International Comity and Family Law: A Marriage Yet To Be Celebrated

*Edzyl Josef G. Magante**

I. INTRODUCTION 372
II. COMITY UNDER THE FAMILY CODE 375
A. *The Nationality Rule*
B. *Article 26 of the Family Code*
III. CONSTITUTIONAL FRAMEWORK OF RECOGNITION 382
IV. THE DOCTRINE OF PUBLIC POLICY 388
V. CONCLUSION 390

I. INTRODUCTION

> *If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom.*
>
> *- Justice Robert Jackson*[1]

Although not part of the sources of international law as understood in the formulation adopted in article 38 of the Statute of the International Court of

* '04 J.D., *second honors*, Ateneo de Manila University School of Law; *cum laude*, AB '00, University of Santo Tomas. In 2003, the author was part of the team that won the national rounds and competed in the international rounds of the Philip C. Jessup International Law Moot Court Competition held in Washington, D.C. The author was an Associate of Angara Abello Concepcion Regala & Cruz Law Offices (2004-2007). He is currently a Senior Associate of Zambrano & Gruba Law Offices (2007-present). He is also a Co-Coordinator of a project of the Ateneo Law School with the Philippine Judicial Academy for the continuing legal education of members of the Philippine judiciary and research attorneys on public and private international law issues. He teaches Legal Technique and Logic at the Ateneo Law School. The author's previous works published in the *Journal* are *Confusion over Right to Bail in Extradition Proceedings: Did Government of Hong Kong Special Administrative Region v. Olalia Overturn Government of the United States of America v. Purganan?*, 52 ATENEO L.J. 134 (2007) and *Ratification of the Rome Statute at the Crossroads: Issues and Perspectives In Order To Render Philippine Courts Fully Competent To Prosecute Crimes Covered by the Rome Statute*, 51 ATENEO L.J. 935 (2007).

Cite as 52 ATENEO L.J. 372 (2007).

1. Estin v. Estin, 334 U.S. 541 (1948) (Jackson, J., dissenting).

Justice (ICJ),[2] the doctrine of comity is a well-accepted principle in international law.[3] Its objective is to further the interests of international cooperation by recognizing the systemic value of reciprocal goodwill.[4] The concept and rules of comity originate in the adoption by States of certain forms of conduct which create a mutually advantageous system of reciprocity based on expediency.[5] Historically, practices so extended between States are found initially in the area of diplomacy, particularly in connection with the maintenance of diplomatic relations, and, to a qualified extent, in attempts to uphold humanitarian principles during armed conflicts.[6]

One scholar traces the modern origin of comity to Ulrik Huber,[7] who posited three axioms on the law's applicability:

> 1. The laws of each State are valid within the boundaries of this State and bind all of its subjects, but not beyond;
>
> 2. All persons who are found within the boundaries of a State are held to be its subjects, whether they dwell there permanently or temporarily; and
>
> 3. The rulers of States arrange it by comity that the laws of each nation which are enforced within its boundaries maintain their validity

2. Statute of the International Court of Justice, art. 38, June 26, 1945, 3 Bevans 1179, 59 Stat. 1031, T.S. 993, 39 AJIL Supp. 215. Article 38 provides:

   > The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   >
   > a. *international conventions*, whether general or particular, establishing rules expressly recognized by the contesting states;
   >
   > b. *international custom*, as evidenced by a general practice accepted as law;
   >
   > c. the *general principles of law* recognized by civilized nations;
   >
   > d. subject to the provisions of Article 59, *judicial decisions* and the *teachings of the most highly qualified publicists* of the various nations, as subsidiary means for determination of the rules of law.
   >
   > This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto. (emphasis supplied)

3. *See*, H.G. Maier, *Extraterritorial Discovery: Cooperation, Coercion and the Hague Evidence Convention*, 19 VAND. J. TRANSNAT'L L. 239, 253 (1986).
4. *Id.*
5. MAX PLANCK INSTITUTE FOR COMPARATIVE PUBLIC LAW AND INTERNATIONAL LAW, 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 41-44 (2006).
6. *Id.*
7. Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9 (1966).

everywhere, to the extent that the power or the laws of the other State and its citizens are not prejudiced.[8]

The import of the doctrine is best explained by the U.S. Supreme Court in *Hilton v. Guyot*:[9]

> 'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[10]

Often, it is the attempt to achieve that delicate balance between international duty and convenience in the observance of comity that has led to vague formulations and unclear standards in comity — induced legislation. Comity has thus been regarded as, in the nature of things, a rather vague consideration,[11] that it is, and ever must be, uncertain.[12] It must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule.[13] Whatever the merits of these observations, the undeniable influence of comity in the growth of international law should compel States to make room for comity in every area of domestic legislation that is susceptible to having a foreign element. States must endeavor to formulate rules of comity that, while being consistent with legitimate State interests, do not unnecessarily emasculate laws or judgments promulgated in a foreign country. One fertile ground for the formulation of such rules is family law, particularly the recognition of marriages solemnized or contracted in another country.

