Foreign Child Marriages and Constitutional Law – German Constitutional Court Holds Parts of the German Act to Combat Child Marriages Unconstitutional



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Update: the Court's press release is now available in English.

I.

Yesterday, on March 29, 2023, the German Constitutional Court published its long-awaited (and also long) decision on the German "Act to Combat Child Marriage" (Gesetz zur Bekämpfung von Kinderehen). Under that law, passed in 2017 in the midst of the so-called "refugee crisis", marriages celebrated under foreign law are voidable if one of the spouses was under 18 at the time of marriage (art. 13 para. 3 no. 2 EGBGB), and null and void if they were under 16 (art. 13 para. 3 no. 1 EGBGB) – regardless of whether the marriage is valid under the normally applicable foreign law. In 2018, the German Federal Court of Justice refused to apply the law in a concrete case and asked the Constitutional Court for a decision on the constitutionality of the provision.

That was a long time ago. The wife in the case had been fourteen when the case started in the first instance courts; she is now 22, and her marriage certainly no longer a child marriage. And as a matter of fact, the Constitutional Court decision itself is already almost two months old; it was rendered on February 1. This and the fact that the decision cites almost no sources published after 2019 except for new editions of commentaries, suggests that it may have existed as a draft for much longer. One reason for the delay may have been internal: the president of the Court, Stephan Harbarth, was one of the law's main drafters. The Court decided in 2019 that he did not have to recuse himself, amongst others for the somewhat questionable reason that his support for the bill was based on political, not constitutional, considerations. (Never mind that members of parliament are obligated by the constitution also in the legislative process, and that a judge at the Constitutional Court may reasonably be expected to be hesitant when judging on the unconstitutionality of his own legislation.)

II.

In the end, the Court decided that the law is, in fact, unconstitutional: it curtails the special protection of marriage, which the German Constitution provides, and this curtailment is not justified. The decision is long (more than sixty pages) but characteristically well structured so a summary may be possible.

Account to the Court, the state's duty to protect marriage (art. 6 para. 1 of the Basic Law, the German Constitution) includes not only marriage as an institution but also discrete, existing marriages, and not only the married status itself but also the whole range of legal rules surrounding it and ensuing from it. Now, the Court has provided a definition of marriage as protected under the Basic Law: it is a union, in principle in perpetuity, freely entered into, equal and autonomously structured, and established by the marriage ceremony as a formalized, outwardly recognizable act. (Early commentators have spotted that "between one man and one woman" is no longer named as a requirement, but it seems far-fetched to view this as a stealthy inclusion of same-sex marriage within the realm of the Constitution.) The stated definition includes marriages celebrated abroad under foreign law. Moreover, it includes marriages celebrated at a very young age as long as the requirement is met that they were entered into freely.

A legislative curtailment of this right could be justified. But the legislator has comparably little discretion where a rule, as is the case here, effectively amounts to an actual impediment to marriage. Whether a curtailment is in fact justified is a matter for the classical test of proportionality: the law must have a proper and legitimate purpose; it must be suitable towards that purpose; it must be necessary towards that purpose; and it must be adequate ("proportional" in the narrow sense) towards the purpose, in that the balance between achieving the purpose and curtailment of the right must not be out of proportion.

Here, the law's purposes themselves – the protection of minors, the public ostracization of child marriage, and legal certainty – isarelegitimate. The worldwide fight against child marriage is a worthy goal. So is the desire for legal certainty regarding the validity of specific marriages.

The law is also suitable to serve these purpose: the minor is protected from the legal and factual burdens arising from the marriage; the law may deter couples abroad from getting married (or so the legislator may legitimately speculate; empirical data substantiating this is not available.) A clear age rule avoids the uncertainty of a case-by-case *ordre public* analysis as the law prior to 2017 had required.

According to the Court, the measures are also necessary towards these purposes, because alternative measures would not be similarly successful. Automatic nullity of the affected marriages is more effective, and potentially less intrusive, than

determining nullity in individual proceedings. It is also more effective than case-by-case determinations under a public policy analysis. And it offers better protection of minors than forcing them to go through a procedure aimed at annulling the marriage would.

