

## 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

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 decisions, as well as the *Tribunal Constitucional* 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* of 2002 (<http://tribunalconstitucional.es/Id/Resolucion/Show/23106>) followed a wide margin 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.

In 2012, the Spanish Constitutional Court upheld the constitutionality of a law, by making reference to the legislation and court decisions mentioned in the Civil Code which had referred to a Privy Council precedent solely to borrow the language of "same-sex as opposing tree" (*Edwards v A.G. Canada* [1930] AC 123, 1 DLR 98 (PC)) to support its evolutionary readings of the this analogy in the Canadian Supreme Court's judgment in *Reference re Constitution Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79). The Constitutional Court displayed a clear comparative effort aimed to support the assertion of the precept of was signed of. Similarly, the *Tribunal* introduced a full overview of international jurisprudence and of the European Court of Human Rights (see the reference to the *Goodridge v Department of Public Health* (Mass. 2003)-, and the Constitutional Court of Slovenia, *Kopel v. Slovenia* (U-I-425/06-10-). In *Schalk and Kopf v. Austria*, 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 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.

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 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.

---