Hard Cases

'A Case with Peculiarities': Mixed Same-Sex Marriages Before the Supreme Court

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Abstract

This article examines the judgment of the Italian Supreme Court (*Corte di Cassazione*) no 11696 of 14 May 2018 concerning the legal status of mixed same-sex married couples under Italian law. It explores the problems relating to the recognition and the civil status registration in Italy of couples of the same sex where one spouse is a foreigner and the other is Italian. Legge 20 May 2016 no 76 (registered partnerships law) and decreto legislativo 19 January 2017 no 7 established a regime under which Italian couples who married abroad are recognised and registered, hence downgraded, as civil partners, whereas foreign couples are recognised and registered as married. They say nothing, however, on mixed couples. During the parliamentary debate, however, the government affirmed that their main concern was to avoid Italians to circumvent the registered partnerships law by marrying abroad and then obtaining the recognition of their marriage in Italy. Based on this intent, the Supreme Court found that mixed couples are subject to the same anti-elusive logic – a construction that this article criticises under several viewpoints.

'Justice is a game of chance, never to be taken seriously'.

Piero Calamandrei

I. Introduction

Almost two years after the enactment of Italian legge 20 May 2016 no 76 on same-sex registered partnerships (hereinafter 'legge no 76/2016'), the Supreme Court has rendered its first ruling concerning one of the crucial questions addressed therein: the recognition of foreign same-sex marriages and their subsequent civil status registration in Italy.[1]

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[1] Corte di Cassazione 14 May 2018 no 11696, currently unreported. See legge 20 May 2016 no 76, *Gazzetta Ufficiale* 21 May 2016 no 118, regulating registered partnerships between persons of the same sex and cohabiting couples (*Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze*) (hereinafter 'legge no 76/2016'). This law is commented by G. Buffone et al, *Unione civile e convivenza* (Milano: Giuffrè, 2017), 89-431 and G. De

This question, which is now distinctly regulated by legge no 76/2016 and the decreto legislativo 19 January 2017 no 7 ('Decreto no 7/2017'),[2] has a long history indeed. Since the idea of extending the access to civil marriage to same-sex couples came to the mind of some Dutch legislators in 1996, scholars have enquired about whether 'a marriage contracted between two people of the same sex (would) be recognised abroad'.[3] In fact, to put it as the US Supreme Court,

> '(b)eing married in one State but having that valid marriage denied in another is one of the most perplexing and distressing complication(s) in the law of domestic relations'.[4]

Nonetheless, besides the scholarly debate, which obviously evolved in parallel with the increasing number of States that introduced registered partnerships and/or same-sex marriage domestically, foreign marriages recognition has profound implications for the identity, equality, dignity and integrity of lesbians and gay men.

In fact, confronted with a hostile environment domestically, 'the affirmation of dignity realises itself through the experience of belonging to a non-discriminatory legal context', which is the foreign law allowing same-sex marriage.[5] Moreover, as the European Court of Human Rights ('ECtHR') has

Cristofaro, 'Le "unioni civili" fra coppie del medesimo sesso. Note critiche sulla disciplina contenuta nei commi 1-34 dell'art. 1 della l. 20 maggio 2016, n. 76, integrata dal d.lgs. 19 gennaio 2015, n. 5' *Le nuove leggi civili commentate,* 101 (2017); in English see M.M. Winkler, 'Italy's Gentle Revolution: The New Law on Same-Sex Partnerships' 1 *Digest – National Italian American Bar Association Journal*, 22-31 (2017) and N. Cipriani, 'Unioni Civili: Same-Sex Partnerships Law in Italy' 3 *Italian Law Journal*, 343, 346-349 (2017).

[2] Decreto legislativo 19 January 2017 no 7, *Gazzetta Ufficiale* 27 January 2017 no 22, amending the existing provisions of private international law according to legge no 76/2016 (*Modifiche e riordino delle norme di diritto internazionale privato per la regolamentazione delle unioni civili, ai sensi dell'articolo 1, comma 28, lettera b), della legge 20 maggio 2016, n. 76*). Decreto legislativo no 7/2017 introduced new provisions in legge 31 May 1995 no 218, '*Riforma del sistema italiano di diritto internazionale privato*' (Reform of the Italian system of private international law) in order to regulate same-sex unions with transnational elements. This article will not deal with such provisions, which concern, signally, the status of foreign same-sex marriages (Art 32-*bis*), the requirements to enter into a registered partnership in Italy (new Art 32-*ter*); alimony obligations (Art 32-*quater*); foreign registered partnerships (Art 32-*quinquies*). For a commentary of these provisions see C. Campiglio, 'La disciplina delle unioni civili transnazionali e dei matrimoni esteri tra persone dello stesso sesso' *Rivista di diritto internazionale privato e processuale,* 33 (2017); M.M. Winkler, 'Disposizioni di attuazione, finali e transitorie', in G. Buffone et al eds, n 1 above, 394-417; in French M.M. Winkler and K. Trilha Shappo, 'Le nouveau droit international privé italien des partenariats enregistrés' *Revue critique de droit international privé,* 319, 326-333 (2017).

[3] K. Waaldjik, 'Free Movement of Same-Sex Partners' 3 *Maastricht Journal of European and Comparative Law,* 271-272 (1996).

[4] *Obergefell* v *Hodges*, 135 S. Ct. 2584, 2607 (2015), quoting *Williams* v *North Carolina*, 317 US 287, 299 (1942).

