NEW VOICES

RECOGNITION IN ITALY OF SAME-SEX MARRIAGES CELEBRATED ABROAD: THE IMPORTANCE OF A BOTTOM-UP APPROACH

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This paper aims to challenge the traditional concept of marriage, as union between persons of opposite-sex, which until now has underlain the Italian policy of registration of same-sex marriages celebrated abroad and that the recent Italian law introducing civil unions for same-sex couples has not set aside completely. To this end, this paper explores the interplay of rules on EU free movement of persons and human rights and the recognition of a legal status created abroad. In a situation where the (national and supranational) legal framework fails to address all the problems, a bottom-up approach fuelled by societal change and its reflection in increasing litigation could be decisive. In fact, this kind of approach could lead to solutions which do not always fall into step with the normative context, but which is equally important in order to raise awareness of the need to eradicate any discrimination against same-sex couples.

Keywords: Marriage, same-sex, free movement of persons, right to respect for private and family law, Italy, recognition.

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I. Challenging the Traditional Concept of Marriage as a Union Between Different-Sex Persons

On May 11th this year, the Italian Parliament passed a law introducing civil unions for same-sex couples (Law 2016, no 76).[1] The adoption of a specific legal framework providing for the recognition and protection of same-sex unions in Italy could no longer be postponed, especially after the Strasbourg Court (ECtHR), in *Oliari and Others v Italy*,[2] had found that the latter had violated article 8 of the European Convention on Human Rights (ECHR) failing to recognize and to protect same-sex unions in its national legal system.

The new law does not extend the right to marry to same-sex couples, but at least provides them with many rights previously reserved to married couples (e.g. rights related to social welfare, to tax law, to labour law, to migration law, etc). The main difference between marriage (for different-sex couples) and civil union (for same-sex couples) remains that a child born during a civil union is not a child of the couple, but only a child of the biological parent. Moreover, the new law explicitly excludes same-sex couples from the possibility of jointly adopting a child, while it does not provide anything with regard to stepchild adoption (i.e, the adoption by one partner of the other same-sex partner's child) which – although with great difficulty – is beginning to be recognized by the Italian courts. Furthermore, the sole fact that the institution of marriage is still reserved to different-sex couples and is not open to same-sex couples might be considered discriminatory in itself and might constitute an obstacle to the free movement of same-sex couples.

It should be clarified, from the outset, that the new Italian law on civil unions does not address in detail the issue of recognition in Italy of same-sex marriages concluded abroad. Rather, it delegates the regulation of this subject to the Italian Government in accordance with the principle that the Italian regulation on civil unions will be applicable to same-sex couples who

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1 Legge 20 Maggio 2016, no 76, Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze, Italian Official Journal no 118 of 21 May 2016.

2 *Oliari and others v Italy*, Apps nos 18766/11 and 36030/11 (ECtHR, 21 July 2015).

have celebrated a marriage, or a civil union, or a comparable form of partnership abroad. This implies that a same-sex marriage celebrated abroad will only produce the effects of a civil union in Italy with the consequent downgrading of the couple's rights.

The aim of this paper is not to analyse the specific provisions of the Italian law on civil unions. Rather, the paper aims to challenge the traditional concept of marriage, as a union between persons of opposite-sex, which until now has underpinned the Italian policy of registration of same-sex marriages celebrated abroad and still constitutes the rationale of the new Italian law on civil unions.

To this end, I will explore the interplay of rules on freedom of movement of persons and human rights on the recognition of civil status records. First of all, in Section II, I will pay attention to the principle of non-discrimination and to the rules relating to the free movement of persons within the territory of EU Member States as enshrined in articles 18 and 21 of the Treaty on the Functioning of the European Union (TFEU). Thus, I will assess the extent to which those principles represent a real duty on every EU Member to recognize the family status created in another Member State. Secondly, in Section III, I will analyse the ECtHR's case law which established that a status validly created abroad might be entitled to protection under human rights law and, in particular, under the right to respect for private and family life as covered by article 8 ECHR. It is not evident whether this case law might also be applied to ensure an automatic recognition of a same-sex marriage celebrated abroad.

In Section IV, I will examine the evolution of recent Italian case law relating to the Italian policy of registration of same-sex marriages celebrated abroad. I can anticipate that the number of judicial decisions in favour of the recognition of same-sex marriages concluded abroad is limited. However, some openings can be identified in this case law and their importance is shown by the circumstance that they convinced more and more same-sex couples to seek the recognition of their marriage celebrated abroad, and to challenge the refusal to record through legal action.

The increasing litigation certainly reflects the societal evolution and, together with other signals that I will explore in Section V, shows that the way same-sex is perceived in Italy is gradually changing.

In my opinion, even after the adoption of the recent Italian law on civil unions, the (national and supranational) legal framework fails to solve all the problems. Nonetheless, in Section VI, I will conclude that the results achieved through this paper show that in order to eradicate any discrimination against same-sex couples, a bottom-up approach generated by individuals' behaviours and their attempts to seek recognition of their rights, could force the current normative context and push towards the gradual erosion of the traditional concept of marriage as a union between different-sex persons.

II. THE EU AND THE FREE MOVEMENT OF SAME-SEX COUPLES

The development of EU law is the first field that puts pressure on the traditional concept of marriage.

The European Union is not endowed with specific competence in substantive family matters. Indeed, a dedicated legal basis on family matters is only provided in the field of judicial cooperation in civil matters. In particular, EU institutions, operating under article 81(3) TFEU (and previously, on the corresponding article 67 TEC), may establish measures concerning family law with cross-border implications. The main instruments through which those private international law competences have been implemented are represented by the Brussels II Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters,[3] and the Rome III Regulation concerning the law

[3] Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 1347/2000 [2003] OJ L338/1.

applicable to divorce and legal separation.[4] However, the lack of a dedicated legal basis for substantive family law is not contradicted by the regulation concerning family reunification which has been elaborated upon in light of the wider goal of the free movement of persons and has allowed the European Court of Justice (ECJ) to rule on family matters and issues related to same-sex couples.

With particular reference to the rules on the keeping of civil status records, the ECJ has held on several occasions that those rules fall within the competence of the individual Member States. However, the ECJ has also stated that the exercise of that competence by the Member States must comply with EU law and, in particular, should not hinder the principle of non-discrimination and the rules relating to the free movement of persons as enshrined in articles 18 and 21 TFEU.[5]

In accordance with this view, the ECJ considered that the obligation to comply with those objectives may imply that personal status – at least in some cases – should not be questioned by the authorities of another Member State.

