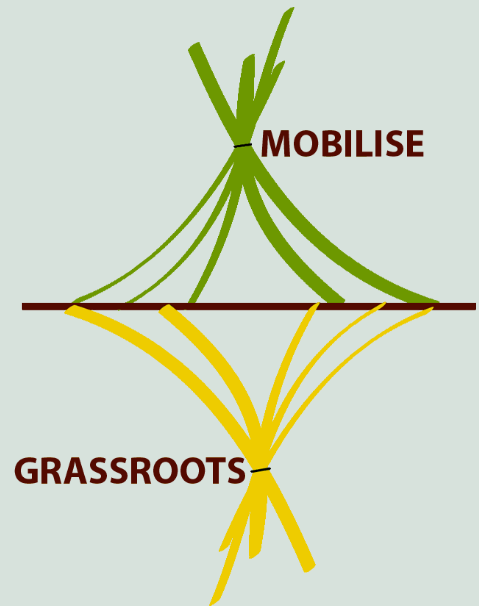

ITALY

National Courts Study Report

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Background Information on the National Legal Order in Italy

1. *Locating the national court(s) studied within the broader national legal order*

The Italian Constitutional Court is the Supreme Court of Italy. Other higher courts in Italy are the Supreme Court of Cassation and the Council of State, which are both bound to the judgements of the Constitutional Court.

According to Article 134 of the Constitution, the Constitutional Court shall decide on:
- controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions;
- conflicts over allocation of the powers of the State, and between those powers allocated to the State and Regions or between Regions;
- charges brought against the President of the Republic, according to the provisions of the Constitution

2. Locating the ECtHR within the broader national legal order

Key to understanding the position of the ECtHR within the national legal order is Article 117 of the Constitution, according to which: "the legislative authority is exercised by the State and the Regions respecting the restrictions deriving from the Community Order and from international obligations". This provision has been interpreted by the Constitutional Court in several judgments and in 2007, with the decisions 348 and 349, an important result regarding the status of the ECHR within the Italian legal system was reached. According to the Court:

"Article 117, paragraph 1 of the Constitution requires the exercise of legislative power of the State and Regions to comply with international law obligations, which undoubtedly include the European Convention on Human Rights. Prior to its introduction, the inclusion of international treaty rules into the Italian legal system was, in accordance with the previous reasoning of the Constitutional Court, traditionally dependent on an act of ratification, which normally had the status of an ordinary law which could hence potentially be modified by other subsequent ordinary laws [...] Significant margins of uncertainty remained [...] The situation of uncertainty has led several judgements of the ordinary courts to directly set aside legislative provisions which contrast with the ECHR, as interpreted by the Strasbourg Court [...] Today this Court is called upon to clarify this normative and institutional problem, which has significant practical implications for the everyday practice of legal practitioners. Whilst the new version of Article 117, paragraph 1 of the Constitution on the one hand places beyond doubt the greater silence of the ECHR to subsequent ordinary legislation, on the other hand it brings the Convention within the jurisdiction of this Court, since eventual contrasts will not generate problems of the temporal succession of laws or assessments of the respective hierarchical arrangement of the provisions in contrast, but questions of constitutional legitimacy. **The ordinary courts do not therefore have the power to set aside ordinary legislation in contrast with the ECHR, since the alleged incompatibility between the two takes the form of a question of constitutional legitimacy due to an eventual violation of article 117, paragraph 1 of the Constitution, falling under the exclusive jurisdiction of the Constitutional Court."**

In essence, for the Italian Constitutional Court the ECHR, through article 117 of the Constitution, serves as an **intermediate standard for judicial review of legislation**, therefore the ECHR is still subject to the Italian Constitution: "The arguments set out above do not imply that the ECHR, as interpreted by the Strasbourg Court, acquires the force of constitutional

law and is therefore immune to assessments by this Court of its constitutional legitimacy. It is precisely because the provisions in questions supplement a constitutional principle, whilst always retaining a lower status, that it is necessary that they respect the Constitution".