[5] B. Pezzini, 'I confini di una domanda di giustizia (profili costituzionali della questione della trascrizione del matrimonio *same-sex* contratto all'estero' 2 *GenIUS – Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere,* 77-79 (2015) (translation from Italian).

stated on multiple occasions, the legal recognition of same-sex relationships has, regardless of its concrete effects, 'an intrinsic value' which 'would further bring a sense of legitimacy to same-sex couples'.[6] Part of this legitimacy derives from both the recognition and registration of the foreign civil status obtained with marriage, which for the ECtHR are also part of an individual's 'personal and social identity, and indeed psychological integrity protected by Art 8'.[7] In this perspective, the 'cross-border continuity of personal and familiar status' pertains to every person's human rights arsenal.[8]

Given these characteristics, it is unsurprising that foreign marriage recognition has been used by Italian same-sex couples, in a true dynamic of 'strategic litigation',[9] to force the Parliament to put a stop to its 'repetitive failure' to act when it came to pass a law benefiting them.[10] The famous judgment of the Supreme Court 15 March 2012 no 4184, which acknowledged the 'social dignity' of same-sex unions and excluded that same-sex marriage could violate the international public policy (*ordine pubblico internazionale*), represented the highest point of this litigation, generating further workload for both the government and the judiciary.[11]

[6] Eur. Court H.R., *Oliari et al* v *Italy* App no 18766/11 and 36030/11, Judgment of 21 July 2015, para 174, available at https://tinyurl.com/y8a4tyuy (last visited 30 June 2018), quoting Eur. Court H.R., *Vallianatos* v *Greece* App no 29381/08 and 32684/09, Judgment of 7 November 2013, para 81, available at https://tinyurl.com/yc6cdsjp (last visited 30 June 2018).

[7] Eur. Court H.R., *Orlandi et al* v *Italy* App. no 26431/12, 26742/12, 44057/12 and 60088/12, Judgment of 14 December 2017, para 144, available at https://tinyurl.com/y7c587a2 (last visited 30 June 2018), quoting Eur. Court H.R., *Dadouch* v *Malta* App no 38816/07, Judgment of 20 July 2010, para 48, available at https://tinyurl.com/y8az7udt (last visited 30 June 2018).

[8] See G. Biagioni, 'On Recognition of Foreign Same-Sex Marriages and Partnerships', in D. Gallo et al eds, *Same-Sex Couples before National, Supranational and International Jurisdictions* (Berlin: Springer, 2014), 359-380, 361, quoting P. Franzina, 'Some Remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad' *Diritti umani e diritto internazionale,* 609 (2011).

[9] B. Pezzini, n 5 above, 78-79.

[10] The ECtHR reproached Italy for its 'repetitive failure' to act in *Oliari*, n 6 above, para 184 (where it found that 'this repetitive failure of legislators to take account of Constitutional Court pronouncements or the recommendations therein relating to consistency with the Constitution over a significant period of time, potentially undermines the responsibilities of the judiciary and in the present case left the concerned individuals in a situation of legal uncertainty which has to be taken into account').

[11] Corte di Cassazione 15 March 2012 no 4184, *Giustizia civile,* 1691 (2012). The Court here denied the possibility to register the petitioners' foreign marriage but pointed out that such a refusal 'no longer depended on the marriage's non-existence or invalidity, but rather on its inability to produce, as marriage, any legal effect in the Italian legal system'. Id, para 4.3. The most important statement contained in this ruling, however, is certainly the acknowledgment that marriage is no longer abiding by the heteronormative paradigm. In fact, according to the Court, 'regardless of a legislative intervention in this field, (same-sex couples) can seize the judiciary to claim (…) the right to receive an equal treatment compared to that ensured by the law to a married couple and, in that context, to raise the related constitutional review questions applicable to individual cases'. Id, para 4.2. This statement derives from the ruling of the ECtHR in *Schalk and Kopf*, where the Court affirmed it 'would no longer consider that the right to marry

By introducing positive rules concerning foreign marriage recognition, legge no 76/2016 and decreto legislativo no 7/2017 radically changed the country's legal landscape. This article takes advantage of the case brought before the Supreme Court – a case of recognition and registration of a foreign marriage entered into by an Italian-Brazilian couple – to offer an interpretation of said rules. It starts with an overview of the case (section II) by examining its factual background (II.1), the proceedings (II.2) and the governing provisions (II.3). Subsequently, it analyses the Court's ruling (section III) by presenting its peculiarities (III.1), the Court's reasoning and conclusions (III.2) and some criticism (III.3).

II. The Case

1. Factual Background

The case addressed by the Supreme Court concerned two individuals, an Italian and a Brazilian citizen respectively, who had married in Brazil in 2012 and in Portugal one year later.

