Harry Phillip American Inn of Court
The Same Sex Marriage Cases
September 15, 2015

Comparative Law Considerations

The opening paragraph of a recent law review article raises the question of cross-border recognition of marriages in a way that has intriguing implications in the same-sex marriage context:

> Imagine case 1: Odysseus married Penelope in their homeland Greece, in a marriage valid under Greek law. Later, they moved to Troy. According to the norm embodied in the conflict of laws rules regarding marriage, Troy would recognize the validity of this marriage regardless of the terms of marriage in Trojan law. That is because the ceremony is valid according of the law of the country where it was preformed, and the parties are considered to have martial capacity according to the law of their home country. The choice of law rules regarding this issue, through structured for the most part by each country independently, are similar throughout the world. Each states the same basic norm that when a couple that is eligible to marry marries in a ceremony valid in the country where the marriage is preformed, other countries should recognize this marriage as valid. This would be the case even if the marriage was performed in a manner unacceptable in Trojan law or between parties unfit to marry according to that law, out of respect for Greece's autonomy and control over its people. So, wherever Odysseus may go, his marriage to Penelope remains valid.

Sharon Shakargy, *What Do You Do When They Don't Say "I Do"? Cross-Border Regulation for Alternative Spousal Relationships*, 48 VAND. J. TRANSNAT'L L. 427, 428-29 (2015)(footnote omitted).

Stated differently, choice of law rules (or the lack of applicable choice of law rules) will help determine the extent to which same-sex marriages originating in the United States will be recognized in other countries. As reflected in two slightly dated (as of December 31, 2012) Appendices attached to another law review article, the extent to which same-sex marriage or marriage-like relationships are recognized around the world present a mixed and intriguing spectrum.[1] For example, as of December 31, 2012, same-sex marriages were permitted in ten or eleven nations and prohibited in at least forty-seven nations.

[1] Attached hereto are copies of Appendix I and Appendix II from Professor Wardle's law review article. *See* Lynn D. Wardle, *Equality Principles as Asserted Justifications for Mandating the Legalization of Same-Sex Marriage in American and Intercountry-Comparative Constitutional Law*, 27 BYU J. PUB. L. 489, 523, 526 (2013)(footnotes omitted).

Basic principles that might apply are set out in the Restatement (Second) Conflict of Laws regarding Validity of Marriage:

> (1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6.
>
> (2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).

Section 6 of the Restatement (Second) Conflict of Laws identifies the following principles: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied. *Id.* § 6(2). If the above-stated principles apply to the marriage of Penelope and Odysseus and the marriage was valid under Greek law, it appears that they can legally live happily ever after as a married couple in Troy.

Apart from choice of law considerations, Professor Lynn Wardle, in his law review article, mentioned international documents on equality as potential sources for cross-border recognition of same-sex marriages and related issues. *See* Lynn D. Wardle, *Equality Principles as Asserted Justifications for Mandating the Legalization of Same-Sex Marriage in American and Intercountry-Comparative Constitutional Law*, 27 BYU J. PUB. L. 489 (2013). He mentioned the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Hague Convention on the Civil Aspects of International Child Abduction, and the Convention on the Rights of the Child. Professor Wardle also pointed to general language from the Universal Declaration of Human Rights that might be considered to be helpful: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." *Id.* at 512.

Professor Wardle's discussion of international cases was particularly interesting:

> Advocates of same-sex marriage have long argued that these documents should be interpreted to provide a right to same-sex marriage. Those claims have been notably unsuccessful. These human rights charters have not been interpreted as requiring member states to redefine marriage to include same-sex couples. For

example, in 2002 in *Joslin* v. *New Zealand,* the United Nation's Human Rights Committee affirmed that the internationally recognized civil right of marriage created by the International Covenant on Civil and Political Rights confers the obligation on states "to recognize as marriage only the union between a man and a woman wishing to marry each other." This became the touchstone of understanding these human rights documents, and the various member states have been left to determine for themselves what recognition will be given other domestic relationships. Similarly, in *Rees* v. *United Kingdom*, the European Court of Human Rights held that the right to marry, as protected by the European Convention on Human Rights, applies only to "traditional marriage," leaving the individual states free to individually determine the nature and degree of recognition to extend to extend other relationships.

In 2010 in *Schalk* v. *Austria*, the European Court of Human Rights held definitively that the European Convention on Human Rights does not require member countries to legalize or even recognize same-sex marriages. Upholding the Austrian government denial of the two gay petitioners' request to legally contract a marriage, and agreeing with the Austrian court's holding that disallowance of same-sex marriage did not violate the Convention, the European Court held that the Convention did not confer or protect any right to same-sex marriage: The Court observes that, looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women. However, in contrast, all other substantive Articles of the Convention grant rights and freedoms to "everyone" or state that "no one" is to be subjected to certain types of prohibited treatment. The choice of wording in Article 12 must thus be regarded as deliberate. Moreover, regard must be had to the historical context in which the Convention was adopted. In the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex.

