Source: Bulletin of the Transilvania University of Braşov, Series VII: Social Sciences and Law

Bulletin of the Transilvania University of Braşov, Series VII: Social Sciences and Law

Location: Romania

Author(s): Angela Maria Romito

Title: The rights of same sex couples under European and Italian Law (II)

The rights of same sex couples under European and Italian Law (II)

Issue: 2/2019

Citation style: Angela Maria Romito. "The rights of same sex couples under European and Italian Law (II)". Bulletin of the Transilvania University of Braşov, Series VII: Social Sciences and Law 2:419-430.
https://www.ceeol.com/search/article-detail?id=828810

Bulletin of the *Transilvania* University of Braşov
Series VII: Social Sciences • Law • Vol. 12(61) No. 2 – 2019
https://doi.org/10.31926/but.scl.2019.61.12.2.25

THE RIGHTS OF SAME SEX COUPLES UNDER EUROPEAN AND ITALIAN LAW (II)

Angela Maria ROMITO[1]

Abstract: *The article illustrates how the rights of same-sex couples are regulated in the European area. The article first highlights the increasing awareness, both within the ECHR system as well as the EU, that same-sex couples are entitled to some form of legal protection at an international level. The article then briefly presents the leading cases decided by the ECHR, the CJEU, and finally by Italian courts. Finally, the article focuses on the Italian legal system, and legislation adopted in 2016 that regulates same-sex civil unions in Italy. The article ends with a critical evaluation regarding the actual outcomes.*

Key words: *non-discrimination; same-sex couples; same-sex marriage; civil unions; recognition of family status; right to privacy; international protection; Charter of Fundamental Rights of the European Union.*

1. The Recognition and Protection of Same-Sex Couples under EU Law

Although there is an increasing interest in recognizing and regulating the rights of same-sex couples in Europe, there is a lack of uniformity among the national laws of European Member States.

The lack of uniformity on the marital status of persons (and more generally on substantive family law) among the European States is due to the fact that legislation that refers to a person's status, which is relevant to the rules on marriage, is a matter that falls within the exclusive competence of Member States. Consequently, Member States are free to decide whether same sex couples may legally marry (see judgments of CJEU *Garcia Avello* C-148/02, EU:C:2003:539; *Maruko*, C-267/06, EU:C:2008:179, and *Parris* C-443/15, EU:C:2016:897). However shared competence (between Member States and the Union) exists in the Area of Freedom, Security, and Justice, where the European Union is tasked by the Treaties to develop judicial cooperation in civil (including family) matters having cross border implications. In the exercise of this competence, the European Union may (in accordance with the provisions of the Treaties) take EU-wide measures (Art 81 TFEU) or may authorize Member States, *inter se*, to establish family law measures (Art 20 TEU). It is also conceivable that the European Union might exercise

[1] University of Bari Aldo Moro - Italy, angelamaria.romito@uniba.it.

this competence in international family law instruments having a broader scope of application than the EU region (Art 216 TFEU) (see Fiorini, 2012, p. 1-19).

Although the EU Treaties do not refer to the family reunification rights of Union citizens who exercise their free movement rights, already in the 1960s it was recognized that if nationals of Member States move between Member States in furtherance of the Community's objectives, they have the right to be accompanied by their close family members [see Regulation (EEC) No 1612/68 and Council Directive 73/148/EEC]. Accordingly, secondary legislation has always provided for family reunification rights – these are, currently, provided by Directive 2004/38 – for Union citizens who exercise their right to move and reside freely in the territory of other Member States.

Under EU law, the "spouse" of the migrant Union citizen [now referred to in Article 2(2)(a) of Directive 2004/38/EC], has always been considered one of the family members who has a right to accompany his or her spouse while traveling within the territory of other Member States. The nationality of the "spouse" and, in particular, whether he or she is a Union citizen or a third-country national, has never mattered, as the rationale behind granting family reunification rights has simply been to encourage the exercise of free movement *by the Union citizen*. This free movement can be impeded if the spouse – of whatever nationality – cannot accompany or join the migrant Union citizen (Tryfonidou, 2017, online).

In sum, the EU has taken the position that European family law should remove legal borders and other barriers (thus promoting free movement) in order to facilitate equal access to justice.