In particular, in *Garcia Avello*[6] and in *Grunkin and Paul*[7] the ECJ held that the failure to recognize a surname legally acquired and registered in another Member State is liable to cause serious inconvenience for the Union citizen concerned in so far as it constitutes an obstacle to freedom of movement that

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4 Council Regulation (EU) 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10.

5 On the topic, see Heinz-Peter Mansel, 'The Impact of the European Union's Prohibition of Discrimination and the Right of Free Movement of Persons on the Private International Law Rules of Member States – With Comments on the Sayn-Wittgenstein Case before the European Court of Justice' in Katharina Boele-Woelki et al (eds), *Convergence and Divergence in Private International Law, Liber Amicorum Kurt Siehr* (Eleven International Publishing-Schulthess 2010) 291 ff.

6 Case C-148/02, ECLI:EU:C:2003:539, *Carlos Garcia Avello v Belgian State*.

7 Case C-353/06, ECLI:EU:C:2008:559, Stefan Grunkin and Dorothee Regina Paul.

could be justified only if it was based on objective considerations and was proportionate to the legitimate aim pursued.[8]

The principle of non-discrimination has proven particularly effective with reference to the rights of same-sex couples who have entered into a registered partnership. In particular, in *Tadao Maruko*,[9] in *Jürgen Römer*[10] and in *Frédéric Hay*,[11] the ECJ dealt with the interpretation of Directive 2000/78[12] whose purpose is to combat certain forms of discrimination in the areas of employment and occupation, including that on grounds of sexual orientation, with a view to putting the principle of equal treatment into effect in the Member States.

In all these three cases, according to the ECJ, the assessment of discriminatory treatment was subject to the condition that the person who entered into a same-sex registered partnership in the Member State concerned could be considered in a legal and factual situation comparable to that of a married person. According to the ECJ, the assessment of that comparability must not be carried out in a global and abstract manner and must not consist of examining whether national law generally and comprehensively treats registered partnership as legally equivalent to marriage. Rather, the assessment must be carried out in a specific and concrete manner in the light of the right concerned. It is evident from the

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8 Considerations of public policy such as the prohibition of title of nobility or the need to respect the national identity of a Member State, which includes protection of a State's official national language, have been considered legitimate objectives capable of justifying restriction of the recognition of a surname and, thus, to the freedom of movement and residence enjoyed by citizens of the Union. See Case C-208/09, ECLI:EU:C:2010:806, *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*; Case C-391/09, ECLI:EU:C:2011:291, *Malgožata Runevič-Vardyn, Łukasz Paweł Wardyn*.

9 Case C-267/06, ECLI:EU:C:2008:179, Tadao Maruko v Versorgungsanstalt der deutschen Bühnen.

10 Case C-147/08, ECLI:EU:C:2011:286, Jürgen Römer v Freie und Hansestadt Hamburg.

11 Case C-267/12, ECLI:EU:C:2013:823, Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres (ECJ 12 December 2013).

12 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

reasoning of the ECJ that the right of every EU Member State to decide whether the registered partnerships have to be treated as equivalent to marriage remains unaffected.

However, the case law concerning the interpretation of Directive 2000/78 that I just mentioned, deals with EU social policy and in particular with situations where the parties did not exercise their right of free movement within the European Union. In contrast, in my view, when the right to freedom of movement is at stake, it is more difficult to admit that EU Member States hold an absolute discretionary power to decide whether (and to what extent) to recognize the effects of a same-sex registered partnership or even of a same-sex marriage celebrated in another EU Member State.

In fact, the refusal to recognize the status created in another Member State could represent an obstacle to the free movement of persons and thus would hinder one of the fundamental goals of EU integration. For this reason, it should be stressed that it is possible to affirm the existence of a real duty on each EU Member to recognize the personal or family status created in another Member State.[13] However, the extent of such a duty requires clarification. In my opinion, it seems reasonable that some authors specify that the requested Member State may refuse to recognize the status created abroad in case the relevant situation has no connection to the State of origin or in the case of a breach of a concerned State's public policy.[14] In fact, I think that this approach is in line with the ECJ's case law on mutual recognition of surnames duly acquired in another Member State to which I referred above. In that context, the ECJ has warned that an obstacle to the freedom of movement of persons might be justified where it is based on objective considerations and is proportionate to the legitimate objective of the

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[13] See, eg, Roberto Baratta, 'Problematic elements of an implicit rule providing for mutual recognition of personal and family status in the EC' [2007] IPRax 4; Laura Tomasi, *La tutela degli* status *familiari nel diritto dell'Unione europea* (CEDAM 2007) 95 ff, 235 ff.

[14] This cautious approach is recommended by Christian Kohler, 'Towards the Recognition of Civil Status in the European Union' (2013-2014) 15 YB Priv Intl L 13, 26-7.

national provisions.[15] In particular, considerations relating to public policy might justify the national restrictive measure and thus the refusal to recognize the status created abroad. However, the ECJ stressed that the concept of public order must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any oversight by the European Union institutions.[16]

The sensitive nature of this issue is confirmed by the cautious approach taken by the EU institutions. In fact, whilst the importance of facilitating mutual recognition of civil status has been repeatedly underlined in various non-binding documents,[17] it has also been specified that an automatic recognition might be better suited to certain civil status situations such as the attribution or change of surnames, and might prove to be more complicated in other civil status situations such as marriage.[18] Moreover, it is significant that when drawing up the proposal for a Regulation concerning the simplification of the circulation of certain public documents, the prospect of introducing a mechanism to automatically recognize civil status certificates issued by other EU Member States was considered too ambitious, and therefore it was decided – at least for now – not to address the issue of the effects of public documents between the Member States.[19]

The EU institutions have not taken – to date – a strong stand in favour of recognition of same-sex couples even when they regulated family reunification.

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[15] *Sayn-Wittgenstein* (fn 8) para 81 and the case law there cited.

[16] ibid, para 86.

[17] Communication from the Commission to the Council and the European Parliament, Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations {SEC(2004)680 and SEC(2004)693}, COM(2004) 401 final of 2 June 2004, p 11; European Parliament, Resolution of 23 November 2010 on civil law, commercial law, family law and private international law aspects of the Action Plan Implementing the Stockholm Programme (2010/2080(INI)), P7_TA(2010)0426 para 40; Green Paper, Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records, COM(2010) 747 final of 14 December 2010, para 4.

