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National Report: Italy

Virginia Zambrano

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NATIONAL REPORT : ITALY

PROF. VIRGINIA ZAMBRANO

1. Legal framework: Please briefly explain the legal system used in your country. Include information about the type of Constitution (written; unwritten; modifiable by a Constitutional Tribunal, by Supreme Court decisions, by Congress only; etc.) Please do not use more than one page to provide your legal framework.

The Italian legal system is dominated by legislation, particularly in the form of comprehensive codes (Codice Civile 1942; Codice Procedura Civile 1942 as recently amended by l. 18/06/2009; Codice Penale 1930; Codice di Procedura Penale 1989). Although these are highly detailed, they are open to rational application, especially now in the light of the basic law—for example, more than two-thirds of the provision of the civil code have been subject to revision, repeal, amendments or additions. The Italian system nevertheless still relies primarily on the application of these Codes of Law and Statutes which contain general principles and concepts, but subject to interpretations by judges in particular cases.

Only three sources of law are formally acknowledged in the Italian legal system, ex art. 1 Disp. Prel. Codice Civile, (which can be considered now outdated): Statutes (in various forms: legge, decreto legge, decreto legislativo), “regolamenti” (as administrative acts) and customary law (consuetudine). At the apex of the Kelsen pyramid, there are Constitution and constitutional laws, followed by laws, in the formal sense of national law, and codes promulgated by the Italian Parliament, delegated legislation, regional laws, “regolamenti” and then customary laws. To accept this structure, however, would not provide an accurate picture of the situation of Italy today, as two further sources have been developed. These are the decisions reached in the Courts by the judiciary, which are not a simple application of existing laws, and EU Directives. The latter ones are deemed to be of constitutional value in force of art. 10 Cost.

Formally, precedent does not exist in Italy, except in a limited circumstance. Therefore, Court decisions do not have any effect in future cases and bind only the parties to the case. Prior decisions have some enduring effect but, in contrast to the Common law system, the older the

decision, the weaker it is in terms of its persuasiveness, and, conversely, the more recent a judicial decision is, the greater its persuasive authority will be. Decisions of the Superior Court (Corte di Cassazione) do have a greater temporal effect and newer decisions are taken into account by scholars, practitioners and judges alike. In practice, the interpretations of statutes by the Court of Cassation have an influence as precedent on lower Courts.

Where the application of the legal rule to the facts is not obvious or the factual situation is not clearly envisaged by the legal rule, and judges cannot reason by analogy with similar rules or factual situations, a judicial interpretation of the law is required. Interpretation, ex art. 12 Disp. Prel. Codice Civile must comply with some principles: grammatical rules; logical and systematic rules; and teleological rules.

The general requirement of legal certainty in a legal system also demands consistency in Court decisions.

The lower Courts (Tribunali) are certainly aware of the decisions taken in the higher Courts (Court of Appeal; Corte di Cassazione) and are likely to follow these, using them as a sort of persuasive authority for their own decisions. The exception to the lack of a general system of binding precedent is represented only by the “unconstitutionality decisions” of the Constitutional Court. These judgments are binding on all organs of the Constitution as well as all Courts and legislative and executive authorities. They can also invalidate national and regional laws. A central role in the Italian system is thus played by the Constitution. Italy has a written, not flexible (but rigid) Constitution and a centralized control of constitutionality, endorsed by the “Constitutional Court.”

The first Constitution of modern Italy was the “Statuto albertino,” granted in 1848 by Carlo Alberto to his territory (Piedmont and Sardinia). When Italy was unified under his son, Vittorio Emanuele II, the Statuto became the basic law of the nation and remained in force until 1948.

Modeled on the liberal Belgian Constitution of 1831 (which in turn had been inspired by French democratic theory), the Statuto vested all legislative power in the elected representative of the people. No Court could refuse to enforce a law or strike it down as unconstitutional. Such an attempt would have been considered a serious violation of the principle of separation of power. Moreover, the Statuto was a “flexible” constitution, i.e., it could be overridden by a simple act of Parliament or a royal decree. No judicial review was considered in the Statuto.

In 1948, the Italian Constitution came into force, which reflected the nation’s changed political climate. Many economic rights were eliminated, political rights of the citizen were strengthened, the executive’s power was increased, and the independence of the Constitutional Court was made

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more secure. The Constitution of 1948 is only modifiable by a Constitutional Law. The Italian Constitution has to be considered as a compromise; the outcome of a political and ideological debate that put together different points of view. In a context of dialogue, and in an attempt to get rid of the old fascist concept of the State, the Christian Democrats' only defeat was the deletion of a provision of the Constitution which had guaranteed the indissolubility of marriage.

The Constitutional Court is charged with four tasks: (1) to determine the constitutionality of laws and acts of national and regional government; (2) to solve disputes among State institutions (executive, administrative, or legislative powers) and between national government and Regions; (3) to settle jurisdictional disputes between regions; (4) to act as the Court of impeachment when charges are made against the Prime Minister; President of Republic; or a Cabinet Minister.

Access to Court depends on whether the parties involved are or not private citizens. When private citizens are involved, there are two possibilities: (1) unless the trial judge can render a judgment in the case which is independent of the constitutional issue, or decide that the issue of constitutionality is manifestly unfounded, he must immediately transfer the case to the Constitutional Court, suspend the trial and wait for the decision of the Constitutional Court; (2) the trial judge can raise the issue of unconstitutionality himself during the trial and send the case to the Court. In both cases, once the Constitutional Court has settled the issue, the case is remanded to the original Court whose judges must comply with the decision.

Of course, the Constitutional Court must carefully interpret the norm in dispute and check if it is in compliance with the Constitutional values before deciding whether it is constitutional or not. Even if the Court of Cassation has previously interpreted it, the Constitutional Court is not obliged to follow that interpretation. Its decision to interpret the law and declare it unconstitutional is final and irreversible.

2. Constitutional regulations applicable to same-sex partnerships. Please be specific about the constitutional guarantees in your country that conflict/support same-sex marriage and those that can conflict/support same-sex unions in a format different than marriage. Explain each case.

With the enforcement of Directive 2000/78/EC, a false impression might be given that gay rights enjoy adequate protection in Italy and that the law of the European Community and its Member States is sufficiently well-developed to effectively protect the dignity of the gay population of the European Union (EU), ensuring them equal treatment.

Unfortunately, the EU situation highlights some legal *lacunae* in the protection of these rights. In Italy, for instance, we have a negative development in gay rights and a substantial failure to implement EU Directives properly. This failure relates to Directive 2004/38/EC on the free movement of citizens, Directive 2003/109/EC on the free movement of third-world nationals who are long-term residents, as well as Directive 2003/86/EC on family reunification. On the other side, the same Directive 2004/38/EC on free movement of citizens, for instance, does not view same-sex couples and spouses as equal to heterosexual couples, recognising the former only in countries where same-sex unions are recognised.

According to the Italian legal system currently in force, same-sex partners can neither marry each other, nor establish a registered partnership. Nevertheless, they are permitted to live in an unmarried partnership within the framework of the current legislation in the field of informal cohabitation. This type of partnership is not regulated in the Civil Code and does not create any familial relationship between the partners. However, the lack of a specific law on same-sex cohabitation does not deprive cohabitants of protection based on art. 2 of the Italian Constitution.

Before analyzing art. 2 CI, we should consider that the Italian Constitution pays special attention to the concept of family as defined in articles 29, 30, and 31. This constitutional interest for the institution of family is rooted in cultural and historical reasons.

During fascism, the Italian Civil Code (1942) looked at the family as an authoritarian institution; an institution subjected to strict State control. With the Constitution of 1948 things have changed in favor of an individual approach that promotes the parties' autonomy. Since then, the definition of what family *is*, is embedded in fundamental rights and liberties.

