Recognition of a status acquired abroad: Sweden

Reconocimiento de una situación jurídica relativa al estatuto personal válidamente creada o modificada en el extranjero: Suecia

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Abstract: This report addresses questions of civil status recognition in Sweden, the main legal developments and case-law related to the recognition of a civil status. The ECHR and CJEU case law influenced the case-law some extent, especially in relation to cross-border recognition of names and surrogacy arrangements. Meanwhile, autonomous private international law on recognition of marriages prefers substantive Swedish law and protects the Swedish approach to children's rights and gender equality.

Keywords: Status acquired abroad, cross-border recognition of status, marriage recognition, international name law, Swedish private international law.

Resumen: En algunas materias relacionadas con el estatuto de la persona, la jurisprudencia del TJUE y del TEDH ha fomentado el reconocimiento por parte de los Estados de las situaciones jurídicas válidamente creadas o modificadas en otros Estados. Esta jurisprudencia ha cambiado y está cambiando la metodología y práctica propias del Derecho internacional privado de producción interna. Este trabajo analiza los efectos de esta jurisprudencia europea sobre el Derecho internacional privado sueco cuando este se enfrenta a una situación jurídica relacionada con el estatuto de la persona que ha sido válidamente creada en el extranjero y que se quiere hacer valer en Suecia.

Palabras clave: Estatuto personal, Ley personal, reconocimiento, situación jurídica relativa al estatuto personal válidamente creada en el extranjero, Derecho internacional privado sueco.

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I. General Issues

1. Legally significant changes have been introduced in Sweden in relation to cross-border recognition of a family status. For instance, since 2019 underage marriages are refused recognition in Sweden.[1] This applies regardless of whether there was any connection to Sweden, and whether the couple had concluded the marriage in another EU Member State. After an official investigation on polygamous marriages,[2] a broad provision on *non-recognition* of all marriages that *could not be concluded in Sweden* was introduced as a *general rule* from 1 July 2021.[3] Currently the provision[4] is formulated strictly and presents a clear preference for Swedish substantive law, unless there are "special reasons" to recognize the marriage that could not had been concluded under Swedish law and provided that the said marriage was not an underage marriage.

2. In other instances, new possibilities for cross-border recognition of civil status were allowed. For example, new rules allowing easier cross-border recognition of parenthood apply from January 2019,[5] and from January 2022.[6] As a general rule, there is still no possibility to recognize surrogacy arrangements concluded abroad and the status of parenthood in situations involving surrogacy. Nevertheless, an important case on a surrogacy arrangement, which had been concluded in the USA, was analysed by the Supreme Court of Sweden in 2019. The said case serves as a *precedent*. It was positive to the cross-border recognition of the child's relation to the intended mother, as established abroad. The case is discussed further in this paper, see paras 39-40.

3. Considering that cross-border recognition of civil status could include a wide variety of topics and methods, the paper focuses mainly on cross-border recognition of personal civil status in the area of family law. It relates to the more recent and relevant changes. I also discuss cross-border recognition in closely related areas, where the EU law or case-law of the supranational European courts may have had an impact. Finally, I review the key arguments used for recognition or non-recognition of the civil status in the area of family law, from the perspective of Sweden.

II. Awareness of Cross-Border Recognition of Status in Sweden

4. There is a high awareness of the issue in Sweden, in particular as regards cross-border recognition of family status. L. Pålsson has written on limping family status since the 1960ies[7] and is acknowledged internationally for his work. Major textbooks mention status recognition even though they are not necessarily using this term. There are many articles on specific topics. For instance, M. Jänterä-Jareborg has analysed the problems of recognition of child marriages,[8] marriages under Sharia, and same-sex marriages.[9] M. Bogdan has written on same-sex marriages and registered partnerships.[10] M. Sayed on recog-

[1] Act (1904:26 s.1) on Certain International Legal Relationships in Respect of Marriage and Guardianship (Lag om vissa internationella rättsförhållanden rörande äktenskap och förmynderskap). Changed by SFS 2018:1973 and SFS 2021:465.

[2] SOU 2020:2. Stricter rules on foreign polygamous marriages (Skärpta regler om utländska månggiften).

[3] SFS 2021:465 Act on amending the Act (1904:26 s. 1)

[4] Act (1904:26 s.1), 1 chap. 8 § (1).

[5] SFS 2018:1280 Act amending the Act (1985:367) on international paternity questions.

[6] SFS 2021:528, Act (2021:528) amending the Parenthood Act (föräldrabalken).

[7] L. Pålsson, *Haltande äktenskap och skilsmässor*. Komparativa studier över internationellt privaträttsligaproblem beträffande äktenskap och skilsmässor med territoriellt begränsad giltighet, Norstedt, Stockholm, 1966. L. Pålsson, *Marriage and Divorce in Comparative Conflict of Laws*, Leiden, 1974.

[8] 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, *International andNational Perspectives on Child and Family law*, Essays in Honour of Nigel Lowe, Intersentia, 2018: 267-282.

