Sweden: New rules on non-recognition of underage marriages

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On 1 January 2019, new restrictions came into force in Sweden's private international law legislation in respect of marriages validly concluded abroad. The revised rules are found in the Act (1904:26 p. 1) on Certain International Relationships on Marriage and Guardianship, Chapter 1 § 8a, as amended by SFS 2018:1973. The content of the new legislation is, briefly, the following: no marriage shall be recognised in Sweden if the spouses or either one of them was under the age of 18 years at the time of the marriage. By way of exception, this rule may be set aside once both parties are above 18 years of age, if there are exceptional reasons to recognise the marriage.

The law reform is in line with a recent European trend, carried out in e.g., Germany, Denmark and Norway, to protect children from marrying and, one could claim, to 'spare' people who married as a child (or with a child) from their marriage.[1] The requirement of 18 years of age has been introduced not only as the minimum marriage age for concluding a marriage in the State's own territory, i.e., as a kind of an internationally mandatory rule, but also as a condition for the recognition of a foreign marriage.

The new Swedish legislation constitutes perhaps the most extreme example on how to combat the phenomenon of child marriages. The marriage's invalidity in Sweden does not require a connecting factor to Sweden at the time of the marriage, or that the spouses are underage upon arrival to Sweden. Theoretically, the spouses may arrive to Sweden decades after marrying, and find out that their marriage is not recognised in Sweden. The later majority of the persons involved does not repair this original defect. The only solution, if both (still) wish to be married to each other, will be to (re)marry!

It remains to be seen whether the position taken in the Government Bill, claiming that the new law conforms with EU primary law and the ECHR, is proportionate and within Sweden's margin of appreciation, will be shared by the CJEU and the ECtHR. Swedish Parliament, in any case, shared this view and did not consider

that EU citizens' free movement within the EU required exempting underage spouses from the rule of non-recognition. The new law applies to marriages concluded as of 1 January 2019. It does not affect the legal validity of marriages concluded before that date.

To understand the effects of the Swedish law reform, the following needs to be emphasised. One of the special characteristics of Swedish family procedure law is that is does not provide for decrees on marriage annulment or the invalidity of a marriage. Divorce and death are in Sweden the only ways of dissolving a marriage! This position has applied since 1 January 1974, when the right to immediate divorce became the tool to dissolve any marriage concluded in Sweden against a legal obstacle to the marriage, e.g., a spouse's still existing marriage or duress to marry. A *foreign* marriage not recognised in Sweden is, however, invalid directly by force of Swedish private international law legislation. It follows that it cannot be dissolved by divorce – as it does not exist as a marriage in the eyes of Swedish law. It does not either produce any of the legal effects of marriage, such as the right to maintenance or property rights. It does not qualify as a marriage obstacle, with the result that both 'spouses' are free to marry each other or anyone else.

What, then, is the impact of the legislation's exception enabling, in exceptional circumstances, to set aside the rule of non-recognition? This is an assessment which is aimed to take place *ad hoc,*usually in cases where the 'marriage's' validity is of relevance as a preliminary issue, whereby each competent authority makes an independent evaluation. It is required that non-recognition must produce exceptional hardships for the parties (or their children). The solution is legally uncertain and unpredictable and has been subject to heavy criticism by Sweden's leading jurists.

The 2019 law reform follows a series of reforms carried out in Sweden since 2004. According to the established main rule, a marriage validly concluded in the State of celebration or regarded as valid in States where the parties were habitually resident or nationals at the time of the marriage, is recognised in Sweden, Chapter 1 § 7 of the 1904 Act. Since a law reform carried out in 2004, an underage marriage is, nevertheless, invalid directly by force of law in Sweden, if either spouse had a connection to Sweden through habitual residence or nationality at the time of the marriage. (The 2019 law reform takes a step further, in this respect.) Recognition can, in addition, be refused with reference to the

*ordre public*exception of the 1904 Act, Chapter 7 § 4. The position taken in Swedish case law is that *ordre public*captures*any*marriage concluded before both parties were 15 years of age. Forced marriages do not qualify for recognition in Sweden, since the 2004 reform. The same applies to marriages by proxy, since 2014, but only on condition that either party to the marriage had a connection to Sweden through habitual residence of nationality at the time of the marriage.

The 2019 legislation differs in several respects from the proposals preceding it, for example the proposed innovation of focusing on the underage of a spouse at the time of either spouse's arrival to Sweden. A government-initiated inquiry is currently pending in Sweden, the intention being to introduce rules on non-recognition of polygamous marriages validly concluded abroad.

[1] See M. JÄNTERÄ-JAREBORG, 'Non-recognition of Child Marriages: Sacrificing the Global for the Local in the Aftermath of the 2015 "Refugee Crisis"', in: G. DOUGLAS, M. MURCH, V. STEPHENS (eds), *International and National Perspectives on Child and Family Law, Essays in Honour of Nigel Lowe*, Intersentia 2018, pp. 267-281.