The constitutional argument against regulation of same sex unions. The core of this protection is represented by art. 29 CI whose formulation is aimed at showing that the family is a “**società naturale fondata sul matrimonio**” (natural partnership based on marriage). Two different interpretations of this article have led Scholars and Courts to very different/contrasting positions.¹ On one side, art. 29 CI has been used to

1. The more conservative, view can be attributed to a group of Scholars who adopt a “catholic-oriented” approach in interpreting art. 29 Const. It.. Amongst many see, L. MENGONI, *La filiazione fuori dal matrimonio*, in *Atti del Convegno di Venezia*, 12 marzo 1972, Giuffrè, Milano 1973, *passim*; A. TRABUCCHI, *Morte della famiglia o famiglia senza famiglia*, in *Rivista diritto civile*, 1980; S. PULEO, *Concetto di famiglia e rilevanza della famiglia naturale*, *ivi*, 1979. The cohabitation falls outside the provision of art. 29 Const. It. In Cass. 24th January 1958, n. 169, in *Rivista giuridica della circolazione e dei Trasporti*, 1958, 436, Judges state that “Italian legal system doesn't take into account cohabitation but only marriage, for ethical, social and public policy reasons.” It comes of no surprise that it was not until the two sentences of 1968/126 and 128 (of the Constitutional Court) that in Italy was repealed the adultery

demonstrate that in the Italian system no other family is protected but the legitimate one. The qualification of family as “natural law partnership” proved—following a natural law approach – that no other family model but the legitimate one should be recognized because of the unambiguous formulation of art. 29 that links family and marriage. A less strict interpretation of art. 29 has been suggested to broaden the so-called “natural law” approach to family. In this perspective, it has been said that even though art. 29 reinforces the idea that only the legitimate family is worthy of protection, the concept of marriage is founded on the factual reality that men and women are different in many ways, and that the union of a man and a woman is different to that of two men or two women (or some other multi-party relationship).

The fundamental right to marry would not be an absolute right, because it is limited by the impediments to marriage: marriageable age, insanity, prior marriage, certain degrees of kinships and affinity and the condemnation for murder of a prior spouse (Articles 84-89 Italian Civil Code). These impediments to marriage are considered to be in accordance with the right to marry provided they are based on fundamental public interests that express important societal interests.

The naturalness of the union between a man and a woman is considered to be at the very core of what makes marriage “marriage,” and—as a consequence—art. 29 CI links marriage and reproduction, and, above all, paternity as the most important legal consequences of marriage. The “marriage is procreation” argument singles out the unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage, as clearly stated in art. 30, comma 3, CI (where the rights of the children born out of wedlock are protected as long

crime (here, the wife who has had a love affair with another man was accused of adultery crime). Currently, our Constitutional Judges are aware of the fact that family relations have changed in many respects, but being coherent with their precedents, they continue stressing the difference between marriage and cohabitation for the reasons already mentioned. Recently, in C. Cost. 13th May 1998, n. 166, judges stated the right of the woman to remain in the house (jointly run but not jointly owned) with the children, after the breaking off the couple.

On the other side, a more pluralistic view has been adopted by scholars who are persuaded that family is a way of organizing our living together in society. This view – based on a laic interpretation of art. 2 and 29 Cost.—abridges the distance between legitimate family and cohabitation (*See, inter alia* F. PROSPERI, *La famiglia non fondata sul matrimonio*, Camerino-Napoli, Esi, 1980, 42 ss; V. ROPPO, *La famiglia senza matrimonio. Diritto e non diritto nella fenomenologia delle unioni libere*, in *Riv.trim.dir.proc.civ.*, 1980, 697 s; F. GAZZONI, *Dal concubinato alla famiglia di fatto*, Milano, Giuffrè, 1983, 146; G. OBERTO, *I regimi patrimoniali nella famiglia di fatto*, Milano, Giuffrè, 1991, 369; M. DOGLIOTTI, *Famiglia di fatto*, in *Dig. Disc. priv.*, vol. VIII, Utet, Torino, 1992, 190 ss; G. CATTANEO, *La famiglia nella Costituzioni, Famiglia e matrimonio*, Utet, Torino, 1997, 16; V. ZAMBRANO, *La famiglia non fondata sul matrimonio*, in *Trattato teorico-pratico*, dir. Autorino-Stanzione, Torino, Giappichelli, 2005, 218 ss.

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as this protection does not interfere with the rights of the legitimate children). Accordingly, some scholars have said that failure to recognize same-sex unions does not constitute a violation of the right to private life or a violation of art. 2 CI. An adequate interpretation of articles 2, 29 and 30 CI should lead to consider same-sex unions as a family unit.

Another argument worth highlighting is the one that has linked reproduction to marriage, as stated in art. 31 CI. According to this constitutional provision the welfare state has the duty to help families and motherhood. In this respect, the argument against same-sex unions states that same-sex families would create tremendous confusion and instability relating to the crucial social roles and responsibilities that are linked to the basic social institution of marriage. In the end, recognizing same-sex families would create an incentive for people to forego marriage and pursue an alternative relationship less beneficial to society.

The constitutional argument in favor of same-sex unions. A different interpretation views the legitimate family as only one of the multiple forms of family relations a person can enter into. A more correct interpretation of art. 29 CI suggests that this article only expresses an inclination towards the marital family, but does not deprive cohabitation of constitutional protection, which lies in articles 2 and 3 of the CI and it's constantly confirmed by the position of the Constitutional Court judges.

This argument has been mainly used in Courts as well as among scholars to prove that heterosexual cohabitation, even though it cannot be put on a par with marriage, deserves legal protection. It is true that the Italian legal system does not equate cohabitation with marriage and heterosexual cohabitants don't have the same status as spouses. However, the absence of a specific law in Italy—unlike the situation of other European countries—hardly prevents non-marital heterosexual cohabitation from getting some kind of protection.

The judges of our Supreme Court have unhesitatingly recognized that non-marital cohabitation is still legally relevant, although not equal to marriage. In some cases, the recognition appears to be “indirect,” e.g.: when the Court of Cassation pronounces *de facto* cohabitations not illegal, thus not a cause of invalidity of a “contratto attributivo di diritti patrimoniali.”² In other cases instead, the social importance of the union

2. In Cass. civ., 8 June 1993, no. 6381, (1994), 1 *Nuova giur.civ.comm.* 339 the judges say “the factio cohabitation gives rise to a relation that is not unlawful. As a consequence of that, parties are free to enter in a “gratuitos loan for use” (comodato *ex art.* 1803 c.c.it.; prêt à usage or commodat *ex art.* 1874 Cod. Nap.; art. 1740 Código Civil; LeiheVertrag § 598 BGB). The cause of this contract is not unlawful and, as a consequence of that, the contract is not void, because *de facto* cohabitation even though not regulated by law, doesn't violate general principles of law. In other terms cohabitation is not against legal public policy, or good morals as referred to by art. 1343, 1354 c.c.it. On the other hand, the factio cohabitation has been considered by

does not seem to be able to reduce the difference—constantly referred to as *obiter*—between cohabitation and traditional marriage. Stability, certainty, mutuality and correlation of rights and duties are believed to be characteristic of marriage and not of cohabitation³. Thus, wherever these factors are missing and there is substantial uncertainty in the relationship, it is not possible to grant the cohabitants certain rights, some of public, some of exquisitely private law.

The situation for gay and lesbians is more complex, depending on the aforementioned restricted definition of marriage as a union between a man and a woman that prohibits the State to allow same-sex couples to enter into civil marriage or be granted other prerogatives.

Recently, the Court of Appeal in a case in Roma,⁴ stated that “the mere consideration of family as ‘**società naturale fondata sul matrimonio**’ (natural partnership based on marriage) ex art. 29 CI does not prevent the acceptance of other family models, if society attaches to them the accepted value of family”.⁵ The relevance given to legitimate family does not mean the denial of other forms of unions, as art. 2 CI. recognizes the right of every person to “the free development of its personhood.” This is a crucial rule: the right of a person to enter into any kind of relationship that she/he deems to be relevant for her/himself.

