

**UNIVERSITÀ DEGLI STUDI DI TRENTO**

**THE LEGAL RECOGNITION OF SAME-SEX UNIONS IN THE EU:  
CAN THE CHARTER OF FUNDAMENTAL RIGHTS OF THE  
EUROPEAN UNION MAKE THE DIFFERENCE?**

by

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## ABSTRACT

The issue of same-sex unions in the EU has been differently addressed by Member States. From same-sex marriage to non-recognition, the situation in the EU poses a series of questions related to the principle of nondiscrimination and to the right of free movement for EU citizens. However, all Member States are bound by the same human rights obligations. Among the legal instruments adopted in the context of fundamental rights protection, the now binding force of the Charter of Fundamental Rights of the EU represents a novelty introduced by the Treaty of Lisbon. This research investigates two aspects of the issue related to same-sex unions' recognition between the period 2008-2011. First, by analyzing the case law at different spheres of adjudication, the dissertation examines whether same-sex unions' legal recognition constitutes an obligation Member States are today obliged to fulfill. Second, it explores judicial orientations in relation to the claims brought before them by same-sex couples, explaining the reasons behind an apparently deferential attitude toward the legislator. As discussed in this thesis, there exists a duty to recognize, thus 'indifference' of Member States constitutes a violation of fundamental rights. Accordingly this research clarifies how the '*duty to*' approach, if compared to '*a right to*' approach, might better explain the answer given by the judiciary to the claims posed by LGBTI people in the context of same-sex unions legal recognition. In particular, this thesis contends that while it is possible to frame the argument of same-sex unions in terms of states' obligations, it would not be desirable to establish a single rule concerning the legal recognition of same-sex unions.

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## INTRODUCTION

As shown by the 2011 Rainbow Europe Map<sup>1</sup>, the situation of LGBTI<sup>2</sup> people in the European Union (EU) is still characterized by a number of differences among EU Member States (MSs). In particular, distinctions can be observed by looking at how national legal systems recognize, protect, and generally address the issue of including LGBTI people in society. The purpose of this research is to analyze one of the main issues related to the inclusion of LGBTI people in the ‘EU society’, namely the right to be recognized by the legal system as family for those of the same-sex who decide to form a basic social unit (e.g. a family). Adopting the expression ‘EU society’ could seem inappropriate since the EU is a union of states whose societies (social communities) might appear sensibly different. However, belonging to the EU means

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<sup>1</sup> ILGA-Europe’s Rainbow Europe Map and Index rates each European country’s laws and administrative practices according to 24 categories and ranks them on a scale between 17 (highest score: respect of human rights and full legal equality of LGBT people) and -7 (lowest score: gross violations of human rights and discrimination of LGBT people). The categories look at the (1) inclusion of the grounds of sexual orientation and gender identity in anti-discrimination and anti-hatred/violence laws; (2) existence of legal/administrative procedure for legal gender recognition for trans people; (3) legal recognition of same-sex couples and parenting rights; (4) respect of freedom of assembly and association of LGBT people; (5) equality of age of consent for same-sex sexual acts; (6) discriminatory requirements to legal gender recognition of trans people. The Rainbow Map and Index are available at: <http://www.ilga-europe.org> (last retrieved on June 2011).

<sup>2</sup> The acronym LGBTI is adopted instead of LGBT in order to include among Lesbian, Gay, Bisexual, and Transgender also Intersex people. According to the Intersex Society of North America: ‘Intersex’ is a general term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn’t seem to fit the typical definitions of female or male. For example, a person might be born appearing to be female on the outside, but having mostly male-typical anatomy on the inside. Or a person may be born with genitals that seem to be in-between the usual male and female types—for example, a girl may be born with a noticeably large clitoris, or lacking a vaginal opening, or a boy may be born with a notably small penis, or with a scrotum that is divided so that it has formed more like labia. Or a person may be born with mosaic genetics, so that some of her cells have XX chromosomes and some of them have XY. Though we speak of intersex as an inborn condition, intersex anatomy doesn’t always show up at birth. Sometimes a person isn’t found to have intersex anatomy until she or he reaches the age of puberty, or finds himself an infertile adult, or dies of old age and is autopsied. Some people live and die with intersex anatomy without anyone (including themselves) ever knowing. See [http://www.isna.org/faq/what\\_is\\_intersex](http://www.isna.org/faq/what_is_intersex). (retrieved on 11/03/2011).

to be bound by the same significant fundamental principles. Indeed, all the MSs: share ‘common constitutional traditions’ as firstly acknowledged by the European Court of Justice<sup>3</sup> (ECJ), and subsequently confirmed by the new wording of art.6 (co.2) of the Treaty on the European Union (TEU)<sup>4</sup>; they are all required to respect the European Convention on Human Rights (ECHR); all of them are now compelled to adhere to the European Charter of Fundamental Rights (hereinafter, the EU Charter of Rights).