With a recent judgment (49/2015) the Italian Constitutional Court has narrowed the domestic impact of the ECHR case law. As Andrea Pin put it: "the Constitutional Court is saying that the ECtHR's interpretation of the European Convention of Human Rights counts only when it is well settled". The Italian Constitutional Court established certain criteria for lower judges, to be followed by judges when they have to apply the ECtHR case law. According to the Court, domestic judges should refrain from applying the ECtHR's case law when:

a) There is a high degree of jurisdictional creativity, which implies that the new principle is not well settled in case law;
b) There are inner conflicts within the ECtHR's jurisprudence;
c) Its promulgation is by a Chamber, and not by the Grand Chamber itself;
d) The ECtHR judgment indicates a misunderstanding of the Italian legal context; and
e) Dissenting opinions are attached to the relevant case law[1].

3. The de facto situation of the status of international jurisprudence (and specifically, that of the ECtHR) at the domestic level

The de facto situation is well summarized by a group of Italian legal scholars. As they have recently argued: "[...] ***the Italian national legal system is still not conceived as subordinate to the transnational ones. The Italian system still retains a distinctive constitutional dimension and substantive peculiarities, which are of great importance in and of themselves***"[2]. This means that the application of the ECtHR case law variates also according to the judge called to decide on the case and on the ability of the lawyers to be in full command of the case law. As we will see, it is often a small group of lawyers that is able to bring cases in court using the ECtHR jurisprudence.

CASES:

Case No. 1 (Crucifix in public schools)

1. *Lautsi v. Italy*
2. Court(s) in which it played out: Administrative Court; Council of State; Constitutional Court; ECtHR.
3. Date of submission and date of judgment: ECtHR March 2011 (Grand Chamber ECtHR).
4. Whether the ECtHR case law or ECHR are cited: Yes, by the claimant.
5. Whether the case eventually reached the ECtHR: Yes, it did.

The applicants in this case are Italian nationals, Finnish-born Ms. Soile Lautsi and her two sons, Dataico and Sami Albertin, who live in Italy. When the sons were attending public schools in Italy the parents raised the issue of the presence of the crucifix in the classroom. The schools'

[1] See A. Pin, D. Tega, Mini Symposium: Pin and Tega on Italian Constitutional Court Judgment No. 49/2015, available at: http://www.iconnectblog.com/2015/04/mini-symposium-on-cc-judgement-

[2] V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context*, OUP, 2016, p.230

governors decided to keep the crucifix and the Lautsi family brought proceedings before the Administrative Court. The Administrative Court referred the issue of constitutionality to the Constitutional Court, which found the question inadmissible, since the decrees were regulations, not law subject to constitutional review. The Administrative Court, however, ruled against Lautsi as, according to the Court, the presence of the crucifix in public classrooms was not against the principle of laicità. Ms. Lautsi appealed to the Consiglio di Stato but lost also in that case, as for the Court the crucifix itself represented the principles of "tolerance, affirmation of one's rights, the autonomy of one's moral conscience vis-à-via authority, human solidarity, and the refusal of any form or discrimination," which could fulfil a highly educational function.

The applicant, relying upon Article 2 of Protocol No. 1 (right to education) and Article 9 (freedom of thought, conscience, and religion), and upon Article 14 (prohibition of discrimination), made application to the European Court of Human Rights in July 2006. In a Chamber Judgment of 3 November 2009, the Court held, unanimously, that there had been violations of each of these provisions. The Italian government requested a Grand Chamber hearing, which took place on 20 July 2010. On 18 March 2011, the Grand Chamber found, by 15 votes to 2, no violation of Article 2 of Protocol 1: "The Court found that, while the crucifix was above all a religious symbol, there was no evidence ... that the display of such a symbol on classroom walls might have an influence on pupils." The subjective perception of the applicant was not sufficient to establish a breach of Article 2 of Protocol 1. Moreover, "the decision whether crucifixes should be present in classrooms was, in principle, a matter falling within the margin of appreciation of the State, particularly where there was no European consensus," though that margin of appreciation "went hand in hand with supervision by the Court, whose task was to satisfy itself that the choice did not amount to a form of indoctrination."
The Court also concluded that no further issue arose under Article 9 and that there was no cause to examine the case under Article 14.
Judges Bonello, Power and Rozakis each expressed a concurring opinion. Judge Malinverni expressed a dissenting opinion, joined by Judge Kalaydjieva.