On this basis, articles 2 and 3 (the equality clause) of CI turn out to be strong legal tools in the recognition of same-sex unions. On the other hand, a new call for “status” can be inferred from art. 2 CI, based on matrimonial freedom. In its positive dimension, the “freedom to marry” (the right of getting married with the loved person) has also been considered as a fundamental right by articles 12 and 16 of the Universal Declaration of Human Rights (UDHR), article 8 of the European Convention on Human Rights (CEDU), article 7 and 9 of the Charter of Fundamental Rights of the European Union,⁶ while matrimonial freedom, in its negative dimension as “freedom from” marriage, implies the freedom of a person to freely enter

Italian legislator in art. 317 *bis* c.c. as related to parenthood and leasehold (l. 27 luglio 1978 n. 392). On this topic see Doria, *Autonomia privata e “causa” familiare. Gli accordi traslativi tra I coniugi in occasione della separazione personale e del divorzio*, (1996), Milano, Giuffrè (ed.) at 170 ss.; ANGELONI, *Autonomia privata e potere di disposizione nei rapporti familiari*, (1997), Padova, Cedam (ed.) at 413 ss.; G.CECCHERINI, *Contratti tra coniugi in vista della cessazione del ménage*, (1999), Padova, Cedam (ed.) at 124 ss.; G. OBERTO, *I contratti della crisi coniugale*, (1999), Milano, Giuffrè (ed.) at 420 ss.; TOTARO, *Gli effetti del divorzio*, in P. Zatti (ed.), vol. IV, *Trattato di diritto di famiglia* (2003) at 1276.

3. See, Const. Court, 20 April 2004, no. 121, (2004) 1 *Giust.Cost.* 2; Const. Court, 14 November 2000, no. 491, (2001) 1 *Nuova giur.civ.comm.* 176 Const. Court., 3 November 2000, no. 461, (2001) 1 *Giust.civ.* 295.

4. Roma, 13 July 2006, in *Foro it.* 2008, 12 3695.

5. *Ibid.* Our translation.

6. See also Constitutional Court 12th November 2002, n. 445, in *Giur. cost.* 2002.

into a civil relationship, if she/he wishes.⁷ On this ground, to deny some people access to marriage on the basis of their sexual orientation is unjust and contrary to the equal treatment clause (art. 3 CI), as it would be to do so on the basis of their nationality, religion or political beliefs. This argument is reinforced by the recognition of transsexuals to marry.⁸ In Italy, in fact, transsexuals can marry heterosexual partners and adopt children when married to a person of the opposite sex. Our Constitutional Judges, in upholding the constitutionality of the Transsexual Act 164/1982, stressed the aim of the law, whose purpose is to help people affected by gender dysphoria to get rid of their isolation, vulnerability, humiliation, anxiety and sense of indignity too often felt by them, because of their sexual diversity.⁹ Within the Italian legal system, one rule seems to assume and construe reproduction as inherently linked to marriage as an institution, whilst the other aims to cut off such an institutional bond. A meaningful example in this respect is offered by the Italian Civil Code, where no provision considers diversity of sex as being a legal impediment to marriage. These are only age, mental illness previous, marriage still valid, kinship, and crime (articles 84 to 88 of the Italian Civil Code). Sex has been seen as an essential determinant of the relationship called marriage, on which the family is built, and of which the capacity of natural heterosexual intercourse is an essential element. The view that these are an “essence” of marriage—hard to explain but centered on the possibility of procreation—sustained opposition to extending the rules of entry into marriage to homosexual couples.

7. If the civil union statute is open to heterosexual and same-sex couples, please specify if there is any formal differential treatment between both types of couples within such legal framework.

According to the Italian legal system currently in force same-sex partners can neither marry each other, nor establish a registered partnership. Nevertheless, they are permitted to live in an unmarried partnership within the framework of the current legislation in the field of informal cohabitation.

8. If your country does not have a specific regulation on same-sex partnerships, please indicate if there are other legal statutes that specifically recognize same sex partners for specific purposes, i.e.: domestic violence act, inheritance rights act, adoption laws, etc.

7. Constitutional Court, 13th May 1998, n. 166, in *Giur. cost.* 1998, 1419.

8. See Transsexual Act of 14th April 1982, n. 164.

9. Constitutional Court, 24th May 1985, n. 161, in *Giur. it.* 1987, I,1,236).

This answer focuses on the fact that there are no laws in Italy that recognize same-sex partnerships for specific purposes. With the Court being reluctant to include non-discrimination based on sexual orientation within the scope of sex-based non-discrimination (ex art. 3 CI), the unfortunate gay rights situation in Italy cannot be easily changed. A timid attempt on the way of recognising same-sex unions cannot be seen either in Statute 1228/1954 or in its Regulation (dPR. N.233/1989), as those statutes have a mere administrative scope.

The General Register Office (Anagrafe ex Statute law 1228/54), in fact, is aimed at controlling how many people live in a specific area and provides an organization only for statistic and electoral purposes (Register of voters). For these reasons, it is under the superior control of both the Ministry of the Interior and the Italian Institute for Statistics (ISTAT). The application of law 1228/1954 is granted by Reg. n. 223/1989 whose art. 4 and 5 offer, respectively, a definition of family pertaining to vital statistics. Article 4 defines the “famiglia anagrafica” and Article 5 defines “Convivenza anagrafica.” According to article 4, of Reg. 223/1989, “Famiglia anagrafica” has a less broad meaning compared to “Convivenza anagrafica,” as it applies to any emotional relationship whether or not based on marriage. On the contrary, the concept of “Convivenza anagrafica” only refers to cohabitation for religious, care, military, study reasons, etc.

“Famiglia anagrafica” and “Convivenza anagrafica” have in common the living together of two or more people, not the emotional relationship requirement which is relevant only for the definition of what constitutes “Famiglia anagrafica.” The Registrar’s office has only an administrative scope, as registration doesn’t create any status. Therefore while families based on marriages have to be considered as “Famiglia anagrafica,” not every “Famiglia anagrafica” is a legitimate family. The provision of article 5 of Reg. N. 223/1989 is important in so far as the concept of “Famiglia anagrafica” includes same-sex cohabitations. Then, the Registration certificate gives homosexual couples the possibility to benefit from some prerogatives. On this basis, article 29 of the Correctional Institution Act 354/1975 states that an individual (also gays or lesbians) has the right to receive notices on captivity conditions, disease, or death of his/her partner. On the other hand, article 30, l. of Act 354/1975 grants inmates special permissions in cases of death or severe disease of their partners. In this case registration is intended as a condition for enjoying the benefits of the law, but does not grant any marital status, even if registration appears to achieve the goal of certainty and then create a marital-like status similar to marriage. Such possibility has been criticized by those who are against any kind of regulation of intimate family relationships not based on marriage. As a matter of fact, reformers want to equate more same-sex cohabitation

with recognized family relationship, than putting it on a par with marriage. Regardless of different opinions, the definition of “Famiglia anagrafica” established in article 4 of Re. N.223/1989 has served the purpose of creating special Registries (Registri delle unioni civili) aimed at conferring to cohabitants some administrative rights, especially social housing benefits. This kind of registration has been looked upon with suspicion by Italian administrative judges in so far as “it gives publicity to situations not regulated by national laws. Neither the autonomy of Italian Regions nor Municipalities can be overstated to the point of recognizing them a normative power in a field (General Registry Office) traditionally attributed to the competence of the State.”¹⁰

Social developments in the light of cohabitation outside marriage have brought Italian Administrative Judges to reverse in 2001 their former decision. Judges held that (1) the Registries are not a source of marital status; (2) partners “may” not “have” to register themselves; (3) Registries comply with art. 2 and 3 of CI.¹¹ To sum up the role of these Registries, even though they cannot be seen as an instrument for formal recognition of same-sex partners for specific purposes, they indeed play an important role in certifying the existence of a non marital union (different and same-sex) that can be lawfully created by Regions and Municipalities.¹²

Another sign of the relevance attributed to same-sex partnerships can be found also in art. 199, comma 3, lett. a) of the Italian Penal Procedural Code which establishes the right of an individual to refuse to testify against her partner. In its formulation article 199 equates spouses with partners. In Corte of Assise Turin, sect. I, ord., 19th November 1999, judges held that “there is no reason to distinguish between marriage and same-sex unions, because both have in common the idea of living together.”

9. Is your country discussing future regulation on same-sex marriage? If so, please explain the type of regulation being proposed, at what level (constitutional, legislative, administrative, etc.), in what stage the discussion is at present, what are the chances of being passed and when.

No discussion on future regulation of same-sex marriage is on.