[9] M. Jänterä-Jareborg, The Incidental Question of Private International Law, Formalised Same-Sex Relationships and Muslim Marriages. In Patrik Lindskoug, Ulf Maunsbach, Göran Millqvist (ed.) *Essays in Honour of Michael Bogdan*, Lund: Juristförlaget, Lund, 2013: 149-164.

[10] M. Bogdan, "Registered partnerships and EC Law." In *Legal recognition of same-sex couples in Europe,*Intersentia,

nition of *kefala* under Islamic law,[11] and surrogacy arrangements were analysed by J. Stoll.[12] Cross-border recognition of civil status has once again become a debated political issue in Sweden during the last few years, in particular regarding the hot topics on cross-border *non-recognition* of child marriages, polygamous marriages and surrogacy arrangements. Non-recognition is envisioned as the general rule in all of these cases, in order to protect the Swedish approach to children's rights and to gender equality.

5. Academic articles and overviews of the status quo by legal commentators appeared in the media, following the political debate on national values. They focused on cross-border recognition of child marriages[13] and parenthood. The modernized rules allow broader possibilities of recognition of parenthood[14]and no possibilities to recognize child marriages, even if they originate from an EU Member state. The academics and even the Council of Legislation (Lagrådet) were critical on the latter proposal, as well as on the legal changes of 2021 in order to refuse recognition of polygamous marriages. The Council of Legislation is the institution in Sweden that has the task to scrutinize the proposals for legislation and advice the Parliament and the Government on the contents of the proposals.[15] The function of the Council of Legislation is that of a recommendatory *a priori* constitutional review. Regardless of the Council's critical opinion and refusal to support the legislative amendment,[16] the Parliament adopted the proposed blanket non-recognition rule.

6. The courts in Sweden tend to take into consideration the case practice of the ECJ and ECtHR.[17] The conclusion of M.Bogdan and U. Maunsbach after an analysis of court practice of Swedish courts was that "Swedish courts seem to follow obediently the CJEU case law in close relation to the wording of the judgments."[18] In my opinion, this "obedient following" means that the Swedish solution is to follow the case law but not to go beyond what is really required. This reserved and careful approach applies especially when the Swedish law is based on different underlying ideas than the ideas of the European supranational court decisions or the ideology reflected in the foreign law. In general, the reforms in Sweden in this area could be claimed as slightly endorsing a *lex fori* approach.[19] In recent years, the preference for the *lex fori* in this area has gradually increased.

III. Methodology of Cross-Border Recognition in Sweden

7. The precise methodology depends on the civil status and the legal situation in question, as well as the decision-making authority. Different sets of rules will apply in case of marriage, parenthood, name, and so on.

2003. M. Bogdan, "Private International Law Aspects of the Introduction of Same-Sex Marriages in Sweden," *Nordic Journal of International Law* 78 (2009) 253-261.

[11] M. Sayed, *The Kafala of Islamic Law: How to Approach it in the West.* In Patrik Lindskoug, Ulf Maunsbach, Göran Millqvist (red.) Essays in Honour of Michael Bogdan, Lund: Juristförlaget, Lund, 2013: 507-520.

[12] Mostly from substantive/domestic and comparative perspective, see J. STOLL, Surrogacy Arrangements and Legal Parenthood: Swedish Law in a Comparative Context. Dissertation, Uppsala University, 2013.

[13] Please see, in English, M. Jänterä-Jareborg, "Sweden: New rules on non-recognition of underage marriages," 6 February 2019, http://conflictoflaws.net/2019/sweden-new-rules-on-non-recognition-of-underage-marriages/

[14] Provided that the child's right to know his/her origin will be adequately ensured (i.e. not in case of private/anonymous donations but in State supported systems of assisted reproductive technology).

[15] Act on Council of Legislation (Lag (2003:333) om Lagrådet).

[16] For a full reasoning on non-recognition of child marriages by the Lagrådet (2018),see (in Swedish) https://www.lagradet.se/wp-content/uploads/lagradet-attachments/Forbud%20mot%20erkannande%20av%20utlandska%20barnaktenskap.pdf

[17] For instance, see M. Bogdan, Svensk och EU-domstolens rättspraxis i internationell privat- ochprocessrätt 2013-2014, in SVJT, 2015: 573-623.

[18] M. Bogdan and U. Maunsbach, "Sweden", In *Cross-Border Litigation in Europe,* Studies in PrivateInternational Law (eds. Beaumont, Danov Trimmings and Yüksel), Hart, 2017: 453-461.

[19] For instance, see M. Jänterä-Jareborg, "The Incidental Question of Private International Law, Formalised Same-Sex Relationships and Muslim Marriages*",* In Patrik Lindskoug, Ulf Maunsbach, Göran Millqvist (ed.) *Essays in Honour of Michael Bogdan*, Lund: Juristförlaget, Lund, 2013: p. 156. M. BOGDAN and U. MAUNSBACH, p. 461.

