The Future of Sexual Orientation and Gender Identity in Human Rights

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The European Court of Human Rights (ECtHR) has a long history of adjudicating cases concerning sexual orientation and gender identity. Many of those cases involved the controversial interpretive approach known as European consensus – a form of comparative legal reasoning building on positions taken by the states parties and grouping these together to establish either a consensus or a lack of consensus. A number of recent cases have brought European consensus back into the spotlight. Most prominently, the case of *Fedotova v. Russia* concerned the lack of legal recognition for same-sex partnerships in Russia. Unlike the chamber judgment, which unusually did not mention European consensus at all, the Grand Chamber referred repeatedly to what it called 'a clear ongoing trend at European level towards legal recognition and protection of same-sex couples within the member States of the Council of Europe' (para. 186). At this juncture, with debates on the future of the Council of Europe at a renewed high, it is worth revisiting the role that European consensus plays within the ECtHR's case-law, particularly with regard to sexual orientation and gender identity, and where it might take us in the future.

Janus-Faced European Consensus

European consensus is notoriously Janus-faced: depending on the constellation, it can be used to argue in different directions. If there is a consensus in favour of the applicant and the respondent state thus finds itself part of a minority position, then the ECtHR usually finds a violation of the Convention (the so-called "spur effect"). When it identifies a lack of consensus or a consensus against the applicant, conversely, it leaves the respondent state a wide margin of appreciation and usually finds no violation (the so-called "rein effect"). The flexibility that this Janus-faced character gives to European consensus is no doubt part of why it has acquired such a weighty role in the ECtHR's case-law. Both the rein effect and the spur effect have been relevant in high-profile cases concerning sexual orientation and gender identity, from early cases like *Dudgeon v. the United Kingdom* and *Rees v. the United Kingdom* via leading cases like *Christine Goodwin v. the United Kingdom* and *Schalk and Kopf v. Austria* to subsequent cases like *Hämäläinen v. Finland* and *Oliari v. Italy*, to name only a few.

Several cases decided this year, besides *Fedotova v. Russia*, similarly relied on European consensus. *Macat# v. Lithuania* concerned the labelling of a children's fairy tale book depicting same-sex relationships as harmful to children. The ECtHR surveyed the states parties' laws on same-sex relationships in school curricula and concluded, inter alia, that 'legal provisions which explicitly restrict minors' access to information about homosexuality or same-sex relationships are present in only one member State' (para. 212). In *Y v. France*, the ECtHR revisited a long line of case-law dealing with gender registration, although in an unusual constellation

with particular difficulties since the applicant was an intersex person. The ECtHR relied heavily on European consensus – since the 'vast majority' (para. 77) of states parties allow only for binary gender markers – to refuse a designation as 'intersex' or 'neutral' on the applicant's birth certificate. Both the rein effect and the spur effect, then, retain their relevance in the ECtHR's case-law.

Criticism of European Consensus

While the ECtHR uses European consensus in different ways, academic criticism has overwhelmingly focussed on the rein effect. This is understandable, particularly in cases concerning sexual orientation and gender identity: via the medium of European consensus, heteronormative and cisnormative assumptions underlying the states parties' legal orders are quietly transferred to the European level and given normative force by the ECtHR. When resulting in the denial of rights, it is most immediately visible that this is problematic. Liberal critics of European consensus have therefore pointed out that the rein effect leads to the curtailment of minority rights and brings with it the danger of a 'tyranny of the majority'. The spur effect is less discussed in comparison, but it is worth dwelling on. The rein effect is rightly criticised for the denial of rights it leads to, but it is the spur effect, after all, that holds the key to where European consensus would take us in the future.

As I argue in more detail in *European Consensus between Strategy and Principle* (available open access here), the focus on how the rein effect of European consensus curtails minority rights should be expanded to question its relation to power more generally. Regardless of whether the rein effect or the spur effect is at issue, European consensus carries a conservative lilt since it refers to the status quo in the form of the states parties' legal systems – it takes up positions that are already dominant in public policy and law, rather than looking for marginalised positions or those that could yet be developed in the future. As a form of reasoning that groups legislative positions together without interrogating the structural forces at play in bringing them about, European consensus also points away from critical engagement with power structures both intra-nationally and transnationally within Europe. Even in cases involving the spur effect, it merely reproduces the dominant position at the European level without providing a counter-hegemonic rationale for the ECtHR's decision: the premise of establishing commonality makes it difficult to use European consensus for anything else.

The Politics of Expansive Rights Interpretations

Critical discussions of the spur effect are difficult, in part, because they all too easily slip into well-rehearsed debates about 'new' human rights. Findings of rights violations in sexual orientation and gender identity cases, in particular, are often cast as involving 'new' rights – to legal gender recognition, same-sex civil partnerships, or perhaps (as the ECtHR tentatively hints at but steers well clear of) same-sex marriage. The dissenting opinion of Judge Wojtyczek in *Fedotova v. Russia* is a particularly explicit example: relying on an originalist reading of the Convention, he claims that the 'question at stake is not about the exercise of Convention rights but about adding new rights to the Convention' (para. 3.3.). Casting rights as 'new' allows for them to be more easily questioned, be it as causing rights inflation, as

endangering the ECtHR's legitimacy, or (Wojtyczek's primary line of attack) as lying outside the ECtHR's competence to adjudicate on. In a previous dissenting opinion, Judge Wojtyczek already specified what it is that he wants to safeguard by adopting this interpretive approach: the 'complementariness of the biological sexes of the two spouses' as a 'constitutive element of marriage', defined as 'a social institution open to procreation'.

Faced with what amounts to thinly veiled homophobia and transphobia cast in originalist language, it is hardly surprising that at least some commentators who are otherwise critical of European consensus welcome its spur effect since, unlike the rein effect, it leads to more expansive interpretations of minority rights, potentially pushing the ECtHR towards 'progressive' rulings. But this carries its own risks. Giving weight to the spur effect in this way implies a maximalist conception of human rights in which a higher level of human rights protection is self-evidently accepted as an improvement. This maximalist approach resonates with many activists' and academics' view of human rights as inherently benign, always pointing towards a better world. As critiques of human rights have long pointed out, however, human rights are a field of discursive struggle in which different visions of a just society are fought out, and their dominant interpretations may be oppressive as well as liberatory. The maximalist conception of human rights implied by the spur effect makes it difficult to incorporate this perspective and thus shifts the focus away from questioning how human rights themselves relate to power – even when they ostensibly vindicate gay rights, trans rights, or the rights of other minorities. Relying on European consensus as the basis for change, in other words, distracts us from debating which direction the ECtHR's case-law should develop in to actually contribute to more just societies.

Beyond European Consensus

Once we move beyond European consensus, we can critically engage in these debates. An important example of how the maximalist conception of human rights is already being questioned concerns the ECtHR's 'coercive overreach' – its increasing reliance on criminal law as a means of fleshing out states' positive obligations to prevent and offer redress for rights violations. Does extending and solidifying the reach of the carceral state in this way really lead to more just societies, especially for those already most marginalised and therefore most likely to be targeted by law enforcement? For issues pertaining to sexual orientation and gender identity, queer theorists and critical race theorists have asked similarly probing questions. Within queer communities, who profits from the extension of hate crime legislation, from inclusion in state-sanctioned partnerships and marriage, or from more diverse gender markers – and who loses out? It is crucial, I would submit, to also grapple with these questions when engaging with the ECtHR's case-law on sexual orientation and gender identity. The direction that case-law should develop in is not predetermined, and the weighty role currently given to European consensus should not make us believe otherwise.