There are several norms within the EU legal system that grant indirect protection to same-sex couples. In particular, articles 7, 9, and 21 of the Charter of Fundamental Rights of European Union (CFREU) govern *the Respect for private and family lif*e, the *Right to marry and right to found a family* and the *Right not to be discriminated* on the ground of sexual orientation. In addition**,** some other relevant norms have been recalled by the CJEU in cases related to the rights of same-sex couples: article 21.1 TFEU referred to the EU citizenship and the Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the States of the EU.

The current lack of clarity that persists with regards to the mutual recognition of same-sex marriages in EU Member States and the consequent inconvenience that emerges as a result of this uncertainty is, in itself, an obstacle to free movement: being unsure as to whether a same-sex spouse may be able to join his or her partner in another Member State and be considered as a lawful spouse there is highly likely to deter the exercise of free movement of an EU citizen. It is hard to believe that Union citizens who are married in a Member State would willingly move to another Member State where their same-sex spouses would not be allowed to accompany or join them; or, assuming that the spouse could join the EU citizen in the host State on another basis (i.e. not as a spouse), it would be highly unlikely that he or she would be willing to move to a Member State where the marriage would not be recognized and, thus, where the individuals would not be treated as a couple for the purposes of taxation, social security, property law, inheritance, and other legal rights.

The recent judgment in the *Coman* case issued by the CJEU on 5 June 2018 addresses this problem. It is highly significant at a symbolic level, however in my opinion it is not a gay-marriage case, but it concerns the right of freedom of movement, instead. Specifically, it addresses the cross-border legal recognition of same-sex relationships and the cross-border recognition of same-sex marriages without addressing discrimination on the ground of sexual orientation but confining it to a question of free movement of persons (Gyeney, 2018, p. 149–171). In other words, it is important because the highest EU court stated that same-sex marriages are equal to "traditional" marriage for the purposes of EU free movement law.

2. The factual background and the reasoning

The ruling in *Coman* was much awaited hence the wide attention it received in the media and in scholarly blogs and publications.

The facts are quite simple: Relu Adrian Coman, a dual Romanian - U.S. citizen, and Robert Clarbourn Hamilton, a U.S. citizen, married in Belgium in 2010. Two years later, Mr. Hamilton, in his capacity as member of Mr. Coman's family, requested under article 3 of the Directive 2004/38/EC a right to permanent residence in Romania. Pursuant to art. 7 of the Directive 2004/38 the "family members" of a Union citizen who are not nationals of an EU Member State and who accompany or join the Union citizen in the host Member State, shall have the right of residence there for a period of longer than three months. For the purposes of the Directive, "family member" means, inter alia, "the spouse" of a Union citizen (art. 2.2.a).

Mr Hamilton's request was rejected by the Romanian authorities on the basis that the Civil Code prohibits same-sex marriage and does not recognize such unions even if contracted abroad [Article 277 (2)] (see Gyeney, 2018, p. 154). The spouses challenged this decision, claiming that it is a case of discrimination on the ground of sexual orientation and that the latter provision of the Civil Code is unconstitutional.

Mr. Coman and Mr. Hamilton brought an action against the decision of the Romanian Inspectorate of Immigration, seeking a declaration of discrimination on the grounds of sexual orientation as regards the exercise of the EU right of freedom of movement. In their action, they also argued that the parts of the Romanian Civil Code which do not recognize same-sex marriage are unconstitutional, as they infringe upon the provisions of the Romanian Constitution that protect the right to personal life, family life, and private life, and the provisions relating to the principle of equality. The first instance court hearing the case referred the matter to the Romanian Constitutional Court which, decided to make a reference for a preliminary ruling to the ECJ asking, essentially, whether a Union citizen who has exercised free movement rights can enjoy, with his same-sex spouse, family reunification rights under EU law.

The CJEU held that the refusal of a Member State to extend family reunification rights to a third country national who lawfully married a same-sex Union citizen in another Member State during the citizen's period of genuine residence in that State, impeded the free movement rights of the Union citizen. Moreover, the Court held that an obligation to recognize a same-sex marriage for the purpose of family reunification rights "does not undermine the national identity or pose a threat to the public policy of the Member State concerned", as "such recognition does not require that Member State

to provide, in its national law, for the institution of marriage between persons of the same sex" (paragraph 45).

