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SYMPOSIUM ON INTERNATIONAL LAWS PUBLIC AND PRIVATE

FOREIGN RELATIONS LAW AS A METHOD OF PRIVATE INTERNATIONAL LAW'S THEORETICAL SELF-REFLECTION AND CRITIQUE

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In this essay, I think with Karen Knop about the heuristic and critical potential of the framework of Foreign Relations Law (FRL) for Private International Law (PrIL). I apply the framework of FRL to the recognition of foreign marriages in Denmark to study how PrIL is operationalized by domestic authorities. FRL helps us see how PrIL's operationalization engages a wide array of legal fields, including Public International Law (PIL), domestic administrative law, and immigration law, as well as the domains of foreign service and foreign policy. In doing so, PrIL in this context draws upon all these fields' rationales and implicit assumptions. I argue that a FRL perspective not only contributes to PrIL's theoretical self-reflection, but also enhances PrIL's capacity for subversiveness—"its ability to unsettle by showing a given legal system's assumptions and approaches to be a matter of choice rather than simply common sense."[1]

Foreign Relations Law as an Analytical Framework

As both a public and private international lawyer, Karen Knop sought ways of overcoming disciplinary isolations. FRL as a methodological "framing" was Knop's latest passion because of the potential it offered to bring "greater breadth and greater detail" to both PrIL and PIL.[2] Unfortunately, little of her work on FRL was published.[3] In this essay, I draw on unpublished materials for workshops organized and planned by Knop in Helsinki in June and August 2022 on the subject of FRL as well as my conversations with Knop in Oxford, London, Helsinki, and Budapest in the same year. Those interactions inspired me to deploy a FRL perspective in my own work on the regulation of marriage at the intersection of PIL and PrIL.

FRL offers an analytical framework that helps overcome the assumption that the state "speaks with one voice in international law"—an assumption that, as Knop and her collaborators for one of the workshops put it, is "as often debunked as repeated" in PIL and PrIL.[4] In all of her work, Knop aimed to understand how different branches of domestic public power interact with international law. For the workshops in Helsinki, she invited authors working on an untraditional range of topics. For one workshop, for instance, she invited authors working

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[1] Karen Knop, *Foreign Relations Law: Comparison as Invention*, *in* THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 49 (Curtis A. Bradley ed., 2019).

[2] *Id.* at 45–47.

[3] *Id.*; *Professor Karen Knop: Is Foreign Relations Law the Answer to Populism?*, U. HELSINKI (Apr. 16, 2021).

[4] Karen Knop, Martti Koskenniemi & Robert Wai, *Workshop Description: The Multi-vocal State in International Law: Diplomacy Inside Out: Workshop*, University of Helsinki 1 (2022) (on file with the author).

on constitution drafting. These authors showed how the codification of domestic public law historically emerged from comparative and international legal thinking of the drafters.[5] She also invited authors writing on the nature of international representations by states and "secret diplomacy,"[6] examples which demonstrated the difficulty of distinguishing between decisions made by diplomats reflecting the state's national law and interests, and those made reflecting international law and the interests of an international organization.

Knop invited these interventions as part of her exploration of FRL, because they complicate the dichotomies in legal theory between national and international, and internal and external law. As such, these interventions engaged with "domestic law [and bureaucracy] relevant to inter-state issues"[7] and were therefore relevant to Knop's exploration of the FRL framework. In her work at the University of Helsinki, she sought to apply FRL to explore how domestic opposition to populist leaders mobilize constitutional rules on division and devolution of public powers to resist executive withdrawals from international treaties.[8]

Knop thereby sought to understand how populist opposition to international law can be resisted, not by enhancing the "resilience of international law,"[9] but by application and interpretation of the domestic. As a critical legal scholar, she employed a critical theory method that draws from the particular rather than the universal. As she reminded readers of her first monograph,[10] hers was a study of the concept of self-determination not as a matter of an international right but as "moments of national liberation . . . moments of decolonization."[11] In this work, she also drew on the engagement with international law by local actors in, and from, the Global South.[12] People "on the ground" are often labeled as "local translators or they are vernacularizers" of international law, but Knop suggested treating them as "theorizers."[13] She thus shifted the vantage point to examine how those on the ground used international law and then aimed to generate theory (of international law) from those actions.[14] This critical move accordingly underpins this essay.