This article shall raise some of the important legal issues in the current debates on recognition of foreign marriages. Particular focus shall be given to the comity provision in the Family Code dealing with marriage recognition, article 26, first paragraph. Considering, however, the dearth of jurisprudence in this area, the author shall provide a constitutional framework for understanding the operation of comity rules in marriage recognition, relying heavily on American authorities. As an integral component of a fundamental appreciation of the subject, the doctrine of public policy shall be discussed.

8. *Id.* at 26 n. 52.
9. Hilton v. Guyot, 159 U.S. 113 (1895).
10. *Id.* at 163-64.
11. Philips Medical Systems International B.V. v. Bruetman, 8 F.3d 600, 604 (7th Cir. 1993).
12. *Hilton*, 159 U.S. at 164 (citing Saul v. His Creditors, 5 Mart. (N.S.) 569, 596 (La. 1827)).
13. *Id.*

The ultimate objective of this article is to guide the courts in the proper application of appropriate legal principles in marriage recognition cases.

II. COMITY UNDER THE FAMILY CODE

A. The Nationality Rule

Any discussion on comity under the Family Code must begin with the nationality rule. The rule is contained in article 15 of the Civil Code,[14] which provides: "Laws relating to family rights and duties, or to the status, condition and legal capacity of persons are binding upon citizens of the Philippines, even though living abroad."[15]

The rule is supplemented by article 17 of the Civil Code, thus:

> Article 17. The forms and solemnities of contracts, wills, and other public instruments shall be governed by the laws of the country in which they are executed.
>
> When the acts referred to are executed before the diplomatic or consular officials of the Republic of the Philippines in a foreign country, the solemnities established by Philippine laws shall be observed in their execution.
>
> *Prohibitive laws concerning persons, their acts or property, and those which have for their object public order, public policy and good customs shall not be rendered ineffective by laws or judgments promulgated, or by determinations or conventions agreed upon in a foreign country.*[16]

The seminal case on the application of the nationality rule in articles 15 and 17 of the Civil Code in the context of marriage recognition is *Tenchavez v. Escaño*.[17] In this case, Pastor Tenchavez and Vicenta Escaño were validly married to each other. Vicenta left for the United States and eventually filed a complaint for divorce against Pastor in Nevada on the ground of "extreme cruelty, entirely mental in character."[18] A decree of divorce was issued.[19] Vicenta then married Russell Leo Moran in Nevada.[20] Vicenta subsequently acquired American citizenship and lived with Russell and their children in California.[21] Meanwhile, in the Philippines, Pastor filed an action for legal

14. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386 (1950).
15. *Id.* art. 15.
16. *Id.* art. 17 (emphasis supplied).
17. Tenchavez v. Escaño, 15 SCRA 256 (1965).
18. *Id.* at 358.
19. *Id.*
20. *Id.*
21. *Id.*

separation.[22] Vicenta claimed a valid divorce from Pastor and an equally valid marriage to Russell in Nevada.[23] The issues raised in the Supreme Court which are relevant to the application of the nationality rule are: (1) whether the divorce obtained by Vicenta in Nevada should be recognized in the Philippines; and (2) whether Pastor had a valid ground for legal separation. The Court held:

> It is equally clear from the record that the valid marriage between Pastor Tenchavez and Vicenta Escaño remained subsisting and undissolved under Philippine law, notwithstanding the decree of absolute divorce that the wife sought and obtained on 21 October 1950 from the Second Judicial District Court of Washoe County, State of Nevada, on grounds of "extreme cruelty, entirely mental in character." At the time the divorce decree was issued, Vicenta Escaño, like her husband, was still a Filipino citizen. She was then subject to Philippine law, and Article 15 of the Civil Code of the Philippines (Rep. Act No. 386), already in force at the time, expressly provided:
>
> > "*Laws relating to family rights and duties or to the status, condition and legal capacity of persons are binding upon the citizens of the Philippines, even though living abroad.*"
>
> The Civil Code of the Philippines, now in force, does not admit absolute divorce, *quo ad vinculo matrimonii*; and in fact does not even use that term, to further emphasize its restrictive policy on the matter, in contrast to the preceding legislation that admitted absolute divorce on grounds of adultery of the wife or concubinage of the husband (Act 2710). Instead of divorce, the present Civil Code only provides for *legal separation* (Title IV, Book 1, Arts. 97 to 108), and, even in that case, it expressly prescribes that "the marriage bonds shall not be severed" (Art. 106, subpar. 1).
>
> For the Philippine courts to recognize and give recognition or effect to a foreign decree of absolute divorce between Filipino citizens would be a patent violation of the declared public policy of the state, specially (sic) in view of the third paragraph of Article 17 of the Civil Code ...
>
> ...
>
> From the preceding facts and considerations, there flows as a necessary consequence that in this jurisdiction *Vicenta Escaño's divorce and second marriage are not entitled to recognition as valid*; for her previous union to plaintiff Tenchavez must be declared to be existent and undissolved. It follows, likewise, that her refusal to perform her wifely duties, and her denial of *consortium* and her desertion of her husband constitute in law a wrong caused through her fault, for which the husband is entitled to the corresponding indemnity (Civil Code, Art. 2176). Neither an

22. *Id.* at 359.
23. *Tenchavez*, 15 SCRA at 359.

