DOI: 10.20472/IAC.2015.019.039

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# ORLANDI AND OTHERS V ITALY: SAME SEX MARRIAGE IN ITALY, A PROBLEM OF PRIVATE INTERNATIONAL LAW

## Abstract:

The paper studies the case of the Italian non-recognition of same sex marriages contracted abroad. Many Italian same sex couples marry in countries where that is allowed; then, they apply to have their status recognised in Italy; but because there is no law regulating same sex relationships, their applications are often rejected. The paper studies a pending recourse before the European Court of Human Rights – Orlandi and others v Italy – in highlighting Italian private and international law provisions. To facilitate the analysis, the paper compares the Orlandi case with Oliari and A, and Felicetti and others v Italy, and studies the third party communications submitted by a number on nongovernmental organisations.

## Keywords:

Marriage equality, LGB rights, Italy, Private International Law, NGOs.

**JEL Classification:** K33

## Introduction

The paper studies the case of the Italian non-recognition of same sex marriages contracted abroad. Many Italian same sex couples marry in countries where that is allowed; then, they apply to have their status recognised in Italy; but because there is no law regulating same sex relationships, their applications are often rejected. The paper studies a pending recourse before the European Court of Human Rights (ECtHR) *Orlandi and others v Italy* (*Orlandi and others v Italy*, Pending). In detail, the paper researches the issue related to the lack of recognition of same sex marriages and private and international law issues. To facilitate the analysis, the paper compares *Orlandi* case with *Oliari and A, and Felicetti and others v Italy* (*Oliari and A and Felicietti and others v Italy*, Pending). The paper studies also the third party communication submitted by six nongovernmental organisations (NGOs) on behalf of the applicants of the two cases (Robert Wintemute, 2014), and the communication submitted on defence of "traditional" heterosexual marriage submitted for the *Orlandi* case (Roger Kiska, 2014).

This paper addresses the theme of same sex marriage in Italy because the legal limitation to marry for same sex couple has consequences in the social life of Italian LGB (lesbian, gay and bisexual) couples. Indeed, LGB individuals suffer particular challenges when they are in unrecognized partnerships: inferior tax, employment and insurance benefits; difficulties in obtaining public housing allocations (Thomas Hammarberg, 2011, p. 95); immigration issues in regard of inter-nationality couples (*C and LM v the United Kingdom*, 1989, *Taddeucci and McCall v Italy*, Pending; Christopher A. Duenas, 2000); limitations related to pension or tenancy for a surviving spouse (*Karner v Austria*, 2003); and reduced freedom of movement when one of the partners needs to move abroad (*X, Y and Z v the United Kingdom*, 1997).

The paper first examines the legal status of same sex marriage in the Council of Europe (CoE) and in Italy, and second, it describes the two case studies and the third party comments. The paper then discusses the private and international law issues overlooked by the third parties comments. Finally, some conclusive remarks on the possible development of the same sex marriage in Italy are provided.

## Marriage equality in the Council of Europe law and in the Italian law

In 2010, the Committee of Ministers of the CoE released a recommendation on measures to combat discrimination based on sexual orientation and gender identity (CM/Rec(2010)5, 2010). In that document, the CoE did not mention the marriage right for LGB individuals; but it recommended that when CoE member states confer rights and benefits to *de facto* couples and couples on registered partnerships, these rights ought to be equivalently applicable to same and opposite sex couples (CM/Rec(2010)5, 2010, para. 23–24). However, different sex unmarried couples have no rights under Italian law, and therefore the scope of the CoE recommendation does not encompass Italian same sex couples.

Before and after the 2010 CoE recommendation, the ECtHR dealt with marriage and partnership rights for LGB couples in a number of adjudications. First, in 2003, in *Karner v Austria*, the ECtHR stated that a CoE member state is required to provide "particularly serious reasons by way of justification" to refuse to grant unmarried same sex couples with the rights of unmarried opposite sex couples (*Karner v Austria*, 2003, para. 37). Subsequently, in 2010, in *Schalk and Kolpf v Austria,* the ECtHR did not accept the applicants' argument that Austria was obliged to recognize their same sex relationship through marriage. The ECtHR noted that "there is an emerging European consensus towards legal recognition of same-sex couples" (*Schalk and Kopf v Austria*, 2010, para. 105). However, Article 12 (Right to marry) "enshrined" the meaning of marriage as being between a man and a woman. Although a number of CoE member states provide the right to marry for same sex couples, this right did not "flow from an interpretation of the fundamental right as laid down by the Contracting States in the [European Convention of Human Rights (hereafter the European Convention)] in 1950" (*Schalk and Kopf v Austria*, 2010, para. 53). The ECtHR noted that the non-heterosexual marriage is an evolving topic; but states maintain their margin of appreciation in the "timing and introduction of legislative changes" (*Schalk and Kopf v Austria*, 2010, para. 105; Pietro Pustorino, 2014).

