

## Spain, Constitutional Court, STC 198/2012, 6 November 2012

### Deciding bodies and decisions

Constitutional Court, STC 198/2012, 6 November 2012,

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### Area of law

Non-discrimination

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### Subject matter

Does the Spanish Constitution allow for same-sex marriage?

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### Summary Facts Of The Case

The Civil Code was amended by Law 13/2005 to allow for same sex marriage. This law was challenged before the Constitutional Court by more than 50 Deputies of the Popular Party. The applicants claimed that the recognition of same sex marriage clashed, inter alia, with Article 32 of the Spanish Constitution, which sets forth that men and women have the right to marry.

The Spanish Tribunal Constitucional followed an evolutionary interpretation of the Constitution and held that Article 32 of the Constitution did not prevent the legislator from passing a law to allow for same sex marriage. The Court indicated that the recognition of same sex marriage was a legislative option supported by the principle of equality, but failed to ground its decision upon the right to non-discrimination on the basis of sexual orientation.

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,” but it then mentioned the use of this analogy in the Canadian Supreme Court’s judgment on same-sex marriage, displaying a clear comparative effort used to support the assessment of the very 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 and the Constitutional Court of Slovenia).

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.

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### Relation to the scope of the Charter

The *Tribunal* addressed the rationale of the newly enacted Law 13/2005. It identifies the purpose of the law in the “equation between the legal status of homosexual and heterosexual persons,” and evokes 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

is also heavily cited to prove that States enjoy a wide margin of discretion in regulating the possibility to extend the institution of marriage to same-sex couples. Significantly, the Tribunal takes also the opportunity to mention a case (regarding discrimination on grounds of sexual identity), in which its position on the equal treatment rights granted to a transsexual parent was later sanctioned by the Court of Strasbourg.

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#### Sources - ECtHR Case Law

Fretté v. France (App. no. 36515/97), 2002

Schalk v. Kopf

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#### Sources - Internal or external national courts case law

Privy Council, Edwards v A.G. Canada [1930] AC 123, 1 DLR 98 (PC).

Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, 2004 SCC 79.

Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003).

Judgment of 2 July 2009, Blažič and Kern v. Slovenia U-I-425/06-10.

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