III.1. Recognition by Court Judgments

III.1.1. Key Principle

8. The starting point of the Swedish approach is that foreign court judgments have no legal force in Sweden, save for the exceptions provided under EU law. In addition, court judgments originating from outside of the EU can also be recognized, only if there is a clear *legal basis* in Swedish law. Nuanced legal rules provide for cross-border recognition of court decisions in different areas, including those that relate to civil status. The "procedural" method of recognition is the most relevant for the recognition of civil status effects in family law and other areas of law. Being able to dissolve marriage by divorce or to receive spousal maintenance are examples of the said legal effects. If the court judgment is not recognized directly in Sweden, the case may be reviewed anew in its substance, and the foreign judgment used by discretion, if at all.

III.1.2. Confirmation by State Authority

9. According to the case law, the said decision can even include a private divorce, providing that a state authority *confirmed* the said decision in some form.[20] In this precedent decided in 2013, the Supreme Court acknowledged a Bengali divorce by repudiation (talaq). However, repudiation of wives by husbands, without providing the same opportunity to both genders, conflicts with the principle of gender equality.[21] The decision was met somewhat critically. It is particularly questionable whether private divorces by *talaq* or a Catholic marriage annulment should be recognized, considering that the supranational European court decisions lead to the opposite direction, i.e. non-recognition of such statuses.[22] Even though the Swedish court pointed to the confirmation by a state authority of a non-European country, the recognition of status is still the question to be decided by the Swedish court. Hence the Swedish authorities have the responsibility of checking whether the human rights of the persons involved were not infringed by the conclusion or dissolution of the status.

III.1.3. Foreign Decisions on Status are Exceptional

10. Another important thing to note is that although the rule is that recognition by court judgments requires a legal basis, in accordance with the Supreme Court of Sweden, civil status decisions (statusdomar) are considered special. They relate to the very *identity* of persons. Therefore, civil status decisions can even be recognized in situations where express legal basis is lacking, as confirmed by the Supreme Court of Sweden in June 2019.[23] The said case concerned a court decision that established motherhood in accordance with a surrogacy arrangement. In Swedish law, there are no legal rules on establishing the motherhood (see further on Surrogacy) and that prompted the question whether the court decision could be recognized.

11. That exception for the requirement of a clear legal basis does not establish the general rule of cross-border recognition of status decisions, however. In that particular case, the US decision on status was confirmed for a number of reasons, to be discussed later in more detail (see further in 8.3). The practical circumstances and the social reality of persons involved can vary in other cases.

[20] The Supreme Court of Sweden NJA 2013 not 9, case no. Ö2475-12.

[21] M. Jänterä-Jareborg, "Transnationella familjer ur ett internationellt privaträttsligt perspektiv – särskilt avseende äktenskap", In Familj, Religion, Rätt: En antologi om kulturella spänningar i familjen, iUstus, 2010: 238-239.

[22] Pellegrini v. Italy, app. no. 30882/96, 20 July 2001, ECtHR. Sahyouni v Mamisch [2017] ECJ Case C-372/16.

[23] The Supreme Court of Sweden, NJA 2019 s.504, Ö3462/18.

III.1.4. Swedish Court Decisions on the Existence of Status

12. Swedish courts can also adopt decisions as regards the determination of inexistence or existence of the civil status concluded abroad, even if that status was not confirmed by court decision, such as marriage. This stems from Article 3 (1) of the Act on certain International Legal Relationships Regarding Marriage and Guardianship (1904), which provides that marriage cases also include the legal disputes *whether the marriage exists* between the spouses.

13. Thus, the Swedish court could be asked to determine whether the marriage exists (so-called *fastställelseyrkan,* an application for a declaratory judgment) under the general procedural law. The court may adopt either a negative or a positive decision. If the court determines the existence of the marriage, it will have all effects in Sweden. This would be beneficiary for the applicant. However, if the court decides that the status does not exist, the applicant would have no possibility to argue for separate effects of the said status after the said decision. Therefore, applicants should be encouraged to think through the risks and possibilities in the specific factual circumstances. After a court decision that the status does not exist, it could be difficult to claim other effects of the status, for instance, inheritance or maintenance.

III.2. Conflict of Law Method

14. The conflict of law method is widely applied for cross-border recognition of civil status in specific disputes over effects of the civil status. This is done both regarding the validity of marriage, names, and so on. At the same time, this method is often applied in a simplified way in Sweden. For instance, *lex loci celebrationis* rule applies to the formal validity of marriage, which really simplifies recognition, and the state authorities are not expected to analyse the material validity of marriage in usual cases. In addition, the legislator provided for specific rules on non-recognition of certain "unacceptable" statuses, which also exclude the necessity of a nuanced *ordre public* analysis.

15. The preliminary issue of marriage validity could arise, for instance, in the context of determination of inter spousal maintenance[24] or inheritance. The court would need to solve that preliminary issue and it may allow recognition under extraordinary circumstances.