In contrast to other CoE and European Union (EU) member states, Italy does not allow same sex couples to marry or to register their partnership.[1] Those who support marriage equality in Italy maintain that the Italian Constitution does not explicitly state that only different sex couples can marry (Associazione Radicale Certi Diritti, 2012). Indeed, Article 29 of Italian Constitution reads: [2]

> *The Republic recognises the rights of a family as a natural society founded by the marriage. The institution of marriage is based on the moral and juridical equality of the spouses within the limits prescribed by law for the family unity*

This view is not shared by those who oppose marriage equality. They maintain that Civil Code Articles 93, 96, 98, 107, 108, 143, 143-bis, 156-bis mention words as "husband" and "wife" indicating the different sex of the spouses. Indeed, in April 2010, the Italian Constitutional Court issued Sentenza 138/2010 (Corte Costituzionale, 2010). The Constitutional Court was referred to by the Trento Court of Appeal, which was discussing a case where requests for marriage banns had been denied. In its decision, the Constitutional Court declared that Article 2 of the Constitution [3]

[1] Same sex marriage: the Netherlands (2001), Belgium (2003), Spain (2005), Sweden (2009), Norway (2009), Portugal (2010), Iceland (2010), Denmark (2012), France (2013), the United Kingdom (2014), Ireland (2015) and Luxembourg (2015). Alternative forms of recognition: Andorra (2005), Austria (2010), Belgium (2000), Croatia (2014), Chezk Republic (2006), Denmark (1989), Finland (2002), France (1999), Germany (2001), Hungary (2009), Iceland (2006), Ireland (2011), Liechtenstein (2011), Luxembourg (2004), Malta (2014), the Netherland (1998), Norway (1993), Slovenia (2006), Sweden (1995), Switzerland (2007), the United Kingdom (2005).

[2] Italian Constitution (entered into force 1 January 1948) reads in Italian, "La Repubblica riconosce i diritti della famiglia come società naturale fondata sul matrimonio. Il matrimonio è ordinato sull'eguaglianza morale e giuridica dei coniugi, con i limiti stabiliti dalla legge a garanzia dell'unita' familiare." (Translation in English from: *Oliari and A and Felicietti and others v Italy*, para B(1).)

[3] Article 2 of Italian Constitution reads "La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo sia nelle formazioni sociali ove si svolge la sua personalita', e richiede l'adempimento dei doveri inderogabili di solidarieta' politica, economica e sociale." (Translation: "The Republic recognises and

safeguards same sex couples, who have the "fundamental right to express their personality in the couple" (Corte Costituzionale, 2010, para. 18; *Oliari and A and Felicietti and others v Italy*, Pending, para. A(1)). However, the Constitutional Court declared inadmissible the challenge to the constitutional legitimacy of Articles 93, 96, 98, 107, 108, 143, 143-bis, 156-bis of the Civil Code, and maintained that the marriage is between two different sex spouses (Corte Costituzionale, 2010, para. a).

In addition, in 2012, the Court of Cassation issued Sentenza 4184/2012 in deciding the case of a marriage contracted abroad that the Italian authorities refused to register (Corte di Cassazione, 2012). The Court of Cassation maintained that the same sex marriage does exist and is valid. However, the couple have no right to register their marriage in Italy, because that act cannot produce legal effect in the Italian order (Corte di Cassazione, 2012, para. 4(3))

Because of the lack of recognition of same sex marriage, a number of sympathetic city mayors have taken the initiative to register marriages contracted abroad by their citizens. However, the well-known constitutionalist Vladimiro Zagrebelsky stressed that is not the task of mayors to overcome the limits of the law, but is the Parliament role to create adequate legislations (Vladimiro Zagrebelsky, 2014). Indeed, in Sentenza 138/2010, the Constitutional Court had called on Parliament to regulate same sex unions (Corte Costituzionale, 2010, para. 8); but it was not until 2014 that Monica Cirinnà, member of the Senate for the Democratic Party (Partito Democratico, PD), was the rapporteur for the bill (Disegno di Legge) to enforce civil partnerships in Italy (Monica Cirinnà, 2014). The law is now in discussion in the Parliament, and the Prime Minister Matteo Renzi pledged on Twitter that the civil unions will be institutionalised (Alessandra Arachi, 2015).

## The two cases

The applications for *Oliari and others v Italy* have been lodged in 2011 by three same sex couples.[4] On the other hand, the applications for *Orlandi and others v Italy* was submitted by six same sex couples, 11 were Italian citizens and one Canadian.[5] The two cases are described in turn.

