OPINION 50

OFFICIAL OPINION NO. 50

December 21, 1967

MARRIAGE—Validity Where Solemnized in De Facto Unrecognized Country.

Opinion Requested by Hon. Birch Bayh, United States Senator.

I am honored to respond to your inquiry concerning the marriage which was to be solemnized in the German Democratic Republic (East Germany), a state not recognized by the United States Government, between an Indiana resident and a citizen of East Berlin. Before answering this question, I must clearly state to you the posture that the Attorney General of Indiana is required to take when reviewing the legal ramifications posed by a matter involving a citizen of the State of Indiana, and, of course, the United States, and a foreign government. First, it should be noted that in the international field, the sovereignty of the United States is complete. In managing international relations the President of the United States is the sole medium of the federal government. I further understand that a citizen of the State of Indiana must have a duly authenticated document, signed and sealed by a recognized officer of the State of Indiana, as a necessary prerequisite to obtain permission and the necessary documents to marry a citizen of East Berlin. Because of the delicacy of foreign relations and of the power peculiar to the President of the United States in this regard, before even answering the question you have propounded on a municipal (local) law basis, I must turn to the Department of State of the United States and ask two questions. I am absolutely bound by the Constitution of the United States to accept the answers, regardless of my personal legal view. Those two questions are: First, does the United States of America recognize the German Democratic Republic, and

second, may I answer a question concerning an Indiana citizen relating to the validity of a marriage solemnized in the German Democratic Republic? I am favored with an answer to these two questions through your office from Assistant Secretary of State Douglas MacArthur II, in which I am informed by the Department of State that the United States Government does not recognize the East German regime nor the existence of a state in the Soviet Zone of Germany. I am further advised by the Department of State that no objection is lodged against my rendering an opinion on municipal law concerning marriages to aid a citizen of Indiana and of the United States. It is pointed out by the Assistant Secretary that no opinion by the Attorney General of Indiana could affect the external relationship of the United States with any other government of the world recognized or unrecognized.

A citizen of Indiana cannot consummate his marriage to a woman resident of East Germany without official documentation of some kind from a recognized officer of Indiana. As I have stated, I could not and would not attempt to answer your question without first notifying the State Department. Since I have received the answer of the State Department, and following the precarious guidelines set down in external relations in the case of the *United States v. Curtis-Wright Export Corp.*, 229 U.S. 304 (1936), I am, therefore, answering your question as it applies to the municipal law of the State of Indiana, as I view it. I am not in any way commenting upon, or attempting to construe the relationship of the United States to any government.

With this background I now look to the important question which emanates from your inquiry:

> Would the State of Indiana recognize as valid a marriage which was solemnized in the German Democratic Republic (a state not recognized by the United States Government) between an Indiana resident and a citizen of said foreign state?

Marriage is said to consist of two steps: (1) valid consent between parties to live as husband and wife, thereby creat-

ing the relation between themselves, and (2) converting of this relation by act of law into the status of marriage. II Beale, *Conflict of Laws* § 121.2 (1935).

It is a well recognized rule that the validity of a marriage depends upon the law of the place of celebration. *Bolkovac v. State,* 229 Ind. 294, 98 N.E. 2d 250 (1951); II Beale, *Conflict of Laws, supra,* at 669; Rabel, *The Conflict of Laws: A Comparative Study,* p. 222 (1945). The universally accepted *Conflict of Laws* doctrine that a marriage valid at the place of celebration is valid everywhere is subject to two exceptions: (1) where the marriage is contrary to the positive laws of the forum state, or (2) is contrary to the strong public policy of the forum state. *Roche v. Washington,* 19 Ind. 53, 57 (1862); *Sclamberg v. Sclamberg,* 220 Ind. 209, 41 N.E. 2d 801 (1942); Rabel, *The Conflict of Laws: A Comparative Study, supra,* at 245, 251; 19 I.L.E. *Marriage* § 3.

It follows that unless the present situation falls within one of these two exceptions and provided further that the marriage was solemnized according to the law and custom of the German Democratic Republic, the State of Indiana would recognize the marriage as valid in Indiana on principles of comity as implemented by American Conflicts Rules.

(1) *Positive Law*—Chapter 1 of Burns §§ 44-101 through 44-112 deals exclusively with the status of marriages in the State of Indiana. These statutory prohibitions include, *inter alia,* incestuous (§ 44-103), polygamous (§ 44-104) and common-law (§ 44-111) marriages but do not include any prohibition against an Indiana resident marrying a citizen of a foreign state not recognized by the United States Government. For the purposes of this opinion, we will assume that the marriage in question will not violate the positive statutory prohibitions of Indiana. Finding no positive law in Indiana to negate the general rule that a marriage valid where celebrated is valid everywhere, attention must be directed to the second exception, public policy.