Case No. 2 (Places of worship/mosques)

1. *63/2016*
2. Court(s) in which it played out: Constitutional Court.
3. Date of submission and date of judgment: Judgment 24 March 2016.
4. Whether the ECtHR case law or ECHR are cited: No.
5. Whether the case eventually reached the ECtHR: No.

With this decision the Italian Constitutional Court declared unconstitutional certain norms of a regional law approved by the Lombardia region (2/2015) which provided for very strict conditions for the opening and approval of places of worship. In particular, the court declared unconstitutional Article 70 2 bis a) and b) where, for the building of places of worship, they introduced certain conditions for groups with an agreement with the State and different conditions for those without. The difference in treatment is to be considered unconstitutional from the point of view of Articles 8.1 and 19 of the Constitution, as well as because the regulation of the relationship with religious groups is an exclusive competence of the State according to Article 117 2 c) of the Constitution.

Case No. 3 (Constitutional agreement with an atheist group)

1. *52/2016*
2. Court(s) in which it played out: Regional Administrative Court; Council of State; Supreme Court; Constitutional Court
3. Date of submission and date of judgment: judgment 10 March 2016 (Constitutional Court)
4. Whether the ECtHR case law or ECHR are cited: yes
5. Whether the case eventually reached the ECHR: currently pending at the admissibility stage before the ECtHR

This case concerned the discretion recognized to the government to finalize agreements with religious groups according to Article 8 of the Constitution. For years atheist and non-believers have tried to start a negotiation with the government in order to finalize an agreement, but the government always refused to negotiate with them. Therefore, they brought several cases before administrative and civil courts. With this decision the Constitutional Court sided with the government against decision 16305/2003 of the Court of Cassation, which did not recognize the total discretion of the government in this matter. With this decision the Constitutional Court confirmed that the possibility to start and finalize the agreement is a "political question" and a not-justiciable issue.

Case No. 4 (Civil unions and same-sex marriage)

1. *Oliari v. Italy*
2. Court(s) in which it played out: Civil Courts; Constitutional Court; ECtHR
3. Date of submission and date of judgment: judgment 21 July 2015 (ECtHR)
4. Whether the ECtHR case law or ECHR are cited: yes
5. Whether the case eventually reached the ECtHR: yes

The applicants in this case are three homosexual couples. Mr Oliari and Mr A., who were in a relationship with each other, asked the Trent Commune Civil Status Office to issue their marriage banns in July 2008. Following the rejection of their request, they challenged the decision before the Trent Tribunal, arguing that Italian law did not explicitly prohibit marriage between persons of the same sex and that even if that was the case, such a position would be unconstitutional. The Tribunal rejected their claim, noting that under the Civil Code one requirement for contracting marriage was that spouses be of the opposite sex. Following the applicants' appeal, the appeal court made a referral to the Constitutional Court with a view to their claims of unconstitutionality of the law in force. In April 2010, the Constitutional Court declared their constitutional challenge inadmissible, concluding that the right to marriage, as guaranteed by the Italian Constitution, did not extend to homosexual unions and was intended to refer to marriage in its traditional sense. Before the ECtHR all applicants claimed violations of Articles 8 and 14 in conjunction with Article 12. The Court acknowledged that same-sex couples were in need of legal recognition and protection of their relationships there was therefore a positive obligation recognized and a duty to provide it for the Italian state. The Court also recognized that Article 12 did not impose an obligation on States to grant a same-sex couple like the applicants access to marriage.

Case No. 5 (Medical assisted reproduction)

1. *162/2014*
2. Court(s) in which it played out: Constitutional Court
3. Date of submission and date of judgment: judgment 9 April 2014
4. Whether the ECtHR case law or ECHR are cited: Yes, by claimant and judge
5. Whether the case eventually reached the ECtHR: No

With this judgment the Italian Constitutional Court has declared the inconstitutionality of the ban on assisted procreation which was regulated by law 40/2004. In particular, the court declared unconstitutional the parts of the law which prohibited heterologous fertilization: a) section 4 paragraph 3 "It is forbidden the use of techniques of medically assisted procreation of the heterologous type"; b) section 9, paragraphs 1 and 3, which included the prohibition of the disclaimer of paternity and the anonymity of the mother; c) section 12, paragraph 1, which included penalties for anyone who uses for procreation purposes, gametes from subjects outside the applicant couple. It is one of a series of judgments on this topic given by different Courts in Italy.