> unsubstantiated charge of deceit nor an anonymous letter charging immorality against the husband constitutes, contrary to her claim, adequate excuse. Wherefore, *her marriage and cohabitation with Russell Leo Moran is technically "intercourse with a person not her husband" from the standpoint of Philippine Law, and entitles plaintiff-appellant Tenchavez to a decree of "legal separation under our law, on the basis of adultery"* (Revised Penal Code, Art. 333).[24]

B. Article 26 of the Family Code

The lone comity provision in the Family Code[25] is article 26. It provides:

> Article 26. All marriages solemnized outside the Philippines, in accordance with the laws in force in the country where they are solemnized, and valid there as such, shall also be valid in this country, except those prohibited under articles 35(1), (4), (5) and (6), 36, 37 and 38.
>
> Where a marriage between a Filipino citizen and a foreigner is validly celebrated and a divorce is thereafter validly obtained abroad by the alien spouse capacitating him or her to remarry, the Filipino spouse shall likewise have capacity to remarry under Philippine law.[26]

The first paragraph lays down the rule on recognition of marriages solemnized in another country, while the second paragraph provides the rule on recognition of divorces obtained abroad.

The general rule on marriage recognition is that marriages which are valid under the laws of the country where they are celebrated are also valid in the Philippines. The exceptions are marriages which, though valid in the country of celebration, are:

> (1) contracted by any party below eighteen years of age even with the consent of parents or guardians;[27]
>
> (2) bigamous or polygamous marriages not falling under article 41 of the Family Code;[28]

24. *Id.* at 361-63 (emphases supplied).
25. The Family Code of the Philippines [FAMILY CODE], Executive Order No. 209 (1988).
26. *Id.* art. 26.
27. *Id.* art. 35 (1).
28. *Id.* art. 35 (4). For reference, article 41 of the Family Code provides:

    > Article 41. A marriage contracted by any person during the subsistence of a previous marriage shall be null and void, unless before the celebration of the subsequent marriage, the prior spouse had been absent for four consecutive years and the spouse present had a well-founded belief that the absent spouse was already dead. In case of disappearance where there is danger of death under the circumstances

(3) contracted through mistake of one contracting party as to the identity of the other;[29]

(4) void for non-compliance with article 53 of the Family Code;[30]

(5) contracted by any party who, at the time of the celebration, was psychologically incapacitated to comply with the essential obligations of marriage, even if such incapacity becomes manifest only after solemnization;[31]

---

set forth in the provisions of Article 391 of the Civil Code, an absence of only two years shall be sufficient.

For the purpose of contracting the subsequent marriage under the preceding paragraph, the spouse present must institute a summary proceeding as provided for in this Code for the declaration of presumptive death of the absentee, without prejudice to the effect of reappearance of the absent spouse.

Article 391 of the Civil Code, cited in the above article, states:

Article 391. The following shall be presumed dead for all purposes, including the division of the estate among the heirs:

(1) A person on board a vessel lost during a sea voyage, or an aeroplane which is missing, who has not been heard of for four years since the loss of the vessel or aeroplane;

(2) A person in the armed forces who has taken part in war, and has been missing for four years;

(3) A person who has been in danger of death under other circumstances and his existence has not been known for four years.

29. FAMILY CODE, art. 35 (5).

30. *Id.* art. 35 (6). For reference, article 53 of the Family Code provides: "Either of the former spouse may marry again after compliance with the requirements of the immediately preceding article; otherwise, the subsequent marriage shall be null and void."

The preceding article states:

Article 52. The judgment of annulment or of absolute nullity of the marriage, the partition and distribution of the properties of the spouses, and the delivery of the children's presumptive legitimes shall be recorded in the appropriate civil registry and registries of property; otherwise, the same shall not affect third persons.

31. *Id.* art. 36. In Republic of the Philippines v. Court of Appeals and Molina, 268 SCRA 198 (1997), the Supreme Court prescribed the guidelines for the declaration of nullity of a marriage on the ground of psychological incapacity, as follows:

(1) The burden of proof to show the nullity of the marriage belongs to the plaintiff.

(6) between ascendants and descendants of any degree, whether the relationship between the parties be legitimate or illegitimate;[32]

(7) between brothers and sisters, whether of the full or half-blood and whether the relationship between the parties be legitimate or illegitimate;[33]

(8) between collateral blood relatives, whether legitimate or illegitimate, up to the fourth civil degree;[34]

(9) between step-parents and step-children;[35]

(10) between parents-in-law and children-in-law;[36]

(11) between the adopting parent and the adopted child;[37]

(12) between the surviving spouse of the adopting parent and the adopted child;[38]

(13) between the surviving spouse of the adopted child and the adopter;[39]

(14) between an adopted child and a legitimate child of the adopter;[40]

---

(2) The root cause of the psychological incapacity must be: (a) medically or clinically identified; (b) alleged in the complaint; (c) sufficiently proven by experts; and (d) clearly explained in the decision.

