Same-sex unions in Italy: a European obligation?

Anna Maria Lecis Cocco Ortu

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Same-sex unions in Italy: a European obligation?

ANNA MARIA LECIS COCCO-ORTU
Ph. D. Candidate in Public Comparative Law
University of Siena and of Aix-Marseille
anna.lecis@gmail.com

States worldwide have increasingly been introducing same-sex marriage or other forms of civil partnerships for same-sex couples. Nonetheless, in Italy same-sex couples are still not allowed to marry, and marriages celebrated abroad between two individuals of the same sex cannot be legally registered in the country.
While in many legal systems courts have taken a role in the recognition of those rights, the Italian Constitutional Court and Court of Cassation seem content to take a soft-approach, deferring to the Parliament to address these issues according to a flexible time-table.
However, in a context of strategic litigation unusual for the Italian system, some lower courts did not embrace the same self-restrained approach.
Can the courts intervene on this issue? Do they have any obligation to grant same-sex couples legal recognition? Maybe, the answer will come just from Europe.
These issues will be addressed in a two part presentation.
First, I will address the issue of whether the Italian government has an obligation to extend to same-sex couples the right to enter into marriages or at least civil unions. Second, I will address the issue whether Italy has an obligation to recognize marriages and partnerships registered abroad.
In the conclusions, I will put forward the idea that the two issues are actually two interchangeable steps of a same path, which - the one involving the other or *vice versa* - will lead eventually to the introduction and mutual recognition of same-sex marriages within the European space.

Key words: Same-sex unions - right to marry - interstate recognition of marriage - ECHR - EU Law

SAME-SEX UNIONS IN ITALY: A EUROPEAN OBLIGATION?

"If I thought of getting married, I would worry that I was taking advantage of a privilege that I have that a same-sex couple wouldn't have" [1]

Introduction

While States worldwide have increasingly been introducing same-sex marriage or other forms of civil partnerships for same-sex couples, same-sex marriage is still not allowed in Italy, and marriages celebrated abroad between two individuals of the same sex cannot be legally registered in the country, as the Court of Cassation recently indicated in a case concerning two Italian citizens married abroad[2].

The matter concerning the right to marry and/or to family life for same-sex couples - in Italy, as well as in those other countries that still do not provide for any type of legal recognition for same-sex couples - thus arises under two perspectives: the right to enter into marriage or civil partnership in the State and the right to see a union celebrated abroad recognized therein.

None of these rights seems to be fully guaranteed under International and European Law.

Limiting my analysis within the European borders[3], to take up the challenge posed by the promoters of this workshop, today I will try to answer the two following questions: is there any obligation for member States, deriving from EU Law or the ECHR, to introduce same-sex marriages or civil partnerships? And is there any obligation to give legal recognition to such kinds of unions celebrated or registered in another Member State?

Those questions will be addressed with a special focus on the Italian jurisprudence. Italian courts pronouncements are in fact emblematic of the difficult role of courts, taken between the inactivity of the Legislator and the struggle for rights, in a multilevel system of rights protection within the framework of a supra-national system where not only people, but also rights, aim to pass national borders.

1. AN OBLIGATION TO ALLOW SAME-SEX MARRIAGES OR CIVIL PARTNERSHIPS

"The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one's own life partner is so rooted in our traditions" [4]

1.1. The parliamentary discretionary power in the regulation of marriage

More and more States in the world have been recognizing the right of same-sex couples to get married[5].

More and more European States have been introducing legislations codifying same-sex marriage or civil unions[6], the last one being France, with the so-called Law on the *"mariage pour tous"*, approved by the Parliament on April 23 and promulgated on May 18, after the decision of the Constitutional Council no. 2013-669 DC of May 17.

The choice of wording in these two statements, similar but not just identical, is not fortuitous, but rather the conscious consequence of a first observation: while throughout the world the introduction of same-sex marriages occurred through the intervention of the parliament or of the judiciary (or even through referendum), with regard to Europe we must acknowledge the preeminence of the discretional power of legislative assemblies, with a self-restraint approach adopted by courts[7].

This point seems to represent, nowadays, the common ground shared by the different levels of European governance in the so-called multilevel system of rights protection: Europe *does not impose* to States the introduction of same-sex marriages, State Parliaments still enjoying a large margin of appreciation in Family Law and regulation of marriage. But Europe *neither does oppose* to same-sex marriage legislations, since both the Charter of Rights of the EU and the ECHR are compatible with a same-sex model of marriage[8]. Moreover, the European institutions, both within the EU and the Council of Europe, have been strongly encouraging the adoption of some kind of regulation for same-sex couples in many soft law documents[9].

Indeed, a difference must be made between the exigency to open the marriage to same-sex couples and the need to provide for other forms of civil unions.

As a matter of fact, the European Court of Human Rights pushed itself a little bit further talking about the need to give some kind of legal recognition to same-sex couples.

In *Schalk and Kopf v. Austria*[10], the Court reaffirmed, on the one hand, that States enjoy a margin of appreciation in the regulation of marriage, because there is still not a European consensus on the issue; on the other hand, the Court also underlined that there is a trend towards the introduction of some type of legal recognition for same-sex couples and, therefore, States must have a margin of appreciation only *in the timing* of such reform.