In other words, Romania's exercise of its competence in the family law field and, in particular, its choice not to recognize same-sex marriages contracted in other Member States, is contrary to EU law as it can impede the exercise of EU free movement rights and, hence, the ECJ rightly found a breach of EU law in the case of Coman. It is clear that this rationale pertains to both situations where a Union citizen seeks to be accompanied by his same-sex spouse in his Member State of nationality where he returns after exercising free movement rights (the Coman scenario), as well as where a Union citizen seeks to be accompanied by her same-sex spouse in a Member State other than that of her nationality, to which she moves (Tryfonidou, 2019, online).

For the first time, the CJEU ruled that the term "spouse", for the purpose of granting a right of residence to non-EU citizens, is indeed "gender neutral" and may therefore include spouses of the same sex. Consequently, Romania (as well as all EU member States) must recognize Mr. Hamilton as "the spouse" of Mr. Coman and, as such, allow him to reside in its territory for a period of longer than three months.

Coman provided the CJEU with its first opportunity that has been given to the ECJ to interpret the term "spouse" in this context and to clarify whether this term must be read as including the same-sex spouse of a Union citizen (in the Cocaj case, C-459/14, the ECJ was asked to clarify the meaning of the term "registered partner" in the same Directive and to specify, in particular, whether it includes same-sex registered partners, but the reference was subsequently withdrawn by the referring court, meaning that that question remains unresolved). Due to the sensitivity of the issue and the divergence of views among the Member States, the EU Legislature consciously chose vagueness over clarity, thus making this an issue that would have to be resolved by judicial interpretation. Being aware of this, in its reasoning the Court is always careful not to infringe the national sovereignty of Member States regarding family law: while Advocate General (AG) Wathelet took a truly global and progressive view of the issue (according to him, the term "spouse" is "gender-neutral and independent of the place where the marriage was contracted"), the judges of the Court, taking a more federal and Eurocentric view of issue, were more cautious and confined the reasoning to marriages entered into in EU Member States (Khan, 2018, online; Szczerba-Zawada, 2018, p. 47).

The judgment of the Court – compared to the arguments of the reasoning of Advocate Wathelet – reveals its narrow scope. In fact, the Court several times made it clear that EU Member States are free to bar same-sex couples from marrying on their territory; the judgment concerns only couples married in an EU Member State in accordance with the law of that State but not registered partners. Indeed, Article 2(2)(b) of the Citizens' Directive explicitly provides that same – sex partners who have entered into a civil union are only entitled to a derived right of residency if "the host Member State treats registered partnerships as equivalent to marriage".

The judgment only applies in cross-border situations and, thus, in line with the well-established purely internal rule, it cannot help married same-sex couples who are in a purely internal situation i.e. a situation which has no connection with EU law (Rijpma J. et al., 2014, p. 484-487).

Moreover, the Grand Chamber insisted that the decision was applicable for "the sole purpose of granting a derived right of residence" and did not extend to other rights that are based on residency (i.e. taxation, social security, property law, or inheritance).

It is important to mention that according to the decision, same-sex marriages must be recognized by the Member State of destination only (a) if the EU citizen partner has exercised the right of free movement. It has to be recalled that under the rule in *McCarthy* (C-434/09, ECLI:EU:C:2011:277), article 21 TFEU does not apply to an EU citizen who has never exercised the right of free movement and is not deprived of the genuine enjoyment of the substance of the rights conferred by EU citizenship; and (b) for the purposes of the grant of family reunification rights under EU law, it clearly has the potential to create the need for such marriages to be recognized in a broader range of circumstances, even when this is not required by EU law.

In addition, to avoid so called "marriage tourism", *Coman* applies only when an EU citizen has taken-up "genuine residence" in the territory of another Member State. Recalling its precedent *O. and B* (CJEU decision, C-456/12, ECLI:EU:C:2014:135), the Court clarified that such genuine residence can only exist when the Union citizen has settled in another Member State *for more than three months* (see paragraph 32–57 of the decision). This ensures that Union citizens who reside in a Member State that has not opened marriage to same-sex couples cannot side-step the law of their Member State of residence, by moving to another Member State to marry and then return to that State (Geyney, 2018, p. 165).

Therefore, in sum, the judgment in *Coman* is not a free-for-all and does not impose the recognition of foreign same-sex marriages within the EU.

