All you need is law: Italian courts break new ground in the treatment of same-sex marriage

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Abstract: On 15 March 2012 the Italian Corte di Cassazione delivered a judgment in case 4184/12 which marks a fundamental change of direction in the treatment of same-sex marriage in the Italian legal system. This case must be read in conjunction with other recent cases decided by Italian and European courts, which are relied upon by the Corte di Cassazione. In fact, a short outline of the case-law illustrates both the piecemeal nature of legal developments affecting same-sex marriage and the complex mix of issues that arise in this legal field. The issue of same-sex marriage bridges private and public law, and implicates family, free movement, and equality (non-discrimination) rights under national and European provisions. This paper argues that, even if the Court's ruling did not confer upon same-sex couples a specific right to marry or to have a marriage registered in Italy, it still extended their status by recognising a right to family life and, on that basis, a right to be treated on an equal footing with heterosexual married couples.

Keywords: same-sex marriage; European Court of Human Rights; free movement; family law; Italian Constitutional Court; discrimination.

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1 Introduction[1]

On 15 March 2012 the Italian *Corte di Cassazione* delivered a judgment in case 4184/12 which marks a fundamental change of direction in the treatment of same-sex marriage in the Italian legal system. This case, when viewed in context with other recent cases decided by Italian and European courts, illustrates both the piecemeal nature of legal developments affecting same-sex marriage, as well as the complex mix of issues that arise in this legal field. Same-sex marriage bridges private and public law, and implicates family, free movement, and equality (non-discrimination) rights under national, European and international provisions.

2 Prior Italian case law on same-sex marriage in the context of EU law

In order to grasp the reasoning of the *Corte di Cassazione* (civil law section) on family rights and non-discrimination, we must first clarify what this case does *not* decide. The March 2012 decision by the *Corte di Cassazione* must be distinguished from two earlier Italian court decisions which addressed same-sex marriage in the context of European Union (EU) citizenship and the free movement of persons under Directive 2004/58/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. That Directive expressly mentions registered partners, but is silent about whether the term 'spouse' includes a same-sex husband or wife. Both prior Italian cases resolved this ambiguity directly or indirectly in favour of same-sex couples.

The first case (Cass. Pen. sez. I n. 1328, 19 January 2011) concerned a non-EU citizen who appealed to the *Corte di Cassazione* (criminal law section) against his conviction by the Justice of Peace of Mestre for illegal entry and residence in Italy. The appellant argued that his marriage celebrated in Spain with an EU citizen should entitle him to EU free movement rights, even when the marriage was between two men. The *Corte di Cassazione* agreed in principle, and directed the Justice of Peace to ascertain whether Spanish legislation treats the same-sex partner as a 'spouse' and, if so, to recognise the effects of the marriage in the Italian territory. This was the first time the Court admitted the possibility that same-sex marriage could have legal effects in Italy, albeit only in regard to immigration issues – such as rights of exit, entry and residence – which are provided by Directive 2004/58/EC.

The second case (Trib. di Reggio Emilia, sez. I civ., ord. 1401/2011, 13 February 2012) concerned a marriage in Spain between a Uruguayan and an Italian man. When the couple later moved to Italy, the Uruguayan partner applied for a residence permit. Here the Italian Court explicitly ruled that limiting marriage to a man and a woman goes against both the interpretation of the term 'spouse' found in the EU Directive and the broad meaning given to the rights to marry and to found a family mentioned in Article 9 of the Charter of Fundamental Rights. The Court clearly stated that once there is evidence

that any marriage has been lawfully celebrated in an EU Member State, free movement rights both of the citizen and his/her family member ought to be guaranteed, regardless of the spouses' national legislation. But here, too, only rights under Italian immigration law are assured.

3 The Corte Di Cassazione's leap forward (March 2012)

The March 2012 decision by the *Corte di Cassazione* (civil law section) in case 4184/2012 involves a distinctly different fact pattern from the one found in the two earlier cases, and the Court's rationale consequently relies on different legal sources. This case involves two Italian men who went to Holland, concluded their marriage there, then returned home to Italy and asked the competent Italian authority in Latina to register their marriage. The Latina authority refused to register the marriage in Italy, pursuant to a 2007 circular from the Ministry of Interior which proscribed local authorities from registering same-sex marriages celebrated abroad on the grounds that they violate *ordre public*. On appeal, the Italian citizens argued *inter alia* that this refusal violated their rights to marry and to have a family life, as well as the principles of non-discrimination and self-determination. The appeal was rejected by both the Tribunal of Latina and the Court of Appeal in Rome, as well as by the *Corte di Cassazione*. But even though the *Corte di Cassazione* did not go so far as to grant same-sex couples the right to marry or to have a foreign marriage registered in Italy, its decision breaks new ground and thus warrants close analysis.