Part I

First order questions addressed through the empirical research:

a. Who were the people involved in triggering the selected case? A network of lawyers/NGOs? Was there a transnational dimension to the process?

Case #1. ***The litigation was part of a strategic effort by the Union of Atheists*** to challenge the presence of the crucifix in Italian public schools. The case was followed first by local lawyers in Padova and later, and before the ECtHR, by ***Studio Legale Paoletti*** a law firm based in Rome. As the lawyers of the Union of Atheists confirmed[3], there were conversations also with European networks of atheists, but the case and the legal strategies were mainly elaborated at the national level. The Union of Atheists paid the legal fee of the case.

Case #2. The litigation started because the Italian government challenged the laws approved by the Lombardia Region on the ***requirements to build places of worship*** (law 12/2005 and 2/2015)[4]. This case was not litigated by private law firms, but by the legal service of the Prime Minister's office and by the lawyers of the Lombardia region. There was no transnational dimension in this litigation.

Case #3. This case started in 1996 with a request from the Italian Union of Atheists to be considered, by the Italian government, as a "religious group" able to sign an agreement with the State (*intesa*) according to Article 8 of the Constitution. It was mainly a strategic litigation coordinated by the lawyers of the Atheist Union against the denial of the government to start the negotiations for the agreement as, ***according to the government, the groups could not be considered as a "religious group***". There was no transnational dimension in this case.

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[3] Interview with UAAR legal affairs representative.

[4] For more details see G. Anello, *Freedom of Religion vs Islamophobia: Lombardy's "Anti-Mosques" Law in Uncostitutional*, 2/4/2016, available at: http://verfassungsblog.de/freedom-of-religion-vs-islamophobia-lombardys-anti-mosque-law-is-unconstitutional/.

Case #4. This case started as a multiple strategic litigation before different Italian lower courts. It reached the Italian Constitutional Court and was brought to the ECtHR by Enrico Oliari with the support of his lawyer (Alexander Schuster). ***He was able to bring the case to Strasbourg against all the suggestions given by NGOs active in the field,*** which explicitely suggested to him not to bring the case to the ECtHR because he would lose it. It should be mentioned, however, that Oliari's lawyer recognized that without the previous mobilization of NGOs for LGBT rights there would be no case[5]. There was no transnational dimension in the litigation strategy of this case. However, it is worth mentioning that ***LGBTI NGOs have been litigating many cases in Italian Courts.*** Also, before the Strasbourg Court, a team of lawyers that we have seen involved in the *Lautsi* case and in the *Costa-Pavan* case submitted an amicus brief in support of the claimant[6].

Case #5. This case is ***part of a large number of cases litigated as mobilization strategy to counter law n. 40/2004*** approved by the Italian Parliament to regulate medically assisted reproduction (see individual case study on *Costa-Pavan v. Italy*). Associazione Luca Coscioni was the leading organization with lawyers Filomena Gallo and Gianni Baldini litigating the case. Other NGOs, such as Osservatorio Vox, intervened before the Constitutional Court. There was no direct transnational dimension in the litigation, but the Associazione Luca Coscioni has been constantly in contact with international scientific societies to gather data to be used for evidence before courts.

b. What are the relative roles of individual actors – lawyers, claimants, NGOs, etc., in the selected case?

Case #1. The husband of Soile Lautsi (Dr. Massimo Albertin) confirmed that everything started because of their deep feeling of being discriminated against as atheists in Italy. ***Both Soile Lautsi and her husband were members of the Union of Atheists*** that was the key organization in the mobilization for the case. The case first started with local lawyers from Padova, with no particular ties to any particular organization. One of the lawyers (Ficarra) was described by Dr. Albertin as a "former comunist"[7]. Dr. Albertin also argued that two of the judges of the local administrative court changed after that the Constitutional Court declared the inadmissibility of the case. ***According to him one of these two judges was a "militant catholic" and this might have played a role in the decision of the local administrative court***[8]. Dr. Albertin also mentioned that he started with the idea to bring the case to Strasbourg because he was sure that he would have lost in the Italian courts. His arguments were not

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[5] Interview with Oliari's lawyer.