1.2. The Italian jurisprudence

The same outcome has been reached by the Italian Constitutional Court and Supreme Court of Cassation.

With decision no. 138/2010, the Constitutional Court upheld the existing ban in the Italian Civil Code against same-sex marriages, in a highly objectionable decision which was not perfectly clear in some paragraphs and thus gave rise to different lectures of the Court's interpretation[11].

Nonetheless, in this decision the Court made some important statements concerning the constitutional status of same-sex couples and their right to legal recognition[12]. As a matter of fact, the Court affirmed that same-sex relationships fall within the notion of the "social groups where human personality is expressed" mentioned by art. 2 of the Constitution, and that the Parliament must therefore grant them some form of legal recognition in order to guarantee the same-sex couples' fundamental right to be engaged in a publicly recognized and legally relevant relationship, with connected rights and obligations. The Constitutional Court, on the one hand, indicated that the constitutional notion of marriage does not impose nor oppose the introduction of a law providing for same-sex marriages, also in compliance with international obligations deriving from the ECHR[13]; on the other hand, it reiterated that, even if same-sex relationships must be considered protected under the Constitution, the Court's interpretation cannot go as far as allowing itself to adopt an "addictive decision" to give same-sex couples a legal status.

In a nutshell, the Court indicated that it falls within the Parliament's competence to enact a legislation introducing some form of recognition for same-sex relationships, be it civil unions or marriage, and that the Parliament should do it, in order to guarantee to same-sex couples the enjoyment of a fundamental right.

However, this "warning"[14] has been completely ignored in the political debate (also because of the lack of clarity of the decision, that led politicians and jurists to different interpretations and misinterpretations), insomuch as the President of the Constitutional Court, in its annual report on the activity of the Court, this past April 2013, urged the Parliament to follow the warnings of the Court, among which the one concerning the introduction of a legislation on same-sex couples[15].

On March 2012, also the Italian Court of Cassation rendered a judgment on this matter[16], addressing the issue of the recognition and possible efficacy in Italy of a same-sex marriage celebrated abroad. Even if the Court eventually rejected the appeal, it nevertheless established some important principles[17].

The case originated from the appeal of two male Italian citizens, married in the Netherlands, against the refusal of the mayor of their hometown to recognize and transcribe their marriage in the Public Registry. The appeal, rejected by both the courts of first and second instance, was eventually filed with the Supreme Court of Cassation. The Court of Cassation rejected the appeal, but corrected the legal motivation of the refusal, which is not the "inexistence" of a same-sex marriage for the lack of the necessary requirements of the difference of sex between the two partner, but the "inability of a same-sex marriage to produce legal effect in the Italian territory", under the existing legislation.

The Court's reasoning to reach this outcome is not quite clear, while it is clearer its aim: the Court wanted to overrule the previous jurisprudence on the inexistency of such marriages for the lack of

the necessary requirements of the difference of sex between the two partners, but without going as far as admitting their recognition. In order to reach this outcome, the Cassation adopted a new category in the recognition of foreign legal acts concerning family status.

As a matter of fact, the Law on the application, in the Italian legal system, of International Private Law provides that "the foreign legal acts concerning […] the existence of family relationships" are effective in Italy "unless they are against the public order"[18]; therefore, either a marriage (an *existing* marriage, once the argument of the inexistency has been excluded) is against the public order or it is effective, *tertium non datur*, it seems. However, the Court found and took a third way.

The Court first observed that the same marriage, celebrated between a man and a woman, would have been absolutely valid and effective in the Italian territory and would have implied a right to transcription. The Court thus shifted the object of its analysis, from the right to transcription to the existence of the correspondent right of same-sex couples to be legally married in Italy. Analyzing the recent case-law on the topic issued by the Italian Constitutional Court and the European Court of Human Rights (particularly, the abovementioned Const. Court decision no. 138/2010 and ECtHR *Schalk and Kopk v. Austria*), it framed the legal status of same-sex couples as follows: as stated by the Constitutional Court and the ECtHR, there is not a fundamental right to marry of same-sex couples; such a right, even though constitutionally admissible, could not be recognized by courts through evolutive interpretation, but could only be introduced by the legislative assembly; however, as the ECtHR stated, the sexual heterogeneity of the partners can no longer be considered an essential requirement of marriage, and thus the previous Italian jurisprudence considering the sexual heterogeneity as a condition required for the very existence of a marriage must be overruled; the courts, both ordinary and constitutional, can nonetheless intervene to recognize to same-sex partners some of the rights granted to married heterosexual couples, under the principle of equality.

This judgment, even though not innovative, has the merits of clarifying once and for all that same-sex marriage could be legally introduced, with no violation of constitutional provisions, and that courts can intervene in order to recognize some rights to same-sex couples in the name of equality.

Giving an answer to the question presented at the beginning, Is there a European obligation to introduce same-sex marriage or civil partnership?, the answer must be undoubtedly positive for the latter type of union, and not only with regard to European exigencies, coming from the EU and the ECHR, but also with regards to the Constitution, where such exigency is implied under art. 2 Const. As a matter of fact, the Constitutional Court affirmed a principle already established by the ECtHR and by several other courts worldwide[19], a principle that governs the request of same-sex couples' legal recognition throughout the world: whether it is written in a bill of rights or not, the right of

two people in love with each other that want to share their lives, each one with the person of their choice, must be recognized as a fundamental right.