FRL according to Knop was an analytical frame that has an outward face (examining the international) and an inward face (examining the internal allocation of laws and decisions). The outward face shows how relations between domestic branches of public power shape international law and politics.[15] Knop's understanding of the inward face amends Campbell McLachlan's "allocative conception"[16] of FRL, which "views its function . . . as a set of rules of jurisdiction and applicable law."[17] In Knop's version, the FRL lens allocating authority over international decisions to domestic actors is potentially open to an unlimited range of actors and legal fields. As such, it is a method of inquiry rather than authority and represents a "legal space of possibility."[18]

[5] Karen Knop & Martti Koskenniemi, *Workshop Description: Lost Public Side of Public International Law*, University of Helsinki (2022) (on file with the author).

[6] Knop, Koskenniemi & Wai, *supra* note 4, at 3.

[7] Knop, *supra* note 1, at 47.

[8] Knop, Koskenniemi & Wai, *supra* note 4, at 1; *Professor Karen Knop*, *supra* note 3.

[9] *Professor Karen Knop*, *supra* note 3.

[10] Karen Knop, Diversity and Self-Determination in International Law (2002).

[11] Karen Knop et al., *Turn on the Light: Sparking Critical Energy in International Law Research*, Inst. Glob. L. & Pol'y, 24:00–25:00 (May 6, 2021).

[12] *Id.* at 42:00.

[13] *Id.* at 42:00–43:00.

[14] *Id.*

[15] Knop, *supra* note 1, at 54.

[16] *Id.* at 47; Campbell McLachlan, *The Allocative Function of Foreign Relations Law*, 82 Brit. Y.B. Int'l L. 349 (2012).

[17] Campbell McLachlan, *Five Conceptions of the Function of Foreign Relations Law*, *in* The Oxford Handbook of Comparative Foreign Relations Law, *supra* note 1, at 24.

[18] Knop, *supra* note 1, at 60.

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Foreign Relations Law and Marriage Recognition

"[F]ields matter as analytical frames," Knop insisted.[19] They can function as "straitjackets," but as she observed, they can also function as optics, and "shifting optics . . . can open up questions that you wouldn't necessarily have thought of if you were just thinking [about the problem] from first principles [of the legal field initially viewed as relevant]."[20] I argue that FRL as a shift in optics applied to marriage recognition is generative not only for PrIL's legal-analytical theory but also for PrIL's capacity to function as critique.[21] I specifically apply the allocative conception of FRL to unravel the variety of domestic actors with allocated roles in the operationalization of PrIL behind each PrIL decision on marriage recognition. Consequently, I show how these decisions engage a plethora of other fields such as PIL (including human rights law), domestic administrative law, foreign service, and foreign policy, which consequently are incorporated into the substance of PrIL.

Cross-border marriage can be conceptualized as a "private relationship with a foreign element" and its recognition is thus a matter of PrIL. At the same time, the recognition forms the legal basis of spousal reunification and can also be a matter of migration law. Further, the ability to continue married life upon migration is also a part of the right to family life, and hence a matter of human rights law. Whether we analyze the issue from the perspective of one or more of these legal fields will influence the doctrinal, as well as critical legal, analysis of the recognition of foreign marriages.

I take marriage recognition rules in Denmark as an example of a broader North Atlantic trend of amending rules for marriage recognition ostensibly due to human rights concerns. As noted by critical scholarship, these legal amendments, however, have the simultaneous effect of reducing access to residence and other entitlements for those from racialized post-colonies, in particular.[22] Critical legal analysis of the Danish context has thus shown how the new rules for recognition, such as the conditional prohibition on the recognition of marriage between cousins and an absolute prohibition on the recognition of marriage of persons under 18, reflect as well as perpetuate racist, sexist, and economic ideologies.

These rules were formally adopted by amending Danish codes of migration law and PrIL, typically due to human rights concerns. Accordingly, the relevant rules are applied by authorities deciding on family reunifications (*Udlændingestyrelsen, Udlændingenævnet*) operating under the Danish Ministry of Migration and Integration, and by an authority tasked with cross-border marriage recognition (*Ankestyrelsen*) operating under the Danish Ministry of Social Affairs, Housing and the Elderly.[23] The relevant fields engaged by these actors would seem to be PrIL, migration law, and human rights law. This premise, concerning the relevant fields involved, would ordinarily inform the critique of these rules. Particularly, a critique of the assumptions and function drawing on critical social theory[24] would develop arguments primarily from ascertaining the social impact of these rules and juxtaposing

[19] *Id.* at 45.

