Corte costituzionale

JUDGMENT NO. 138 OF 2010

Francesco AMIRANTE, President

Alessandro CRISCUOLO, Author of the Judgment

JUDGMENT NO. 138 YEAR 2010

In this case the Court considered the provisions of the Civil Code governing marriage, following references from two Courts seized with applications from homosexual couples seeking recognition of their right to marry following refusals by the civil registrar to publish notice of their intention to marry. The referring courts stated that since homosexual marriage is neither expressly permitted or prohibited under Italian law, there is therefore a gap in the legal system which it falls to the Constitutional Court to fill. The Court rejected the questions raised on the grounds that they sought to obtain a substantive judgment not required under constitutional law, and that it fell to Parliament to determine the particular form of the guarantees required under Article 2. Moreover, all of the provisions of international and supranational law referred to are clear in reserving the detailed regulation of such matters to the discretion of the national authorities, namely Parliament.

THE CONSTITUTIONAL COURT

composed of: President: Francesco AMIRANTE; Judges: Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO, Giuseppe FRIGO, Alessandro CRISCUOLO, Paolo GROSSI,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 93, 96, 98, 107, 108, 143, 143a and 156a of the Civil Code, initiated by the *Tribunale di Venezia* by referred order of 3 April 2009 and by the Trento Court of Appeal by referral order of 29 July 2009, registered as nos. 177 and 248 in the Register of Orders 2009 and published in the Official Journal of the Italian Republic nos. 26 and 41, first special series 2009.

Considering the entries of an appearance by G. M. and another, E. O. and others as well as the interventions by the President of the Council of Ministers, the *Associazione Radicale Certi Diritti*, and C. M. and others (after expiry of the time limit);

having heard the Judge Rapporteur Alessandro Criscuolo in the public hearing of 23 March 2010;

having heard Counsel Alessandro Giadrossi for *Associazione Radicale Certi Diritti* and for M. G. and another, Ileana Alesso and Massimo Clara for *Associazione Radicale Certi Diritti*, for G. M. and another and for C. M. and others, Vittorio Angiolini, Vincenzo Zeno-Zencovich and Marilisa D'Amico for *Associazione Radicale Certi Diritti*, for G. M. and another and for E. O. and others and the *Avvocato dello Stato* Gabriella Palmieri for the President of the Council of Ministers.

The facts of the case

1.- By the referral order mentioned in the headnote, the *Tribunale di Venezia*, sitting as a bench of judges, raised a question concerning the constitutionality of Articles 93, 96, 98, 107, 108, 143, 143a and 156-bis of the Civil Code with reference to Articles 2, 3, 29 and 117(1) of the Constitution "insofar as, interpreted systematically, they do not permit persons of homosexual orientation to contract marriage with persons of the same sex".

The lower court states that it has been requested to rule in proceedings initiated by Messrs G. M. and S. G., both male, concerning an objection pursuant to Article 98 of the Civil Code against the decision of 3 July 2008 whereby the registrar at the Municipality of Venice refused to publish notice of their intention to marry, as requested by them.

The official considered that the publication was unlawful on the grounds that it contrasted with the constitutional and ordinary legislation in force, since the institution of marriage under Italian law "is unequivocally centred on the fact that the spouses are of different sex", as should be inferred from the body of legislation governing that institution, for which that diversity "constitutes an indispensable premise, and a fundamental prerequisite, up to the point that the opposite possibility, regarding persons of the same sex, is legally inexistent and certainly foreign to the definition of marriage, at least according to the body of legislation still in force", including according to the

position adopted in case law. The contested decision also cites an opinion of the Interior Ministry of 28 July 2004 in which it is stated that "with regard to the possibility of registering a deed of marriage contracted abroad between persons of the same sex, it is pointed out that such deeds are not eligible for registration in Italy since our legal system makes no provision for marriage between individuals of the same sex on the grounds that this would be contrary to public order"; this assertion was repeated in the circular from the same Ministry of 18 October 2007.

The *Tribunale di Venezia* refers to the arguments made by the applicants, who pointed out that Italian law does not contain a concept of marriage, nor an express prohibition on marriage between persons of the same sex. Moreover, the documents of the Interior Ministry cited refer to international public law and not municipal public law, and in any case violate the Constitution and the Nice Charter, with the result that they should be set aside. In any case, a literal interpretation of the provisions of the Civil Code underlying the refusal to grant publication is claimed to violate the Italian Constitution and, in particular, Articles 2, 3, 10(2), 13 and 29 thereof.

The referring court continues observing that, on the basis of these arguments, as their principal claim the applicants requested the court to order the registrar at the Municipality of Venice to publish notice of their intention to marry; in the alternative, they raise a question concerning the constitutionality of Articles 107, 108, 143, 143a and 156a of the Civil Code, with reference to Articles 2, 3, 10(2) 13 and 29 of the Constitution.

In view of the above, the *Tribunale di Venezia* points out that, according to applicable law, marriage between persons of the same sex is neither contemplated nor expressly prohibited. However, it is certain that both upon enactment in 1942 as well as during the 1975 reform, Parliament did not consider the question of homosexual marriage, which at the time was not yet being debated, at least not in Italy.

Besides, "whilst there is no provision containing an express definition, the institution of marriage as provided for under Italian law in its current form indubitably refers only to marriage between persons of the opposite sex. Whilst it may be the case that the Civil Code does not expressly specify the difference in sex as one of the prerequisites for contracting marriage, various provisions, including those referred to in

the application and the constitutionality of which is questioned, refer to the husband and wife as "participants" in the celebration (Articles 107 and 108), protagonists of the marital relationship (Articles 143 *et seq*) and authors of pro-generation (Articles 231 *et seq*)".

In the opinion of the Court, precisely due to the clear tone of the provisions indicated, under the current state of applicable legislation, it is not possible to extend the institution of marriage to apply also to persons of the same sex. This would amount to a strained interpretation which the courts are not permitted to make (except the Constitutional Court), "as against a consolidated concept dating back thousands of years of marriage as the union between a man and a woman".

On the other hand, the referring court continues, "it is not possible to ignore the rapid transformation in society and customs over the last decades, which have witnessed the end of the monopoly held by the model of the normal traditional family and the parallel spontaneous emergence of different, albeit minority, forms of cohabitation, which require protection, are inspired by the traditional model, and as such aim to be acknowledged and regulated. New needs, associated also with the evolution of culture and civilisation, call for protection, and this requires close attention to the ongoing compatibility of the traditional interpretation with constitutional principles".

