

## **Decision no. 2010-92 of 28 January 2011**

### **Mrs Corinne C. et al [Prohibition of marriage between persons of the same sex]**

On 16 November 2010 the Constitutional Council, in the conditions provided for by Article 61-1 of the Constitution, received an application for a priority preliminary ruling on the issue of constitutionality raised by the Cour de Cassation (first civil chamber, decree no. 1088 of 16 November 2010) on behalf of Ms Corinne C. and Ms Sophie H., raising the conformity of the articles 75 and 144 of the Civil Code with the rights and freedoms guaranteed by the Constitution..

THE CONSTITUTIONAL COUNCIL,

Having regard to the Constitution;

Having regard to Ordinance no. 58-1067 of 7 November 1958 as amended, concerning organic law on the Constitutional Council;

Having regard to the Civil Code;

Having regard to decree no. 05-16627 of the Cour de Cassation (first civil chamber) of 13 March 2007;

Having regard to the Regulation of 4 February 2010 as to the procedure applicable before the Constitutional Council with respect to applications for priority preliminary rulings on the issue of constitutionality;

Having regard to the observations of the Prime Minister, registered on 8 December 2010;

Having regard to the observations on behalf of the applicants by Esq. Emmanuel Ludot, Attorney at the Reims Bar, registered on 14 December 2010;

Having regard to the observations in interventions on behalf of the Association SOS Homophobie and the Association of Gay and Lesbian Parents and Future Parents by Esq. Caroline Mécarry, Attorney at the Paris Bar, registered on 14 December 2010;

Having regard to the documents produced and appended to the case files;

Having heard Esq. Ludot on behalf of the applicant and Esq. Mécarry for the associations, and Mr Thierry-Xavier Girardot, appointed by the Prime Minister, at the public hearing on 18 January 2011;

Having heard the Rapporteur:

1. Considering that in terms of Article 75 of the Civil Code: "On the day specified by the parties, after the period of public notice, the officer of civil status, at the town hall, in the presence of two witnesses at least or four at the most, relative or not of the parties, shall read Articles 212, 213 (paragraphs 1 and 2), 214 (paragraph 1) and 215 (paragraph 1) of this Code to the future spouses. Article 371-1 must also be read".

"However, in case of serious impediment, the Prosecutor of the Republic of the place of marriage may require the officer of civil status to betake himself to the domicile or residence of one of the parties to celebrate the marriage. In case of imminent danger of death of one of the future spouses, the officer of civil status may betake himself there before any requirement or authorization of the Prosecutor of the Republic, to whom he shall then notify as soon as possible of the necessity of that celebration outside the town hall.

Mention shall be made of this in the record of marriage. The officer of civil status shall ask the future spouses and, if they are minors, their ascendants present at the celebration and authorizing the marriage, to declare whether a prenuptial agreement has been made and, in the affirmative, the date of that contract and the name and place of residence of the *notaire* who received it. Where the documents produced by one of the future spouses do not accord with one another as to the first names or the spelling of the names, he shall ask the one whom they concern and, if the latter is a minor, his closest ascendants present at the celebration, to declare that the variance results from an omission or a mistake. He shall receive from each party, one after the other, the declaration that they wish to take each other as husband and wife; he shall pronounce, in the name of the law, that they are united by marriage, and he shall draw up a record of it at once".

2. Considering that in terms of Article 144 of the Civil Code: "A male and a female until the completion of eighteen years may not contract marriage";

3. Considering that the priority preliminary ruling on constitutionality pertains to the final subparagraph of Article 75 of the Civil Code and to Article 144; that these provisions must be regarded as informing the several legislative provisions that stem from it, as recalled by the Cour de Cassation in the aforementioned decree of 13 March 2007, "that, according to French law, marriage is the union between a man and a woman";

4. Considering that, according to the applicants, the prohibition of marriage between persons of the same sex and the absence of any legal opt-out infringe Article 66 of the Constitution and the freedom of marriage; that the associations maintain, *inter alia*, failure to regard the right to live a normal family life and equality before the law;

