It must be

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[43] In fact, the OLG Hamm did not consider this point. It is unclear what would have had to be applied if it had considered the fact that the Baha'is are considered heretics and deprived of some basic citizen's rights, including the right to the application of their own religious rules in matters of personal status as granted to the adherents of the recognised religious minorities.

[44] For Iranian family law, see *Moḥaqeq-Dāmād*, barresī-e feqhi-e ḥoqūq-e ḫānevāde, nekāh va enḥelāl-e ān[9] [civil law, marriage and dissolution of marriage] (2002); *Ṣafā`ī, Emāmī*, ḥoqūq-e ḫānevāde[8] [family law] 2 volumes; Teheran (2001); IPG (1983) No. 32, 287-297 (293).

[45] Compare *Dörner*, IPRax (1994) 33-37 (36f.).

borne in mind, however, that in international private law, different parts of the same case can be governed by the laws of different countries, and thus the coherence within one single system can get shaken. Therefore, these arguments of compensatory rights and duties can only be validly raised where there are minor children, the applicable law in maintenance matters in the concrete case is Iranian law, and the grandparents of the children are still alive and able to take care of the minor children.

Furthermore, it was argued that under Iranian law the wife has a right to get her dower out of the estate before the shares are calculated[46], which again increases her share. In the concrete case, this also presupposes a dower that is sufficient enough to fill this gap, which is not always the case.

Iranian law is developing, and Iranian legislators have been attempting to fill the gaps in female inheritance. As an example, on July 21, 2002, the Iranian parliament presented a draft law to include the compensation right (oğrat olmeṯl)[47] that the wife has under the Iranian divorce law in the estate as a senior dept[48]. This law has not been passed yet, and it remains to be seen whether it will pass the control of the Council of the Guardians. This would eventually also be something that might be considered in the future.

2. *The diverging shares for daughters and sons*

The diverging shares for daughters and sons have been found to be against public policy. Here the views of the courts and the literature are closer.

The numerical share of the sister by itself is just a number that seems harmless because it does not say anything about potential discrimination. We thus have to consider the devolution of the estate as a whole. Here the unequal shares between sister and brother become visible. In comparison to the unequal shares of husband and wife, there is, of course, one big difference: the discrimination of the sister is not hypothetical, for the mere existence of the brother diminishes her share because of her gender. Here there is a strong ground for striking the foreign rule with the sword of public policy because of the prohibition of discrimination for gender reasons in the German constitution[49].

The argument of maintenance duties raised in favour of the discriminatory rule cannot logically be raised, nor is the argument of dower valid, because these concern hypothetical future financial burdens for the son that might not

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[46] *Ṣafā`ī, Emāmī,* ḥoqūq-e ḥānevāde[8] 187.

[47] See on oğrat ol-meṯl *Yassari,* Überblick über das iranische Scheidungsrecht: FamRZ (2002) 1088; *Ansari-Pour,* Remuneration for Work Done by the Wife under Islamic and Iranian Law: Yearbook of Islamic and Middle Eastern Law 8 (2002-2003) 109-121.

[48] Abrār (daily newspaper) from July 21, 2002.

[49] IPG (1983) No. 32, 287-297 (292); IPG (2001) No. 30 443-461 (457); IPG (1999) No. 36 475-484 (480)

arise at all. Those considerations are purely speculative because one cannot look into the future, and we are bound to consider the concrete case.

II. The exclusion from succession for religious reasons

Here the view in the German judicature and literature is quite unanimous. The exclusion from inheritance of the non-Muslim spouse of a Muslim deceased is obviously in contradiction with fundamental principles of German law[50]; it is considered discriminatory against non-Muslims and it leads to the exclusion of whole categories of heirs who would have inherited if they were Muslims. It also contravenes Article 14 GG, which guarantees the right of inheritance.

E. Consequences of incompatibility of the foreign rule with public policy

If a foreign provision is considered not applicable for public policy reasons, the question arises as to how to fill the gap. The gap that is produced has to be filled with the least interruption of the foreign law. This means that the judge is not entitled to automatically apply German law instead[51].

Regarding the case of unequal shares for gender reasons, the rule will just be ignored and it will be decided as if this rule did not exist. The widowed wife will get as much as the widowed husband would have received, and daughter and son will get equal shares. In the case of prohibition of inheritance for non-Muslims, here again the discriminatory rule will be disregarded[52].

F. Conclusion

This compromise between the principally accepted authority of foreign law and the influence of the German constitution is interesting because it gives an idea of how the foreign family and succession laws would have to be reformed to match the international conventions of human rights, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[53], to which Iran and most Islamic countries are a party.

This compromise, however, also may lead to a result that is neither purely Iranian nor German succession law whenever the ordre public clause has been

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[50] See *Riering*, Der Erb- und Pflichtteilsverzicht im islamischen Rechtskreis: ZEV 12 (1998) 455-457 (456).

[51] *Palandt(-Heldrich)* (n. 1) Article 6 EGBGB note 13.

[52] See also *Lorenz*, "RGZ 106, 82 ff revisited": Zur Lückenfüllungsproblematik beim ordre-public in Ja/Nein-Konflikten: IPRax (1999) 429-432 (430).

[53] Convention on the Elimination of All Forms of Discrimination against Women resolution 34/180 adopted on December 18, 1979, entered into force on September 3, 1981.

applied. The certificate of inheritance issued to the family of the deceased thus must contain the wording: "This certificate is issued according to Iranian law with the restrictions of Article 6 EGBGB[54]." This is not contestable as long as the estate is devolved in Germany and does not contain any real estate located outside Germany. However, in cases where the heirs or some of the heirs are resident in Iran, or when there is real estate to be divided that is located in Iran, problems for the recognition and enforcement of the German certificate will subsequently arise.

[54] *Palandt(-Edenhofer)* (n. 1) § 2369 note 10; *Dörner*, IPRax (1994) 33-37 (37).