Beside its reasoning, the *Coman* case is highly interesting for two additional reasons: following the AG's opinion, and reversing the discriminatory stance the ECJ (?) had adopted in the early 00's, when it ruled in *D and Sweden v. Council* (CJEU decision, joined cases C-122/99 P and C-125/99 P, ECLI:EU:C:2001:304), [first] *Coman* provides a progressive and updated interpretation of the concept of "spouse" (see paras. 55- 58), because if no account was taken of those developments of the society, the relevant rules of law would risk losing their effectiveness; [second] *Coman* indicates the ECJ's willingness to move further than the Strasbourg Court: while the latter required States to grant only "some form" of recognition of same-sex relationships officialized in another State (see Orlandi vs. Italy in Romito, 2018, p. 164), in *Coman*, the Court is forcing Romania to recognize the effects of the union celebrated in Belgium as a marriage.

3. The Italian legal system: an overview on the legal context

Italy delayed legalizing same-sex partnerships mainly for cultural reasons. Since 1983, several bills to regulate unmarried couples were filed with both Parliamentary Chambers, however only a few expressly referenced same-sex couples and until the 2000s, homosexuality was still a non-issue in the Italian public sphere. Same-sex couples lived in an unmarried partnership within the framework of the current legislation in the field of informal cohabitation, but their union was incapable of "creat[ing] any familial relationship between the partners" under the law (Zambrano, 2011, p. 225-228).

However, Italian courts have long been progressive, dynamic, activist and even creative in their interpretation of the national law and their continuous flow of new decisions has produced a considerable body of jurisprudence. Italian Courts (Tribunals, Court of Appeals, Court of Cassation), even though they did not adopt a firm position on the matter, they had already reached the same conclusions of CJEU referring to the necessity of granting same-sex couples the right of family reunification and the right of residency in cases involving the same-sex spouse of an Italian citizen who had entered into a marriage in a foreign jurisdiction that legally recognized such unions. As an example, the outcome of the *Coman* decision had been anticipated by the court of Reggio Emilia, which found that a Uruguayan man could legally reside in Italy based on the fact that he had entered into a legally recognized marriage in Spain with an Italian citizen. The court concluded that the freedom of movement of people in the European Union would be impaired if a domestic law denied a residence permit under these circumstances. (Trib. Reggio Emilia, 13 febbraio 2012, Foro it. I, 2727 (2012); *see* also Tribunal of Pescara, 15 gennaio 2013, FAMIGLIA E DIRITTO 790 (2013).

At the Constitutional level (the Italian Constitution is dated 1948) several national norms are relevant:

- Article 2 states that Italy recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. (…);
- Article 3 states that all citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal, and social conditions (…)
- Article 29 recognizes the rights of the family as a natural society founded on marriage. Marriage is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family.
- Finally, Article 117(1) incorporates supranational legal provisions like Articles 8, 12, and 14 of the ECHR into the Italian legal system.

In addition, regulations governing issues involving matrimonial property are contained in part VI of section VI of book I of the Italian Civil Code (articles 159-219), entitled "matrimonial property law." To give a complete picture of matrimonial property issues, reference must also be made to regulations located in other parts of the Italian civil code (Articles 143, 147, and 156) or in special laws (with regard to the effects, in terms of property, resulting from marriage dissolution, reference must be made to Articles 5, 6, and 8 of law no. 898 of 1 December 1970).

Two specific laws must also be mentioned: Legge n. 151 of 19 May 1975 (Family law reform) and the recent Legge n. 76 of 20 May 2016 (also known as Cirinnà Bill on Same-Sex partnership or the civil-union bill).

4. The Relevant Case-Law

To understand fully the evolution of the normative protection of same-sex couples in Italy it is necessary to look at the leading cases in Italian law which contributed greatly to fill the legislative gap that existed prior to the adoption of the new law. The case law on

the issue is very abundant, however focusing only on the decisions of the highest Courts, only a few cases can be referred to as leading cases.

