The Question:

A human right to conscientious objection to same-sex unions?

Introduced by Silvia Borelli and Chiara Vitucci

The far-reaching changes in social attitudes in Western society over recent decades are progressively resulting in recognition of the right of homosexual couples to be regarded before the law as a family on an equal footing with their heterosexual counterparts. These developments have in turn provoked requests for exemptions, and outright refusals to celebrate same-sex unions, by civil servants who, on the basis of their religious convictions, object to the recognition of homosexual relationships. Domestic legislators have dealt – and are still attempting to deal – with the issue in a variety of ways, including the controversial recognition of an opt-out for religious organizations and individual ministers in the recent UK legislation on equal marriage, and the total exclusion of any exceptions, as in the case of France. At the same time, cases implicating ‘conscientious objection’ to being required to celebrate same-sex unions have come before the courts, both domestic and international.

The European Court of Human Rights dealt with the question for the first time in 2013 in Eweida and Others v United Kingdom, in which one of the applicants complained about the loss of her job due to her refusal to officiate at civil partnership ceremonies. The somewhat tentative and deferential approach adopted by the Court, which took refuge in the doctrine of ‘margin of appreciation’, is a clear sign of the delicate and controversial character of the questions raised.

The challenge which faces both modern European societies, and the European Court of Human Rights as the guardian of the values of equality, tolerance and individual freedom enshrined in the European Convention on Human Rights, has two fundamental facets. The first, crucial question is whether there is any room in contemporary human rights law for a ‘right to conscientious objection’ for those who refuse to
celebrate same-sex unions (or otherwise discriminate against homosexuals) on the basis that homosexuality is contrary to the basic tenets of their faith. In other words, can the refusal to celebrate same-sex marriages and unions ever be regarded as a manifestation of religion or conscience deserving of protection under the Convention and domestic law?

Second, if such a right of conscientious objection does indeed exist, how can it be reconciled with other internationally recognized human rights, most notably the rights of prospective homosexual spouses to respect for their private and family life (protected under Article 8 of the European Convention), and the prohibition of discrimination on the basis of sexual orientation in the enjoyment of Convention rights (enshrined in Article 14)? To what extent, if any, should the prohibition of discrimination on the basis of sexual orientation prevail over or override the right to act in accordance with the dictates of one’s conscience and/or religion?

QIL asked Michel Miaillé and Ryan Hill, two scholars with a particular interest in the interaction of law and religion, to put forward their views on the issues at stake. The two authors chose quite different perspectives. Miaillé addresses the question from the perspective of the facts underlying the leading French case on the issue – the unsuccessful constitutional challenge to the 2013 French law on ‘mariage pour tous’ on the basis of the lack of any provision for exemptions for public officials who object to celebrating same-sex marriages. Focussing on French political history, theory and constitutional norms, he places conscientious objection in an historical perspective; on that basis, he argues that the margin for manoeuvre for désobéissance à la loi by a public official of the constitutionally secular and neutral French State is extremely narrow, to the point that there is practically no place left for lawful exemptions. By contrast, Hill focuses his contribution on freedom of conscience under international law, considered as a separate right, intertwined with the rights to freedom of belief and freely to manifest one’s religion. He suggests that, even if the approach adopted by the European Court in the Eweida case is far from satisfactory, it may be possible to balance the rights in conflict.

The two opinions show the richness of the debate in Europe and the multiple possible perspectives which exist. However, the very fact that there exist such different perspectives eloquently illustrates the dif-
difficulties in finding any widely-shared consensus at a European level on such matters. In the absence of any consensus on the topic, it may well be that the recognition by the European Court of a relatively broad margin of appreciation for States on these questions will remain the only viable approach for some time to come. As such, in the first instance, it will remain for each State to seek to strike an appropriate balance between the competing rights involved, taking account of both the social context and the need to respect the principles of tolerance, broadmindedness and equality which are at the core of the ‘democratic society’ safeguarded by the European Convention.