[18] Green Paper (fn 17), para 4.3.

[19] COM(2013) 228 final of 24 April 2013, 6.

In particular, Directive 2004/38[20] recognizes the right of the spouse or of the registered partner of an EU citizen, to move with his (or her) family member, or to exercise their right to family reunification within the territory of a Member State. But a problem arises, first of all, because the Directive makes no further specification regarding the applicability of the concept of 'spouse' to same-sex marriage.[21] During the preparatory work that led to the final text of the Directive, political reasons convinced the EU institutions to avoid any further clarification of the concept of spouse and any explicit extension to same-sex couples, as that would be unacceptable to certain Member States.[22] The result of that omission is that certain Member States refused to recognize the free movement rights of a member of a married same-sex couple.[23] Secondly, with regard to the reunification of the non-married couple the Directive specifies that the partner with whom the Union citizen has contracted a registered partnership on the basis of the legislation of a Member State, may avail himself (or herself) of the free movement rights under the Directive, if the legislation of the host Member State treats registered partnerships as being equivalent to marriage and in accordance

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[20] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77.

[21] This issue is dealt with in depth by Scott Titshaw, 'Same-Sex Spouses Lost in Translation? How to Interpret "Spouse" in the E.U. Family Migration Directives' [2016] Boston U Intl LJ 45.

[22] The original broad approach of the European Commission, according to which the term 'spouse' included also same-sex marriages, is evident in the answer that the Commission gave to a specific question of the Italian delegate and that can be read in Council of the European Union, Interinstitutional File 2001/0111 (COD), no 15380/01, 18 December 2001, 7. The changing approach and the decision to intend the term 'spouse' to refer to heterosexual couples only can be observed in Council of the European Union, Interinstitutional File, 2001/0111 (COD), no 10572/02, 10 July 2002, 11.

[23] European Union Agency for Fundamental Rights (FRA), *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis* (2009) <www.fra.europa.eu/sites/default/files/fra_uploads/192-FRA_hdgso_report_Part%201_en.pdf> 66-7, accessed 28 April 2016.

with the conditions laid down in the relevant legislation of the host Member State. This means that the Directive leaves it to each Member State to decide whether to regulate registered partnership and whether to consider it as equivalent to marriage.

Neither of these marriage qualification issues has been addressed by Directive 2003/86 (the so-called Family Reunification Directive)[24] which applies to a third-country national who wants to join his (or her) spouse (also a third-country national) when moving to, or within, EU territory. In respect of the interpretation of the term 'spouse' in the Family Reunification Directive, the arguments I discussed in relation to Directive 2004/38 apply. Moreover, the Family Reunification Directive leaves it to the Member States to decide whether to authorise the entry and residence of the unmarried partner with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership.

With regard to the issue of the qualification of spouse, the ECJ stressed in the past that, according to the definition generally accepted by the Member States, the term 'marriage' means a union between two persons of the opposite-sex.[25] However, in this specific case the ECJ had to decide whether the refusal to grant a household allowance to a same-sex registered partner could be regarded as being discriminatory and did not deal with family reunification issues. Furthermore, the statement of the ECJ was rendered in 2001, when openness to same-sex marriages in the legislation of so many Member States had not yet manifested.

For these reasons, the ECJ would probably not decide in the same way a request for a preliminary ruling on the interpretation of the term 'spouse' in the framework of the free movement of persons in light of the rapid development of the concept of marriage seen in a significant number of Member States over the past few years. It has been noted that, in principle,

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[24] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12.

[25] Joined Cases C-122/99 P and C-125/99, ECLI:EU:C:2001:304, *D and Kingdom of Sweden v Council of the European Union.*

in such a case, the ECJ could interpret the term 'spouse' according to three alternative solutions:[26] in accordance with the law under which the marriage took place; in accordance with the law of the host State; or adopting an autonomous concept of 'spouse'.

In my opinion, although it would be decisive in solving the problem, this last alternative risks being perceived as too intrusive. Arguments in favour of the first alternative (the application of the law of the country of origin) or in favour of the second alternative (the application of the law of the host State) could be carried out. Without a doubt, the cautious approach shown by the EU institutions in drawing up the Directives 2003/86 and 2004/38 may point to qualifying the term 'spouse' according to the law of the host State, which would be a solution most respectful of the autonomy of each Member State in such a sensitive subject, not delegated to the EU competences.

However, considering that both the Directives tend to ensure the freedom of movement of persons and that an increasing number of Member States allow for same-sex marriage in their legislation, I think that an evolutive interpretation by the ECJ that could favour the free movement of the couple – as would be an interpretation of the term 'spouse' according to the law of the country of origin – should be preferred. The proposed interpretation would make it clear that the choice of a Member State to reserve marriage to different-sex persons does not prevent same-sex couples married abroad from the right to family reunification. Thus, the right to free movement of same-sex couples will be better achieved, with the result that the entry of new family models into more traditional countries will become increasingly frequent. The increased mobility and the diversification in life models will be a catalyst of social change, with the consequence that, at least in the long term, the belief of the uselessness of maintaining the traditional concept of marriage might exert its influence also at a political and normative level.

[26] See Koen Lenaerts, 'Federalism and the Rule of Law: Perspectives from the European Court of Justice' [2011] Fordham Intl LJ 1338, 1355 ff.

III. The Right to Respect for Family Life and the Recognition of Same-Sex Marriages Celebrated Abroad

The traditional concept of marriage comes under assault – apart from EU law – also from the Strasbourg Court.

In 2010 the ECtHR, in *Schalk and Kopf*, clearly affirmed for the first time that a cohabiting same-sex couple living in a stable *de facto* partnership falls within the notion of 'family life' for the purpose of the right to respect for private and family life as enshrined in article 8 ECHR.[27] The Court in Strasbourg observed that a rapid evolution of social attitudes towards same-sex couples has taken place in many European countries – as proven by the fact that a considerable number of them have afforded legal recognition to same-sex couples. For this reason, the Court considered it artificial to uphold its previous case law according to which same-sex couples only fell under the notion of 'private life', and not also under the notion of 'family life' within the meaning of article 8 ECHR. The Strasbourg Court stressed that the notion of family is no longer confined to the traditional marriage-based relationship and may include other *de facto* families, regardless of whether the relationship is established by different-sex or same-sex couples.