• The **Constitutional Court Judgment no 138/2010** (similar to *Schalk e Kopf* regarded interventions and attempts to combat discrimination on the basis of sexual orientation) was the first to recognize in Italy the constitutional dignity of same-sex unions: even same-sex couples are social formations protected by Article 2 of the Constitution. For this reason, same-sex partners are granted the fundamental right to live freely as a couple, obtaining juridical recognition within the boundaries of the law. However, the Constitutional Court also clarified that **same-sex partnerships are not equivalent to marriages**. Still, the Court established the possibility of intervening to protect specific situations in which there could be the need for an equal treatment of married and same-sex couples. Article 29 of the Constitution did not create a constitutional right to marry a person of the same sex. In fact, such a conclusion would "go so far as to impinge the core of the provision, modifying it in such a manner as to embrace situations and problems that were not considered at all when it was enacted."

• **Court of Cassation Judgment no 4184/2012** dealt with an even more complex and delicate problem: the recognition of same-sex partnerships formalized abroad. The case referred to two Italians married in the Netherlands who attempted to register their marriage in the register of civil status in Italy. Taking into account the contribution of supranational judgments (ECtHR, *Schalk and Kopf*, 2010), the judges overcame the stereotypes of nature and tradition and recognized the validity of a foreign same-sex marriage as effective in Italy even though such a marriage could not be performed lawfully in Italy. Although the Court held that the refusal to register a same-sex marriage that was performed abroad did not violate the right to marry. However, it recognized the existence of a right to family life and to live free as a couple and held that in specific situations same-sex couples should be treated the same way as married couples. With respect to same-sex marriages contracted abroad, the Court noted the need to recognize such unions but clarified that they cannot produce effects in Italy. And while the Court denied the possibility to register the petitioners' foreign marriage, it pointed out that such a refusal "no longer depended on the marriage's non-existence or invalidity, but rather on its inability to produce, as a marriage, any legal effect in the Italian legal system." To fill the existing void, the Court concluded that the foreign same-sex marriage would be registered in Italy as a civil union (Winkler, 2012, p. 108).

Notwithstanding this prior decision, there was no formal legislative framework to regulate same-sex couples. This void was highlighted in 2015 when the European Court of Human Rights issued its judgment in the *Oliari* case. There, the ECHR sanctioned Italy for violating Article 8 of the Charter because Italy failed to grant the claimants, a same-sex couple, a juridical instrument that acknowledged their right to officialize their partnership (see Romito, 2018, part I). It became increasingly clear that Italy could no longer delay legalizing same-sex partnerships. One year later, Legge 20 May 2016 no 76 (Italy's civil union law) was adopted and it was implemented by Legislative Decree 19 January 2017 no 7. Some have interpreted the new legislation as creating a family model, not only a social model but also a juridical one, founded on a basis other than heterosexual marriage (Ferrando, 2016, p. 6-16).

• **Court of Cassation Judgment no 11696/2018** concerns the legal status of **mixed nationality same-sex married couples** under Italian law. The ruling is the first of its kind since same-sex civil unions became legal in Italy. It explores the problems relating to the recognition and the civil status registration in Italy of couples of the same sex where one spouse is a foreigner and the other is Italian. A Brazilian and an Italian who married in Brazil in 2012 and then performed another ceremony in Portugal in 2013, sought to have their marriage recognized under Italian law but were denied. According to the Italian Supreme Court, **Italian citizens who marry their same-sex partner abroad cannot have their marriage recognized as a marriage back in Italy,** but they may register their partnership as a civil union. The Italian Supreme Court judges did not overrule the earlier appeals court ruling on the case, which stated that Italian law would recognize married same-sex couples only as civil partners, regardless of whether they wed before or after Italy introduced civil unions in 2016. The Italian Supreme Court, however, ruled that "same-sex marriage does not correspond to the model of matrimony outlined in our legal system," and that, because civil unions provide mostly the same legal protections as marriages – with adoption rights a notable exception – denying same-sex couples the right to marry could not be considered discriminatory. As a consequence, the Italian Supreme Court judges ruled that Italy may legitimately use its "legislative discretion" to exclude same-sex couples from marriage so long as a valid alternative is available to them.

All in all, the combination of new legislative measures and recent judicial opinions establish a regime under which Italian citizens who marry a same-sex partner from a different State are forced to downgrade their relationship from "married" to "civil partners"; a marriage contracted abroad by an Italian citizen with a same-sex foreign spouse (so-called mixed same sex marriage) has the same effects as a registered partnership, whereas foreign same-sex couples are recognized and registered as married (Winkler, 2018, p. 273-288).