In Brazil same-sex marriage is legal since 2013.[12] In a judgment released in 2011 in the context of a direct constitutional challenge, the Supreme Court (*Supremo Tribunal Federal*) had affirmed that the Constitution of 1988 does not assign to the term 'family' any ideological or pre-constituted legal meaning, as 'it is not important whether family is constituted formally or informally, by heterosexual or homosexual people'.[13] On this ground, the Court directed the judiciary and the executive power to interpret Art 1723 of the Civil Code, which mentions 'a man and a woman' as the typical members of a family, consistently with such a constitutional notion of the same,

> 'in a way to exclude any meaning of this provision that prevents the

enshrined in Art 12 (of the ECHR) must in all circumstances be limited to marriage between two persons of the opposite sex'. Eur. Court H.R., *Schalk and Kopf* v *Austria*, App no 30141/04, Judgment of 24 June 2010, para 61, available at https://tinyurl.com/yalrf27y (last visited 30 June 2018). In commenting this decision, the Italian Supreme Court further noted that 'the right to marry under Art 12 has acquired, pursuant to the interpretation of the European court – which represents a radical development of a consolidated and ultramillenary notion of marriage – a new and broader content, which includes also the marriage entered into by two persons of the same sex'. Corte di Cassazione no 4184/2012 n 11 above para 3.3.4. As explained by B. Pezzini, n 5 above, 85-88, the ruling no 4184/2012 triggered a wave of registration, at the municipalities level, of Italian same-sex couples married abroad, a move that in turn caused the Ministry of Interior to issue a circular (*circolare*) which instructed the prefects to put a stop to such a move. See Consiglio di Stato 26 October 2015 no 4898 and 4899, *Foro amministrativo,* 2498 (2005), and Consiglio di Stato 1 December 2016 no 5048, *Guida al diritto*, 4, 33 (2017).

[12] See in this respect J.M. Cabrales Lucio, 'Same-Sex Couples Before Courts in Mexico, Central and South America', in D. Gallo et al eds, n 8 above, 93-125, 114–117.

[13] Supreme Court of Brazil (*Supremo Tribunal Federal*) 4 May 2011, direct constitutional action, ADI 4277 DF, para 3.

recognition of stable, public and durable unions between persons of the same sex'.[14]

Following this judgment, in 2013 the National Judicial Council resolved to prohibit local authorities from refusing to perform marriages when requested by couples of the same sex.[15]

Portugal also adopted same-sex marriage in 2010.[16] In 2009, the Constitutional Court was urged to determine whether the Constitution commanded same-sex marriage, and responded negatively. It held that, although the Constitution prohibited any discrimination based on sexual orientation, changing the notion of marriage in order to include same-sex couples would amount to an invasion of the competence of the legislature.[17] The Parliament quickly reacted by passing a statute that repealed the requirement of the spouses to be of the opposite sex under Arts 1577 and 1628(e) of the Civil Code.[18]

The Italian-Brazilian spouses demanded the Civil Status Office (*Ufficio di stato civile*) (CSO) of Milan to proceed with the registration (*trascrizione*) of their marriage. Had they been an opposite-sex couple, the CSO would have granted such a request smoothly, as registration of foreign marriage is a common practice for CSOs throughout the country.[19] However, in their case the CSO argued that the fact that they were two men prevented such a result. The spouses appealed against the denial, but both the Tribunal and the Court of Appeals of Milan dismissed their case.

2. The Proceedings

According to the Tribunal of Milan,

'the act of marriage between persons of the same sex cannot be registered because it is uncapable of producing any legal effect in our legal

[14] ibid para 6. Art 1.723 of the Brazilian Civil Code (2002) so reads: 'It is recognised as a family the stable union between a man and a woman, configured as public, continue and durable cohabitation with the purpose of establishing a family' (translation from Brazilian).

[15] Council of National Justice of Brazil (*Conselho Nacional de Justiça*), Resolution 14 May 2013 no 175, para 1.

[16] See T. Fidalgo de Freitas and D. Tega, 'Judicial Restraint and Political Responsibility: A Review of the Jurisprudence of the Italian, Spanish and Portuguese High Courts on Same-Sex Couples', in D. Gallo et al eds, n 8 above, 287-318, 304-313; J. Maria and L. Villaverde, 'And the Story Comes to an End: The Constitutionality of Same-Sex Marriages in Spain', in M. Saez ed, *Same-Sex Couples – Comparative Insights on Marriage and Cohabitation* (Heidelberg: Springer, 2015), 13-48, 32-37.

[17] Constitutional Court of Portugal 9 July 2009 no 359, available at https://tinyurl.com/yax9qsg (last visited 30 June 2018).

[18] Legge 31 May 2010 no 9, allowing civil marriage between persons of the same sex. For the text of these two provisions see J. Maria and L. Villaverde, n 16 above, 33.

[19] See for instancee Corte di Cassazione 25 July 2016 no 15343, *Foro italiano*, 3476 (2016) which recognized the validity of a marriage entered into via Skype between an Italian woman and a Pakistani man.

system, given the current state of the legislation'.[20]

Before the Court of Appeals, the petitioners claimed that, as nowhere in the Italian Civil Code it is explicitly provided that spouses must be of the opposite sex, their marriage had to be recognised and registered as any other marriage. They also claimed that the denial amounted to a discrimination based on sexual orientation. The Court, however, disagreed on both stances.

It held, in particular, that although the difference in the spouses' sex is not explicitly contemplated among the requirements for a valid marriage,

> 'it cannot be reasonably denied that marriage as regulated by the legislature of 1942, and remained untouched by subsequent reforms of family law, is that between persons of the opposite sex and that it is currently reserved to those couple only'.

As to the second argument, the Court concluded that, even if 'same-sex marriage concretises the recognition of the principles of equality and non discrimination', this marriage still cannot be recognised (nor can it be registered) 'because of the current state of the legislation', whose absence 'cannot be filled by judicial intervention'.[21]

Before the Supreme Court, the petitioners reiterated the same arguments. However, since 2016 the 'state of the legislation' has radically changed, as legge no 76/2016 and decreto legislative no 7/2017 had entered into force and dictated precise rules for the recognition (or non-recognition) of same-sex marriages contracted abroad.

