Principle of Non-discrimination on the Grounds of Sexual Orientation and Same-Sex Marriage. A Comparison Between United States and European Case Law

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Abstract By way of a comparison between European and United States case law regarding same-sex marriages, this chapter aims at stressing the important role of judicial activity in implementing the full meaning of equality in exercising the fundamental right to marry. From an analysis of different judgments concerning the same-sex marriage, it is possible to observe a gradual global prevailing of the "paradigm of heterosexual marriage", as a result of the non-discrimination principle on the grounds of sexual orientation, which is consolidated by the occidental juridical culture. The study of this case law also points out the relationship between social consent, judicial activity and legislative power. The European supranational courts as well as the US Supreme Court seem to check in a more stringent manner the discretion of the domestic/State legislators, in accordance with the growing social consent in favor of same-sex marriages. The "new approach" of the European supranational courts and the US Supreme Court has the merit to trigger a virtuous dialog among lower courts, State legislators and civil society in order to gradually give fullness to the meaning of the non-discrimination principle on the grounds of sexual orientation. Hence, it is possible to say that the current question is not if the same-sex marriage is constitutional but who decides about it. Judicial action, in the absence of legislative answers, risks guaranteeing only a fragmentary (and often contradictory) protection of fundamental rights. It should be desirable that the legislator will choose suggestions coming from the "living law" and that the "dichotomy" between the two powers will be reduced to unity, according to the rules of a democratic system, based on the separation of and loyal cooperation between the same powers.

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1 United States and European Case Law: The History of "Parallel Routes"

Despite many differences between the United States and the European legal system,[1] we can find some "assonances" when we compare the United States (federal and State level) case law and the European (supranational and national level) case law about the non-discrimination principle on the grounds of sexual orientation and, particularly, with regard to the *same-sex marriage*.

Initially both in the Unites States and in Europe, the principle of non-discrimination based on sexual orientation rooted thanks to the "judicial activism".

Indeed, without any specific normative framework to refer to, the European courts—in particular, the European Court of Human Rights (ECtHR)—and the US Supreme Court declared the principle of non-discrimination on the grounds of sexual orientation, emphasizing its potential application in various fields, including the familiar one. In addition, the judicial approach concerning non-discrimination principle on the grounds of sexual orientation created the pre-conditions for the implementation of a "gradual protection" of gay rights.

As noticed by some authors,[2] the "step by step approach" of judges has enabled conquests that perhaps would not have been possible to obtain through legislative action, if we consider historical times or if we consider the dominant public opinion toward sexual freedom.

This is demonstrated by the fact that, almost globally, the jurisprudential excurses concerning gay rights developed through four phases:

(1) important decisions of the US Supreme Court and the ECtHR have led to the decriminalization of sodomy in States where this was a crime and/or an aggravating circumstance of the crime. Three leading cases can be mentioned: the *Dudgeon* case (ECtHR, 1981)[3]; the *Romer*[4] and the *Lawrence*[5] cases (US Supreme Court, 1996, 2003);
(2) a second phase began in the late nineties, in particular in the European Union, thanks to important judgements of the European Court of Justice (ECJ) relating to the non-discrimination principle on the grounds of sexual orientation in

[1]Clear differences, if we only compare the US government system—US Federalism—with the EU governing system (a Union of States) and if we consider the role played by European courts—the European Court of Human Right and the European Court of Justice—at the European supranational and at national level.

[2]See Sperti (2013).

[3]*Dudgeon v. United Kingdom* (App. no 7525/76), ECtHR, judgment of 22 October 1981.

[4]*Romer v. Evans*, 517 US 620 (1996).

[5]*Lawrence v. Texas*, 539 US 558 (2003).

the workplace (*Grant* case,[6] 1998; *D. and Kingdom of Sweden* case,[7] 2001). This judicial trend was then followed by European Union institutions that:

- established the general principle of non-discrimination (Article 13 European Community Treaty—Amsterdam 1997, today Article 19 Treaty on the Functioning of the European Union—Lisbon 2007);
- adopted the Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation or the Directive 2004/38 on the rights of European Union citizens and their family members to move and reside freely within the territory of Member States, with which the EU opened the notion of family member to the same-sex spouses and to same-sex partners;
- included the non-discrimination principle between the fundamental EU values (Article 2 Treaty on European Union—Lisbon, 2007);
- and, finally, mentioned the principle of non-discrimination on the grounds of sexual orientation in the EU Charter of Fundamental Rights (Article 21), a document legally binding all Member States;

(3) the Courts passed the purely "individualistic" approach of previous decisions in order to assert a "pluralistic view" of human dignity and the freedom to live in their own familiar dynamic, respecting sexual orientation, as a "new declination" of the self-determination of the individual within his/her private sphere.

From this point of view, it is clear the influence that the decisions of the courts have exercised on the legislative evolution, with regard to same-sex marriages and/or civil unions.[8]

As a result of this "global" judicial trend, many States and national legislators intervened to recognize same-sex couples in a more or less deep manner, also in accordance with national social consensus.

[6]Case C-249/96 *Grant,* [1998] ECR I-00621.

[7]Joined cases C-122/99 and C-125/99 *D. and Kingdom of Sweden* [2001] ECR I-04319.

[8]E.g. *Baehr v. Lewin*, 74 Haw. 852 P.2d 44 (1993); *Goodridge v. Department Public Health*, 440 Mass. 309 (2003); *Lewis v. Harris,* 188 N.J. 415, 908 A 2d 196 (2006). In Europe: the decisions of the German *Bundesverfassungsgericht,* 1 BvF 1/01, 1 BvF 2/01 of 2002 and 1/11 and 1 BvR 3247/09 of 2013; the judgments of the Portuguese *Tribunal Constitutional*, no. 359 of 2009 and no. 192 of 2010; the decisions of the Italian Constitutional Court, no. 138 of 2010 and no. 170 of 2014; the ruling of the French *Conseil Constitutionnel* no. 663 of 2013 and the decision of the Spanish *Tribunal Constitucional* no. 198 of 2012. We can also mention the case law of the ECtHR (in particular: *Schalk and Kopf v. Austria,* App. no. 30141/04, ECtHR, judgment of 24 June 2010, and *Vallianatos v. Greece,* App. nos. 29381/09 and 32684/09, ECtHR [GC], judgment of 7 November 2013) and of the US Supreme Court (*United States v. Windsor,* 133 S. Ct. 2675, 2013, and *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2013).

Looking to these results, it is possible to draw a "mapping" of different laws that came into force in the United States but also in many European Countries. Indeed, we can distinguish:

(1) States that follow the "separate but equal" approach have introduced a civil institution that is, now, for the same-sex couples, like marriage is for heterosexual couples. This implies that the progressive and gradual extension of the rights linked to marital status, to the same-sex couples is, from time to time, "filtered" by the legislator and controlled by the Constitutional Court. The German *Lebenspartnerschaft* could be an example. As a result of important decisions of the *Bundesverfassunggericht*, it was possible to extend to homosexual partners the same social security rights (i.e. the same survivor's pension that is recognized for heterosexual married couples[9] or some parental rights, like the right to adopt a biological child or an adopted child of the respective partner)[10];
(2) States that have opened the institution of marriage to the same-sex couples, (e.g. Belgium, Finland, France, Portugal, Spain, The Netherlands and the United Kingdom. In the United States it is thought that as a result of the *Windsor* case, and also the recent decisions of the other federal judges, thirty-six States now recognize the same sex marriage);
(3) States, such as Italy, in which same-sex couples can not marry; or where there is not any specific institution (like the German one) for the same-sex couples or where any institution does not exist, like the French *pact civil de solidarieté* (*Pacs*), that could protect homosexuals as heterosexual couples, that do not wish to marry. In Italy same-sex couples could only benefit from judicial protection, with regard to these specific situations.