Two follow-up questions still remain without an ultimate response: how far can judges go in the recognition of rights related to marriage and, above all, what is to happen with marriage?
We will leave this latter question aside for a moment and reserve it for our conclusions, and try to give an answer to the former.
It is difficult to foresee how large will be, in Italy, the limits for judicial activism on the issue, but their extension will probably be directly proportional to the inactivity of the Legislators: the longer the Parliament will abstain from legislating on same-sex relationships status, the wider will possibly be the area of intervention of judges in the matter[20].
One of the boundaries of judicial intervention has eventually shown up with regard to the legal recognition of same-sex marriage as a precondition for the enjoyment of freedom of movement and residence within the European Union. This was the case in some controversies decided, insofar, by lower courts[21], concerning the issuance of the Permit of Stay for family reunification to the same-sex spouse of an Italian citizen.
This brings us to the second part of this presentation: is there an obligation to recognize marriages and civil unions registered abroad?

2. AN OBLIGATION TO RECOGNIZE INTERSTATE MARRIAGES WITHIN THE EU

*"If any *** person and *** person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it […] they shall be punished"*[22]

This second part will be divided in two sections. In the first, I will leave a part for a while the question concerning the constitutional rationale for recognition and the fundamental rights' protection perspective, in order to address the issue of legal recognition in a Private-EU Law perspective. In this sense, the major matters arise mainly, but not exclusively, with regard to bi-national couples or couples who moved from the country where they were married to a country where they cannot be legally married[23].
In the second section, I will re-take the fundamental rights perspective, to observe the complex puzzle of different possibilities of no recognition and partial recognition, and how this inequality affect people's lives.

2.1. The recognition of interstate marriages under EU Law

As for the first section, the starting point is the law governing the legal recognition of civil status, e.g. the married status. As we can read in the section of the *Europa* web-portal dedicated to information for citizens, "Marriage (civil marriage: meeting legal requirements, but without any religious affiliation) is a legal status recognized in all EU countries. Different rules apply to partnerships other than marriage." However, the explanation goes on with "*In theory*, your marriage is guaranteed to be recognized in all other EU countries – but this does *not fully apply to same-sex marriages*" *[emphasis added]*[24].

This is because some States consider such unions against the "public order" of their legal system, or include the difference of sex between the spouses as a requirement for the very existence of the marriage, whose verification precedes the evaluation for recognition and effectiveness, or they just do not allow a same-sex marriage, even if perfectly valid and recognizable, to produce its effects.

This latter is the case in the Italian jurisprudence today, as established by the aforementioned Cassation's decision. Therefore, A.G. and O.M., married in The Hague on June 1st, 2002, cannot be legally married in Italy, with all the consequences in terms of mutual rights and obligations related to the lack of this civil status.

Most evident problems rise with respect to the freedom of movement within the EU borders, from one Member State to another. In fact, as is known, the first right related to the European citizenship is the freedom of movement and residence.

The existence of a right to family reunification for foreigners (i.e. nationals of a non-EU member State) was, for a long time, not accepted under international law, nor ECHR and EU Law[25]. In fact, at the beginning, the EU aimed to economic integration with the idea that "it would eventually allow for more political integration"[26].

It was with Directive 2004/388/CE that the right to reunification appeared for the first time, as an inner component of the "right of citizens of the Union and their family members to move and reside freely within the territory of the Member States"[27].

The Directive governs the right of entry and residence for Union citizens and their family members, establishing the following rules: EU citizens have the right to enter another Member State and their family members who do not have the nationality of a Member State enjoy the same rights as the citizen they accompany; family members of EU citizens who are not nationals of a Member State can request a permit of stay for family members, lasting for five years from their date of issuance; EU citizens acquire the right of permanent residence in the host Member State after a five-year period of uninterrupted legal residence and the same rule applies to family members who are not nationals of a Member State and who have lived with a EU citizen for five years.

As for the definition of "family member", art. 2.2 of the Directive clarifies that:

> "Family member" means: (a) the spouse; (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State; (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b); (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b).

The notion of family member is the crucial issue when it comes to same-sex couples, because, as we saw above, the existing divergences concerning the essential requirements for the very existence of marriage (and analogous institutions) had to be taken into account in a field where States are still granted a wide margin of discretional power. These divergences pose a typical issue of private international law. Normally, domestic immigration laws will only agree to consider the legality of same-sex relationships when the domestic Family Law allows for them[28].

Considering that most of European legislations do not allow same-sex marriages, this brings as a consequence that, as we saw before in the Italian Court of Cassation case, while "the [same] marriage, whereas between two people of opposite sex, would be […] valid and effective"[29], it will not be recognized whereas it is between two people of the same sex. This circumstance clearly poses a problem of discrimination on the basis of sexual orientation, due to the fact that homosexual people cannot live a relationship legally recognized within the whole EU territory, thus suffering a limitation of their freedom of movement and residence[30].

Even if the EU institutions have not taken this matter into account since the beginning, scholars, NGOs and other members of civil society have been dedicating for a long time a certain attention to the issue, with the awareness that it was a key-point under the perspective of the freedom of movement in the internal market and the European integration[31].