Unlike the two earlier cases noted above, the Italian same-sex couple did not seek to rely directly on free movement rights under EU law. The facts publicly available in this case were not such as would trigger the application of EU free movement of persons rules, since neither Italian man had worked or resided in The Netherlands. Absent such a nexus, it is unclear why the Italian men were able to marry there, since Dutch law appears to require that at least one party to the marriage be a legal resident. Yet the *Corte di Cassazione* was apparently satisfied that the Italian men in question were married under Dutch law, and raised no red flags concerning a possible evasion of Italian (domiciliary) law. Instead of concerning itself with this puzzling feature of the case, the Court moved on to address the applicants' far-reaching rights-based claims which, unlike the earlier cases, did not involve the important (but nonetheless limited) handful of immigration rights guaranteed by the EU Directive. Rather, this same-sex couple sought full civil recognition, in the form of registration of their marriage.

This is not to say, however, that either the Italian same-sex couple or the *Corte di Cassazione* ignored EU law entirely in this case. Indeed, the men argued that Italy's failure to recognise the marriage they had concluded in another Member State impaired their rights – as EU citizens – to move freely, reside and settle in a Member State per Article 21 (1) TFEU (para. 3.3.2). Moreover, the couple urged the Italian Court to make a preliminary reference to the Court of Justice of the European Union (CJEU) seeking interpretation of Articles 9, 21, 51, 52, 53 and 54 of the Charter of Fundamental Rights. The *Corte di Cassazione*, however, was not persuaded, and ultimately refused to refer any questions to the CJEU. Rather, the Court referred to decisions by the Italian *Corte Costituzionale* (decision 138/2010) as well as by the CJEU (C-299/95 *Kremzow*; C-328/04 *Vainaj*; C-400/10 *McB e.a.*; C-256/11 *Dereci*), all of which limit the application of the Charter to situations falling within the scope of EU law. And in the

firm view of the *Corte di Cassazione*, the rights to marry and to found a family do not fall within the scope of EU law at all, since Article 9 of the Charter expressly relegates these matters to national law (para. 3.3.2). Given that the issue fell outside the scope of EU law, the *Corte di Cassazione* considered that there was no basis for applying the Charter, and thus no occasion for making a preliminary reference.

After excluding the possibility that EU rules would resolve the case, the *Corte di Cassazione* turned to the key question, namely whether there are still reasons, in modern Italian society, to consider same-sex marriage unlawful. In addressing this pressing question, the Court demonstrated that it has a clear idea of its role as a national Court operating in an international environment, and showed its familiarity with relevant national and international legislation, as well as with the case law of the CJEU, the European Court of Human Rights (ECtHR), and the Italian *Corte Costituzionale* (Constitutional Court). The core of the judges' reasoning focuses on the tension between, on the one hand, the traditional concept of marriage, as derived from Roman law and enshrined in recent instruments such as Article 16 (1) of the Universal Declaration on Human Rights and Article 23 (2) of the International Covenant on Civil and Political Rights, and, on the other hand, recent trends in European and non-European States towards giving full recognition to the legal effects of same-sex marriages.

3.1 Other cases considered by Corte Di Cassazione

In reaching its March 2012 decision regarding the Italian same-sex couple, the *Corte di Cassazione* takes into consideration two rulings dating back to the first half of 2010: first, decision 138/2010 of the Italian *Corte Costituzionale,* and second, *Schalk and Kopf v. Austria* (Application no. 30141/04) of the ECtHR. In both of those 2010 decisions, which are elaborated below, the courts opened the door a crack towards civil recognition of same-sex marriage, but ultimately hesitated to cross the threshold. Instead, it was the *Corte di Cassazione* in March 2012 that stepped through the door, albeit cautiously.

3.1.1 Decision 138/2010 of the Italian Corte Costituzionale (April 2010)

In its 2010 decision, the *Corte Costituzionale* ruled that Articles 3, 29 and 2 of the Italian Constitution *cannot* be read to mean that the right to same-sex marriage has any constitutional ranking in the Italian legal system. Rather, the Court insisted that Article 29 of the Italian Constitution (1948) embodies a 'naturalistic' definition of marriage that presupposes gender diversity, as can be deduced from the Italian Civil Code (1942) and secondary legislation adopted thereafter. This interpretation was not inevitable, however, since the language of Article 29 is gender-neutral, and thus leaves room to argue that the constitutional definition of 'marriage' is open-ended and might theoretically include unconventional types of marriage. In particular, Article 29 defines 'family' as a "natural society based on marriage" and proclaims the "moral and legal equality of the spouses". However, the *Corte Costituzionale* did not avail itself of this opportunity in 2010, since the drafters of the Constitution had never considered the possibility of allowing same-sex marriage. In the end, despite acknowledging that the concepts of 'marriage' and 'family' ought to be interpreted in line with socio-cultural changes occurring over time, the *Corte Costituzionale* declared the aim of procreation to be inherent in marriage and worthy of constitutional protection (Decision 138/2010 of the *Corte Costituzionale*, Considerato in diritto, point 9). The Court shied away from a 'creative' interpretation of the Constitution

that would radically modify core concepts in ways that had never been contemplated by the drafters.