5. The Cirinnà Bill

The Cirinnà Bill, based on the German life-partnership model, addresses the legal regime of civil unions between persons of the same sex and the regulation of cohabiting couples of both same and opposite sexes. The law aimed to grant most of the basic rights and privileges enjoyed by married Italian heterosexual couples to LGBT couples, however the clear intent is to protect the primacy of heterosexual marriage and to create a parallel, secondary path to access family status for homosexual or lesbian couples who are defined as distinct social formations. The law consists of one article divided into 69 paragraphs: these include basic provisions for purposes of taxes, inheritance, and social welfare programs, but those paragraphs exclude stepchild adoption.

In the first paragraph, the legislation makes clear that same-sex partnerships are social units compliant with Articles 2 and 3 of the Constitution, but they are not equivalent to "traditional families." No mention is made of family, either through Article 29 of the Constitution -- which recognizes and safeguards families founded on marriages -- or in any other way.

The Italian law carefully avoided equating the two marriage and civil unions mainly for political and cultural reasons: both marriages and same-sex civil unions have the same level of legal protection even though there are different interests to protect (procreation and children). From a substantial point of view, the civil union law borrows many aspects from civil marriage: it requires the same preconditions (the so-called "essentials"), such as the absence of a pre-existing civil union or marriage and the absence of consanguinity or affinity between the partners. Civil unions can also be challenged on the same grounds as marriage. Furthermore, as with married couples, registered partners have the same rights and duties to provide reciprocal material and moral support and cohabitation, and in respect of assets partitioning, inheritance and social security.

Despite the fact that the new legislation defines civil unions as a specific formation different from marriage, paragraph 20 of l. 76/2016, the law has made it possible to apply the provisions of the Civil Code to civil unions, even where these are not explicitly mentioned. The general equivalence clause establishes that "any provisions referring to marriage and containing the words 'spouse', 'spouses' or equivalent, wherever they occur in any law, regulation, administrative deeds and collective agreements, apply to civil unions between persons of the same sex as well. This provision does not apply to the norms of the Civil Code that are not expressly referred to in this Law, and to the provisions of the Law No. 184 of May 4, 1983. Without prejudice of what is currently provided and allowed in respect of adoptions by existing laws."

The desire to distinguish civil unions from marriages has led, in the final document, to the exclusion of adoption and stepchild adoption. Nevertheless, in order to hinder potential adverse effects on the numerous pending proceedings regarding stepparent adoption by same-sex couples, it is stated that the prohibition to equate registered partners and spouses to adoption operates "[w]ithout prejudice of what is currently provided and allowed in respect of adoptions by existing laws" (for critical remarks see Cipriani, 2017, p. 343-355).

Some other differences between the legislation on marriage and same-sex partnerships reflect a modern vision of relationships: the request for a license for civil unions, that in marriage triggers the requirement to post bans (Pubblicazioni) for at least eight days, is replaced by a simple request addressed to the officer of civil status, after which the constitution can take place after thirty days. Individuals under 18 are not allowed to enter into a civil union with a person of the same sex but are allowed to marry a person of the opposite sex as long as they obtain judicial consent. In contrast with marriage, moreover, the constitution of a civil union does not require a declaration by the officer that the two partners are now in a civil union. Furthermore, unlike spouses, registered partners have no reciprocal duty of fidelity.

There are additional differences. One involves the family surname. When they enter into a civil union, same-sex couples are free to choose the surname of either partner as a family surname; married couples do not have this right: a heterosexual wife has no say as to what surname will be adopted for the family. Moreover, the procedure for dissolving a civil union is highly simplified compared to divorce because it eliminates the requirement of the two steps process (separation and divorce) and it establishes a

three-month period after the unilateral decision to end the relationship (Winkler, 2017, pp. 1-31, and especially pages 27-28).

After the adoption of Law 76/2016, the Italian Parliament reformed the rules on private international law adding four new provisions (art. 32 bis-32 quinques) in Law No. 218/1995 to regulate same-sex partnerships, cohabitation agreements and spouses' or partners' property regime (Lopes Pegna, 2017, p. 527-551). According to one of these rules (Article 32-bis) a marriage celebrated abroad between two Italian citizens of the same sex or between an Italian national and a non-Italian of the same sex will be considered a civil union governed by Italian law. However, the marriage celebrated abroad by two persons of the same sex who are not Italians, will be considered "marriage" in Italy if it is allowed in the place of celebration (Damascelli, 2018, p. 8-9). The result of the application of the law is debatable because it creates an unreasonable difference of treatment between a same-sex marriage celebrated by an Italian national abroad and other same-sex unions that have a transnational character.

