



## **The Draft Legislation on Child Marriage and Private International Law: An Interview with Institute Director Jürgen Basedow**

***It is not only with onset of the refugee crisis that German courts have had to address child marriage. What is the role of private international law in the recognition of a marriage in Germany?***

According to the German understanding, marriage is a contract and not a sovereign act of a foreign country. Consequently, the recognition of a foreign marriage is subject to the same conflict-of-law rules that govern a domestic marriage. As regards formalities and the marriage procedure, validity is assessed under Art. 11 EGBGB (Introductory Act to the Civil Code), meaning that compliance with the foreign country's procedural requirements is generally sufficient. In terms of material validity and matters such as minimum age and impediments to marriage, the national law of each spouse is applicable (Art. 13 EGBGB).

***In reasoning why a child marriage cannot be recognised under German law, courts will often raise the issue of ordre public (public policy). Why?***

As Art. 13 EGBGB (see above) makes reference to the national law, it may be the case that the applicable marriage law cannot be reconciled with the German principles underlying the institution of marriage. For instance, Muslims in Middle Eastern countries are generally subject to Islamic marriage law, this being true also when Islamic law has been partially superimposed by national legislation. Yet Islamic law, or state law, generally prescribes a very low minimum age for brides, one which falls below the age of majority. Further, if one bears in mind that Islamic law requires a man to conclude the bride's marriage in a representative capacity, in many cases the suspicion may arise that the union has not occurred with the bride's free and voluntary consent, perhaps even being a forced marriage. The public policy exception (Art. 6 EGBGB) allows the non-recognition of foreign marriages in such cases.

***Up to now, an individual determination was made in each case. This approach is to be eliminated and replaced with a general prohibition of child marriage involving participants under the age of sixteen. How do you view this current political development? What consequences can such a general prohibition have for the individual parties?***

The political initiative for setting a rigid minimum age is – at least on its surface – premised on the desire to help underage females who have married outside of Germany's borders. The underlying assumption is that the non-recognition of the minor's marriage will always be of assistance. This overlooks many realities: First, in many instances the under-aged wife does not desire such assistance; for many young women marriage represents a recognition of their adulthood within their particular social setting. Second, there are cases of extreme need in which – also in some European countries – the youth welfare office or the court will for understandable reasons permit a fourteen- or fifteen-year-old girl to marry. Third, young women from Islamic countries will very often continue to live in an exclusively Islamic community after their relocation in Germany, a community which will meet the non-

recognition decision of the German authorities with a certain dismay, leaving the now non-married woman to suffer a wide range of abuse and harassment; thus what was envisaged as protection for a young woman inflicts further harm instead. Fourth, where the minor bride is pregnant or already a mother at the point in time when the marriage is revoked, the child is left to suffer the stigma of illegitimacy in his or her Islamically influenced community. And how will a German youth welfare office react when confronted with a fifteen-year-old mother who perhaps has no relatives in Germany? Will they seek designation of a child guardian whose determinations will supersede those of the mother? Fifth, the recognition question can potentially impact a woman long after she has passed her tender years as a minor. Years later, upon seeking a share of the estate upon the death of her husband, the German court's non-recognition of the foreign marriage concluded decades earlier will harm the wife yet again, this time the non-recognition dooming her status as an heir.

The proposed legislation has not been adequately thought through. In some cases it will achieve the opposite of what its proponents desire. It is also foreseeable that the impacted parties will not always accept the non-recognition decision; it is only a matter of time before we see actions alleging violations of fundamental rights raised before the German Federal Constitutional Court and actions against Germany brought before the European Court of Human Rights.

***Do you see a different legal solution than the general prohibition which is sought?***

There is no sensible way around a process of case-by-case determinations. If German lawmakers feel pressured to act in the current election year, then they should limit themselves to formulating a law containing a non-exhaustive list of factors guiding application of the public policy exception. Additionally, one could consider concentrating recognition matters before the central judicial administrations of the single German states (*Landesjustizverwaltungen*), similar to the procedure that has for many years proven reliable in deciding on the recognition of foreign divorce decrees.