Merkel's Conscience

Maximilian Steinbeis

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Dear Friends of Verfassungsblog,

It has happened, finally: 16 years after the Netherlands' pioneering move, Germany has joined the ranks of countries where same-sex couples can properly marry each other just like anyone else, the last European country north of the Alps and west of the former Iron Curtain (except for Northern Ireland) to do so. Glittering confetti was thrown in the Bundestag after the vote on Friday morning, provoking Speaker Norbert Lammert to admonish the deputies not to expose themselves to the "suspicion of foolishness". Which will not dampen our exultation. Verfassungsblog has time and again made the constitutional case for the adoption of the marriage for all over the years. And now, we celebrate.

Angela Merkel, the Chancellor and CDU chairwoman, was not among those who voted yes. Her reasoning was quite remarkable: she appealed to her "fundamental conviction that the constitutional protection in Art. 6 involves marriage of husband and wife". The clarification of this question should be seen as a "conscience decision". Therefore, the CDU/CSU deputies were released from the expectation to vote along the party line.

At first sight, this way of invoking the Basic Law seems to fit well with the inherent conservatism of constitutional law. The German *Staatsrechtslehrer* used to be a wildly conservative bunch, and to an astonishing degree still are. Constitutional law *is* conservative, in a certain sense: it preserves order. It gives the majority the right to rule over the minority. It gives those who have the right to say: this is mine and not up for political redistribution. My property, my privacy, my conscience.

On second sight, however, there is something wrong with Merkel's statement. This is not conservative. This is crazy.

What the constitutional protection in Article 6 involves or not is a matter of interpretation. To claim that the constitutional term of marriage refers exclusively to man and woman is a completely legitimate proposition, of course. Even if the Constitutional Court should disagree one day, it remains possible to hold that conviction. You just have to give reasons for it. You must be able to answer the question of why Article 6 should be read in this way and not otherwise. You must at least try to convince. Angela Merkel did not do that. Instead, she said: This is my "fundamental conviction". She said: "For me," this is what the constitution demands. She said it is a "consciencious decision" for the deputies to interpret the basic law in this way.

Excuse me?

Conscience begins where reason ends. A consciencious objector says: I am sorry, this may be totally unreasonable, I cannot name any convincing reason at all, but I just cannot do that. I follow some incommunicable command here. This is something you cannot talk me out of without violating my innermost soul. My conviction about this is not up for disputation.

Can this be done with regard to same-sex marriage? Of course it can. There are plenty of Catholic, Protestant, Muslim, Jewish believers who feel and see things that way. But they follow their conscience, as opposed to the constitution.

Constitutional interpretation or consciencious objection – you cannot do both. If you do not get along with same-sex marriage for reasons of faith you must then also stand before your personal Reichstag at Worms: Here I stand, I can do no other. You cannot appeal to the constitution, which applies equally to all. And if you pretend to do so, you do violence to the constitution and to all other constitutional interpreters. You set your own reading of the constitution

absolute. Why would you then need a constitution at all?

In general, I am amazed about the nonchalance with which many who object to the constitutionality of same-sex marriage set their own constitutional understanding absolute. It is unconstitutional do decide this matter with a simple majority, they keep saying, that would require a supermajority! As if the interpretation of Article 6 this argument presupposes were not exactly what the whole debate is about in the first place. The Bundestag is as legitimate an interpreter of the constitution as anyone else, and of course it is within its competence to decide with a simple majority on a law that may or may not be declared unconstitutional by the Constitutional Court at some point. How to interpret the constitution is always a matter of dispute. To take the risk of a rebuff in Karlsruhe is not only perfectly legitimate but emphatically the job of the representatives of the people who take their responsibilities seriously.

In some way, the right always seems to succeed in making themselves believe that their reading of the constitution is somehow dictated by nature. They did that with the opening of the borders in 2015, and now they do the same with the opening of marriage in 2017. There will always be some constitutional law professor who certifies their constitutional interpretation with utmost authority, so they can keep on shaking their heads in a distressed and indignant way at the turpitude of these liberals that so blatantly disobey their own liberal constitution.

To not let them get away with that, to pierce their self-congratulatory constitutional certainty and force them to justify their readings of the law – this should be the task of constitutionalists.

The hour of politics

In fact, Article 6 can be read in quite the opposite way. MATHIAS HONG shows how this can be done (in German) and comes to the carefully reasoned conclusion that the Constitution not only does not prohibit, but even commands the opening of the marriage for all: while the constitutional framers obviously did not have same-sex couples in mind when they phrased Article 6, they most certainly had human dignity and equality in mind and were very much aware of the long-term effect these rights can have in shaking up the most stable matters of course in society. Constitutional law is not *all* that conservative, after all.

Contrary to the previous history that led to this decision, and unlike in many other countries, the opening of marriage in Germany was ultimately no act of the Constitutional Court. Why, despite all the allegations that the Chancellor had only pursued her strategy of "asymmetrical demobilization", this decision can be seen as an "hour of politics", and why that is a good thing, I have written down here (in German).

The British government has disclosed its views on the rights of EU citizens in the post-Brexit era and the role the ECJ should play in their protection – none at all, if you ask Whitehall. Why they can totally forget about that is vividly described by CHRISTOPHER McCRUDDEN.

On the occasion of the first anniversary of the Brexit referendum, GERHARD VAN DER SCHYFF submits the instrument of referenda as such to a critical analysis and asks to make its impact on fundamental rights the principal measure of its desirability.

It is not one but 20 years since the UK and China have agreed on the future of Hong Kong in "one state, two systems". What became of that agreement and why there is little reason to celebrate this year, is described by MALTE FELDMANN.

While same-sex marriage is more alive and kicking as ever, another major issue of constitutional debate of the last few years in Germany has been put to rest without much ceremony: data retention. What did her in was ultimately an injunction by a regional administrative court. JÜRGEN KÜHLING investigates how this came about and what is to be made of that decision (in German).

At the ECJ, the indefatigable Advocate General Eleanor Sharpston is, on the last mile of British EU membership, about to win major merit for the development of European refugee law. Her opinion on the question of competence for the asylum procedure during the climax of the 2015/16 refugee crisis is analyzed by STEFAN SALOMON.

Glossator FABIAN STEINHAUER rubs the gloss off the first sentence of Carl Schmitt's *Verfassungslehre*, to rather surprising results (in German).

Elsewhere

The first constitutional court to stipulate a right to same-sex marriage was the South African, in its legendary 2005 judgment *Minister of Home Affairs v. Fourie*. Now the South African Constitutional Court has handed down another groundbreaking decision, writes AOIFE NOLAN – on social and economic rights and their horizontal third-party effect between landowners and occupants.

SYLVIE PEYROU examines the important data protection decision *Ayçaguer v. France* of the Strasbourg Court of Human Rights.

KUSHTRIM ISTREFI and EMMA IRVING applaud the result of Strasbourg judgment *Bayev et.al. v. Russia*, which condemns the ban on "gay propaganda" in Russia as a violation of human rights, but criticize the reasoning in a rather pungent way.

So much for this week. Please feel encouraged to forward this letter to anyone who might be interested!

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All best, and take care,

Max Steinbeis

ABOUT THE AUTHOR

Maximilian Steinbeis

Maximilian Steinbeis is a legal journalist and writer and the founder and director of Verfassungsblog.

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