The Federal Rainbow Dream: On Free Movement of Gay Spouses under EU Law

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Uladzislau Belavusau Di 5 Jun 2018 Di 5 Jun 2018

After a pretty disappointing and self-contradictory judgement on the wedding cakes delivered yesterday by the US Supreme Court, the Court of Justice of the European Union came up today with the long-awaited decision in the case of *Coman* (C-673/16) – putting a thick full stop on a long debate about the interpretation of the term 'spouses' under the EU Free Movement Directive. In short, the Court held that the term does cover spouses of the same sex moving to an EU Member State where a gay marriage remains unrecognized. This simple YES is a huge step forward in federalizing the EU constitutional space in a time of multiple crises. Together with Dimitry Kochenov (here and here) and Alina Tryfonidou (here and here), as well as several other scholars, we have been advocating for this path of legal reasoning in the EU in the recent years, despite recurrent scepticism voiced about this simple federal track in interpreting the Directive amongst a number of our distinguished colleagues at all sorts of conferences. The frustration of those scholars and advocacy groups about our argument largely stemmed from esoteric disclaimers in EU primary law regarding family matters as being supposedly reserved to the regulation of the Member States. It would perhaps have been more correct to state that currently, national and EU law rather co-regulate family matters to a certain degree.

The EU Free Movement Directive 2004/34/EC, the instrument of secondary EU law at hand employs gender-neutral language for family unions and partners. The Directive establishes several regimes for married, registered and unregistered partners. If a same-sex couple is married in a home state, then EU law unquestionably requires the host state to recognise the marriage; the wording of the Directive is crystal-clear in this respect. In practice, host states not recognising same-sex marriages often obstructed the practical enjoyment of the right of a spouse to join their partner – an issue which no doubt badly waited for its interpretation at the Luxembourg Court. Two situations are possible in the case of a registered partnership. Should the host Member State treat registered partnerships as equivalent to a married couple, an individual has the right to join his or her partner as if they were spouses. If the host state does not treat registered partnerships as equal to marriage, then the couples fall into the category of unregistered partners in a 'durable relationship'. However, EU law creates no obligation to recognise registered partnerships. Unregistered

partners do not enjoy the same right as a spouse to join their partners. Instead, the Directive obliges Member States to ‘facilitate entry and residence’ to unregistered partners who are in a ‘durable relationship’. This unclear rule applies equally to both same-sex couples and to couples of the opposite sex.

The present case deals with Mr. Coman, who holds Romanian and US citizenship, and Mr. Hamilton, an American citizen. In 2010, they married in Brussels, where Mr. Coman took up residence in order to work at the European Parliament as a parliamentary assistant. Obviously their “Belgian” marriage would not be possible in Romania, a country that has been the last amongst the EU candidates to de-criminalize homosexuality and does not offer an institute of either marriage or partnership for same-sex countries, unlike – by now, finally – the majority of EU Member States. Considering that Directive 2004/38/EC permits bringing spouses of EU nationals from Member State A to Member State B, Mr. Coman tried to activate this track by requesting the respective residence status within this Free Movement Directive for his husband, third-country national Mr. Hamilton. Expectedly, Romanian authorities refused to grant such a status, explaining their decision on the basis of non-recognition of “homosexual unions” in Romania. Supported by the reputed LGBT organization, *Asoçiatia ACCEPT*, the couple began proceeding their claim for discrimination under EU law before national courts. Ironically, this is the second case regarding discrimination on grounds of sexual orientation from Romania in Luxembourg, and the second one supported by *Asoçiatia ACCEPT* who won Case C-81/12 in 2013 (about a homophobic statement by a football club’s patron, who refused to hire a supposedly gay player for the team). I have commented on that 2013-case extensively in an article for Columbia Journal of European Law, unpacking inter alia the context of LGBT rights in Romania. Unlike in *Coman*, the major peculiarity of the previous Romanian case was the absence of an individual plaintiff. The player at stake did not litigate, and the case was brought by *Asoçiatia ACCEPT* alone. Yet that 2013-case also reached Luxembourg via request for a preliminary ruling. In the present case of *Coman*, the Constitutional Court of Romania referred a question about the scope of the term “spouse” in Directive 2004/38/EC for a preliminary ruling at the Court of Justice.

In response, the Luxembourg Court has come up today with a non-equivocal decision, specifying that in a situation in which a Union citizen has made use of his freedom of movement by taking up genuine residence in a Member State other than that of which he is a national, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex. Furthermore, Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. The Court has also confirmed its previous finding that while the Free Movement Directive would not otherwise apply to Mr. Cowan, a Romanian citizen and his American husband (because it applies only to EU citizens residing in another Member State), it can nonetheless apply by analogy, since Mr. Coman reentered his country of nationality. Most importantly, the Court refused to extend

public-policy and national-identity derogations available in EU primary law to any moralistic concerns about "deviant marriage" of the Member States. The CJEU obviously does not impose the obligation to introduce an institute of same-sex marriage or partnership in every EU country – that decision explicitly falling within the competence of the Member States – yet it demands recognition of the status attached to same-sex marriage legally registered in a Member State all over the Union, for the preservation of the free movement of persons and the sanctuary of EU citizenship.

