Cover Page

Universiteit Leiden

The handle http://hdl.handle.net/1887/36111 holds various files of this Leiden University dissertation.

Author: Koffeman, Nelleke Renate
Title: Morally sensitive issues and cross-border movement in the EU. The cases of reproductive matters and legal recognition of same-sex relationships
Issue Date: 2015-11-04

Executive Summary

Morally sensitive issues and cross-border movement in the EU

The cases of reproductive matters and legal recognition of same-sex relationships

Within the European Union (EU) considerable diversity exists in respect of morally sensitive issues like abortion, assisted human reproduction (AHR), surrogacy and legal recognition of same-sex relationships. While the 20th century has witnessed an increased intergovernmental cooperation between States as well as an increased transferral of State powers to supranational organisations such as the EU, certain competences have traditionally remained with the States. The aforementioned morally sensitive issues are areas of law *par excellence* where standards are primarily set at State level. It is usually considered that it should be left to each State to decide whether, for example, abortion is available on social grounds, whether couples can become parents with the involvement of a surrogate mother and whether same-sex couples can marry and/or adopt children.

While there is no strong degree of European regulation in these areas, and diversity is generally respected at European level, there is nonetheless a certain potential for European regulation in these fields. The EU has competences in respect of issues that are strongly related to, and at times intertwined with, reproductive matters and legal recognition of same-sex relationships. Here, one may think of competences in the areas of health and equal treatment. In addition, several of these morally sensitive issues come within the scope of the European Convention on Human Rights (ECHR), for instance by means of the right to respect for private life under Article 8 ECHR. There is thus (potential for) (indirect) European influence in these areas.

Cross-border movement within the EU furthermore adds a new dimension to this complex picture. Cross-border movement is a given within the EU; people move around for various reasons and purposes, not uncommonly pursuing economic objectives. Such mobility is enabled and stimulated by the EU free movement rules that, *inter alia*, protect the free movement of persons and the freedom to receive services in another EU Member State. Diverging regimes in the aforementioned morally sensitive matters may create obstacles to such cross-border movement; they may hinder or deter persons from making use of their free movement rights. For instance, same-sex couples may be discouraged from moving to an EU Member State where they have no possibility to have their relationship legally recognised by means of a civil partnership or marriage. Differences in regimes in morally sensitive

issues may, by contrast, also be the direct impetus for cross-border movement within the EU, as people from Member States with less permissive regimes may wish to enjoy the possibilities, rights and benefits of more permissive regimes of other States. For example, in Member States with restrictive abortion regimes, women who wish to have their pregnancies terminated may want to travel to Member States with more liberal regimes.

Such cross-border movement and the existing obstacles thereto do not only highlight existing diversity in morally sensitive issues, they also imply, among other things, that States are increasingly confronted with (the consequences and effects of) other States' regimes. For example, same-sex couples residing in one EU Member State may claim recognition of their marriage concluded in another Member State, while women or couples who had a certain type of AHR treatment in another State that is outlawed under the law of their own State, may claim reimbursement of the costs involved in that treatment under the national health system of their State. Such confrontation may require a reaction from the States involved, whether they function as country of origin or as country of destination or both.

The present research explores this cross-border dimension of morally sensitive issues within the European Union. It provides an overview of trends and developments in national and European law in morally sensitive issues and gives insight into the interests that are at stake and the dynamics that apply both in internal and in cross-border situations.

Two thematic case studies and five jurisdictions

The backbone of the present research consists of two thematic case studies – one on reproductive matters (Case Study I) and one on legal recognition of same-sex relationships (Case Study II) – which focus on five jurisdictions. The latter encompass three national jurisdictions – Ireland, Germany and the Netherlands – and two European jurisdictions or systems, namely the EU and the ECHR. The case studies have been chosen because they concern pre-eminently morally sensitive issues and, consequently, politically controversial matters, in respect of which EU Member States have long taken different positions and still did so at the time this research was commenced (i.e., in 2009), as well as when it was concluded (i.e. July 2014). Moreover, the issues covered by the two case studies are not 'just' morally sensitive issues, they also concern areas in which fundamental rights claims can be made and – importantly, given the focus of this research – that have a demonstrable cross-border dimension. The three national jurisdictions have been selected, *inter alia*, because they cover a certain range in approaches in respect of reproductive matters and legal recognition of same-sex relationships and have different (constitutional) profiles.

Both case studies follow the same structure. Each one consists of six chapters, five describing the standard-setting in the five selected jurisdictions (the ECHR, the EU,

Germany, Ireland and the Netherlands respectively), and one drawing conclusions for the respective case study.

