JUDGMENT NO. 170 YEAR 2014

In this case the Court heard a referral from the Court of Cassation in proceedings brought by a married couple, who had been divorced contrary to their wishes by operation of law following the gender reassignment of one of the spouses. The Court noted that the ECHR did not require member states to recognise same-sex marriages, and that the state had an interest in maintaining the heterosexual nature of marriage. Nevertheless, it held that the exercise of the right of sexual determination should not be excessively penalised by the complete sacrifice of the protective legal framework provided by marriage. The Court found the contested provisions to violate Article 2 of the Constitution on the grounds that the balance struck took no account of the interests of the couple. Since the imposition of the requirement that divorce be voluntarily would entirely sacrifice the legitimate interest of the state in exclusively heterosexual marriage, the Court held that the state was required to enact appropriate legislation to grant protection in such situations consisting in another form of registered partnership.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 2 and 4 of Law no. 164 of 14 April 1982 (Provisions on the correction of the assigned gender), initiated by the Court of Cassation in the proceedings pending between B. A. and another and the Ministry of the Interior and others by the referral order of 6 June 2013, registered as no. 214 in the Register of Referral Orders 2013 and published in the Official Journal of the Republic no. 42, first special series 2013.

Considering the entry of appearance by B. A. and another and the interventions by the *Avvocatura per i diritti LGBTI* [Advocacy Association for LGBTI rights] and the President of the Council of Ministers;

having heard the judge rapporteur Mario Rosario Morelli at the public hearing of 10 June 2014;

having heard Counsel Giovanni Genova for the *Avvocatura per i diritti LGBTI*, Counsel Francesco Bilotta for B.A. and another and the *Avvocati dello Stato* [State Counsels] Attilio Barbieri and Gabriella Palmieri for the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.− Having been called upon to decide on the question at the centre of the main proceedings concerning the "effects of a gender reassignment ruling on a pre-existing marriage lawfully contracted by the person who exercised the right to change gender identity whilst married in a situation in which neither the person concerned nor the spouse intends to dissolve the marital relationship", the Court of Cassation doubts that the solution imposed by Article 4 of Law no. 164 of 14 April 1982 (Provisions on the correction of the assigned gender), which was not amended by Article 7 of Law no. 74 of 6 March 1987 (New provisions setting out rules relating to the dissolution of marriage) and subsequently confirmed by Article 31 of Legislative Decree no. 150 of 1 September 2011 (Complementary provisions to the Code of Civil Procedure on the reduction and simplification of civil cognisance proceedings, enacted pursuant to Article 54 of Law no. 69 of 18 June 2009), which is not applicable to the proceedings *ratione temporis* – that is, the solution of stipulating that the gender reassignment order relating to the spouse has the automatic effect of dissolving the marriage – strikes an appropriate balance between the interest of the state in upholding the heterosexual model of marriage and the countervailing rights accrued by the two spouses within the context of their previous life as a couple.

In fact, in the opinion of the referring court, the so-called "compulsory divorce" – introduced by the contested legislation (Article 4 and the related Article 2 of Law no. 164 of 1982) – results in a lack of protection consisting in the indiscriminate sacrifice, without any compensatory mechanisms, "of the right to self-determination in choices relating to one's own personal identity, of which the sexual sphere is a constituent

element; of the right to continue the previous relationship when it has attained the stability and continuity typical of the matrimonial bond; of the right not to suffer unfair discrimination compared to all other married couples, who are granted the ability to choose whether to divorce; and of the right of the other spouse to decide whether to continue the marital relationship".

For this reason in particular, Article 4 and, insofar as it is relevant, Article 2 of Law no. 164 of 1982 are claimed to contrast with Articles 2, 3 and 29 of the Constitution and Articles 8 and 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, which are invoked as interposed rules for the purposes of the further violation of Articles 10(1) and 117(1) of the Constitution, whilst it is also argued that Articles 2 and 4 of Law no. 164 of 1982 violate Article 24 of the Constitution.

2.− Submitting broad arguments endorsing the grounds for challenge contained in the referral order, counsel for the applicants sought a ruling that Articles 2 and 4 of Law no. 164 of 1982 and consequently, pursuant to Article 27 of Law no. 87 of 1953, also Article 31(6) of Legislative Decree no. 150 of 2011, are unconstitutional.

3.− In reaching the opposite conclusion that the question under examination is groundless in all respects, the State Counsel by contrast recalled, as a preliminary matter, the fact that the "heterosexual paradigm" of marriage cannot be set aside, as was reiterated by this Court also in Judgment no. 138 of 2010, inferring the corollary that, in Italy, a marriage that has previously been celebrated between two heterosexual persons, one of whom alters his or her gender identity during the relationship without any objection by the other, ends up by this very fact becoming subject to "supervening invalidity".