16. The fact that marriage was recognized in that particular context does not mean that it will have effects in other areas of law. This is in contrast to a declaratory judgment (*fastställelsetalan*)[25] which could ensure that civil status has legal effects in Sweden, whatever effects may be concerned, currently or in the future. Choice of law method is much more nuanced and specific to the relevant context. If an applicant does not address the court for a declaratory judgment on whether a certain legal relation exists, the case can still require a solution of this question of (in)existence.[26]

III.3. Inclusion of the Status in the Registry

17. Civil status that is lawfully concluded abroad is registered by the State tax agency in Sweden. The person can appeal the decision to refuse registration of the civil status. The inclusion into the registry and recognition of material status validity should be distinguished. Registration of marriage in population records does not mean that the marriage will be treated as valid in absolutely all instances. This inclusion is seen as a proof of validity until proven otherwise, for instance, by the Swedish court in a procedural decision, as discussed above.

[24] Available under very limited and special circumstances in Sweden rather than as a general rule.
[25] The Swedish Code of Judicial Procedure (*Rättegångsbalken*) adopted 1942, with subsequent amendments, 13:2.
[26] Ibid, last sentence.

18. Taking the example of marriage again, if the marriage is not included in the registry, parties are free to marry somebody else or each other. Considering that there is no such institute as a marriage annulment in Sweden, even if the State tax agency makes a mistake, there is no other way to dissolve the marriage but to divorce.

19. The State tax agency claims to include even civil statuses that are not backed by formal documents into the registry. However, they must ensure that the *correct* information is included in the registry.[27] That means that some evidence is absolutely necessary. In practice, civil status documents from some countries (Syria, Bangladesh, Afghanistan, Eritrea) has not been readily accepted by the State tax agency.[28] It can also occur that personal identity documents and civil status documents coming from a certain country, are considered unreliable at certain time periods.

20. The Swedish tax agency issues special documents (Ställningstaganden) with the overview of these problems of reliability of civil status documents coming from different States. The said documents overview the relevant case law of the Swedish courts on civil status from these States, and provide the guidelines on population registry officials. These guidelines are regularly renewed and the treatment of civil status may change, e.g. it can be accepted that passports usually can be accepted as proof of identity but events (birth, death) cannot be deemed reliable to prove the status.

21. EU Regulation 2016/1191 on the circulation of public documents is applied in Sweden. That ensures acceptance of civil status documents. It has little effects on the recognition of civil status created abroad, except for simplifications of formalities. The application was eased by both internal legislative supplementation[29] and technological preparations by implementing authorities. The implementing authorities are the State police and the State tax agency.

IV. Formal and Material Requirements for Recognition

22. The Act on certain International Legal Relationships Regarding Marriage and Guardianship provides for the rule on formal validity and not substantial/material validity,[30] which instead has always been presumed to follow the formal validity. According to this Act, marriage is recognized, if it is *formally valid* in the country of celebration (alternatively: formal validity in the country of habitual residence or nationality).[31] The substantial (material) validity of such marriage has been presumed, whatever was the applicable material law. However, since July 2021, a new provision was inserted, which states that marriage concluded abroad is not recognized in Sweden if "at the time of the conclusion of marriage there were some obstacles to enter into marriage according to the Swedish law" (my translation).[32] Since 2021, a foreign marriage that could not have been concluded in Sweden can only be recognized as *an exception* in Sweden. The recognition is possible if there are special reasons, and provided that the marriage had not been concluded by persons under 18 y. of age.[33] The last amendment applies the filter of substantive Swedish law to all marriages concluded abroad.

23. Sometimes formal and material considerations are very closely connected, e.g. in case of proxy marriages. The material law consideration is that such marriages could lack genuine consent and

[27] Act on population registry (Folkbokföringslagen (1991:481), and preparatory works, prop. 1994/95:94, page 14 and further.

[28] E.g., a Syrian marriage and divorce were found to be problematic to prove. It was considered that thedocuments provided by the person are not trustworthy, Administrative court of appeal in Göteborg (Kammarrätten i Göteborg), case no. 2964-14.

[29] Regulation on complementing rules (Förordning (2018:1199) med kompletterande bestämmelser till EU:s handlingsförordning)

[30] Act (1904:26 s.1), 1: 7 §.

[31] Act (1904:26 s.1), 1: 7 §.

[32] Act (1904:26 s.1), 1: 8 § a (1), introduced by SFS 2021:465.

[33] Act (1904:26 s.1), 1: 8 § a.

might even be forced. Proxy marriages are not recognized in Sweden since the amendment of 2014, unless the parties were not Swedish nationals and did not have their habitual residence in Sweden and their marriage is legally valid in the country of celebration.

24. It is irrelevant whether the marriage is celebrated in a civil or religious ceremony, as long as it constitutes a legally valid marriage. At the same time, it cannot be a completely private and purely religious in nature to have effects in Sweden. Formal defects are often the basis for a refusal to register the civil family status.[34]

25. There are different formal and material requirements regarding the recognition of court judgments on divorce, as well as other interrelated areas. For instance, the Act on certain International Legal Relationships Regarding Marriage and Guardianship provides for certain *formal requirements* for recognition of court judgment on divorce. In particular, it specifies which courts in Sweden have jurisdiction to deal with the issue of cross-border recognition and the procedural right to be heard. If the decision of the court does not conclude that the decision has a legal force in Sweden, there is nothing to prevent a re-examination of the case anew.