While domestic laws were giving different solutions to the question, the EU Institutions, particularly the EU Parliament, eventually came up with a Resolution that:

> "Calls on Member States to fully implement the rights granted under Article 2 and Article 3 of Directive 2004/38/EC not only to different sex spouses, but also to the registered partner, member of the household and the partner, including same-sex couples recognized by a Member State, irrespective of nationality and without prejudice to their non-recognition in civil law by another Member State, on the basis of the principles of mutual recognition, equality, non-discrimination, dignity, and private and family life; calls on Member States to bear in mind that the Directive imposes an obligation to recognize freedom of movement to all Union citizens (including same-sex partners) without imposing the recognition of same-sex marriages."[32]

Despite this resolution, the issue has not found a happy ending yet, with a coherent application of the directive throughout Europe.

As I already mentioned, this is one of the field where the Italian judiciary has proven to be more active, in order to avoid an unreasonable discrimination and privation of rights, in controversies decided, so far, by a lower court and, only as a matter of principle, by a Criminal section of the Cassation.

The Tribunal of Reggio Emilia, in 2012, decided in favor of the applicant, a non-European citizen married to an Italian citizen in another European country, against the refusal of the Permit of Stay for family reunification, on the ground of the existence of a family relationship under the law of another Member State.

Therefore, Tizio and Caio (we made up the names), respectively a Uruguayan and an Italian citizen, are "family members" in Italy for the purposes of Immigration Law.

With regard to the notion of "spouse" under EU Law, the Tribunal also referred to a decision issued by the first criminal section of the Cassation, which has been quite neglected by the doctrine, where the court, in a proceeding concerning the conviction of a foreigner for the crime of "illegal entry and permanence", referred the proceeding back to the lower court in order to verify if the same-sex marriage entered into by the foreigner with an Italian citizen in Spain must be considered equalized to an ordinary marriage under the Spanish Law, thus giving to the foreigner the status of "spouse" under EU Law for immigration purposes.

These pronouncements eventually gave an impulse to politics. In fact, in a state of judicial uncertainty, the Ministry of Interior clarified the situation concerning the Permit to Stay of the same-sex spouse of a EU member resident in the territory.

In November 2012, the Ministry issued a ministerial memorandum that marks an historical milestone for same-sex regulation in Italy. The memorandum indicated that a foreign same-sex spouse, married to an Italian citizen with a union celebrated in another EU country recognizing same-sex marriage, is entitled to a Permit to Stay for reasons of family reunification[33].

The Ministry indicated that a foreign national married to an Italian citizen of the same sex through a marriage celebrated abroad and legally recognized in another EU country, is a "family member" for purposes of EU legislation. Referring to the aforementioned decision of the Tribunal of Reggio Emilia, the memorandum explained that, despite the fact that the foreign national in such circumstance could not be technically considered "married" to the Italian citizen under the Italian law - since the Italian legal system neither recognizes nor allows same-sex marriages or same-sex civil unions - that person should nonetheless be considered a family member. This interpretation, grounded on the protection of the right to family life, is in fact consistent with the jurisprudence of

the Supreme Court of Cassation and the Italian Constitutional Court – the document goes on – whose recent decisions have indicated that the right to family life of same-sex couples must be recognized and protected through legislation.

2.2. The fundamental rights rationale and the need of equal treatment

This solution is far to mark the end, in the Italian legal system, of the problems concerning same-sex marriages and partnerships registered in another Member State.

On the contrary, it brings to some paradoxical consequences: first, the husband or wife of an Italian citizen of the same-sex is recognized as "family member" of his/her spouse for Immigration Law purposes, but not as husband or wife under the Italian Law; second, while a same-sex marriage celebrated abroad between a citizen and a foreigner (or, we should think, a EU citizen and a foreigner) can produce at least some effects in the Italian legal system, a marriage between two Italians of the same sex cannot. Still, it is worth noting that free movement is obviously not the only right dependent from the recognition of a marriage or civil union[34]: social security rights, heritance rights, alimony, etc. are all rights dependent on the civil status, as well as some competences concerning authorization for medical treatment[35].

Here we come back to the fundamental rights perspective, since this situation of uncertainty, that implies full recognition for some couples, partial recognition for others, and still no recognition under some aspects and for some effects, creates many situations of inequality and unreasonable discriminations.

Is it still acceptable to have such divergences in the enjoyment of fundamental rights within a Union that aims to be "a more perfect union", a Europe of rights[36]?

Comparable problems are currently faced in the United States[37], the more perfect union for excellence, where the different approaches adopted by State legislations towards the introduction and recognition of same-sex unions have posed the matter of the interstate recognition. Here the parallel with the interracial marriage issue, addressed during the civil rights revolution era in the US history, is more than appropriate: the historical memory goes straight to those years, when marriages between some kinds of "different" people were recognized in some States and not in others. Back then, the discriminating element was the "race" instead of the sex.

We do not intend, here, to address the issue of the comparability between the two circumstances under a substantial point of view, referring to the rationale for interracial marriage to support same-sex marriage[38]. Rather, we want to assume the American context before the abolishment of the ban against interracial marriages as an example of the problems that may rise inside a political union of

States, be it federal or supranational, when State legislations provide for very different standard in the enjoyment of fundamental rights.

Mildred and Richard Loving got married in Washington D.C. and just wanted their marriage to be legally recognized in their home-State, Virginia, where it was illegal[39].