In the *Oliari* case, Oliari and A are two Italian male citizens in a long term relationship. In 2008, they decided to marry and applied to a marriage banns to the Civil Status Office of the Commune of Trento. As their request was rejected, they challenged the decision before the Trento Tribunal, in maintaining that the Italian Constitution does not prevent same sex couples from marrying. However, the Trento Tribunal rejected the claim in stating that Civil Code required the spouses to be of different sex. Consequently, the applicants raised the same sex marriage issue before the Trento Court of Appeal, which referred the case to the Constitutional Court (*Oliari and A and*

guarantees the inviolable rights of the person, as an individual and in social groups where personality is expressed, as well as the non-derogable duties of political, economic and social solidarity." See *Oliari and A and Felicietti and others v Italy*, *supra* note 2, at para B1).

[4] Oliari and A, Felicetti and Zappa, and Perelli Cippo and Zacheo.

[5] Orlandi and Mortagna, DP and GP lodged on 20 April 2012, Isita and Bray lodged on 20 April 2012, Goretti and Giartosio, Rampinelli and Dal Molin lodged on 6 July 2012, Garullo and Ottocento lodged on 11 Setember 2012.

*Felicietti and others v Italy*, Pending, para. A(1)). The Italian Constitutional Court decided on the case in Sentenza 138/2010, discussed above. Felicetti and Zappa, two male Italian citizens, who applied for marriage banns, were also rejected a few months after. The applicants did not follow the remedy provided by the Civil Code, because of the Constitutional Court decision of 2010. Finally, Perelli Cippo and Zacheo are two male Italian citizens; who requested marriage banns, also rejected. They then applied to the Milano Tribunal the following year, again unsuccessfully. The applicants did not pursue further with their recourses due to the 2010 Constitutional Court decision (*Oliari and A and Felicietti and others v Italy*, Pending, para. A(2–3)).

The applicants claim they have been discriminated against for their sexual orientation invoking Article 8 (Right to respect for private and family life) and 12 (Right to marry), in conjunction with Article 14 (Prohibition of discrimination) of the European Convention. In considering the claim, the ECtHR asked three questions to the parties: should the applicants have the possibility to have their relationship recognised by the law? In what way are they disadvantaged by the lack of recognition? Have they suffered discrimination on the base of their sexual orientation (*Oliari and A and Felicietti and others v Italy*, Pending, p. 6)?

In the *Orlandi* case, first, Orlandi and Mortagna are two female Italian citizens, in a long term relationship. In 2009, Mortagna went in Toronto, Ontario, Canada for work and the two married there. When in 2011, Mortagna went back in Italy at the end of her contract, the two women asked the Commune of Ferrara to register their Canadian marriage; but the Italian authorities rejected the application (*Orlandi and others v Italy*, Pending, para. A(1)). Second, DP and GP are a same sex couple and they cohabitate in Italy. The two went in Toronto in 2011 for marring and asked the Commune of Peschiera Borromeo to register their marriage, but their application was rejected (*Orlandi and others v Italy*, Pending, para. A(2)). Third, Isita and Bray are an Italian and a Canadian citizen, they are both male and they met in Italy; they married in Vancouver, Canada and live together there. In 2011, they requested the Commune of Napoli to register their union, but their application was rejected (*Orlandi and others v Italy*, Pending, para. A(3)). Fourth, Goretti and Giartoso are two male Italian citizens in a relationship since 1995. In 2008, the two married in Berkley, California, United States, and asked the Commune of Roma to register their union, again unsuccessfully (*Orlandi and others v Italy*, Pending, para. A(4)). Fifth, Rampinelli and Dal Molin are two male Italian citizens in a relationship since 1995. In 2007, Rampelli moved to the Netherlands for work, the couple married in Amsterdam, and consequently also Dal Molin moved to the Netherlands. In 2011, they asked the Commune of Mediglia and Milano to recognise their union. The request was rejected by Commune of Mediglia and Commune of Milano did not respond (*Orlandi and others v Italy*, Pending, para. A(5)). Finally, Garullo and Ottocento are two male Italian citizens who married in The Hague, the Netherlands. They asked the Commune of Latina to recognise their marriage, the application was rejected and the applicants challenged the decision at the Latina Tribunal, which decided that their wedding was not valid (*Orlandi and others*

*v Italy*, Pending, para. A(6)). The applicants appealed to the Court of Cassation which issued Sentenza 4184/2012, discussed above.

Similarly to the *Oliari* case, the applicants invoked the violation of Articles 8, 12 in conjunction with Article 14. They claimed discrimination on the grounds of their sexual orientation because Italian authorities did not register their marriage contracted abroad, and they were not able to marry or have their relationships recognised in Italy. The ECtHR asked the parties to answer four questions: does the refusal to register their marriage interfere with the private and family life of the applicants? Is the impossibility of having their relationships recognised an interference in the private and family life of the applicants? In what way they are disadvantaged by the lack of recognition? Have they suffered discrimination on the base of their sexual orientation (*Orlandi and others v Italy*, Pending, pp. 7–8)?