(3) The incapacity must be proven to be existing at the time of the celebration of the marriage.

(4) Such incapacity must also be shown to be medically or clinically permanent or incurable.

(5) Such illness must be grave enough to bring about the disability of the party to assume the essential obligations of marriage.

(6) The essential marital obligations must be those embraced by articles 68 up to 71 of the Family Code as regards the husband and wife as well as articles 220, 221 and 225 of the same code in regard to parents and their children.

(7) Interpretations given by the National Appellate Matrimonial Tribunal of the Catholic Church in the Philippines, while not controlling or decisive, should be given great respect by our courts.

(8) The trial court must order the prosecuting attorney or fiscal and the Solicitor General to appear as counsel for the State.

32. FAMILY CODE, art. 37 (1).

33. *Id.* art. 37 (2).

34. *Id.* art. 38 (1).

35. *Id.* art. 38 (2).

36. *Id.* art. 38 (3).

37. *Id.* art. 38 (4).

38. FAMILY CODE, art. 38 (5).

39. *Id.* art. 38 (6).

(15) between the adopted children of the same adopter;[41] and

(16) between parties where one, with the intention to marry the other, killed that other person's spouse or his or her own spouse.[42]

As noted earlier, there is a dearth of jurisprudence on recognition of foreign marriages in the Philippines. Recognition of divorces obtained abroad, however, has received a considerable amount of attention from the Supreme Court. A brief look at the direction of jurisprudence in this regard is warranted.

As worded, the rule on recognition of foreign divorces[43] seems to apply only to situations wherein one party was a Filipino and the other a foreigner at the time of the celebration of the marriage. Indeed, the Supreme Court has affirmed this interpretation in *Garcia v. Recio*[44] and *Republic v. Iyoy*.[45] In *Garcia,* the Court ruled:

> Philippine law does not provide for absolute divorce; hence, our courts cannot grant it. A marriage between two Filipinos cannot be dissolved even by a divorce obtained abroad, because of Articles 15 and 17 of the Civil Code. ***In mixed marriages involving a Filipino and a foreigner, Article 26 of the Family Code allows the former to contract a subsequent marriage in case the divorce is "validly' obtained abroad by the alien spouse capacitating him or her to remarry."***[46]

To the same effect is the Court's literal interpretation of article 26, second paragraph, in *Iyoy*: "As it is worded, article 26, paragraph 2, refers to a special situation wherein one of married couple is a foreigner who divorces his or her Filipino spouse."[47]

In *Republic v. Orbecido III*,[48] however, the Supreme Court adopted a different interpretation of article 26, second paragraph. Confronted with the question whether the said provision applies to a marriage between two Filipino citizens where one later acquired alien citizenship, obtained a divorce decree, and remarried while in the U.S., the Court ruled in the affirmative, explaining that:

40. *Id.* art. 38 (7).
41. *Id.* art. 38 (8).
42. *Id.* art. 38 (9).
43. *Id.* art. 26.
44. Garcia v. Recio, 366 SCRA 437 (2001).
45. Republic v. Iyoy, 470 SCRA 508 (2005).
46. *Garcia,* 366 SCRA at 446-47 (emphasis supplied).
47. *Iyoy*, 470 SCRA at 527.
48. Republic v. Orbecido III, 472 SCRA 114 (2005).

> Records of the proceedings of the Family Code deliberations showed that the intent of paragraph 2 of article 26, according to Judge Alicia Sempio-Diy, a member of the Civil Code Revision Committee, is to avoid the absurd situation where the Filipino spouse remains married to the alien spouse who, after obtaining a divorce, is no longer married to the Filipino spouse.
>
> Interestingly, paragraph 2 of article 26 traces its origin to the 1985 case of *Van Dorn v. Romillo, Jr.* The *Van Dorn* case involved a marriage between a Filipino citizen and a foreigner. The Court held therein that a divorce decree validly obtained by the alien spouse is valid in the Philippines, and consequently, the Filipino spouse is capacitated to remarry under Philippine law.
>
> Does the same principle apply to a case where at the time of the celebration of the marriage, the parties were Filipino citizens, but later on, one of them obtains a foreign citizenship by naturalization?
>
> The jurisprudential answer lies latent in the 1998 case of *Quita v. Court of Appeals.* In *Quita*, the parties were, as in this case, Filipino citizens when they got married. The wife became a naturalized American citizen in 1954 and obtained a divorce in the same year. The Court therein hinted, by way of *obiter dictum*, that a Filipino divorced by his naturalized foreign spouse is no longer married under Philippine law and can thus remarry.
>
> Thus, taking into consideration the legislative intent and applying the rule of reason, we hold that paragraph 2 of article 26 should be interpreted to include cases involving parties who, at the time of the celebration of the marriage were Filipino citizens, but later on, one of them becomes naturalized as a foreign citizen and obtains a divorce decree. The Filipino spouse should likewise be allowed to remarry as if the other party were a foreigner at the time of the solemnization of the marriage. To rule otherwise would be to sanction absurdity and injustice. Where the interpretation of a statute according to its exact and literal import would lead to mischievous results or contravene the clear purpose of the legislature, it should be construed according to its spirit and reason, disregarding as far as necessary the letter of the law. A statute may therefore be extended to cases not within the literal meaning of its terms, so long as they come within its spirit or intent.
>
> If we are to give meaning to the legislative intent to avoid the absurd situation where the Filipino spouse remains married to the alien spouse who, after obtaining a divorce is no longer married to the Filipino spouse, then the instant case must be deemed as coming within the contemplation of paragraph 2 of article 26.
>
> In view of the foregoing, we state the twin elements for the application of paragraph 2 of article 26 as follows:
>
> 1. There is a valid marriage that has been celebrated between a Filipino citizen and a foreigner; and