10. Is your country discussing future regulation on same-sex unions in

10. TAR of Tuscany 9th February 1996, n. 94.

11. TAR Tuscany, sez. I, 11th June 2001, n. 1041.

12. See, inter alia, Law Regione Lazio, 15th October 1999; Law Regione Valle d’Aosta 27th May 1998; Law Regione Liguria 28th February 1983, n. 6; Law Regione Piemonte 10th December 1984, n. 64; Law Regione Emilia Romagna 14 March 1984, n.12.

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a format different than marriage? If so, please explain the type of regulation being proposed, at what level (constitutional, legislative, administrative, etc.), in what stage the discussion is at, what are the chances of being passed, and when.

In Italy, under the current leadership full same-sex marriage will never be legalized and regulation on different or same-sex unions will never pass. As far as marriage is concerned, articles 29 and 30 of the Italian Constitution have been seen as obstacles for gays and lesbians couples that are impossible to overcome. Art. 31 of the Italian Constitution sets forth the principle that marriage shall enjoy the special protection of the state. Marriage is protected as an institution and our Courts have always pointed out that marriage requires a couple of different sex.¹³ The Italian legislature, however, is not entirely restricted by this interpretation. In theory, they are free to grant different and same-sex couples some kind of legal recognition.

Accordingly, a first draft on unmarried couples was introduced into the Italian Parliament in 2007. The draft on Cohabitants' Rights (Diritti dei Conviventi: Di.Co.) was passed by the Government, but failed on its final passage to the Parliament. According to the draft, two persons of different or same sex could enter into a partnership (art. 1, Di.Co.). Not every cohabitation was deemed worth of protection, but only a lasting and still present one. Same-sex partners owed care and support (also financially) to each other (art. 1 Di.Co.) even though they were not free to choose a common name. The fact that one partner never became a relative of the other partner implied that no further rights in other areas of law, such as tax law or civil procedural law, were accorded. In this sense, the draft did not allow benefits in taxation, social security, or health insurance premiums. However, cohabitants were granted the right to succeed in a tenancy, because same-sex unions were no longer considered illegal or against public policy. Had the couple been living together for three years, after separation the partners could claim alimony. As far as Succession Law is concerned only a nine year cohabitation gave the partner the right to inherit.

No registration was required, as the law was not aimed at granting same-sex couples equal rights to married couples. Therefore the declaration made by cohabitants to the "General Registrar Office" ex DPR (the Decreto del Presidente della Repubblica is a legislative act that has the same value of a Statute 223/1989) had only an evidential value. The draft did not take into account the possibility of a life-partnership contract, as the only (minimal) regulation had to be completely founded in the law. Individuals were

13. Cass. civ., 1808/1976; 1304/1990; 7877/2000.

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entitled to make medical decisions for ailing partners or regarding organ transplants. However, a written document was needed reflecting the name of the individual being authorized to make medical decisions on the partner's behalf. This living will or "mandat en prévision de la inaptitude," had to be issued in front of 3 attesting witnesses, and had to be signed by its author.

Critics contended that, although the draft did not grant (hetero and) same-sex couples the same rights as married couples; it used the same restrictions (art. 2 Di.Co.). Situations that prevent *de facto* unions having legal effects included the following: if either of the parties was under the age of sixteen (as in Article 84 of the Italian Civil Code); visible dementia, including lucid intervals, and incapacity or civil disability by reason of mental disorder (as in Article 85 Italian Civil Code); a subsisting previous marriage, except where the parties have been judicially separated (as in Article 86 Italian Civil Code); kinship in the direct line or in the second degree of the collateral line or affinity in the direct line (as in Article 87 Italian Civil Code); a previous conviction of one partner for murder or attempted murder of the other partner's spouse (as in Article 88 Italian Civil Code).

The definition of what constituted a union was not clear, as undefined was the concept of "lasting cohabitation." In few words, the draft should be seen as an attempt to rule what had already been created by way of case law.

A second draft (Contratti di Unioni Solidali: CUS) on unmarried couples was then introduced into the Italian Parliament on 12 July 2007. Compared to the previous draft, the legal recognition of unmarried couples lied more on contract. Couples in committed relationships could register at any notary public office or "justice of peace" (the so-called "giudice di pace," but the term used by the Italian legislator is misleading under many points of view) and partnership could be terminated upon application of one or both partners. CUS differed from Di.Co. in several ways: (1) the drafting technique (the bill was not proposed as a separate statute but as an amendment to the Italian Civil Code); (2) it had a different name; (3) cohabitation was viewed as a contractual or quasi-contractual relationship. Regardless of these differences, and the fact that it had a less formal approach to the problem of the advance directives, rights and duties for cohabitants were similar to those proposed in the former draft (Di.Co.). According to the latter draft, the couple would have been able to jointly register their non-marital partnership in the registries maintained by the local government's notary. The registration would have been terminated on the couple's joint petition or upon the petition of either one of the cohabitants with notice being sent to the other partner. To avoid polygamous registrations, the proposal had established that only one

partnership could have been recorded for one person at the same time. The proposal did not connect any other legal effect to the registration, apart from serving as evidence in the case of dispute.

On 8 October 2008, with the change of the Italian political leadership, a new draft was introduced into the Italian Parliament: XVI Legislatura n. 1756, on Rights, Duties and Responsibilities of unmarried couples (Di. Do. Re). Not only does Di.Do.Re reaffirm the paramount value of the legitimate family (art. 1), but also it seems to have been drafted bearing in mind only heterosexual unions. The appropriate duration of cohabitation qualifying for legal recognition has been set to three years. But a three-years qualifying period may be suitable in the alimony context, but it may be inappropriate where the claim is to a succession in tenancy or to the right to housing of the surviving partner. In the inheritance context, cohabitants were not given rights to claim alongside the deceased's other relatives. Such a draft suggests that cohabitation has been viewed neither as akin to marriage nor as another intimate relationship deserving recognition. The draft, should it pass, does not put cohabitants in a better off position than the one they can now rely upon.

11. Non-legislative regulations: does your country provide specific benefits/rights to same-sex couples via administrative acts? i.e.: death pension for the surviving partner; hospital visitations or the right to make decisions when one of the partners is incapacitated to make them. Please provide details.

Confirming a stereotyped family's notion, our Constitutional Judges found that no other situation can be comparable to that of a family based on marriage (C. Cost., 27th March 2009 n. 86, in *Giust. Civ.*, 2009, 4-5, 817). However, for unmarried heterosexual couples, the lack of a legal regime of recognition in the Italian legal system does not denote a stigma on non-traditionally families. Legal accommodations in some fields, such as housing or in the area of torts, have led Courts to take away at least the harsher collisions between the legitimate family and the heterosexual unions. The situation is different with regard to same-sex unions.

As we have seen, the timidity—recte resistance—on the part of the Italian legislator in drafting a law on same-sex unions depends on the way art. 29 and 30 of the Italian Constitution and art. 107 ss. of Italian Civil Code have been traditionally interpreted. Even though not expressly forbidden by law, for years same-sex unions have been simply ignored by the Italian legal system. Recently, Courts have found that art. 3 CI prohibiting sex discrimination cannot be considered as an adequate protection, and did not prohibit discrimination based on sexual

orientation.¹⁴ According to Italian law neither one of the partners acquires any right of ownership on the other's property, nor any right or duty to administer it. This being so, the property of each individual is subject to the general regime of law of obligations and property law: each partner is allowed, for instance, to sell or rent his/her assets without the requirement of the partner's consent.

An alternative means to protect same-sex unions is then to consider their relationship as a contractual one. Here the impetus comes in the case law rather than statute, and it is limited to the resolution of property disputes. Gay and lesbian people are thus confined to all sorts of cohabitation schemes, on a contractual basis, which fall dramatically short of the legal blessings of marriage. The enforcement of domestic contracts between cohabitants never ends up in granting a kind of legal recognition to same-sex couples as, on the contrary, happens to unmarried couples. In this case, cohabitation agreements are particularly important because same-sex partners do not enjoy any legal rights and protections. Therefore, contract law accomplishes the ambitious goal of producing and implementing a body of rules that enhance the autonomy and self determination of the parties by electing a formal equality perspective.