Nonetheless, the Court sees in the law a violation of the Constitution: the measure is disproportionate to the curtailment of rights. That curtailment is severe: the law invalidates a marriage that the spouses may have considered valid, may have consummated, and around which they may have built a life. Potentially, they would be barred from living together although they consider themselves to be married.

The Court grants that the protection of minors is an important counterargument in view of the risks that child marriages pose to them. So is legal certainty regarding the question of whether a marriage is or is not valid.

But the legislation is disproportionate for two reasons. First, the law does not regulate the consequences of its verdict on nullity. So, not only does the minor spouse lose the legal protections of marriage, including the right to cohabitation; they also lose the rights arising from a proper dissolution of the marriage, including financial claims against the older, and frequently wealthier, spouse. These consequences run counter to the purpose of protecting the minor. Second, the law does not enable the spouses to carry on their marriage legally after both have reached maturity unless they remarry, and remarriage may well be complicated. This runs counter to the desire to protect free choice.

The court could have simply invalidated the law and thereby have gone back to the situation prior to 2017. Normally, substantive validity of a marriage is determined by the law of each spouse's nationality (art. 13 para. 1 EGBGB). Whether that law can be applied in fact, is then a matter of case-by-case determinations based on the public policy exception (art. 6 EGBGB). That is in fact the solution most private international lawyer (myself included) preferred. The Court refused this simple solution with the speculation that this might have resulted in bigamy for (hypothetical) spouses who had married someone else under the assumption that their marriages were void. (Whether such cases do in fact exist is not clear.) Therefore, the Court has kept the law intact and given the legislator until June 30, 2024 to reform it. In the meantime, the putative spouses of void marriages are also entitled to maintenance on an analogy to the rules on

divorce.

III.

The German Constitutional Court has occasionally ruled on the constitutionality of choice-of-law rules before. Its first important decision – the Spaniard decision of 1971 – dealt with whether the Constitution had anything to say about choice of law at all, given that choice of law was widely considered to be purely technical at the time, with no content of constitutional relevance. That decision, which addressed a Spanish prohibition on remarrying after divorce, already concerned the right to marry. Another, more recent decision held that a limping marriage, invalid under German law though valid under foreign law, must nonetheless be treated as a marriage for purposes of social insurance. Both decisions rear their heads in the current decision, forming a prelude to a constitutional issue that now resurfaces: the court is interested less in the status of marriage itself and more in the actual protections that emerge from a marriage.

The legal consequences of a marriage are, of course, manifold, and the legislator's explicit determination that the child marriage should yield no consequences whatsoever is therefore far-reaching. (Konrad Duden's proposal to interpret the act so as to restrict this statement to consequences that are negative for the minor is not discussed, unfortunately). Interestingly, the Court accords no fewer than one fifth of its decision, thirteen pages, to a textbook exposition of the relevance of marriage in private international law. Its consequences were among the main reasons for near-unanimity in the German conflict-of-laws field in opposition to the legal reform. Indeed, another fifth of the decision addresses the positions of a wide variety of stakeholders and experts –the federal government and several state governments, the Max Planck Institute for Comparative and International Private Law, a variety of associations concerned with the rights of women, children, and human rights as well as psychological associations. Almost all of them urged the Court to rule the law unconstitutional.

These critics will regard the decision as an affirmation, though perhaps not as a full one, because the Court, worried only about consequences, essentially upholds the legislator's decision to void child marriages entered into before the age of sixteen. This is unfortunate not only because the status of marriage itself is often

highly valuable to spouses, as we know from the long struggles for the acceptance of same-sex marriage rather than mere life partnership. Moreover, the result is the acceptance of limping marriages that are however treated as though they were valid. This may be what the Constitution requires. From the perspective of private international law, it seems slightly incoherent to uphold the nullity of a marriage on one hand and then afford its essential protections on the other, both times on the same justification of protecting minors. In this logic, the Court does not question whether the voiding of the marriage is generally beneficial to all minors in question. Moreover, in many foreign cultures, these protections are the exclusive domain of marriage. It must be confusing to tell someone from that culture that the marriage they thought was valid is void, but that it is nonetheless treated as though it were valid for matters of protection.

