Colonialism and German PIL (3) – Imagined Hierachies

This post is part of a series regarding Colonialism and the general structure of (German) Private International Law, based on a presentation I gave in spring 2023. See the introduction here.

As mentioned in the introduction, this series does **not** intent to automatically pass judgment on a norm or method influenced by colonialism **as inherently negative**. Instead, the aim is to reveal these influences and to initiate a first engagement with and awareness of this topic and to stimulate a discussion and reflection.

The first post (after the introduction) dealt with classic PIL and colonialism and already sparked a vivid discussion in the comments section. This second considered structures and values inherent in German or European law, implicitly resonating within the PIL and, thus, expanding those values to people and cases from other parts of the world. The **third category** discusses an imagined hierarchy between the Global North and Global South that is sometimes inherent in private international law thinking, for instances where courts or legislators abstractly or paternalistically apply the public policy to "protect" individuals from foreign legal norms. This is especially evident in areas like underage marriages and unilateral divorce practices found *inter alia* in Islamic law.

1. The public policy exception – abstract or concrete control?

The public policy exception is intended to prevent the application of foreign law by way of exception if the result of this application of law conflicts with fundamental domestic values. Such control is necessary for a legal system that is open to the application of foreign law and, in particular, foreign law of a completely different character. German law is typically very restrictive in its approach: The public policy control refers to a concrete control of the results of applying the provisions in question. In addition, the violation of fundamental domestic values must be obvious and there must be a sufficient domestic connection. In other countries, the approach is less restrictive. In particular,

there are also courts that do not look at the result of the application of the law, but carry out an abstract review, i.e. assess the foreign legal system in the abstract. For a comparison of some EU Member States see this article.

2. Explicit paternalistic rules

Furthermore, there are some rules that exercise an abstract control of foreign law. Article 10 of the Rome III Regulation contains a provision that analyses foreign divorce law in the abstract to determine whether it contains gender inequality. According to this (prevailing, see e.g. conclusions of AG Saugmandsgaard Øe) interpretation, it is irrelevant whether the result of the application of the law actually leads to unequal treatment. This abstract assessment assumes – even more so than a review of the result – an over-under-ordering relationship between domestic and foreign law, as the former can assess the latter as "good" or "bad".

Even beyond the *ordre public* control, there has recently been a tendency towards "paternalistic rules", particularly triggered by the migration movements of the last decade. The legislator seems to assume that the persons concerned must be protected from the application of "their" foreign law, even if they may wish its application. In particular, the "Act to Combat Child Marriage" which was only partially deemed unconstitutional by the Federal Constitutional Court (see official press release and blog post), is one such example: the legislator considered the simple, restrictive *ordre public* provision to be insufficient. Therefore, it created additional, abstract regulations that block the application of foreign, "bad" law.

3. Assessment

In the described cases as a conceptual hierarchy can be identified: The impression arises that foreign legal systems, particularly from the "Global South", are categorised in the abstract as "worse" than the German/EU legal system and that persons affected by it must be protected from it ("paternalistic norms"). As far as I can see there is a high consensus in the vast majority of German literature (but there are other voices) and also the majority of case law that the abstract *ordre public* approach should be rejected and that the aforementioned norms, i.e. in particular Art. 13 III EGBGB (against underage marriages) and Art. 10 Rome III-VO (different access to a divorce based on gender), should ideally be abolished. It would be desirable for the legislator to take greater account of the

literature in this regard.