According to the *Tribunale di Venezia*, the first principle is that laid down by Article 2 of the Constitution where it recognises the inviolable rights of man, not only within the individual sphere but also, and perhaps above all, within the social sphere, that is "in social formations where he expresses his personality", out of which the family must be regarded as the first and most fundamental expression.

Indeed, the family is the primary social unit in which the individuality of the person is expressed, and it is therefore necessary to protect his/her inviolable rights, granting him/her a status (that of a married person) which attains the level of a characteristic feature within society and which grants a very specific body of rights and duties which cannot be bargained away.

The right to marry amounts to a fundamental right of the person, recognised on supranational level (Articles 12 and 16 of the 1948 Universal Declaration of Human Rights, Articles 8 and 12 of the Convention for the Protection of Human Rights and

Fundamental Freedoms, ratified by Law no. 848 of 4 August 1955 – Ratification and implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and the Additional Protocol to the Convention, signed in Paris on 20 March 1952 – and Articles 7 and 9 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000), as well as on national level (Article 2 of the Constitution). The freedom to marry or not to marry, and to chose one's spouse independently, relates to the sphere of autonomy and individuality, such that it amounts to a choice with which the State may not interfere, unless there are predominant incompatible interests, which cannot be identified in this case.

The only important right in relation to which a contrast could be hypothesised would be that, vested in the children, to grow up in an appropriate family environment, a right which also corresponds to a social interest. However, this interest could only impinge upon the right of homosexual couples to adopt children. Nonetheless, it would be a distinct right compared to the right to contract marriage, and indeed certain legal systems have excluded the right of adoption whilst permitting marriages between homosexuals. In any case, since the legislation governing this institution of Italian law places emphasis on the need to assess the interest of the minor to be adopted, it is for the courts to make any decision on this matter.

The referring court then examines Article 3 of the Constitution, concluding that, since the right to contract marriage is an essential element of the expression of human dignity, it must be guaranteed to all persons and may not be subject to discrimination on the grounds of sex or personal circumstances, such as sexual orientation, with the resulting obligation on the State to intervene in cases in which its exercise is impeded.

Therefore, if the goal pursued by Article 3 of the Constitution is that of prohibiting unreasonable differences in treatment, the implicit rule that precludes homosexuals from the right to contract marriage with persons of the same sex, thereby following their own sexual orientation (which is not pathological or illegal), does not have any rational justification, above all if compared with the analogous situation of transsexual persons who, having obtained official gender reassignment pursuant to Law no. 164 of 14 April 1982 (Provisions governing official gender reassignment), may contract marriage with

persons who were born with the same sex (the court recalls that the constitutionality of the above legislation was confirmed by the Constitutional Court in judgment no. 165 of 1985).

According to the referring court, the assertions contained in that judgment may indeed be deemed to apply also to homosexuals. Indeed, Law no. 164 of 1982 is claimed to have "profoundly changed the contours of the institution of civil marriage, allowing it to be celebrated between persons of the same biological sex who are incapable of procreation, thereby endorsing the psycho-sexual orientation of the individual". Against this backdrop, it would not be justified to discriminate against homosexuals who do not wish to carry out any adaptive surgical operation, who are prevented from marrying, and transsexuals who are permitted to marry even though they have the same biological sex and are incapable of procreating.

The opinions rejecting the recognition of the freedom of persons of the same sex to marry on the basis of ethical considerations associated with tradition or nature, cannot be endorsed, both due to the radical transformations which have occurred in family customs, and also due to the fact that this would involve dangerous arguments, which have been used in the past to defend serious discrimination – subsequently recognised as unlawful – such as inequalities between spouses under the Italian law of marriage before the reform or discrimination against women.

Besides, "with regard to the rights of homosexuals, as well as those of transsexuals, there are very strong pressures, originating from European and supranational level, to set aside discriminations of any type, including that preventing the formalisation of affective unions".

In relation to Article 29(1) of the Constitution, the *Tribunale di Venezia* observes that the meaning of the provision is not to recognise the foundation of the family as a kind of "natural right", but rather to assert the prior existence and autonomy of the family compared to the State, thereby imposing limits on the State legislature, as emerges from the records of the debate conducted within the Constituent Assembly, recalling the abuses previously committed against a certain type of family.

Accordingly, the fact that the protection of tradition does not fall within the purposes of Article 29 of the Constitution and that family and marriage are institutions

open to transformation is claimed to be demonstrated by the evolution of the legislation from 1948 down to the present day. The referring court then provides an overview of the legislation in this area, recalls the judgments of this Court protecting the moral and legal equality of spouses, as well as the reform implemented by Law no. 151 of 19 May 1975 (Reform of family law), and concludes that, far from being anchored to a typical and inalterable model, the constitutional significance of the family has on the contrary proved to be permeable to social changes, with the associated repercussions on family law.

Therefore, the arguments justifying the implicit prohibition on marriage between persons of the same sex on the basis of arguments associated with the ability of the couple to procreate and the protection of procreation are claimed to be without foundation. In this regard, it is claimed to be sufficient to assert that the Constitution and private law do not specify the ability to have children as a precondition for contracting marriage, or the lack of such capacity as a precondition for its invalidity or grounds for dissolution of the marriage, with the result that marriage and parenthood are decisively distinct institutions.

Once it has been excluded that a difference in treatment between homosexual couples and heterosexual couples can be based on the provisions of Article 29 of the Constitution, since this provision provides constitutional protection to legitimate families, it should not constitute an obstacle to the legal recognition of marriage between persons of the same sex, but should rather in fact be raised to an additional parameter on the basis of which the constitutionality of the prohibition is to be assessed.

Finally, the referring court points to Article 117(1) of the Constitution, which requires the legislature to respect the limitations resulting from Community law and international law obligations. It recalls in this regard, as interposed rules, Articles 8, 12 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In particular, with reference to Article 8, the European Court of Human Rights is claimed to have embraced a concept of “private life” and the protection of personal identity that was not limited to the individual sphere, but rather extended to private relationships, and ended up establishing a positive duty for States to take action in order to remedy the gaps liable to prevent the full realisation of the

individual's personality. The judgment in *Goodwin v. United Kingdom* of 17 July 2002 is cited, in which the Strasbourg Court ruled that the prohibition on the marriage by a transsexual with a person of his/her own original sex was contrary to the Convention.

