Italy—Constitutional Court rejects same-sex marriage claim, judgment 138, April 14, 2010

Constitutionality; Italy; Marriage; Same sex partners; Sexual orientation discrimination

While another Latin American jurisdiction with a strong Catholic heritage legislated recently for marriage equality (see "Argentine Senate backs bill legalising gay marriage" *BBC News*, July 15, 2010: *http://www.bbc.co.uk/news/10630683* [Accessed August 10, 2010]; also see "Argentina" [2010] P.L. 413), same-sex marriage campaigners in Italy have experienced a set-back with an adverse ruling from the Italian Constitutional Court.

A number of Italian gay couples sought publication of their marriage banns, but their local municipalities refused, arguing that the Italian Civil Code does not allow same-sex marriages. The couples challenged the refusals before the local courts: in Venice and Trento. The actions subsequently came before the Constitutional Court on the motion of the regional courts.

The first question raised was, was the lack of provision for same-sex marriage in Italian law unconstitutional discrimination on the ground of sexual orientation? Also put before the Constitutional Court was scope of art.29 of the Constitution, which affirms that the Italian Republic recognises family rights as natural society is founded on marriage. An argument was made that the expression "natural society" entailed a concept of family as an autonomous concept (independent of the traditional definition) which could change in meaning over time. Finally, one of the referring courts raised the question of whether there was an infringement of arts 8, 12 and 14 of the ECHR and/or arts 7, 9 and 21 of the EU Charter of Fundamental Rights (EUCFR).

The Constitutional Court held that protecting gay partnerships (and related rights and duties) does not necessarily require providing for same-sex marriage; on this point it referred to foreign examples of same-sex couple recognition short of full marriage (e.g. domestic or civil partner legislation). To require same-sex marriage was beyond the role of the court and a matter for Parliament. The Court also rejected the claims based on the ECHR and EUCFR.

The Court also held that while the concept of marriage provided for in art.29 is to be interpreted in light of social transformations, that its core historical meaning cannot be eroded. When the Constitution was written the reference to marriage was based on that provided for in the Italian Civil Code of 1942, which postulates husband and wife. So marriage and same-sex partnership are not homogeneous categories, because only the former benefits of the Constitutional protection and has the "(potential) procreative aim" (at p.9). Though marriages where one of the parties has had gender re-assignment surgery are lawful.

The judgment returns the issue to the Parliament and leaves gay couples in uncertainty. Polls indicate that Italian civil society is favourable to recognition of gay partnerships, but the Italian political classes do not appear ready to adopt a law on this issue; and the Vatican is, of course active in its opposition. Notwithstanding that, as judges Rozakis, Spielmann and Jebens, affirmed in their joint dissenting opinion (in *Schalk and Kopf v Austria* ECtHR June 24, 2010, at p.9):

> "Today it is widely recognised and also accepted by society that same-sex couples enter into stable relationships. Any absence of a legal framework offering them, at least to a certain extent, the same rights or benefits attached to marriage … would need robust justification, especially taking into account the growing trend in Europe to offer some means of qualifying for such rights or benefits."

Probably the "Italian silence" will not last for a long time; sooner or later gay couples will receive formal recognition, even if it will not be full marriage.

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New Zealand—Supreme Court's first departure from Privy Council precedent changes test for award of exemplary damages in negligence claims—*Couch v Attorney-General (No.2)* [2010] NZSC 27

Exemplary damages; Negligence; New Zealand; Personal injury claims; Precedent

By the Supreme Court Act 2003, New Zealand abolished appeals to the Privy Council and established a new Supreme Court as its highest court. That court has now for the first time overruled a Privy Council decision on an appeal from New Zealand. The substantive issue concerned the test for awarding exemplary damages in negligence claims—an issue of special significance in New Zealand personal injury cases, because the accident compensation legislation excludes damages claims for personal injury, with the exception of claims for exemplary damages.

In *Bottrill v A* [2002] UKPC 44, [2003] 2 NZLR 721, the Privy Council had adopted a general test of "outrageous" conduct, overturning the Court of Appeal which would have required at least conscious awareness of the risk, or subjective recklessness, to be shown. The Supreme Court in *Couch*, by a 4:1 majority (Elias C.J. dissenting), effectively re-instated the Court of Appeal's position in *Bottrill*. The Supreme Court majority included two judges who were members of the Court of Appeal majority in *Bottrill*.

All the judges were agreed that the Supreme Court cannot be bound by Privy Council decisions, any more than final courts of appeal can be bound by their own decisions (perhaps even less so, since one of the purposes of creating the Supreme Court was to have decisions informed by an "understanding of New Zealand conditions, history, and traditions": Supreme Court Act 2003 s.3(1)(a)(ii)). But for the sake of stability and certainty, the court should depart from precedent only very rarely; it should not do so "unless it is satisfied that the Privy Council decision was not only in error but also inappropriate for the proper development of New Zealand law in New Zealand conditions" (at [51]; see also at [32], [104], [207]–[209], [251]).

The majority considered *Bottrill* to be a proper case for reconsideration. Aside from considering the decision to be erroneous, the reasons included the extent of judicial disagreement: a bare majority of the Privy Council (3:2) had overturned a clear majority of the Court of Appeal (4:1). Also, it was unlikely that people had rearranged their affairs according to the decision (at [69], [107]–[108], [252]). Factors such as these were considered relevant by the High Court of Australia in deciding whether to depart from its own earlier decisions in *John v Commissioner of Taxation of the Commonwealth of Australia* (1989) 166 C.L.R. 417 (*Couch* at [51]).

Perhaps the strongest reason, however, arose from the accident compensation legislation. Given the bar on compensatory damages claims for personal injury, coupled with the unavailability of lump sum payments for non-pecuniary losses under the accident compensation scheme since 1992, there was a great incentive