With regard to this mapping, we can note that, at least, since 2010 to the present, a further "season" for the protection of same-sex couples has started.

In this new phase, "the challenge" (legal, political and ethical) is represented by the overcoming of the "paradigm of heterosexual marriage" and by the overcoming of the "separate but equal" approach, that has inspired many State laws. From this point of view, judicial protection for some specific situations (i.e. the Italian model) can not satisfy the need of equality, as imposed by the constitutional principle of non-discrimination on the grounds of the sexual orientation.

This consideration leads us to point out the *fourth assonance* between the US context and the European one. Indeed, at State level, some inhomogeneity in the protection of the homosexual family can record.

This situation depends on the discretion that both the US Supreme Court and the European courts recognize the State/national legislator.

[9]BVerfG, 1 BvR 1164/07 of 2009; BVerfG, 1 BvR 611/07 of 2010.

[10]BVerfG, BvR 1/11, BvR 3247/09 of 2013.

Neither the American Federation nor the European Union have the formal power, the "formal authority" to impose to all Member States a unique notion of marriage.[11]

This has been said, as in the US Supreme Court in *Windsor* case of 2013 in which the Supreme Court declared the unconstitutionality of section 3 of the Defense of Marriages Act, because it infringes the Fifth Amendment of the Federal Constitution.[12] As a result of that decision, the Supreme Court asserted (but also going further beyond this) that the imposition at the federal level of the "heterosexual paradigm" of marriage is an invasion of the legislative competence of the State.

Similarly, this "opening" to the discretion of the national legislators, emerges also in the ECtHR or ECJ case law. It could be mentioned, for example, the *Schalk and Kopf v. Austria* case, where, for the first time, the ECtHR has been required to assess whether the refusal by State authorities to the same-sex marriage could be a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (especially, Articles 12, 8 and 14).[13]

In its judgment, the European Court asserted that, because of the social evolution of the family concept, as recorded in some States, "it [would be] artificial to maintain the view that, in contrast to a heterosexual couples, a same-sex couple [could not] enjoy 'family life' for the purposes of art. 8".[14]

Similarly the US Supreme Court and the ECtHR abandoned "the paradigm of heterosexual marriages", in order to adopt "a more neutral" concept of marriage, with respect to the peoples' sexual orientation. However, at the same time, the same judges asserted that:

> [A]s matters stand, the question of whether or not to allow same-sex marriages is left to regulation by the national law of the Contracting State.[15]

One could question as to why. The answer seems to be the same in the United States as in Europe:

> Marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not hurry to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society.[16]

The same "opening" to the discretion of the national legislators also emerges from the ECJ case law (i.e. *D. and Kingdom of Sweden* case), as well as from later cases (i.e. *Maruko* case[17] and *Römer* case[18]).

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[11] See Perelli (2013), p. 3.

[12] See, for an Italian issue about this decision, D'Aloia (2014a, b).

[13] *Schalk and Kopf v. Austria* cit.. See for the analysis of this decision Crivelli (2011).

[14] See *Schalk and Kopf v. Austria* cit., para. 94.

[15] Ibid., para. 61.

[16] Ibid., para. 62.

[17] Case C-267/06 *Maruko* [2008] ECR I-1757.

[18] Case C-147/08 *Römer* [2011] ECR I-3591.

I would like to anticipate that in the latest European case law, the European judges seem to pay more attention to the social trends. It appears as well that European judges are prepared to check in a more stringent manner the discretion of domestic legislators, in accordance to a growing social consent in favor of same-sex marriage.

From this point of view, it is important to stress the relationship between "the social consent" and the judicial activity: without a clear position of the legislator on same-sex marriage, the casuistic approach of the judges could test and, at the same time, influence the social consent on this matter. In addition, through particular argumentative techniques, the judges are able, crosswise, to create conditions to encourage a homogeneous legislative framework in favor of same-sex marriages.

The use of comparison by judges, for example, shows that the "others have done so" may represent an important resource in order to decide difficult cases, to overrule a decision, to better support similar arguments, to "soften" the reactions of the public opinion, with regard to "social consequences" of the decision.

Both in United States and European case law, there are frequent references to foreign leading cases relating to non-discrimination based on sexual orientation. There is also a circulation track of different models,[19] and, as many authors have noted, this has become a real "dialogue between Courts".[20]

This dialog describes, in a symptomatic manner, the stronger interaction between courts, as result of the globalization process, of the creation of "global standards" in the protection of fundamental rights and of the "new universalism of rights protection, built on a cooperative constitutionalism, projected beyond the boundaries of the State".[21]

Emblematic is a decision of the Spanish Constitutional Court (judgment no. 198 of 2012). In order to justify the evolutionary interpretation of marriage, as protected by Article 32 of the Spanish Constitution, the Court referred many times to international and foreign experiences, especially when the same remembered:

[19]See, for example, *Dudgeon v. United Kingdom* cit., a real "leading case" in the history of the gay rights, that continues to be mentioned in many decisions of the national Constitutional Courts of different Countries. See the decision of the Italian Constitutional Court no. 138 of 2010 but also the *Lawrence* case, ruled by the US Supreme Court, which is the first case in which the Supreme Court referred to a foreign European case (*Lawrence v. Texas* cit.).

[20]On this issue see Sperti (2006, 2013); De Vergottini (2010); Ruggeri (2013, 2014b). About the notion of "community of judges", are also interesting the considerations outlined in the Seminar "Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility?" (Strasbourg, 31 January 2014), available at http://www.echr.coe.int/Documents/Dialogue_2014_ENG.pdf.

[21]For the problematic relationship between national judges, Constitutional Courts, supranational and international courts see D'Aloia (2014a). See also Ruggeri (2013), Tega (2012).

> The equality between same sex marriages and opposite sex marriages has been consolidated by the occidental juridical culture.[22]

It is interesting to point out the definition of "occidental juridical culture": for the Spanish Court, it includes, not only the doctrine, international law, the judgments of the international and European courts but also comparative law and the foreign experiences that have the same social and cultural conditions.[23] Consequently, as correctly noted by some Italian authors,[24] we can say that the referral to foreign experiences is used, most of the time, to demonstrate the existence of some common (both European and American) values and to promote the evolutionary interpretation of marriage.

In principle, it could be said that, if the concept of "occidental juridical culture" is linked to the idea of the legal system as social phenomenon bound to reality, then the judge is the *trait d'union* between law and society and, in a dynamic way, an important entrance door for the social change.

2 The Judicial "Development" of the Principle of Non-discrimination of Same-Sex Couples and the Growing Conditioning by Supranational Judges on the Discretion of State/National Legislators

2.1 European Supranational Level: The ECHR System

As previously mentioned, the principle of non-discrimination on the grounds of sexual orientation has emerged, both in the American case law and in the European case law, primarily on the basis of an evolutionary interpretation of the

[22] *Tribunal Constitutional de España*, decision no. 198/2012, 6 November 2012, available at http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=20674. The Court wrote: "*Si se acude al Derecho comparado, en la balanza de la integración del matrimonio entre personas del mismo sexo en la imagen actual del matrimonio pesa el hecho de que la equiparación del matrimonio entre personas de distinto sexo y entre personas del mismo sexo se ha consolidado, en los últimos años, en el seno de varios ordenamientos jurídicos integrados en la cultura jurídica occidental*".

