CENTRE FOR JUDICIAL COOPERATION

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Spain, Tribunal Constitucional, Sentencia 198/2012, Constitutionality of same-sex marriage

Deciding bodies and decisions

Tribunal Constitucional (Constitutional Court, Spain)

Subject matter

Constitutionality of a new amendment to the *Código civil* (Civil Code), which had extended marriage to same-sex couples

Summary Facts Of The Case

In 2005, Law No. 13 amended the Spanish Civil Code to allow for same-sex marriage. More than 50 Deputies of the Popular Party brought a claim before the *Tribunal Constitutional* which alleged the violation of, *inter alia*, Article 32 of the Spanish Constitution. According to this provision *men and women* have the right to marry. The *Tribunal Constitucional* (http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/23106)followed an evolutionary interpretation of the Constitution, holding that its Article 32 did not prevent the legislator from passing a law such as the one in question. The Court indicated that the recognition of same sex marriage was a legislative option supported by the principle of equality; nevertheless, it failed to ground its decision upon the right to non-discrimination on the basis of sexual orientation.

Diagram

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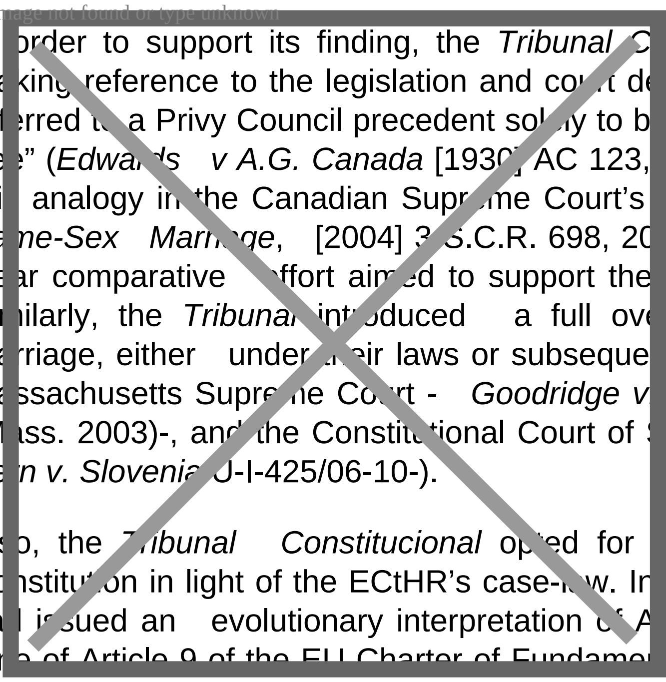

In 2012, the Spanish Constitutional Court upheld the constitutionality of a new amendment to the Civil Code, which had extended marriage to same-sex couples. In order to support its evolutionary reading of the relevant provision of the Constitution (Art. 32), the Constitutional Court referred to a number of precedents of foreign courts (horizontal cooperation) and of the European Court of Human Rights (vertical cooperation). In particular, it relied on the Judgment in *Schalk and Kopf*, where the Strasbourg Court had embraced itself an evolutionary reading of Art. 12 ECHR on the right to marry, taking the move, *inter alia*, from the literal tenor of the

The *Tribunal* repeated this exercise as regards the rationale of Law 13/2005. It identified the purpose of the law in the equation between the legal status of homosexual and heterosexual persons, and evoked several ECtHR's decision, as well as Art. 21 of the EU Charter of Fundamental Rights as evidence that this purpose is underpinning a general trend. The case law of the Strasbourg Court was also heavily cited (starting with the leading case of 2002 *Fretté v. France*, App. no. 36515/97) to prove that States enjoy a wide margin of discretion in regulating the possibility to extend the institution of marriage to same-sex couples.