Whereas the society, in many States, did not accept interracial marriages for reasons grounded on "tradition" and a sort of "natural law" (arguments analogous to those raised against same-sex marriage, after all), the impulse given from the need to grant freedom of circulation of rights together with people helped to move forward the general recognition of interracial marriages.

Although the decision, in the *Loving case*, was eventually issued on the basis of the fundamental rights rationale[40], the request of interstate recognition played an essential role in the proceeding, and therefore in the evolution on the issue.

The same will happen, in all likelihood, with same-sex marriages.

Conclusions. The interchangeable steps of a same path.

Even if, in Europe, the last word on the introduction of a legislation guaranteeing the fundamental right to family life for same-sex couples seems to rest with the Parliaments, judiciaries still have a crucial role in the elimination of discriminations between couples married in a State or in another, or between couples in other situations of inequality.

Will the fundamental rights rationale push toward mutual recognition? Or, *vice versa*, will the exigency to guarantee freedom of circulation with the same (economic, social and) civil rights within the borders of the Union push towards the protection of a fundamental right that is still missing?

The future is not ours to see. But what we can dare to foresee is the final outcome, because the recognition of marriages and unions registered abroad, for EU Law exigency, and introduction of same-sex marriages or civil unions in each State, for guaranteeing the enjoyment of a fundamental right, are interchangeable steps of a same path, that – in a way or another - will eventually lead to the introduction and mutual recognition of same-sex marriages within the European space.

Moreover, also the distinction between "civil marriage" and "civil partnership" is going to become more and more only a linguistic distinction, since the States which have already legally recognized same-sex couples' relationships as civil unions are leaning toward equalization in the content between that and civil marriage[41].

This appears to be the trend. Still, those who struggle for the recognition of these rights cannot let down their guard, because a "rights revolution" is not an unstoppable process, and strategic litigations and public campaigns have shown to be an essential part of it.

[1] Martha Nussbaum, *Interview with Martha Nussbaum*, published in the New York Times on December 10, 2009 and appeared in print on December 13, 2009, on page MM22 of the New York edition, cited by S. RODOTÀ (2012): *Il diritto di avere diritti*, Laterza, Roma.

[2] Court of Cass., I Civ. Sect., judgment no. 4184/2012, see *infra*.

[3] My presentation will adress the supra-national obligations of EU States, which are bound by both EU and ECHR law.

[4] Alaska Sup. Ct. Brause v. Bureau of Vital Statistics, 1998.

[5] For an overview, consistently updated, see the ILGA website at www.ilga.org.

[6] An up-to-date overview of the different legislations in Europe can be found at http://www.ilga-europe.org/home/guide_europe/country_by_country; for scholarly works on such developments, even if not up-do-date, see A. SCHUSTER (2011): "Le unioni fra persone dello stesso genere nel diritto comparato e europeo", in B. PEZZINI, A. LORENZETTI (eds. 2011), *Unioni e matrimoni same-sex dopo la sentenza 138 del 2010: quali prospettive?*, Jovene, Napoli, p. 257; R. WINTEMUTE, M. ANDENAS (eds. 2001): *The Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law*, Hart Publishing, Oxford; C. WAALDIJK (2004): "Others may follow: the introduction of marriage, quasi-marriage, and semi-marriage for same-sex couples in European countries", *New England Law Review*, Vol. 38, no. 3, p. 569.

[7] The role of Constitutional Courts on the matter, in Europe, has emerged mainly in the moment of validation of laws adopted by the Parliament. See, for ex. *Cour d'Arbitrage* of Belgium, no. 159/2004, Constitutional Tribunal of Portugal, no. 121/2010, Constitutional Tribunal of Spain, no. 198/2012, Constitutional Council of France, no. 2013-669 DC.

It is worth noting that in Portugal and France the constitutional judges were called to pronounce, in a first moment, on the constitutionality of the interdiction of same-sex marriages and, in a second one, on the constitutionality of the legislation allowing such marriages. See also Constitutional Tribunal of Portugal, no. 359/2009 and Constitutional Council of France, no. 2010-92 QPC (on the Portuguese decisions, see E. CRIVELLI (2010): "Il matrimonio omosessuale e la ripartizione di competenze tra legislatore e organo di giustizia costituzionale: spunti da una recente decisione del Tribunale costituzionale portoghese", in www.associazionedeicostituzionaliti.it and E. SORDA (2011): "Same-sex marriage: il caso portoghese", *Ianus*, no. 4, p. 173).

This does not means that in the European countries there is not a judicial struggle on the matter. Conversely, many cases have been taken to courts in the frame of proper strategic litigations assisted by gay rights associations. This was the case, for ex., for all the Italian cases cited here, which have been promoted by two associations, *Associazione radicale Certi diritti* e *Rete lenford*, in the frame of the campaign named "*Affermazione civile*"(i.e. "civil affirmation"). See www.affermazionecivile.it e www.certidiritti.it. For a report on the activities carried out in the campaign, see G. FELICETTI (2010): "Le coppie che ricorrono alla Corte sono la punta di un iceberg sommerso", in AA.VV., *La «società naturale» e i suoi "nemici"*, Giappichelli, Torino, p. 133 and Y. GUAIANA (2011): *Dal cuore delle coppie al cuore del diritto*, Stampa alternative, Viterbo.