3. The Provisions of Legge no 76/2016

Legge no 76/2016 introduced in the Italian legal system the new institution of registered partnership between persons of the same.

The registered partnership regime is similar, but not identical, to that of civil marriage. While it is established that all provisions referring to marriage or spouse(s) 'apply also to each party of the registered partnership between persons of the same sex',[22] some differences in treatment persist for registered partners *vis-à-vis* married couples. For instance, the registered partnership creates no fidelity duty upon the registered partners.[23] In other cases, the partners benefit

[20] Tribunale di Milano, decree 17 July 2014, available at https://tinyurl.com/yayc2mae (last visited 30 June 2018).

[21] Corte d'Appello di Milano, decree 6 November 2015 no 2286, available at https://tinyurl.com/ycdf3bch (last visited 30 June 2018). To be true, the wording of the Court mentions the 'marriage between person of the *same* sex', but this is evidently a lapsus.

[22] Legge no 76/2016, n 1 above, Art 1(20) (so-called 'general equivalence clause').

[23] Art 1(11) legge no 76/2016, where the 'reciprocal fidelity duty' is missing from the list of effects of the registered partnership on partners. On this issue see M. Gattuso, 'Rapporti

of advantages that remain unavailable to spouses, for example in the entitlement to choose a common family name (whereas the name of the husband is imposed to a married couple).[24] Importantly, adoptions are precluded to registered partners, although legge no 76/2016 does not prevent same-sex partner from relying on the stepchild adoption scheme provided by the law of 1983 on adoptions.[25]

As regards foreign marriages, legge no 76/2016 commanded the government to issue a regulatory framework concerning the update of private international law rules (legge 31 May 1995 no 218 of reform of Italian private international law, hereinafter 'legge no 218/95') according to the following directive:

> 'by providing the application of the registered partnership regime governed by Italian laws to couples of the same sex who have entered into a marriage, a registered partnership or a similar institution abroad'.[26]

Under this provision, same-sex unions that are recognised abroad – whether by marriage, registered partnership or similar – would be subject to legge no 76/2016. This technique, which is well-known among private international law scholars as the 'method of recognition of foreign situations' or '*coordination des systèmes*', predicates the generalised application of the law of the forum, and is particularly useful when the latter 'does not have a provision equivalent to that of the otherwise applicable foreign (other State's) law or, for that matter, has a contrary rule'.[27] This way, because

> 'the foreign institution is recognised as the national institution of the jurisdiction where recognition is sought', the rule is also dubbed as of 'accommodated recognition'.[28]

Accommodated recognition is very often adopted as a rule by national legislatures which preferred a registered partnership scheme to same-sex marriage.

personali', in G. Buffone et al, *Unione civile e convivenza* n 1 above, 145; L. Olivero, 'Unioni civili e presunta licenza d'infedeltà' *Rivista trimestrale di diritto e procedura civile,* 213 (2017).

[24] Art 1(10) legge no 76/2016 (registered partners are entitled to choose a name for their family among their own's).

[25] See Art 1(20) legge no 76/2016, stating that the general equivalence with marriage 'does not apply to the norms of the Civil Code that are not expressly referred to in this Law, and to the provisions of the legge no 184 of 4 May 1983, without prejudice of what is currently provided and allowed in respect of adoptions by existing laws'. The latter refers to the abundant case law relating to Art 44(d) of legge 4 May 1983 no 184, which allows the partner of a parent to adopt the latter's own child (stepchild adoption). See in this respect Corte di Cassazione 22 June 2016 no 12962, *Foro italiano*, I, 2342 (2016).

[26] Legge no 76/2016, n 1 above, Art 1(28)(b).

[27] P. Hay, 'Recognition of Same-Sex Legal Relationships in the United States' 54 *American Journal of Comparative Law,* 257, 267 (2006).

[28] K. Boele-Woelki, 'The Legal Recognition of Same-Sex Relationship within the European Union' 82 *Tulane Law Review,* 1949, 1967 (2008).

In the United Kingdom, for example, Section 215(1) of the *Civil Partnership Act 2004* provides that '(t)wo people are to be treated as having formed a civil partnership as a result of having registered an overseas relationship'.[29] In *Wilkinson* v *Kitzinger*, the Family Division of the High Court of England enforced this provision by 'treating' the marriage contracted in British Columbia (Canada) by two women domiciled in England 'as a civil partnership'.[30] This precedent, however, is no longer applicable to foreign marriages after the *Marriage (Same-Sex Couples) Act 2013* introduced same-sex marriage in the United Kingdom and permitted the conversion of a civil partnership into marriage if the partners so request.[31]

In Switzerland, the matter is regulated by the *Federal Law on Private International Law* of 1987, as amended by the *Federal Law on Domestic Registered Unions* of 2004. Art 45(3) of the former states that 'the marriage validly entered into between persons of the same sex is recognised in Switzerland as domestic registered partnership'.[32] No case law has been reported thus far implementing this provision.

Finally, in Germany, where a law on civil partnership (*Lebenspartnerschaft*) has been in force from 2001 to 2017 before being replaced with a law on same-sex marriage in that same year,[33] a foreign same-sex marriage was registered in the civil status registry as *Lebenpartnerschaft* according to a ruling of 2010 of the Administrative Tribunal of Berlin, which applied Art 17b of the Introductory Provisions to the Civil Code.[34] Also this example is redundant, as the German Parliament adopted same-sex marriage in 2017.[35]

The accommodated recognition scheme characterizes legge no 76/2016 as well. Two problems are left open, however. A first problem concerns the qualification – or, better said, the 're-qualification'[36] – of the foreign 'registered

[29] Civil Partnership Act 2004, 2004 c. 33, Section 215(1).