The Act on certain International Legal Relationships Regarding Marriage and Guardianship also provides for certain conditions that could be called *material requirements* on the recognition of a divorce judgment. The court decision on divorce that is adopted in a foreign state can be recognized in Sweden only if that court had reasonable grounds for jurisdiction in accordance with the spouses' nationality or habitual residence, or another connection. Furthermore, if the spouse entered into a new marriage after the court decision on divorce was adopted in a foreign state, the earlier marriage is considered dissolved, even if the court decision is not in force in Sweden, provided that the other spouse does not show that the remarriage was manifestly unjust in his/her respect.[35] This does not apply to court decisions adopted in EU member states and the Nordic state, where special rules apply and jurisdictional grounds are never reviewed.

V. Rules on Non-Recognition

26. The rules on non-recognition of certain marriages have been included in the "letter of the law" during the last decade in Sweden.[36] It is considered that a specific list of marriages that will not be recognized increases legal foreseeability, in contrast to a broad discretion of the *ordre public* safeguard. The rules on non-recognition gradually included the marriages contracted when at least one of the parties was under 18, proxy marriages (provided that one of the parties was a Swedish national or had a habitual residence in Sweden), and marriages that are likely to be forced. Since 2021, a broad provision is included: marriages that could not have been concluded in Sweden at the moment of conclusion, are not recognized.[37] No connection with Sweden is required for non-recognition. In addition, special non-recognition provisions apply to "likely to be forced" marriages"[38] and proxy marriages.[39] The broad provision on the non-recognition is restricted only if there are "special reasons" for recognition and on the condition that the recognized marriage is not a child marriage.

27. Even prior the legislative amendment of 2021, other types of marriages besides the listed examples could be refused recognition, if they had been concluded despite hindrances under the Swedish law, while one of the parties was a Swedish national or had a habitual residence in Sweden. The said broad formulations could also potentially catch polygamous marriages. Nevertheless, they had been recognized until recently.

[34] M. Jänterä-Jareborg, The Incidental Question of Private International Law, Formalised Same-Sex Relationships and Muslim Marriages, p. 159.

[35] Act (1904:26 s.1), 3: 7 §.

[36] Ibid, 1: 8 a §

[37] Act (1904:26 s.1), 1: 8 a § (1).

[38] Ibid, 1: 8 a § (2).

[39] Ibid, 1: 8 a § (3).

28. In 2018, there were only 152 persons who were married with more than one person, according to State tax agency. It was nevertheless considered worthwhile to draft stricter rules on the non-recognition of such marriages.[40] As regarding the blanket refusal of recognition of child marriages and polygamous marriages, the *Lagrådet* and many authoritative scholars and practitioners in Sweden tend to be critical towards blanket non-recognition rules in private international law.[41]

VI. Ordre Public

29. Only if the marriage is not covered by the said prohibitive rules but still manifestly contradicts the Swedish public policy, can the *ordre public* be employed under 7 (4) § of the Act. For instance, before it was clearly provided that child marriages cannot be recognized, in one case of 2012, *ordre public* was analysed with respect to child marriage.[42] The court found that the Swedish *ordre public* at the time did not prevent the recognition of the marriage of 15 y. old girl and that justified the refusal of her right to family reunification with her father. The *ordre public* safeguard is to be interpreted restrictively. Certain provisions on the non-recognition of marriages, discussed before could nevertheless be interpreted as codified *ordre public* rules. They prescribe the contents of the *ordre public* in advance.

30. The main argument of the stricter rules as to underage marriage was that "children should not be married in Sweden",[43] although at the same time, there is a very small possibility to "recognize" the marriage by PIL. Both spouses need to be at least 18 at the time of the dispute and there must be especially weighty reasons (not just "special reasons"). In preparatory works, one possibility is mentioned as an example. Marriage that had been contracted when one spouse was under 18 y. of age, perhaps could be "recognized" by court in a dispute over inheritance in the context of incidental question.[44]

VII. Recognition of Effects

31. Regarding the effects of recognition of marriages, M. Jänterä-Jareborg has explained as follows:

> "Sweden's general approach is the traditional one, namely that a family law status created abroad but recognized in Sweden should be granted the legal effects of a corresponding family law status in Swedish law; the law applicable to these legal effects is determined in accordance with the generally applicable conflicts rules."[45]

32. This means that the effects are not made dependent upon the *lex causae* treatment of that civil status. For instance, if a Swedish court would consider that the Polish law needs to apply in a specific case of division of matrimonial property of a same-sex married couple, they would do so without consideration that the Polish family law does not allow same-sex marriage. The effects are not "locked" together with the status but treated as a separate question.

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[40] Stricter rules on foreign polygamous marriages (Strängare regler om utländska månggiften, Kommittédirektiv), Committee Dir. 2018:68.

[41] Legislative proposal of the Government on prohibition of recognition of foreign polygamous marriages (Förbud mot erkännande av utländska månggiften) 2020/21:149, Lagrådet's opinion is annexed. On child marriages, see opinion of 2018, as referenced before (Förbud mot erkännande av utländska barnäktenskap). Both opinions were highly critical to the legislative proposals.

