



## The Legal Status of Same-Sex Couples in Italy

Marriage and family have always played a central role in the Italian legal system. To marry and found a family are considered part of individual rights that, as such, must be freely recognised and guaranteed to everyone, without unreasonable (unconstitutional) discrimination and irrespective of the persons' belief. Nonetheless, the rights to marry and found family remain both contingent and religiously grounded: contingent because their concrete existence depends on the State's action. Faithfully grounded because, very often, the States' provisions regulating these rights are subject to the influence of a given religious tradition, namely the Catholic tradition and prescriptions.

In fact, in a secularized constitutional legal system, religion continues to play an important role in regulating the rights to marry and found a family. Furthermore, some constitutional rules sanctioning these rights (for example, those related to [Article 29 of the Italian Constitution](#)) are often made on religious premises that, as such, aim at giving a higher importance to certain relationships (referring to a given religious tradition) as to others (believed to be in contrast with that tradition). This could explain the origin of several legal restrictions, such as those imposed upon same-sex couples (see *Corte costituzionale*, [decision n° 138/2010](#)). These restrictions are often based on religious disapproval (see *Mons. Galantino: no a gender, uniti nel difendere la famiglia*).

The fact is that Italy is a democratic system, where people have a wide range of different religious beliefs. This system is supposed to respect the space within which people pursue their creeds. State cannot, however, agree that religion is in itself a sufficient ground for legal regulation, especially when fundamental rights are involved. In other words, the Italian State can accept that some religious ideas and practices have public credit, but it must be very careful about imposing these ideas and practices to all citizens. The State ought to pay particular attention to the impact that some religious rules can have on the fundamental rights, which imply the right not to be discriminated for reasons relating to sex, race, colour, language, religion, as well as the citizen's association with minority groups such as those based on the sexual orientation of the persons concerned. That does not mean that the State cannot impose any legal restrictions in this field. Groups of people, though, cannot be fenced out of these rights without some reasonable (constitutionally based) justifications (see *The Road to Equality. Same-Sex Relationships within the European Context: The Case of Italy*). For this, taking into serious account the dramatic changes in the

society, same-sex couples are now recognised as a 'legal realities' in many European Countries (the same can be said about the United States of America, see on this the June 2015 historical *Obergefell v. Hodges* of the Supreme Court that, considering the differences among the States' legislations, has declared same-sex marriage legal across the US).

In this sense, we must consider that, so far as the legal status of the Italian same-sex couples is concerned, on October 2015 Prime Minister Matteo Renzi assured that a bill titled "De facto couples and civil unions" (the so-called *Ddl. Cirinnà*) would become law within the 2015; he has called this legal Act "a pact for civilization." In compliance with the national and European jurisprudence (see *infra*), this Act would finally allow same-sex couples to form a civil partnership by means of an official declaration in the presence of an official of the Italian registry office, giving them the right to a tax deduction for dependent spouse, social security benefits for the household and a pension for the surviving partner.

Cardinal Angelo Bagnasco, president of the Italian Bishops' Conference, has reacted by reaffirming that it is "unfair" to give to other types of relationships the same rights duly belonging to the "natural" family based on marriage, and made up of "father, mother and children." Resistance is political, and comes from the conservatives within the majority, the Catholic senators and deputies of *Nuovo Centrodestra* (NCD) headed by Minister for the Interior Angelino Alfano – who did not vote for the "compromise" amendment, which passed thanks to the support of the opposition Five Stars Movement (*Movimento Cinque Stelle*). In the NCD's opinion, the new bill does not sufficiently distinguish civil unions from marriage, nor does it resolve such quandaries as adoptions and stepchildren adoption, survivor's pension, and surrogate mothers, which *Nuovo Centrodestra* firmly opposes.

In order to better understand this debate, it is important to take into account the Italian and European jurisprudence.

One should in particular compare two judgements of the Italian Constitutional Court, namely the sentence n° 138/2010 and the sentence n° 170/2014. With the 2010 decision the Court addressed itself to the legislature in the form of a 'warning' (*sentenza di monito*), which contained suggestions and guidance for resolving legislative issues in closer accord with the Constitution. It remains, though, that the questions raised by the *Tribunale di Venezia* and the Trento Court of Appeal (the so-called *giudice a quo*) was declared inadmissible. By contrast, with the 2014 decision (no. 170) the Constitutional Court sustained a constitutional challenge (*sentenza di accoglimento*), declaring some parts of a legislative Act, related to the compulsory divorce, unconstitutional.

More specifically, the 170/2014 judgement involves two persons, Alessandro and Alessandra, who got married in 2005. Some years later, Alessandro realized to be (or feel) a woman and decided to transition to the female sex: she had always felt that she had been a female in a male body. For

this reason, she underwent gender reassignment surgery and, under the Italian law, Alessandro became Alessandra in 2009. The couple then discovered that, in the light of the Act referring to compulsory divorce, the local registry office (*ufficio di stato civile*) had dissolved the matrimony because they were in a same-gender marriage. In reaction, the couple asked the Civil Court of Modena to nullify the action of the registry office. The Court of Modena sided with the applicants on October 27, 2010. Afterwards, the Italian Ministry of Interior appealed the Civil Court's judgement to the Court of Appeal of Bologna, which reversed the trial decision. Then, the couple went to the Supreme Court of Cassation, which on June 6, 2013, asked the Constitutional Court how to deal with this issue: the Constitutional Court was called upon to decide on the questions concerning the effects of a gender reassignment ruling on a pre-existing marriage. Finally, on June 10, 2014, this Court heard arguments on the case, and delivered the decision the day after.