A written contract governing the rights and obligations of same-sex couples addresses issues such as how property will be distributed in the event of a death or breakup, the way in which debts will be paid, who will have the right to make medical decisions, and so on. The partners, on the basis of art. 1322 of the Italian Civil Code, are free to enter into any contract, provided it is—as Italian scholars say—worth of protection, i.e. not immoral/illegal. It has been said that a cohabitation contract serves the purpose of spreading the costs and the losses of the cohabitation itself between the partners. For that reason, only under special requirements—subjectively and objectively speaking—the partners can enter into a cohabitation contract.

With regards to the subjective requirement, for a cohabitation contract to be valid under Italian law the parties must be capable (i.e., to be mentally stable and not to be a minor) and the covenant must be publicly authenticated (art. 1350 Italian Civil Code). Moreover, partners are permitted to negotiate among each other sale, labour or loan contracts, among others. Although cohabitation may not, by itself, give a partner rights to the other cohabitant's property, one partner may assert the existence of an agreement regarding the ownership of property or promised compensation which the other party disputes. The legal effects of cohabitation agreements are questioned. However, a cohabitation

14. On this topic, see answer to question n. 10.

agreement respected as contract and supported by a valid “causa”(in the Italian legal system the concept of “causa del negozio” can be seen as the corollary of the canonical law principle “Pacta sunt servanda” which has governed the law of contract since the fourteenth century) should be enforceable.

A valid “causa” is, for example, the partners’ mutual promises relating to property rights or the provision of services, but not their agreement to maintain a sexual relation. Such an agreement is considered illegal, as art. 1346 Italian Civil Code states that “the object of the contract must be legal, possible, specific or capable of being specified.” Then, a partner’s right to freedom of contract can only concern the economic aspects of their relationship. The right to freedom of contract does not allow a person to impose on the other the obligation of respecting those duties that arise from marriage, such as the duty of care, fidelity, cohabitation (see, in this respect art. 143 Italian Civil Code). The contract, in other words, cannot serve the scope of establishing a catalogue of rights and duties similar to that applying to married couples. Moreover, it is important to say that—under an objective point of view—the cohabitation agreement may not be self-executing with respect to the rights the partners wish to confer on each other. For example, if an individual wishes her partner to have the right to make medical decisions on her behalf, she should appoint a so called “Amministratore di Sostegno” (ex art. 408 Italian Civil Code as modified by art. 2, of the Disabled Person Protection Act of 9th January 2006, n. 4). This new institution is aimed at protecting, with the least possible limitations, the personal capacity of individuals wholly or partially deprived of autonomy to perform the functions of everyday life. The caregiver, or “Amministratore di sostegno,” is to be chosen (according to article 404) “with sole regard to the care of the beneficiary’s interests” (article 408), to such an extent that “negligence in pursuing the beneficiary’s interest” (article 410) is highlighted as a failure of the duty of support.

For the appointment to be valid either a written document certificated by a public notary or an act registered at any notary public registry is required. For the determination of the person who is able to be appointed as “Amministratore di Sostegno,” art. 408 Italian Civil Code includes, among others relatives, the cohabiting partner. Here, the neutral use of the word “convivente” (cohabiting partner) deserves attention because it is held that the word, being “gender neutral,” refers also to gay and lesbians. Although not expressly mentioned by the law, they are allowed to benefit from this provision. The same could be said, in the absence of an express reference, for the provision of the Domestic and Violence Act 154/2001, where a “protection order” can be delivered on behalf of the spouse or children damaged by the violent conduct of the cohabiting person.

The partners can also structure their future assets by way of setting an express trust, or, according to ex art. 2645 ter of the Italian Civil Code, by creating a separate estate on a fiduciary basis (art. 2645 ter can be seen as the Italian answer to the common law trust, able to overcome—*inter alia*—the limits of our system in accepting a concept of dual ownership).¹⁵

The termination of the cohabitation contract follows the rule of art. 1372 Italian Civil Code and is based on mutual consent. Theoretically, even if an opting out clause is possible under art. 1373 Italian Civil Code, scholars are reluctant to accept it. The fact that cohabitation contracts are aimed to regulate a familial relationship should be able to identify a special, different type of contracts with an “atypical” *causa*. Here, the concept of “*causa*” is embedded of other values, since those contracts are deemed to regulate the financial issues that arise in the course of a special relationship—one based on love and solidarity—and not simply on efficiency and fairness in transaction. As a result, the contract regulation provided for by our Civil Code could not be applied to every aspect of the cohabitation contracts, as far as their “*ratio*” is detached from the one of others’ “commercial” contracts.¹⁶

However, partners can bargain the ownership of assets, as well as the regime covering the consequences of possible change on the ownership of movable assets during the duration of the relationship. For real estate, since there is no recognition of inheritance rights and the rules of succession law

15. On the 16th October 1989, the Italian Government has ratified the Hague Convention on Trusts (11th July 1985). In Italy, the introduction of trust can be considered controversial, because it challenges two basic principles of property law: (1) the *numerus clausus* of property rights; (2) the principle settled in art. 2740 Codice Civile is based on the idea that everybody is liable for the undertaken obligation with all his/her asset. In other words, nobody can “divide” his/her asset, because this separation would impair the creditor’s position. For this reason, while “foreign” trust are generally accepted—as a consequence of the Hague Convention—the situation is much more debated as far as “internal” trust (Trust concluded in Italy) is concerned. Another way to “separate” the asset has recently been introduced (in our legal system) by way of art. 2645 ter Codice Civile (“*patrimonio separato*”, whose purpose is to create a separate fund on behalf of some people in need of help, or public administration). One limit to the application of art. 2645 ter is represented by the fact that immovables and registered chattels (we use the words immovable and movable goods, but there is no coincidence with the English distinction between real/personal property) can be used only for the fulfilment of a precise scope (above all scopes of assistance). A “scope” that must be worthy of protection, as stated in art. 1322 of the Italian Civil Code. Heterosexual as well as homosexual cohabitations don’t fall outside the scope of the norm, so that art. 2645 ter provide for a suitable solution. The “*patrimonio separato*” offers, anyway, a less flexible solution if compared to trusts.

16. For a more detailed discussion on this topic, see: E. Russo, *L'autonomia privata nella stipulazione di convenzioni matrimoniali*, in *Le convenzioni matrimoniali ed altri saggi sul nuovo diritto di famiglia*, Milano, 1983; G. Oberto, *Convivenza (contratti di)*, in *Contr. impr.*, 1986, p. 369 ss.; M. Franzoni, *I contratti tra conviventi “more uxorio,”* in *Riv. trim. dir. proc. civ.*, 1994, p. 737; G. Oberto, *I regimi patrimoniali della famiglia di fatto*, Milano, 1991, p. 220 ss.; F. Angeloni, *Autonomia privata e potere di disposizione nei rapporti familiari*, Padova, 1997, p. 214 ss.

are mandatory, the surviving partner does not acquire any inheritance rights (Articles 456 ss. Italian Civil Code). The prohibition of any agreement on inheritance (ex Art. 458 Italian Civil Code), however, does not impede the partners from entering in a contract for the benefit of a third party (ex art. 1411-1412 Italian Civil Code), which will be performed only after the death of the Promisor.¹⁷

Nevertheless, it should not be forgotten that the testator always has a margin of freedom, albeit within the *quota* available, of disposition of his or her assets by making provisions in a will in favour of the other partner (art. 587 ss. Italian Civil Code). The question on whether more favourable effects should be granted to same-sex relationships is not a new one. It is, however, one with no answer at this moment.

As far as labour law is concerned, no reference is made to the right to benefit from the legal regime on holidays, absences, leave and preferential placement enjoyed by officials of the public administration under the same terms as spouses and the right to benefit from the legal regime on leave, public holidays and absences, as applied to individual employment contracts, on terms equivalent to those applying to married couples. Even though such rights cannot properly be characterised as effects on persons but rather as measures of social protection they are not granted to same-sex unions.