The *Tribunale di Venezia* emphasises the fact that the Nice Charter also enshrines the rights to respect for private and family life (Article 7), to marry and found a family (Article 9) and non-discrimination (Article 21), establishing them as fundamental rights of the European Union. Moreover, the decisions of the European Institutions should also not be disregarded, having for some time invited the Member States to remove the obstacles preventing marriage for homosexual couples, or the recognition of equivalent legal institutions (which, regardless of their legal status, entail the adoption of a position in favour of the recognition of the right to marriage), or otherwise to implement the legislative harmonisation within the Member States of the legislation enacted for legitimate families, which should also be extended to homosexual unions (these documents are cited in the referral order).

Finally, the referring court points out that the legal systems of many countries with a legal tradition similar to the Italian one are moving towards a concept of family relations that can include homosexual couples. In fact, in certain States (the Netherlands, Belgium and Spain) the prohibition on marriage involving persons of the same sex has been removed, whilst other countries have established institutions dedicated to homosexual unions through legislation analogous to that governing marriage, at times excluding the provisions governing guardianship rights and adoption. Amongst the countries that have not yet introduced marriage or forms of quasi-marriage protection, many provide for forms of registering *de facto* families, including homosexual families.

On the basis of the above considerations, the *Tribunale di Venezia* reaches the conclusion that the question of constitutionality raised is not manifestly groundless, and also finds that it is relevant because the application of the contested provisions cannot be avoided in the logical and legal reasons to be conducted in order to reach a decision in this case.

2. – Messrs G. M. and S. G. entered an appearance in the proceedings before the Constitutional Court, with a voluminous written statement filed on 20 July 2009.

After setting out the facts on which the case is based and reporting the contents of the referral order, the private parties highlight the relevance of the question proposed and observe that the referring court has recognised an incontrovertible fact, namely that the law does not currently impose any express prohibition preventing two persons of the same sex from contracting marriage. The requirement that marriage be heterosexual is claimed to be the result of an interpretative tradition arising within a social context that was entirely different from the current one and which has been handed down from one generation to the next, including through the residual influence of the canon law on the institution under civil law.

However, it is claimed that the historical dimension to the phenomenon cannot prevent the question from being revisited, as other foreign constitutional courts have done. Nor can it be inferred that heterosexuality is a mandatory characteristic of marriage by interpreting Article 29 of the Constitution on the basis of the literal wording of the Civil Code as currently in force, because that Article does not constitutionalise the characteristics of the institution of marriage provided for under ordinary legislation or emerging from its settled interpretation. The Civil Code is claimed to constitute the object and not the parameter for the proceedings and, in any case, "cannot end up as a key with which to read constitutional law. It would in fact beg the question to assert that the Code does not violate the right to contract marriage pursuant to Article 29 because that provision, read in the light of the Code itself, only provides for the union between persons of the same sex. In fact, the making of an incontrovertible reference *secundum presuppositionem* would end up subverting the hierarchy of sources".

Therefore, it is argued that it is necessary to identify the meaning of the words "marriage" and "family" used in Article 29 in the light of the principle of self-determination which pervades the entire Constitution. That provision privileges families founded on marriage. In the opinion of the parties, this means that if in our society even two people of the same sex can establish a family, their exclusion from the bond of marriage will not only result in irrational discrimination, but also ensure that thousands of citizens are denied the protection from the State to which they would otherwise be entitled in accordance with the constitutional rule.

Such a situation would not be similar to *de facto* heterosexual unions, which are protected under constitutional law (Article 2 of the Constitution), because within *de facto* unions there is a clear choice by the parties not to put the life projects which bind together the cohabitees on a legal footing, whilst couples of persons of the same sex do not have this freedom since they cannot choose whether to marry or not.

Having recalled the concept of the family as the "natural society" contained in the referral order, the parties observe that the interest protected under Article 29 of the Constitution is in the first place the right to individual self-determination and to protection against undue interference by the State whenever the person decides to realise him/herself within a family relationship. For homosexual couples this right is currently entirely disregarded.

It is not possible to assert that the Constituent Assembly chose heterosexuality as a unquestionable feature of the family, the rights of which are recognised and guaranteed under Article 29 of the Constitution, with the result that same-sex couples may be excluded from the scope of that provision. The private parties claim that it is certain that the phenomenon also existed at the time of the Constituent Assembly although, due to the fact that it was not socially relevant, it could not at the time be taken into consideration. This means that no choice was made in favour of the heterosexual family to the detriment of the homosexual family, reserving for the latter a lower social and legal dignity.

However, this situation cannot prevent the system from being reviewed, in consideration of the changed social and legal circumstances, given the relevance in this regard of Community law, pursuant to Article 117(1) of the Constitution, and above all of the supreme principles of Italian law, such as equality (and therefore non-discrimination) and the protection of fundamental rights.

The private parties go on to observe that the "living law" (or uniform and consolidated case law) conceptualises the institution of marriage as being endowed with a feature (heterosexuality) which Article 29 of the Constitution by no means suggests, thereby preventing homosexual persons from enjoying their civil rights to the full, including the right to realise themselves in emotional and social terms within the context of a legitimate family.

Moreover, it is not possible for "natural society" to be understood as a framework for procreation, since civil marriage is claimed no longer to be oriented towards that goal. As of 1975, impotence does not constitute grounds for invalidity of the marriage, unless it was the object of a material error by the other spouse (Article 122 of the Civil Code). Moreover, persons who following a sex change are not capable of procreation and those who, due to their age, no longer have that capacity may also contract marriage.

Ultimately, procreation is claimed to be solely a contingent element in the marital relationship, which is claimed to demonstrate how distant the concept of family that is to be embraced in relation to Article 29 of the Constitution is from that under the Judaeo-Christian tradition. Marriage is without doubt the union of two existences, the fundamental aims of which coincide with the rights and duties which married couples accept at the time the marriage is celebrated pursuant to Article 143 of the Civil Code – aims which do not include the merely contingent prospective of procreation. If this were not the case, it would be necessary to conclude that it would be impossible to celebrate marriage whenever it is biologically impossible for the married couple to procreate.

The parties then argue that the right to marry is a fundamental human right, recalling (*inter alia*) the case law of this Court – which has conceptualised the right both in terms of the freedom to contract marriage with the chosen person (judgment no. 445 of 2002) as well as the freedom not to marry and to form another union (judgment no. 166 of 1998) – and concluding that homosexual citizens cannot enjoy these two freedoms.

After illustrating the aspects and purposes of that right, as well as the practical aspects of its exercise, including from the context of the protection of discriminated minorities, they emphasise the requirement that the fundamental right be guaranteed to all without distinction, including in cases where a citizen is a homosexual. Moreover, it is not to be guaranteed in abstract terms, according to the view of those who consider that it is for Parliament through ordinary legislation to choose whether or not to legalise marriages between same-sex couples. Given the existence of a fundamental right, it is for the Constitutional Court, or the merits courts through interpretation, to remove the

obstacles that prevent it from being exercised by all, especially if it is considered that it is not a legislative prohibition that is at issue but rather a mere interpretative practice.