[8] Art. 9 of the Charter of Fundamental Rights of the European Union states that "The right to marry and the right to found a family shall be guaranteed in accordance with the National laws governing the exercise of these rights." Any reference to "women and men" was indeed deliberately avoided in order to admit the possibility of same-sex marriages, as it is explained in the commentary to the Charter. Art. 12 of the ECHR, instead, does expressly mention the right of "Men and women of marriageable age […] to marry and to found a family"; however, the European Court of Human Rights, in *Schalk and Kopf*, adopted an evolutive interpretation of the provision and, also in the light of art. 9 of the Charter, affirmed that "the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex" (*Schalk and Kopf v. Austria*, p. 61).

[9] For ex.: with Recommendation no. 1474 (2000), the CoE's Assembly invites "the Committee of Ministers … [to] call upon States … to adopt legislation which makes provision for registered partnerships"; the European Parliament Resolution of March 13, 2012 on Equality "[promotes] the mutual recognition of civil unions and of same-sex families across Europe between those countries which already have the relevant legislation in place … [and] regrets the implementation by some Member States of restrictive definitions of 'family' in order to deny legal protection to same-sex couples and their children".

[10] Schalk and Kopf v. Austria (1st Sect.), App. no. 30141/04, decided on June 24, 2010. For a commentary of the decision and of the previous ECtHR's case-law, see among others, S. L. COOPER (2011): "Marriage, Family, Discrimination & Contradiction: An Evaluation of the Legacy and Future of the ECtHR's Jurisprudence on LGBT Rights", *German Law Journal*, p. 1746; G. WILLEMS (2013): "La vie familiale des homosexuels au prisme des articles 8, 12 et 14 de la Convention européenne des droits de l'homme: mariage et conjugalité, parenté et parentalité", *Revue trimestrielle des droits de l'homme*, vol. 93, p. 65.

[11] The decision seems to be, in our opinion, the outcome of an unavoidable collage of different opinions in a system that does not allow dissenting opinions. In fact, the Italian system of constitutional justice does not provide for dissenting or concurring opinions: the judgment, even if written by the judge in charge, is the collective outcome of the discussion within the Court, possibly adopted unanimously, "without voting" (see, G. ZAGREBELSKY (2005): *Principi e voti*, Einaudi, Torino); however, obviously not all the discussions can reach eventually a common view and therefore sometimes the decision reflect the difference of thought among the judges, just like the decision at issue. In fact, it contains a large amount of arguments, ranging from the original intent to the evolutive interpretation, from the "natural society" defense to the exigency of non-crystallization of the notion of marriage, from the literal interpretation to the systematic one. This complexity created a not always coherent motivation, which gave rise to an extremely various range of opinions on the meaning of the decision: while some scholars read in it an open door to same-sex marriages, others retain the view that the Constitutional Court defended the heterosexual paradigm of marriage (on the different interpretation, see R. ROMBOLI, 2011). Our view clearly falls within the formers.

[12] For a more complete summary of the Court's decision, see P. FARAGUNA (2011): "Constitutional Paradoxes from Inequality Equality to Equality: the Italian Case (with a Little Help from Abroad)", in A. SCHUSTER (ed.), *Equality and Justice. Sexual Orientation and Gender Identity in the XXI Century*, Forum, Udine, p. 75, on this point 86 ff., where the Author analyses the different arguments in the court's motivation, affirming that "the importance of the Constitutional Court's ruling does not reside in the acceptance or rejection of the constitutional question, but in the motivational strategy behind the rejection."

[13] The Court analyzed the constitutionality of the ban also in the light of ECHR provisions (and ECtHR jurisprudence) because, in the Italian hierarchy of legal sources, the ECHR integrates the constitutional parameter (as an "interposed norm", lying between the Constitution and the Law in the hierarchy of sources of law) because, according to art. 117 Const., "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations." In a famous jurisprudence started with dec. nos. 348-349/2007, the Constitutional Court affirmed that, since the ECHR is a special Treaty, which established a Court vested with the power to interpret the content of the Convention, the interpretation provided by this Court – and not only the text of the Convention – must be taken into account in ascertaining the meaning of the ECHR provisions. For a commentary to this jurisprudence, see O. POLLICINO (2008): "Constitutional Court at the crossroads between constitutional parochialism and co-operative constitutionalism. Judgments No. 348 and 349 of 22 and 24 October 2007", *European Constitutional Law Review* no. 4/2, and, more recently, G. MARTINICO (2012): "Is the European Convention Going to be 'Supreme'? A Comparative-Constitutional overview of ECHR and EU Law before National Courts", *European Journal of International Law*, vol. 23/2, p. 401, on this point p. 422 ff.; for a brief summary, see also Palomar Italy no. 1/2008 at http://www3.unisi.it/dipec/palomar/italy.

It should be noticed that the Constitutional Court decision was issued two months before *Schalk and Kopf*, the leading case on the issue being then *Mata Estevez v. Spain*, where the ECtHR recognized only that "the applicant's emotional and sexual relationship [with another man] related to his private life" but not to his family life.

[14] The English translation does not have the same meaning of the Italian word "*monito*", which is the term used for a category of Constitutional Court decisions that do not declare the inconstitutionality of a provision, but warn the Legislator that there is an inconstitutionality that has to be solved through a legislation reform.