**Third party comments**

In his book, *The global right wing and the clash of world politics*, Clifford Bob (2012) highlighted that in the analysis of international global issues, conservative movements are often overlooked. In particularly, he argued that LGBT (lesbian, gay, bisexual and transgender) organisations have sometimes failed in advocating their issues at the United Nations, because of strong conservative organisations interested in preventing them from achieving their goals (Clifford Bob, 2012, p. 70). In the two case studies, a pro-LGB group and a conservative group have submitted third parties interventions. Indeed, Robert Wintemute, on behalf of six NGOs – FIDH (*Fédération Internationale des ligues des Droits de l'Homme*), AIRE Centre (Advice on Individual Rights in Europe), ILGA-Europe (European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association), ECSOL (European Commission on Sexual Orientation Law), UFTDU (*Unione forense per la tutela dei diritti umani*), and LIDU (*Lega Italiana dei Diritti dell'Uomo*) – submitted some written comments in support of the 18 applicants of both *Oliari* and *Orlandi* cases, before the second section of the ECtHR. Similarly, Roger Kiska, on behalf of Alliance Defending Freedom (ADF), submitted a third party intervention for *Orlandi* case, before the second section of the ECtHR. The two documents are analysed in turn.

In his comments, Wintemute reviewed the CoE and EU law in highlighting several points. First, limiting particular rights to married couples without providing same sex couples to access marriage is indirect discrimination; therefore, European states should ensure same sex couples some form of legal recognition (Robert Wintemute, 2014, para. 8–13). Second, excluding same sex couples from particular rights connected with marriage is not justifiable (Robert Wintemute, 2014, para. 14-15). Moreover, there is a consensus among CoE member states in providing some form of recognition of same sex couples (Robert Wintemute, 2014, para. 16-18). Indeed, the ECtHR found that states that provide citizens with alternative institutions for unmarried couples make these institutions available for same sex couples (*Villianatos and others v Greece*, 2013, para. 92). Wintemute also reviewed the jurisprudence of numerous

courts in highlighting that these courts have required states to create an alternative to marriage or to make marriage accessible for same sex partners. Some examples are high courts in Canada, some high courts in the United States, the Constitutional Courts in South Africa, Colombia, Portugal and Austria, and the Supreme Courts in Brazil and Mexico (Robert Wintemute, 2014, para. 19-33).

As stated above the comment is in support of the applicants for both *Oliari* and *Orlandi* cases, and these above comments can be useful for both cases. However, the *Orlandi* case raised private international law issues, and therefore Wintemute addressed this theme in the final page of the communication. He stated that same sex marriages contracted abroad could be registered as civil partnership in countries that not foresee marriage equality (Robert Wintemute, 2014, para. 37-38). In addition, Wintemute highlighted that in 2014, the European Parliament of the EU adopted a resolution for proposing a mutual recognition of the civil status across EU members, in order to reduce the barriers for the freedom of movement of LGB individuals (A7-0009/2014, 2014, para. 4(H)). Wintemute concluded by saying that "[t]here is a growing consensus in European and other democratic societies that same-sex couples must be provided with some means of qualifying for rights or benefits attached to marriage" (Robert Wintemute, 2014, para. 39).

Kiska on behalf of ADF submitted a third party intervention only for the *Orlandi* case. Following the directive of ECtHR, the intervention did not address the specific facts of the case; but only discussed the definition of marriage (Roger Kiska, 2014, para. 1). First, Kiska maintained that for the ECtHR marriage rights are encompassed in the margin of appreciation of the member states; because, under the principle of subsidiarity, "local authorities are better suited to assessing the cultural, legal and social elements of their own nation than the [ECtHR]" (Roger Kiska, 2014, para. 3-4). Second, Kiska affirmed that the ECtHR has stated in more than one occasion that neither Article 12 nor Article 8 can be interpreted to cover the right to same sex marriage (Roger Kiska, 2014, para. 5-9). Third, Kiska pointed out that, as long as there is a trend in practising some forms of recognition of same sex relationships, there is also a trend among numerous nations in issuing special provisions that define marriage as only between different sex partners (Roger Kiska, 2014, para. 10-12).

Kiska's position on the issue is clearly conservative because of the use of the inverted commas to refer to the same sex marriage, i.e. same sex "marriage". The focal point of the author is that states have an interest in institutionalising marriage as a tool to protect the unity of the family and the wellbeing of the children. Because of same sex couples cannot naturally procreate, the author compares same sex couples to a couple of two "[n]on-romantic best friends" (Roger Kiska, 2014, para. 14).

Finally, Kiska listed the social harm in legalising same sex marriage. These aspects are briefly mentioned here, and they are analysed more in-depth later in the paper. First, marriage equality prejudices the religious liberty of some faiths (Roger Kiska, 2014, para. 17-20). Second, marriage equality will not promote a "healthy marriage culture" (Roger Kiska, 2014, para. 21). Third, marriage equality will harm the healthy

rearing of the children born in same sex marriages (Roger Kiska, 2014, para. 22-26). Kiska concluded that because no intergovernmental courts have recognised marriage equality, the ECtHR should continue to follow this line (Roger Kiska, 2014, para. 27).