Case Study I – Reproductive matters

Case Study I on reproductive matters covers three subjects, namely abortion, assisted human reproduction (AHR) and surrogacy. For each of these topics, the five substantive chapters in Case Study I (i.e. Chapters 2 to 6) investigate, for the relevant European and national jurisdictions, what – if any – standard-setting is in place, and how this developed over time. For a better understanding of the relevant standard-setting and – where relevant – the debates in politics and legal scholarship concerning these often controversial matters, a general (constitutional) framework is sketched first. A brief introduction is given to very prominent rights in the relevant jurisdiction (e.g. the protection of the unborn on the Irish jurisdiction), as well as to a selection of themes and – in the case of the EU – competences that are key in the case study. It is subsequently set out if the relevant reproductive services are at all legalised and if so, under what conditions access to these services is provided for. Also, the financing of abortion and AHR treatment under each State's national health system is briefly addressed. In the discussion of national regulation of surrogacy, the possibilities – if they exist at all – for intended parents to establish parental links with a child born following a surrogacy arrangement are also discussed. The discussion of regulation of AHR addresses a number of issues that may occur in the course of AHR treatment, namely, the donation of gametes and embryos, preimplantation genetic diagnosis (PGD), gender selection and vitrification of egg cells.

The analysis of the internal picture for each of the jurisdictions provides insight into what considerations and interests play, or have played, a role in legislative debates and case law and how change was or may be brought about. It also provides the basis for the subsequent analysis of the cross-border picture that is enclosed in each substantive chapter. The latter analysis starts – where available – with some statistics on the scale of cross-border movement in the context of the case study in the respective jurisdiction. Subsequently each of the substantive chapters examines for the respective jurisdiction how it has dealt and deals with cross-border situations in reproductive matters and how the jurisdictions interact in this regard. Thereby, *inter alia*, Private International Law regimes and (national implementation of) the EU free movement rules are studied, in order to answer questions like whether foreign birth certificates are recognised in cross-border surrogacy cases or whether women who wish to have an abortion in another country have a right to access to information about such foreign abortion services, as well as a right to follow-up treatment upon return.

Chapter 7 draws conclusions on Case Study I. It discerns trends in standard-setting and in judicial and legislative processes regarding reproductive matters. It is, for instance, observed in Chapter 7 that balancing of interests related to reproductive matters has often had different outcomes in the three States studied and that the

legislative and judicial processes in the States have taken different shapes. Also, European law (both EU law and the ECHR) explicitly allows for such diversity between legal regimes in reproductive matters. States are left room to make their own principled choices in these moral and ethical issues and they are free to prohibit reproductive practices, as long as the relevant interests have been balanced in the decision-making and as long as their principled choices are consistent. However, once they decide to regulate in the area, they must also provide for the effective enjoyment of rights and entitlements, which entails that they must ensure that the applicable procedures enable careful decision-making. There are, at the same time, also similarities in the ways in which reproductive matters have been dealt with in the various jurisdictions. Generally, over time more reproductive practices have been legalised and regulated for, or at least initiatives to that effect have been taken. Also, a gradual development towards a central role for the best interests of the child is clearly visible, although the views on what these require exactly have in some cases changed over time. Furthermore, a development has been visible towards assessment of reproductive matters with due regard to the individual circumstances of the case. Both at European and national levels, there has been increased attention focused on the introduction of procedures allowing for careful decision-making in reproductive matters.

On the basis of the analysis of Chapters 2 to 6, Chapter 7 continues to identify four types of legal responses to cross-border movement for reproductive matters. The first is 'warding off' (the effects of) cross-border movement, that is the deterring of people from going to other States or from coming to their state. Such warding off may take different shapes, ranging from travel bans to non-recognition of legal parenthood established in another State in an international surrogacy situation. Secondly, as a mirror to the 'warding off' approach, States may choose to accommodate (the effects of) cross-border movement in reproductive matters, for example by providing for information and follow-up care in case of cross-border abortion. A third type of response is 'adaptation', which means the adjustment of national standard-setting in the area to that of another State or other States to which cross-border movement takes place. Lastly, cross-border movement has in some situations enabled States to 'outsource' the protection of certain interests in reproductive matters to other States. The ECtHR has in some cases namely held that foreign treatment options contributed to the justification of restrictive regimes.

For each of these legal responses, Chapter 7 assesses the extent to which the respective response is commensurable with or even dictated by European law. For example, it is concluded that warding off by means of non-recognition of legal effects of foreign options or by means of bans on information on foreign treatment options has generally proven not easily justified under European law, and refusing follow-up care may also be problematic. It is furthermore assessed how these legal responses relate to one another and what the implications of each respective category of legal responses are, or may be, for the States concerned, as well as for the individuals involved in the cross-border movement.