6. Conclusions

Starting from a local (Italian) to a European perspective, some considerations about virtuous results seem to be clear. Three factors greatly affected the Italian Parliament in adopting the Law 76/2016: (1) the pressure of the international case law – mainly the Court of European Convention on Human Rights, (2) the European legislation, that forced all Member States to end any discrimination against gays and lesbians "based on … sexual orientation", (3) the domestic courts (judiciary) which, on account of not having the power to create a new legal regulation, secured a legal protection to a *de facto* situation that urged to be ruled since long time (Alicino, 2015, 1-46).

More generally, looking at the EU framework, the picture becomes much more dynamic; the rapid changes that occurred in many Western European countries concerning the legal treatment of gays and lesbians after 2000 are due mainly to the activism of the ECJ that cross – fertilized the domestic legislations, only encouraging them to step without imposing legislative changes through the "denationalization" of crucial national family-law regimes**.** Europe has, until recently, boasted as the most progressive continent regarding the legal recognition of same-sex relationships; currently all western EU Member States make provision for legal recognition of same-sex relationships, though there remains considerable diversity between the types of legal status being afforded. At the same time, there are still six EU Member States (Bulgaria, Latvia, Lithuania, Poland, Romania, Slovakia) - all situated in Eastern Europe – which do not offer any legal recognition to same-sex relationships whilst there are seven EU Member States(Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland, and Slovakia) – again, all situated in Eastern Europe – that maintain a constitutional ban on same-sex marriage.

The recent debate in Romania, the failed referendum in October 2018 to ban same-sex marriage in Romania's Constitution, the Romanian highest court's ruling of 2018, and the attempts to reform the statutory law, are evidence of the challenges of cross-fertilization and significant changes in the direction of democracy and against discrimination.

Hopefully the same kind of large political debate can take place in other Eastern Europe countries (see, for instance, "ECJ 'gay marriage' ruling sparks opposition in Poland", 6 June 2018, available at http://polandinenglish.info/37528158/ecj-samesex-marriage-ruling-sparks-opposition-poland).

Finally, it must be considered that Romania is about to take over the presidency of the Council of the EU and thus legalizing civil partnerships before May 2019 would send a strong signal to all the neighboring countries that it is to remain on its strong commitment to European values.

Over all in Europe there is a clear trend of progress (a summary of the legal framework regarding LGBTI issues in European countries is available at http://rainboweurope.org, and Waaldijk, 2017, 1-183) and to quote Kees Waldijk (1994, p. 51): "where there is legal change it is change for the better. Countries are not all moving at the same time and certainly not at the same speed, but they are moving in the same direction: forward".

References

Court of Justice of the European Union, Judgment of 12 March 2014, *O. and B.*, Case C‑ 456/12, ECLI:EU:C:2014:135, published in the electronic Reports of Cases (Court Reports - general).

Court of Justice of the European Union, Judgment of 5 June 2018, *Coman and Others*, Case C‑ 673/16, ECLI:EU:C:2018:385, published in the electronic Reports of Cases (Court Reports - general).

Alicino, F. (2015). *The Road to Equality. Same-Sex Relationships within the European Context: The Case of Italy*. LUISS School of Government Working Paper Series SOG-WP 26/2015. Retrieved from https://sog.luiss.it/sites/sog.luiss.it/files/ SOG%20Working%20 Papers%20WP25-2015%20Alicino.pdf

Cipriani, N. (2017). Unioni Civili: Same-Sex Partnerships Law in Italy. *The Italian Law Journal, 2* (3), 343-355.

Damascelli, D. (2018). Applicable law, jurisdiction, and recognition of decisions in matters relating to property regimes of spouses and partners in European and Italian private international law. *Trusts & Trustees*, october, 1-11.

Ferrando, G. (2016). Le unioni civili. Prime impressioni sulla riforma. *Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, *2* (3), 6-17. Retrieved from http://www.articolo29.it/wp-content/uploads/2017/03/genius-2016-02.pdf.