[30] *Wilkinson* v *Kitzinger*, [2006] EWHC 2022 (Fam), para 25, concluding that, based on Section 215(1) of the *Civil Partnership Act 2004*, '(t)he Petitioner's marriage under Canadian law is an overseas relationship which, by reason of the above provisions, is treated as a civil partnership'.

[31] See Marriage (Same-Sex Couples) Act 2013, 2013 c. 30, Section 9.

[32] Art 45(3) of the Federal Law on Private International Law of 18 December 1987, RU 1988 1776 (2017).

[33] See Law Introducing the Right to Marry for Persons of the Same Sex (*Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts*), 20 July 2017, *Bundesgesetzblatt* 28 July 2017, 2787.

[34] Administrative Tribunal (*Verwaltungsgericht*) of Berlin 15 June 2010, 23 A 242.08 *Praxis des Internationalen Privatund Verfahrensrechts*, 270 (2011). Art 17b of the Introductory Provisions to the Civil Code (*Einführungsgesetzes zum Bürgerlichen Gesetzbuche*, EBGB) regulate foreign civil partnerships and establish, at para (4), that their effect 'shall not exceed those arising under the provisions of the German Civil Code and the Civil Partnership Act'.

[35] Law Introducing the Right to Marry for Persons of the Same Sex (*Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts*), n 33 above, 2787.

[36] See in this regard O. Lopes Pegna, 'Effetti in Italia del matrimonio fra persone dello stesso sesso celebrato all'estero: solo una questione di ri-qualificazione?' *Diritti umani diritto*

partnership' (*unione civile*) and of the foreign 'similar institution' (*istituto analogo*) to which the Italian law should apply. As legge no 76/2016 itself illustrates, the rights, duties and effects of a registered partnership can vary depending on the national legal system where the spouses decide to formalise their relationship, especially in light of 'the lack of uniformity between the legislation of different (…) countries'.[37] A second issue pertains to family formats that are open to same-sex as well as opposite-sex couples, such as, for example, the French *Pacte civil de solidarité* (PACS), the Dutch domestic partnerships or the Hungarian cohabitation scheme. As the following paragraph shows, the former problem has only partially been resolved by the regulation enacted by the government according to the directive contained in legge no 76/2016.

4. The Provisions of Decree 7/2017

Because the provision of legge no 76/2016 that addressed foreign marriages recognition generally mentioned same-sex couples who have married abroad, the government intended the Parliament's directive, and the coordination provision contained therein, as having an anti-elusive objective only. In fact, the draft decree prepared by the government mentioned that

> 'the rationale of the (Parliament's) directive appears (…) reasonably connected to the need to avoid elusive behaviors of Italian citizens who go abroad to marry with the objective of circumvent Italian law in a logic of system shopping'.

In this case, the government concluded that 'the foreign union would be recognised, as to its effects, pursuant not to a foreign law but to legge no 76/2016'.[38]

According to this view, the accommodated recognition was a mere punishment for attempting to circumvent Italian law, and seemed to pursue no other objective. Based on this premise, the government drafted a text that, by accommodating foreign marriages with a registered partnership regardless of the spouses' citizenships, established that '(t)he marriage contracted abroad by persons of the same sex produces the same effect of a registered partnership regulated by Italian law'.[39]

Both Chambers of the Parliament, however, found this draft text to be both

internazionale, 89, 112 (2016).

[37] K. Waaldijk, 'Great Diversity and Some Equality: Non-Marital Legal Family Formats for Same-Sex Couples in Europe' 1 *GenIUS – Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere,* 42, 43 (2014).

[38] See Report to the draft decree amending private international law rules (*Relazione illustrativa all'Atto del governo sottoposto a parere parlamentare. Schema di decreto legislativo recante disposizioni di modifica e riordino delle norme di diritto internazionale privato in materia di unioni civili tra persone dello stesso sesso*), no 345 of 5 October 2016, 2.

[39] ibid 3 (draft Art 32-*bis* of legge 31 May 1995 no 218).

inconsistent with the proper functioning of the accommodated recognition rule and intrinsically overinclusive. They therefore asked the government to redraft the related provision by distinguishing *truly elusive marriages* from *genuinely foreign ones* and therefore limiting the accommodated recognition 'only to Italian citizens who marry abroad'.[40] The new provision that resulted from this process (new Art 32-*bis* of legge no 218/1995) accommodates only those marriages 'entered into by Italian citizens with a person of the same sex'. Its text now so reads:

> 'Art 32-*bis* (*Marriage contracted abroad by Italian citizens of the same sex*). – The marriage contracted abroad by Italian citizens with a person of the same sex has the same effects of a registered partnership governed by Italian law'.[41]

The wording is clearly misleading. The syntax of the title seems to announce a provision regarding two Italian citizens who marry (in fact, it says '… Italian citizens *of the same sex*', not '… Italian citizens with a person of the same sex').[42] Furthermore, the text would have sounded better by saying 'marriage contracted abroad *by an Italian citizen*' rather than 'by Italian citizens', as who is marrying are two persons and not three or four. All in all, the text implies that when two Italian citizens marry abroad, their marriage must be qualified as a

> 'totally Italian situation (*situazione totalmente italiana*) which has been deliberately transformed into a *transnational* one with the objective of applying a legal regime which is not contemplated by Italian law'.