In the same judgment, the ECtHR also interpreted the right to marry enshrined in article 12 ECHR in the light of article 9 of the EU Charter of Fundamental Rights: the Court stressed that the latter provision has deliberately dropped the reference to 'men and women' made by article 12 ECHR and does not contain any obstacle to recognising same-sex relationships in the context of marriage. Marriage should no longer be

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[27] *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010), paras 93-94. With regard to the debate on the family life of same-sex couples and their right to marry according to the case law of the European Court of Human Rights, see: Ian Curry-Sumner, 'Same-sex relationships in Europe: Trends Towards Tolerance?' (2011) 3 Amsterdam Law Forum 43, 56 ff; Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2013) 93 ff and 146 ff; Pietro Pustorino, 'Same-Sex Couples Before the ECtHR: The Right to Marriage' in Daniele Gallo and Luca Paladini and Pietro Pustorino (eds), *Same-Sex Couples before National, Supranational and International Jurisdiction* (Springer 2014), 399.

considered to be limited, in all circumstance, to opposite-sex partners.[28] With this interpretation the Strasbourg Court challenged the traditional concept of marriage. However, the ECtHR also affirmed that neither article 12 ECHR nor article 14 ECHR taken in conjunction with article 8 ECHR imposes an obligation on the Contracting States to grant same-sex couples access to marriage.[29] In fact, marriage has deep-rooted social and cultural connotations which may differ largely from one society to another and it is up to each country to decide whether or not to allow same-sex marriage.[30]

Whilst the Strasbourg Court reiterated in its subsequent case law that there is no obligation to grant access to marriage to same-sex couples, it also considered that the interest of a same-sex couple in having the option of entering into a form of civil union or registered partnership must be protected. Thus, in *Oliari and others* the Court ruled that a State, like Italy, that did not provide a legal framework allowing same-sex couples to have their relationship recognised and protected under domestic law, failed to comply with the positive obligation to ensure respect for such couples' private and family life.[31] In my view, it is important to underline that the Court arrived to this conclusion after having stressed that from the examination of the Italian legal system it followed 'that there exists a conflict between the social reality of the applicants, who for the most part live their relationship openly in Italy, and the law, which gives them no official recognition on the territory'.[32] This means that *de facto* new models of family might no longer be ignored and have to be recognized at a legal level.

The case law that I have just explored is obviously important because it shows the obligations arising from the ECHR with reference to same-sex couples and clarifies that in the ECtHR's view, marriage shall not necessarly be reserved to different-sex couples.

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[28] *Schalk and Kopf* (fn 27), paras 60-61.

[29] ibid, paras 61 and 101.

[30] ibid, para 62.

[31] *Oliari* (fn 2), para 185.

[32] ibid, para 173.

However, the ECtHR has not yet specifically considered whether the right to private and family life, as enshrined in article 8 ECHR, could lead to affirming the existence of the right to obtain the recognition of same-sex couples created abroad.

Nevertheless, it is worth recalling the case law developed as regards the recognition of the familial status created abroad through adoption or through surrogate motherhood. In particular, in *Wagner*[33] and in *Negropontis*,[34] the Strasbourg Court dealt with the recognition of adoptive status and ruled that respectively Luxemburg and Greece had violated article 8 ECHR by refusing to recognise a foreign order for adoption. In turn, in *Mennesson*,[35] in *Labassés*[36] and in *Paradiso and Campanelli*,[37] the Strasbourg Court dealt with the recognition of the legal parent-child relationship established abroad following a surrogacy arrangement and ruled that France (in the first two cases) and Italy (in the third case) had violated article 8 ECHR. In these particular contexts, the ECtHR established that a status validly created abroad might be entitled to protection under human rights law and, in particular, under the right to respect for private and/or family life, as covered by article 8 ECHR. This protection could not be restricted by the rigid application of the rules on the conflict of laws, which, in any case, might not be considered a sufficient reason adduced by the national authority to justify any interference with the exercise of that right. However, no duty to recognize the status created abroad flows automatically or unconditionally from article 8 ECHR. In particular, it has been argued that the good faith shown by the parties at the moment they acquired the status, and the legitimate expectation of stability for that status are preconditions for recognition. And the legitimacy of this expectation mainly depends upon the strength of the links the position has with the country under which the status has been created.[38]

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[33] *Wagner and J.M.W.L v Luxembourg* App no 76240/01 (ECtHR, 28 June 2007).

[34] *Negrepontis-Giannisis v Greece* App no 56759/08 (ECtHR, 3 May 2011).

[35] *Mennesson v France* App no 65192/11 (ECtHR, 26 June 2014).

[36] *Labassée v France* App no 65941/11 (ECtHR, 26 June 2014).

[37] *Paradiso and Campanelli v Italy* App no 25358/12 (ECtHR, 27 January 2015).

[38] In this view, see Patrick Kinsch, 'Recognition in the Forum of a Status Acquired Abroad – Private International Law Rules and European Human Rights Law', in

However, the considerations about the nature of the status with which the ECtHR has been confronted should not be underestimated: the above-mentioned cases, despite each having their own different peculiarities, all deal with the best interest of the child which the Strasbourg Court considered fundamental in order to prove an infringement of article 8 ECHR. It is significant that when a similar issue about stability of status has been raised with reference to the recognition of a marriage, the Strasbourg Court has followed a more cautious approach. In this respect, in *Mary Green and Ajad Farhat*[39] the ECtHR dealt with Malta's refusal to recognize the validity of a marriage celebrated in Libya by two opposite-sex Maltese citizens who had been living together for twenty years. In this case, in view of the interest of the national community (in that case, Malta's) in ensuring monogamous marriages, and those of the third party directly involved (namely, the first husband of the applicant), the ECtHR found that a fair balance of the conflicting values need not impose the recognition of the status created abroad.

The latter case shows that the stability of the status created abroad is not sought at any cost. The host State could object to this value owing to the existence of other conflicting internal values that could be considered equally important. Deciding the relevance of such conflicting values does not depend solely on the host country's degree of acceptance, but may be ruled upon by the ECtHR. Without a doubt, the aim of avoiding polygamous marriages represents a primary concern on which the ECtHR does not want to interfere. Perhaps, in light of the above mentioned case law relating to same-sex couples and the right to respect for private and family life, the solution would be different where the recognition of the status created abroad is sought by monogamous same-sex couples.

