

Human rights – Right to respect for private and family life – Right to marry – Same-sex couple filing appeal against Municipal Civil Registrar’s refusal to publish banns of marriage – Refusal upheld by civil courts of first and second instance – Neither Italian Constitution nor Civil Code providing gender-related definition of marriage – Civil Code regulating marriage between man and woman but not between same-sex couples- Constitutional Court’s existing ruling on analogous case upholding current legislation under (1) Constitutional principles of human dignity and equality (2) European Convention on Human Rights and Charter of Fundamental Rights of the European Union relying on state’s margin of appreciation on regulation of same-sex partnerships (3) Court’s lack of jurisdiction to extend right to marry to same-sex couples - Same-sex couple requesting referral to Constitutional Court for alleged unconstitutionality of Civil Code on basis of (a) denial of right to contract marriage on an equal basis to non-homosexuals, (b) discrimination based on sexual orientation, (c) limitation of legal capacity based on sexual orientation, (d) diminution of social dignity of homosexual persons, (e) prevention of development and expression of personality within type of union widely recognized by international and European human rights charters – Whether court should overrule previous ruling on same-sex marriage – Whether exclusion of same-sex couples from right to marry unlawful under multi-level (international, European and national constitutional) system of human rights protection – Italian Civil Code arts 107, 108, 143, 143bis, 143ter, 153bis – Italian Constitution arts 2, 3, 10.1, 22, 29, 117– Charter of Fundamental Rights of the European Union arts 9 and 21 – European Convention on Human Rights, arts 8, 12 and 14

Constitutional Court decision no 138/2010 had established that neither the European Convention of Human Rights (ECHR) in Article 12 nor the Nice Charter in Article 9 compelled the Member States to grant the right to marry to same-sex couples. While requiring some legal recognition and protection for same-sex partnerships, they did not dictate a unique regulatory model. In fact, Member States had applied them in various ways ranging from marriage to many other forms of legal recognition. In Italy same-sex unions should be accorded certain rights and duties (such as those of mutual assistance) by virtue of their belonging to the category of stable social nucleus “aimed at the fundamental development of human personality” (Italian Constitution art 2). Nevertheless, it was up to the legislature to identify the legal scheme of protection, which did not have to correspond necessarily to marriage.

Since 2010, the European Court of Human Rights had accorded a wide margin of appreciation to the Member State in matters of same-sex partnerships, and this had not changed over time: see *Schalk and Kopf v Austria*, App No 30141/04 (ECtHR, 24 June 2010); *Gas and Dubois v France*, App No 25951/07 (ECtHR, 15 March 2012); *Hämäläinen v Finland*, App No 37359/09 (ECtHR, 16 July 2014). In the European Convention on Human Rights could be identified a “concentric scheme” of protection for civil partnerships and marriage, created by Articles 8 and 12. Article 8 - on the right to respect for private and family life – had to be interpreted as addressing both civil partnerships and marriage and undoubtedly entailed the right for same-sex couples to see their engagement protected by the legal system, even though not necessarily through the right to marry. The right to marry was covered by Article 12, which, although referring to heterosexual unions, neither prevented, nor imposed on the Member States an obligation to extend, the right to same-sex marriage.

The Italian Constitutional Court had not changed its position after its 2010 ruling, having rejected the request to transcript a same-sex marriage celebrated abroad in the Italian Civil Register, on the grounds that such a union was not provided for by Italian law and therefore could not produce legal effects in Italy. Nonetheless, the Constitutional Court had stressed the ‘absolute

indeterminacy' of same-sex couples' legal *status* in Italy, urging lawmakers to intervene in order to fill the gap that divided their *status* from the full protection granted to heterosexual couples by the institution of marriage. This exhortation had been reiterated in Judgment no 170/2014, when the Court had deemed unconstitutional legislation automatically dissolving a marriage when one spouse changed sex. The Court ruled in the later case that the preservation of certain rights and duties should have been permitted according to Article 2 of the Italian Constitution and Article 8 of the ECHR.

The Italian Constitution, in accordance with the ECHR, presented a 'concentric scheme' of protection for unions: Article 2 of the Italian Constitution was the source of an essential set of rights and duties applying to both marriage and same-sex partnerships, while Article 29 specifically addressed marriage. The legal recognition of same-sex partnerships in Italy was encompassed by the identification of a "common ground" of rights and duties applied to every kind of union, under Article 2 of the Constitution. Same-sex conjugal union as a legal institution, however, could not be created by judicial decision: it fell within the remit of the legislature. Moreover, the absence of legal provisions on same-sex marriage could not be considered a restriction on the legal capacity of homosexual persons under Article 22 of the Italian Constitution, since that article addressed only limitations of public law liberties for political reasons.

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