Following the European Court of Justice’s (ECJ) decision in *Maruko*<sup>5</sup>, the aim of this research is to verify whether the duty to provide legal recognition for same-sex unions<sup>6</sup> within the entire EU has become compulsory for MSs according to the fundamental guarantees now offered at constitutional, supranational, and international level. A comparative constitutional law perspective is adopted. In specific, the theoretical premise is that since the principle of equality and nondiscrimination have been uniformly assimilated within the EU through the application of EU law within

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<sup>3</sup> The ECJ has constructed its case law on the protection of fundamental rights within the EU through its famous cases *Stauder*(1969), *Internationale Handelsgesellschaft* (1970), and *Nold* (1974). In the first case, the Court stated that ‘*fundamental rights [are] enshrined in the general principles of Community law and protected by the Court*’ (ECJ, case C-29/69, delivered on 12 November 1969). In the second case, it upheld that ‘*Fundamental rights are an integral part of the general principles of law the observance of which the Court ensures*’ (ECJ, case C 11/70, delivered on 17 December 1970). In the third case, the ECJ considered that ‘*the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States*’ (ECJ, case C-4/73 delivered on 14 May 1974).

<sup>4</sup> F. BELVISI, *The “Common Constitutional Traditions” and the Integration of the EU*, in *Diritto & Questioni Pubbliche*, n.6, 2006, pp.30-33.

<sup>5</sup> ECJ, case C-276/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, delivered on 4 April 2008.

<sup>6</sup> It is reasonable to argue that using the reference same-sex unions does not truly encompass the nature of these unions. Indeed, while sex is a biological reference associated to gender and can be changed, gender is a subjective quality an individual perceive of him/herself (e.g. a person decide to change sex in light of his/her perception of his/her own gender and not vice versa). However, for the sake of clarity, this research has preferred to use the common terminology, i.e. same-sex unions, instead of same-gender unions.

MSs and coherently with the common principles enchainned in MSs constitutions/legal traditions<sup>7</sup>, there exists a '*duty to recognize*'. The logic applied by this research is reversed: instead of focusing on '*the right to*', the chosen approach is '*the duty to*'. The attention is thus shifted from the individual to the state, whose obligations must be fulfilled.

It follows, that a lack of national political will to grant same-sex partners legal recognition, i.e. '*indifference*' on this issue, constitutes a violation of fundamental freedoms. '*Indifference*' in this context creates two main problems: (1) at national level, non-recognition of same-sex unions in light of the fundamental right to found a family (art.9 EU Charter of Rights) read in conjunction with art.21 (nondiscrimination principle) cannot reasonably be supported without infringing EU law; (2) at supranational level, the right of free movement for individuals and families within the EU (*ex* Art. 39 TEC<sup>8</sup>, now Art. 45 TFEU) would remain available only for heterosexual couples, thus evidently violating the nondiscrimination principle.

Before the entrance into force of the Lisbon Treaty in December 2009, though the EU Charter of Rights had been solemnly proclaimed in 2000, it did not represented a binding legal text, but merely an interpretative instrument used by judges as a set of driving principles. Therefore, the now changed legal context can lead to new developments in the context of same-sex unions' rights. Indeed, the judiciary could be solicited in intervening to restore equality. In other words, either constitutional

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<sup>7</sup> The UK does not have a written constitution but its legal traditions and the Human Rights Act can be considered as part of the so called '*common constitutional traditions*' as recognized by the ECJ.

<sup>8</sup> To be read in combination with *ex* arts 12, 18, 40, 44 and 52 TEC.

courts or the ECJ as supranational judge could overcome discrimination through judicial law-making.

Thus, judicial activism could operate at national or supranational level. Nationally it would find its justification in the constitutional principle of equality and dignity as accomplished in light of both EU principles and the ECHR. Supranationally, it would be reasonable to argue that in the light of the EU Charter of Rights – according to the right not to be discriminated (art.21), the right to marry and the right to found a family (art.9), and also the right to free movement (art.45 TFEU), enjoyed by all EU citizens and granted to both individuals and their families – same-sex partners need legal recognition to be capable of exercising concretely these rights. As underlined by several authors, the Court of Justice has been repeatedly proactive in the definition of the EU social policy, sometimes it has even ‘dictated and imposed’ its own view<sup>9</sup>. Consequently, it would not be surprising for the ECJ to decide to step into the debate over same-sex unions within the EU by adopting a decision far more reaching than those issued until now.