In the context of the right to freedom of movement for workers, courts have also stated that, according to art. 29 and 30 of the Italian Immigration Act, D.lgs. 286/1998, the foreigner who has been living in a *de facto same-sex* union cannot benefit from the special right to “family reunification,” as the provision takes into account only spouses, children, and parent (this Act has been recently amended by art. 23, comma 1, of the Italian Immigration Act 189/2002 and by art. 2, comma 1, lett. e), D. Lgs. n. 5 del 2007, that implement Dir. 2003/86/CE. The purpose of this

17. According to art. 1411 Codice civile, parties can enter into a contract to benefit a third party. This contract is valid and absolute (irrevocable) as soon as the third party has accepted the benefits (property or money) that contracting party want to give him (of course the third party must feel free to accept or not the benefit). After the acceptance of the third person, the contracting parties have to perform their obligation. This is the *genus* of “contratto a favore di terzo”. A peculiar application of this scheme can be found in art. 1412 Codice Civile. Here the performance of the contract is subordinate to the death of the Promisor. A typical example of this hypothetical fact situation to which the rule attaches a legal consequence (quoting Merryman on the concept of “fattispecie”) is a life insurance on behalf of the surviving homosexual cohabitant. The contract ex art. 1412 Codice Civile is a contract “inter vivos,” because when it was concluded the Promisor was still alive and the issue of the contract doesn’t originate after the death; it has to be performed after the Promisor’s death. In other words, it is a contract “inter vivos” and as contract “inter vivos” and not “mortis causa” (the death works as a term) it is valid. The distinction between “inter vivos” and “mortis causa” contracts is important as, under Italian law, all kind of agreements on inheritance are void.

directive is to determine the conditions under which third-country nationals residing lawfully on the territory of the Member States may exercise the right to family reunification).

In this context, a timid attempt on the way of recognizing same-sex unions can be seen in the tendency of our courts in allowing damages for pain and suffering to the surviving partner (as held in C. Cass., 29th April 2005, n. 8976, in *Foro it*, 2006, 9, 2448; Trib. Rome 19th July 2007, in *Diritto e Giur.*, 2007; Trib. Naples, 28th June 2006, in *Giur. Merito*, 6, 1572 and more recently in Trib. Milan, 14th January 2009, n. 449, in *Giustizia a Milano*, 2009, 14).

For reasons I will explain immediately, the debate growing around this case-law seems to me highly unsatisfactory. The individualistic approach employed by Italian judges fails to recognize the rationale of a same-sex union. Italian judges are, in fact, reluctant to consider same-sex unions as worthy of protection, *per se*, offering a clear example of ambivalence in dealing with the question of same-sex unions. The freedom of contract approach, in fact, can be considered unsatisfactory as it worsens the position of partners with less bargaining power. Besides, the individualistic approach fails to give a comprehensive answer to the questions raised by the cohabitation. On the other hand, the traditional view, centred on the idea of heterosexuality, reveals its inadequacy in mastering the ongoing social changes. This is true above all when we look at the revolution that has involved family law. The Italian answer to the question raised by same-sex unions is, at moment, inadequate, even though some timid, indirect attempts of recognition have been made by courts.

In Trib. Milan, 2nd November 2007, proc. 2794/07, judges warned that the relation between the partners must not adversely affect the children. In the case, a lesbian couple had brought up two children (eight and six years old at the moment of the breaking off) born—by way of medical assisted reproduction techniques—with the sperm of a donor. Having the biological mother, after the breaking off, denied to her partner the access to the children, this one went to court asking for a joint custody order. In dismissing the claim the court said that, even if truly stated, the question was one for which the law did not offer any legal remedy (i.e. no joint custody order could be delivered, because of the same-sex cohabitation). Therefore, judges in assessing the jurisdiction of the prosecutor who was the sole person entitled in that case to take measures on custody matters (ex art. 330 Italian Civil Code) held that the refusal to recognize same-sex marriage could not harm the children of the couple.

The fact that the partners, in a same-sex couple, are not each genetically related to the children they are raising does not mean that there are no emotional ties between the partner who is not the biological parent and the

children. Based on art. 155 of the Italian Civil Code (as modified by Statute 8th February 2006, n. 54 on Joint Custody), judges said that the legislation at issue grants, if beneficial to the child, visitation rights to third persons such as the partner of the biological parent. This case reflects how the best interest of the child approach ended up in the recognition of a parent-like relationship and, then, in an indirect recognition of the same-sex union.

Nevertheless, no right to adopt is granted. Despite a general consensus towards an antidiscrimination policy against gays and lesbians, and although there is no expert evidence that children raised by gay and lesbians grow up in worse-off conditions than those raised by heterosexual couples, the legislature and the courts are reluctant to extend “the right to adopt” to same-sex partners. Even though the right to adopt is expressly granted to spouses that have been married for at least three years (ex art. 6, National Adoption Act 183/1984), a recognition of opposite sex unions can be found in the provision that states that if spouses had been living together before getting married, also this period of time must be taken into account.

In Trib. Bologna, 15th July 2008, in *Dir.Famiglia*, 2009, 1251, the court accepted the father’s claim for a joint custody order. The court held that such exclusion harmed the children who would thus be deprived of the chance of having emotional ties with their father which was contrary to their best interest. In contrast, in Trib. Minori, Catanzaro 27th May 2008, in *Dir. Famiglia*, 2009, 1, 237, judges denied joint custody to a father holding that it would have been extremely dangerous for the son to have contact with a father that had a strong homophobic hate against homosexuals. Judges held that in this case there was an unusual risk for the son, the one of being brought up in an unsafe environment.¹⁸ The judges’ way of

18. Here the couple was separating. Having set any economic aspect of the separation, the partners were arguing about the custody of their child. Art. 155, para 3 C.C. (as amended with Act 54/2006) makes provisions for both parents to exercise parental responsibility over their children. In this context—following that shared parenthood is deemed to avoid children suffering because of their father’s divorce/separation—only in very exceptional cases can court allocate sole custody to only one parent. In so doing they have to clearly explain the reasons for the decision. Here the judge said that the homophobic hate against homosexuals would have been extremely dangerous for the son’s education. On this basis they denied to the father a joint custody order. At the moment I can’t predict if any of the arguments used in favour of the anti discrimination principle will be applied in a same-sex case later on. What appear evident to me is that if orientation discrimination were to be treated as sex discrimination, then all law which explicitly impose extra “disabilities” on homosexuals would hardly pass judicial review. Orientation discrimination is treated as something different from sex discrimination—at least in Italy—and this approach explains the different positions taken by our courts. Anyway in Trib. Napoli 28th June 2006, in *Corriere del Merito*, 2006, 984, a homosexual father received a joint custody order. The mother, having discovered the homosexuals relation of the husband, claimed over a sole custody order. Homosexuality didn’t cast any shadow on the child-parent relation and, the court, dismissed the application of the mother.

reasoning pursued the legitimate aim of “protecting health and rights of children” by avoiding that any intolerance or discriminating behaviour influenced his education. While it is broadly accepted that Scholars came to an identical result, in so doing, judges went a step further. The non discrimination principle contains not only a system of values but also a pedagogic meaning, obliging the Courts in certain cases to intervene in private relations (as the one between father and son), to secure a certain enforcement of these values: in the end those of human dignity.

12. Judicial construction of the law: Are there any relevant decisions in your country that had or may have future impact in the legal construction of same-sex marriage or in the legal recognition of same-sex unions/partnerships? Please provide the date and name of the case, and briefly explain the case and its relevancy for this topic.

The legislations of several European countries regulate heterosexual as well as same-sex cohabitation, according to a status model (same-sex marriage, registered partnership, joint home cohabitation) or a combination of the status model with freedom of contract (French PACS).

In these countries, family law has embraced a pluralist rationale and, as a consequence of that approach, heterosexual marriage is no longer paramount in defining the legal notion of family. Recent developments in adoption regulations, together with biotechnological progress, challenge the crucial elements of the traditional family model such as heterosexuality and bi-parental paradigm.