In the case under examination, "the full realisation of oneself as a person means the ability to live one's sexual orientation to the full, choosing a person of the same sex as one's life partner, within a legal relationship classified in the same way as marriage".

Therefore, in the opinion of the applicants, the interpretation that prevents same-sex couples from marrying amounts to an unreasonable limit on the exercise of personal freedom in that it disregards the ability of the person to choose what is best for himself from this point of view of his or her relationships.

The private parties go on to refer to the argument that Article 29 of the Constitution precludes the legal recognition of homosexual couples – even only through an alternative institution to marriage – and argue that it is groundless, pointing out that this Article cannot be interpreted in such a manner as to violate one of the fundamental principles of the constitutional order, namely the principle of equality. After detailed argumentation on this point, including in relation to the economic aspects of the extension of marriage to homosexual couples, the applicants observe that the principle of equality must take on a new dimension aimed at favouring pluralism and social inclusion within our society, which is no longer characterised by homogeneity in cultural terms. The use of a right which has the effect of preventing an individual from exercising a fundamental right or freedom by virtue of his or her personal circumstances contrasts with that conception. And this is without taking account of the parallel violation of Article 2 of the Constitution, because in this way the exercise of the right to the full realisation of one's personality is prevented.

Moreover, the private parties emphasise the Community and international law already mentioned in the referral order.

They then criticise the argument whereby no court – not even the Constitutional Court – can go so far as to accept the applicants' request seeking to obtain publication of notice of their intention to marriage on the basis of the recognition of their right to marry.

Having repeated that this amounts to an interpretative practice resulting from the text of ordinary legislation dating back to well before the entry into force of the

Constitution, and that (for the reasons stated above) the practice contrasts with supreme rules and principles with constitutional standing, the applicants argue that the case under examination does not involve the creation of a new institution or the assertion of the existence of a new right (operations which the courts are not able to perform) because the right to marry already exists and is clearly delineated whereas, notwithstanding its status as a fundamental right, it is granted only to heterosexuals.

Finally, reference is made to certain argumentative passages from the judgments of foreign courts which have dealt with the constitutional position within their respective systems of the prohibition on same-sex marriages.

In conclusion, this Court is requested to obtain adequate information regarding the number of same-same-sex couples living in Italy and the impact of the current interpretative practice, which prevents persons of the same sex from marrying one another, on their psychological and social well being.

3. – The President of the Council of Ministers, represented by the *Avvocatura dello Stato*, intervened in these constitutionality proceedings by writ filed on 21 July 2009, asking that the question be ruled inadmissible or otherwise manifestly groundless.

The State representative bases his argument on the position that, under both private law and constitutional law, the legislation governing the institution of marriage refers without doubt to the union between persons of the opposite sex.

The requirement that the couple be of the opposite sex, which is inferred directly from Article 107 of the Italian Civil Code as well as numerous other provisions of the same Code, is traditionally and constantly treated within the academic literature and case law as one of the indispensable prerequisites for the existence of a marriage. In fact, in the opinion of the *Avvocatura Generale*, the institution of marriage under Italian law is conceptualised as a public law institution intended to regulate specific effects, which Parliament protects as a direct consequence of a relationship of cohabitation between persons of the opposite sex (filiation, rights of succession and the law on adoption).

The reference by the referring court to Article 2 of the Constitution is claimed to be neither decisive nor of material relevance.

According to the settled interpretation of this Court, this provision "must be read in the light of the constitutional rules governing individual rights and fundamental guarantees, at the very least to the effect that there are no other inviolable fundamental rights that do not necessarily result from those provided for under the Constitution" (judgment no. 98 of 1979), which are claimed not to include the claim brought by the applicants in the proceedings before the lower court.

The classification of Article 2 of the Constitution as one of the "fundamental principles", as against the inclusion of Article 29 within Title II amongst the "ethical and social relations", is not only an argument based on a textual interpretation but also the most significant argument that can preclude the well-foundedness of the assumption contained in the referral order, since the cohabitation of persons of the same sex is obviously not prohibited under Italian law. In fact, the most recent academic literature tends to treat the protection of homosexual couples within the context of the protection of *de facto* couples.

There is claimed to be no violation of the principle of equality laid down by Article 3 of the Constitution because the latter requires equal treatment for identical situations and different treatment in *de facto* different situations.

The State representative observes that, when commenting upon Article 3, the academic literature has considered the prohibition on discrimination on the grounds of sex to be "in some way less rigid compared to other prohibitions" both in terms of the correlation between certain distinctions and objective differences between the sexes, as well as in legislative terms since the Constitution contains rules that are capable of justifying – within certain limits – distinctions grounded on sex, "in particular Articles 29, 37 and 51".

The academic literature is also claimed to have concluded that the reference to the principle of reasonableness made in Article 3 of the Constitution is not relevant in the case under examination because different legislative treatment could be deemed to be "reasonable" insofar as aimed at achieving other predominant constitutional values.

The reference to the case law on the unlawful discrimination previously suffered by transsexual individuals is also claimed to be irrelevant because the problem of "identity of biological sex" in those cases took on a different significance.

As regards Article 29 of the Constitution, in providing that "The Republic recognises the rights of the family as a natural association founded on marriage", the said provision delineates a "two-way relationship" between the concepts referred to in it, whilst also "requiring the legislature to keep family law distinct from other legislation that may be dedicated to any other type of social association, even if it has similar features".

In the opinion of the *Avvocatura Generale*, two positions as to the meaning of that rule were reached following the debate held within the Constituent Assembly when drafting Article 29.

The first stresses the pre-legal nature of the family, identifying one single unequivocal and stable model, whilst the second acknowledges Article 29 as having a content that changes in line with the evolution of social customs. On the other hand, part of the academic literature has moved beyond that dichotomy, concluding that the rule refers to a model of the family which, whilst it may be amenable to development and change, is nonetheless characterised "by a hard core" which has "as its minimum and indispensable content the fact that the married couple are of the opposite sex", thereby maintaining the original content laid down in the Constitution, without changing it in a way that is different and distant from its original formulation.

Finally, there is no contrast with Article 117(1) of the Constitution, with regard to the limitations resulting from Community law and international law obligations.

The State representative points out that Community law has not enacted legislation on marriage, but has limited itself in various resolutions to laying down criteria and principles, leaving to the individual Member States the question as to whether to adapt national legislation.