Similarly, the Court ruled that the Convention's non-discrimination article, "Article 14[,] taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation [to legalize same-sex marriage] either." Petitioners claimed also that Article 14 was violated because even though they now could register their partnership in Austria, they were "discriminated against as a same sex-couple on account of certain differences conferred by the status of marriage on the one hand and registered partnership on the other." The Court of Human Rights rejected that claim noting the margin of appreciation accorded states, and the lack of consensus within Europe on the point, that registered partnerships in Austria were "a legal status equal or similar to marriage in many respects" with "only slight differences in respect of material consequences, [but] some substantial differences ... in respect of parental rights." However, it was important to the Court to note that the scheme "corresponds on the whole to the trend in other

> member States [in Europe]." Therefore, the Court concluded that there was "no violation of Article 14 of the Convention taken in conjunction with Article 8."

Id. at 513-15 (footnotes omitted).

It appears, therefore, that choice of law and international equality documents might yield mixed results in the quest for cross-border recognition of same-sex marriages.

APPENDIX I: THE LEGAL ACCEPTANCE OF SAME-SEX MARRIAGE AND UNIONS IN THE UNITED STATES AND GLOBALLY

Legal Status--31 December 2012

A. Legal Allowance of Same-Sex Unions in the United States

Same-Sex Marriage Is Legal in Nine U.S. States (18%), the District of Columbia, and Two Indian Tribes

Connecticut	New York
Iowa	Washington
Maine	Vermont
Maryland	District of Columbia
Massachusetts	Coquille Tribe
New Hampshire	Suquamish Tribe

Same-Sex Unions Equivalent to Marriage ("Civil Unions") Are Legal in Eight U.S. States (20%) and the District of Columbia.

California	Hawaii
Nevada	Delaware
New Jersey	Rhode Island
Oregon	District of Columbia
Illinois	

Same-Sex-Union Registry and Specific, Limited Benefits in Two More U.S. Jurisdictions.

Colorado	Wisconsin

B. Legal Allowance of Same-Sex Unions Globally

Same-Sex Marriage Is Permitted in Ten (*or Eleven*) Nations.

The Netherlands	Sweden
Belgium	Portugal
Canada	Iceland
Spain	Argentina
Norway	Denmark (*and arguably South Africa*)

Same-Sex Unions Equivalent to Marriage Are Allowed in Seventeen or Sixteen Other Nations (9%).[122]

Ecuador	Brazil
Finland	Switzerland
France	United Kingdom
Germany	Uruguay
Luxembourg	New Zealand
South Africa	Austria
Slovenia	Ireland
Andorra	Liechtenstein and (most of) Australia

Same-Sex Partnerships (Formal but Not Equal to Marriage) Are Allowed in Five or More Nations.

Columbia	Hungary
Croatia	Israel

APPENDIX II: THE LEGAL REJECTION OF SAME-SEX MARRIAGE AND UNIONS IN THE UNITED STATES AND GLOBALLY

Legal Status--31 December 2012

A. Legal Rejection of Same-Sex Unions in the United States

Thirty-one States (62%) and Six Indian Tribes Prohibit Same-Sex Marriage by Constitutional Amendment. Twenty States (40%)* Also Ban Civil Unions.

Alaska	Kentucky*	Ohio*	Cherokee Tribe
Alabama*	Louisiana*	Oklahoma*	Navajo Tribe
Arkansas*	Michigan*	Oregon	Sault Tribe
Arizona	Mississippi	South Carolina*	Muscogee Tribe
California	Missouri	South Dakota*	Iowa Tribe
Colorado	Montana	Tennessee	Chickasaw Tribe
Florida*	Nebraska*	Texas*	
Georgia*	Nevada	Utah*	
Hawaii	North Carolina*	Virginia*	
Idaho*	North Dakota*	Wisconsin*	
Kansas*			

B. Legal Rejection of Same-Sex Marriage Globally

At Least 47 of 193 Sovereign Nations (24%) Have Constitutional Provisions Defining Marriage As a Union of Man and Woman.

Armenia (art. 32)
Azerbaijan (art. 34)
Belarus (art. 32)
Bolivia (art. 63)
Brazil (art. 226)
Bulgaria (art. 46)
Burkina Faso (art. 23)
Burundi (art. 29)
Cambodia (art. 45)
China (art. 49)
Columbia (art. 42)
Cuba (art. 43)
Democratic Republic of Congo (art. 40)
Ecuador (art. 38)
Eritrea (art. 22)
Ethiopia (art. 34)
Gambia (art. 27)
Honduras (art. 112)
Hungary (art. M - April 2011)
Japan (art. 24)
Latvia (art. 110 - Dec. 2005)
Lithuania (art. 31)
Malawi (art. 22)
Moldova (art. 48)
Mongolia (art. 16)
Montenegro (art. 71)
Namibia (art. 14)
Nicaragua (art. 72)
Panama (art. 58)
Paraguay (arts. 49, 51, 52)
Peru (art. 5)
Poland (art. 18)
Romania (art. 48)
Rwanda (art. 26)
Serbia (art. 62)
Seychelles (art. 32)
Somalia (art. 28)
South Sudan (art. 15)
Spain (art. 32, disregarded or overturned by legislation)
Sudan (art. 15)
Suriname (art. 35)
Swaziland (art. 27)
Tajikistan (art. 33)
Turkmenistan (art. 25)
Uganda (art. 31)
Ukraine (ark. 51)
Venezuela (art. 77)
Vietnam (art. 64)