Italy has neither a specific law allowing same-sex marriage nor any kind of civil union regulation. Therefore, in our legal system, marriage seems to maintain its function as a major factor in the organization of society, although it plays a different role and shows—because of the disruption of the patriarchal rationale—different features. The sexual discrimination argument (articles 2 and 3 CI) used by those who try to overcome the Italian cultural heritage that prevents regulating same-sex marriage/union has been seen as inconsistent by those who firmly believe that marriage (and, in general, family) has a strong heterosexual implication. In denying any legitimacy to same-sex marriage/union, those scholars point out that marriage requires a man and a woman. The fact that marriage consists of both a man and a woman emphasizes the absolute equality and equal necessity of both sexes for the most fundamental unit of society, as proved by the formulation of art. 29 CI).

In so doing, those scholars join marriage and reproduction, considering the latter as the scope of the former. They fail to remember that nowadays this construction of marriage appears artificial, as recently recognised by Italian judges in Trib. Venice 3rd April 2009.

The case concerned the publication of banns of marriage on behalf of a same-sex couple. Having the general registry office refuse the publication, the couple went to court asking (1) for an order of publication of the banns, and (2) in case of dismissal of the petition, claiming the unconstitutionality of articles 107, 108, 143, 143 bis, 156, and 231 of the Italian Civil Code, where express reference is made to marriage as a union of individuals of opposite sex. The court stated that, in light of the Italian Civil Law system, no order of publication of the banns could be legally delivered, because judges are obliged by current laws. Nevertheless, the court held that the traditional concept of family did not resist the test of time. In doing so, judges went through a legal-anthropological examination of facts showing how a pluralistic approach in the legal conception of family would have sounded as an acknowledgement of the ongoing change throughout Europe. They assumed that it was contradictory, on one hand, not recognizing same-sex marriage, but, on the other, allowing matrimonial capacity to transsexuals that can marry and even adopt children when married to a person of the opposite sex.¹⁹

As far as Statute 184/1982 on Transsexuals is concerned, the Constitutional Court went a step further. In fact, in Const. Court, 6th May 1985, n. 185, judges in assessing the compatibility of law 184/1982 to the Italian Basic Law, said that the statute was aimed at avoiding any social and legal discrimination towards transsexuals that could have prevented the free development of their personhood. Moreover, same-sex marriages

19. In Trib. Venice 3rd April 2009, the Court pointed out that “the right to marry is of fundamental importance for all individuals, for homosexuals too. In so doing the judges quote art. 12 and 16 International Convention on Human Rights of 1948; art. 8 and 12, CEDU; art. 7 and 9 Carta di Nizza 2000 and, last but not least, art.2 Cost. It. Because the right to marry is a fundamental right which all citizens may enjoy, only important state interest can justify a limitation of this right. This is not the case for the publication of banns of marriage on behalf of a same-sex couple, because values as State interest, public policy or health are not at issue.” Moreover they say, after a long and interesting historical excursus of the most important changes in the Italian Family Law System, that “l’accezione costituzionale della famiglia, lungi dall’essere ancorata ad una connotazione tipica ed inalterabile, si è mostrata permeabile ai mutamenti sociali, con le relative ripercussioni sul regime giuridico familiare. Le considerazioni che precedono sull’espressione “società naturale” e sull’estraneità della tutela del matrimonio tradizionale alle finalità dell’art. 29 Cost. portano a ritenere prive di fondamento quelle posizioni che giustificano l’implicito divieto del matrimonio fra persone dello stesso sesso, argomentando dalla capacità procreativa della coppia e dalla tutela della procreazione. Al riguardo sarebbe, peraltro, sufficiente sottolineare come né la Costituzione né il diritto civile prevedano la capacità di avere figli come condizione per contrarre matrimonio, ovvero l’assenza di tale capacità come condizione di invalidità o causa di scioglimento del matrimonio, essendo matrimonio e filiazione due istituti distinti.” What they say, and I find that this the core of the decision, is that the reason why same-sex couples should not be allowed to marry is rooted on the interest of the State in the creation and care of the next generation, that can only be served if the children are “of the couple.” But, no provision expressly forbids a homosexual marriage and no provision of the Civil Code takes into account, as bar to marriage, the capability of having children. Neither can the mere fact of infertility be a cause of invalidity of the marriage.

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should be legalized as part of the right of privacy, or right to marry only the beloved person (no matter if man or woman) in compliance with the right to respect private and familial life according to art. 7, 9, and 21 of the Nizza European Charter; art. 12 and 16 of the Universal Declaration of Human Rights; art. 8 and 12 of the European Convention on Human Rights. EU Recommendation N. 924/1981 of 1.10.1981; Resolution n. 28 of 8th February 1994 against sexual discriminations; Resolution 16th March 2000 on protection of human rights throughout Europe; and last but not least, Resolution 14th January 2009 concerning the enforcement and judgement in matrimonial matters. This set of values should be considered as paramount when looking at the gay and lesbian claim for marriage. On this basis, the Venice judges held that the aforementioned articles of the Italian Civil Code on the celebration of marriage had to be re-examined because they were not in harmony with the Italian Constitution. More recently, using the same argument, other judges have referred the question of incompatibility to the Italian Constitution of articles 107, 108, 143, 143 *bis*, and 156 of the Italian Civil Code. The Constitutional Court has recently decided the case.²⁰

Theories opposing same-sex marriage underline that the sexual discrimination argument should not be used because the claim for same-sex marriage confuses “tolerance” with “preference.” The Italian legal system categorizes relations in three ways—as “preferred,” “tolerated,” and “prohibited.” Marriage would be the classic example of a “preferred” relationship (art. 29 CI). Thus, the claim for same-sex marriage is not a claim for mere “tolerance,” but for “special preference” and cannot be accepted. In other words, homosexuality is a personal condition and not a

20. Court of Appeal Trento, 9th July 2009; Court of Appeal Florence, 13th November 2009; Trib. Ferrara, 11th December 2009. The question of Constitutionality has been dismissed (sent. 2010/138) on the ground that: (1) on this topic, Constitutional Court can't adopt a “sentenza interpretativa additiva” because the Constitutional Court displays only a function of control of Constitutionality. It falls outside the competence of Constitutional Judges, to legislate by way of interpretation (and accepting the case, as it was formulated by the Trial Courts —Court of Appeal Trento, 9th July 2009; Court of Appeal Florence, 13th November 2009; Trib. Ferrara, 11th December 2009— would have meant to subvert, by way of case law, the concept of Marriage. It is up to the legislature decide whether or not to change the law; (2) the Constitutional judges, to dismiss the question, quote some articles of the Italian Civil Code whose formulation clearly makes reference to the marriage as a union between a man and a woman – art. 231 Codice Civile on filiation states that “the husband is the father of the child conceived in the marriage” (presumption of legitimacy); art. 235 and 244 Codice civile on disclaimer of paternity talk of father and mother; art. 5, l. 1970/898 (Divorce Act) says that, after divorcing, the woman can't use anymore the surname of the husband; (3) the analysis of the legislative history of art. 29 Cost. It shows as our Constitutional Fathers bore in mind the marriage as union of opposite sex; (4) the different legal systems deserve dissimilar legal treatments to homosexual unions. Some systems do really equate the homosexual union to marriage, but some others do not. It means that, even though art. 9 Nizza's Charta talks about the freedom of marriage, this article left the States free of regulating as they want this topic in accordance with their tradition.

source of discrimination, since homosexuals are exercising their right of freedom as ruled in art. 2 CI.²¹ Also the privacy argument has been questioned on the ground that marriage is not a matter of mere personal privacy, but it involves a public *status*. Even if –as some assert– the state may have no interest in regulating private sexual behaviour, it undoubtedly has a great interest in regulating the public status, public benefits, and public institution of marriage. Well known in this sense is the decision of Trib. Roma, 28th June 1980. The decision concerned a dispute between a gay couple and the General Registry Office of Rome (GRO) (Ufficiale dello Stato civile). The couple requested the publishing of wedding banns. The GRO stated that it could not accept the request because according to Italian law only a man and a woman were allowed to marry. In this case the judges, interpreting provisions of the Constitution, article 87 of the Civil Code (on kinship), article 143 of the Civil Code (where the Italian legislature in defining duties and rights arising from marriage uses the expressions of husband and wife), and article 143 *bis* of the Civil Code (on the wife's surname after marriage), held that the marriage relationship of husband and wife was “deeply rooted” in the history and traditions of our nation. The same could not be said of same-sex relationships.