Case Study II – Legal recognition of same-sex relationships

Chapters 8 to 12 of Case Study II explore what the five selected jurisdictions provide for in respect of legal recognition of same-sex relationships. Thereby a first focal point is whether same-sex couples have (a right to) access to a registration form – civil partnership or marriage – under the relevant jurisdictions and, if so, what these entail. Secondly, the case study covers the question of parental rights for same-sex couples. Thereby various forms of adoption are discussed, namely second-parent adoption (adoption of a child by the partner of the child's legal and genetic parent), successive adoption (the situation where a partner adopts the child of an adoptive parent) and joint adoption. Also, legal parenthood by operation of the law and access to AHR treatment for same-sex couples are addressed.

The five substantive chapters of this case study follow the same basic structure as Chapters 2 to 6 of Case Study I (see above). They thus start with a general (constitutional) framework, followed by a discussion of the internal and the cross-border picture respectively. As in Case Study I, the debates in politics and legal scholarship are – where relevant – included in those discussions.

Chapter 13 concludes for Case Study II that when it comes to legal recognition of same-sex relationships across the European Union, States have taken the lead, rather than the European institutions. National legislatures, courts and administrative bodies set the tone and pace and the European level generally only follows. The European Courts have at times given some subtle nudges to the national legislature or judiciary, but this was generally only in situations where first (principled) steps towards legal recognition had already been taken at the national level. In the case law of the ECtHR, civil status has often functioned as a vehicle for unequal treatment of same-sex couples and different-sex couples. Only in cases where no 'special legal status' was involved, has the ECtHR applied strict scrutiny.

Traditional notions of marriage and the family have toned down in all three States studied, although they have not been completely abandoned in all States. Also, under the ECHR marriage does still enjoy strong protection. Moreover, the increased acknowledgement and legal protection of *de facto* family life has been paired with the acceptance of biological differences between different-sex couples and same-sex couples, and between lesbian couples and gay couples, as justification for certain differences in treatment between these groups in respect of parental matters. Unequal treatment of same-sex couples does thus still exist, but there has been a shift in the justification grounds from more morally charged grounds to more value-neutral grounds.

Generally a steady development towards increased protection of LGBT rights and correspondingly legal recognition of same-sex relationships has been discernible. Such change has been in most cases brought about gradually and at a slow pace, with some exceptions of much quicker developments. These developments are likely to continue in the future. Possibly the European level will take a more proactive stance

in some respects. In any case it is likely that the European Courts will continue to nudge national legislatures and courts in this process of increased equalisation of the legal position of same-sex couples with that of different-sex couples.

In respect of cross-border situations, Chapter 13 concludes that in essence two categories of legal responses to cross-border movement can be identified in Case Study II: 'warding off' and 'accommodation'. In their most extreme form these are, in the context of the case study at hand, mutually exclusive. However, it has turned out that different degrees of 'warding off' and of 'accommodation' are possible. In some cases States have resorted to partial or conditional accommodation in their dealing with cross-border movement in the context of Case Study II. For example, in Ireland and Germany same-sex marriages have been 'downgraded' to the level of civil partnership, while foreign same-sex registered partnerships are recognised only if they meet certain standards. Other categories of legal responses to cross-border movement in the context of Case Study II that have been visible – albeit to a limited extent only – are 'adaptation' and 'backing out'. The latter implies the situation where fear that other countries will not accept or recognise the national legislative choices, is presented as an argument against the granting of certain rights to same-sex couples. Following the lines of Chapter 7, it is assessed subsequently in Chapter 13 how the various legal responses relate to one another and what the implications of each respective category of legal responses are, or may be, for the States concerned, as well as for the individuals involved in the cross-border movement. Chapter 13 furthermore concludes that standard-setting at the European level for cross-border cases in the context of Case Study II has so far been fairly minimal. Some minimum accommodation obligations in respect of the entry and residence of same-sex partners of EU citizens follow from the relevant Free Movement Directive, but particularly as regards the legal position of these couples once entry and residence have been granted, there remain various open questions. Here, case law of the CJEU or further guidance of the EU legislature as to the discretion that States either have or not do not have in these matters is much desired.