(2) *Public Policy*—Public policy is a concept which does not lend itself to well-defined limits. It traditionally embodies statutory and case law and laws of Christendom. Rabel, *supra,* at 251. Public policy is reflected, for example, by stat-

utes prohibiting incestuous and polygamous marriages. See *Sclamberg v. Sclamberg, supra.* We can find no instance, however, of refusal to recognize a valid foreign marriage celebrated under the marriage law of the foreign country on the basis of finding one of the parties' citizenship repugnant to the public policy of this state.

Russia, from the time of the revolution until it was accorded formal recognition by this country, was a *de facto* unrecognized regime similar to the German Democratic Republic. Our research has revealed no cases where a marriage was declared invalid on the basis of nonrecognition. I Hackworth, *Digest of International Law,* ch. III, § 54, p. 365 (1940) discusses and cites one of the earlier cases involving nonrecognition of Russia at the time:

> ". . . the refusal of the political department to recognize a government should not be allowed to affect private rights which may depend upon proving the existing conditions in such state.
>
> "Justice requires that effect should be given by our courts, even though we do not recognize the Russian Government, to those acts in Russia upon which the rights of our citizens depend. . . ."

The Confederate States during the Civil War is another example of unrecognized *de facto* Governments. In the case of *Texas v. White,* 74 U.S. 700, 733 (1868) the court stated:

> ". . . It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, *such for example, as acts sanctioning and protecting marriage and the domestic relations,* governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government. . . ." (Emphasis added.)

The *de facto* principle was elaborated on by Judge Cardoza while on the bench of the Court of New York. His views were stated as follows:

> "Juridically, a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it. In practice, however, since juridical conceptions are seldom, if ever, carried to the limit of their logic, the equivalence is not absolute, but is subject to self-imposed limitations of common sense and fairness, as we learned in litigations following our Civil War. . . ." *Sokoloff v. National City Bank,* 239 N.Y. 158, 145 N.E. 917, 918 (1924).

Although we can find no cases directly on point, it would appear that Indiana would concur with the reasoning in the above line of cases. The case of *Roche v. Washington, supra,* involved a male resident of the State of Indiana who married an Indian woman in Huntington County, Indiana, according to the manner and customs of the Miami tribe of Indians. The Indian custom of marriage required no ceremony beyond an agreement of the parties to live together as husband and wife. The Court concluded that the Miami Indian tribe did not constitute a state. So, as in this inquiry, the court was reviewing the validity of a marriage celebrated in a place not recognized as a state. The Court declared on p. 57, that:

> "*Laws giving effect to contracts of marriage are not repugnant to the laws of Indiana,* and the proposition is established, as a general one, in private international law, that an actual marriage, valid in the country where celebrated, will . . . by courtesy, be given effect to in other States. . . . *If . . . an actual marriage took place . . . there could be no objection to its being upheld in the courts of this State, though celebrated among an uncivilized tribe of Indians.*" (Emphasis added.)

In *Roche* the court held that no actual marriage had taken place since the parties could separate or divorce at will.

The marriage was not denied, however, because of the non-recognition of the Miami Indian tribe as a nation.

Acts of the East German government, unrecognized by the United States, were under review in *Upright v. Mercury Business Machines Co.*, 13 App. Div. 2d 36, 213 N.Y.S. 2d 417 (1961). Granting *de facto* existence to that government, the New York Court noted that although a foreign government may not be recognized by the political arm of the United States, such non-recognition does not preclude our courts from taking judicial cognizance of the effect on private rights and contracts of the acts and laws of such government. It was further held that non-recognition does not prevent persons living within its territory from entering into private contracts with those outside thereof. In considering the validity of the private contract in *Upright* in view of the asserted defense of illegality based on the non-recognition of the East German government, the court concluded that such transactions are unenforceable only if it is shown that they violate our laws or some definite public policy.

The common element running through each of these cases is that private rights should not be made dependent on the status of a foreign government.

Presuming that the marriage in question will be solemnized according to the law and custom of the German Democratic Republic and concluding that the marriage does not violate the public laws or policy of this State, it is my opinion that the State of Indiana would recognize the marriage as being valid in Indiana.