[15] "*Un altro esempio di 'invito' rimasto sinora inascoltato è quello contenuto nella sentenza n. 138 del 2010. In tale pronuncia la Corte ha escluso l'illegittimità costituzionale delle norme che limitano l'applicazione dell'istituto matrimoniale alle unioni tra uomo e donna, ma nel contempo ha affermato che due persone dello stesso sesso hanno comunque il 'diritto fondamentale' di ottenere il riconoscimento giuridico, con i connessi diritti e doveri, della loro stabile unione. Ha perciò affidato al Parlamento la regolamentazione della materia nei modi e nei limiti piú opportuni*." *Report of the President of the Constitutional Court Franco Gallo on the jurisprudence of 2012*, April 13, 2013, at http://www.cortecostituzionale.it.

[16] Court of Cass., I Civ. Sect., judgment no. 4184/2012.

[17] While many comments welcomed the decision with enthusiasm (M. DI BARI, 2012) for the completeness and clarity of the Court in summing up the status of legislation and jurisprudence regulating same-sex couples, some scholars strongly criticized this judgment, underlining several points of the motivation affected by lack of coherence: A. SCHUSTER (2012): "Il matrimonio e la famiglia omosessuale in due recenti sentenze. Prime note in forma di soliloquio", *www.forumcostituzionale.it* and B. PEZZINI, "Un paradigma incrinato: la faticosa rielaborazione di categorie concettuali tra le sentenza della Corte costituzionale 138/2010 e della Corte di cassazione 4184/2012", *ibidem*, where the A. also describes different positions assumed by commentators.

[18] Art. 65, Law no. 218/95.

[19] Among others, the Alaska Superior Court's decision can be cited again: "Today the court has recognized that the personal choice of a life partner is fundamental and that such a choice may include persons of the same sex", Alaska Sup. Ct. Brause v. Bureau of Vital Statistics, 1998. Similar conclusions were reached by the Massachusetts Supreme Court, in Goodridge v. Department of Public Health, November 18, 2003 and by the South African Const. Court's decision in Minister of Home Affairs v. Fourie, of December 1, 2005.

[20] This would be what has be called the "third way" for the legal recognition of same-sex couples, through the "diffused" recognition: see, G. FERRANDO, "La 'via legislativa' al matrimonio same-sex", in B. PEZZINI, A. LORENZETTI (eds.), *Unioni e matrimoni same-sex*, cit., p. 31 ff.

[21] Actually, even the Court of Cassation, I crim. sect., did pronounce on the issue, in a proceeding concerning the conviction of a foreigner for the crime of "illegal entry and permanence". With decision no. 1328 issued on January 19, 2011, the Court, considering that the foreigner was married to an Italian citizen under the Spanish Law, referred the proceeding back to the lower court in order to verify if such union in Spain must be considered equalized to a marriage, thus giving the status of "spouse" under EU Law for immigration purposes.

[22] Virginia Code, § 20-58. The words "white" and "colored" have been deliberately removed. This provision, as much as others against "intermarriage between a white and a colored person", was repealed by the US Supreme Court in *Loving v. Virginia*.

[23] Actually similar problems of recognition may arise, regardless to their nationality, in relation to: a couple going abroad just to get married; a couple married in their country of residence and then moving to another EU country; a married couple who want to temporary entry in another EU country where their marriage is not recognized (one of them not having a EU permit of stay); a couple whose civil status would be relevant in another country for judicial purposes. Borrowing the four categories of marriages relevant in the interracial cases, we could enumerate evasive, migratory, visitor and extraterritorial marriages. See: A. KOPPELMAN (2005): "Recognition and Enforcement of Same-Sex Marriage. Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges", *University of Pennsylvania Law Review*, vol. 153, p. 2143.

[24] See http://europa.eu/youreurope/citizens/family/couple/marriage/index_en.htm.

[25] The European Court of Human Rights has traditionally granted domestic law a wide margin of appreciation. The European Union also adopted a similar view when it first addressed family reunification in 1993 with the adoption of the Resolution on the harmonization of national policies on family reunification. See T. ERTUNA LAGRAND (2011): "Mutual Recognition of Same-Sex Marriages from an EU Immigration Law Perspective", in A. SCHUSTER (ed.), *Equality and Justice*, cit., p. 241 ff.

[26] A. R. ZIEGLER (2011): "LGBT Rights and Economic Migration: Will the Liberalization of the Movement of Persons in Economic Integration Agreements Increase the Need for Common Regional Standards Regarding Civil Status Rights?", in A. SCHUSTER (ed.), *Equality and Justice*, cit., p. 219 ff., on this point p. 228.

[27] This is the object of the Directive. The right to family reunification is also expressly mentioned in the "Treaty on the Functioning of the European Union": Art. 79 par. 2 (a) of TFEU vest the EU Parliament and Council with the competence to establish measures that affect family reunification.

[28] This is also the case in federal States, as the United States, where divergences among state laws prevail, as we will see later.

[29] Court of Cass., I Civ. Sect., judgment no. 4184/2012, § 2.1.

[30] It should be noted that homosexuals can be discriminated in the enjoyment of their rights in the internal market, from a State to another, also with regards to other aspects of economic integration, such as workers rights and rules concerning the offering of services and goods. On this subject see, for ex.: K. WAALDIJK, M. BONINI BARALDI (eds. 2006): *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive*, TMC Asser Press.

