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**Traversing Disciplinary Silos: Marriage, Private International Law and the ECHR[[1]](#footnote-1)**

The focus of this paper is on the English conflicts rules affecting marriage – and how they are impacted by human rights law.

As far as human rights law is concerned, the emphasis will be on the European Convention on Human Rights (ECHR) – in particular, Article 8 ECHR (right to respect for family life), Article 12 ECHR (right to marry) and Article 14 ECHR (right to be protected against discrimination in the enjoyment of Convention rights) - but other instruments of international human rights law will also be considered.

Initially, upon looking into this area, one might expect to find a few leading European Court of Human Rights (ECtHR) judgments which would in turn have been considered by the English courts in private international law cases. However, a review of existing case-law soon reveals that there is a real lack of authority on the interaction of these two bodies of law – and that effectively we have two sets of lawyers (conflicts lawyers and human rights lawyers) each ploughing their own separate furrows and each very reluctant to take account of the interests and methodologies of the other legal discipline. The upshot of this disciplinary isolation is a branch of private international law which seems to be beset with human rights inconsistencies – and a branch of human rights law which provides no adequate steer or guidance for those interested in the appropriate development of private international law.

This paper will seek to demonstrate the extent of this disciplinary isolation – both on the private international law and human rights front – and to examine its implications. In conclusion, it will seek to identify the reasons why the interrelationship of these two bodies of law is so underdeveloped insofar as marriage is concerned.

Focussing, first of all, on the private international law side and its apparent imperviousness to human rights influence, one might start with the 1962 UN Marriage Convention which has been ratified by the UK and which prohibits double proxy marriages (ie ceremonies where both parties are absent) - and insists on celebration of marriage in the presence of a competent authority and the maintenance of official marriage registers. This 1962 Convention recognises in essence that formality and presence are instrumental in ensuring true consent to marriage. The ECtHR has not dealt directly with the question of absentee marriage but it sees free will as a core element of marriage and has repeatedly expressed its support for measures facilitating the objective verification of marriage.

Against that human rights backdrop, one might expect at the very least a degree of caution in recognising overseas proxy and customary marriage forms – but, as any private international law text will confirm, English law takes the view that proxy celebration is a matter of form and that a proxy marriage valid under the law of the place of celebration will be recognised in England. While the landmark case establishing that principle (Apt v Apt [1948] P. 83) was concerned with an overseas ceremony from which only one spouse was absent, more recent case-law has confirmed that the same principle will be applied to double proxy marriages, indeed even in circumstances where there are additional reasons for denying recognition. For example, in Pazpena v Pazpena [2001] All ER (D) 2101 an alleged Uruguayan marriage was found to be entitled to recognition despite the fact that neither party had been present and despite strong evidence suggesting that the marriage certificate had been a forgery. An English presumption of validity of marriage was invoked and the ‘marriage’ was found to be entitled to recognition. Similarly in McCabe v McCabe [1994] 1 FLR 410 a Ghanaian customary marriage ceremony celebrated in absentia by two English residents was found to be entitled to recognition – despite difficulties in determining the applicable formalities and the absence of any registration or official notification.

It has to be said that there was no allegation of forced marriage in either of these two cases, and it has to be acknowledged that the 1962 Convention as an unincorporated international convention is not directly binding within English law. However, the principles laid down in these cases are clearly amenable to abuse and to the facilitation of forced marriage, and if the UK subscribes to the principles laid down in the 1962 Convention, then by logical extension, the common law recognition policy is irrational.

Moving on from the 1962 Convention, there are also more general signs of human rights incompatibility when one looks at the modern case-law on formal validity of marriage. The ECtHR[[2]](#footnote-2) – and the UK Supreme Court in immigration cases like Baiai [2008] UKHL 53 and Quila [2011] UKSC 45– have emphasised (by reference to Articles 8 and 12 ECHR) the need for interferences in marriage to be rational and proportionate and predictable. It is arguable that the modern English case-law on formal validity of marriage does not meet these human rights standards. The case-law is highly contradictory in certain respects and very uncertain in terms of the scope of the tests laid down.

It was mentioned earlier that the English presumption of marriage came to the rescue of the marriage in Pazpena – and this and some other cases suggest a high degree of flexibility in terms of when that presumption may be used; however, other authorities appear to insist on a much firmer evidential foundation for the presumption (eg Al-Saedy v Musawi [2010] EWHC 3293 (Fam)). So there is some inconsistency and uncertainty respecting the role of the presumption of validity.

Also, more generally, where a foreign marriage is formally defective according to the relevant foreign law of the place of celebration, the question arises as to whether English law should treat the alleged marriage as a void marriage (which gives rise to ancillary relief obligations) or as a non-marriage (which gives rise to no such obligations). This is obviously a very important question in practice but the case-law doesn’t give any clear guidance as to how it should be answered. Some authority emphasises knowledge and intention and suggests that innocent non-compliance should result in the marriage being considered void (eg Burns v Burns [2007] EWHC 2492 (Fam)) while other judges have taken the view that there is no marriage at all (not even a void one) if there is a fundamental formal defect (eg Dukali v Lamrani [2012] EWHC 1748 (Fam)).

