Kann die Liebe Sünde sein? Judging in Europe on moral issues
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Judging and judges' dilemmas are the main topics of this weblog. How do national judges in Europe decide highly controversial cases, like same-sex marriage and adoption of children born out of wedlock? Does Strasbourg case law make it easier for them? And, in their turn, are national judges helping their Strasbourg-colleagues? This blog post argues that judging on human rights should not be seen as a top down process from Strasbourg, but rather needs a bottom up approach of national judges.

'Kann denn Liebe Sünde sein? (Can love be a sin?) was a famous German song in the 1930's, vocalised by Zarah Leander. At the time she was (and still is) considered a gay icon. In his 2013 inaugural address US President Barack Obama answered her question:

> "Our journey is not complete until our gay brothers and sisters are treated like anyone else under the law – for if we are truly created equal, then surely the love we commit to one another must be equal as well."

Same-sex marriage in Europe is now possible in Belgium, Denmark, Iceland, the Netherlands, Norway, Portugal, Spain and Sweden.

But in many of the 47 member states of the Council of Europe regulation of same-sex relationships is still a highly controversial issue as this first month of 2013 has shown.

On 25 January Russia's Parliament backed a draft law banning 'homosexual propaganda'. The Duma voted 388 to 1 in favour of the law that makes public events and dissemination of information on the lesbian, gay, bisexual and transgender community to minors punishable by fines of up to € 15,000. One day earlier, on 24 January Polish Parliament voted against civil partnership for same-sex couples (by contrast on that very same day an Equal Marriage Bill was introduced in the UK, making it possible for same-sex couples to marry in both civil and religious ceremonies. Senior local Conservatives however are now urging the prime minister to delay any parliamentary decision on gay marriage until after the next election.) And on 13 January, a crowd of 340.000 marched in Paris to protest against plans to make it possible for same-sex partners to adopt their partners child.

SOCIAL ISSUES, POLITICAL MATTERS AND LEGAL QUESTIONS

Highly sensitive moral issues like same-sex marriage and adoption by same-sex couples are not only political matters. They become legal questions when they are raised before national and European courts. Most of these cases rely on Article 8 (right to family life) and 12 (right to marry) of the Convention, taken alone and in conjunction with Article 14 of the Convention (non-discrimination), and – more and more - Article 9 of the Charter of Fundamental Rights of the European Union (Right to marry and right to found a family). Unlike Article 12 of the Convention the wording nor the history of Article 9 of the Charter exclude same-sex marriage ("The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.")

In 2010, the European Court of Human Rights decided an important Austrian case. The applicants, Horst Michael Schalk and Johann Franz Kopf, a same-sex couple, asked the competent Austrian authorities in 2002 to allow them to contract marriage. Their request was refused and the applicants brought their case to Strasbourg. The Court found that Article 12 of the Convention did not impose an obligation on Austria to grant same-sex couples, access to marriage. Consequently, there had been no violation of Article 12 of the Convention.

However, the Court in the Schalk and Kopf case made two important moves. First, it noted that since 2001 “a rapid evolution of social attitudes towards same-sex couples had taken place in many member States”. In view of this evolution, the Court considered it “artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8”. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.

And secondly, it held with reference to Article 9 of the Charter of Fundamental Rights of the European Union and also in contrast to its earlier case law that it:

> “would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants' complaint. However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State.”

Last year, on 15 March 2012, the Court decided the French case Gas and Dubois. The case concerned the refusal of Ms Valery Gas’ application for a simple adoption order in respect of Ms Nathalie Dubois’ child. The Court however saw notably no evidence of a difference in treatment based on the applicants’ sexual orientation, as opposite-sex couples who had entered into a civil partnership were likewise prohibited from obtaining a simple adoption order. This judgment was criticised because it did not really respond to the complaint of indirect discrimination, because same-sex couples can not marry in France and – unlike different-sex couples – have no choice.

And only last month, on 16 January the Court held a Grand Chamber hearing in the case of Vallianatos and others v. Greece. The case concerns the legislation on “civil unions” that entered into force in Greece in November 2008. The applicants allege that these unions, comprising a contract between two individuals of full age and of different sexes, are discriminatory. The Court will rule on this case later this year. Christian groups like ECLJ have intervened as third party in this case. They argue that marriage under Article 12 of the Convention should be reserved by the Court to a relationship between a man and a woman.

AS MATTERS STAND

In his comment on the 2012 Gas and Dubois case Nicolas Hervieu observes that in recent years the ECHR under pressure from some of the 47 member states, tends to self-censor its case law when it comes down to morals, ethics and religion:

> “Une telle autolimitation jurisprudentielle ne saurait surprendre. En particulier depuis ces dernières années, la Cour n’a cessé de reconnaître aux États une large marge d’appréciation dès que le contentieux affecte des enjeux sensibles sur le plan « moral, éthique, social ou religieux » (-) “

Hervieu is even worried that the wide margin of appreciation left to member states functions as an excuse for ‘Strasbourg’ for not upholding the human rights protection afforded by the Convention:

> “Pour autant, la liberté étatique ne doit aucunement être synonyme de désactivation complète des garanties et mécanismes protecteurs des droits et libertés conventionnels. Or, à notre sens, de récents arrêts de Grande Chambre ont révélé une tendance inquiétante: les juges strasbourgeois n’hésitent pas à

> sacrifier sur l'autel de 'autolimitation jurisprudentielle nombre de mécanismes dynamiques, tels que la notion de « consensus européen »"

It is undeniably true that recent Strasbourg judgments have raised great concern among some member states, like the Lautsi judgment (Crucifix case) in Italy, and the prisoner voting rights and Abu Quatada (Othman) cases in the United Kingdom. Last year the former British president of the Court, Sir Nicholas Bratza answered strong criticism from the UK on the Court's decisions:

"The Court is a dynamic institution, but also in many respects a fragile one, which ultimately relies heavily on the support and good faith of the Council of Europe member States. (-) protecting human rights does not make you popular. Standing up for the rule of law will not win you votes, at least not in the short term. Accepting that even those who come to destroy democracy must benefit from the protection of the fundamental rights without which democracy has no real sense is never going to be easy to sell to public opinion. Yet that is the essence of what we do here, what the Court represents and what the Council of Europe stands for."

How very sensitive these matters are can be illustrated by the EU-speech of British Prime Minister David Cameron on the 23th of January of this year:

> "Today, public disillusionment with the EU is at an all-time high. (-) People feel that the EU is heading in a direction that they never signed up to. They resent the interference in our national life by what they see as unnecessary rules and regulation. They are angered by some legal judgements made in Europe that impact on life in Britain. Some of this antipathy about Europe in general really relates of course to the European court of human rights, rather than the EU."

The Strasbourg Court has always been very much aware of the potential sensitivity of its judgments. Indeed, ever since the Court referred to the Convention as a 'living instrument which must be interpreted in the light of present-day conditions' (Tyrer v. United Kingdom, 1978), it has placed heavy weight on the absence of consensus amongst contracting states. It has always stressed that member states and national judges are the first protectors of the Convention and that it should not fall into the 'fourth instance trap' (meaning that the Court should leave the establishment of the facts to national courts). In a speech on the role of national parliaments (2012), Bratza explained the distribution of responsibilities between the member states' legislatures and the Court:

> "In the best-case scenario, the legislative process is clearly marked by a sensitivity on the part of legislators to the human rights implications of the laws adopted, reflected in the preparatory work and parliamentary debates. The legislature's considered judgment carries much weight with the European Court of Human Rights, which recognises that the national authorities have direct democratic legitimation in so far as the protection of human rights is concerned, and that by reason of their direct and continuous contact with the vital forces of their countries, they are in principle better placed than an international court to evaluate local needs and conditions."

This doctrine is clearly reflected in the Court's recent case law on same-sex issues. In the French Gas and Dubois-case (2012), the French Government had stressed that French law on the legal relationship between parents and children was based entirely on the model of sexual difference. In view of this approach, which was a choice made by society, the Government took the view that allowing a child to have ties of parentage with two women or two men was a fundamental reform which could only be undertaken by Parliament. The issue therefore had to be dealt with as a whole in the course of a democratic debate and not through tangential issues such as the sharing of parental

responsibility in the context of simple adoption. Although the Court saw notably no evidence of a difference in treatment based on the applicants' sexual orientation, it did respond in the Gas and Dubois case to the 'democratic argument' that was raised by the French government:

> "On the one hand the Court has held repeatedly that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification (-). On the other hand, the margin of appreciation enjoyed by States in assessing whether and to what extent differences in otherwise similar situations justify a different treatment is usually wide when it comes to general measures of economic or social strategy"

It was for that same reason that the Court in the Schalke and Kopf-case opted to exercise limited supervision over national choices:

> "as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State. (-) In that connection the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society."

'EUROPEAN COURTS'

As matters stand - in the view of the Court - general measures 'of economic or social strategy', such as same gender marriage and adoption, belong to an important extend to the member states. That must be reassuring to all those who think that Strasbourg 'invents' new human rights every day.

Hervieu argues that as a consequence of its case law, 'Strasbourg' leaves applicants in the cold (although the Court's case law since Schalk and Kopf is definitely moving). But what about national judges; are they left in the cold as well? Yes, if they expect quick and clear answers from Strasbourg in controversial cases. No, if judges learn to appreciate the dynamical process that judging in Europe on fundamental rights has become.

Development and evolution of human rights in highly sensitive moral areas is not – and can not be - a top down process from Strasbourg (and Luxemburg). The Court's judgments apply to 800 million people in 47 member states and its decisions have tremendous impact. In order to keep its authority among the member states the Court must be brave and careful at the same time, because it proved easy to attack the Court with unfair motives for being ´activist´ or not ´democratically legitimized´.

Therefore the development of legal moral issues like same-sex marriage needs a bottom up approach. The member states have their own responsibility to uphold the Convention. And national judges in Europe should not forget they are indeed European Courts of first instance. Since they 'are in principle better placed than an international court to evaluate local needs and conditions', national judges are the first ones called upon to answer the question how Convention rights can 'be interpreted in the light of present-day conditions'.