[23] In the same decision, the Court wrote: "*Pues bien, la cultura jurídica no se construye sólo desde la interpretación literal, sistemática u originalista de los textos jurídicos, sino que también contribuyen a su configuración la observación de la realidad social jurídicamente relevante, sin que esto signifique otorgar fuerza normativa directa a lo fáctico, las opiniones de la doctrina jurídica y de los órganos consultivos previstos en el propio ordenamiento, el Derecho comparado que se da en un entorno socio-cultural próximo y, en materia de la construcción de la cultura jurídica de los derechos, la actividad internacional de los Estados manifestada en los tratados internacionales, en la jurisprudencia de los órganos internacionales que los interpretan, y en las opiniones y dictámenes elaboradas por los órganos competentes del sistema de Naciones Unidas, así como por otros organismos internacionales de reconocida posición*". See for a comment Ibrido (2012, 2013).

[24] See Sperti (2013).

concept of privacy and self-determination of individuals (as guaranteed by Article 8 of the ECHR and by the Fourteenth Amendment of the US Constitution).

Starting at the end of the nineties, the ECtHR has inaugurated a combined interpretation of Articles 8 and 14 (prohibition of discrimination on many grounds—but not expressly on the grounds of sexual orientation—in the exercise of freedoms protected by the European Convention), never more be abandoned.[25]

To say that there has been a discrimination in the exercise of rights protected by the ECHR on the grounds of sexual orientation implies to subject, under *strict scrutiny*, the arguments used by the State to support the legitimacy of the national measures that restricted the same rights.

This is clear in *Karner v. Austria*,[26] about the succession of the surviving same-sex partner in a tenancy. In this case, the ECtHR stated that the protection of the "traditional family" is an important and legitimate reason to justify different treatment based on sexual orientation. However, at the same time, the same Court stated that the Austrian government did not adequately prove the national *ingérence* (the denial of the right of the surviving same-sex partner) with respect to the purpose (the protection of a traditional family).

For many years, the European Court has abandoned the "individualistic" approach in interpreting Articles 8 and 14 and begun to consider homosexual unions as "family life". Doing so, the Court has begun to use the ECHR as a "living instrument"; paying more attention to the evolution of the contemporary society; and to the raising an European consensus in favor of a more broad concept of family life.

We can see this approach, in particular in the *Schalk and Kopf* case,[27] in which the European Court greatly enriched the arguments presented to that date. This is a very important decision: first, the parameter used is not only the result of a combined reading of Articles 8 and 14 or because, as said, the ECtHR arrived to a notion of marriage (Article 12), which opens to the discretion of legislator; second, at the supranational level, "marriage" no longer appears as a traditional notion of marriage.

As we have already seen, the European Court links the same-sex relationship to the notion of private-family life (Article 8) and, taking into account the social evolution of the concept of family registered in many States, it states that:

> It [would be] artificial to maintain the view that, in contrast to a different-sex couples, a same-sex couples [could not] enjoy the "family life" for the purposes of art. 8.[28]

Recently, the ECtHR has returned to rule on the issue of the legal recognition of same-sex couples, in the case *Vallianatos v. Greece*.[29] The Court ruled on an

[25] In particular, see *Salgueiro da Silva Mouta v. Portugal* (App. no. 33290/96), ECtHR, judgment of 21 December 1999.

[26] *Karner v. Austria* (App. no. 40016/98), ECtHR, judgment of 24 July 2003.

[27] *Schalk and Kopf v. Austria* cit..

[28] See cit., footnote 12.

[29] *Vallianatos v. Greece* cit.. See for a comment Rudan (2014), p. 1; Valenti (2013).

application submitted by a number of Greek same-sex couples, alleging infringement of Articles 8 and 14, because they were excluded—and therefore discriminated against compared to the heterosexual couples—by the Greek law on civil unions, entered into force in 2008.

On its merits, the decision of the ECtHR does not appear innovative. The Court confirms the well-established case law based on the evolutionary interpretation of Article 8 of the European Convention, as asserted in the *Schalk and Kopf* case. Other aspects, however, can lead us to reflect how interesting are the procedural aspects of this decision. In particular, the attention is to be focused on:

(a) the fact that the couples of Greek citizens decided to refer the matter directly to the ECtHR, asserting that Greek law does not offer an effective domestic remedy;
(b) the assignation of the case directly to the Grand Chamber of the European Court.

With regard to the first aspect, considering the "substantial" meaning that has been the rule of the prior exhaustion of domestic remedies in the European case law, the ECtHR asserts that, in the Greek system, there are no effective remedies available to assert the right protected by Articles 8 and 14 of the European Convention. According to the Court, also Article 105 of the Introductory Law to the Civil Code (that states that "the State shall be under a duty to make good any damage caused by the unlawful acts or omissions of its organs in the exercise of public authority") cannot be considered as an effective remedy. Likewise, in the opinion of the ECtHR, the Greek constitutional control is not sufficient, because it is not a concrete control.

The European Court does not consider positively the fact that, in the Greek system, as in the Italian one, the ECHR is a source of law superior to the ordinary legislation (Article 28 of the Greek Constitution), as it results from some decisions of the national supreme courts which declared unconstitutional several domestic laws that infringed the European Convention (and so Article 28 of the Constitution that expressly states that international law shall prevail over any contrary provision of the law).

These statements appear slightly "forced"; it seems that, in this case, there has been almost an "invasion of the field", an overlap of the ECtHR in respect to national judges and, in particular, with respect to constitutional judges.[30]

With regard to the second aspect—the referral of the case directly to the Grand Chamber—it is known that, according to Article 30 of the European Convention and to Article 72 of its Rules of Procedure, a Chamber may divest its own jurisdiction in favor of the Grand Chamber, where the case raises deep problems of interpretation of the ECHR or is at odds with a previous judgment of the European Court.

The present case, however, does not seem to present both of the hypothesis mentioned above; the decision seems rather to confirm, on its merits, the well-established case law by the ECtHR. Therefore, it appears that, with the referral to

[30]On the relationships between different courts, see Gallo (2012), Ruggeri (2013).

the Grand Chamber, the European Court wanted to confer "authoritativeness" to this new way of interpreting the rule of prior exhaustion of domestic remedies.

Within the European system of "multilevel protection of rights", it conveys that the ECtHR shows the tendency to "centralize", as much as possible, the judgment of "conventionality" of national laws, exercising therefore, in relation to the recognition of same-sex couples, a tighter control on the discretion of the domestic legislator.

There is also another aspect of this judgment that seems very significant. I refer to the attitude of the judges of Strasbourg in assessing the European growing social consent concerning the recognition of same-sex couples: they materially count the European Countries that introduced a legal protection to same-sex couples.[31]

According to the European Court, even if it cannot be said that there is homogeneity among European Countries, this growing trend has an impact on the domestic legislation, because it imposes on the State "in a isolated position" the obligation to justify, in a more stringent manner, the choice to not recognize same-sex couples. This means that the ECtHR has to use *strict scrutiny* on the arguments of the State; therefore, in the absence of "convincing and weighty" arguments, the Court can declare the infringement of the Convention.[32]

In this judgment, it would seem there is a will to "close the circle" on Article 8 of the ECHR, in order to repair almost the "minimum level" of legal protection for same-sex couples, that, on the basis of a growing European social consensus, could influence the discretion of national legislators. From this point of view, it seems clear, at least, that a national legislator, which intends to introduce a law in order to protect unmarried couples, cannot exclude, from such protection, same-sex couples.