This freedom granted to European lawmakers has accordingly given rise to various forms of protection for homosexual couples.

There is no violation of Articles 7, 9 and 21 of the Nice Charter, which is an integral part of the Lisbon Treaty, since Article 9 itself, which recognises the right to marry and to found a family, reserves the determination of the conditions governing the exercise of that right to national law.

As regards international law obligations, and in particular compliance with the ECHR, the aforementioned provisions of the Italian Civil Code do not appear to contrast with Articles 8 (right to respect for family life), 12 (right to marry) and 14 (prohibition on discrimination) of the ECHR, since Article 12 itself not only reasserts that the institution of marriage concerns persons of the opposite sex, but reserves the determination of the conditions governing the exercise of the relative right to national law.

Ultimately, leaving aside the heterogeneous nature of the models for recognition adopted by the European States, the common element is claimed to be the "central status of the lawmaker" within the process of including homosexual couples within the scope of the legal effects of the legislation providing for protection.

In any case, a proactive intervention by the Constitutional Court could not be achieved through a lexical operation involving merely the replacement of the words "husband" and "wife" with the word "spouses", since it would in reality involve the inclusion of a new figure into the normative framework of the Civil Code notwithstanding a constitutional rule which refers precisely to the former, whereas this task is necessarily reserved to Parliament.

4. – By the other referral order mentioned in the headnote, the Trento Court of Appeal raised a question concerning the constitutionality of Articles 93, 96, 98, 107, 108, 143, 143a and 156a of the Civil Code with reference to Articles 2, 3 and 29 of the Constitution insofar as, considered overall, they do not permit individuals to contract marriage with persons of the same sex.

The local court states that it was seized of an application pursuant to Article 739 of the Code of Civil Procedure filed by two couples (each formed of persons of the same sex) against an order of the *Tribunale di Trento* rejecting the applicants' objection to a decision by the registrar of the Municipality of Trento. In this decision the said official had refused to publish notice of intention to marry as requested by the applicants, having concluded that marriage between persons of the same sex was not admissible under Italian law; the refusal had been ruled lawful by the court.

Having ruled groundless the main question seeking to obtain an order that the registrar publish notice of their intention to marry, the referring court examines the question of constitutionality filed in the alternative by the appellants.

After referring to the order by the *Tribunale di Venezia*, the referring court observes that, compared to the time when the provisions governing marriage were enacted, "an unstoppable transformation in society and customs has occurred which has led to the overturning of the monopoly held by the model of the traditional family and the parallel spontaneous emergence of different forms of cohabitation which call for protection and regulation (at times very forcefully)".

Against this backdrop, according to the Trento Court of Appeal it is necessary to consider whether or not the institution of marriage as currently regulated contrasts with the constitutional principles.

The question arises in particular in relation to the principle of equality laid down by Article 3 of the Constitution. Essentially, since the right to contract marriage amounts to "an essential aspect of the expression of human dignity (guaranteed under Article 2 of the Constitution and, on supranational level, by Articles 12 and 16 of the 1948 Universal Declaration of Human Rights, Articles 8 and 12 ECHR and Articles 7 and 9 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000), it is necessary to ask whether it is lawful to prevent marriage between homosexuals, or whether on the contrary it must be guaranteed to all, without discriminations based on sex or personal circumstances (such as sexual orientation), with the resulting obligation on the State to intervene in cases in which its exercise is prevented".

It is claimed to be undeniable that the question is relevant in order to reach a decision because a declaration that the provisions governing marriage were unconstitutional insofar as they do not permit marriages between homosexuals would have a decisive impact on the outcome of the proceedings before the lower court.

Moreover, it cannot be argued that the question is manifestly groundless because "the observations made above cannot be set aside by an interpretation whereby marriage must and may be open only to heterosexual couples due to its social function – a principle which according to some may be inferred from Article 29 of the Constitution

(a provision acknowledging the rights of the family as a natural association founded on marriage). In fact, this principle is limited to granting the family its natural role in the sense that on the one hand the State cannot disregard that social reality towards which the vast majority of individuals inclines by nature, whilst on the other hand asserting that the family is based on marriage; however, it certainly does not go so far as to exclude protection for *de facto* families (which is available irrespective of marriage) or to assert the function of the family as the granary of the State".

According to the referring court, "the evolution in legislation and case law, as the *Tribunale di Venezia* recalls most clearly in the referral order cited above, provides us today with a concept of family which leads to the conclusion that Article 29 of the Constitution cannot grant significance only to legitimate families with the purpose of furthering the spouses' procreative capacity. This means that, if anything, the question raised must be deemed worthy of attention by the Constitutional Court also in relation to that provision of constitutional law".

5. – The President of the Council of Ministers, represented by the *Avvocatura Generale dello Stato*, intervened in the proceedings before the Constitutional Court by writ filed on 3 November 2009 requesting that the question be ruled inadmissible, or in the alternative groundless. The State representative makes arguments analogous to those submitted in the proceedings initiated by the referral order from the *Tribunale di Venezia*.

6. – By writ filed on 2 November 2009 the private parties in the proceedings initiated by the referral order from the Trento Court of Appeal, Messrs O. E. and L. L. and Ms Z. E. and Ms O. M. also entered an appearance, claiming that the Court should rule the question raised well founded and accept it.

7. – The *Associazione Radicale Certi Diritti*, represented by its secretary and legal representative *pro tempore* entered an appearance in the latter proceedings by writ filed on 3 November 2009 and, recalling the objectives set out in the Association's Charter, declared that it considered itself to have standing to intervene and that the questions of constitutionality raised by the Trento Court of Appeal were admissible and well founded, reserving the right to make any further appropriate illustration of its own position and to file any additional documentation.

8.- By writ filed on 25 February 2010 in the constitutionality proceedings initiated by the aforementioned referral order of the Trento Court of Appeal, Messrs C. M. and G. V., P. G. B. and C. G. R., and R. F. R. P. C. and R. Z. entered an appearance.

The interveners, all of whom are male, state that by three decisions all dated 5 November 2009, intimated by letters sent on 11 November 2009, the registrar at the Municipality of Milan informed them of the refusal to publish notice of their intention to marry as requested by them.

They observe that their own direct interest in intervening arose after the expiry of the ordinary time limits applicable for the proceedings before the Constitutional Court and for this reason the writ of intervention was filed before the time limit of twenty days prior to the date of the hearing scheduled for discussion. Considering that this was due to a temporal circumstance outwith the control of the applicants that has been proven by documents issued by the public administration, and referring insofar as necessary by analogy to the provisions of Article 153(2) of the Code of Civil Procedure, they assert that the intervention should be considered to have been made within the applicable time limit, and in any case request that their intervention be treated as having been filed in a timely manner.