**Considerations on the third party comments and intervention**

Both nongovernmental documents focus on discussing the validity of same sex marriage or at least the recognition of same sex relationships, but both lack an in-depth analysis of private international law issues. However, before discussing the private and international law issues raised by the *Orlandi* case, the two documents are briefly discussed.

Wintemute put considerable effort in displaying examples of international jurisprudence and CoE jurisprudence to validate the assumption that there is a growing trend in regulating same sex relationships. He concluded his comments by affirming that there is a general consensus both among European and non-European democracies to provide same sex couples "with some means of qualifying for rights or benefits attached to marriage" (Robert Wintemute, 2014, para. 39) This is to say that Wintemute did not focus his comment on marriage equality; rather, he focused on marriage equality and other forms of recognition for same sex couples. Wintemute's strategy is understandable.

Countries enforce different forms of same sex couples recognition. In some countries non-heterosexual couples are entitled of some rights and benefits as a heterosexual *de facto* couple or as heterosexual civil partners; while, some countries enforce a "separate but equal" system (Eskridge, 2013, p. 854; Evan Wolfson, 1998), in which civil partnerships are only available for same sex couples, and marriage only for opposite sex couples (Kees Waaldijk, 2005, p. 38; Nicola Barker, 2013, p. 50). Therefore, advocating for lower forms of recognition can be a political compromise (Merin, 2002, pp. 62–63), or an intermediate step toward marriage equality (Eskridge, 2013, p. 880). However, reaching just civil partnership rights is still discriminatory (Nicola Barker, 2013, p. 41; Nigel Christie, 2001, p. 320; Bruce MacDougall, 2000, pp. 237–238), and full equality is possible only when same sex and different sex couples have equal access to both civil partnership and marriage. In addition, one can also ask whether reaching only a lower form of recognition rather than marriage would be accepted by the applicants of the case study.

Kiska intervention also has a major problem because it is based on the assumption that Italy recognises same sex unions, as he stated that:

> *[W]here states, like Italy, have already conferred a legal status upon same sex couples similar to marriage through recognised same sex unions, a state is therein not obligated to redefine marriage altogether (Roger Kiska, 2014, para. 8).*

Finally, on the private and international law issues, both the documents omit to properly address the question. Wintemute confined his comments to one paragraph.

Kiska did not express particular comments on private and international law issue, explicable by the fact that his mandate was to discuss the definition of marriage.

## Private and international law

In the application of the *Orlandi* case, the relevant Italian private international law is Law 218 of 31 May 1995, *Riforma del sistema italiano di diritto internazionale privato (1/circ)*, Articles 16-17-28-29:

> *Article 16 "i) Foreign law shall not be applied if its effects are contrary to public order. ii) In such cases, the law according to other connecting criteria provided for in the same law shall apply. In absence of any such provision, Italian law shall apply."* [6]
> *Article 17 "The following provisions are without prejudice to the prevalence of Italian laws which in view of their object and scope shall be applied notwithstanding reference to the foreign law."* [7]
> *Article 28 "A marriage is valid, in relation to form, if it is considered as such by the law of the country where it is celebrated or by the national law of at least one of the spouses at the time of the marriage or by the law of the common state of residence at the time of the marriage."*[8]
> *Article 29 "i) Personal relations between spouses are regulated by the national law common to both parties. ii) Personal relations between spouses who have different nationalities or several nationalities common to both are regulated by the law of the state where matrimonial life is most prevalent."*[9]

The four articles can be dived in two groups, Article 16 and 17 refer to the notion of public order, while Article 28 and 29 are focused on the validity of marriage contracted abroad. The two groups of articles are discussed separately.

## Public order

The notion of public order has been used in other occasions within LGB adjudications at the ECtHR. Exemplary is the landmark decision of *Dudgeon v the United Kingdom,* where the ECtHR admitted that "the law should not intervene in matters of private moral conduct more than necessary to preserve public order" (*Dudgeon v the United Kingdom*, 1981, para. 11). That is to say that, in the ECtHR jurisprudence on LGB rights, the notion of public order has to be used in association with the notion of