[6] Amicus brief in support of the claimant submitted by Associazione Radicale Certi Diritti. The amicus brief was signed by the legal representative of the organization, Mr. Yuri Guaiana with ***Nicolò Paoletti, Filomena Gallo*** and Claudia Sartori. The amicus brief describes the mobilization campaign udertaken by the NGO Certi Diritti: "En 2008, l'Associazione Radicale Certi Diritti a lancé, de concert avec Rete Lenford-Avvocatura per i diritti LGBT, une campagne sur plan national pour faire reconnaitre le mariage civil entre membres d'un meme sexe, intitulée "*Affermazione Civile*". Durant cette campagne, 25 couples ont saisi 13 tribunaux ordinaires sur 166 et 6 cours d'appel sur 26. Parmi ces procédures, quatre ont soulevé des doutes d'inconstitutionalité. En plus de ces actions judiciaries, la campagne a organisé différents cours de formation sur ce thème à l'intention des avocats ainsi que des conférences dans les universités et des séminaires".

[7] Interview with Dr. Massimo Albertin.

[8] Ibid.

built upon legal knowledge of case law and legal details of the ECtHR case law, but in the belief that only a supranational institution could understand their situation.

Case #2. The Italian government challenged the regional law approved by the Lombardia region because its strict requirements for the construction of mosques were believed to be in violation of the Italian constitution. It must be said that the litigation was triggered also for political reasons, given the fact that, at that time, the goverment was led by the Democratic party and the Lombardia region by the Northern League***. One NGO, associazione VOX, submitted an amicus brief to the Constitutional Court but it was declared not admissible***.

Case #3. The leading role in the litigation has been played by the legal service of the Atheist Union which started the process to obtain the agreement with the State in 1996. Many of the documents (and judicial decisions) have been made available online[9] with comments.

Case #4. At the beginning of the mobilization Oliari and his lawyer were part of a larger campaign of mobilization for same-sex marriage coordinated by NGOs for LGBTI rights. Later there was a split and Oliari, upon the suggestion of his lawyer, decided to go to Strasbourg alone. Leaders of NGOs for LGBT rights thought that he would have lost the case in Strasbourg and therefore endanger their national fight for same-sex marriage. Some of them thought that the decision of the Italian Constitutional Court was already an important milestone. ***Judgment 138/2010*** affirmed the existence of a constitutional fundamental ***right for same-sex partners to obtain recognition of their union*** and, to this effect, of a constitutional duty upon the legislature to enact an appropriate general regulation on the recognition of same-sex unions, with ensuing rights and duties of the partners. As the Italian Constitutional Court acknowledged ***article 2 of the Constitution does require the legal protection of same-sex unions, but neither does it impose the extension of marriage to same-sex couples, nor does it bind the legislature.*** Oliari was brought before the ECtHR because the Parliament would not approve the law after the relevant ECtHR case law.

Case #5. The actors, as in many other cases part of the mobilization against law 40/2004 are ordinary citizens with genuine concerns against the law. The mobilization efforts were coordinated by the lawyers of Associazione Luca Coscioni upon request for constitutional interpretation by courts based in Milan, Florence and Catania.

c. Role played by experience with ECtHR case law in mobilizing groups and individuals to litigate (in general and, where appropriate, at the ECtHR)?

Case #1. The initial and key mobilization factor of the claimants was related to this political situation. In the briefs submitted before Italian courts (and in the same decisions of Italian courts) the ECHR and the decisions of the ECtHR are rather marginal. We would not claim that less experience in terms of ECHR litigation encouraged them to mobilize.

Case #2. ECHR legal norms and ECtHR case law are not mentioned in the brief submitted by the Italian government to the Constitutional Court. The intervention of the NGO VOX mentions the ECHR, but it did not play any role in the judgment since it was declared not admissible by the Italian Constitutional Court.

[9] See https://www.uaar.it/laicita/ateismo-legislazione-italiana/.

Case #3. Initially, before lower courts, ECHR and ECtHR precedents had basically no role since the litigation was almost exclusively based on arguments of Italian constitutional and administrative law. Arguments based on the ECHR were made by the claimant before the Constitutional Court[10] and in this case contributed to further mobilization effort since it was later decided to bring the case to Strasbourg. It is our impression that the deep knowledge of ECtHR case law by lawyers of the Union of Atheists contributed to their mobilization.