They also assert that the intervention should be ruled admissible in the light of the innovations introduced by the Constitutional Court, which has in recent years expressed a position that has become increasingly favourable to admissibility, on a case by case basis, “above all where individuals or associations claim a direct relationship with the question of constitutionality within proceedings concerning a public interest: the interest in a ruling on the constitutionality of the law”.

Against this backdrop, the direct, specific and concrete interest of the interveners in a judgment of this Court cannot be placed in doubt because a ruling that the question is well founded would make it possible to obtain publication of their intention to marry, as already requested and refused by the registrar on the basis of the position that same-sex marriages are inadmissible under the law as currently in force.

On the merits, the interveners submit arguments analogous to those referred to above in support of the well foundedness of the question.

9. – Shortly before the public hearing, the private parties in the two constitutionality proceedings, the President of the Council of Ministers and the *Associazione Radicale Certi Diritti* filed written statements in support of their respective requests.

Conclusions on points of law

1. - By the order referred to in the headnote, the *Tribunale di Venezia* raised a question concerning the constitutionality of Articles 93, 96, 98, 107, 108, 143, 143a and 156-bis of the Civil Code with reference to Articles 2, 3, 29 and 117(1) of the Constitution "insofar as, interpreted systematically, they do not permit persons of homosexual orientation to contract marriage with persons of the same sex".

The lower court states that it has been requested to rule in proceedings initiated by two men concerning an objection pursuant to Article 98 of the Civil Code against the decision whereby the registrar at the Municipality of Venice refused to publish notice of their intention to marry, as requested by them, considering that it contrasted with the constitutional and ordinary legislation in force, since the institution of marriage under Italian law is centred on the fact that the spouses are of different sex.

The *Tribunale di Venezia* refers to the arguments made by the applicants, who pointed out that the law as currently in force does not contain a concept of marriage, nor an express prohibition on marriage between persons of the same sex. They refer to the Constitution and to the Nice Charter, claiming that the literal interpretation of the provisions of the Civil Code underlying the refusal to grant publication are unconstitutional with particular reference to Articles 2, 3, 10(2) and 29 of the Constitution.

In view of the above, the referring court points out that, under Italian law, marriage between persons of the same sex is neither provided for nor expressly prohibited. Moreover, even though there is no provision containing a definition, "the institution of marriage as provided for under Italian law in its current form indubitably refers only to marriage between persons of the opposite sex". According to the court, the clear tone of the provisions of the Code regulating the institution concerned do not permit it to be extended also to persons of the same sex. This would amount to a strained interpretation which the courts are not permitted to make (except the Constitutional Court), "as

against a consolidated concept of marriage dating back thousands of years as the union between a man and a woman".

On the other hand, according to the court, it is not possible to ignore the rapid transformation in society and customs, the end of the monopoly held by the model of the normal traditional family and the parallel spontaneous emergence of different (albeit minority) forms of cohabitation, which require protection, are inspired by the traditional model, and as such aim to be acknowledged and regulated. New needs, associated also with the evolution of culture and civilisation, call for protection, and this requires close attention to the ongoing compatibility of the traditional interpretation with constitutional principles.

In view of the above, starting its argument from the consideration that the right to marry is a fundamental right of the person that is recognised both on supranational level as well as nationally (Article 2 of the Constitution), the *Tribunale di Venezia* illustrates the objections in relation to the various constitutional principles invoked, and arrives at the conclusion that the question raised is not manifestly groundless, which it moreover considers to be relevant because the application of the contested provisions cannot be avoided within the logical and legal line of reasoning that must be carried out in order to reach a decision in the case.

2. - By the other referral order mentioned in the headnote, the Trento Court of Appeal raised a question concerning the constitutionality of Articles 93, 96, 98, 107, 108, 143, 143a and 156a of the Civil Code with reference to Articles 2, 3 and 29 of the Constitution insofar as, considered overall, they do not permit individuals to contract marriage with persons of the same sex.

The local court states that it was seized of an application pursuant to Article 739 of the Code of Civil Procedure filed by two couples (each formed of persons of the same sex) against an order of the *Tribunale di Trento* rejecting the applicants' objection to a decision by the registrar of the Municipality of Trento. In this decision the said official had refused to publish notice of intention to marry as requested by the applicants, having concluded that marriage between persons of the same sex was not admissible under Italian law; the refusal had been ruled lawful by the court.

Having ruled groundless the main question seeking to obtain an order that the registrar publish notice of their intention to marry, the referring court examines the question of constitutionality filed in the alternative by the appellants, making considerations analogous to those submitted by the *Tribunale di Venezia* in relation to the objections raised.

3. – Since the two constitutionality proceedings concern the same question, they are to be joined for decision in a single judgment.

4. – As a preliminary matter, it is necessary to confirm the order adopted during the course of the public hearing and appended to this judgment, ruling inadmissible the interventions by *Associazione Radicale Certi Diritti* and Messrs C. M. and G. V., P. G. B. and C. G. R., and R. F. R. P. C. and R. Z. This is due to the settled case law of the Constitutional Court mentioned in the order according to which interventions are not admissible in interlocutory constitutional proceedings by individuals that were not parties to the proceedings before the lower court and who do not have a qualified interest pertaining directly and specifically to the substantive relationship at issue in the case, and not which is simply regulated on the same footing as any other by the contested provision or provisions, having regard also to the finding that were an intervention by a third party with an interest only analogous to that averred in the main proceedings to be admissible, this would contrast with the interlocutory nature of the proceedings before the Constitutional Court.

5. – The question raised by the two referral orders in relation to Article 2 of the Constitution must be ruled inadmissible because it seeks to obtain a substantive judgment that is not mandated under constitutional law (*inter alia*: orders no. 243 of 2009, no. 316 of 2008, no. 185 of 2007 and no. 463 of 2002).

6. – The said orders are both premised on the assumption that the institution of civil marriage, as currently provided for under Italian law, refers only to the stable union of a man and a woman. This fact is clear not only from the contested provisions, but also the legislation governing affiliation within wedlock (Articles 231 *et seq* of the Civil Code, with particular reference to actions for repudiation, Articles 235, 244 *et seq* of the same Code) and by other provisions including, for example, Article 5(1) and (2) of Law no.

898 of 1 December 1970 (Provisions governing the dissolution of marriage), as well as the legislation governing civil status.

Essentially, all legislation governing the institution contained in the Civil Code and in special legislation postulates the difference in sex of the married couple against the backdrop of "a consolidated concept of marriage dating back thousands of years", as stated in the referral order from the *Tribunale di Venezia*.