Such a situation, as a result, 'cannot be considered *foreign* but rather *national*, hence the total application of legge no 76/2016'.[43]

In sum, the parliamentary debate made Italian citizenship the driver for determining elusive marriages as opposed to authentically foreign ones. At the normative level, Art 32-*bis* of legge no 218/1996 applies to the former but not to the latter. As a consequence, foreign same-sex marriages between two Italians are treated as registered partnerships, whereas foreign same-sex marriages between two foreigners are treated as marriages. And as such are they registered by the CSO respectively. Notably, the law says nothing about mixed marriages, where one of the spouses is Italian and the other is a foreigner – the exact situation that landed in the Supreme Court.

[40] Cf Justice Commission of the Chamber of Deputies (*Camera dei deputati*), Opinion concerning the draft decree no 345/2016, n 38 above, and the hearing held before the Justice Commission of the Senate, 15 November 2016. On this developments see C. Campiglio, n 2 above, 43-45.

[41] Art 32-*bis* of legge no 218/1995, as inserted by Art 1(1)(a) of decreto legislativo no 7/2017.

[42] See in this regard C. Campiglio, n 2 above, 44-45.

[43] Report no 345/2016, n 38 above, 3 (emphasis original).

III. The Court's Judgment

1. 'Peculiarities' of the Case

The Court started its reasoning by noting that the case at issue presents 'some peculiarities that deserve to be mentioned shortly'.[44] These peculiarities mainly consist in the fact that the petitioners sought the recognition (and registration)

> 'of their conjugal union as marriage and not as registered partnership, as they deem as illegitimate the application to them of the so-called *downgrading*, ie the conversion of their conjugal union in registered partnership'.[45]

The petitioners argued in this respect that marriage reflected the quality of their relationship in a way that registered partnership did not, and therefore refused to accept the downgrading effected by the accommodated recognition rule under legge no 76/2016. Essential to their view were the differences that exist under Italian law between marriage and registered partnership, which they valued as discriminatory and ultimately degrading (see *supra* section II.3).

Besides these differences, the discrimination is clearly symbolic.[46] Among the plethora of judicial statements in this respect,[47] it suffice to recall here the recent judgment of the Austrian Constitutional Court that declared the registered partnerships law discriminatory and therefore unconstitutional. The Court concluded that

> '(t)he distinction of the law between opposite-sex and same-sex relationships as two different legal institutions violates the principle of equal treatment, which forbids any discrimination of individuals on grounds of personal characteristics, such as their sexual orientation'.[48]

[44] Corte di Cassazione no 11696/2018 n 1 above, para 13.2.

[45] ibid.

[46] See, *inter alia*, *Garden State Equality* v *Dow*, 82 A. 3d 336 (N.J. Super. Ct. Law Div. 2013) (holding that the New Jersey Constitution commands same-sex marriage notwithstanding the *Civil Union Act* enacted by the legislature which granted same-sex couples the same rights as married couples); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (where the Supreme Court of California held that sexual orientation discrimination requires a strict judicial scrutiny of all statutes concerning same-sex couples). Among scholars see M. Murray, 'Paradigms Lost: How Domestic Partnership Went from Innovation to Injury' 37 *New York University Review of Law and Social Change,* 291, 296 (2013).

[47] See in this regard M. Gattuso, 'L'unione civile: tecnica legislativa, natura giuridica e assetto costituzionale, in Unione civile e convivenza', in G. Buffone et al, *Unione civile e convivenza* n 1 above, 38-88, in particular 77-88.

[48] Constitutional Court (*Verfassungsgerichtshof*) (Austria) 4 December 2017, no G 258-259/17, unreported. Here the Court noted that 'on account of the different terms used to designate a person's marital status (married vs living in a registered partnership), persons

It follows that the petitioners' view that refused to accept the downgrading of their marriage to a registered partnership was not at all eccentric from a constitutional standpoint.

Finally, the petitioners assessed the Brazilian citizenship of one of them as an element that made their relationship *genuinely international*, so that the anti-elusive objective of the accommodated recognition rule could not actually apply to them.

2. The Court's Analysis

After addressing two preliminary questions – signally, the duty to notify the petition with the *Procuratore generale*[49] and the applicability of legge no 76/2016 to marriages contracted before its entry into force[50] – the Court first found that two norms dictated the solution of the case at issue. One was Art 32-*bis*, which is reproduced in the preceding paragraph;[51] the other was Art 32-*quinquies* of legge no 218/1995, which so reads:

> 'Art 32-*quinquies* (*Registered partnership constituted abroad by Italian citizens of the same sex*). – The registered partnership, or other similar institution, constituted abroad between Italian citizens of the same sex who habitually reside in Italy has the same effects of a registered partnership governed by Italian law'.[52]

As to Art 32-*bis*, the Court considered it 'crucial' for deciding the case. It recalled, in particular, that its current wording was the consequence of an amendment imposed by the Parliament to the original draft proposed by the government, which provided for the application of the accommodated recognition rule to *any* foreign same-sex marriage, regardless of the citizenship of the spouses. The Court explained that this application 'was deemed unjustified under the

living in a same-sex partnership have to disclose their sexual orientation even in situations in which it is not and must not be of any significance and, especially against the historical background of this issue, they are at risk of being discriminated against'. The law that was declared unconstitutional was the Registered Partnership Act (*Bundesgesetz über die eingetragene Partnerschaft*), published in *Bundesgesetzblatt* 18 December 2009 no 135.

