

Gay Marriage: France Blacklists 11 Nationalities (Updated)

In May 2013, France adopted a law allowing gay marriage.

The statute confirmed France' traditional choice of law rule according to which the law of the nationality of each spouse applies to the substantive validity of marriage (Civil Code, Art. 202-1, para. 1). However, in order to avoid confining the new legislation to couples of nationals originating from the 14 jurisdictions or so which allow gay marriage, the statute also adopted a new rule providing that same sex marriage would still be allowed when the national law or the law of the residence of one of the spouses only allowed it (Civil Code, Art. 202-1, para. 2). I have already reported how the French Constitutional Council miraculously found this provision to be constitutional.

So, is everybody welcome to come to Paris to marry a French national? Not quite. The French ministry of justice has issued guidelines instructing French mayors not to marry couples including a national coming from a list of 11 jurisdictions. The reason why is that France concluded a bilateral treaty with each of these jurisdictions providing for the application of the law of the nationality of each spouse. As treaties are superior to statutes in France, the administration has concluded that these treaties prevail over Art. 202-1, para. 2 of the Civil Code.

La règle introduite par l'article 202-1 alinéa 2 ne peut toutefois s'appliquer pour les ressortissants de pays avec lesquels la France est liée par des conventions bilatérales qui prévoient que la loi applicable aux conditions de fond du mariage est la loi personnelle.

Dans ce cas, en raison de la hiérarchie des normes, les conventions ayant une valeur supérieure à la loi, elles devront être appliquées dans le cas d'un mariage impliquant un ou deux ressortissant(s) des pays avec lesquels ces conventions ont été conclues. En l'état du droit et de la jurisprudence, la loi personnelle ne pourra être écartée pour les ressortissants de ces pays.

Most of these treaties, however, were concluded in the 1950s and 1960s. None of them contains any express provision on same sex marriage.

The blacklisted nationalities are:

- Algeria, Tunisia and Morocco,
- the five countries which formerly constituted Yugoslavia
- Laos, Cambodia
- Poland

A French prosecutor enforced the guidelines at the beginning of September and denied the right to marry to a Franco-Moroccan couple.

UPDATE:

The decision of the prosecutor was set aside today by a first instance court of Chambéry.

I could not see the judgment, but the French press has reported that the Court would have ruled that the recent French statute has modified French international public policy, and that the applicable bilateral convention should thus be avoided as it discriminates against gay people.

This would be an innovative use of the public policy exception, to avoid the law of the forum, as discussed in comments by Mr Margonski and Mr Davis.