A confirmation of the pressure on the traditional concept of marriage also derives from recent case law concerning the right to family reunification of

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Katharina Boele-Woelki et al (eds), *Convergence and Divergence in Private International Law, Liber Amicorum Kurt Siehr* (Eleven International Publishing-Schulthess 2010) 259, 273.

[39] *Mary Green and Ajad Farhat v Malta* App no 38797/07 (ECtHR, 6 July 2010).

non-married same-sex couples. In particular, in *Taddeucci and McCall*,[40] the ECtHR held that Italy cannot invoke, in any case, its margin of appreciation in order to protect the concept of traditional family as a legitimate ground capable of justifying a different treatment between different-sex and same-sex couples. In fact, according to the Court, Italy should have considered that same-sex couples are unable to marry in Italy and, consequently, are in a different position if compared to non-married opposite-sex couples who apply for a residence permit for family reunification. Once again, the Strasbourg Court does not impose granting access to marriage to same-sex couples, but undeniably puts pressure on the traditional concept of marriage.

IV. The Evolution of the Italian Case Law Concerning the Registration of Same-Sex Marriages Celebrated Abroad

The evolution of recent Italian case law relating to the Italian policy of registration of same-sex marriages celebrated abroad, can be considered, in my opinion, a further example of the on-going process of erosion of the traditional concept of marriage.[41]

As observed above, the new Italian Law 2016 no 76 provides for the first time a specific legal framework for the recognition and protection of same-sex unions. The intervention of the Italian Parliament could no longer be postponed in light of the Strasbourg Court pressure to regulate the issue with the aim of ensuring respect for such couples' private and family life. At the same time, the Italian Parliament intervened in the context of a growing legal uncertainty arising from the litigation through which the Italian policy against registration of same-sex marriages celebrated abroad had been challenged.

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40 *Taddeucci and McCall v Italy* App no 51362/09 (ECtHR, 30 June 2016).

41 The fundamental role played by national courts in order to increase the acceptability of new models of marriage by public opinion and politics is stressed by Angioletta Sperti, 'Judicial dialogue and evolutionary interpretations of the Constitutions in cases on same-sex marriage and rights of homosexuals couples' (2014) IXth World Congress Constitutional Challenges: Global and Local, <http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws5/w5-sperti%20.pdf> accessed 30 December 2015.

The first argument against the recognition of a same-sex marriage that can be found in Italian case law is based on the lack of an essential element to qualify it as a marriage according the Italian legal system: the opposite sex of the two spouses. If a marriage does not exist under the Italian legal system, therefore, the public Registrar cannot accept the request for registration.[42] The need for different-sex marriage has been derived from the Italian Constitution as well as from other pieces of legislation. Article 29 of the Constitution provides that the Italian Republic recognises the rights of the family as a natural society founded on marriage. This reference to the natural character of the relevant union has been commonly interpreted as implying a choice in favour of the traditional relationship between two spouses of different sex.[43] Although there is no legislative rule that expressly provides that a marriage must be concluded between spouses of different sex, arguments in favour of that solution can be deduced from articles 107 and 108 of the Italian Civil Code: both articles regulate the celebration of the marriage and refer to the will of the spouses to become husband and wife. Moreover, a few other articles of the Italian Civil Code refer – albeit implicitly – to spouses with different sex: to give just one example, article 87 no 3 may be mentioned, according to which an uncle and his niece, as well as an aunt and her nephew, cannot marry each other. If marriage is only possible between opposite-sex

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[42] This argument has been used by, for example, the Italian Supreme Court, no 7877/2000 (albeit only as *obiter dictum*); the Latina Tribunal, Decree of 10 July 2005; Rome's Court of Appeal, 13 July 2006; Venice Tribunal, Order of 3 April 2009.

[43] Regarding the concept of family in the Italian Constitution, see Francesco Dal Canto, 'Matrimonio tra omosessuali e principî della Costituzione italiana' (2005) Foro It 275. The choice in favour of the traditional relationship between two spouses of different sex has been confirmed by the Italian Constitutional Court in its judgment no 138/2010 and, more recently, in its judgment no 170/2014. Regarding these judgments, see Roberto Romboli, 'La sentenza 138/2010 della Corte costituzionale sul matrimonio tra omosessuali e le sue interpretazioni' in B*arbara* Pezzini and Anna Lorenzetti (eds), *Unioni e matrimoni same-sex dopo la sentenza 138 del 2010: quali prospettive?* (Jovene 2011) 3; Fabrizio Marongiu Buonaiuti, ''Il riconoscimento dei matrimoni e delle unioni tra persone dello stesso sesso alla luce dei più recenti sviluppi della giurisprudenza costituzionale' [2014] Ordine internazionale e diritti umani 629.

couples, there is no need for an express prohibition of marriage between an uncle and his nephew or between an aunt and her niece.[44]

The second argument used against the recognition in Italy of same-sex marriages concluded abroad avails itself of the typical safeguard of private international law as represented by the clause of public policy. In this view, same-sex marriage could not be recognised because it would be against history, tradition and the cultural fabric of Italian society. This argument was used by the Ministry of Home Affairs in its Circulars of 2001 and 2007,[45] both adopted with the aim of clarifying the rules governing civil status documents, and has often been used by the courts as to bolster the above-mentioned non-existence argument.[46]

The case law based on the non-existence argument has recently been set aside by the Italian Supreme Court. In its Judgment no 4184 of 15 March 2012, taking account of the case law of the ECtHR,[47] the Supreme Court decided that same-sex marriage can no longer be considered non-existent. In fact, as I have already stressed, the ECtHR interpreted the right to marry enshrined in article 12 ECHR also in the light of article 9 of the EU Charter of Fundamental Rights, as no longer limited, in all circumstances, to marriage between two persons of the opposite sex. This breakthrough, in the opinion of the Italian Supreme Court, contrasts with the basic premise of the spouses' different sexes as a minimum requisite for a marriage.[48] The non-existence argument, in the view of the Supreme Court, is no longer adequate in the current legal reality. The Supreme Court, nevertheless, upheld the impossibility of registering a marriage concluded abroad. This outcome is no longer a consequence of the non-existence or of the invalidity of the same-sex

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44 For references also to other articles of Italian Civil Code, see Franco Mosconi, 'Europa, famiglia e diritto internazionale privato' (2008) Rivista di diritto internazionale 347, 364.