[20] Knop et al., *supra* note 11, at 41:00.

[21] Knop, *supra* note 1, at 49.

[22] Nicole Stybnarova, Regulating Recognition and Reunification of Marriage in the Structure of Global Wealth Accumulation: Law, Economy and Social Domination, ch. 4 (2023) (unpublished Ph.D. dissertation, University of Helsinki) (on file with the author); Annika Liversage & Mikkel Rytter, Ægteskab Og Migration: Konsekvenser Af de Danske Familiesammenføringsregler 2002–2012 (2014); Annika Liversage & Mikkel Rytter, *A Cousin Marriage Equals a Forced Marriage: Transnational Marriages Between Closely Related Spouses in Denmark*, *in* Cousin Marriages: Between Tradition, Genetic Risk and Cultural Change (Alison Shaw & Aviad Raz eds., 2015).

[23] Stybnarova, *supra* note 22, ch. 4.

[24] On methods of critical social theory: Raymond Geuss, The Idea of a Critical Theory: Habermas and the Frankfurt School (1st ed. 1981).

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those against the rules' manifest content. It would thus develop arguments in the context of migration, cross-border relationships, and human rights of marriage identified as immediately relevant.

However, the FRL framework allows us to see that other fields of law and other public actors are also engaged in operationalizing these rules. We can thus see how these additional fields shape the social impact of these rules. In particular, the FRL framework points to links between public authorities officially making decisions on recognition of foreign marriages and the Danish foreign service. It shows that the decision-making authorities are guided by internal administrative guidelines issued by the Ministry of Foreign Affairs (MFA), in addition to the substantive rules on marriage recognition and family reunification. These guidelines have a significant influence on which applications for marriage recognition will get scrutinized more strictly. As recognition is carried out by public administrative bodies, general principles of domestic administrative law apply in the process. The foreign marriage sought to be established thus must be supported by public documents with prescribed formal qualities. Drawing on these domestic evidentiary standards, the MFA has set out a list of countries viewed as places where plagiarized documents can be easily secured. This list is not public, but some administrative decisions refer to it, and indicate that some countries are singled out as sources of plagiarized documents, e.g., Afghanistan, Iraq, Sudan, and Pakistan,[25] because they are seen as having a dysfunctional civil service due either to temporary issues (conflict and war) or long-term problems (corruption and perceived lack of organization).

As my review of the administrative cases reveals,[26] the MFA guidance further advises the domestic authority tasked with recognizing marriages that it can only rely on documents from these states if they have been verified by the local Danish embassy. Denmark, however, no longer maintains diplomatic services in some of the listed states (typically for security reasons). Public documents from countries like Iraq, Sudan, and Afghanistan thus require attestation from a local Danish embassy, which does not exist.[27]

The concerned applicants have two options. The responsible domestic Danish authority can directly contact its civil service counterpart in the country issuing the documents and request verification. This option is viable only if there are functioning civil authorities in the country in question. Moreover, some refugee applicants have resisted this approach due to personal security concerns. Alternatively, the verification can be provided by the nearest Danish embassy, which can claim legal expertise in the concerned jurisdiction (for example, consular services in Sudan are provided by an embassy in Ethiopia). Although this intervention into the PrIL process of recognition is an ad hoc MFA intervention informed by Danish foreign policy, the increased administrative costs are borne by the applicants. The cost of the second option rises significantly when the neighboring embassy itself lacks the relevant legal expertise and instead hires a local lawyer to certify the documents.

Through this FRL guided analysis, we can see that the social effect of the application of the law goes beyond what we might find when we focus on legal fields immediately identified as relevant. FRL highlights how one domain of law, and its social effect, is influenced by or channeled through the logic of, and conduct of actors within, another legal field that was initially invisible. Through these insights, the Danish PrIL authorities can become "theorists" of PrIL—as per Knop's method of treating actors on the ground as theory-builders. The insight concerning their practice can deepen and broaden PrIL's legal-analytical theory by showing that it substantively draws on administrative law and PIL, and its operation is embedded in the workings of the foreign service and foreign policy.