At the international level, the European Court of Human Rights (ECtHR) could also play an influential role for the behavior of the other two levels, but, given that the application of the European Convention goes far behind EU frontiers, and considering that the right to free movement applies only to EU citizens, a judicial intervention on the side of the ECtHR would be unlikely to occur. In addition, whereas it is possible to argue that among EU MSs, common constitutional traditions

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<sup>9</sup> A. R. O’NEILL, *Recognition of Same-sex Marriage in the European Community: The European Court of Justice’ Ability to Dictate Social Policy*, in *Cornell International Law Journal*, vol. 37, 2004, p. 201.

and EU law create the basis for a coherent and shared understanding of fundamental principles, the same cannot be affirmed if Contracting Parties of the ECHR are considered (e.g., developments in the elaboration of the meaning of rights related to homosexual families and the degree of ‘social acceptance’ are still sensibly different among Contracting States of the ECHR, and consequently the ECtHR is more prone to leave a greater margin of appreciation to states).

Hence, this research examines whether judicial activism at national and/or supranational level is now more likely to take place and prompt the enhancement of homosexual families’ rights, or instead, there are still reasons to believe it is better to leave the legislative power the possibility to dictate when and how to address this specific issue.

Before describing the structure and contents of this research it is useful to clarify one point: notwithstanding the multiplicity of countries in which same-sex unions have been legally recognized, this research does not consider non-EU legal systems. This decision is coherent with two exigencies: (1) the main purpose of this thesis is demonstrate whether the now binding EU Charter has an impact on same-sex partners’ rights within MSs and in the EU in general, thus excluding from the analysis non-MSs; (2) although other foreign legal experiences (e.g. U.S., Canada, South Africa) might surely reveal a judicial trend toward the right of sexual minorities, the EU is a very peculiar organization. None of the other countries outside the EU is characterized by a multilevel structure of protection of fundamental rights as it is for MSs (with three levels, national, supranational, and international).

This research is divided in three chapters leading the reader through an analysis that explains the reasons why it is possible to argue that a duty to recognize does exist, and the underlying limits of judicial intervention when considering this specific issue. As explained in the concluding part of this thesis, the assumption that MSs have a ‘duty to recognize’ is not to be confused with the idea of a clear and well-specified individual right, i.e. the right to found a family. In other words, it is underlined how it is possible to establish a duty on the side of states without entering into its ‘specification’. This choice might allow the legislative power a certain degree of flexibility in the creation of a legal model of inclusion for same-sex families, while at the same time leaving the room open for judicial intervention in case of unfair discrimination among types of families.

The first chapter firstly introduces and explains one of the main changes subsequent to the entrance into force of the Lisbon Treaty, i.e. the new formulation of art.6 TEU, whose contents might pose the basis for a new understanding of the system of source of law in the EU. As highlighted, art.6.3 TEU binds the EU to the ECHR. In doing so, the ECHR is *de facto* enshrined within the system of sources of law of the EU<sup>10</sup>, thus raising the issue on whether national ordinary judges should consider also the ECHR as directly applicable uniformly within MSs. Indeed, this confusion has already emerged and both the ECJ and national courts had the occasion to deal with this issue.

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<sup>10</sup> As established by Protocol 8 on the TEU, the EU will be allowed to accede the ECHR but it will have to preserve its own specific characteristics as Union and considering EU law, thus elaborating specific mechanisms for states’ (non-MSs) and individuals’ claims in order to allow the Union or MSs to address correctly future applications (art.1 (b)).

In addition, though art.6.1 TUE clearly confines the scope of application of both the EU Charter of Rights and the ECHR within the limits of the EU competence, this formal distinction cannot exclude the possibility – as happened in a number of occasions in the past – for the ECJ to exercise its competence indirectly over subjects outside the competence of the EU. Both the analyzed cases *Maruko* and *Römer*<sup>11</sup> demonstrate the ECJ's willingness to address the issue of equality among types of families and related social benefits. In fact, the ECJ though avoiding a direct reference to family matters (excluded from the competence of EU law), has deemed necessary to define the limits of states' discretion when differentiating among couples (either heterosexuals or homosexuals) framing its reasoning around other EU principles such as 'equal pay' and nondiscrimination.

Once clarified the importance of art.6 TUE, the beginning chapter offers a comparative examination of the case law at different levels of adjudication. This comparative efforts offers an insight on what could be called a European *idem sentire* toward the recognition of same-sex unions. Indeed, by 2011, only 11<sup>12</sup> MSs up to 27<sup>13</sup> MSs have not passed legislation on this subject. The comparative method offers at least two important advantages: (1) it allows to understand in depth the

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<sup>11</sup> ECJ, case C-147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg*, delivered on 10 May 2011.