Conclusions

The concluding chapter, Chapter 14, provides a synthesis of the relevant findings of Chapters 7 and 13, as well as a number of observations about morally sensitive issues and cross-border movement within the EU more generally. It draws parallels and discerns trends in respect of balancing exercises and legislative and judicial processes in morally sensitive issues. For example, while the jurisdictions studied for this research generally recognise the same interests in the relevant case studies, the weight that is, or has been, accorded to these interests differs or has differed between the various jurisdictions. The interests of the child have prevailed in both case studies, and both case studies have shown that involvement of the interests of the (future) child, makes a crucial difference to balancing exercises, especially in cross-border cases, such as cross-border surrogacy cases. The two case studies furthermore point to an emerging trend of granting more protection to relatively

concrete interests such as the best interests of the child, over rather abstract interests like 'the traditional marriage institute'. This development can also be regarded as a shift from values deeply entrenched in the society and law of a specific State, to less value-charged values that are (more) commonly shared and transnational. When it comes to the actual balancing exercises, another trend is a greater legal recognition of *de facto* situations, such as *de facto* family life. Next to this, there appears to be increased attention for balancing in individual cases.

European jurisdictions generally have taken a rather reactive, pragmatic and incremental approach in morally sensitive issues. Particularly the approach of both European Courts (the CJEU and the ECtHR) at times could even be described as evasive. Nevertheless, both European Courts have applied a similar kind of reasoning that is typified as the 'in for a penny, in for a pound' approach. This entails the idea that States may decide whether or not to grant a certain right or entitlement at national level, but once they do indeed grant that right or entitlement and they thereby act within the scope of European law, they must do so in a way which meets European standards. States have thus been held to take the consequences of their choices in morally sensitive matters. Further, in the case law of the ECtHR, for both case studies variations on the margin of appreciation doctrine can be identified, which mainly concern the use of consensus based arguments for determining the width of the margin.

In respect of the legal responses to cross-border movement in respect of morally sensitive matters, Chapter 14 concludes, *inter alia*, that a gradual converting of 'warding off' in 'accommodation' is visible for both case studies, while increasingly more accommodation obligations have been formulated at the European level. For example, in cross-border abortion cases and cross-border reproductive care (CBRC) cases, information about foreign treatment options and – in any case in cross-border abortion cases – follow-up care must be provided and States must 'facilitate' the entry and residence of stable same-sex partners of migrating EU citizens. That accommodation is gaining ground may be explained by an increased acknowledgement of the fact that in cross-border situations different interests are at stake, or in any case that these interests are weighted differently in cross-border situations. This holds particularly true in cross-border situations where individual burdens exist, and even more so when a child is involved whose interests must prevail.

One of the general observations made in Chapter 14, is that despite limited competences at EU level and the granting of a wide margin of appreciation by the ECtHR in many of the morally sensitive issues addressed in the research, it cannot be denied that there is increasing (indirect) European standard-setting in these areas, both in internal and cross-border situations. This also has implications for (the variety in) national moral choices throughout the European Union. The 'in for a penny, in for a pound' approach of the European Courts as described above, (potentially) has particular implications. It namely risks becoming an 'all or nothing' approach, and may in this way drive a wedge between the European States. Further, cross-border

movement in itself, as well legal responses thereto – whether deliberately chosen by States or imposed on them by European law – also has implications for (the variety in) national choices in morally sensitive issues in the European Union. On the one hand, cross-border movement may in principle provide a means to uphold national standards for internal situations and thus (a variety in) moral choices. This especially holds true if an outsourcing approach is taken under European law. However, where other legal responses to such cross-border movement are dictated by European law, such an effect of cross-border movement may be diminished. This applies in particular where States are, under European law required to recognise legal effects of, and thus accommodate, cross-border movement. As a consequence thereof, they may feel pressurised to adapt their national standard-setting in these areas to the standards they are bound to apply in cross-border situations. This also implies that where an outsourcing approach is applied, it is likely that States with less permissive regimes remain on their side of the moral spectrum, while accommodation obligations and concerns about implications of cross-border movement, may prompt States to move to or towards the more permissive of this spectrum.

Chapter 14 furthermore observes that in many situations complex balancing exercises and ethical objections to certain practices have been outpaced by real time developments. Even if national legislatures desired so on ethical or moral grounds, they have not been able to prevent certain matters from becoming reality and, correspondingly, from becoming facts of law. States may ban or limit certain practices deemed undesirable within their own jurisdictions, but to prevent people from going abroad for such practices has proven much harder. As a result it has been even more so in cross-border situations that reality has outpaced and dictated the law.

The final chapter is concluded with the observation that in cross-border situations in fact a unique realm of law applies. Those who cross borders (within the EU) enter a special dimension of law that encompasses, apart from EU free movement law and Private International Law, also other areas of law, most profoundly human rights law.