Case #4. The original mobilization took place within the strategic framework offered by Italian Constitutional law. As Oliari's lawyer acknowledged it is also true that there was willingness to put pressure on Italian legislature and courts following the recognition of same-sex marriages granted in other countries.[11]

Case #5. According to the lawyers of the Associazione Luca Coscioni[12] ECtHR ***case law was important in their mobilization as they constantly map and follow legal developments from Strasbourg***. This can be seen also in the development of the case law before local courts.

d. What lawyers and representatives of NGOs that are legally active around religion say about whether they invoke the ECHR/ECtHR and when they do, what the reaction of judges tends to be.

Case #1. The lawyer that followed the case in the Italian courts argued that they could push forward the case without making a central reference to the ECHR[13]. It is not fully clear whether reference to the ECtHR is avoided based on the expectation that Italian judges may not view such references favourably.

Case #2. A lawyer who worked also for a leading Muslim organization (UCOOI)[14] mentioned that in this particular field (permits to build mosques and urban planning) ***Italian administrative law offered all the needed tools to deal with municipalities that deny permits to Muslim communities***. On the part of the judges, there are no relevant ECtHR precedents on this topic. A law clerck to the Constitutional Court mentioned how, especially after 2011, ***the Constitutional Court almost always discusses ECtHR case-law and the fact that there is no reference in the judgment or that few references are made doesn't mean that there was no influence***[15].

Case #3. Key here is a comment made by a law clerk to the Constitutional Court which mentioned how ***the Italian Constitutional Court prefers to develop a line of reasoning and legal arguments based on its own precedents***[16]. Therefore, even if the ECtHR is invoked,

[10] The lawyers of the Union of Atheists made arguments before the Constitutional Court based on Articles 6, 9, 11 and 14 of the Convention ***quoting extensively from the case law of the Court***.

[11] Interview with Oliari's lawyer

[12] Interview with Luca Coscioni association lawyers.

[13] Telephone talk with Padova lawyer.

[14] Interview with Milan lawyer.

[15] Interview with Constitutional Law Clerck.

[16] The Constitutional Court quoted in the judgment the following decisions: *Gutl v. Austria*; *Loffelmann v. Austria*; *Lang v. Austria*; *Savez crkava "Rijec zivota" and others v. Croatia*; *Jehovas Zeugen in Osterreich v. Austria*. The Court argued that these cases were not applicable to the Italian situation which was characterized by a regime were agreements were "additional" to a treatment that was in principle non-discriminatory.

usually its legal reasoning it is not shared because "the ECtHR is a court which focuses on rights, while the Italian Constitutional courts needs also to keep an eye on the functioning of the institutional system"[17]. This statement has been confirmed also by other legal experts we have interviewed.

Case #4. When the mobilization started there was no precedent that could be used before Italian Court therefore, as Oliari's lawyer mentioned, ***"we had not enough materials to build the case on Strasbourg's precedents***"[18]. However, he mentioned that the only precedent that could be used was *Goodwin* and the trends that could be registered in other parts of the world.

Case #5. According to Gianni Baldini (lawyer), the ECtHR's precedents offered a valid support to the arguments that they were able to frame using Italian Constitutional law. These arguments made it possible to show that Italy was part of a large community of law and had to respect European standards in matters of medically assisted reproduction. ***It must be said that the judge that wrote this judgment was also a former judge at the ECJ and a professor of EU Law (Giuseppe Tesauro)***.

e. Do we see a tension between the collective strategies of stakeholder organisations and the individual claimant who is interested in taking his/her own case to court?[19]

Case #1. No, the key organization (the Union of Atheists) behaviours were not in tension with the strategies of the claimants.

Case #2. No, because this case was brought to the Constitutional Court by the government.

Case #3. No.

Case #4. Yes, there is a tension, since ***Oliari moved the case forward against the advice of major LGBT rights NGOs active in the field***[20]. Alexander Schuster also mentioned how there is division and competition among NGOs active in the field. This is also due, according to him, to the different political connections that each NGO has developed[21].

Case #5. No, all the strategies are coordinated.

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[17] Interview with law clerck at the Constitutional Court.