In my opinion, what the ECtHR has decided in the *Vallianatos* case, does not seem to be entirely contradicted by what the same Court decided in the most recent *Hämäläinen* case, in July 2014.[33]

There are different factual requirements between the two cases. In the *Hämäläinen* case, the European Court assessed the compliance with Article 8 (autonomously and also in conjunction with Article 14) and with Article 12 of the

[31]We can read in that decision: "the trend emerging in the legal systems of the Council of Europe member States is clear: of the nineteen States which authorize some form of registered partnership other than marriage, Lithuania and Greece are the only ones to reserve it exclusively to different-sex couples … In other words, with two exceptions, Council of Europe member States, when they opt to enact legislation introducing a new system of registered partnership as an alternative to marriage for unmarried couples, include same-sex couples in its scope. Moreover, this trend is reflected in the relevant Council of Europe materials …" (para. 91).

[32]The judges of Strasbourg write: "The fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that aspect conflicts with the Convention … Nevertheless, in view of the foregoing, the Court considers that the government have not offered convincing and weighty reasons capable of justifying the exclusion of same-sex couples from the scope of Law no. 3719/2008" (para. 92).

[33]*Hämäläinen v. Finland* (App. no. 37359/09), ECtHR [GC], judgment of 16 July 2014.

ECHR, of the Finnish legislation concerning sex change of one of the spouses and the protection of the previous family relationship.

In the absence of a law on same-sex marriages in Finland, the sex change of a spouse implied also the change of the same qualification of the family relationship. In order to give recognition to the new sexual identity of the spouse, the Finnish legislator established the automatic conversion of the previous marriage in a registered civil union (i.e. an institution reserved only to same-sex couples that guaranteed, more or less, the same rights that the marriage offered to the heterosexual couples).

The applicants claimed the possibility to maintain, as same-sex couples, the effects of the marriages previously contracted.

Compared to the *Vallianatos* case, in the *Hämäläinen* case, the judgment does not concern the illegal exclusion of same-sex couples from the legal protection offered by some institutes like the civil union, but the legal recognition of the right of the same-sex couples to marry. Unlike the position of the applicants in the *Vallianatos* case, in this case, the applicants, according to the Finnish legislation at the time, could still have a guarantee of their rights, at least through the registered civil unions.[34]

In my opinion, also for this reason, in the *Hämäläinen* case, the ECtHR has excluded the violation by the Finnish legislator of the provisions of the European Convention mentioned above, stating that "the current Finnish system as a whole has not been shown to be disproportionate in its effects on the applicant"[35] and that there is "a fair balance between the competing interests in the present case"[36] (i.e. between the individual's right to obtain a new sexual identity and the discretion of the legislator to define who can get married).

However, this recent judgment is significant, because once again, the ECtHR recognizes a broad discretion to the domestic legislator, relating to the same-sex marriages.[37] This is, as stated by the Court, because there is not a European social consensus on this issue.

From this point of view, the judgment raises some doubts with regard to the "European social consensus approach".

In the *Vallianatos* case, the European social consensus theory seems to play an "additional" role, compared to the arguments used by the ECtHR in order to justify the violation by the Greek legislator of Article 8 in conjunction with Article 14

[34]The Court writes: "Same-sex marriages are not, for the time being, permitted in Finland although that possibility is currently being examined by Parliament. On the other hand, the rights of same-sex couples are currently protected by the possibility of contracting a registered partnership" (para. 69).

[35]*Hämäläinen v. Finland* cit., para. 88.

[36]Ibid.

[37]Ibid., para. 71: "The Court reiterates its case law according to which Article 8 of the Convention cannot be interpreted as imposing an obligation on Contracting States to grant same-sex couples access to marriages".

of the European Convention (and then, in order to state the discrimination that the same-sex couples suffered on the grounds of their sexual orientation).

Furthermore, this approach doesn't exempt the European Court from examining, through *strict scrutiny*, the Greek government's arguments.

In the *Vallianatos* case, then, the social consensus approach would seem to be symptomatic of the evolutionary interpretation of the ECHR. Adversely, in the *Hämäläinen* case, the lack of the European social consensus concerning same-sex marriages is a central argument for the ECtHR, in order to exclude the violation of the European Convention. The consensus approach, here, is used as "an autonomous hermeneutic criterion",[38] that is difficult to define, and that it seems to be applied, by the European Court, without limits.[39]

Referring to this issue, it is also to be mentioned that the judgment of the ECtHR has been overcome by the Finnish parliament that, on 28 November 2014, passed a civil initiative to introduce same-sex marriage.

Nevertheless, if we consider the overall activity of the ECtHR regarding the rights of the same-sex couples, we have to give credit to some recent studies that point out how the European Court has become increasingly progressive on this issue and its rulings have increased the likelihood of national policy reforms; even the likelihood of policy reforms of Countries whose laws and policies the Court have not explicitly been found to violate the ECHR.[40]

2.2 European Supranational Level: The EU Case Law

We can reach a similar conclusion, if we analyze the latest decisions of the ECJ, after the entry into force of Directive 78/2000—which introduced the prohibition of direct and indirect discrimination in the workplace—as well as after the entry into force of the Treaty of Lisbon and also of the Charter of Nice/Strasbourg that

[38]See Pustorino (2014).

[39]As noticed by judges Sajó, Keller e Lemmens in their dissenting opinion: "In this context, we note that proof of the existence of a consensus, when adduced, must not depend on the existence of a common approach in a super-majority of States: the Court has some discretion regarding its acknowledgment of trends (compare *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, para. 91, ECHR 2013)".

[40]See Helfer and Voeten (2014), p. 105: "In the context of ECtHR judgments on LGBT rights, we find evidence that even where international judges take social trends into consideration, they nonetheless retain considerable discretion and can encourage policy change by noncompliant Countries under the right domestic political and institutional conditions. In particular, ECtHR judgments increase the likelihood that all European nations—even Countries whose laws and policies the court has not explicitly found to violate the European Convention—will adopt pro-LGBT reforms. The effect is strongest in Countries where public support for homosexuals is lowest".

now has binding character. I refer specifically to three cases: *Maruko*,[41] *Römer*[42] and *Hay.*[43]

In the *Maruko* and *Römer* cases, the judges of Luxembourg asserted that the German legislator had infringed the Directive 78/2000, because German law denied the right to a survivor's pension to the surviving same-sex partner (a right guaranteed, however, to heterosexual married couples). For that reason, the German legislator had discriminated on the grounds of sexual orientation for same-sex couples.

In the *Hay* case, the judges of Luxembourg stated that the French legislator had discriminated against same-sex couples (that have contracted a *Pacs*), denying them some benefits guaranteed to same-sex married couples, like special leave and award salary in the case of marriage (benefits that, only after 2008, were extended also to the same-sex couples that contracted a *Pacs*).

In all three cases, in order to verify the existence of any discrimination, the ECJ made a comparison between the situations that, at national level, are comparable.

In the *Hay* case, in order to assess the discriminatory nature of the national legislation (according to Article 2 of Directive 7/2000), the judges of Luxembourg pointed out that it "is required not that the situations be identical, but only that they be comparable" and that "the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned"[44] and, regardless of the fact that "national law generally and comprehensively treats registered life partnership as legally equivalent to marriage".[45]

However, from the comparison of the three decisions, the judgment in the *Hay* case appears to be more inclusive and incisive.

