Some critical comments on the new Swedish rules on non-recognition of foreign child marriages

Michael Bogdan*

The negative and restrictive attitude of the Swedish legislator towards child marriages celebrated abroad has been step-by-step sharpened, most recently by an amendment reacting to the dramatic increase of asylum seekers in the second half of 2015 from countries where persons under the age of eighteen can enter into valid marriages. Such marriages, concluded on or after 1 January 2019, will with almost no exceptions be denied recognition in Sweden, regardless of whether at the time of the wedding the spouses had any connection with Sweden and irrespective of how much time has lapsed thereafter. While the Swedish politicians and public generally welcome this reform, they seem to disregard the serious negative practical and legal consequences such general non-recognition may have for the persons concerned, in particular the young wives. The article examines critically the new rules and discusses the possibilities to reconcile the refusal to accept child marriages with the protection of legitimate interests of the spouses.

Keywords: child marriages; recognition; public policy; foreign marriages

A. Introduction

In November 2018, the Swedish Parliament (Riksdag) passed a law aimed at preventing, subject to very minor exceptions, the recognition in Sweden of marriages1 validly concluded abroad when the spouses, or one of them, had not, at the time of the marriage, reached the age of eighteen (“child marriages”). The new statute,2 which entered into force on 1 January 2019, is formally a mere amendment of the already existing section 8a of Chapter 1 of the Act (1904:26) on Certain International Marriage and Guardianship Relations. The enactment of the amendment was rather controversial and preceded by an animated debate in the Swedish media, much of it characterised by emotions rather than by a rational analysis of its practical consequences. A very

---

*Senior Professor of Comparative and Private International Law, University of Lund, Sweden, Europe. Email: Michael.bogdan@jur.lu.se.
1The same rules are supposed to apply also to registered partnerships.
2Act (2018:1973), published in the – nowadays merely digital – Swedish Official Collection of Statutes (Svensk författningssamling) on 5 December 2018. See <svenskforfattningssamling.se>.

© 2019 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group. This is an Open Access article distributed under the terms of the Creative Commons Attribution License (http://creativecommons.org/licenses/by/4.0/), which permits unrestricted use, distribution, and reproduction in any medium, provided the original work is properly cited.
unusual (even though not quite unique) feature of the legislative process was that the Government pushed the bill proposing the amendment through Parliament in spite of a strong recommendation not to do so, submitted by the Law Council (Lagrådet), which is an official body composed of a number of judges of the highest Swedish courts with the task of examining proposed new legislation from a technical viewpoint, including its potential to lead to the results intended by the legislator and its compatibility with other Swedish legal norms and Sweden’s international obligations. It is also noteworthy that the new legislation goes farther than the original proposal submitted in December 2017 by the inquiry committee appointed by the Swedish Government in March 2017 to investigate whether there was a need for measures ensuring stronger protection against child marriages.\(^4\)

The decision to appoint the inquiry committee, as the first step in the legislative process, was clearly due to the experiences arising out of the rather dramatic arrival in Sweden of a large number of asylum seekers, mainly from the Middle East, in the second half of 2015. Of course, Swedish courts and other authorities had occasionally to deal with foreign child marriages even before that, but the events of 2015 shifted the focus of the problem from child marriages concluded abroad by Swedish residents and/or citizens to foreign couples who entered into a child marriage before (and sometimes long before) their arrival in Sweden. The Swedish Migration Agency reported in 2016 that it had identified 132 married children (not counting adults who were married during childhood prior to their arrival in Sweden) and expressed fear that there was a large number of hidden cases among asylum seekers. Out of the 132 children, 129 were girls and 3 were boys. Around one third of them had children of their own.\(^5\)

The purpose of this short article is to summarise the development of Swedish private international law on this issue and to submit the new legislation to a critical analysis.

**B. The main rule on recognition of foreign marriages**

Just like in most other countries, the fundamental principle of Swedish private international law has been for many decades and still is that a marriage solemnised abroad in accordance with foreign law is valid in Sweden if it is valid in the country where it was concluded. In addition, a foreign marriage is also recognised in Sweden if it is valid in the country or countries of which the spouses were nationals or habitual residents at that time.\(^6\) These rules applied until 2004

---

3. *Regeringens proposition* 2017/18:288.
4. The report of the inquiry committee was published in the government series *Statens offentliga utredningar* (SOU) 2017:96. An English summary of the report is found at 21–32.
5. See SOU 2017:96 at 23.
6. See Ch 1, s 7 of Act (1904:26). A foreign marriage can be recognised in Sweden even in some other rather special cases that need not be described here, such as marriages celebrated by foreign diplomats.
generally even to marriages entered into in violation of Swedish marriage impediments pertaining to the capacity of the parties, irrespective of any connection between the couple and Sweden. Thus, in spite of the minimum age limit of eighteen years imposed by Swedish substantive family law, a child marriage validly concluded abroad was in principle automatically valid also in Sweden, subject only to the general exception of public policy (ordre public) which was assumed to impose the minimum age of fifteen years. The idea behind these liberal rules was that foreign marriages should be recognised as far as possible in order to avoid the undesirable phenomenon of “limping marriages”, valid in some countries while not recognised in others.