[6] Articolo 16: "1. La legge straniera non è applicata se i suoi effetti sono contrari all'ordine pubblico. 2. In tal caso si applica la legge richiamata mediante altri criteri di collegamento eventualmente previsti per la medesima ipotesi normativa. In mancanza si applica la legge italiana." (English translation from *Orlandi and others v Italy*, *supra* note 1, at para B(1).)
[7] Articolo 17: "1. È fatta salva la prevalenza sulle disposizioni che seguono delle norme italiane che, in considerazione del loro oggetto e del loro scopo, debbono essere applicate nonostante il richiamo alla legge straniera." (English translation from *Orlandi and others v Italy*, *supra* note 1, at para B(1).)
[8] Articolo 28: "Il matrimonio è valido, quanto alla forma, se è considerato tale dalla legge del luogo di celebrazione o dalla legge nazionale di almeno uno dei coniugi al momento della celebrazione o dalla legge dello Stato di comune residenza in tale momento." (English translation from *Orlandi and others v Italy*, *supra* note 1, at para B(1).)
[9] Articolo 29: "1. I rapporti personali tra coniugi sono regolati dalla legge nazionale comune. 2. I rapporti personali tra coniugi aventi diverse cittadinanze o più cittadinanze comuni sono regolati dalla legge dello Stato nel quale la vita matrimoniale è prevalentemente localizzata." (English translation from *Orlandi and others v Italy*, *supra* note 1, at para B(1).)

necessity. To understand the notion of public order and necessity, two aspects need to be taken in consideration: on one hand, there is the right of same sex couples to have their marriages contracted abroad recognised by the Italian authorities; and on the other hand, there is the interest of Italian society to maintain public order. To study the balance between these two interests, the ADF' third party intervention is analysed. As mentioned above, Kiska maintained that marriage equality can harm the society in promoting an un-healthy marriage culture. Children raised in LGB-parents families would not be healthy reared, with a consequent harm on the welfare. Finally, marriage equality would prejudice the religious liberties of some religious groups (Roger Kiska, 2014, para. 17–20).

In regard of the first point, what Kiska means by "healthy" and "culture" is not clear. Looking from a global perspective, it is not easy to find a definition of traditional marriage because marriage has a meaning that shifts in the time and in the space (Nigel Christie, 2009, pp. 94–96; Scot M. Peterson and Iain McLean, 2013, pp. 48–78). For example, many societies have group marriage, and cultures differ in their definition of incest (Carlos A. Ball, 2014, pp. 31–35; Abraham Rosman, 2009, pp. 99–105). As well, Europe is a continent characterized by a large number of different religions, tongues, dialects and cultures. Moreover, the idea of the Western nuclear family – composed of two different sex parents and children – has been deeply challenged by several phenomena that occurred in the 20$^{th}$ century. These include the legalisation of divorce; an increase of immigrant families coming from non-Western contexts – whose households encompass parents, grandparents, and cousins; and finally, the increasing trend of unrelated singles sharing houses for financial reasons (Abraham Rosman, 2009, pp. 134–135).

On the second point, Kiska does not even acknowledge different views; this omission decreases the convincing power of his argument. In Kiska's view, the well-being of children is to be raised by "two biological parents in a low-conflicting marriage"; thus, allowing same sex marriage is a threat to the state and would costs "taxpayers billions of dollars in social and welfare benefits" (Roger Kiska, 2014, para. 15). However, he omitted to mention that there are studies that claim the opposite (Carlos A. Ball, 2014; M. V. Lee Badgett, 2009). In particular, the ECtHR highlighted that "the scientific community – especially child-care specialists, psychiatrists and psychologists – [is] divided over the possible consequences of children being brought up by one or more homosexual parents" (*Fratté v France*, 2002, para. 3). Moreover, in response to the claim of costs for the taxpayers; it can be said that when LGB people are not allowed to marry and to form a family, they are more likely to weight in the state benefits (OLGA, Retrieved 6 May 2015). Indeed, Wilson (2013, 91) explained that when countries redefine marriage in encompassing also LGB couples, these countries can contain or reduce "spending on citizens who could be cared for by intimates beyond the heterosexual nuclear family model."

On the third point, Kisk highlighted an important issue, which is the freedom of religious beliefs. Kiska presented some examples within the ADF's casework. In particular, he

cited some cases where individuals with faith beliefs that do not accept homosexuality have been fined, or dismissed from employment because of their attitude towards homosexuality (Roger Kiska, 2014, para. 18–19). Finding a compromise solution between marriage equality and freedom of religious practice is a theme that needs more discussion, especially in academia (Scot M. Peterson and Iain McLean, 2013).

In sum, of the three arguments proposed by Kiska, the first is inconsistent in its definition. Kiska failed to explain to which culture he was referring to, and what he was meaning with “healthy marriage”. The second argument lacks in rigor because Kiska proposed only studies to support his view. The third argument is credible, and the cases that Kiska raised are relevant. A religious person should not be required to promote homosexuality or a Christian counsellor should not be fired because they decline to assist a lesbian woman, and other similar cases (Roger Kiska, 2014, para. 18–19). There is clearly the need to find a compromise, but banning same sex marriage is not a compromise, it is a solution all in favour of some religious groups.

