Ghassemi v. Ghassemi: An Interesting Decision from the Louisiana Court of Appeal

This is certainly not the first case, or the last case, to discuss the inherent conflict that results when a state provides that foreign marriages should be recognized, but nonetheless bans a certain form of marriage that is permitted elsewhere. It does, however, illustrate a noteworthy approach where the two states are worlds-apart in their public policies.

The case of *Ghassemi v. Ghassemi* involves divorce proceedings between persons married in 1976. The trial court refused to recognize their marriage for two reasons. First, they were married in Iran. Second, they are first cousins.

On the first issue, the trial court refused to "recognize any document, decree, judgments[,] statutes or contracts . . . whatsoever from the country of Iran." In its view, "that country has been declared by itself and by its leader to be an enemy of the United States. The United States has had no diplomatic relations with that country for 28 years, and they are not a signatory to the Hague Convention with respect to marriages." It didn't seem to matter that when the couple was married in 1976, Iran was a U.S. ally.

This decision seemed quite spurious, and was overturned on appeal. Under this reasoning, all couples married in Iran would have been unmarried for all legal purposes, depriving them of the ability to inherit under the laws of intestate succession, call on the standard legal procedures for property settlement upon divorce, obtain various insurance benefits that were available only to married couples, etc. This, for no reason other than that the leaders of the country in which

they were married are enemies of the United States. According to the Court of Appeal, "[i]t would be a questionable policy indeed to base the status of private individuals on the fluctuation of international relations," and on the poor behavior of the leaders of the country in which they were married.

The second issue took a bit more ink to resolve. Iran permits marriage between first cousins. Like many states, Louisiana law bars marriage between first cousins, but it also provides that foreign marriages should be recognized, even if they would otherwise be illegal, unless it violates "a strong public policy" of the state.

In measuring the "strength" of Louisiana's policy against first-cousin marriage, the Court of Appeal looked, first, to whether Louisiana law categorically prohibits all first-cousin marriages and sexual relationships; the court found that it did not. *Ghassemi*, Slip. op. at 22 ("we note that the Louisiana Legislature has not expressly outlawed marriages between first cousins regardless of where they are contracted as it has emphatically done in the case of purported same sex marriages" (emphasis in original)); see also id. at 24 ("relations between first cousins are not prohibited by our criminal incest statute"). It also noted that "marriage to first cousins has not always been prohibited in Louisiana." Id. at 17-18. (noting that the change in the law came in 1902).

While this may have been enough to reverse the decision of the trial court, the Court of Appeal also looked to various other sources as to the depth of the prohibition on first cousin marriage, including:

- "natural law" (which Louisiana courts seem to refer to much more often than do other state courts, perhaps because of Louisiana's civil law tradition),
- "Bible's Book of Leviticus, the font of Western incest laws"

(which does not prohibit first-cousin marriages)
• the views of other U.S. states (of which about half allow some or all first-cousin marriages),
• the views of other "western countries" (interestingly, "the U.S. is unique among western countries in restricting first cousin marriages.")
Id. at 24-26.

Surveying these sources, the court eventually found that "although Louisiana law expressly prohibits the marriages of first cousins, such marriages are not so odious as to violate strong public policy of this state." Id. at 22.

Like other who have commented on this case (Hat Tip to the editors at the Volokh Conspiracy for pointing it out), I also generally agree that American courts shouldn't refer to modern foreign law in interpreting the meaning of the U.S. Constitution; for sure, American constitutional practices have their own history, text, and have been crafted in accordance with American life and our unique political thought. But is it a mistake to cast this decision into that same ilk of those decisions that have sparked controversy and, in some quarters, restrained outrage? *Compare Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a state sodomy law as inconsistent with the U.S. Constitution, based partly on a survey of laws in other countries) *with id.* (Scalia, J., dissenting) (characterizing the Court's discussion of foreign laws as "meaningless" and "dangerous dicta," since "this Court … should not impose foreign moods, fads, or fashions on Americans") Using a comparative survey of foreign law to determine the scope of non-Constitutional domestic legal principles is often sensible—as even Justice Scalia has agreed, *see Schriro v. Summerlin*, 542 U.S. 348 (2004)—where the question is an empirical one. See id. (referencing the laws of "other countries" to determine whether judicial fact-finding, as opposed to juries, so "seriously diminishe[s]" accuracy as to produce an "impermissibly large risk" of

injustice). But here, the case directly involves the scope of the State's "public policy" exception to marriage recognition. Isn't this a classic issue that is necessarily bound-up in the individualized history and political fabric of the forum state, which should be decided by referencing only that State's authorities? Its probably a distinction without a difference here—even had the court stopped before its comparative survey, there was still likely enough evidence that "such marriages are not so odious as to violate strong public policy" of Louisiana.