The rules made it relatively easy for all, including Swedish citizens with habitual residence in Sweden, to circumvent the Swedish marriage impediments, among them the minimum age limit of eighteen years, by marrying abroad in a country with more liberal laws, such as in a country that allowed child marriages. It was not unusual, in particular within some immigrant groups, that girls under the age of eighteen, some of them Swedish citizens and habitual residents since birth, were taken abroad where they concluded an arranged marriage, which was then without any formalities valid in Sweden as well.

C. The two restrictions introduced in 2004

In order to combat such “marriage tourism”, certain legislative measures were taken in 2004. One measure, which lies beyond the scope of this article, was an amendment of the Swedish Penal Code, making it a crime to induce, by compulsion or deception, a person to go abroad in order to marry there. At the same time, two restrictions on the recognition of foreign marriages were introduced into Chapter 1, section 8a of Act (1904:26), even though they did not apply to marriages concluded prior to 1 May 2004 and contained an escape clause making it possible to disregard them if there were special reasons to recognise

---

7Ch 2, s 1 of the Swedish Marriage Code.
8See Ch 7, s 4 of Act (1904:26).
9See Regeringens proposition 2017/18:288 at 7. Until 2004 a foreign national who had reached the age of fifteen could marry in Sweden if he or she had the capacity to do so under his or her lex patriae. In fact, in theory even a foreigner under that age could marry in Sweden if he or she was granted a special permission by the County Administrative Board, see Chapter 1, ss 1 and 3 of the Act (1904:26) as it was at that time. Since 2004 the age limit of eighteen years must be complied with by all persons wishing to enter into a marriage celebrated by Swedish authorities, regardless of the nationality and residence of the parties and without any possibility of exemption.
10See Ch 4, s 4c and d of the Swedish Penal Code.
11A third restriction, which is of limited relevance for this article, was added in 2014, refusing recognition to marriages entered into without both of the parties being simultaneously present at the ceremony (marriage by proxy), provided that at least one of the parties was a Swedish citizen or habitual resident at that time.
the marriage. The interpretation of the scope of the escape clause was in the Government Bill explicitly left to be developed in case law, but it is clear that it was intended to be interpreted restrictively and used under extraordinary circumstances only (in fact, the escape clause was tightened in 2014, when “special” reasons was replaced with “extraordinary” reasons). The Swedish Tax Agency, which is in charge of the official population records, has not found sufficiently “extraordinary” reasons to register a foreign child marriage in any case since 2014.

The first of the two restrictions introduced in 2004 stipulated that a foreign marriage should not be recognised if it had been concluded in violation of Swedish marriage impediments, provided that at least one of the parties was a Swedish citizen or habitual resident at that time. Since 2004 it is thus impossible for such persons to circumvent the age limit imposed by Swedish substantive family law by marrying abroad and having the marriage recognised in Sweden. It should be noted that the minimum age requirement applied even to the spouse who was not a Swedish citizen or resident at the time of the marriage, so that it prevented the recognition in Sweden of a foreign marriage concluded between, for example, an adult Swedish man and a foreign child bride residing abroad. The restriction was applied rather strictly. In a case decided in 2012, the Supreme Administrative Court (Regeringsrätten, subsequently renamed Högsta förvaltningsdomstolen), refused the registration in the Swedish public population records of a marriage validly concluded in Palestine by a Swedish resident because the ceremony took place ten (10) days before her eighteenth birthday. The court found no reasons to apply the escape clause in section 8a and grant an exemption from the age requirement in this case, in spite of the rather insignificant nature of the deviation and regardless of the pregnancy of the Swedish resident in question. It is important to keep in mind that in the eyes of Swedish authorities such non-recognised marriage remains invalid even after the child has reached adulthood and the couple have thereafter been living together for many years, had children, etc. The reason given for such strict approach was that an adult who married during childhood has never had the opportunity to give an adult consent to entering into a marriage (as opposed to staying in a marriage).