2. A valid divorce is obtained abroad by the alien spouse capacitating him or her to remarry.

The reckoning point is not the citizenship of the parties at the time of the celebration of the marriage, but their citizenship *at the time a valid divorce is obtained abroad* by the alien spouse capacitating the latter to remarry.[49]

If *Orbecido III* is any indication of how the Supreme Court will interpret article 26, first paragraph, on recognition of foreign marriages, it will be not strictly based on the letter of the law, but on its spirit, reason and justice. In this light, there must be due consideration of applicable constitutional principles and the doctrine of public policy.

III. CONSTITUTIONAL FRAMEWORK OF RECOGNITION

The constitutionality of laws on recognition of marriages solemnized abroad, and even of those dealing with the validity of marriages celebrated within the forum State, is to be tested against established standards in the realm of substantive due process,[50] equal protection,[51] and quite uncommonly, non-establishment of religion.[52] In this regard, a rich source of some helpful standards is the domain of same-sex unions.

The familiar rule of substantive due process is that, in order to survive a constitutional challenge, the law under consideration must pass the "purpose and means test": its purpose must be the protection of the interests of the public generally, as distinguished from those of a particular class; and the means employed are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.[53]

The groundbreaking decision of the U.S. Supreme Court in *Lawrence v. Texas*[54] has redefined the landscape of American jurisprudence on the validity of marriage laws and recognition of interstate marriages. *Lawrence* invalidated a state sodomy law that criminalized only members of the same sex from engaging in certain kinds of sexual activity. The Court interpreted

49. *Orcebido III*, 472 SCRA at 122.

50. PHIL CONST, art III § 1. It provides that "[n]o person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws."

51. *Id.*

52. PHIL CONST, art. III § 5. It provides that "[n]o law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof."; *See generally*, Richard S. Myers, *Same-Sex Marriage and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45 (1998) at 59-65.

53. U.S. v. Toribio, 15 Phil. 85 (1910) (citing Lawton v. Steele, 152 U.S. 133, 136 (1894)).

54. Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).

the substantive right to "liberty" in the due process clause to extend its protection to intimate sexual conduct between two partners of the same sex, declaring unconstitutional all those laws that had prohibited private "sodomy," oral or anal sex, between consenting adults in a non–commercial setting.[55] The Court situated this ruling within a larger discussion of the relationships of gay and lesbian couples and described the nature of the liberty interest it was recognizing thus:

> It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.[56]

Putting *Lawrence* in proper perspective, however, the Court's holding on liberty rights was issued in the context of a criminal prosecution. In fact, the Court clarified that the case does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter,[57] thereby excluding the question of marriage. Be that as it may, *Lawrence* has been invoked to support an argument for a fundamental right to marry a person of the same sex[58] because of the language in the decision stating:

> In *Planned Parenthood of Southeastern Pa. v. Casey*,[59] the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.[60] In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:
>
>> 'These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the

55. *Id.* at 578-79.

56. *Id.* at 567.

57. *Id.* at 578.

58. Standhardt v. Superior Court of Arizona, 77 P.3d 451 (Ariz. Ct. App. 2003).

59. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992).

60. *Id.*, at 851, 112 S. Ct. 2791.

> attributes of personhood were they formed under compulsion of the State.'

> Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.[61]

In the matter of equal protection, the settled rule is that the guarantee of equal protection of the laws is not violated by a legislation based on reasonable classification.[62] The classification, to be reasonable, (1) must rest on substantial distinctions; (2) must be germane to the purposes of the law; (3) must not be limited to existing conditions only; and (4) must apply equally to all members of the same class.[63]

In the case that is perceived to have laid the foundation for *Lawrence*, *Romer v. Evans*,[64] the U.S. Supreme Court rejected the proposition that bare expressions of *animus* or disapproval toward homosexuality could serve as a legitimate basis for subjecting gay people to selectively disfavored treatment.[65] *Romer* invalidated an amendment to the Colorado constitution that would have allowed local government to discriminate against homosexuals by way of denying the group opportunity for "special protection" in activities such as "housing, employment, education, public accommodations, and health and welfare services."[66] The Court found that the amendment lacked a rational relation to a legitimate State interest because it imposed a broad and undifferentiated disability on a single named group, an invalid form of legislation that was inexplicable by anything but animus toward the class that it affects.[67] The Court further stated that the desire to express moral disapproval for homosexuality by making gay people unequal to everyone else did not constitute a proper legislative end[68] that could support a valid classification.