[49] In the Court's view, 'the petition does not have to be notified to the *Procuratore generale presso la Corte di Cassazione* but only to the *Procuratore generale presso la Corte d'Appello*, as the latter is a party to the proceedings that originated the challenged ruling'. Indeed, in practice the lack of notification is not a ground to challenge the proceedings if the *Procuratore generale* has presented its pleading to the Court and the Court has granted them in its final judgment. Corte di Cassazione no 11696/2018 n 1 above, para 10.1.

[50] Regarding the retroactivity of legge no 76/2016, the Supreme Court found that it was the rationale behind the new private international law provisions to 'allow a uniform legal regime to the benefit of couples who had (already) entered into a marriage abroad'. See ibid para 12. On this question see Matteo M. Winkler and K. Trilha Shappo, n 2 above, 328.

[51] See the text corresponding to n 41 above.

[52] Art 32-*quinquies* of legge no 218/1995, as inserted by Art 1(1)(a) of decreto legislativo no 7/2017.

anti-elusive rationale underlying the provision'.[53] In particular, 'when the marriage is entered into abroad by two foreigners, there is no intent to circumvent legge no 76/2016': the transaction is 'intrinsically transnational' and 'enjoys a sufficient degree of foreignness in respect of the Italian legal system'.[54] Since Art 32-*bis* refers to 'the marriage contracted abroad by Italian citizens', it does not apply to marriages between two foreigners. Hence, the accommodated recognition rule does not apply to such marriages, which are registered *as marriages* in the registry of marriages.

As to Art 32-*quinquies*, moreover, the Court qualified such provision as a 'safeguard clause'. By stating that foreign registered partnerships and 'similar institutions' are treated as Italian registered partnerships, it makes 'Italian law prevailing over foreign laws that do not protect (same-sex) relationships with the same intensity (as Italian law does)', and confirms 'the centrality and exclusivity of the choice made by the Italian legislature for the recognition of same-sex unions'.[55]

In the Court's view, both Art 32-*bis* and Art 32-*quinquies* show that the legislature intended to favour the recognition of same-sex relationships both domestically and from abroad. Nonetheless, this favour has to be necessarily coherent with the fact that the legislature opted for a domestic family format that contemplated a registered partnership regime and refused to introduce same-sex marriage. The Court deferred to this choice of the legislature by concluding that

> 'the freedom to opt for a certain legal model (…) includes the regulation of the effects of foreign unions with anti-elusive and anti-discriminatory objectives'.[56]

On these grounds, the accommodated recognition rule contained in Art 32-*bis* applies not only when the two spouses are Italian, but also when only one of them is Italian. Three arguments support this conclusion. First, the text of the above mentioned provision states that the foreign marriage must be contracted '*by* Italian citizens', that preposition 'by' (*da*) being a sign that the legislature meant the accommodated recognition rule to cover mixed marriages as well.[57] Second, compared to Art 32-*quinquies*, which uses the preposition 'between' (*tra*) and therefore regulates only foreign registered partnerships 'between Italian citizens', the scope of Art 32-*bis* is clearly broader. Third, because legge no 218/1995 regulates the requirements to enter into a valid marriage abroad according to the personal law of the spouses, foreign marriages where one of the spouses is Italian could not be recognised in Italy anyway, as an Italian

[53] Corte di Cassazione no 11696/2018, n 1 above, para 13.3.
[54] ibid.
[55] ibid.
[56] ibid para 13.4. See also C. Campiglio, n 2 above, 47–50.
[57] Corte di Cassazione no 11696/2018, n 1 above, para 13.4.

citizen is not permitted to marry a person of the same sex in Italy. If they were, this 'would create an unresolved conflict pertaining to the form and the effects of the registration of the foreign marriage'.[58]

Finally, in the Court's view, excluding mixed marriages from the accommodated recognition rule would discriminate Italian citizens who cannot marry in Italy. That way, 'Italian citizens who married abroad and can transfer the form and effects of marriage in our legal system' would be preferred to those that, residing in Italy, cannot marry because the only institution available to them is the registered partnership.

3. A Commentary to the Court's Judgment

On a critical note, one should start with highlighting that the Supreme Court's ruling is based on four different – and progressively applied – hermeneutical canons.

The first is, obviously, the *text* or Art 32-*bis*, which is employed to sustain that the accommodated recognition rule applies to mixed marriage as well as to marriage between two Italian citizens. Second, under a *systematic* approach, Art 32-*bis* is confronted with Art 32-*quinquies*, which however has a different object, ie foreign registered partnerships. Third, the Court is led by a *legislative intent-based* construction of these two provisions to conclude that the former pursues an anti-elusive objective and the latter increases the protection afforded by foreign partnerships when their regime is inferior to Italian law in terms of the partners' rights and benefits. Finally, a *teleological* interpretation allowed the Court to determine the anti-elusive rationale in Art 32-*bis* as the factor driving the fate of mixed same-sex marriages.

Now, accumulating all these canons does not necessarily make the Court's conclusion totally convincing. Indeed, individually taken, they could have led to the opposite outcome, that is to say to recognise and register mixed same-sex marriages as marriages and not simply as registered partnerships.