The second of the 2004 restrictions stipulated that a foreign marriage should not be recognised if it had “probably” been concluded under coercion, regardless of the age of the parties and irrespective of whether any of them had any connection with Sweden at the time of the marriage. This restriction is not specifically aimed at child marriages, but it could become particularly relevant there; in public debates involving journalists and politicians it was sometimes argued that child marriages are by definition involuntary and thus coerced. The last-mentioned argument

---

12 See Regeringsens proposition 2017/18:288 at 28 and 36.
13 See SOU 2017:96 at 30.
14 HFD 2012 ref. 17.
15 See Regeringsens proposition 2017/18:288 at 16.
was not accepted in practice though, as is witnessed by a 2012 judgment of the Superior Migration Court (Migrationsöverdomstolen).\textsuperscript{16} The case concerned a girl validly married in Iraq when she was mere fifteen years old. After the disappearance of her husband, she applied for a Swedish residence permit in order to join her father who lived in Sweden. Pursuant to the Swedish Aliens Act, such family reunification was to be granted to unmarried children, which gave rise to the question of whether the applicant’s Iraqi marriage was valid in Sweden. As none of the spouses was a Swedish citizen or resident at the time of the marriage, there was no reason to consider it invalid because of the low age of the bride at that time. She claimed, therefore, that the marriage was a coerced one, as it had been arranged by relatives without consulting her. The Court pointed out that even though the law merely required probable coercion, a mere assertion that the marriage complied with family traditions giving no real influence to the bride was not sufficient for considering the marriage invalid. The permission to join the father in Sweden was consequently denied.

Just like regarding the first restriction, refusing recognition to child marriages due to the non-fulfilment of the Swedish age requirement, even the invalidity of a (probably) coerced marriage is permanent and is not healed by such facts as that the couple have been voluntarily living together for many years after the wedding, have children, etc. By showing that, at any moment and without any time limitation, the marriage has probably been entered into under coercion it is thus possible to treat it as automatically invalid from the start, without any annulment procedure or judicial declaration of invalidity being required. This may have surprising and far-reaching consequences regarding property, maintenance, inheritance, paternity, surname, and so on. The invalidity can be relied on not only by the coerced spouse, but also by the other spouse or even by other persons, such as the relatives of a deceased spouse who want to deprive the surviving spouse of his or her inheritance rights. Who has exercised the coercion is also irrelevant: it could be the other spouse or third persons, such as the parents of the bride.

D. The 2018 amendment

The principal novelty introduced by the amendment of 2018 is enactment of a special rule on foreign child marriages, separate from the rule regarding foreign marriages that are incompatible with other Swedish marriage impediments (such as polygamous marriages or marriages between some categories of close relatives). Child marriages are now refused recognition irrespective of whether at the time of the wedding there was any connection between the spouses and Sweden, such as Swedish citizenship or habitual residence of one or both of them.

The amendment does not affect the rule on foreign marriages suspected of having been concluded under coercion, but this restriction loses most of its

\textsuperscript{16}MIG 2012:4.
importance in relation to child marriages, since these are now deemed invalid irrespective of coercion. The general escape clause, permitting recognition of a child marriage if it is called for by extraordinary circumstances, is also retained, but it is further tightened because it cannot be relied on any more until both spouses have reached the age of eighteen years.

The new amendment does not apply to marriages concluded before its entry into force, ie before 1 January 2019. This means that the previous rules described above will continue to be relevant for many years for older marriages, including married couples that came to Sweden during the dramatic autumn of 2015.17

E. Analysis and concluding remarks

The proponents of the new principle of general automatic non-recognition ex tunc of foreign child marriages even when none of the spouses had any connection with Sweden at the time of the wedding seem to assume that such non-recognition is beneficial to the child spouse, protecting her somehow from the presumed harmful effects of being married. It is submitted that this assumption is probably wrong in the majority of cases. Far from feeling relieved, the young spouse may feel vulnerable and deprived of protection from her closest relatives. It must be kept in mind that Swedish law does not give a spouse any prerogatives of a personal nature, such as the right to demand sex from or control the freedom of movement of the other spouse, and the implementation of rights of this kind conceivably granted by foreign law would certainly be considered contrary to Swedish public policy; besides, the very liberal Swedish divorce rules give each spouse the right to have an unwanted marriage dissolved without much delay.18 At the same time, the non-recognition of the marriage deprives the spouses of maintenance, share in the marital property, inheritance and other similar rights. Even though the rules may be gender-neutral on their face, it is reasonable to assume that in most cases it is the wife that was a child at the time of the marriage and that she is the economically weaker spouse who will suffer most from the loss of such benefits. In fact, the automatic non-recognition of a foreign child marriage enables the husband to abandon his wife upon arrival in Sweden and enter right away into a new marriage with a new wife. From the husband’s point of view, this may sometimes seem like a good idea since a new marriage with a Swedish citizen or habitual resident would improve his chances to acquire a Swedish residence permit.