Notwithstanding its interpretation of Article 29 of the Italian Constitution in the spirit of Judeo-Christian tradition, the *Corte Costituzionale* took an important first step in 2010 towards constitutionalising same-sex marriage in Italy. The Court used Article 2, a liberal provision, to provide constitutional protection for gay unions as 'social groups' in which all people have the right to develop as individuals (point 8).

3.1.2 Schalk and Kopf v. Austria (Application no. 30141/04) (June 2010) (ECtHR)

The second case considered by the *Corte di Cassazione* in its path-breaking 2012 decision was the 2010 judgment of the European Court of Human Rights (ECtHR) in *Schalk and Kopf v. Austria*. The ECtHR's 2010 decision was more daring than the one that the *Corte Costituzionale* had reached a few months earlier. Reading Article 12 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and Article 9 of the Charter of Fundamental Rights together, the ECtHR stated that it no longer considered that the "right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex". Still, the ECtHR was unwilling, given the absence of consensus in favour of same-sex marriage, to impose this interpretation on the Contracting States. Thus in the end, the ECtHR's conclusion was similar to that reached by the *Corte Costituzionale*, namely that the issue falls within the Member States' margin of discretion, and it is up to their legislative organs to regulate the matter.

3.2 The Corte Di Cassazione's rationale

In its March 2012 decision, the Italian *Corte di Cassazione* builds on earlier developments and moves a decisive step closer to recognition of same-sex marriage. The Court takes a progressive stance by acknowledging the rapid evolution of both legislation and case law that has taken place, especially at the beginning of this century. While it refrains from overturning the outcome of the case as decided by the Latina authority, which refused to register the marriage, it does reject the lower court's reasoning. Where the Latina authority had refused to register the same-sex marriage because it was contrary to *ordre public* (pursuant to a binding 2007 Ministry of the Interior circular), the *Corte di Cassazione* refused for the technical reason that the marriage is unable to produce legal effects in the Italian legal system (paras. 2.2.3 and 4.3). This is an important step away from the Court's previous insistence that gender diversity is, along with the express consent of the couple, a prerequisite for the marriage to exist as legally valid act. Here the *Corte di Cassazione* abandons the earlier position that same-sex marriage is 'non-existent' as untenable, in view of the evolution of legislation and social customs in other parts of the world and the ECtHR's interpretation of Article 12 ECHR. The very fact that some legal systems allow same-sex marriage, including those of EU Member States, obliges the Court to alter its stance and take into account the new context and its consequences for the Italian legal system.

The novelty of the *Corte di Cassazione's* 2012 decision does not lie in any breakthrough constitutionalisation of same-sex marriage, which could only be effected if the *Corte Costituzionale* were to re-interpret Article 29 of the Italian Constitution or if the

Legislature wereto amend it. Rather, the Court grants gay couples a right to family life on the basis of the equality/non-discrimination provision, Article 3 of the Italian Constitution, and makes clear that this right can be judicially protected, even absent any action by the Legislature. This in itself is a significant step in the evolution of the concept of 'family' in the Italian legal system.

In sum, the *Corte di Cassazione* holds that the Italian Constitution does not grant same-sex couples the right to marry in Italy or to have a marriage celebrated abroad registered in Italy. It does, however, grant them a right to a 'family life' which entails treating them on an equal footing with married couples (para. 4.2). Thus, unlike the Italian Constitutional Court, the *Corte di Cassazione* explicitly referred to such right and, by doing so, moved closer to the approach followed by the ECtHR. It will be interesting to see whether and, if so, how this shift in Italian jurisprudence affects the position of the ECtHR, given that the Strasbourg Court's attitude towards and measure of the margin of appreciation left to States tend to change, depending on how far the States' positions vary from one another on a particular issue.

4 Legislative stirrings

Finally, it bears mention that these Italian judicial decisions have stirred the national legislative body to action, though it would be unwise at this stage to speculate on the outcome. The *Italia dei Valori* (Italy of Values) party presented a draft bill (C.5338 on "Modifiche al codice civile inmateria di eguaglianza nell'accesso al matrimonio in favore delle coppie formate da persone dello stesso sesso") on 3 July 2012. In addition, parliamentary questions presented in both the upper and lower houses of the Parliament have challenged the compatibility with EU law of the 2007 Ministry of the Interior circular that proscribes local authorities from registering same-sex marriages celebrated abroad.

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Notes

1 This paper originally appeared as Helsinki Legal Studies Research Paper No. 22 (October 2012), and states the law as of that date.