The teaching of *Lawrence* and *Romer* is that a State must offer a concrete reason for a law denying equal treatment to gay couples in order to assert a legitimate State interest and survive a constitutional challenge on equal

61. *Lawrence*, 123 S.Ct. at 2481-82.

62. People v. Cayat, 68 Phil. 12 (1939).

63. *Id.* at 18 (citing Borgnis v. Falk Co., 133 N.W. 209 (1911); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Rubi v. Provincial Board of Mindoro, 39 Phil. 660 (1919); People and Hongkong & Shanghai Banking Corporation v. Vera and Cu Unjieng, 37 O.G. 187 (1937)).

64. Romer v. Evans, 517 U.S. 620 (1996).

65. *Id.* at 632.

66. *Id.* at 624.

67. *Id.* at 632.

68. *Id.* at 636.

protection grounds. As Justice O'Connor explains in her concurrence in *Lawrence*:

> Moral disapproval of a group cannot be a legitimate governmental interest under the equal protection clause because legal classifications must not be drawn for the purpose of disadvantaging the group burdened by the law. Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy. But the equal protection clause prevents a State from creating 'a classification of persons undertaken for its own sake.' And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior. The Texas sodomy law raises the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.[69]

In the context of marriage recognition, *Lawrence* and *Romer* seem to have raised the minimum threshold of equal protection in that a mere expression of moral disapproval, unsupported by any more substantial explanation of the State's interest, is not a sufficient basis for denying recognition to a marriage validly celebrated in a foreign country.

In the wake of *Romer*, the Vermont Supreme Court held in *Baker v. State*[70] that the exclusion of same-sex couples from the benefits and protections that State laws provide to opposite-sex married couples violates the common benefits clause of the Vermont constitution providing that "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community." [71] The issue, the Court explained, does not turn on the religious or moral debate over intimate same-sex relationships, but rather on the statutory and constitutional basis for the exclusion of same-sex couples from the secular benefits and protections offered married couples.

The *Baker* Court noted that, while the overwhelming majority of births continue to result from natural conception between a man and a woman, it is equally undisputed that many opposite-sex couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, and that others are incapable of having children. Therefore, the Court concluded, if the purpose of the statutory exclusion of same-sex couples is to "further the link between procreation and child rearing," it is

69. Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in the judgment).

70. Baker v. State, 744 A.2d 864 (Vt. 1999).

71. VT. CONST., ch. 1, art 7.

significantly under-inclusive. The Court stated that same-sex couples are entitled to a right to marriage or its equivalent.[72]

In response to *Baker,* the Vermont legislature passed a law which extends the benefits and protections of marriage to same-sex couples through a system of civil unions.[73] The stated purpose of the act is to respond to the constitutional violation found by the Vermont Supreme Court in *Baker* and to provide eligible same-sex couples the opportunity to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples.

The first marriage case after *Baker* was filed in the State of Massachusetts, *Goodridge v. Department of Public Health.*[74] *Goodridge* was supposedly intended to complete the unfinished business of *Baker.* While in *Baker,* the Court awarded marital benefits to same-sex couples, the plaintiffs in *Goodridge* expressly rejected marital benefits as an adequate remedy, claiming that the status itself is a benefit of marriage and that denial of marital status results in less than full equality.[75]

The Supreme Judicial Court of Massachusetts held that the limitation of protections, benefits, and obligations of civil marriage to individuals of opposite sexes, by interpreting the statutory term "marriage" as employed in the marriage licensing statutes to apply only to male-female unions, lacked a rational basis and violated State constitutional equal protection principles. The limitation was not justified by the State's interest in providing a favorable setting for procreation, and had no rational relationship to the State's interests in ensuring that children be raised in an optimal setting and in conservation of State and private financial resources. The Court noted that interpreting the marriage licensing statutes to exclude same-sex applicants had no rational relationship to the State's interest in ensuring that children be raised in an optimal setting, absent any evidence that forbidding marriage to people of the same sex would increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children, as the "best interests of the child" standard did not turn on the parents' sexual orientation or marital status. The Court also noted that the State's interest in providing a favorable setting for procreation did not afford a rational basis for interpretation of the marriage licensing statutes to exclude same-sex applicants, as the laws of civil marriage did not privilege procreative heterosexual intercourse, contained no requirement that

72. Baker v. State, 744 A.2d at 867 (Vt. 1999).

73. *See,* Vt. Stat. Ann. tit. 15, §§ 1201 et seq. and Vt. Stat. Ann. tit 18, §§ 5160 et seq.

74. Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003).

75. Complaint at P 31, Goodridge v. Dep't. of Pub. Health, C.A. No. 01-1647-A.

applicants for marriage license attest to their ability or intention to conceive children by coitus, condition marriage upon fertility, permit divorce for infertility, or require consummation of marriage by coition.