Indeed, in the *Maruko* and *Römer* cases, a comparison was made between opposite-sex married couples and same-sex couples, that have contracted a *Lebenspartnerschaft* (the German institution that is, for the same-sex couples, what marriage is for the opposite-sex couples).

In the *Hay* case, the parameter for comparison is broader, because a comparison is made between married couples and homosexual couples joined in a *Pacs*. On the one hand, this offers legal protection to the *more uxorio* cohabiting couples, homosexual or heterosexual couples and it doesn't produce the same effects of marriages; on the other hand, it is no longer the only "comparable situation" for heterosexual marriages, because the French legislator has "opened" the marriage also to the same-sex couples. As a consequence, the "comparable situation" to the

[41] *Maruko* cit..

[42] *Römer* cit..

[43] Case C-267/12 *Frédéric Hay* [2013] nyr.

[44] Ibid., para. 33.

[45] Ibid., para. 34.

status of worker/spouse ends up covering situations—both legal and factual—that do not depend on peoples' marital status.

Doing so, the judges of Luxembourg find a discrimination pursuant to Article 2 (2)(a) of Directive 78/2000. More specifically, they asserted that there is a direct discrimination based on sexual orientation, if:

> [T]he national rules of the Member State concerned do not allow persons of the same sex to marry, in so far as, in the light of the objective of and the conditions relating to the grant of those benefits, that employee is in a comparable situation to an employee who marries.[46]

In light of the situation, the potential and the "revolutionary" charge of this decision truly emerges, considering the effects of the decision in Countries where the legislator guarantees the protection of same-sex couples through legal arrangements other than marriage or when, a fortiori, same-sex couples do not have any legal protection, as in the Italian legal system.

Precisely, with regard to these legal systems, the decision of the judges of Luxembourg sounds like a warning: expanding so the concept of "comparable situation", as has been said, the ECJ seems to "sanction" and remedy, time to time, the omissions of national legislators who discriminate a single worker on the grounds of sexual orientation.[47] This is the core of the decision, the "most delicate" and strongest point.

Accordingly, the judges of Luxembourg indirectly extended the judgment of reasonableness on areas "reserved" to the discretion of the domestic legislator and to the national courts.

Under this aspect, two things can be said.

First, the *Whereas* no. 22 of Directive 78/2000 provides that the Directive is "without prejudice to national laws on marital status and the benefits dependent thereon". The ECJ appears not to dwell on the actual legal implications of this *Whereas*. If this is so, the judges of Luxembourg actually seem to want to embark on a path of "indirect communitarization of the national family laws".[48]

Focusing on mutual and natural interconnections between labor policies and family policies and "expanding" the meaning of the principle of non-discrimination based on sexual orientation of individual workers, the judges of Luxembourg recognize that this principle is a general principle of the EU legal system and, at the same time, they recognize "a kind of *ultra* efficacy", "compared to other values".[49]

If someone talks about a (even if only indirectly) "communitarization" of the national family law may seem like a gamble, it is not unreasonable to argue that, with that decision, the ECJ aims to restrict the discretion of national legislators on

[46]Ibid., para. 47.

[47]Cf. Valenti (2014).

[48]Cf. De Pasquale et al. (2012).

[49]See Winkler (2011), p. 10. See also Rijpma and Koffeman (2014), Orzan (2014).

the family policies in order to ensure an effective implementation of the principle of non-discrimination based on sexual orientation.

In other words, the discretion of Member States relating to the marital status can no longer be an alibi to continue to discriminate against homosexual workers, excluding them from individual economic or security-welfare performances, if these workers live a (legal or de facto) familiar relationship, that could be comparable to that of heterosexual married workers. This leads, inevitably, to EU judges exerting an "external" and "indirect" control on how that discretion is exercised by national legislators.

Secondly, the *Hay* case not only marks a turning point in the European path in (indirectly) "communitarization" of national family law, but also emphasizes the important role, in this context, that EU judges have assumed.

According to this point of view, it can certainly be argued that, in the *Hay* case, the judges of Luxembourg have been much more incisive than in the past; the decisional space that has previously been left to the "dialog" with the national courts has been regained.

Indeed the *Whereas* no. 15 of Directive 78/2000 provides that:

> The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice.

In compliance with this Directive, in the *Maruko* and *Römer* cases, the EU judges stressed that "the assessment of comparability is within the jurisdiction of the national Courts".[50] It is not so in the *Hay* case, where, in any part of the decision, the ECJ seems to replace the national courts, causing itself the same "assessment of comparability" that the national court should have done.

As the ECtHR seems to have done in enforcing the ECHR, at the same manner, the ECJ seems to operate a tighter control on the discretion of the Member States in order to ensure, in a more rigorous way, the uniform application and interpretation of EU law, especially in contexts where there is not a strong social consent about the level of protection of same-sex couples.

2.3 United States: The Judicial Activism After the Windsor Case. Waiting for Another Decision by the US Supreme Court

In my opinion, the American context is not "so far" from the European one.

As known, referring to the two decisions of 2013 (*United States v. Windsor* and *Hollingsworth v. Perry*),[51] the US Supreme Court has actually written an important page in the battle for same-sex couples rights.

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[50] *Maruko* cit., paras. 67–69; *Römer* cit., para. 4.

[51] US Supreme Court, *United States v. Windsor* cit., and *Hollingsworth v. Perry* cit..

In particular, in the *Windsor* case[52] the US Supreme Court declared the unconstitutionality of section 3 of the Defense of Marriages Act (DOMA), according to which, at the federal level, the accepted concept of marriage was the opposite-sex marriage. This implied that Congress could adopt acts to recognize certain benefits for heterosexual spouses, excluding same-sex couples.

For the Supreme Court, the imposition, at the federal level, of such traditional concept of marriage is an arbitrary invasion in the legislative competence of each State.

In addition, the Supreme Court evaluates the constitutionality of section 3 of DOMA in light of the due process clause, established by the Fifth Amendment. After having asserted that section 3 of DOMA violated the federal balance, the US Supreme Court emphasizes the social, "pluralistic" dimension of the concept of dignity.

The Supreme Court qualified the choice of a State to guarantee to a group of citizens the right to marry, as an important moment "to give further protection and dignity to that bond".[53] In particular:

> This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.[54]

For that reason, the Supreme Court assessed whether section 3 of DOMA had or had not a legitimate aim, starting from the parliamentary works of DOMA, that show a "discriminatory animus" as based on "both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality".[55]

As a consequence, the US Supreme judges recognized that "DOMA writes inequality into the entire United States Code".[56]

From these words it is clear that, as some authors have noted,[57] this case is only an apparent "case" about the distribution of legislative powers.

The argument appears to have been used by the Supreme Court to maintain a self-restraint that, as well as in Europe, has triggered a virtuous mechanism among lower courts, State legislators and civil society, with different effects.

First, this self-restraint creates, gradually, the conditions to justify the social evolution of certain legal institutions and it favors the "climate" for its acceptance by local communities. Second, the dialog with the legislators/lower courts

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[52]For some Italian comments on this decision see: D'Aloia (2014a, b), Massa Pinto (2013), Schillaci (2013).

[53]US Supreme Court, *United States v. Windsor* cit., opinion of the Court, III.

[54]Ibid.

[55]Ibid.

[56]Ibid.