---

17Pursuant to a transitional provision, the new rule does, nevertheless, apply even to such older marriages, whenever Swedish courts or other authorities examine their validity before both spouses reach the age of eighteen. This provision will lose its practical importance by the end of 2021.

18The usual reconsideration period of six months does not apply if the spouse applying for divorce was younger than 18 years at the time of the marriage, see Ch 5, s 5 of the Swedish Marriage Code.
The application of the restrictions imposed by the described section 8a can give rise to complications even in those hopefully more frequent cases where the marriage was a voluntary one and the couple wish to continue to live as a family in Sweden. The question of validity of the same foreign child marriage can arise in various contexts and is decided by various Swedish courts and administrative authorities, for example by tax authorities and administrative courts in connection with the registration of the marriage in the public population records or the granting of various public welfare benefits, by immigration authorities and migration courts in connection with the granting of a residence permit, and by general courts in connection with disputes about marital property, inheritance or maintenance. According to the Swedish legal system, a decision on the validity of the marriage taken in connection with one such issue is not binding on other bodies examining the validity of the same marriage in other contexts, so that for example a refusal to register the couple as married in the population records does not mean that the marriage will necessarily be deemed invalid in a subsequent dispute about inheritance. Mutually inconsistent outcomes can result from different views on whether there are reasons to apply the escape clause in section 8a or – especially regarding child marriages concluded before 1 January 2019 by couples without Swedish nationality or residence – whether coercion is found to be probable or not. It may also be that the recognition of the marriage is perceived as less problematic in disputes about property than when the personal status is at stake, for example when examining the capacity of a spouse to conclude a new marriage.

In theory, it is possible for the spouses or one of them to turn to a competent Swedish court of general jurisdiction and apply for a declaratory judgment on whether the marriage is valid or not; such judgment, once final, would probably be considered binding on all Swedish state organs, including other courts, irrespective of the subsequent context where the validity of that marriage is relevant. Such declaratory judgment would, however, be incompatible with the intentions of the Swedish legislator, since the Government Bill states explicitly that it is to the advantage of the individuals concerned that depending on the context it is possible to arrive at mutually incompatible conclusions regarding the recognition of the

19See M Bogdan, “Do Swedish Civil Status Records Qualify to be Recognized in the Other EU Member States?” in M Joachim Bonell, M-L Holle, and P Arnt Nielsen (eds), Liber Amicorum Ole Lando (DJØF Publishing, 2012), 59–67.

20The jurisdiction of Swedish courts to make such declaratory judgment is governed by Ch 3 s 2 of the Act (1904:26), providing for Swedish jurisdiction, inter alia, if the respondent is a habitual resident of Sweden, if the applicant is a foreigner with habitual residence in Sweden for at least one year, or if there are special reasons to deal with the application and the applicant is unable to lodge his application in the country of which he is a citizen or is resident (the last-mentioned situation may often arise when the applicant is an asylum seeker).
same foreign marriage.21 This means that it may be impossible for a person to answer the simple question of whether he or she is married by a simple “yes” or “no”.

In daily life, both Swedish authorities and individuals rely on the information contained in the official population records, the print-outs or excerpts from which (personbevis) are commonly accepted as evidence of civil status. It will probably come as a surprise to the spouses or their heirs if the validity of the recorded marriage is challenged after many years of what they considered married life. The opposite may also happen, for example if a foreign child marriage that was refused registration in the population records is many years later found to be valid by a court adjudicating a dispute about inheritance. As mentioned above, such inconsistencies are explicitly accepted, and to some extent even intended, by the Swedish legislator.22

Some of the above-mentioned complications can be resolved relatively simply, provided the spouses are well-informed and in agreement. The seemingly simplest solution for couples coming to Sweden is that they as adults go through a new, Swedish marriage ceremony. If they prefer to go on living together without re-marrying, the economically weaker party obtains a certain degree of protection under Swedish law, especially pursuant to the Swedish Cohabitees Act (2003:376) in respect of the couple’s joint dwelling and household goods.23 Such statutory protection can be complemented in various ways, for example by writing a will or purchasing private insurance. However, it is more important to protect the spouses in those situations where no such amicable arrangements have been or can be reached, such as when there is a conflict between the spouses or between the surviving spouse and the relatives of the deceased one. In these cases the non-recognition of the foreign marriage can have very negative consequences. To rely on the extremely restrictive escape clause in section 8a is risky and makes the outcome unpredictable. The same can be said about the effects of the general public policy clause.