[42] Supreme court of administration (Migrationsöverdomstolen), MIG 2012:4, case no UM6327-11.

[43] As expressed in preparatory works for the amendment on non-recognition of child marriages, see Prop 2018 (18) 288, Prohibition of recognition of the foreign child marriages (Förbud mot erkännande av utländska barnäktenskap), p. 13.

[44] Ibid, p. 30.

[45] M. Jänterä-Jareborg, The Incidental Question of Private International Law, Formalised Same-Sex Relationships and Muslim Marriages, p. 157.

33. It is perhaps not too difficult to apply this approach in EU context, because the rules on legal effects of marriage are usually not gender specific, even if the rules on contracting the marriage are reserved to man and woman. However, consider a situation where Iranian law is found to be applicable for the inheritance of a surviving same-sex spouse and the rules on inheritance are also gender specific.[46] In this case, the application of foreign law would not necessarily be so unproblematic, and the Swedish court would need to find an appropriate solution.

VIII. Other Issues of Cross-Border Recognition

8.1. International Company Law

34. Sweden applies the principle of incorporation and it has been suggested that it would be a good idea to apply this principle even at the EU level.[47] The principle is well in line with the case practice of the European Court of Justice. The new version of the Act on companies was adopted in 2005[48] and subsequently amended to incorporate all changes of EU secondary law. The discussion in the legal literature has been rather active.[49] Significant preparations for an implementation of upcoming changes in EU law and the case-practice of the ECJ on international company law are ongoing at the legislative level.[50]

8.2. International Name Law

35. In 2006, the European Commission criticized Sweden for a possible discrimination in this area.[51] Subsequently, a consultation procedure was initiated[52] and then some legislative changes were introduced. Section 49a was inserted in the Act of personal names to make the Swedish law on names more compatible with the EU law and allow the cross-border recognition of names acquired in another country. That recognition is ensured through the notice to Swedish tax agency (Skatteverket), provided that there was a connection to another EU member state (or Switzerland).[53] Habitual residence, nationality or another strong connection to that foreign country was necessary. At the same time, nationality remained the applicable law for Swedish nationals. The amendment came into force in 2012.

36. The new version of the Act on personal names was adopted in 2016.[54] According to section 30 of the Act, a personal name that is acquired in another EU member state or Switzerland because of the changed civil status is "recognized" (i.e. the person has the right to acquire that name) in Sweden, provided that a person had a habitual residence, or a nationality, or another special connection to that state. This rule does not apply to changes of names for other reasons than a change of civil status, e.g. purely administrative name change. The rule also does not apply, if the name is offensive or for another reason inappropriate.

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[46] Ibid, p. 156.

[47] J. Danielius, Aktiebolags rörlighet över gränserna, 2010. https://svjt.se/svjt/2010/120

[48] SFS 2005:551 Companies Act (Aktiebolagslag 2005:551).

[49] For instance, M. Nelson, Utflyttning av aktiebolag: en analys i ljuset av den internationella skatterättenoch EU-rätten, Stockholm: MercurIUS, 2010. K. CEIJIE, Anstånd med betalning av utflyttningsskatter – har rättsläget klarnat? *Skattenytt*, 2014: 295-308.

[50] For instance, the Swedish Parliament discussed COM(2018) 239 proposal regards the use of digital tools and processes in company law in 2018, and in 2021, an extensive nearly 600 p. report was drafted with the view of upcoming legislative changes. SOU-2021:18. Cross border movement of companies (Bolags rörlighet över gränserna).

[51] COM 2006/4454, Ju2007/9279/L2.

[52] Ds 2011:39, International aspects of names (*Internationella namnfrågor).*

[53] For an overview of the situation at that time in English, see L. HÅKANSSON, *Your Europe – your name?An analysis of the compatibility of Swedish private international law with European Union law in name matters*, 2012, https://www.uppsala-juristernasalumnistiftelse.se/wp-content/uploads/2014/11/Linnea- H%C3%A5kansson.pdf

[54] SFS 2016:1013 Act on Personal Names (Lag (2016:1013) om personnamn).

37. The section 30 of the Act of 2016 on Personal Names corresponds to section 49 a in the previous law. Moreover, the nationality principle remains applicable to Swedish nationals wherever they live, with the exception[47] of Swedish nationals having their habitual residence in Denmark, Finland or Norway.

8.3. Surrogacy

38. It must be explained that Sweden until very recently did not have rules on recognition of motherhood. Only the rules on the recognition of fatherhood applied. Since 1 January 2022, the rules on the recognition of fatherhood may also be applied to women.[55] That change was needed for same-sex mothers. As a general principle, the mother is always the birth giving mother (*mater semper certa est* principle) and therefore, the intended mother often needs to adopt a child in Sweden.