[18] Interview with Oliari's lawyer.

[19] Here we explore those cases where individual claimants were discouraged by related interest-group organisations/NGOs from taking the case to court (whether local, national, or the ECtHR) and/or in which the aims of the groups and individuals in question were divergent. The direct relation to our study's aims may not be clear but it may yield interesting results to look into such examples, where they arise in our research. Sometimes inter-organisational politics may influence how and to what effects the ECtHR case law is employed – e.g., in the *Oliari* case, the competition between two LGBT-related groups.

[20] Interview with Enrico Oliari.

[21] Interview with Oliari's lawyer.

f. Do we have examples of isolated individuals litigating in parallel but not connected to one another, and others where we have examples of a more global strategy (whether legal or political)?

Case #1. To our knowledge there were no parallel cases to this one, even though the Atheist Union has brought cases before courts also to protest against crucifixes in other public places with a dedicated campaign[22].

Case #2. We have cases that deal with permission to build mosques neglected by local municipalities before many administrative courts. ***Many of these cases are resolved before regional administrative courts***[23]**.** The right to open mosques is also part of a larger political campaign undertaken by Muslim organizations which includes an effort on their side to reach an agreement with the State as provided by Article 8 of the Italian Constitution. Other religious groups also have problems with municipalities but, so far, their claims have not reached the Constitutional Court.

Case #3. Not to our knowledge.

Case #4. There were parallel cases but connected to this one, as they were also resumed before the Constitutional Court and before the ECtHR. Especially before lower courts they were ***part of the global strategy of NGOs for LGBTI rights***.

Case #5. In this case there was also a media and political strategy carried out by some of the NGOs that were also helping with the litigation in order to change law 40/2004. Besides the full list of cases that was provided to us by Associazione Luca Coscioni, we are not familiar with other cases in similar matters, but it might be possible that individuals challenged the law before other local courts to gain access to assisted medical reproduction.

g. -

h. Obvious ECtHR cases which *could have been* referenced in relation to this case (researchers' own assessment)

Case #1. In the national cases there were very few references to the ECtHR. To our knowledge at that time there was no ECtHR established case law on religious symbols in public schools which could have been invoked.

Case #2. There are no obvious direct cases dealing with the issue at stake, but as the ECtHR has argued in *Association for Solidarity with Jehovah Witnesses and Others v. Turkey*: "[…] the congregations in question were unable to obtain an appropriate place in which to worship on a regular basis, which amounted to such a direct interference with their freedom of religion that it was neither proportionate to the legitimate aim pursued, that is to say the prevention of disorder, nor necessary in a democratic society". ***This case was decided after the decision of the Italian Constitutional Court, but a general argument based on Article 9 of the ECtHR might have been made.***

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[22] https://www.uaar.it/uaar/campagne/scrocifiggiamo/

[23] A research in the database of administrative law courts confirms this statement.

Case #3. We think that the briefs submitted by the Union of Atheists before the Constitutional Court were very detailed in terms of the case law of the ECtHR. ***Very good use also of provision not directly connected to freedom of religion (for instance article 6) was made***.

Case #4. We think that the few cases that could be used and the references to ECHR articles that could be made were made.

Case #5. We think that the lawyers did a great job in making reference to all the possible norms and cases that were available to them.

i. Interviewees' explanations for the lack of reference to the ECtHR, where applicable (And/or to the specific relevant ECtHR cases identified by the researcher)

Case #1. Lack of relevant case law to be used.

Case #2. The main argument made is that it was possible to move forward the case on the basis of arguments crafted within Italian constitutional law. Moreover, the ECtHR did not offer any direct precedent and, again, it is likely that lawyers perceive a certain reluctance on the part of judges to reason firstly on the basis of a Convention reasoning.

Case #3. Not applicable.

Case #4. Basically, Oliari's lawyer tried to make use of every possible precedent. This is especially true for a case submitted to the Constitutional Court with Oliari by the Court of Venice and decided together with the judgment 138/2010. ***The Court devotes a full paragraph to deal with the ECHR argument raised by the claimant***[24].

Case #5. Not applicable.

j. Do we have cases in which ECtHR case law is invoked by *both* sides in the given case (by both the defendant and claimant), in support of their positions?