And it’s quite striking if one reads these cases alongside the UK Supreme Court’s judgments in Baiai and Quila. In one domain, we encounter a vociferous defence of marriage rights under the ECHR and we’re told that arbitrary legislative interference in marriages is absolutely unacceptable – while in the parallel universe of private international law, we encounter this nonchalant development of unpredictable inconsistent common law rules, and there is scarcely any mention of Articles 8 or 12 of the ECHR.

And this sense of a disconnect from human rights law is pervasive: it’s there when one looks at the textbook accounts of private international law on marriage; it’s there in the administrative guidelines giving practical effect to private international law rules, and it’s there in the treatment of essential or substantive validity of marriage – it’s by no means confined to formal validity.

To illustrate this point, let us look at a few more examples of UK authorities applying and interpreting private international law rules in a manner which seems highly questionable from a human rights perspective.

At an administrative level, if one looks at the published guidelines for Entry Clearance Officers, in dealing with immigration applications based on marriage, one sees that where an applicant is relying on a marriage conducted over the telephone, the marriage may be entitled to recognition if the woman accepting the man’s offer of marriage is located in a jurisdiction accepting that marriage form (SET 3.17). Clearly there is scope here for a separate debate as to whether such informal marriages should be recognised at all having regard to the 1962 UN Marriage Convention, but, if such marriages are to be recognised, it seems very undesirable that recognition should hinge on the gender of the party in the overseas jurisdiction. Given the ECtHR’s zero-tolerance stance on direct gender discrimination, it seems very unlikely that this guideline would survive scrutiny under Article 14 taken with Article 8 ECHR.

There are also examples of the English courts blithely giving effect to foreign marriage rules which are clearly incompatible with European and international human rights norms. For example, in the recent case of Asaad v Kurter [2013] EWHC 3852 (Fam) it was accepted – without any real debate – that a marriage celebrated in Syria was formally invalid where the Syrian wife had failed to obtain the government’s consent to marry a non-national (as was required by Syrian law). Nationality based restrictions on marriage have long been considered unacceptable from a human rights perspective: for example, Article 16 of the Universal Declaration of Human Rights, in guaranteeing the right of marriage, explicitly prohibits any ‘limitation due to… nationality’. Arbitrary State interference in a person’s choice of spouse has also been condemned by the ECtHR (eg in Jaremowicz v Poland App No 24023/03, 20 January 2010). In Asaad one would have expected at the very least some debate as to whether this rule of Syrian law should be denied effect on public policy grounds – but this point wasn’t raised at all.

One final example will suffice. In the late 1960s in Mohamad v Knott [1969] 1 QB 1 the English courts ruled that the marriage in Nigeria of a thirteen year old girl and a twenty-six year old man, both domiciled in Nigeria, should be recognised in England. That case was decided in an era where human rights and the rights of children in particular had yet to be developed. However, there is now a much greater emphasis on the rights of children and the need to protect them from the responsibilities of marriage – and recent statements from human rights bodies suggest eighteen should be the minimum age for marriage. Yet in a recent case Mohamed v Knott was referred to *obiter* with apparent approval and again there was no clear sense that the traditional private international law perspective required modification in order to ensure respect for human rights (Re K [2005] EWHC 2956 (Fam) [31]).

It is therefore clear that even modern iterations of private international law principle abound with statements and requirements which are highly questionable from a human rights perspective, and there is a strong sense that human rights law is not taken seriously in the domain of private international law rules affecting marriage. At the start of this paper, it was suggested that the disengagement was mutual – and by the same token, the ECtHR can also be accused of a lack of interest in private international law and of a failure to apply the Convention in a manner which is sensitive to the methodology and logic of private international law.

There is relatively little ECtHR case-law on foreign marriage recognition *per se* – but such case-law as there is on this question, and on marriage and status conflicts more generally, suggests a tendency to either ride roughshod all over the conflicts norms, or else to defer to the private international law perspective without explaining why it is ECHR-compatible. Certainly, upon reading a variety of ECtHR judgments, some dealing with private international law rules, and some dealing with other areas of domestic law, one has the impression of two contrasting approaches being taken. In many cases not concerned with private international law, one encounters ECtHR judges who are willing to roll up their sleeves and to analyse in detail the effectiveness of domestic legal rules and their capacity to fulfil their stated objectives and their proportionality. By contrast, in the conflicts cases, there often appears to be either a bland acceptance or a sweeping unreasoned dismissal of the relevant rule of private international law.