As an alternative to relying on the escape clause in section 8a, an unrecognised foreign child marriage might sometimes be given effects by a creative use of the techniques of private international law. Swedish courts examining the various effects of a marriage will normally deal with the marriage’s validity as a preliminary (incidental) question. One conceivable approach to such questions is that they should or can be decided in accordance with the view of the country whose law governs the main issue (the so-called lex causae approach). The approach of Swedish private international law to preliminary questions is not settled and

21See Regeringens proposition 2017/18:228 at 30.
22See ibid at 29.
23Voluntary marriage-like de facto cohabitation of minors over the age of fifteen is, per se, not considered unlawful under Swedish law, even though in individual cases the Social Welfare authorities may intervene if they find the situation harmful for the child.
appears to be left to the discretion of the court in each individual case.\textsuperscript{24} It is thus conceivable that a Swedish court will grant inheritance right to a surviving spouse in a non-recognised foreign child marriage if that marriage is valid in the country of the citizenship of the deceased who has chosen to have his succession governed by his \textit{lex patriae} in accordance with Article 22(1) of the EU Succession Regulation.\textsuperscript{25} In fact, a somewhat similar approach seems to some extent to be used when it comes to the application of the presumption of paternity of the mother’s husband, since even husbands in non-recognised foreign child marriages appear to be routinely and without any formalities registered by the Tax Agency in the population records as fathers of children born to their wives in countries where the marriage is valid.\textsuperscript{26}

When evaluating the new amendment, one must not forget Sweden’s international obligations. One relevant commitment follows from Sweden being a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, whose Article 8(1) grants everybody the right “to respect for his family and private life”. While the non-recognition of child marriages concluded abroad in circumvention of Swedish law by Swedish citizens or residents can normally be defended, it is dubious whether the same can be said about the non-recognition of a voluntary marriage validly concluded, for example, in Scotland by a Scottish couple living in Scotland when the bride was seventeen years old. The couple had no reason to take Swedish law into account at the time of their marriage and the unexpected retroactive non-recognition thereof, when they several years later move to Sweden, appears disproportionate and uncalled for.

Another international commitment that may sometimes conflict with the non-recognition of a foreign child marriage follows from Sweden’s membership in the European Union. The Treaty on the Functioning of the European Union grants in Article 21 every citizen of the Union the right to move and reside freely within the territory of the Member States, which is interpreted to mean that not only direct but also indirect obstacles to such free movement of persons are, in principle, forbidden. The non-recognition of one’s marriage may sometimes constitute such

\textsuperscript{24}See, for example, M Jänterä-Jareborg, “The Incidental Question of Private International Law, Formalised Same-Sex Relationships and Muslim Marriages” in P Lindskoug, U Maunsbach, G Millqvist, P Samuelsson and H-H Vogel (eds), \textit{Essays in Honour of Michael Bogdan} (Juristförlaget, 2013), 149–164.

\textsuperscript{25}See Reg No 650/2012 of 4 July 2012. The preliminary issue of the validity of a marriage is excluded from the scope of the Succession Regulation by Art 1(2)(a) and is consequently left to be resolved by the private international law of the Member State of the forum.

\textsuperscript{26}See \textit{Regeringens proposition} 2017/18:288 at 17. The legality of this practice seems never to have been examined by Swedish courts and it is doubtful whether the place of birth of the child deserves to be relevant in this respect. It appears that there is no published case where the Tax Agency refused to register paternity in such cases and the refusal has been appealed to court.
unlawful hindrance, but this is a controversial matter that would require an analysis going far beyond the scope of this article.

To conclude, the question of recognition or non-recognition in Sweden of foreign child marriages has given rise to many emotions and controversies. Some people and organisations find the very idea of recognition of such marriages to be an offensive breach of fundamental principles and have actively and successfully lobbied for legislation such as the 2018 amendment, amounting to a general non-recognition. Others were more sceptical, refusing to give much weight to the symbolic aspects of the issue and warned about the practical problems that a general non-recognition might give rise to. It seems that a conceivable compromise could only be reached by disconnecting pragmatically the various practical legal effects of marriage from the issue of personal status, so that such practical effects could be discussed and decided without having to consider and decide on the validity or invalidity of the marriage.

Disclosure statement
No potential conflict of interest was reported by the author.

--

27Cf the judgment of the CJEU of 5 June 2018 in C-673/16 Coman EU:C:2018:385 even though it did not deal with the non-recognition of a child marriage but of a marriage between persons of the same sex.