45 Circular no 2 of 26 March 2001 and Circular no 55 of 18 October 2007.

46 See, eg, Latina Tribunal, Decree of 10 July 2005.

47 In particular, the Italian Supreme Court made reference to *Schalk and Kopf* (fn 27).

48 Italian Supreme Court para 4.1.

marriage, but of its inability to produce – as a marriage – any legal effect in the Italian legal system.[49]

As has already been pointed out, this judgment introduces 'a very sophisticated (but unexplained) distinction between a non-existent marriage and a marriage that does not produce legal effects'.[50] Although the issue is controversial, I agree with those who stress that the inability to produce any legal effect in the Italian legal system amounts, in substance, to a standard consequence that derives in private international law from its incompatibility with public policy.[51]

The inability of same-sex marriages to produce any legal effect in the Italian legal system has been confirmed and repeated several times by more recent case law.[52] However, the non-existence argument has not yet been completely abandoned. In fact, recently, the Council of State, after having recalled the case law according to which the same-sex marriage is incapable of producing any legal effect in the Italian legal system, further argued that, in its view, the same-sex marriage might be more appropriately classified as non-existent.[53]

The conclusions that the majority of the Italian case law has thus far reached with respect to the registration of same-sex marriages should not be interpreted as meaning that this complex issue is closed. In fact, it should be noted that the case law is not completely settled.

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49 Italian Supreme Court para 4.3.

50 See Giacomo Biagioni, 'On Recognition of Foreign Same-Sex Marriages and Partnerships' in Daniele Gallo and Luca Paladini and Pietro Pustorino (eds) (fn 27) 359, 376.

51 See Fabrizio Marongiu Buonaiuti, 'Il riconoscimento dei matrimoni tra persone dello stesso sesso secondo un provvedimento recente del Tribunale di Grosseto' [2014] Ordine internazionale e diritti umani 403, 408.

52 Italian Supreme Court, Judgment no 2400 of 9 February 2015; Regional Administrative Court of Lazio, Judgment no 3912 of 9 March 2015; Milan Court of Appeal, Decree no 2286 of 6 November 2015; Milan Court of Appeal, Decree no 2543 of 1 December 2015.

53 Council of State, Judgment no 4899 of 26 October 2015.

In particular, an Order of the Grosseto Tribunal of 9 April 2014 has provoked a great deal of discussion.[54] This decision, giving its own interpretation of the above-mentioned judgment no 4184/2012 of the Italian Supreme Court, deduced from it that same-sex marriage can no longer be considered to contrast with the public policy clause and, for the first time in Italy, upheld the claim of an Italian couple married abroad (in New York), and requested that the Registrar record such a marriage.[55]

In at least one other case, the solution provided by the Grosseto Tribunal has been followed and the request for registration accepted by a court. This is the case from the Naples Court of Appeal which, in its decision of 31 March 2015, relied on the principles of free movement of persons in the EU and non-discrimination between EU nationals to recognize the same-sex marriage celebrated in France by two French nationals who had moved to Italy for the purpose of work. It must be stressed that the Naples Court of Appeal pointed out that the same solution would not have been possible, if the request for registration had been presented by an Italian same-sex couple who had celebrated their marriage abroad (as was the case in front of the Grosseto Tribunal). This distinction is clearly intended to prevent abuse of law which could have been perpetrated with the sole purpose of bypassing the restrictions of the Italian legal system which prohibits same-sex marriage. However, in my opinion, such legitimate considerations could not lead to exclude in any case – indeed automatically – the relevance of the above-mentioned principles of the free movement of persons in the EU as well as non-discrimination against EU nationals. In fact, the right to free movement would be unreasonably hindered, at least when Italian same-sex couples are able to demonstrate a real and effective connection to the legal system where the marriage has been celebrated.

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[54] For a scrupulous criticism of the reasoning followed by the Decree of the Grosseto Tribunal, see Giacomo Biagioni, 'La trascrizione dei matrimoni same-sex conclusi all'estero nel recente provvedimento del Tribunale di Grosseto' (2014) 2 *Gen*IUS 195.

[55] The Order of the Grosseto Tribunal has subsequently been declared invalid by the Florence Court of Appeal, Decree of 24 September 2014, because of procedural flaws. However, the trial was continued in front of the same Grosseto Tribunal which, in its Decree of 26 February 2015, requested again that the Registrar record such a marriage.

The gradual evolution of the Italian case law shows how the traditional concept of marriage comes under assault due to the pressure deriving from same-sex married couples in search of recognition of their legal status created abroad.

V. The Signals That Show That the Way Same-Sex Is Perceived in Italy Is Gradually Changing

While it is true that the number of judicial decisions in favour of the recognition of same-sex marriages concluded abroad is limited, there is no doubt that the above-mentioned narrow openings have convinced more and more same-sex couples to seek the recognition of their marriage celebrated abroad and to challenge the refusal to record through legal action.

This kind of bottom-up pressure has been recorded notwithstanding the strong reaction from the Italian Ministry of Home Affairs that, on 7 October 2014, adopted a Circular reaffirming the prohibition on registration of foreign same-sex marriages in the national civil-status register. According to the Ministry, it is up to the national legislator to decide whether to bring same-sex marriages into line with those concluded between persons of opposite-sex and to allow the registration of these marriages in the national civil status register.

It must be stressed that this Circular, by its nature, has no binding force and even its legality has been debated.[56] In my view, regardless of whether the arguments followed by the Circular are well-founded, it is particularly important to underline that, subsequent to its publication, many more municipalities have challenged the ministerial prohibition and have either accepted requests for the registration of same-sex marriages or have announced their willingness to accept them.[57] It is true that the records have

[56] Different views are expressed by the Regional Administrative Court of Friuli Venezia Giulia, Judgment no 228 of 21 May 2015, and by the Council of State, Judgment no 4899 of 26 October 2015.

[57] This is the case in, eg, the Municipalities of Bologna, Fano, Leghorn, Milan, Naples, Pisa, Rome, Treviso.

later been declared null and void by the local representatives of the central administration,[58] but it must be stressed that the respective orders have been challenged in the Italian courts and, at least in some cases, actions brought by same-sex couples have been upheld although solely on the ground of lack of competence of the representatives of the central administration.[59]

Moreover, there is no doubt that the way same-sex marriage is perceived in Italy is gradually changing. Signals of this shift may be found in the case law of Italian courts, in some policy shifts by the Italian administration and also by the Italian legislature which, even before the adoption of Law 2016 no 76, although for specific – and limited – reasons, recognised same-sex unions or at least removed some obstacles which hinder their recognition.