IV.

An interesting element in the decision concerns the Court's use of comparative law. Germany's law reform was not an outlier: it came among a whole flurry of reforms in Europe that were quite comprehensively compiled and analyzed in a study by the Hamburg Max Planck Institute (it is available, albeit only in German, open access). In recent years, many countries have passed stricter laws vis-à-vis child marriages celebrated under foreign law: France (2006), Switzerland (2012), Spain (2015), the Netherlands (2015), Denmark (2017), Norway (2007/2018), Sweden (2004/2019) and Finland (2019). Such reforms were successful virtue-signaling devices vis-a-vis rising xenophobia (not surprisingly, right-wingers in Germany have already come out again to criticize the Constitutional Court). Substantively, these laws treat foreign child marriages with different degrees of severity – the German law is especially harsh. However, comparative law reveals more than just matters of doctrine. Several empirical reports have demonstrated that foreign laws were not more successful at reducing the number of child marriages than was the German law, which is more a function of economic and social factors elsewhere than of European legislation. Worse, the laws sometimes had harmful consequences, not only for couples separated against their will, but even for politicians: in Denmark, one former immigration minister was impeached after reports by the Danish Red Cross of a suicide attempt, depression, and other negative psychosocial effects of the law on married minors. And surveys have shown that enforcement of the laws has been

spotty in Germany and elsewhere.

The Constitutional Court did not need to pay much attention to these empirical reports. In assessing whether annulling foreign marriages was necessary, the Court did however take guidance from the Max Planck comparative law study, pointing out (nos 182, 189) that the great variety of alternative measures in foreign legislation made it implausible that the German solution – no possibility to validate a marriage at age eighteen – is necessary . This makes for a good example of the usefulness of comparative law – comparative private international law, to be more precise – even for domestic constitutional law. If demonstrating that a measure is necessary requires showing a lack of alternatives, then comparative law can furnish both the alternatives as well as empirical evidence of their effectiveness. That comparative law can be put to such practical use is good news.

V.

The German legislator must now reform its law. What should it do? The Court has hinted at a minimal solution: consider these marriages void without exception, but extend post-divorce maintenance to them, and enable the couple to affirm their marriage, either openly or tacitly, once they are of age. In formulating such rules, comparative analysis of various legal reforms in other countries would certainly be of great help.

But the legislator may also take this admonition from the Constitutional Court as an impetus for a bigger step. Not everything that is constitutionally permissible is also politically and legally sound. The German reform was rushed through in 2017 in the anxiousness of the so-called refugee crisis. The same was true, with some modifications, of other countries' reforms. What the German legislator can learn from them is not only alternative modes of regulation but also that these reforms' limited success is not confined to Germany. This insight could spark legislation that focuses more on the actual situation and needs of minors than on the desire to ostracize child marriage on their backs.

Such legislation may well reintroduce case-by-case analysis, something private international lawyers know not to be afraid of. This holds true especially in view of the fact that the provision does not regulate a mass problem but rather a

relatively small number of cases which is unlikely to create excessive burdens on agencies and the judiciary. If the legislature does not want to go back to the ordre public test, perhaps it could extend the provision of Article 13 para. 3 no. 2 for marriages entered into after the age of 16 to marriages entered into earlier. This would make the marriage merely annullable; in cases of hardship, the sanction could be waived. The legislator could also substitute the place of celebration for the spouses' nationality as the relevant connecting factor for substantive marriage requirements, as the German Council for Private International Law, an advisor to the legislator, has already proposed (Coester-Waltjen, IPRax 2021, 29). This would make it possible to distinguish more clearly between two very different situations: couples wanting to get married in Germany (where the age restriction makes eminent sense) on the one hand, and couples who already got married, validly, in their home countries and find their actually existing marriage to be put in question. Indeed, this might be a good opportunity to move from a system that designates the applicable law to a system that recognizes foreign acts, as is the case already in some other legal systems.

In any case, the Court decision provides Germany with an opportunity to move the fight against child marriage back to where it belongs and where it has a better chance of succeeding – away from private international law, and towards economic and other forms of aid to countries in which child marriage would be less rampant if they were less afflicted with war and poverty.