Fiorini, A. (2012). *Which Legal Basis for Family Law? The Way Forward* (European Parliament: Policy Department C: Citizens' Rights and Constitutional Affairs). Retrieved from http://www.europarl.europa.eu/RegData/etudes/note/join/2012/462498/IPOL-JURI_NT(2012)462498_EN.pdf.

Gyeney, L. (2018). Same sex couples' right to free movement in light of member states' national identities. The legal analysis of the Coman case. *Iustum Aequum Salutare*, *XIV* (3), 149-171. Retrieved from http://ias.jak.ppke.hu/hir/ias/20182sz/11_GyeneyL_IAS_2018_ 2.pdf.

Khan, A. A. (2018). *The Coman Case: Same Sex Marriage and Free Movement Law*. Retrieved from https://asadakhan.wordpress.com/2018/06/23/the-coman-case-same-sex-marriage-and-free-movement-law/.

Lopes Pegna, O. (2017). Effetti dei matrimoni same-sex contratti all'estero dopo il "riordino" delle norme italiane di diritto internazionale privato. *Rivista di diritto internazionale*, 2 (100), 527-551.

Rijpma J., et al. (2014). Free Movement Rights for Same-Sex Couples Under EU Law: What Role to Play for the CJEU?. In D. Gallo, L. Paladini, P. Pustorino (Eds.), S*ame-Sex Couples before National, Supranational and International Jurisdictions* (pp. 455-491). Springer-Verlag: Berlin.

Romito A. M., (2018). The Rights of Same Sex Couples under European and Italian Law (I). *Bulletin of the Transilvania University of Braşov – Special Issue Series VII, 2*, 11 (60), 161-166.

Szczerba-Zawada, A. (2018). Derived right of residence of a same-sex spouse of a citizen of the European Union. Commentary on Court of Justice judgment of 5 June 2018, C-673/16.

Relu Adrian Coman and others v. Inspectoratul General pentru Imigrări și Ministerul Afacerilor Interne. *Europejiski Przegląd Sądowy listopad*, 11.

Tryfonidou A., (2017. *Awaiting the ECJ Judgment in Coman: Towards the Cross-Border Legal Recognition of Same-Sex Marriages in the EU?*. Retrieved from http://eulawanalysis.blogspot.com/2017/03/awaiting-ecj-judgment-in-coman-towards.html.

Tryfonidou, A. (2019). An Analysis of the ECJ Ruling in Case C-673/16 Coman the Right of Same-sex Spouses under EU Law to Move Freely between EU Member States. *Research report prepared for NELFA*. Retrieved from http://nelfa.org/inprogress/wp-content/uploads/2019/01/NELFA-Tryfonidou-report-Coman-final-NEW.pdf.

Waaldijk, K. (1994). Standard sequences in the legal recognition of homosexuality – Europe's past, present and future. *Australasian Gay & Lesbian Law Journal*, *4*, June, 50-72. Retrieved from https://core.ac.uk/download/pdf/15591657.pdf.

Waaldijk, K. (ed.) (2017). More and more together: Legal family formats for same-sex and different-sex couples in European countries. *Families and Societies Working Paper* 75 (2017). Retrieved from http://www.familiesandsocieties.eu/wp-content/uploads/2017/ 04/WorkingPaper75.pdf.

Winkler, M. M. (2012). 'Italy's High Court Rules on Recognition Claim by Same-Sex Couple Married in the Netherlands'. *Gay/Lesbian Law Notes*, April, 108. Retrieved from http://www.nyls.edu/documents/justice-action-center/lesbiangay_law_notes/lgln-04-2012.pdf.

Winkler, M.M. (2017). Italy's Gentle Revolution: The New Law on Same-Sex Partnerships. *National Italian American Bar Association Law Journal, 1* (25)*,* 1-31.

Winkler, M.M. (2018). A Case with Peculiarities': Mixed Same-Sex Marriages Before the Supreme Court. *The Italian Law Journal*, *1* (4), 273-288. Retrieved from https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3220493_code1998275.pdf?abstractid=3220493&mirid=1.

Zambrano, V. (2011). National Report: Italy. *American University Journal of Gender Social Policy and Law* 19, no. 1, 225-250.