A relatively recent case on foreign marriage recognition is Green and Farhat v Malta App No 38797/07 6 July 2010 and it is suggested that this case belongs in the ‘bland deference’ category. This case concerned a Maltese refusal to recognise the marriage in Libya of a Maltese woman, who had previously been married in Malta. She had dissolved her first marriage in accordance with Libyan law prior to marrying a Libyan man in Libya where she lived for the next twenty years with her second husband. Given the extensive ties with Libya, there was a strong argument that Maltese law was out of line with internationally accepted norms of private international law in refusing to accept the validity of the second marriage on these facts. However, the ECtHR simply accepted the Maltese view that she had failed to prove that her domicile was in Libya, and that this requirement fell within the sphere of Malta’s public policy. It is true that there were other factors at play here (the first husband had not been notified of the Libyan proceedings and at the time Maltese law did not permit of divorce – and the Court alluded to those factors) but there appeared to be no willingness to engage with the argument that a Contracting State has failed to respect a person’s family life (under Article 8 ECHR) in refusing to accept an alteration of status effected in a country where that person has resided for twenty years. And this bland deference is all the more perplexing when one considers that in two contemporaneous judgments, the Luxembourg and Greek authorities were sharply criticised for failing to accept the social reality of a personal status conferred by a third State, and were found to be in breach of Article 8 ECHR in failing to recognise the adoptive status of the applicants in those cases (Wagner v Luxembourg App No 76240/01 28 June 2007, Negrepontis-Giannisis v Greece App No 56759/08 3 May 2011). When one looks at these cases in parallel, it’s hard to see why the same obligation of cross-border status recognition should not apply to marriage.

The same kind of bland deference is encountered in Ammdjadi v Germany App No 51625/08 9 March 2010. In this case, an Iranian woman who had been living in Germany for twenty years applied for a share of her husband’s pension in accordance with German law, but this was denied on the basis that such financial provision was governed by the law of the parties’ nationality, here Iranian law which did not provide for such relief. Again it was arguable that the relevant German private international law rules were out of line with modern private international law thinking, and indeed the ECtHR accepted that ‘habitual residence’ was probably a preferable connecting factor. Nonetheless, the complaint was dismissed summarily on the basis that it was manifestly unfounded. So, as in Green and Farhat, in Ammdjadi, we see private international law rules escaping any real scrutiny, with very severe consequences for the applicants.

It was suggested earlier that in other cases the ECtHR had ridden roughshod over private international law rules – and the Wagner case falls into that category. While the outcome on the facts in Wagner made sense and the Court was right to condemn the applicants’ treatment under Luxembourg law, it is noteworthy when one reads the judgment that there is no real engagement with the private international law rules at issue.[[3]](#footnote-3) In this case, Luxembourg law made the recognition of overseas adoptions conditional on the overseas authorities applying the same law as that designated by Luxembourg choice of law rules but the ECtHR didn’t comment on the rationality of that recognition policy. To the extent that it assessed the proportionality of Luxembourg law, it focussed only on the internal law which precluded adoption by unmarried persons and there was no reasoned assessment of the recognition rule.

The same allegation of riding roughshod can be made with respect to Pellegrini v Italy (2002) 35 EHRR 2 where the ECtHR ruled that the Italian authorities should satisfy themselves that a third country annulment had been granted in compliance with Article 6 ECHR (fair trial guarantee) prior to the recognition of that annulment in Italy. Again there appeared to be no appreciation of the comity and tolerance underpinning private international law, and the desirability of extending recognition even in circumstances where third countries do not adhere to precisely the same standards as the recognising State.

Against this backdrop, it seems fair to say that the ECtHR must shoulder some of the responsibility for the lack of impact of human rights law on private international law. Where it has been faced with facts raising private international law issues, it has often shied away from any engagement with the private international law dimension and has declined to offer coherent guidance to national authorities on their human rights obligations in applying private international law rules.

As to why the ECtHR has so often been reluctant to engage meaningfully with private international law, some have attributed it to a general tendency on the part of the judges of the ECtHR to have a background in public law – and a lack of familiarity with private international law.[[4]](#footnote-4) This reluctance might also be explicable by reference to the very different first principles of these two branches of the law: while human rights law is premised on standardisation and universality, private international law is founded on an ethos of pluralism – and a sense that in cross-border situations one might accept a legal solution which would be considered unacceptable in the domestic context. As far as marriage cases are concerned, some of the ECtHR’s reticence may also be due to the uncertainty as to whether Article 12 ECHR (the right to marry) applies to foreign marriage recognition at all. In Sheffield and Horsham v UK (1999) 27 EHRR 163 it was suggested that it did not; however, other case-law suggests the contrary (eg City of Westminster v IC [2008] EWCA Civ 198 (CA).

1. Paper delivered at conference on ‘Culture, Dispute Resolution and the Modernised Family’ 6-8 July 2016 (conference organised by International Centre for Family Law, Policy and Practice and King’s College London). This paper draws on research undertaken in writing chapter 11 of Fawcett, Ní Shúilleabháin and Shah, *Human Rights and Private International Law* (Oxford University Press, 2016). [↑](#footnote-ref-1)
2. See eg O’Donoghue v UK (2011) 53 EHRR 1. [↑](#footnote-ref-2)
3. This was noted by P Kinsch, ‘Recognition in the Forum of a Status Acquired Abroad – Private International Law Rules and European Human Rights Law’ in K Boele-Woelki et al (eds), *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr* (Eleven International, The Hague 2010) 264. [↑](#footnote-ref-3)
4. See Kinsch, *op cit*, 260. [↑](#footnote-ref-4)