The Court's reasoning, to begin with, does not acknowledge the conundrum laying behind Art 32-*bis*' text, in particular the conflict – highlighted above – between the provision and its title.[59] While it is quite obvious, according to the principle '*rubrica non est lex*', that the provision should prevail over the title, it is also obvious that the title could successfully be used when, as is the case at issue, there is a doubt as to the provision's exact scope. In this case, the title could militate in favour of the exclusion of mixed marriage from the provision.[60]

Also the systematic approach seems questionable. Particularly, the association between Art 32-*bis* and Art 32-*quinquies*, which the Court repeated several

[58] ibid. See Art 27 of legge no 218/1995, which conditions the validity of foreign marriages to the requirements provided by the national law of each spouse.

[59] See the text corresponding to n 42 above.

[60] See again M. Campiglio, n 2 above, 44.

time throughout its judgment, is not really convincing. The Court used this association to argue that, when the legislature wished to limit the recognition of foreign marriages to those unions between two Italian citizens, it did it expressly. But the two provisions have totally different scopes, and the anti-elusive purpose behind the latter is very limited. In fact, it seems reasonable to assume that two Italians residing in Italy with enough resources to move abroad for a week end with a band of relatives and friends would rather decide to marry than to enter into a *PACS* or a *de facto* local partnership with less entitlements than legge no 76/2016, as in both cases what they would obtain, once back home, is a registered partnership under Italian law. The requirement of the habitual residence explains this difference very well, although it is an unfortunate circumstance that Art 32-*bis* does not provide for the same criterion. Also, there is a constitutional cover for same-sex unions which is dictated by Art 8 of the ECHR and binds Italy to provide some form of recognition and protection to same-sex couples who formalised their union abroad.[61] The legislature had therefore no alternative than to confer these couples the only institution known to Italian law other than marriage, ie the registered partnership pursuant to legge no 76/2016.

Furthermore, as to the legislative intent-based and the teleological interpretation of Art 32-*bis*, they do not help much. As a general policy, one should be careful not to confuse elusive marriages with truly transnational ones by expanding 'totally Italian situations' beyond its own typical boundaries. However, the new texts – and, pursuant to them, the Court – made these boundaries extremely blurred, qualifying *as totally Italian* the marriage with a foreign citizen – a situation that is definitely *not totally Italian*. This could be a ground for constitutional review under the reasonableness test, but the Court quickly dismissed the constitutional law arguments raised by the petitioner as ill-grounded.[62]

As a precedent in this respect, one should mention a case where Italian courts recognised and registered the same-sex marriage, contracted in France, between an Italian-French binational and a French citizen.[63] The Court of Appeals of Naples noted that,

[61] Cf Eur. Court H.R., *Orlandi et al* v *Italy* n 7 above, para 210, where the ECtHR concluded that 'in the present case, the Italian State could not reasonably disregard the situation of the applicants which corresponded to a family life within the meaning of Article 8 of the Convention, without offering the applicants a means to safeguard their relationship. However, until recently, the national authorities failed to recognise that situation or provide any form of protection to the applicants' union, as a result of the legal vacuum which existed in Italian law (in so far as it did not provide for any union capable of safeguarding the applicants' relationship before 2016). It follows that the State failed to strike a fair balance between any competing interests in so far as they failed to ensure that the applicants had available a specific legal framework providing for the recognition and protection of their same-sex unions'.

[62] Corte di Cassazione no 11696/2018, n 1 above, para 13.5 (dismissing the constitutional challenges raised by petitioners relating to discrimination based on sexual orientation).

[63] Same-sex marriage is legal in France since 2013. See Law no 2013-404 of 17 May 2013 Opening Marriage to Same-Sex Couples, *Journal Officiel* 18 May 2013 no 114, 8253.

> 'as this is a homosexual couple legally married according to the legislation of their national State, which allows same-sex marriage, no questions relating to Italian law arise (. . .)'.[64]

True, this ruling occurred – and became *res iudicata* – before the entry into force of decreto legislativo no 7/2017, but the point is that the Court considered the Italian citizenship of one of the spouses totally irrelevant to establish recognition.[65]

In light of this case, one could conclude that the trouble with the Court's ruling lays in the use of citizenship as a sort of catch-all criterion to distinguish elusive unions from genuinely transnational ones. In fact, globalization has made citizenship less and less a useful connecting factor for transnational relationships compared, for example, to habitual residence or domicile. It would be better for the legislature to have opted for the same solution adopted in Switzerland, where mixed marriages are recognised and registered as such 'unless the marriage ceremony was performed abroad with the manifest purpose of circumventing the provisions of Swiss law concerning marriage nullity'.[66] The choice of the Italian legislator to link the accommodated recognition rule with the Italian citizenship gives rise to potentially unjust situations for mixed couples who lived abroad for long time and may see no reasons why an anti-elusive scheme should apply to them at all.

IV. Conclusion

Piero Calamandrei used to say, quite rightly, that '(a) just decision is not always well reasoned, and conversely a well reasoned decision is not always just'.[67] The Supreme Court's ruling no 11696/2018 locates in the middle between these two extremes: it did not ensure full justice to the petitioners but did present a genuine interpretation of legge no 76/2016, including its flaws.

[64] Corte d'Appello di Napoli 13 March 2015, *Foro italiano,* I, 297 (2016), confirmed by Corte di Cassazione 31 January 2017 no 2487, *Rivista di diritto internazionale privato e processuale,* 125 (2017).

[65] As is irrelevant Art 19, para 2 of legge no 218/1995, which makes Italian citizenship prevail in case of plural nationalities. See in this regard C. Campiglio, n 2 above, 46-47.

[66] Art 45(2) of the Swiss Federal Law on Private International Law.

[67] P. Calamandrei, *Eulogy of Judges* n * above, 62.