This insight also enhances PrIL's capacity for subversiveness by expanding our understanding of social domination and stratification that result from decisions that initially appear as PrIL decisions. From the initially

[25] Stybnarova, *supra* note 22, at 306.

[26] The following details are based on cases reviewed in: *Id.*, ch. 4.

[27] The embassy in Iraq has re-opened since the research was conducted.

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identified social stratification of migrants and international couples with recognizable and non-recognizable marriages, we move on to stratification of states based on their perceived safety and the soundness of their civil service. This in turn helps us identify further assumptions within the law and draw on additional critical theories.

For example, realizing how recognition decisions are embedded in administrative law reveals the ways in which the assumptions of domestic administrative law reflect externally via PrIL. This includes assumptions anchored in standards of evidence in administrative proceedings, which, for certain regions, only accept documents attested to by the domestic institutions of the forum. It also highlights the state-centric nature of cross-border recognition, which accepts only state-based attestations (as opposed to, for example, religious ones). Additionally, making the connection between the practice of marriage recognition and PIL allows us to see how war, invasion, and conflict affect domestic PrIL's approach to documents from these countries.

Importantly, this enhanced critique not only expands the breadth of our focus, but also offers more nuance. It does so through uncovering further disparities within the social stratification caused by law. For example, the critical eye initially sees that a rule conditionally prohibiting recognition of marriage between cousins will disproportionately impact people from areas where these marriages are normalized, which typically are racialized former colonies. If this is established, the initial critical conclusion might well be that the rule prohibiting recognition of marriage between cousins is racist.

The FRL framework, however, shows that within this larger affected group, the access to recognition for people from Afghanistan, Iraq, Sudan, and Pakistan will be further reduced. This is not because the prevalence of marriage between cousins in these states is higher than in other former colonies, but because these states are listed by the Danish MFA as zones with unreliable civil service and insufficient oversight concerning falsified documents. This highlights how some applicants face additional obstacles—not only because of the legal assumptions about their cultural practices concerning marriage—but also because of further assumptions about the civil service in post-conflict zones or the prevalence of corruption. The former assumption is reflected in the substantive rule prohibiting recognition of marriage between cousins, while the latter assumption is reflected in PrIL's operationalization. FRL thus uncovers the intersectional elements in the discrimination inherent in Western rules on marriage recognition.

As a further nuance, an FRL-informed perspective demonstrates that even if all applicants from the countries on the MFA's list have significantly reduced access to recognition of their marriages, there is a spectrum of accessibility challenges. For example, the MFA rule that costs of additional verification are borne by the applicant creates a further class-based differentiation as these fees can reach up to 500 USD.[28] This points to a further intersectional basis of discrimination: class adds an additional metric of differential experience. Those with the means to do so can partly overcome the general exclusionary threshold for recognition of marriage, based on racist assumptions about familial practices and based on the reliability of civil service in certain countries; those without the means to do so cannot.

Conclusion: Foreign Relations Law as a Method of Critical Private International Law

Drawing on Knop's engagement with the field of FRL as an analytical framework, I demonstrate how this framing prompts us to ask different questions than traditional approaches. The FRL frame shifts the role of critique from unveiling assumptions in PrIL's (and potentially migration law's and human rights') doctrine and rules to tracking its domestic operationalization, opening the space to draw further analytical and critical insights. This framing enhances the breadth and detail of PrIL's critique and hence its subversive capacity.

[28] Stybnarova, *supra* note 22, at 307.

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Interestingly, FRL does not provide direct normative guidance for a critical approaches in PrIL. Rather, it functions as a method of analysis that asks questions about the allocation of authority and its normative source, without answering these. The FRL framework guides PrIL's analysis of decisions made by public authorities acting externally to differentiate between particular offices within these authorities, as well as to inquire into their in/dependence from and operational relationships with other public authorities. In doing so it directs us to reconsider the fields of law involved as a part of PrIL. This direction is underscored by FRL's suggestion to investigate the national particularity of authority and roles expressed internationally. As Knop has shown, framing PrIL inquiries in FRL terms can offer novel insights that advance existing debates about the conceptual boundaries between the international and national, and the legal and political.[29]

[29] Knop, *supra* note 1, at 54.

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