



Alliance Defending Freedom
Landesgerichtsstraße 18/10
1010 Wien
Austria

1 December 2014

Dear Sir/Madam,

Alliance Defending Freedom has followed with some interest the recent refusal by some Mayors to act in accordance with Italian law as interpreted by the Court of Cassation and an explicit instruction from Mr Angelino Alfano, Minister for the Interior.

Alliance Defending Freedom (ADF) is an international legal organization dedicated to protecting and defending fundamental freedoms. As a legal alliance of more than 2,200 lawyers dedicated to the protection of fundamental human rights, it has been involved in over 500 cases before national and international forums, including the Supreme Courts of the United States of America, Argentina, Honduras, India, Mexico and Peru, as well as the European Court of Human Rights and Inter American Court of Human Rights. ADF has also provided expert testimony before several European parliaments, as well as the European Parliament and the United States Congress. ADF has Special Consultative Status with the Economic and Social Council of the United Nations, as well as accreditation with the Organization for Security and Cooperation in Europe, the European Union (the European Union Agency for Fundamental Rights and the European Parliament) and the Organization for American States.

ADF considers that, in registering same-sex marriages contracted outside of Italy, the mayors are acting ultra vires. Moreover, there is no international legal obligation requiring the recognition of these unions, nor the creation of “civil partnerships” for same-sex couples. In fact, the European Court of Human Rights has repeatedly ruled precisely the opposite: that there is no right to same-sex marriage under the Convention.

ADF stands ready to assist you in any way you feel we can in upholding the definition of marriage - understood around the world for centuries - and in challenging those seeking to subvert proper judicial processes by acting outside of their given authority. Any assistance would be provided free of charge and could include legal research and writing assistance or intervention in proceedings as amicus. ADF has the capacity to work in Italian.

We enclose a short memo showing that there is no legal requirement to legislate for same-sex marriage, civil unions or to recognize these when performed outside of the jurisdiction.

Please do not hesitate to contact me if we can be of any further assistance in this matter.

Yours sincerely,

A handwritten signature in black ink that reads "Roger Kiska". The signature is written in a cursive, slightly slanted style.

Roger Kiska
Senior Legal Counsel

TO GOVERNMENT OF ITALY
DATE 1 December 2014
SUBJECT Recognition of same-sex marriages performed abroad

EXECUTIVE SUMMARY

Neither the European Convention on Human Rights, nor any other international legal norm requires a State to redefine marriage or to create a form of “civil partnership.” Furthermore, there is no requirement for a State that retains the definition of marriage as being between one man and one woman to recognize same-sex marriages entered into abroad. Officials who do so in the absence of enabling legislation are acting *ultra vires* and their actions should be annulled in the interests of legal certainty and the rule of law.

BACKGROUND

Neither same-sex “marriage” nor civil unions are permitted in Italy. In the last months, several Mayors announced their willingness to register same-sex “marriage” performed abroad. Following that decision, in October 2014, Italy’s interior minister – Angelino Alfano, issued an order for all prefects to annul such registrations as having no grounding in Italian law.¹

Despite this instruction, and the position in international and national law, a number of mayors continue to register such unions.²

INTERNATIONAL LAW

Marriage under the European Convention on Human Rights

It is well established that the Convention cannot be interpreted as imposing upon contracting States a duty to extend marriage to homosexual couples. The Grand Chamber of the ECHR came to this conclusion in a 2014 judgment, saying:

“[T]he Court reiterates its case-law according to which Article 8 of the Convention cannot be interpreted as imposing an obligation on Contracting states to grant same-sex couples access to marriage ... The Court observes that the present case involves issues which are subject to constant developments in the Council of Europe member states... Thus it cannot be said that there exists any European consensus on allowing same-sex marriages...While it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an

¹ P. Marchetti, “Unable to marry gay couples, some Italian Mayors Rebel”, *The New York Times*, 23 October 2014. Available at <http://www.nytimes.com/2014/10/24/world/europe/unable-to-marry-gay-couples-some-italian-mayors-rebel.html?_r=1>.

² Including those in Rome, Bologna, Naples and Udine.

obligation on the Contracting States to grant access to marriage to same-sex couples.”³

Indeed, only ten out of forty-seven member States of the Council of Europe have redefined marriage, with others having recently held popular referenda to explicitly define marriage as the union of one man and one woman within their national constitutions: In 2012, Slovenia voted explicitly to affirm marriage as being between one man and one woman, a course followed by both Slovakia and Croatia just this year in which the definition of marriage was enshrined in their constitutions.

In addition to identifying the wide array of diverse national policies regarding marriage, the ECHR has also properly considered these applications by reference to Article 12 of the Convention which guarantees the right to marry and to found a family only to “men and women” – this is in contrast to the rest of the Convention rights which are guaranteed to “everyone.”⁴

Registered partnerships under the Convention

Turning to the question of case law on registered partnerships, in *Valliantos and others v. Greece*⁵, the Court considered a Greek law which introduced civil unions to the Greek legal system but only for couples comprising of different sex adults. The Court concluded that this violated Articles 8 and 14 of the Convention insofar as this newly created institution discriminated against people on the basis of sexual orientation.⁶

It is important to note that the Court did *not* rule that the State had a general duty to provide legal recognition in domestic law for same-sex relationships, but rather in this case, there was a specific obligation to do so based on the principle of non-discrimination in that the State provided such recognition for different-sex relationships. The situation in Italy is different with no form of “civil partnership” available to same-sex or different sex couples. In that situation, the Court has never suggested that the State is required to create a particular form of union, only

Therefore, it is clear that the Convention cannot be interpreted in such a way as would create an obligation to redefine marriage to include same-sex couples and that there is likewise no obligation to create “civil unions”.

No obligation to recognize same-sex marriages performed abroad

The Italian Supreme Court has already been asked to consider the registration of a same-sex marriage performed elsewhere and decided, given that same-sex marriage has no equivalent in Italian law, the refusal to register would be upheld.⁷ The Court considered Article 2 of the Italian

³ *Hämäläinen v. Finland*, (App. No. 37359/09) §§ 71-72, 74, 96.

⁴ *Schalk and Kopf v. Austria*, App. No. 30141/04.

⁵ App. Nos. 29381/09 and 32684/09.

⁶ *Ibid.*, § 77.

⁷ Judgment no. 138/2010 of 15 April 2010.

constitution and concluded that the plain meaning of a constitutional precept, as indicated by an examination of the preparatory work, could not be altered by a creative interpretation.

CONCLUSION

Whilst the ECHR has ruled that where a civil union is available, it must not be provided in a discriminatory way, Italy has no possibility of a civil union, whether for hetero or homosexual couples. Italy only allows for the possibility of marriage which the ECHR has held does not include a right to same-sex marriage and the definition of which is within the competence of member States.

Those taking part in these transcriptions have openly stated that this is part of an overall strategy to legalize same-sex “marriage” by forcing the State to “[deal] with a growing number of problematic cases...”⁸ In reality, these cases are far from problematic: same-sex marriage is not legal in Italy and there is no legal requirement, either national or international, that requires the mayors or the central government to register unions created elsewhere.

⁸ A. Cardone, “Pushing the boundaries of Italy’s system on same-sex marriage”, *News.cn*, 29 October 2014. Available at <http://news.xinhuanet.com/english/euroope/2014-10/29/c_133749296.htm>.