The academic literature reaches the same conclusion, and the majority of it is minded to concluded that any same-sex marriage will be void, even though some commentators speak of invalidity. The rare case law of the Court of Cassation which (besides commenting *obiter dicta*) has addressed the question, has held that the difference in sex of the married couple is one of the minimum indispensable prerequisites for the existence of a marriage (Court of Cassation, judgments no. 7877 of 2000, no. 1304 of 1990 and no. 1808 of 1976).

7. – Without prejudice to the above considerations, it is therefore necessary to determine whether the constitutional principle evoked by the referring courts requires this Court to strike down the contested legislation as unconstitutional (if appropriate, setting aside Article 27, last part, of Law no. 87 of 11 March 1953 – Provisions on the establishment and functioning of the Constitutional Court), extending the legislation governing civil marriage to homosexual couples in order to fill the gap resulting from the fact that Parliament has not considered the problem of homosexual marriage.

8. - Article 2 of the Constitution provides that the Republic recognises and guarantees the inviolable rights of man, both as an individual as well as in social groupings in which he or she expresses his or her personality and requires compliance with the mandatory duties of political, economic and social solidarity.

Accordingly, social grouping must be deemed to include all forms of simple or complex communities that are capable of permitting and favouring the free development of the person through relationships, within a context that promotes a pluralist model. This concept must also include homosexual unions, understood as the stable cohabitation of two individuals of the same sex, who are granted 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, the Court finds 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. It is sufficient in this regard to examine – even on a non-exhaustive basis – the legislation of the Countries that have to date recognised the aforementioned unions in order to ascertain the diversity within the choices made.

It therefore follows that, for the purposes of Article 2 of the Constitution, it is for Parliament to determine – exercising its full discretion – the forms of guarantee and recognition for the aforementioned unions, whilst the Constitutional Court has the possibility to intervene in order to protect specific situations (as occurred for unmarried cohabitees: judgments no. 559 of 1989 e no. 404 of 1988). It may in fact be the case that, in relation to particular situations, there is a need to treat married couples and homosexual couples equally, which this Court may guarantee within a review of a provisions reasonableness.

9. – The question raised with reference to the principles indicated in Articles 3 and 29 of the Constitution is groundless.

For reasons of logical priority, it is necessary to start our considerations from this last provision. It provides in paragraph one that "The Republic recognises the rights of the family as a natural association founded on marriage", whilst the second paragraph adds that "Marriage is grounded on the moral and legal equality of the spouses within the limits determined by law in order to protect family unity".

This provision, which has given rise to a lively debate within the academic literature that is still ongoing, places marriage at the core of the legitimate family, defines as a "natural association" (as may be inferred from the *travaux preparatoires* of the Constituent Assembly, in using this expression the intention was to stress that the family contemplated under the provision had original rights which pre-existed the State, and which the latter was obliged to recognise).

In view of the above, it is true to say that the concepts of family and marriage cannot be considered to have been "crystallised" with reference to the time when the

Constitution entered into force, because they are endowed with the flexibility that is inherent within constitutional principles, and are therefore be interpreted taking account not only of the transformations within the legal system, but also the evolution of society and customs. However, such an interpretation cannot go so far as to impinge upon the core of the provision, modifying it in such a manner as to embrace situations and problems that were not considered at all when it was enacted.

In fact, as is clear from the *travaux preparatoires* cited, the question of homosexual unions remained entirely unaddressed within the debate conducted within the Assembly, even though homosexuality was by no means unknown. When drafting Article 29 of the Constitution, the delegates discussed an institution with a precise articulation and which was regulated in detail under civil law. Therefore, absent any different references, the inevitable conclusion is that they took account of the concept of marriage defined under the Civil Code which entered into force in 1942 and which, as noted above, specified (and still specifies) that married couples must be comprised of persons of the opposite sex. The second paragraph of the Article also makes provision to this effect, in asserting the principle of the moral equality of the married couple, focused in particular on the position of the woman to whom it wishes to guarantee equal dignity and rights within the marital relationship.

This meaning of the constitutional rule cannot be set aside through interpretation, because to do so would not involve a simple re-reading of the system or the abandonment of a mere interpretative practice, but rather the implementation of a creative interpretation.

It must therefore be reasserted that the provision did not take account of homosexual unions, but rather intended to refer to marriage within the traditional meaning of that institution.

Moreover, it is not by chance that, after addressing marriage, the Constitution considered it necessary to deal with the protection of children (Article 30), guaranteeing equal treatment also to those born outside marriage, provided that this is compatible with the members of the legitimate family. The necessary and fair protection guaranteed to biological children does not undermine the constitutional significance attributed to

the legitimate family and the (potential) creative purpose of marriage which distinguishes it from homosexual unions.

Against this backdrop, with reference to Article 3 of the Constitution, the contested provisions of the Civil Code – which, as mentioned above, makes provision exclusively for marriage between a man and a woman – cannot be regarded as unlawful under constitutional law. This is both because the legislation is grounded on Article 29 of the Constitution and also because the legislation itself does not result in unreasonable discrimination, since homosexual unions cannot be regarded as homogeneous with marriage.

The reference contained in the referral order from the *Tribunale di Venezia* to Law no. 164 of 14 April 1982 (Provisions governing official gender reassignment) is not relevant.

This legislation – in respect of which, by judgment no. 161 of 1985, this Court ruled inadmissible or groundless the questions of constitutionality referred to it for review – makes provision for the official gender reassignment, by virtue of a definitive court order assigning a person a gender different from that stated in their birth certificate, following surgery to change their sexual characteristics (Article 1).

As will be clear, this involves a condition that is entirely different from that of homosexuals, and is therefore not eligible to operate as a comparator. For transsexuals in fact, the fundamental requirement to be satisfied is that of bringing the body into line with the mind and to this effect a surgical operation is as a rule indispensable since, along with the resulting amendment of the register of births, this is generally able to achieve this alignment (judgment no. 161 of 1985, section three of the Conclusions on points of law). Such persons are eligible to marry following the sex change, as authorised by the court. Therefore recognition of the right of those who have changed sex to marry if anything constitutes an argument in support of the heterosexual nature of marriage as provided for under the law currently in force.

10. – The principle relating to Article 117(1) of the Constitution (invoked only in the referral order from the *Tribunale di Venezia*) remains to be examined.