[57]Sperti (2013).

becomes spontaneously tighter; this fosters the consolidation of a more homogeneous social consent, and gradually gives fullness to the meaning of non-discrimination principle on the grounds of sexual orientation.

Not without a certain circularity, therefore, on the grounds of a growing social consent in favor of the same-sex marriage, we can note that the judges could endorse the same-sex marriage, as "inevitable conclusion" of the non-discrimination principle. On the grounds of the same consent, the control on the legislator in "an isolated position" will become inevitably stricter (as *Vallianatos* case shows).

If we read the American ruling after the *Windsor* case concerning same-sex marriages, we gain the perception of what has been said above, i.e. the growing tendency of federal judges to maintain a tighter control on the discretion of the individual States.

Example of what said above is the decision of the Supreme Court of New Mexico, adopted on 19 December 2013,[58] which moves away from a context that is very similar to the Italian one. Same-sex marriage was not expressly banned in New Mexico, but the ban could be deduced from various legal provisions that expressly refer to the sex diversity of the spouses.

The Court declared that the traditional concept of marriage "violates the Equal Protection Clause under Article II, section 18 of the New Mexico Constitution"[59] because it discriminates against same-sex couples on the basis of either their sex or their sexual orientation.

In order to prove this, the Supreme Court made a comparison between homosexual couples and heterosexual couples. Initially, the Court examines whether the argument of the "potential procreative capacity"—used also by other national Constitutional Courts (such as the Italian one)—may justify a different treatment between same-sex and heterosexual couples. Focusing on the validity of marriages contracted with the desire not to have children, the Court states that "procreation is not the overriding purpose of the New Mexico marriage laws" because:

> The purpose of the New Mexico marriage laws is to bring stability and order to the legal relationships of committed couples by defining their rights and responsibilities as to one another, their property, and their children, if they choose to have children.[60]

The Court adds that with respect to children, the general marriage laws provide that "[a] child born to parents who are not married to each other has the same rights pursuant to the law as a child born to parents who are married to each other", and so the same say "same-gender and opposite-gender couples who want to marry are similarly situated".[61]

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[58] *Griego v. Oliver,* 316 P.3d 865 (2013).

[59] Ibid.

[60] Ibid., para. 33.

[61] Ibid.

Once the conditions for comparability are fixed, the New Mexico Supreme Court examines the constitutional validity of the State law, through the intermediate scrutiny:

> [B]ecause the LGBT community is a discrete group that has been subjected to a history of purposeful discrimination, and it has not had sufficient political strength to protect itself from such discrimination.[62]

Through such scrutiny, the Court considers that the arguments used to deny marriage to the same-sex couples (for example, the public interest to promote a responsible procreation, responsible education of children, not to have deinstitutionalization of the marriage, as well as the moral disapprobation of homosexual activity and the "traditions") are not able to justify the prohibition and discrimination currently existing. Hence it declares the unconstitutionality of the same-sex marriage State ban.

The decision of the Supreme Court of New Mexico is only an example. Indeed, a growing acceptance to same-sex marriage by other States is quickly emerging.

Currently, there are thirty-six States in which same-sex marriages is legal. In twenty-five States,[63] this was possible thanks to the activism of the judges (State courts, district courts and courts of appeal), that overturned the same-sex marriage bans, declaring them unconstitutional.[64] Some States (Indiana, Oklahoma, Virginia, Utah, and Wisconsin) submitted petitions for the *writ of certiorari* to the US Supreme Court in order to obtain renewal of the decisions of the same Court of Appeals that struck down the same-sex marriage ban.

With the order issued on 6 October 2014, the US Supreme Court denied the petitions for the *writ of certiorari*, perhaps because of the almost unanimous view expressed by the different courts about the constitutionality of same-sex marriages. Hence the Circuit Court of Appeals' ruling went into effect in these five States.

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[62]Ibid., para. 53.

[63]Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Kansas, Massachusetts, Montana, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Virginia, West Virginia, Wisconsin, Wyoming. See: National Center for Lesbian Rights. 2015. *Marriages, Domestic Partnerships and Civil Unions: Same-sex Couples within the United States*, available at http://www.nclrights.org. See also for an Italian comment Sperti (2014).

[64]See for example: *Latta v. Otter*, no. CV-00482-CW (2014); *Kitchen v. Herbert*, 755 F.3d 1193 (2014); *Baskin v. Bogan,* 766 F.3d 648 (2014); *Wolf v. Walker*, 986 F. Supp.2d 982 (2014); *Whitewood v. Wolf*, 992 F. Supp.2d 410 (2014); *Geiger v. Kitzhaber*, 994 F. Supp.2d 1128 (2014); *Wright v. Arkansas*, no. CV-14-414 (2014); *Garden State Equality* et al. *v. Dow*, 82 A.3d 336 (2013). See also the pending cases: US Court of Appeals for the Sixth Circuit, *DeBoer v. Snyder*, *Bourke v. Beshear, Tanco v. Haslam, Obergefell v. Hodges*; and US Court of Appeals for the Fifth Circuit, *De Leon v. Perry*.

Likewise, other six States (Colorado, Kansas, North Carolina, South Carolina, Virginia and Wyoming), that are under the same Circuit jurisdiction, were affected by the same ruling.

The order issued last October has not been the "final word" of the Supreme Court. For the first time, after the *Windsor* case and in contrast with the recent rulings of other courts and in contrast with this recent order of the US Supreme Court, the Court of Appeals for the sixth Circuit has overturned lower-court rulings in Michigan, Ohio, Tennessee and Kentucky, upholding the State bans.[65]

In order to justify the argument that the choice of introducing same-sex marriages should be only as result of democratic decision-making and therefore it should be left to the law-maker (not to the judges), the Court of Cincinnati recalled European experiences and in particular the decision of the ECtHR in the *Schallk and Kopf* case and in the *Hämäläinen* case.

As recollected by the judges, both European decisions recognize the existence of the margin of appreciation for States in the matter of marriages:

> Yet foreign practice only reinforces the impropriety of tinkering with the democratic process in this setting … Even more telling, the European Court of Human Rights ruled only a few years ago that European human rights laws do not guarantee a right to same sex marriage. *Schalk and Kopf v. Austria*, 2010. "The area in question", it explained in words that work just as well on this side of the Atlantic remains "one of evolving rights with no established consensus", which means that States must enjoy [discretion] in the timing of the introduction of legislative changes. It reiterated this conclusion as recently as this July, declaring that "the margin of appreciation to be afforded" to States must still be a wide one. *Hämäläinen v. Finland*.[66]

On 18 November 2014, the plaintiffs filed a petition for a *writ of certiorari* with the Supreme Court. At the moment of writing, the case is pending before the Supreme Court; however, it is reasonable to think that it could "force" the US Supreme Court to intervene again, in order to definitively settle the "debate" about same-sex marriages.

What it is happening in the United States and in Europe confirms that:

> The recognition of rights is not something that develops at an even pace. It is rather a history of struggles in which Courts act as watchdogs of the legislative branch and sometimes succeed in developing a "civilization" of fundamental rights … Thus it is not surprising that same sex marriages are legalized following fluctuating vicissitudes.[67]

In this perspective, the question "who should decide concerning same sex marriages?" seems incorrect, as incorrect is to believe that only the law-maker could decide about this issue, because only the law is the result of a democratic decision-making.

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[65] *DeBoer v. Snyder*, *Bourke v. Beshear, Tanco v. Haslam, Obergefell v. Hodges* cit..

[66] Ibid., para. II.G.