In order to support its finding, the *Tribunal Constitucional* made use of comparative law, by making reference to the legislation and court decisions in other countries. The *Tribunal* initially referred to a Privy Council precedent solely to borrow the image of the Constitution as a "growing tree" (*Edwards v A.G. Canada* [1930] AC 123, 1 DLR 98 (PC)), but it then mentioned the use of this analogy in the Canadian Supreme Court's judgment on same-sex marriage (*Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79). In so doing, the *Tribunal* displayed a clear comparative effort aimed to support the assessment of the legal point it was seized of. Similarly, the *Tribunal* introduced a full overview of the jurisdictions recognizing same-sex marriage, either under their laws or subsequent to a judicial decision (see the reference to the Massachusetts Supreme Court - *Goodridge v Department of Public Health*, 798 N.E.2d 941 (Mass. 2003)-, and the Constitutional Court of Slovenia - Judgment of 2 July 2009, *Blažič and Kern v. Slovenia* U-I-425/06-10-).

Also, the *Tribunal Constitucional* opted for a consistent interpretation of Article 32 of the Constitution in light of the ECtHR's case-law. In *Schalk and Kopf v. Austria*, the Strasbourg Court had issued an evolutionary interpretation of Article 12 ECHR, drawing support from the literal tone of Article 9 of the EU Charter of Fundamental Rights, which does not explicitly refer to men and women.

homologue provision in the EU Charter (Art. 9).

Sources - EU and national law

- Article 9 - right to marry
- Article 21(1) non-discrimination on grounds of sexual orientation

Sources - ECHR

Article 8 - right to respect for private and family life
Article 12 - right to marry
Article 14 - non-discrimination

Sources - ECtHR Case Law

- *Schalk and Kopf v. Austria,* Application no. 30141/04, judgment of 24 June 2010

Comments

A. The case is a prime example of the use of comparative method to strengthen judicial reasoning in fundamental rights adjudication. Interestingly, the *Tribunal Constitucional* did not simply mention supranational and foreign authorities *ad abundantiam*, but as decisive evidence strengthening its conviction that the institution of marriage as a union between a man and a woman is fading out. In this connection, it is worth paying attention to the context of the judgment, which differentiates it from other cases on same-sex marriages delivered by courts of other States. The *Tribunal* handed down in response to a challenge to provisions establishing advanced same-sex rights, and not in response to challenges to *the lack* of similar provisions, or invocations of equal treatment by members of a discriminated group. The claimants built had built their case on the assumption that equal treatment ensured by Law 5/2013 did not serve the purpose of equality, as the Law equated two situations that are so different that fairness would rather require a different treatment. Being this a matter of purely constitutional nature, the *Tribunal* is keen to draw from external sources and engage in comparative analysis to bring ammunition to its opinion. The intensive use of normative and judicial examples from other jurisdictions is geared towards the demonstration that a global trend is in action, and that therefore the constitutional soundness of the law impugned is out of question

B. The relative weight of the references to EU law and the ECtHR is higher than that of the list of national statutes and decisions supporting same-sex marriage. The reference to Art. 21 of the EU Charter of Fundamental Rights and the continuous reliance on the ECtHR's judgments on the right to family life and non-discrimination are clearly premised on a sense of deference. Since Spain shares the constitutional instruments on fundamental rights that belong to the EU and ECHR systems, it cannot ignore their content and the case law that stems therefrom, and possibly it is called to respect them, at least through the duty of consistent interpretation codified in Art. 10(2) of the Constitution. Interestingly, the *Tribunal* cites the *Schalk v. Kopf* case, that several other national courts put forward as example of the absence of an obligation to recognize same-sex marriages. The *Tribunal*, instead, highlights the passages where the Strasbourg Court acknowledges that marriage is not necessarily a heterosexual union. Together with *Fretté* and the other similar cases, this judgment serves the purpose of validating the ECHR-compliance of Law

13/2005, and crowns the Tribunal’s effort to frame it as a normal expression of evolutionary constitutionalism, rather than an unconstitutional extravagance.