The *Goodridge* Court also held that the State's definition of marriage which limited the same to opposite-sex couples is incompatible with the constitutional principles of respect for individual autonomy and equality under the law.[76] The Court explained that civil marriage is created and regulated through exercise of the police power, characterizing the public role of marriage as "central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data."[77] The Court proceeded to redefine the common law definition of "civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others."[78] The court then remanded the case to the superior court for entry of judgment, but raised questions to the legislature, writing, "Entry of judgment shall be stayed for 180 days to permit the Legislature to take such action as it may deem appropriate in light of this opinion."[79]

The Massachusetts Senate swiftly reacted to *Goodridge* and requested an advisory opinion from the Court on the constitutionality of a proposed civil union legislation which would make same-sex partners legal "spouses," with all the benefits and responsibilities of marriage.[80] Mindful of the 180-day stay period, the Court answered immediately that the civil union bill maintains an unconstitutional, inferior, and discriminatory status for same-sex couples.[81] Massachusetts now permits same-sex marriage.[82]

With respect to the non-establishment clause, the rule is that a statute must have a secular legislative purpose.[83] The inquiry is whether, in enacting the statute, the government acted with the purpose of advancing religion.[84]

Fr. Joaquin Bernas S.J., member of the 1986 Constitutional Commission, says that, in effect, what the non-establishment clause mandates is

76. *Goodridge,* 798 N.E.2d at 949 (Mass. 2003).

77. *Id.* at 954.

78. *Id.* at 969.

79. *Id.* at 969-70.

80. In re Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004).

81. *Id.* at 572.

82. *See,* Hennefeld v. Township of Montclair, 22 N.J. Tax 166, 2005 WL 646650 (2005).

83. *See,* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

84. *See,* Agostini v. Felton, 521 U.S. 203, 222-23 (1997).

government neutrality in matters of religion.[85] He summarizes the rule of government neutrality in four general propositions: "(1) Government must not prefer one religion over another or religion over irreligion; (2) Government funds must not be applied to religious purposes; (3) Government action must not aid religion; and (4) Government action must not result in excessive entanglement with religion."[86]

In the context of marriage recognition, if the government interest in a particular marriage statute is in establishing a religious conception of marriage, then asserting this moral interest to justify non-recognition would seem to be prohibited by the non-establishment clause.[87]

IV. THE DOCTRINE OF PUBLIC POLICY

The doctrine of public policy originally developed as a matter of customary international law.[88] The doctrine operates largely in cases involving conflict of laws wherein a judge invokes the "discretion" to refuse to give effect to a foreign law or judgment that is contrary to local notions of justice, fair play and good governance. Judge Cardozo's pronouncement in *Loucks v. Standard Oil Co.*[89] is instructive:

> The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.[90]

The Philippine Supreme Court adopted a similar definition of public policy in *Avon Cosmetics, Incorporated v. Luna*[91] quoting *Manresa*:

> And what is public policy? In the words of the eminent Spanish jurist, Don Jose Maria Manresa, in his commentaries of the Codigo Civil, public policy (*orden público*):
>
> > "[R]epresents in the law of persons the public, social and legal interest, that which is permanent and essential of the institutions, that which,

85. JOAQUIN G. BERNAS S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 336 (2003 ed.).

86. *Id.*

87. *See generally*, Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STANFORD J. OF CIV. RIGHTS & CIV. LIBERTIES 32 (2005).

88. *See*, Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 313 (1992).

89. Loucks v. Standard Oil Co., 120 N.E. 198 (N.Y. 1918).

90. *Id.* at 202.

91. Avon Cosmetics, Incorporated v. Luna, 511 SCRA 376 (2006).

> > even if favoring an individual in whom the right lies, cannot be left to his own will. It is an idea which, in cases of the waiver of any right, is manifested with clearness and force."[92]

The lesson from *Loucks* and *Avon* is that courts should be slow to invoke the doctrine of public policy in refusing to recognize a foreign law or judgment in cases where recognition will not violate "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal", or where the State cannot claim some "public, social or legal interest" which is "permanent and essential".

One scholar further suggests that the application of the public policy exception in recognition cases is tempered by the "contacts" of the case with the territory of the forum.[93] He explains:

> In general, however, a foreign law which in itself is repugnant to the forum will be accorded recognition where the repercussion of that law upon the forum is remote and unharmful. Although the forum abhors polygamy, it will, nevertheless, recognize the legitimacy of a child born abroad in a polygamous marriage entered into and valid abroad. All depends on the circumstances, or, more precisely, on the importance of the 'contacts' of the case with the territory of the forum.[94]

In his Yale Law Journal article, Professor Larry Kramer describes the foregoing "contacts" principle as something that courts do not expressly espouse but nevertheless apply.[95] He elucidates:

> I like to illustrate this point to students by asking them to compare two cases decided within two years by a New York court whose membership underwent no significant changes: Mertz v. Mertz and Holzer v. Deutsche Reichsbahn-Gesellschaft. In Mertz, the court found that a Connecticut law permitting spouses to sue one another was contrary to New York public policy; in Holzer, the court ruled that Hitler's Nuremberg laws were not. I think it safe to say the difference is not that Connecticut's decision to lift interspousal immunity violated 'some fundamental principle of justice, some prevalent conception of good morals,' whereas Germany's decision to bar non-Aryans from working or being paid did not. But Mertz involved a husband and wife from New York injured while driving in Connecticut, while Holzer was brought by a German citizen against his German employer. In neither case does the court rely on this consideration, but it seems fair to assume that it was nonetheless significant.[96]

92. *Id.* at 393.

