French Same-Sex Marriage, a Strange International Public Policy

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Last month, on January 28, the French Cour de cassation decided on a new "Same-sex Marriage" Act international case. After "Thalys babies" in September, the issue was about the authorization to wed a French and a Moroccan nationals, the last of whom citizen of a country prohibiting same-sex marriages.

THE DECISION

The facts were simple indeed. Two men, Dominique, French, and Mohammed, Moroccan, wanted to get married in Jacob-Bellecombette, in the suburbs of Chambéry, France, the city of the 1968 Winter Olympics. The Same-sex Marriage Act had just been passed in Parliament, and it was understood as having created a "right to marry" for all, that is for homosexual as well as heterosexual couples (the Act is also known as the "Marriage for all" Act), and for foreigners and French alike. Indeed, Article 202-1 Civil code (C.Civ.) read, at the time:

"*The qualities and conditions necessary to be able to contract marriage are governed, for each spouse, by his personal law.*

Nevertheless, two persons of the same sex may contract marriage when, for at least one of them, either his personal law, or the law of the State within which he has his domicile or his residence, permits it".

Obviously, since Dominique was French and they both lived in France, the condition of Article 202-1 C.civ. was fulfilled. Unforunately, it was not applicable to the case. Indeed, France and Morocco have signed a bilateral convention, on August 10, 1981, concerning personal and family status and judicial cooperation. Sure enough, this "right to wed" therefore knew exceptions, those compelled by the pyramid of norms: where there existed provisions of international source providing solutions for conflict of marriage law, these solutions would prevail over Article 202-1 C.civ. It had actually even been expressly written down in the draft

Act, only to be later written off by the Senate on the ground that the principle of hierarchy of norms enshrined in Article 55 of the Constitution made it irrelevant.

That was until January 28, 2015. In a highly advertised decision, the Cour de cassation decided that:

« […] *if, according to Article 5 of the Franco-Moroccan Convention* […] *substantial conditions such as prohibitions to marriage, are governed for each future spouse by the law of the State he is a citizen of, its Article 4 outlines that one of the contracting States laws may be set aside by the courts of the other State if it is manifestly incompatible with its public policy ;* […] *that is the case of the applicable Moroccan law opposed to the marriage of two persons of the same-sex when, for at least one of them, either his personal law, the law of the State of his domicile or that of his residence allows it* ».

Dominique and Mohammed are therefore allowed to wed. What now?

AN ANALYSIS

At first glance the decision may appear complex but on the whole quite conventional. The Court, after all, only uses the public policy exception allowed by the Convention itself. The solution, therefore, would be specific to the Convention itself, and Morocco only could be concerned by the decision.

The originality of this exception, though, is surprising. This public policy exception is not an absolute exception. It doesn't purport to create an absolute "right to wed". Instead, it depends upon the recognition of same-sex wedding in one of the following States: that of the domicile, the residence or the nationality of at least one of the spouses. This originality calls for three observations, the first about conflict of norms, the second about the scope of this exception, the last about the nature and development of this kind of exception in Europe.

1/ The first observation concerns the phrasing of the public policy clause at play. Indeed, if the Cour de cassation refers to Article 4 of the Convention to justify this surprising exception, its wording is actually grounded in Article 202-1 C.civ. itself. Comparing both this paragraph of the decision and the second paragraph of Article 202-1 C.civ. makes the relationship quite obvious: the exact same words were employed for both of them. Of course, one could say any public policy exception is the political safety valve that Courts may design as they think fit.

Why not designing on the basis of Article 4 of the Convention what is now written in Article 202-1 C.civ.? The blog format is perfect for such an assertion since this seems open to debate, but I would like to propose a negative answer.

In its letter, first, Article 4 is designed as a quite classical public policy exception. "*The law of one of both States applicable under the Convention may only be set aside by the Courts of the other State if it is manifestly incompatible with its public policy*". Words have some weight, though, and it seems necessary to notice that it requires a "manifest" incompatibility. The discussion of this word's value in the context of Article 21 Rome I Regulation should at least raise the attention. And anyway, how can a violation of a public policy exception be "manifest" if it requires checking a potentially foreign law?

In its spirit, second, the solution is nothing less than a levelling of the situations. The Cour de cassation refused to differentiate situations according to the applicable norms when, apart from the nationality of the parties, the situations don't differ. But isn't it the purpose of such conventions to treat citizens differently when their States together agreed to do so? Should the teleological rationale of such mechanism (to exclude the applicable law to defend certain values) eventually level down any and all such clauses, even those more restrictive than the others?

2/ This leads me to the second observation: this exception cannot be limited to the Franco-Moroccan convention. France has ratified identical bilateral conventions with Poland, Vietnam and the former Yugoslavia (which now concerns Slovenia, Bosnia, Serbia and Montenegro). Laos, Cambodia, Tunisia, Madagascar and Algeria have each also entered into similar conventions and though this last group of conventions has no public policy clause, it is still considered available in the silence of the texts. Citizens from all these countries now beneficiate from this "right to wed", even if their countries either ignore or even penalize homosexuality: the policy reasons for which Article 202-1 C.civ. took the guise of the convention are not specific to French-Moroccan relations.

3/ The third observation is more about of this very "specific clause of public policy" (Rigaux and Fallon, n°7.54) that was first developed in Belgium (Article 46, Private International Law Act, 2004) and served as an inspiration to the French Act.

There is an ambiguity as to the nature of this clause. In France, some have characterized it as a positive public policy exception, defending the "right" implemented in the law instead of negatively protecting some values of the society. Noting that Article 202-1 C.civ. does not stop at setting aside the prohibitive law but actually gives the exact answer to the problem, some have characterized it as a substantial provision, not a conflict one. Actually, the debate doesn't seem of great importance : it may be both. Since the effect of the rule is an exclusion of the applicable law to be replaced by the Court's lex fori, it is a public policy exception. Since the effect of the rule is to make sure same-sex marriages are not declared void or prevented in France on this specific ground, it is a substantive rule. When a substantive provision may exclude the application of an opposite foreign solution, the border between notions gets blurred.

But whatever the characterization of the clause, its originality needs to be emphasized. Because they defend what is perceived as a sort of individual right still very variously regarded abroad, Article 202-1 C.civ. as well as Article 46 Belgian law are not absolute in their rejecting prohibitive foreign laws. They require a connection to a State which defends the same right. It looks, therefore, like an application of *Inlandsbeziehung*. But this is a very special one, since *Inlandsbeziehung* requires a unilateral connection with the State of the forum. Here the connection is bilateral, with any State which accepts same-sex marriages. It is as if the French and Belgian legal systems defended that solution only insofar as it gets support from a State that is connected to the case. Truly enough, this State will most often be the French State itself, since the several connecting factors listed in Article 202-1 C.civ. will frequently lead to that country. But a French judge asked to decide on the alleged invalidity of a same-sex marriage of two Moroccan nationals, residing and married in the Netherlands, would have to set aside Moroccan law on this public policy ground because *Dutch law* recognizes same-sex marriages. If this clause is a real public policy clause, and public policy clauses defend values of the connected legal order, then this clause doesn't defend *French* values. It defends the values of an international community, and stands as a sort of truly international public policy, a transnational public policy…

Food for thoughts, and I hope for reactions on this blog.