More recently in Trib. Latina, 10th June 2005, judges have been faced with the issue of recognizing a same-sex marriage celebrated in Holland. The recognition of it as a legitimate family was requested under article 63.2c), DPR 396/2000 which provides rules for the recognition in Italy of marriages celebrated by Italian citizens abroad. According to the previously described view point, Italian law strictly refers only to marriage. Therefore this body of rules does not concern unmarried or same-sex couples. On this ground, the judges on this case held that the term “marriage” historically has referred specifically to the union between a man and a woman, to a relationship between two consenting adults, and not to any relationship involving same-sex couples. Marriage as the inter-gender union of man and woman is one of the great constants in human history as well as for the Italian social and legal culture. The claim that the “right to marry” includes the right of same-sex couples to marry not only is historically specious, but it is in sharp contradiction with articles 84 to 89 of the Italian Civil Code on eligibility to marry (conditions such as age, mental illness, existence of a previous valid marriage, existence of prohibited degrees of relationship, crime, make two people not eligible to marry). The fact that the Italian legislature, in establishing the eligibility conditions for marriage did not

21. Among many, F. D'ANGELI, *La tutela delle convivenze senza matrimonio*, Torino, 2001, p. 32 ss.; M. BIN, *Tra matrimonio e convivenza di fatto: un difficile esercizio di equilibrio*, in *Giur. Cost.*, 1998, p. 2519; F. D'AGOSTINO, *Una filosofia della famiglia*, Milano, 1999, p. 147.

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make any reference to the difference of sex was interpreted by these judges as the proof that same-sex marriage must be seen as non-existent (*inesistente*) at all. According to article 107 of the Italian Civil Code only a union between persons of opposite sex can be regarded as marriage. In Italian legal tradition, in fact, marriage has always been considered as a “Rechtsgeschäft” (act of law) between persons (a) of opposite sex; (b) who want to marry each other and be husband and wife. In fact, article 107 of the Italian Civil Code states that “l’ufficiale di Stato civile riceve da ciascuna delle parti la dichiarazione di prendersi rispettivamente in marito e moglie,” and so does article 64, e), of the dPR, 3rd November 2000 n. 396 on marital status. In other words, same-sex unions, as “non traditional” families, failed to fulfill the substantial and formal requirements provided for by Italian law. Therefore, the judges in this case held that same-sex marriage is against those principles that our country identifies as principles of “public policy” as established in article 18 dPR 396/2000 (This Statute sets the person’s civil or legal status. There, the concept of public policy is used as a barrier, a kind of national values protection, to avoid a modification of the Italian legal system from the outside). Those principles were reaffirmed in Court of Appeal Florence, 27th June 2007 where, in dismissing the Appeal, Judges said that only the legislature has the task of modifying the existing law, while a contract approach to problems arising from unmarried unions could have been considered satisfactory.²²

In spite of the fact that the right to marriage does not extend to same-sex unions because the concept of marriage by its very nature is uniquely conjugal (heterosexual), in Trib. Minori Perugia, dec. 22nd July 1997 we can find a different approach. There, the question was not whether same-sex marriage should be recognized, but whether a transsexual partner had to be considered able to adopt a child. Here, the Court stated that the modification of sex cannot be taken into consideration leading to the result that the couple cannot adopt. In other words, in case of adoption, the control is limited to verifying the capability of the couple in bringing up with love and adequate attention an abandoned child.

Whether in the future the courts will be as bold in response to a claim brought by homosexuals is hard to predict. Sympathy with their position was demonstrated by the judges in a case concerning rights to succeed to a tenancy under housing law in Trib. Rome, 20th November 1982, in *Riv.giur.edilizia*, 1983, I, 959. In that case the judges said that although a same-sex partner was not capable of succeeding in a tenancy, a same-sex union was not illegal nor against public policy. However, they were not ready to go so far as to accept that such a couple could be regarded as

22. In this way, also: Trib. Bergamo, 2nd February 2009; Trib. Turin, 18th May 2009; Trib. Florence, 3rd October 2007; Court of Appeal Rome, 13th July 2006.

“husband and wife.” Nevertheless, the case lends some support to the view that improvement of the legal position of gay and lesbians may come about more easily from the gradual equalization of the rules governing the consequences of relationships rather than in extending the right to marry, per se (on this topic, see next paragraph).

13. Additional comments: Please feel free to include additional comments on the topic that you consider relevant to the specific situation of your country.

A lot still needs to be done in Italy in order to grant same-sex couples the same rights accorded to heterosexuals. Desirable future developments in this area should move in several directions, simultaneously.

First of all, a law should be adopted, at least, to recognize same-sex unions, outlawing discrimination in all spheres, not just discrimination in the workplace. While European Council Directive 2000/78/EC of 27 November 2000 clearly offers the possibility of moving in this direction, because any discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, the Italian legislature has done nothing so far in order to make “full use” of this document.

Secondly, the Italian legislator should take an active stance vis-à-vis existing legislative regulations concerning the recognition of same-sex unions in Europe. In other words, cultural prejudices should not result in gays being denied the possibility of fully benefiting from the duties and rights deriving from a recognized union (marriage or civil union). The Italian legislature should definitively face the fact that the family model has changed to the point that (heterosexual) marriage is no longer paramount in defining the notion of family. However if, on one hand, marriage can be seen as no longer playing a central role in the building up of the idea of family, on the other hand, it still maintain its function (I would say, its meaning) as a major factor in organizing society. This is true especially if we take into account the call for “marriage” of same-sex couples.

In this context, granting marriage to same-sex couples could be seen as the conclusive and final answer to their claims for rights, the “fight” for marriage being interpreted as a new social call for “status” rising from those people who have been traditionally discriminated against. Therefore, giving gay and lesbian couples the same rights as heterosexuals to marry, adopt children, and have access to artificial insemination is to put them on par with heterosexual couples. However, we should take into account sound perplexities and critiques about the counter-effect that status technique can produce. No doubt that the “marriage policy” adds force to social roles. Under this point of view, the emerging status-oriented

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approach shows the crucial social meaning still attached to marriage, even though it tends to reproduce social stereotypes. However, the hostility towards a traditional idea of family, with a clear definition of roles between man and woman, seems to be of no concern in respect to same-sex couples. Not only is same-sex marriage claimed as the source of benefits, it is also a way for gays and lesbians to assess an equality principle.

A more correct and modern interpretation of article 29 CI could support this analysis. Quite the contrary, the same attempt to regulate cohabitation (hetero- and homosexual) outside wedlock has (at the moment) come to a complete stop, as the Italian legislature embraces an outdated approach to family. Thus, the Italian system is far from recognizing same-sex couples' right to marry, regardless of the fact that treating same-sex couples differently from heterosexual couples amounts to discrimination, as prohibited by Article 3 CI. Notwithstanding the fact that also article 9 of the European Union Charter of Fundamental Rights regards respect for family life as a fundamental right, the state of the development of Italian family law is truly embryonic in this field. Consequently, a coherent protection for same-sex unions is lacking. Even if many articles of the Italian Civil Code, as well as some statutes, make express reference to cohabitants granting them some rights, the inconsistency of this solution makes it, *de facto*, difficult for members of such unions to enjoy their rights, thus creating a group of second-class citizens.

The same case law approach offered by judges is inadequate because it fails in reaching a minimum of protection and because judges still perceive this subject as a matter of policy choices. As a consequence, a certain "conjugal hierarchy" sanctioned by the Constitution has been put into place, with registered heterosexual marriages at the top of the pyramid. However, things and times are slowly changing as confirmed by the greater visibility of same-sex relationships and the change of mentalities and attitudes towards homosexuality, which has increasingly gained social acceptance. The absence of a single model of the family, the transformation of the concept of marriage into a relationship of emotional coexistence, detached from the purposes of procreation and upbringing of children, moves towards a higher level of integration of homosexuals into society.

Finally, provided that the State has an interest in having healthy and flourishing children, it should not matter to the State that the child's parents include only one adult who is biologically related to that child or even whether the two parents are of the same or the opposite sex.