93. Arthur Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 YALE L.J. 1027 (1940).

94. *Id.* at 1030-31.

95. Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1974 (1997).

96. *Id.*

In the ambit of marriage recognition, the general rule, rooted in common law, is that the law of the place of marriage controls the question of its validity.[97] The rule is codified in the First and Second Restatements of Conflict of Laws of the U.S.[98] Article 26 of the Family Code follows the same general rule. Public policy exceptions to this rule lie primarily in cases of polygamy,[99] incest,[100] and same–sex unions.[101] The same may be observed of the public policy exceptions in the first paragraph of article 26 of the Family Code.

While marriages have always been subject to a comparison of interests or public policy,[102] departures from the place of celebration rule, especially through the invocation of the "public policy exception," are viewed with great suspicion.[103] In view of the competing policy in favor of validation, American decisions have distinguished between the status of, and the incidents flowing from, marriage. Some courts have upheld an out–of–state marriage for purposes of spousal rights when the status may have violated either the law of the place of celebration or the law of the forum.[104]

V. CONCLUSION

Article 26 of the Family Code needs a lot of rethinking. Application of the *Lawrence* and *Romer* standards alone would render some of the exceptions under the first paragraph unconstitutional for lack of a clearly stated and evident legitimate State interest in denying recognition to a marriage validly celebrated in a foreign country. More importantly, not all of the so–called

97. *See*, Colbert v. Colbert, 28 Cal. 2d 276, 280, 169 P.2d 633, 635 (1946).

98. *See*, RESTATEMENT (First) OF CONFLICT OF LAWS § 121 (1934); *See also*, RESTATEMENT (Second) OF CONFLICT OF LAWS § 283 (1971).

99. *See*, P.H. Vartanian, *Annotation, Recognition of Foreign Marriage as Affected by the Conditions or Manner of Dissolving it Under the Foreign Law, or the Toleration of Polygamous Marriages*, 74 A.L.R. 1533, 1534-35 (1931); *See also*, Godfrey v. Spano, 2007 WL 749692 (N.Y. Sup 2007).

100. *See*, Catalano v. Catalano, 170 A.2d 726, 728 (Conn. 1961); Rhodes v. McAfee, 457 S.W.2d 522, 524 (Tenn. 1970).

101. *See*, Adoption of Tammy, 619 N.E.2d 315, 316 (Mass. 1993); Rutgers Council of AAUP Chapters v. Rutgers Univ., 689 A.2d 828, 835 (N.J. Super. Ct. App. Div. 1997).

102. *See*, Linda J. Silberman, *Can the Island of Hawaii Bind the World?: A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191 (1996).

103. *See*, Richard S. Myers, *Same-Sex Marriage and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45 (1998).

104. *See*, *In re* Dalip-Singh Bir's Estate, 83 Cal.App.2d 256, 188 P.2d 499 (1948); *In re* May's Estate, 305 N.Y. 486, 114 N.E.2d 4 (1953); *In re* Estate of Shippy, 37 Wn.App. 164, 678 P.2d 848 (1984).

public policy exceptions point toward some public, social or legal interest of the State that is permanent and essential. Legislative amendment, though desirable, is, however, a rather tedious process. In the meantime, the courts should not be deterred from following the *Orbecido III* precedent for going out of the letter of article 26 and deciding on the basis of reason and justice. In this regard, the courts would do well to heed the following guidelines:

1. Exceptions to the place of celebration rule in marriage recognition should have a reasonable relation to a legitimate State interest and be not inexplicable by anything but animus toward the class that they affect;

2. Assertions of moral interests in recognition statutes should have a secular purpose and be not in furtherance of a religious conception of marriage;

3. Public policy exceptions to the place of celebration rule are viewed with great suspicion;

4. Strictness or liberality in the recognition of the status and incidents of marriage, particularly where exceptions to the place of celebration rule are invoked, must depend on the "contacts" of the case with the forum; and

5. Public policy exceptions must be based on some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal, or some public, social or legal interest of the State that is permanent and essential.

It is hoped that, with these guidelines, the eventual marriage of international comity and family law in Philippine shores will be a reflection of an internationally acceptable and sound policy, and not be an example of what Justice O' Connor calls "a classification of persons undertaken for its own sake."[105]

105. *Lawrence*, 539 U.S. 557, 583 (2003) (O'Connor, J., concurring in the judgment).