One of the most cogent arguments is that an Italian Judge has already pronounced on public order and same sex marriages. The recognition of marriages contracted abroad is a theme highly debated in many Italian cities: Milano, Roma, Grosseto, Pisa and Napoli. In particularly, in Grosseto, Bucci and Chigiotti are two male citizens married in New York, in 2012 (Redazione online, 2015). The two asked the authorities of Commune of Grosseto to recognise their union, but this application was rejected. Bucci and Chigiotti referred then to the Grosseto Tribunal to challenge the decision (Giuseppina Vassallo, 2014). In the decision, Ottati Judge stated same sex marriage could be register in the Commune of Grosseto because the marriage produce effect in the country where it was celebrated, and this marriage is not a threaten to the public order. [10]

## Marriage validity

In 1978, the Hague Convention on the Celebration and Recognition of the Validity of Marriages declared in its Article 9 that a marriage is valid under the law of the state in which is celebrated (“Hague Convention on Celebration and Recognition of the Validity of Marriages,” n.d.; Willis L. M. Reese, 1979). To date, the conventions has been signed by six countries,[11] and ratified by only three of them.[12] This lack of agreement among states on marriage equality has negative effects on the life of same sex couples; in particular, the lack of harmonization among EU countries effects on the freedom of movement of European citizens (Elpeth Guild, 2001). Furthermore, same sex couples suffer discrimination when compared with opposite sex couples, when one of the two partners is not a European citizen. These inconsistencies will be removed if EU countries comply with the European Parliament resolution A7-0009/2014, on the recognition of the civil status of the European citizens and residents. As of now, this

[10] In Italian: “il matrimonio in oggetto è produttivo di effetti giuridici nell'ordinamento dello Stato dove è stato celebrato e non è contrario all'ordine pubblico;” in Giudice Ottati *Tribunale di Grosseto, Ordinanza 3-9 Aprile 2014* (2014) at para 4(e).
[11] Australia, Egypt, Finland, Luxembourg, the Netherlands, and Portugal.
[12] Australia, Luxembourg, and the Netherlands.

harmonization is not institutionalised and therefore, to better understand the issue, the paragraph proposes a case by case study of the applicants' situations in the *Orlandi* case.

In the *Orlandi* case, the six couples present different situations. Five combinations arise: first, two couples have no connections with the non-EU country where they married. DP and GP are Italian citizens, and married in Canada. Goretti and Giartoso are Italian citizens, and they married in California. But no one of them lived in the country were they married. Second, Garullo and Ottocento, have no connections with the EU country where they married, as they are Italian citizens who married in the Netherlands; but never resided there. Third, Orlandi and Mortagna are Italian citizens and only one of the applicants has had a connection with the non-EU country where they married, as only Mortagna lived in Canada, where they married. Fourth, Rampinelli and Dal Molin are Italian citizens and they both lived in the EU country were they married. Rampelli moved in the Netherlands for work, the two got married in Amsterdam and consequently also Dal Molin moved to the Netherlands. Finally, Isita and Bray are one Italian and one Canadian citizen, who lived in the non-EU country where they married, which is also the country of citizenship of one of the two.

According to Article 28 of law 218/1995, the marriages of the six couples would be valid in the Italian system. Indeed, Articles 28 take in consideration three aspects: the law of the country where the marriage is celebrated, the law of the country of nationality of one of the spouses, the law of the country of residence at the time of marriage. In detail, the first four couples[13] meet only one of the aspects, because they do not have any other connection with the countries where they married. Within this group, Orlandi and Mortagna are in an intermediate situation, because at least one of the applicants lived in the country where they married. Second, Rampinelli and Dal Molin meet two of the requirements, because in addition to marry in the Netherlands, they also lived there. Finally, Isita and Bray meet all the requirements of Article 28. Looking also at Article 29 of law 218/1995, this says that personal relations between spouses of same nationalities are regulated by the law of the common country; but if the spouses have different nationalities, then the persona relations are "regulated by the law of the state where matrimonial life is most prevalent." In the light of Articles 28 and 29, Isita and Bray have a privileged position. They meet all the requirements of Article 28 and because the two have different citizenships, and their matrimonial life was in Canada, Canadian law should be used to regulate the personal relations between the spouses. If Italy complies with the European Parliament resolution A7-0009/2014, Garullo and Ottocento, and Rampinelli and Dal Molin's marriages would have a privileged position because they married in an EU country. Finally, although the other couples' marriages can be considered valid, it is understandable that the Italian authorities have been resistant: the couples have a weak relation with the country where they got married and they married in non-EU countries.

[13] DP and GP, Goretti and Giartoso, Garullo and Ottocento.

## Possible outcomes of *Orlandi* case

Both case studies raised one main issue: the Italian authorities' denial to provide legal recognition of same sex couples. However, *Oliari* raised the issue of equality before the law; while *Orlandi* raised private and international law issues. FIDH, AIRE Centre, ILGA-Europe, ECSOL, UFTDU, and LIDU submitted a single third party communication for both cases; probably because the questions raised by the ECtHR were more focused on the prohibition of discrimination, and on the right to protection of the private life, rather than private and international law issues. In any case, the third party communications did not address crucial aspect of private international law. The analysis proposed in this paper shows that Articles 28 and 29 of law 218/1995 provide the tool to encompass same sex marriages contracted abroad in the Italian system; especially when one of the two spouses is not an Italian citizen.