[31] See, among others, H. U. JESSURUN D'OLIVEIRA (1993): "Lesbians and Gays and the Freedom of Movement of Persons", in K. WAALDIJK, A. CLAPHAM (eds.), *Homosexuality: A European Community Issue - Essays on Lesbian and Gay Rights in European Law and Policy*, Martinus Nijhoff, p. 289; H. HUNT (1999): "Diversity and the European Union: Grant v. SWT, the Treaty of Amsterdam, and the Free Movement of Persons", *Denver Journal of International Law and Policy*, vol 27, p. 633 ff.; M. BELL (2002): "We are Family? Same-Sex Partners and EU Migration Law", *Maastricht Journal of European and Comparative Law*, vol. 9, p. 335.

[32] European Parliament Resolution of 2 April 2009 on the application of Directive 2004/38/EC. In the same sense, the CoE had already urged States to adopt the same immigration rules for homosexual and heterosexual couples ; with Recommendation 1470-2000 (Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe) the CoE Assembly affirms: "the Assembly is aware that the failure of most member states to provide residence rights to the foreign partner in a bi-national partnership is the source of considerable suffering to many lesbian and gay couples who find themselves split up and forced to live in separate countries. It considers that immigration rules applying to couples should not differentiate between homosexual and heterosexual partnerships. Consequently, proof of partnership other than a marriage certificate should be allowed as a condition of eligibility for residence rights in the case of homosexual couples."

[33] Five years before another ministerial memorandum imposed to all Public Officers to not transcribe marriages celebrated abroad between people of the same sex: memorandum no. 55 of October on "Marriages celebrated abroad between people of the same sex. Multilingual certified abstracts of civil status documents".

[34] On this topic, A. COSSIRI, "Famiglie omosessuali, famiglie clandestine. La lacuna dell'ordinamento che produce discriminazione", in *La società naturale e i sui nemici*, cit., p. 79.

[35] Concerning social security rights matters under the EU Law, see the decisions issued by the Court of Justice of the EU in the cases *Maruko* and *Römer* (Maruko v. Germany, App. no. C-267/2006, April 1, 2008; Römer v. Germany, App. no. C-147/08, May 10, 2011)

[36] "More perfect union", as known, is the expression employed in the Preamble of the US Const. However, it is also referred to in the European debate talking about the evolution towards a more political union, a Europe of rights.

[37] See A. KOPPELMAN (2006) : *Same Sex, Different States: When Same-Sex Marriages Cross State Lines*, Yale University Press, New Haven; for a comparison, see also A. WEISS (2007): "Federalism and the Gay Family: Free Movement of Same-Sex Couples in the United States and the European Union", *Columbia Journal of Law and Social Problems*, vol. 41, p. 81.

[38] Indeed, this comparison has assumed a great relevance in the public debate on same-sex marriage. Common law jurisdictions have actually widely referred to precedents concerning interracial marriage not only in cases concerning the recognition of marriages celebrated abroad, but also in cases concerning the very existence of a right to marry for same-sex couples (See, for ex. California Supr. Court, In Re Marriage Cases, May 15, 2008, but also Supreme Court of South Africa, Minister of Home Affairs v. Fourie, December 1, 2005, citing the famous case of the United States Supreme Court Loving v. Virginia, 1968); in the same way, many scholars addressed the issue of same-sex marriage through a comparison with interracial marriage: A. KOPPELMAN (1996): "Same-Sex Marriage and Public Policy: The Miscegenation Precedents", Quinnipiac Law Reviw, vol. 16, p. 105; A. KOPPELMAN, "Recognition and Enforcement of Same-Sex Marriage. Interstate Recognition of Same-Sex Marriages and Civil Unions", cit., p. 2143; A.M. MORRISON (2007): "Same-Sex Loving: Subverting White Supremacy Through Same-Sex Marriage, *Michigan Journal of Race & Law*, vol. 13, p. 177; R.A. LENHARDT (2008): "Beyond Analogy: *Perez v. Sharp*, Antimiscegenation Law, and the Fight for Same-Sex Marriage", *California Law Review*, vol. 96, p. 839.

[39] These were the facts at stake in the case decided with the landmark decision *Loving v. Virginia*, by which the Supreme Court struck down the Virginian Law prohibiting interracial marriages, cohabitations and sexual relationships.

[40] The Court's opinion, drafted by the Chief Justice Warren, indicated that: "Marriage is one of the "basic civil rights of man", fundamental to our very existence and survival […] The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State". *Loving v. Virginia*, 388 U.S. 1, June 12, 1967.

[41] The most critical point concerns, as is known, the possibility to have and raise children (MAP, adoption, second-parent adoption and joint parental authority, etc.), that will not be addressed here. Nonetheless, we want to underline that the provision of two similar form of partnerships, with different names for same-sex and opposite-sex couples, will have to face, sooner or later, the question about the admissibility to differentiate, only in the name, two analogous institutions, with the consequence that they could appear as the first class and the second class version of the same institution: see, on this point, P. FARAGUNA, "Constitutional Paradoxes from Inequality Equality to Equality: the Italian Case", cit., on this p. 85, where the author also cites two US cases where the courts decided that the nominal separation was a constitutional violation.