39. Two cases based on the same facts reached the Supreme Court in 2019.[56] Proceedings no. 1 concerned the refusal to recognize the court decision from the USA on a surrogacy arrangement. Proceedings no. 2 concerned adoption of the same child in Sweden, which was also refused. The Supreme Court of Sweden granted the said case a status of the review (*prövningstillstånd*). These reviews are rather rare and they are accepted as case law. The Supreme Court of Sweden in June 2019 decided to recognize the court decision from the USA and accepted the civil status of the intended mother as the mother of the child in question.[57]

40. The Supreme Court did not provide for the general right to cross-border recognition, however. The reliance on the relevant case law, for instance *Mennesson v France* (ECtHR) on surrogacy arrangements does not necessarily mean that the status acquired by surrogacy will be recognized, when circumstances of the cases differ and the child can *de facto* stay with the intended mother, even if she is not related to him genetically, biologically or legally. The main considerations used in such circumstances are the best interests of the child and impossibility to etsablish the parental status by other means.

8.4. Same-Sex Marriage and Registered Partnership

41. Same-sex marriages concluded abroad are recognized as marriages since 2009 in Sweden. Previously, they were recognized as registered partnerships. Registered partnerships concluded abroad can be registered as marriages in Sweden (upgraded) but there is no public data on the practice of State tax authority. State tax agency in Sweden is responsible for the population registry. It also registers civil statuses lawfully concluded abroad.

42. It could be plausible to expect that partnerships that are registered abroad and are considered "weak" fall under the Swedish cohabitation law instead of the marriage law.[58] Two things must be noted in that regard: first, private international law policy follows the substantive family law policy in Sweden, and second, the recent EU legislation might have unexpected effects on civil status classification in the future.

43. It is well known that when the substantive family policy changes, the reasoning in private international law usually changes as well. Before gender neutral marriage became the reality in Sweden in 2009, it was not possible to recognize same-sex marriage contracted abroad as marriage. The Supreme Court decided that a same-sex marriage concluded in Canada can only be recognized as a registered

[55] Parenthood Act (Föräldrarbalken), 1: 7§, on applicability of the rules *inter alia* to mothers. 1: 9 § (2) on recognition of parenthood when external fertilization was undertaken abroad in State authorised system. It applies to second parent automatic recognition in situations of marriages between two women, and on the condition that the child has the right to know his or her origin.

[56] HD PT case no. Ö 2680/18, HD PT case no. Ö 3462/18.

[57] HD PT case no. Ö 3462/18, decision of 13 June 2019, NJA 2019 s. 504.

[58] Cohabitation Act (Sambolag) 2003:376.

partnership in Sweden.[59] After the gender neutral marriage law was adopted, the interests of two men from Ireland to marry were seen as the *justifiable* special reason for the application of *lex fori* only.[60]

44. Another important thing to note is the impact of the EU legislation on the recognition of civil status. Sweden is a party to the EU Regulations on matrimonial property and property consequences of registered partnerships. Considering that two different Regulations apply, the state authorities in Sweden are encouraged to reconsider whether registered partnerships can be equated to marriages (upgraded).

IX. Key Arguments For Recognition or Non-Recognition of the Status

9.1. Best Interests of the Child

45. The principle of best interests of the child is taken very seriously in Sweden and the child's perspective is considered to be fundamental in legal reasoning. Note also that a political decision was taken to apply the UN Child Convention directly from 2020 and that even strengthens this position.

46. From the point of view of the Swedish legislator, it is considered as the internationally mandatory rule that children should not be married. However, regardless of the best intents to protect all children, the use of this argument as a blanket norm has sometimes resulted in vulnerability[61] of women and girls in underage marriages. A question might arise whether the young women and girls are really protected, when they are refused entry to Sweden on the basis of their marriage. It can be argued that it is not always so. The practice of state authorities also was inconsistent. Marriage can be recognized to the detriment of the young women or the girl, or on the contrary, refused recognition to their detriment, depending on the outcome.

47. As discussed in the literature by M.Jänterä Jareborg, M. Sayed, and S. Mustasaari, even before the said change the Swedish courts had refused recognition of marriages concluded when one of the party was under 18, and in all cases when the party is under 15. Since 2019, the main rule for child marriages is the rule on non-recognition. Instead of some discretion under the *ordre public* exception, the courts are instructed to refuse recognition. The legislative decision can be claimed to be based on the political image of the child's best interests, rather than the needs of the specific child in question. A very narrow discretion might still apply as to the recognition of effects of marriages, even if the status itself is not recognized. It must also be stressed that the Supreme Court of Sweden also highlights that the best interests of the child must be determined on a case to case basis.

48. In the 2019 case on surrogacy, the Supreme Court also relied on the child's right to *private life.* That can be seen as a separate stream of argument, which is nevertheless very closely related to the best interests of the child. It was not the intended mother's right to private life that was seen as infringed by the Court but the child's right to private life, similarly to the case-practice developed by the ECtHR. The child's right to private life was seen as closely connected to the child's right to his/her identity, and

[59] RÅ 2008 ref 82.