This is claimed to have the further consequence – again in the opinion of the State Counsel – that "a spouse who changes sex during the marriage may aspire, with the consent of his or her life companion, for the legal system to recognise the continuing bond of affective community under adequate but different protection, which ensures that the exercise of the inviolable right to sexual self-determination is not excessively compromised, whilst not aspiring to maintain an institution that no longer exists".

4.− As a preliminary matter, it is necessary to confirm the order adopted during the public hearing, which is annexed to this Judgment, by which the intervention by the *Avvocatura per i diritti LGBTI* was ruled inadmissible.

5.− The question is well founded, within the terms and subject to the limits set out below.

5.1.− The situation (which as a matter of fact is indubitably infrequent but which, in the case at issue in the main proceedings has nonetheless arisen) of a married couple who, notwithstanding the issue of a gender reassignment order concerning one of them, do not intend to end their life as a couple, evidently lies outwith the standard model of marriage – which can no longer continue as such as the prerequisite of heterosexuality is no longer fulfilled, which is essential for our legal order – but is also not simplistically comparable to a union of persons of the same sex, as this would be tantamount to negating on a legal level a previously shared life within which the couple has acquired reciprocal rights and obligations, some of which have constitutional relevance, and which, notwithstanding that they may no longer manifest themselves within the context of marriage, are not, for this reason alone, necessarily all to be sacrificed.

5.2.− In order to assess the particular situation under examination correctly, the reference parameter under constitutional law – in relation to the questions raised concerning the constitutionality of the legislation, correctly identified by the Court of Cassation as Articles 2 and 4 of Law no. 164 of 1982, which resolve the situation through an automatic divorce – is not therefore Article 29 of the Constitution, which was invoked as the main parameter by the referring court, since, as this Court has already stressed, the concept of marriage presupposed by the Constituent Assembly (which is protected by Article 29 of the Constitution) is that defined under the 1942 Civil Code which "provided (and still provides) that the married couple must be of the opposite sex" (see Judgment no. 138 of 2010).

This means that even a person who changes his (or her) sex is not prevented from founding a family by contracting marriage once again with a person of the opposite sex from that acquired by him (or her) following gender reassignment.

5.3.− Moreover, the reference to Article 8 (on the right to respect for family life) and Article 12 (on the right to marry and to found a family) of the ECHR, as interpreted by the European Court of Human Rights (*H. v. Finland* – decision of 13 November

2012; *Schalk and Kopf v. Austria* – decision of 22 November 2010), which were invoked as interposed rules with regard to the contested violation of Articles 10(1) and 117(1) of the Constitution, is also not relevant. This is because, absent any consensus between the various member states on the issue of homosexual unions, considering the margin of appreciation consequently granted to them, the European Court of Human Rights asserts that any forms of protection for same-sex couples is a matter for the discretion of the national legislator.

In concluding that a broad interpretation of Article 12 ECHR extending the right to contract marriage also to homosexual couples is possible, the judgment of the European Court of Human Rights in *Schalk and Kopf v. Austria*, which is cited in the referral order, clarifies that a mandatory rule with such scope cannot be inferred from such an interpretation against the member states.

5.4.− Moreover, the contested legislation does not violate the principles laid down in Articles 24 and 3 of the Constitution in the manner alleged.

As regards the former parameter, since as mentioned above there is no right for a couple that is no longer heterosexual to remain united by the bonds of matrimony, no violation can consequently be found to subsist in the manner asserted.

As regards the parameter laid down in Article 3 of the Constitution, given the difference between the special case of dissolution on the grounds of a sex change by one of the married couple compared to the other grounds for dissolution of marriage, the difference in the applicable legislation is justified.

5.5.− On the other hand, the reference to the principle laid down in Article 2 of the Constitution is relevant.

In this regard this Court has already held, in Judgment no. 138 of 2010, that the concept of "social formation" – against the backdrop of which Article 2 of the Constitution provides that the Republic shall recognise and guarantee inviolable human rights – "must also include homosexual unions, understood as the stable cohabitation of two individuals of the same sex, who are vested with the fundamental right to live out their situation as a couple freely and to obtain legal recognition thereof along with the associated rights and duties, according to the time-scales, procedures and limits specified by law".

However, that judgment also clarified that "the aspiration to this recognition – which necessarily postulates legislation of a general nature, aimed at regulating the rights and duties of the members of the couple – cannot solely be achieved by rendering homosexual unions equivalent to marriage", as is confirmed moreover by the differences between the choices made in the countries that have already recognised such unions.

It thus concluded, on the one hand, that "for the purposes of Article 2 of the Constitution, it is for the legislator to determine – exercising its full discretion – the forms of guarantee and recognition for the aforementioned unions", whilst on the other hand noting that "the Constitutional Court [nonetheless] has the possibility to intervene in order to protect specific situations" as part of a review of the reasonableness of the respective legislation.