Firstly, the shifts mentioned have been recorded with regard to the issue of family reunification. In particular, a few Italian judgments[60] declared unlawful a refusal to issue a residence permit to a third-country national who had married a same-sex Italian national in another EU Member State, and then applied for family reunification in Italy. The reasoning followed was that, once the creation of a matrimonial union in an EU Member State is proven, the principle of free movement of the EU citizen and of their family member has to be granted irrespective of the national law of the spouses.

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[58] This is the case with the Prefect of Rome (31 October 2004), of the Prefect of Bologna (3 November 2014) and the Prefect of Milan (5 November 2014).

[59] Regional Administrative Court of Lazio, Judgment no 3912 of 9 March 2015; Regional Administrative Court of Friuli Venezia Giulia, Judgment no 228 of 21 May 2015; Regional Administrative Court of Tuscany, Judgment no 1291 of 25 September 2015; Regional Administrative Court of Lombardy, Judgment no 2037 of 29 September 2015. In contrast, more recently, the Council of State ruled that the Prefect has an implied power to declare null and void the unlawful acts adopted by the local administrations. See, Council of State, Judgment no 4899 of 26 October 2015.

[60] Reggio Emilia Tribunal, Order of 13 February 2012, <http://www.meltingpot.org/IMG/pdf/trib-re-coniuge-omosex.pdf> and Pescara Tribunal, Order of 15 January 2013, <http://www.articolo29.it/decisioni/tribunale-di-pescara-ordinanza-del-15-gennaio-2
013/> both accessed 28 May 2016.

It is significant that the Ministry of Home Affairs, with its Circular of 26 October 2012,[61] took note of the solution adopted by this case law and affirmed that it had its logical antecedent in the judgment no 1328/2011 of the Italian Supreme Court. According to this judgment, the concept of 'spouse' for the purpose of a family reunification shall be evaluated according to the foreign legal system of the country where the same-sex marriage has been celebrated. This has the consequence that a person who has celebrated marriage to an EU citizen in an EU Member State, shall be considered a family member for the purpose of the right of residence.

This increase in awareness about the issues concerning same-sex couples has also been confirmed by the reform of the law implementing Directive 2004/38 on the free movement of citizens of the European Union and their family members.[62] In particular, the original provision that the duty of the host Member State to facilitate the entry and residence of the partner with whom the EU citizen has a durable relationship was subordinate to the provision that the said stable relationship would be duly certified by the State of nationality of the EU citizen. Thus, the same-sex partner of an EU national was not included among the beneficiaries of the provision in case the legislation of his (or her) national State does not actually provide for the recognition of same-sex relationships. Bowing to the pressure of an infringement procedure opened by the European Commission,[63] Italy erased the provision whereby certification would be issued by the EU Member State of nationality and now only requests that the stable relationship is sworn to in official documents. The official documents of the State of origin are therefore now admitted as sufficient evidence, with the result that one

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[61] Circular no 8996 of 26 October 2012.

[62] The Directive has been implemented by Legislative Decree no 30/2007. For comment, see Marcello Di Filippo, 'La libera circolazione dei cittadini comunitari e l'ordinamento italiano: (poche) luci e (molte) ombre nell'attuazione della Direttiva 2004/38/CE' (2008) Rivista di diritto internazionale 420. The reform to which I refer in the text has been introduced by Law no 97/2013.

[63] See the infringement procedure no 20112053 commenced by the European Commission by formal notice on 28 October 2011 and closed on 10 December 2013.

obstacle to family reunification for such same-sex partners has been overcome.[64]

Another indication of the slow evolution of the Italian legal position in favour of same-sex couples can be traced from the case law that admits the registration in Italy of the birth certificate of a child born to a same-sex couple married in a State where such a union is allowed,[65] as well as from the recent case law that admits the stepchild adoption by a same-sex partner.[66] These decisions are of course informed by *favor filiationis* and have the goal of providing for the best interests of the child.[67] Nonetheless, in my opinion, through this kind of case law the opposition to same-sex marriage is being progressively eroded.

With the recent Law 2016 no 76, the Italian Parliament has decided to regulate civil unions for same-sex couples, but did not provide these latter with the option to marry. The new law is certainly less ambitious than its

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[64] See Ilaria Queirolo and Lorenzo Schiano Di Pepe, *Lezioni di diritto dell'Unione europea e relazioni familiari* (3rd edn, Giappichelli 2014) 171, 208 ff. For a practical application of the new version of Legislative Decree no 30/2007 as amended by Law no 97/2013, see Verona Tribunal, Order no 152/14 of 10 December 2014.

[65] Turin Court of Appeal, Decree of 29 October 2014, <http://www.questionegiustizia.it/doc/Corte_Appello_Torino_sezione_famiglia_decreto_29.10.2014.pdf>; Milan Court of Appeal, Decree of 16 October 2015, <http://www.ilcaso.it/giurisprudenza/archivio/13842.pdf>; Naples Court of Appeal, Decree of 30 March 2016, <http://www.articolo29.it/corte-dappello-di-napoli-sentenza-del-30-marzo-2016/>, all accessed 28 May 2016.

[66] See, recently, Italian Supreme Court, Judgment no 12962 of 22 June 2016. With this Judgment the Supreme Court dismissed an action brought by the Public Prosecutor against the Rome Court of Appeal, Judgment no 7127 of 23 December 2015, and consequently confirmed the decision of stepchild adoption originally delivered by Rome Juvenile Court, Judgment no 299 of 30 July 2014. For a usefull collection of the Italian case law that admits stepchild adoption by a same-sex partner, see <http://www.articolo29.it/adozione-in-casi-particolari-second-parent-adoptionmerito/> accessed 3 July 2016.

[67] The need to value the best interest of the child as a guideline also for the recognition of adoptions by same-sex couples abroad, is stressed by Giulia Rossolillo, 'Spunti in tema di riconoscimento di adozioni omoparentali nell'ordinamento italiano' (2014) 2 Cuadernos de Derecho Transnacional 245, 252 ff.

original formulation and is the result of a political compromise that has been deemed necessary to convince the more traditional sections of the majority parties to accept the introduction of a legal regime for same-sex couples.