If the applicant in the *Orlandi* case were different sex couples they would have their marriages registered in Italy, because it appears that they meet one or more requirements to make their marriages valid. Indeed, it is not the validity of their marriages to be under discussion. This is because already in Sentenza 4184/2012, the Court of Cassation did accept the validity of a same sex marriage contracted abroad. The object of the discussion is the legal consequences of the same sex marriages contracted abroad in the Italian system.

To prevent the registration of same sex marriages contracted abroad, Italian authorities can raise the public order argument. However, the notion of public order needs to be considered in combination with the notion of necessity, and this paper showed that the requirement of necessity is not strong enough to prevent the recognition of same sex marriages contracted abroad. In particular, the strongest argument is that, Ottati Judge has already affirmed in 2014 that same sex marriages contracted abroad are not contrary to the Italian public order.

However, the recognition of same sex marriages contracted abroad is still a controversial topic in Italy. In the past few years, some city mayors have taken the initiative to register such marriages. These decisions have been criticised by some politicians;[14] and other have requested that the situation be clarified.[15] The ECtHR decision on the *Orlandi* case, or further development on the Italian law, should clarify the position of the same sex couples married abroad.

If *Orlandi* will result in a negative adjudication for the applicants, the decision of recognising same sex marriages contracted abroad will be left to the Italian authorities. If *Orlandi* adjudication is positive for the applicants, this will have both short term and long term consequences. A short term consequence would be a further discrimination.

[14] For example, in 2014, the Ministry of the Interior Angelino Alfano issued a circular in asking the prefects to cancel the same sex marriages registered in several districts, ("Ecco il testo della circolare con cui Alfano chiede di cancellare le trascrizioni dei matrimoni gay," 2014).

[15] Emilio Bonifazi, Grosseto's mayor, asked the competent authorities to issue a clear norm on how to act on the registration of same sex marriages contracted abroad, it is not possible to leave the registration to the discretional decision of numerous mayors, tribunals and prefect. (Redazione online, 2015).

Indeed, only wealthy LGB couples could marry, that is only those who are able to go abroad and marry. Those who do not have this financial capability would still be excluded by the marriage equality.[16] In addition, different sex couples could marry in their home country or wherever they want; whereas same sex couples could only marry abroad. However, on the long term, there is the hope that the recognition of same sex marriages contracted abroad will slowly open the path to the institutionalisation of marriage equality in Italy and in other CoE countries.

## Conclusions

This article presented two communications to the ECtHR, *Oliari v Italy* and *Orlandi v Italy.* In presenting these case studies, the article aimed to clarify some aspects of the same sex marriage issues that have been raised in Italy in the past years. Two claims have been highlighted. On one hand, there is the claim of some Italian citizen to be able to marry in their country of nationality; on the other hand, there is the claim of some Italian and non-Italian citizens to have their marriages contracted abroad recognised in Italy. In detail, the article analysed the notion of public order and the Italian private international law.

To facilitate the analysis, the paper considered the third party interventions submitted from a group of pro-LGB rights NGOs and from a pro-traditional family NGO. The analysis shown that pro-LGB rights NGOs issued a single document for the two cases, which although have several differences. Despite the fact that it cannot be claimed that the submission of one single document will jeopardise the result of the case for the applicants; the submission of two separate documents would have probably meant a more adequate analysis of the private international law issues.

In conclusion, many authors argue that the recognition of same sex couples will be eventually achieved, at least in the so-called Western world. Italy is an example of particular cultural resistance in recognising the rights of its LGB citizens and residents, arguably because of the Christian Catholic tradition. Although full marriage equality is still far from a reality, there is the hope that the institutionalisation of civil partnership, in conjunction with the recognition of same sex marriages contracted abroad, can be an intermediate step towards the full recognition of the marriage equality.

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[16] Christie made a similar point in the New Zealand contest, before the institutionalisation of marriage equality (Nigel Christie, 2009, pp. 82–83).

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## Post Scriptum

On July 2015, the ECtHR decided on the *Oliari* case. First, the ECtHR reiterated that same sex couples are just as capable as different sex couples to have stable and committed relationships, and therefore they need legal recognition of their relationships. Second, the ECtHR acknowledged a trend both in Europe and in the Americas and Australasia in providing legal recognition for same sex couples. Finally, the ECtHR recognised that the highest judicial organ in Italy (the Constitutional Court) has already called the Parliament to rule on civil partnership acts, but the legislators have repeatedly failed in taking in consideration such recommendations. In conclusion, because Italy have not produced convincing reasons of public interest against the applicants' benefits in having legally recognised their relationships, the ECtHR deemed that Italy has failed to fulfil its positive obligations to protect the right to family life of the applicants.