To reduce the risk of a 'legislative vacuum', the 2014 decision operated under the more specific designation of the 'principle-additive decision' (*sentenza additiva di principio*). Here the Constitutional Court did not add new norms to the Italian law. It specified the guiding principles that the legislature must concretize into unambiguous rules when amending or replacing the measure that had been declared unconstitutional. In fact, the 2014 judgement declared some parts of the Act regulating the compulsory divorce unconstitutional not for what it provided, but for what it failed to provide. This Act failed to guarantee and protect the inviolable rights and duties of the same-sex couple that, under both Article 2 of the Italian Constitution and the 138/2010 constitutional judgement, are defined social groups.

To be more precise, the 2014 Constitutional Court's decision added to the Italian legal order a new subject, namely same-sex couple or same-sex *de facto* relationship, drawing it from the Constitution (Article 2). In doing so, the Court took into account what the ECtHR had, in the meantime, established on the basis of the European Convention (especially Article 8 of the ECHR). So, with the 2014 judgment, the Constitutional Court overtook a role that, in the Italian system, belongs principally to the Parliament. Yet, this result cannot be wholly attributable to the Court. Rather, it is mainly due to both the present-day conditions and the changes in the evolution of civil-status issues, as the Court had already made it clear with the 2010 decision (no. 138). The fact is that since then (2010) the Parliament has not approved any rule capable of remedying the violated constitutional principles (Article 2) concerning same-sex social groups. Therefore, the 2014 judgement offered the only way for constitutional law to perform its task, as clearly illustrated by another important judgement ([n° 8097](#)) made by the Court of Cassation one year later.

That means that, as long as the Italian Parliament does not approve an Act regulating civil same-sex social groups, Alessandra (formerly Alessandro) and Alessandra can no longer be considered married under Article 29 of the Constitution, which is reserved for opposite-sex couples.

But, they should be treated in the same way and with the same respect as married pairs. This is because, as said, the Constitutional Court's 170/2014 judgement could not be merely understood as a "warning" (like the 138/2010 decision). It is a principle-additive decision, which "obliges" the Italian Parliament to regulate same-sex couples, as contemplated by Article 2 of the Constitution. In effect, this obligation derives without any doubt from fundamental principles, inviolable rights and infrangible duties established by Article 2 that, as the Court said at the end of 2014, identifies the essential elements of the Italian constitutional order.

This explains the 2015/8097 decision of the Italian Court of Cassation, which nullifies the act of the local registry office: as long as the Parliament does not approve legislative rules regulating the civil same-sex social groups, Alessandra (who used to be Alessandro) and her partner continue to benefit from the marital status. This can also provide an explanation for the content of the 21 July 2015 decision related to the case of *Oliari and Others*, when the Court of Strasbourg (ECtHR) held that Italy violates the human rights of same-sex couples by its failure to officially recognise their relationships.

The ECtHR does not deny that the Member States enjoy a certain margin of appreciation in implementing their positive obligation under Article 8 ECHR. The problem is that number of factors must be taken into account when determining the breadth of this margin. The European Court has in fact considered that, where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted. At the same time, though, where there is no consensus within the Member States either as to the relative importance of the interest at stake or as to the best means of protecting it, and where the case raises sensitive moral or ethical issues, the margin will be wider. The impact on the domestic legislation that produces discordance between social reality and the Italian law, being regarded as an important factor in the assessment carried out under Article 8 of the European Convention (see *Le coppie dello stesso sesso. L'arte dello Stato e lo stato della giurisprudenza*), is, therefore, of relevance to the 2015 *Oliari* judgement.

The ECtHR's verdict reflects the conclusions contained in the domestic jurisprudences, particularly those of the Italian Constitutional Court. Since 2010, this Court has affirmed the need to analyse the constitutionality of the legislations regulating the marriage and the same-sex couples in Italy in the light of the "conflict of interests". On the one hand, the interest of the State to protect fundamental characteristics of the institution of matrimony, considered as the natural union between a male and female, and as the foundation of the traditional family in Italy. On the other, the interest of a same-sex couple to be legally recognized as a form of social group, capable of promoting the free development of the persons concerned. In this way, both the Italian Constitutional Court and the Court of Strasbourg have agreed that, while leaving the interests of the gay people without any

legal protection, the current Italian legislation is weighted too much in favour of the interests of the State.

In stating this, whilst the Court of Strasbourg stresses the role of Article 8 of the ECHR, the Constitutional Court highlights the function of Article 2 of the 1948 Italian Charter. Furthermore, even though three judges of the ECtHR have voted with their (four) colleagues for a violation of Article 8 of the Convention, in the *Oleari* case they do so on the basis of a different, narrower reasoning, restricted to the legal situation in Italy. By the concurring opinion, these three European judges have specifically affirmed that the right of same-sex couples to obtain legal recognition of their union is based not on the ECHR, but rather on the Italian Constitution, as interpreted by the national high Courts (see [Matrimonio same-sex e unioni civili: alla ricerca di una tutela costituzionale e sovranazionale](#)).

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