[67] See Romeo (2014).

If we agree, we deny the important democratic role of the judiciary power, which is to ensure that the constitutional rights, liberties, and duties do not become hostage by popular whims and by majority decisions.[68]

3 The Same-Sex Couples at a National Level: The Italian Case

3.1 The Decisions of the Italian Constitutional Court (no. 138 of 2010, no. 170 of 2014) and the … "Italian Avoiding Ability" Concerning Same-Sex Marriages

As stated above, a growing European trend is developing in favor of the same-sex marriage: Countries like Belgium, Denmark, Finland, France, Netherlands, Norway, Portugal, Sweden, Spain and the United Kingdom have already introduced it in their legal systems.

But there are also Countries, such as Germany, that, on the grounds of the special constitutional protection of the marriage institution (*die Ehe*), have followed the "separate but equal" approach, and introduced a similar institution (*Lebenspartnerschaft*), now fully equipped as heterosexual marriages.

In this scenario, the Italian situation is particular if not "isolated". The Italian parliament has never enacted a law on same-sex marriages; currently, it is only being discussed as a bill for the introduction of a legislative framework for civil unions.

In Italy, the Civil Code does not expressly refer to the diversity of sex as a requirement for marriage. Nevertheless, considering that heterosexuality is deeply rooted within Italian society, the diversity of sex has been considered as an essential pre-requisite.

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[68]In this regard, the words of Martha Craig Daughtrey, in her dissenting opinion to the decision of the Court of Appeals for the Sixth Circuit (*DeBoer v. Snyder* case), seems to me very significant: "Today, my colleagues seem to have fallen prey to the misguided notion that the intent of the framers of the United States Constitution can be effectuated only by cleaving to the legislative will and ignoring and demonizing an independent judiciary. Of course, the framers presciently recognized that two of the three co-equal branches of government were representative in nature and necessarily would be guided by self-interest and the pull of popular opinion. To restrain those natural, human impulses, the framers crafted Article III to ensure that rights, liberties, and duties need not be held hostage by popular whims. More than 20 years ago, when I took my oath of office to serve as a judge on the United States Court of Appeals for the Sixth Circuit, I solemnly swore to 'administer justice without respect to persons', to 'do equal right to the poor and to the rich', and to 'faithfully and impartially discharge and perform all the duties incumbent upon me … under the Constitution and laws of the United States'. … If we in the judiciary do not have the authority, and indeed the responsibility, to right fundamental wrongs left excused by a majority of the electorate, our whole intricate, constitutional system of checks and balances, as well as the oaths to which we swore, prove to be nothing but shams".

So much so that, in the past, marriages contracted between persons of the same sex were judged not only as an invalid act, but even as a non-existent act, because it was contrary to public order.

In 2010 (before *Schalk and Kopft* case), for the first time, the Italian Constitutional Court dealt with a question concerning the constitutionality of some Articles of the Civil Code, with reference to Articles 2 (pluralism principle), 3 (equality principle), 29 (right to marry), 117(1) (constitutional, international, European limits to the legislative power) of the Constitution "insofar as, interpreted systematically, they do not allow homosexual individuals to celebrate marriages with persons of the same sex".[69]

Article 117 of the Constitution states that:

> Legislative powers shall be vested in the State and in the Regions in compliance with the Constitution and with the constraints deriving from EU legislations and international obligations.

Relating to the alleged violation of this Article, the Constitutional Court ruled inadmissibly on the question: international and European laws—says the Court—do not impose upon the national legislator a duty to introduce the same-sex marriages.

We have already seen that Article 12 of the ECHR and Article 9 of the EU Charter of Fundamental Rights expressly refer to the national legislative discretion for the definition of marriage.

With regard to Article 2 of the Italian Constitution ("The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social group where human person is expressed" as it requires compliance with the mandatory duties of political, economic and social solidarity), the Constitutional Court maintains that this Article promotes a constitutional pluralist model: "social groups" must be deemed inclusive of all communities forms in which a person can freely develop his or her own personality; as a result, it encompasses every stable "familiar" relationship of people, including same-sex unions.

However, the Italian Constitutional Court finds that this Article does not impose upon the legislator the duty to recognize the same-sex marriages; the legislator has the discretion to choose to introduce other institutions to protect same-sex couples.

Owing to a comparative approach, the Constitutional Court notices that the experience of other Countries is inhomogeneous; indeed, not all foreign legislators have introduced same-sex marriages.

The Italian Court also rules that the question referred to Article 2 of the Constitution is inadmissible, because an Italian legislator can exercise his discretion and choose many legal instruments to guarantee to the rights of same-sex couples, not necessarily the marriage itself.

At the same time, the Court says that judges, with their decisions, may protect specific situations concerning same-sex couples, as they already do so for the opposite-sex cohabiters.

[69]Italian Constitutional Court, decision no. 134 of 2010.

The Constitutional Court then moves to consider Article 29 of the Constitution, according to which "The Republic recognizes the rights of the family as a natural society founded on marriages", without explicitly stating that spouses have to belong to opposite sexes. Using the words "natural society", the Constituent Assembly intended to recognize the "pre-existence" (and the autonomy from the State) of the first social group (family) that the State has only to recognize.

On account of this, the Italian Court moves to reconstruct the meaning of "family" and "marriage"; yet, in a different way from other Constitutional Courts, the Italian ones use an original argument:

1. the concept of family and marriage cannot have been crystallized with reference to the time when the Constitution entered into force, because they were endowed with the flexibility that is inherent within constitutional principles;
2. the concept of family and marriage has also to be interpreted taking account not only the transformations within the legal system, but also the evolution of society and its customs;
3. however, such an interpretation "cannot go so far as to impinge the core of this constitutional provision [Article 29], modifying it in such a way as to embrace situations and problems that were not considered at all when it was enacted".[70]

In the opinion of the Court, proof of this could be found in the Constituent Assembly debate with regard to Article 29 of the Constitution: the Assembly did not address the question of homosexual unions, even though homosexuality was not unknown.

For this reason, the Court considers that the meaning of the constitutional provision under discussion cannot be set aside through interpretation, because this would not involve a simple re-reading of the system or the abandonment of a mere interpretative practice, rather a creative interpretation of Article 29.

Constitutional judges, on the other hand, going over, and, dealing with the alleged violation of Article 3 of the Constitution (principle of non discrimination) justify the different treatment of heterosexual couples on the basis of their "(potential) ability to procreate".[71]

The Constitutional Court reiterated its position in judgment no. 170 of 2014,[72] where more clearly it excluded that the legislator could introduce, by ordinary law, same-sex marriages.[73] The legislator could protect same-sex couples as every social formation, in light of the principle of social pluralism (Article 2 Constitution), but not as married couples: under Article 29 of the Constitution, only heterosexual couples can get married.

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[70]Ibid.

[71]In my opinion, the core of the decision is represented precisely by the word "potential".

[72]With this judgment, the Court states the constitutional illegitimacy of the norm that provides the automatic nullity of the marriage in case of change of sex of one of the spouses. At the same time, the Court doesn't consider the couple (become same-sex couples) as married or joined in a civil union.

[73]As suggested by some authors: see, for example, Cartabia (2012), Pinto and Tripodina (2010).