5. Considering that, in terms of Article 34 of the Constitution, the law determines the rules concerning "the status and capacity of persons, matrimonial property systems, inheritance and gifts"; that it is at any time permissible for the legislator, acting in his field of competence, to adopt new provisions that he judges appropriate and to modify previous texts or abridge them by substituting, where necessary, some of their provisions, so that in exercising this power, he does not deprive constitutional requirements of legal guarantees; that Article 61-1 of the Constitution, like Article 61, does not grant the

Constitutional Council a general mandate for judgments and decision-making in a manner similar to that of Parliament; that this article only gives it the competence to pronounce on the conformity of a legislative provision with constitutional rights and freedoms;

6. Considering, firstly, that Article 66 of the Constitution prohibits arbitrary detention and assigns the protection of individual liberty to the judicial authority in the conditions set down by law; that freedom of marriage, which is a component of personal liberty, results from Articles 2 and 4 of the Declaration of the Rights of Man and the Citizen of 1789; that the contested provisions do not affect individual liberty; that, accordingly, the grievance drawn from the violation of Article 66 of the Constitution is inoperative;

7. Considering, secondly, that the freedom of marriage does not restrict the competence of the legislator under Article 34 of the Constitution to determine the conditions of marriage, provided that in exercising this competence he does not deprive constitutional requirements of legal guarantees;

8. Considering, on the one hand, that the right to lead a normal family life stems from the tenth subparagraph of the Preamble to the Constitution of 1946: “The Nation shall provide the individual and the family with the conditions necessary to their development”; that the final subparagraph of Article 75 and Article 144 of the Civil Code do not impede the liberty of same-sex couples to cohabit in the conditions set out in Article 515-8 of the Code, or to benefit from the legal framework of a PACS civil solidarity pact governed by Articles 515-1 et seq.; that the right to lead a normal family life does not imply the right to marry for couples of the same sex; that, consequently, the provisions criticized do not infringe the right to lead a normal family life;

9. Considering, on the other hand, that Article 6 of the Declaration of 1789 provides that the law “must be the same for all, whether it protects or punishes”; that the principle of equality does not prevent the legislator from settling different situations in different ways, or from derogating from equality for the general interest, provided that in both cases the difference in treatment that results is either in direct relationship with the subject of the law established thereby; that by maintaining the principle according to which marriage is the union of a man and a woman, the legislator has, in exercising his competence under Article 34 of the Constitution, deemed that the difference of situation between couples of the same sex and those composed of a man and a woman can justify a difference in treatment with regard to the rules regarding the right to a family; that it is not for the Constitutional Council to substitute its judgment for that of the legislator regarding the consideration of this difference of situation; that consequently the grievance relating to the violation of Article 6 of the Declaration of 1789 must be removed;

10. Considering that it results from the above that the grievance drawn from the infringement on the freedom of marriage must be removed;

11. Considering that the contested provision is not contrary to any other right or freedom guaranteed by the Constitution;

HELD:

Article 1: The final subparagraph of Article 75 and Article 144 of the Civil Code conform to the Constitution.

Article 2 – This decision shall be published in the *Journal Officiel* of the French Republic and notified in the conditions provided for in Section 23-11 of the Ordinance of 7 November 1958 referred to hereinabove.

Deliberated by the Constitutional Council in its session on 27 January 2011, sat on by: Mr. Jean-Louis DEBRÉ, President, Mr. Jacques BARROT, Mrs Claire BAZY MALAURIE, Mr. Guy CANIVET, Mr. Renaud DENOIX de SAINT MARC, Mrs Jacqueline de GUILLENCHMIDT, Mr. Hubert HAENEL and Mr. Pierre STEINMETZ.

Announced on 28 January 2011.

Journal Officiel, 29 January 2011, p. 1894 (@ 82).