Most surprisingly, until this 2018 decision in *Coman*, the CJEU had not had a chance to demand either absolute mutual recognition of same-sex couples moving between Member States nor to clarify the meaning of the term 'spouse' under Directive 2004/38/EC – the two options that have been clearly open for changing the current practice of national-level non-compliance in a number of Member States. It appears that similar questions from national courts based on Directive 2004/34 were formulated in a crucially wrong way and the Court remains restricted in its activism by the questions referred from Member States. The 1996 case C-13/94 *P. v. S*, where CJEU used a gender equality clause to protect the rights of transsexuals, was already a huge achievement for LGBT rights, considering that back in the 1950s (when the European Economic Community was established), judges all over Europe (including in the sisterly European Court of Human Rights) employed the language of crime, pathology and deviation when describing any alternative sexuality. Notoriously, lesbian gay couples, however, remained unprotected by EU law until the introduction in 1997 of sexual orientation as grounds of discrimination via Article 19 in the TFEU, and subsequent harmonization of this equality field "beyond gender" by 2000 Equality Directives. Yet, the post-2000 jurisprudence of the Court remained within the confines of employment relations regarding the very restricted material scope of the Framework Equality Directive 2000/78/EC. The case of *Coman* transcends this narrow paradigm of discrimination within employment schemes and extends it to the federal horizons, clearly mimicking the earlier jurisprudence of the US Supreme Court.

Despite a somewhat schizophrenic judgement of the US Supreme Court in yesterday's case of *Masterpiece Cakeshop* (584/US, 4 June 2018) regarding the religious sensibilities of a Colorado baker who refused to deliver a cake for a gay wedding, another judgment of the US Supreme court, namely in *Obergefell v. Hodges* (2015) stands as a crucial example of a federal opportunity for gays and lesbians — a legal track that has been explored by cause lawyers with regard to *Coman*. Although *Obergefell* was widely streamlined in media as a judgement about same-sex marriages, *de jure* the decision is more about the recognition of rights derived from marriage than status, which ironically made the recognition of status all over the US states only a matter of time. The case was launched after a same-sex couple, James Obergefell and John Arthur, married in Maryland. Their state of residence – Ohio – did not recognize their marriage license, which enabled them to file a lawsuit about discrimination. John Arthur was terminally ill and suffering from amyotrophic lateral sclerosis. For this reason, they wanted the other partner, James Obergefell, to be identified as his surviving spouse on his death certificate, based on their marriage in Maryland. Through this paradigm of rights based on free movement between the states, the Supreme Court delivered a truly landmark judgement establishing that a fundamental right to marry is apparently guaranteed to same-sex couples by the Due Process clause and the Equal Protection clause of the Fourteenth Amendment to the

United States constitution. The European Court of Human Rights quickly followed with its revolutionary *Oliari & Others v. Italy* (21 July 2015) judgement, where the Court all of sudden established that Italy should offer some form of registered partnership or marriage to gay couples. It is remarkable that in this case, the judgement refers to comparative jurisprudence, giving the example of the decision in the US Supreme court that precedes Strasbourg by just a couple of weeks (*Oliary & Others v. Italy* 2015, para. 56). This Strasbourg judgement also captures the growing consensus in the Member States, noting that 11 countries of the Council of Europe recognized same-sex marriages, while 18 offered recognition of various forms of same-sex partnerships at the moment of the decision (*Oliary & Others v. Italy* 2015, para. 54). In *Coman*, the CJEU rounded this important circle of federal thinking, adding to a tacit recognition track for same sex marriages visible in the jurisprudence of the US Supreme Court and the European Court of Human Rights.

EU citizenship and internal market are not only a unique space for 'overcoming' nationality, often imagined in terms of the dominant ethnicity of Member States. "EU sexual citizenship" equally offers an activist arena for challenging sexual identities and inequalities embedded in those national citizenships, trans-nationalizing discourse on rights and gay emancipation, especially in Central and Eastern Europe, as a matter of EU law. European, in this context, becomes a language of rights and entitlements, which can be turned, inter alia, against their own states of nationality. EU federalization fosters the social imagination of EU citizens and social movements which, in turn, rely on EU equality standards and mobility within the internal market as a strategy for humiliating member states. European becomes the language of rights and entitlements. EU sexual citizenship thus turns into a realm for disciplining embarrassment in the Union. Dictating gender roles, sexual choices and lifestyles is not yet fully precluded. Yet, thanks to the EU, it is finally a cause for shame and yields less cash.

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