This decision is clearly dissonant with respect to the general European trend[74] and to the decisions of other Constitutional Courts that, in another way, found their rulings on an evolutionary interpretation of the constitutional concepts of marriage and family.[75]

The Italian Constitutional Court does not seem to take into account the supranational normative and the European case law that is gradually imposing, as mentioned before, the full meaning of the equality, recognizing the same fundamental right to marry, for both homosexual and heterosexual couples.[76]

3.2 The Approach of Italian Judges to the Same-Sex Marriage

Despite the judgments of the Constitutional Court, or better taking advantage of the "glimmers" of these decisions, Italian judges have begun to offer a guarantee for same-sex couples in specific situations. We can mention the decision no. 4184 of 2012 of the Italian Court of Cassation,[77] where it ruled on whether two same-sex Italian citizens, married abroad, were entitled to record their marriage certificates at an Italian Civil Registry Office.

For the first time, the Court of Cassation asserted that same-sex marriages could not be considered as inexistent; it is only an act that cannot produce effects in Italy. In other words, the Court did not consider this type of marriage as contrary to the public order.

The Supreme judges, indeed, said that, as with the *Schalk and Kopf* case, the ECtHR recognized the existence, at the European level, of a "neutral concept" of marriage that the national parliament, in its full discretion, has to define. So it could be said that same-sex marriage is still an act that does not exist.

Moreover, the Supreme Court "invited" national judges to intervene to protect specific legal situations of same-sex couples. In doing so, the Supreme Court confirmed the role of the judiciary in implementing the conditions of the integrated protection of fundamental rights and the importance of the "dialog" between national judges with the ECtHR.

[74]See Ferrando (2014), at 2.

[75]See, for examples, the decisions nos. 359 of 2009 and 210 of 2010 of the Portuguese Constitutional Court; the decision no. 198 of 2012 of the Spanish Constitutional Court or the ruling no. 669 of 2013 of the French Constitutional Court.

[76]See Pezzini (2014), at 2; Brunelli (2014), at 2.

[77]This decision is available at http://www.giurcost.org/casi_scelti/Cassazione/Cass.sent.4184-2012.htm.

Indeed, as determined by the rulings of the Constitutional Court (nos. 348 and 349 of 2007), in the domestic hierarchy of sources law, the ECHR is placed above statutes and laws yet is below the Constitution, with the result that:

(1) the judges are required to interpret the rules in a consistent manner with the European Convention (therefore, they shall apply the civil rules concerning marriage registration according to Article 12 of the same Convention as interpreted by the European Court in the *Schalk and Kopf* case);
(2) if this is not possible, they should raise a question of constitutionality to the Constitutional Court, for infringement of Article 117(1) of the Constitution.

Through the duty of consistent interpretation to the European Convention, judges have become "the first" interlocutors of the ECtHR:

> [T]he protection of a particular situation is the result of a virtuous combination between the obligation of the national Legislator to adapt to the European Convention and the obligation of the judge to interpret the rules in a consistent manner with the Convention and the obligation of the Constitutional Court not to allow that a rule, of which it has been found the deficit with respect to a fundamental right, continues to have effect.[78]

Several judges show a lot of courage in developing the "potentiality" of the judgment of the Court of Cassation of 2012. For example, the trial court of Reggio Emilia (judgment of 13 February 2012) that judged a case about the free movement of same-sex couples.[79]

A Uruguayan citizen who got married to an Italian citizen in Palma Majorca requested the residence card on the grounds of family reunification that was refused by the *Questura* (police headquarters). The judge of Reggio Emilia upheld the application on the basis of EU Directive 38/2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, transposed by the Italian legislator in 2007.

According to the judge, the subject of assessment is only the applicant's right to obtain a permit to stay in Italy, with respect to the EU Directive mentioned above and not the legitimacy of the same-sex marriage, contracted in Spain. Asserting this, the judge recalled the fundamental right of each person to live freely in a relationship, without discrimination based on sexual orientation as recognized by the ECtHR.

It can then be addressed the decisions concerning temporary custody of children to homosexual couples (Family Proceedings Court of Bologna, Decree, 31 October 2013; Trial Court of Parma—Tutelary Judge—Decree, 3 July 2013; Family Proceedings Court of Palermo, 4 December 2013) or the decision of the Court of Grosseto of 9 April 2014.[80] The latter ordered the transcript of a same-sex marriage, celebrated in New York City, asserting that, after the ruling of the

[78]See Italian Constitutional Court, decision no. 317 of 2009.

[79]Decision available at http://www.articolo29.it.

[80]Decision available at http://www.articolo29.it.

ECtHR on the *Schalk and Kopf* case, a same-sex contract abroad is no longer contrary to the public order.[81]

4 Conclusion

The analysis of US and European case law allows us to draw some brief concluding remarks.

The supranational courts seem to prefer the spontaneous emergence of a homogeneous European social consensus; they also appear to recognize the wider discretion of the domestic legislator on whether to introduce same-sex marriages or not. With the effect, that the control over its margin of appreciation, in the face of such social change, will become more strict.

At the same time, however, both in Europe and in the United States, the supranational/federal courts are monitoring the national normative changes in the light of a new trend, with the effect, that the control over the margin of appreciation of a single legislator, in the face of such social change, will become stricter. This is clear in the US case law: in the *Windsor* case, for example, the US Supreme Court qualified the choice of a State to guarantee the right to marry to the same-sex couples as an important moment "to give further protection and dignity to that bond".[82] This is also clear if we consider ECtHR case law: the Court counts the Countries that protect same-sex couples and emphasizes that the isolated position of the State, that does not protect such couples, will be subject to stricter scrutiny.

Similar conclusion may be drawn if we analyze the ECJ case law: exploiting the natural interconnections between EU work/social security policies and national family policies, the Court could exercise an indirect control on the discretion of the national legislator in the matter of marital status.

At the national/State level, judges are exercising "from below" the same "pressure" on the legislator and their decisions may foster the emergence of a homogeneous social consensus in favor of same-sex marriages. From this point of view, the Italian experience is emblematic. As we have seen, through the duty of interpretation in conformity to the ECHR, Italian judges represent "the first port of entry" for European and international law.

The analysis of same-sex marriage case law underlines another important aspect: the close link between legal system and society. The *sollen sein* of each institution is influenced by the consequential dynamism that reflects, in its *sollen sein* and in its *sollen werden,* the historical and social perception of the community, at any given time.

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[81]To the contrary, see, Tribunal of Pesaro, Decree, 14 October 2014; Tribunal of Milan, Decree, 17 July 2014, available at http://www.articolo29.it.

[82]See cit., footnote 52.

If we consider—as the Spanish Constitutional Court states—"*El Derecho come un fenómeno social vinculado a la realidad en que se desarrolla*"[83] it seems clear that judges represents the essential *trait d'union* between social reality and legal reality. In other words, the judge is the privileged subject to intercept change, to implement it.

With regard to same-sex marriages and the role of the judiciary, many scholars highlight the dichotomy between the "Legislative State" and the "Jurisdictional State",[84] often condemning the overexposure of the judiciary, in the silencing of the legislator. In this perspective, we can say that now the question is not if same-sex marriage is constitutional but who decides it. Judicial action alone, in the absence of any legislative action, risks guaranteeing only a fragmentary (and often contradictory) protection of fundamental rights.

Hence it is correct to hope that the legislator will choose suggestions coming from the "living law" and that the dichotomy between the two powers will be united, according to the rules of a democratic system, based on the separation/loyal cooperation between the powers.[85]

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[83]See Spanish Constitutional Court, decision no. 198 of 2012. See also supra, footnotes 21 and 22.

[84]See about this matter Ruggeri (2014a).

[85]For the same conclusions see again Ruggeri (2014a).

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