Case #1. No.

Case #2. Not to our current knowledge.

Case #3. No.

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[24] It is woth quoting few sentences from the Court's decision: "Il rimettente in primo luogo evoca, quali norme interposte, ***gli artt. 8, (diritto al rispetto della vita privata e familiare), 12 (diritto al matrimonio) e 14 (divieto di discriminazione)*** della Convenzione europea per la salvaguardia ei diritti dell'uomo e delle libertà fondamentali (CEDU), (…) pone l'accento su una sentenza della Corte europea dei diritti dell'uomo (un causa ***C. Goodwin c. Regno Unito***, 11 luglio 2002), che dichiarò contrario alla Convenzione il divieto di matrimonio del transessuale (dopo l'operazione) con persona del suo stesso sesso originario, sostenendo l'analogia della fattispecie con quella del matrimonio omosessuale".

Case #4. Before the Constitutional Court ***also the Italian government invoked the provisions of the ECHR to argue that there was no need for the State to recognize same-sex marriage,*** as this was within the margin of appreciation of each member state[25].

Case #5. Yes, in this ***case both the claimant and the government quoted the ECtHR in support of their positions***.

k. Within such examples (where ECtHR case law is invoked by both sides), examples of cases where the *same* case law is invoked by both sides

Case #1. No.

Case #2. Not possible to assess.

Case #3. No.

Case #4. No.

Case #5. In this case there is disagreement over the interpretation of the case *S.H. v. Austria*.

PART II

Please provide your analysis of:

a. The source of references to the ECHR/ECtHR case law (where applicable): claimant, defendant, or judge?

Case #1. Only a mention of Article 9 (no cases) by the claimant, that is also found in the decision of the Council of State.

Case #2. No reference; The only reference available was in the amicus brief submitted by the NGO Vox which was declared not admissible and which argued that the law was discriminatory and ultra vires.

Case #3. The cases and provisions quoted by the claimant are later reproduced also in the judgment of the Constitutional Court.

Case #4. The reference was made both by the claimant and the Italian government.

Case #5. Claimant, defendant and judge.

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[25] As it is reported in the judgment of the Constitutional Court: "(…) la citata normativa del codice civile italiano non appare in contrasto ***con gli artt. 8 (diritto al rispetto della vita familiare), 12 (diritto al matrimonio) e 14 (divieto di discriminazione***), della CEDU, dal momento che proprio l'art. 12 non solo riafferma che l'istituto del matrimonio riguarda persone di sesso diverso, ***ma rinvia alle leggi nazionali***, per la determinazione delle condizioni per l'esercizio del relativo diritto".

b. Context in which the Court is referenced: in defense of the claimant or of the defendant?

Case #1. Article 9 is mentioned in defense of the claimant.

Case #2. Not possible to assess.

Case #3. In defence of the claimant in the briefs, but according to the Constitutional Court the cases were not relevant for the case at stake.

Case #4. Arguments on the basis of the ECHR are made by both parties.

Case #5. The Court is referenced both in defence of the claimant and of the defendant.

c. 'Weight' of the reference for this case: central to the argument or not?

Case #1. The reference is not relevant for the outcome of the case.

Case #2. Not possible to assess.

Case #3. The reference made in the judgment is not central, but is relevant for the claimant.

Case #4. The reference ***was not central to the final outcome of the case***.

Case #5. It is central to the argument (especially of the defendant).

d. Ultimate effect of the reference: to the extent possible, an ascertainment of whether the reference swayed the decision or not.

Case #1. No impact of the reference for the final decisions in local courts.

Case #2. Not possible to assess.

Case #3. The reference by the Court did not contribute to the final outcome of the judgment.

Case #4. The reference was used both to reinforce the position of the claimant and also by the defending the government.

Case #5. It did not sway the decision.

e. Nature of the reference: to the extent possible, an ascertainment of whether the reference reflects the thrust of the ECtHR case/judgment referenced.

Case #1. Not possible to assess.

Case #2. Not possible to assess.

Case #3. The reference by the claimant reflects the thrust of the ECtHR case law, it will be interesting to see if the case will be now declared admissible by the Strasbourg Court.

Case #4. The reference made is relative only to one case. Other references are only to Convention's articles.

Case #5. Not possible to assess.