[60] Administrative court of appeals in Stockholm (Kammarrätten i Stockholm), case no. 862-14, KamR 862-142014-11-06, 2014-01-16. The Irish citizens and residents wanted to enter a same-sex marriage in Sweden. The court found that although this is an evasion ofIrish law, the interest of the Irish men to marry had greater significance and hence, there were special reasons (särskilda skäl) to apply the Swedish law. It must be noted that Ireland at the moment had a possibility to enter into a registered same-sex partnership and the court relied on the presumption that the same-sex marriage in Sweden would had been recognized as such, rather than be completely denied recognition.

[61] S. Mustasaari, "The married child belongs to no one? Legal recognition of forced marriages and childmarriages in the reuniting of families,"*Child and Family Law Quarterly*. 26, 3, 2014: 261-282.

M. Jänterä-Jareborg, M. Non-Recognition of Child Marriages: Sacrificing the Global for the Local in the Aftermath of the 2015 'Refugee Crisis'. In *International and National Perspectives on Child and Family law*, Essays in Honour of Nigel Lowe, Intersentia, 2018: 267-282.

that should entail the legal recognition of relations that are important to the child, such as those with a mother and siblings. The Court relied on the ECtHR practice on this matter (para 32 of the case) including the Advisory Opinion of 2019,[62] which allowed the recognition of intended mothers in cases of surrogacy, even if they were not genetic mothers.

9.2. Gender Equality

49. The arguments of gender equality, equality of spouses in marriage, equal treatment before the law could also be used in cases of non-recognition of a child marriage, a polygamous marriage, and surrogacy arrangement. For the higher ideal of gender equality in Sweden, a specific woman in the dispute could also face financial detriment and lose her possibility to negotiate a religious divorce, after the Swedish court refuses her right to *mahr*.[63]

50. The implied argument of gender equality relates to same-sex marriages with foreign elements. As mentioned above, when the principle of gender equality was extended to Swedish marriage laws, two Irish men were found to have a special reason to marry in Sweden. This applied regardless of their lack of connections to Sweden, or the fact that their marriage would be downgraded to a partnership in Ireland. The discussed case is not a precedent and cannot be compared with the Supreme Court's case law on recognition of the Canadian same-sex marriage as a registered partnership rather than marriage (prior 2009). However, it is interesting to see how fast the legal argumentation shifted after the change of the domestic policy on gender equality. It only took a few years to go from "impossibility" to recognize to "special reasons" for allowing marriage, regardless of the choice of law rules that referred to foreign law.

51. It could be argued that two Polish nationals on holiday in Sweden and without any connection to Sweden would not be allowed to enter into a same-sex marriage, because that marriage would not be recognized in the state of their habitual residence and the common nationality. If the same-sex marriage is recognizable in the state of origin of at least one spouse, *in whatever form*, then there is a ground to claim that it can be concluded in Sweden. Still, such conclusion of marriage in Sweden can only be seen as an exception and the said legal argumentation could even be seen as extended obiter dicta.[64] In contrast to Denmark, the Swedish legal rules are in principle not open to all same-sex couples wanting to marry.

52. In the case of 2019 on cross-border surrogacy, gender equality is an important implied argument. Even though the Court does not elaborate on it, as mentioned above, the legal status of the mother in Sweden is established under the *mater semper certa est* principle. That means that the cross-border recognition of the status in this area differed for men and women and men had a somewhat privileged position. Women could only establish their status through adoption, regardless whether they were genetic mothers. Although the gender equality argument was not explicit, the human rights of intended mothers have improved.

53. In this case, the child was born in California and no claims on the exploitation of women were raised. However, transnational surrogacy from less developed States is often connected to the exploitation of women and it is not likely that in such cases the status would be recognized. In my opinion, the precedent allows the recognition of status created through State-supported systems, where surrogacy

[62] Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, [GC], no. P16-2018-001, French Court of Cassation, 10 April 2019.

[63] M. Sayed, M. Linton, Kvinnor "i kläm" vid bedömning av mångfald? In *Genuskritiska Frågor inom juridiken*, Iustus, Juridiska Fakulteten i Uppsala, 2018: 123-143

[64] The couple from Ireland did not marry in the end, because they did not submit originals of their passports. Therefore, the elaborate argumentation on whether they had the right to marry could also be seen as unnecessary in this case.

is legally regulated.[65] Status originating from the States where such private arrangement was simply tolerated in practice is not likely to be recognized.

9.3. Practical Reality

54. Finally, the Swedish approach seems to rely on the practical reality of the civil status. For instance, the State tax agency adopts guidelines that analyse whether the specific civil status documents from particular states are reliable, what are the practical problems with proving the status, etc. These documents are highly detailed and they are regularly updated.

55. The Supreme Court of Sweden in its precedent on surrogacy (2019) also relied on the fact that the child conceived a after surrogacy arrangement in USA now lives with the intended mother in Sweden and they are a family. The reliance on "practical reality"[66] seems to have been decisive in the argumentation and not a formalist search for a legal basis for recognition of a court decision from abroad. The biological connection between the child and the intended mother was not required.

[65] It is also doubtful whether the surrogacy arrangement can be confirmed by a court decision in all such situations.
[66] The Supreme Court of Sweden, case no. 3462/18, para 38.