5.6.− In line with the principle asserted in that Judgment, it cannot be denied that the situation of a married couple who intend to continue to live as a couple, notwithstanding the modification of the sexual characteristics of one of them, with the resulting rectification [of that spouse's gender] in the civil registry, may be classified under the category of "specific" and "particular" situations involving same-sex couples, in relation to whom the prerequisites will be met for intervention by this Court in order to review the adequacy and proportionality of the provisions adopted by the legislator.

The particular situation that comes into consideration here involves, on the one hand, the state's interest in not altering the heterosexual nature of marriage (and thus in not permitting its continuation once the essential prerequisite that the married couple be of the opposite sex no longer obtains) and on the other hand the interest of the couple, one of whom has changed sex, in ensuring that the exercise by one spouse, with the consent of the other, of the freedom to choose in relation to such a significant aspect of his or her personal identity is not excessively penalised by the complete sacrifice of the legal dimension provided for the previous relationship, which the couple would on the contrary wish to maintain (this last position has been adopted in the judgments of the Austrian Constitutional Court – see VerfG, judgment no. 17849 of 8 June 2006 – and the German Constitutional Court – see BVerfG, 1st Senate, order of 27 May 2008, BvL 10/05) .

The legislation – the constitutionality of which is questioned by the referring court – resolves those conflicting interests by granting protection exclusively to the state's interest in not changing the fundamental characteristics of the institution of marriage, remaining closed to any form of balancing – even though this is possible – with the interests of the couple which is no longer heterosexual but which, owing to the life previously shared within a lawful marriage, claims that it should in any case be protected as a "form of continuity", characterised by the "stable cohabitation of two individuals" that is "capable of permitting and favouring the free development of the person through relationships" (see Judgment no. 138 of 2010).

Accordingly, there lies the violation which, with regard to the issue under examination, the provisions subject to constitutional review cause to Article 2 of the Constitution.

However, it is not possible to operate a *reductio ad legitimitatem* through a "manipulative" judgment, by which automatic divorce is replaced by divorce upon request, as this would be tantamount to enabling the continuation of the matrimonial bond between persons of the same sex, which would breach Article 29 of the Constitution. It will therefore be for the legislator to introduce an alternative arrangement (different from marriage) which enables the two spouses to avoid the passage from a situation in which they enjoy the utmost legal protection to one in which protection is absolutely uncertain. The legislator is called upon to comply with this task with the utmost dispatch in order to resolve the unconstitutionality of the legislation under examination due to the current lack of protection for the individual rights involved.

5.7.− Therefore – accepting the questions raised as far as appropriate − Articles 2 and 4 of Law no. 164 of 14 April 1982 must be ruled unconstitutional with reference to Article 2 of the Constitution, insofar as they do not provide that the order reassigning the gender of one of the spouses, which causes the dissolution of the marriage, must in any case allow the maintenance of a relationship regulated by law, if both spouses so wish, under another form of registered partnership that grants adequate protection to the rights and obligations of the couple, the regulation of which is reserved to the discretionary choice of the legislator.

5.8.− On the same grounds, the declaration of unconstitutionality must be extended pursuant to Article 27 of Law no. 87 of 1953 to Article 31(6) of Legislative Decree no. 150 of 2011, which replaced Article 4 of Law no. 164 of 1982, which was in turn repealed by Article 36 of the Legislative Decree, but which essentially reiterates its content, with minimal and irrelevant lexical variation.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

1) declares that Articles 2 and 4 of Law no. 164 of 14 April 1982 (Provisions on the correction of the assigned gender) are unconstitutional insofar as they do not provide that the order reassigning the gender of one of the spouses, which causes the dissolution of the marriage or the cessation of the civil effects resulting from the transcription of the marriage, must in any case allow the maintenance of a relationship regulated by law, if both spouses so wish, under another form of registered partnership that grants adequate protection to the rights and obligations of the couple, in a manner to be specified by the legislator;

2) consequently, declares that Article 31(6) of Legislative Decree no. 150 of 1 September 2011 (Complementary provisions to the Code of Civil Procedure on the reduction and simplification of civil cognisance proceedings, enacted pursuant to Article 54 of Law no. 69 of 18 June 2009) is unconstitutional insofar as it does not provide that the order reassigning the gender of one of the spouses, which results in the dissolution of the marriage or the cessation of the civil effects resulting from the transcription of the marriage celebrated in a religious ceremony, must in any case allow the maintenance of a relationship regulated by law, if both spouses so wish, under another form of registered partnership that grants protection to the rights and obligations of the couple, in a manner to be specified by the legislator.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 11 June 2014.