With regard to the issue of recognition of same-sex marriages celebrated abroad, the Law 2016 no 76 – although limiting itself to delegating the regulation of the matter to the Italian Government – establishes the general principle according to which the Italian regulation on civil unions will be applicable to same-sex couples who have celebrated their marriage, or civil union, or some comparable form of partnership abroad. Through such a provision, same-sex marriages celebrated abroad will be subject to a downgrade in so far as they will be considered as only equivalent to civil unions as described in the Italian legal system. Irrespective of any assessment of the legality of such a downgrade,[68] it is undisputable that the new law marks the abandonment of the theory according to which same-sex marriages celebrated abroad are incapable of producing any legal effect in the Italian legal system.

Same-sex marriages can no longer be considered to be in contrast to public policy. This conclusion has already been supported by certain case law,[69] which has at the same time paradoxically affirmed the inability of same-sex marriages to produce any legal effect in Italy. Furthermore, in light of the other signals showing that the way in which such unions are perceived by the Italian legal system is gradually changing, it seems anachronistic to me to maintain the view that same-sex marriage could be considered in contrast to the fundamental values of Italian society and thus to the public policy clause.

VI. Final Remarks: The Missing Piece of the Puzzle

It has not been many years since same-sex marriages celebrated abroad were considered non-existent in the Italian legal system. Such an opinion, however, was no longer defensible, according to the ECtHR case law and the

[68] However, the issue of the legality of such a downgrade will be dealt with in Section VI.

[69] Italian Supreme Court, Judgments no 2400 of 9 February 2015; Regional Administrative Court of Lazio, Judgment no 3912 of 9 March 2015.

EU Charter of Fundamental Rights. For this reason, since the judgment no 4184/2012 of the Italian Supreme Court, the Italian courts started to justify the impossibility of registration of a marriage celebrated abroad as a consequence of its inability to produce any legal effect – as a marriage – in the Italian legal system. Apart from the doubts that arise from such a legal category, the reasoning that might lead to the non-recognition of same-sex marriage essentially entails public policy considerations.

The content of this traditional exception to the operation of conflict of law rules depends on the values that the internal legal system considers to be fundamental in a certain historical period. Although Italy is not obliged to introduce the possibility of celebrating same-sex marriages into its legal system, it may no longer underestimate the increasing relevance – at the European level – of the principle of recognition of the status created abroad. In particular, that principle has been affirmed within the framework of the EU law in order to ensure the free movement of persons within the territory of the Member States. At the same time, any failure to recognize a status validly created abroad (even in a non-European country) could raise concerns about the commitment to the fundamental right of respect for private and family life, as set out in article 8 ECHR.

However, I stressed that the stability of the status created abroad has not yet been specifically affirmed with regard to the recognition of same-sex marriages neither by the ECJ nor by the ECtHR. Thus, in any case, the stability of the status is not an absolute value. In fact, according to the ECJ, public policy considerations might justify national restriction measures and thus a refusal to recognize the status created abroad. Similarly, the ECtHR found that recognition of the status might be excluded following a fair balancing of conflicting values.

With the adoption of the Italian Law 2016 no 76 on civil unions the stability of the status created abroad through same-sex marriages is not granted. In fact, such marriages will be treated as equivalent to a civil union according to the Italian legal system. This outcome certainly represents a step forward compared to the previous affirmation that same-sex marriages could not produce any legal effect in the Italian legal system: it follows from the above

that same-sex marriages are no longer considered in contrast with public policy. Nonetheless, this solution is still not the same as affirming the full recognition of a same-sex marriage celebrated abroad.

One may wonder if the downgrade created by the law on civil unions might be considered in line with the supranational context I discussed above. Despite the fact that Italy was not legally obliged to introduce same-sex marriages into its legal system, there is no doubt that the solution envisaged by the new law implies the creation of a limping status for same-sex couples, having regard to the fact that they are considered married by the State where the marriage was celebrated, yet are only considered bound by a civil union when they move to Italy.

In order to verify if such a limping status, besides being undesirable in itself, contravenes EU free movement rights as well as the right to private and family life, a case-by-case approach should be followed. From this perspective, if EU same-sex couples are able to demonstrate a real and effective connection to the legal system where the marriage has been celebrated, their new status ought not to be perceived as a mere consequence of their will to overcome the actual limits of the Italian legal system and they could affirm that the downgrade of their marriage to a civil union entails an obstacle to their right of free movement (when the marriage has been celebrated in another EU Member State). In certain cases, they could also affirm a violation of their right to respect for their private and family life: while it is true that their relationship would at least produce the effects of a civil union, together with the rights and duties that the Italian legal order attaches to this status, nonetheless these rights and duties are not exactly the same as those which derive from a marriage. For example, the downgrade will represent a hurdle to the recognition in Italy of the rights and duties that a married partner has acquired in the State of origin towards the biological son or daughter of his or her partner.

Otherwise, if Italian same-sex couples (and couples consisting of an Italian partner and a citizen of another country) go abroad only to get married and have no genuine link with the country where the union is formalized, they will then have fewer chances to challenge the downgrade of their marriage to a

civil union by invoking EU free movement rights and/or the right to private and family life. In fact, their behaviour could be perceived as an abuse of the right and for this reason could hardly be considered worthy of protection.

From a normative point of view the issue of recognition of same-sex marriage is not yet completely resolved. Considering that 11 EU countries grant same-sex couples the right to get married,[70] the situation may arise more and more frequently where same-sex couples who celebrate their marriage abroad will submit requests to the Italian authorities to register such marriages. Many of them will not be satisfied that their marriage will qualify as a civil union and new litigation will probably arise with the effect of putting pressure on the Italian authorities. From a purely legal point of view, not all the arguments favour same-sex couples' expectations. However, as the recent Italian case law described within this paper has shown, the effect of a bottom-up dynamic, where the increasing movement of persons boosts the circulation of new models of family, should be in itself a key driver for a (real) new approach by the Italian authorities to the matter, to face up to the demands and expectations of a constantly evolving society. I believe that this bottom-up dynamic will help Italy move forward with more courage towards a complete equalisation of different kinds of couples, which, in my opinion, will only be achieved by granting the right to marry to same-sex couples.

[70] It must be specified that, as of the day of writing, same-sex marriage is possible in the following 10 EU countries: Belgium, Denmark, France, Ireland, Luxembourg, Portugal, Spain, Sweden, the Netherlands and the United Kingdom (excluding Northern Ireland). Furthermore, in Finland, the law on same-sex marriage will enter into force on 1 March 2017.