The referring court evokes in the first place, as interposed legislation, Articles 8 (the right to respect for private and family life), 12 (the right to marry) and 14 (non-

discrimination) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), ratified and implemented by Law no. 848 of 4 August 1955 (Ratification and implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and the Additional Protocol to the Convention, signed in Paris on 20 March 1952); it places emphasis on a judgment of the European Court of Human Rights (in the case *Goodwin v. United Kingdom*, judgment of 11 July 2002), which held that the prohibition on marriage for (post operative) transsexuals with persons of their original sex was contrary to the Convention, arguing that this case was analogous to that involving homosexual marriage; it also invokes the Nice Charter (Charter of Fundamental Rights of the European Union) and in particular Article 7 (the right to respect for private and family life), Article 9 (the right to marry and to found a family) and Article 21 (non-discrimination); it mentions various resolutions of the European Institutions "which have for some time invited the Member States to remove the obstacles preventing marriage for homosexual couples, or the recognition of equivalent legal institutions"; finally, it points out that within the legal systems of many states with a legal tradition similar to Italian law, a concept of family relations is establishing itself that is such as to include homosexual couples.

In relation to the above, the Court observes that: a) the reference to the judgment of the European Court cited is not relevant because it relates to a situation, governed by English law, concerning the case of a transsexual who, following the operation and the acquisition of female characteristics (paragraphs 12-13 of the judgment) had started a relationship with a man, whom she could not however marry "because the law treated her as a man" (paragraph 95). Under Italian law, this situation would have been regulated and resolved under the terms of Law no. 164 of 1982. And in any case, it has been noted above that the situations of transsexuals and homosexuals are not homogeneous (see paragraph 9 above); b) both Articles 8 and 14 ECHR as well as Articles 7 and 21 of the Nice Charter contain provisions of a general nature relating to the right to respect for private and family life and the prohibition on discrimination, which are moreover largely analogous. By contrast, Articles 12 ECHR and 9 of the Nice Charter specifically provide for the right to marry and to found a family. Therefore,

according to the principle of *lex specialis derogat generali*, it is the latter provisions which must be referred to in the case under examination.

Article 12 provides that "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right".

Article 9 provides in turn that "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights".

In relation to the first provision it should be pointed out that the Nice Charter was implemented by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, and which entered into force on 1 December 2009. In fact, the new text of Article 6(1) of the Treaty on European Union, as amended by the Treaty of Lisbon, provides that "1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".

For the purposes of this judgment, there is no need to address the problems that the entry into force of the Treaty raises in relation to Union law and national legal systems, especially with regard to Article 51 of the Charter, which regulates its scope. For the purposes of this judgment, it must be pointed out that, in asserting the right to marry, Article 9 of the Charter (as moreover Article 12 ECHR) refers to the national laws governing its exercise. It must be added that the Explanations relating to the Charter of Fundamental Rights drawn up under the authority of the Praesidium of the Convention which drafted the Charter (which, whilst they do not have the status of law, undoubtedly constitute an instrument of interpretation) clarify in relation to Article 9 (*inter alia*) that "This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex".

Therefore, except the express reference to men and women, the observation that also the legislation cited does not require the application of the rules put in place for marriages between men and women on a fully equivalent basis to homosexual unions is in any case decisive.

Once again, the reference to national laws provides confirmation of the fact that the matter falls within the discretion of Parliament.

As mentioned above, further confirmation of this may be obtained from the examination of the choices and solutions adopted by numerous countries which have introduced in some cases a genuine extension to homosexual unions of the legislation in place for civil marriages or, more frequently, highly different forms of protection ranging from the general equivalence between such unions and marriage, through to a clear distinction from marriage in terms of their effects.

On the basis of the above considerations, the Court must therefore rule inadmissible the questions raised by the referring courts with reference to Article 117(1) of the Constitution.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby:

a) *rules* that, with reference to Articles 2 and 117(1) of the Constitution, the question concerning the constitutionality of Articles 93, 96, 98, 107, 108, 143, 143a and 156-bis of the Civil Code raised by the *Tribunale di Venezia* and the Trento Court of Appeal by the referral orders mentioned in the headnote is inadmissible;

b) *rules* that, with reference to Articles 3 and 29 of the Constitution, the question concerning the constitutionality of the aforementioned Articles of the Civil Code raised by the *Tribunale di Venezia* and the Trento Court of Appeal by the same referral orders is groundless.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 14 April 2010.

Signed:

Francesco AMIRANTE, President

Alessandro CRISCUOLO, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 15 April 2010.

The Director of the Registry

Signed: DI PAOLA

Annex:

ORDER READ OUT IN THE HEARING OF 23 MARCH 2010

ORDER

Considering the case file relating to the constitutionality proceedings initiated by the referral order of the Trento Court of Appeal filed on 29 July 2009 (no. 248 of 2009);

Whereas the *Associazione Radicale Certi Diritti* intervened in those proceedings, as represented by its Secretary and legal representative *pro tempore*, by writ filed on 3 November 2009;

by writ filed on 25 February 2010, Messrs C. M. and G. V., P. G. B. and C. G. R., R. F. R. P. C. and R. Z., all male, intervened in the same proceedings;

neither the *Associazione Radicale* nor the gentlemen who intervened on 25 February 2010 are parties to the proceedings before the lower court;

according to the settled case law of this Court, only the parties to the main proceedings have standing to intervene in interlocutory constitutionality proceedings (in addition to the President of the Council of Ministers and, in cases involving regional legislation, the President of the Regional Council), whilst interventions by third parties not involved in the proceedings are only admissible for those with a qualified interest relating directly and without intermediation to the substantive relationship at issue in the proceedings, and not one that is simply regulated, on the same footing as every other relationship, by the provision or provisions subject to challenge (*inter alia*: the order

read out in the hearing of 31 March 2009, confirmed in judgment no. 151 of 2009; judgments no. 94 of 2009, no. 96 of 2008 and no. 245 of 2007; and order no. 414 of 2007);

were an intervention by a third party that is the holder of an interest which is only analogous to that averred in the main proceedings to be deemed admissible, this would contrast with the interlocutory nature of proceedings before the Constitutional Court since the parties would be entitled to participate in the said proceedings without any prior control of the relevance and non-manifest groundlessness of the question by the lower court;

accordingly, both the intervention by the *Associazione Radicale Certi Diritti* as well as that made by the deed submitted on 25 February 2010 must be ruled inadmissible, independently of the fact that the latter was filed late (order no. 119 of 2008).

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

rules that the interventions by *Associazione Radicale Certi Diritti* and Messrs C. M. and G. V., P. G. B. and C. G. R., R. F. R. P. C. and R. Z. are inadmissible.

Signed:

Francesco AMIRANTE, President