<sup>12</sup> These countries are: Bulgaria, Cyprus, Estonia, Greece, Italy, Latvia, Lithuania, Malta, Poland, Romania, and Slovakia.

<sup>13</sup> EU MSs where legislation on same-sex marriage has been passed: Belgium (2003), Netherlands (2001), Portugal (2010), Spain (2005), Sweden (2009). EU MSs where legislation on civil unions or registered partnerships has been approved: Civil unions / registered partnerships are allowed in: Austria (2010), Czech Republic (2006), Denmark (1989), Finland (2002) France (1999), Germany (2001), Hungary (2009), Ireland (2011), Luxembourg (2004), Slovenia (2006), United Kingdom (2005).

mechanisms of a given legal order; (2) it offers the possibility to emphasize similarities, thus posing the basis for a possible generalization<sup>14</sup>.

In other words, with the help of comparison, it is possible to understand whether and how the formation of a new ‘shared understanding of the contents of rights’ is taking place<sup>15</sup>. In addition, the comparative method has become crucial in contexts such as the EU, where EU law is now affecting almost every branch of MSs’ domestic law. Moreover, since the EU system of protection of fundamental right represents a multi-level structure in which the relations among and between levels have led to a system governed by ‘heterarchy’ instead of hierarchy (as described in chapter III), it is necessary to examine the case law at different levels to frame the argument concerning the specific issue of same-sex unions. Furthermore, since this research intends to estimate whether and to what extent judicial activism might ‘prevail’ over policy-makers’ reluctance to pass legislation on same-sex unions, it is meaningful to evaluate how judges (at national, supranational, and international level) have so far responded to those claims made by same-sex partners.

Thus, the first operative choice has been to confine the analysis in the period 2008-2011, i.e. one year before the EU Charter of Rights entered into force, until now. In 2008 the ECJ issued the first judgment in which it stated that opposite-sex and same-sex couples should be treated equally as long as the two situations are *de facto* identical. The analysis explains the reasoning behind judicial review in those cases

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<sup>14</sup> See, generally, J. BRYCE, *Studies in History and Jurisprudence*, Adamant Media, Boston, 2002, pp.189-191; See also, A. Watson, *Legal Transplant*, University of Georgia Press, Athens, Georgia, 1993.

<sup>15</sup> See B.S. MARKESINS, *Foreign Law & Comparative Methodology, A subject and a thesis*, Hart Publishing, Oxford, 1997, p.209.

issued before and after 2009 in which same-sex partners have brought their claims before European Courts.

At national level four countries, namely Italy, France, Hungary, and Portugal have been selected according to three criteria: (1) in all these countries supreme courts have the capacity to address claims on the constitutionality of laws in light of fundamental rights protected by the constitution or as resulting by international agreements ; (2) the temporal dimension, i.e. constitutional courts in these countries had to deal with the issue of same-sex unions' legal recognition in the period 2008-2011; (3) the degree of protection/recognition afforded to same-sex unions is sensibly different between these countries (e.g. while in Italy there is no legislation allowing same-sex partners to be recognized as family, in Portugal same-sex marriage is allowed). The case of Germany – though representing the country whose legislation on registered partnerships has been declared in violation of EU law by the ECJ – is not considered separately because it is examined within the section regarding the supranational level. For each of the selected national cases a brief historical description of the legislative choices made in relation to same-sex unions is also provided to contextualize the analysis.

As for the international level, the chapter preliminarily describes how the Council of Europe (CoE) has repeatedly recommended (e.g. the CoE Parliamentary Assembly *Resolution 1547* of 2007<sup>16</sup>) states to address the issue of same-sex unions in order to overcome discrimination on the ground of sexual orientation. Subsequently, the

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<sup>16</sup> *Res 1547* (2000), para.34 (14), text adopted by the Parliamentary Assembly on 18 April 2007 (15th Sitting), available at: <http://assembly.coe.int>.

examination of the ECtHR's case law shows a change in the understanding of the Strasbourg court over the concept 'family'. In particular, while the ECHR does not distinguish – as art.9 of the EU Charter of Rights does – between the right to marry and the right to found a family as two distinct fundamental rights (e.g. art.8 ECHR protects family life, while art.12 ECHR speaks only about the right to marry), the ECtHR's recent jurisprudence has begun to consider the right to found a family as a fundamental rights existing independently from the right to marry. This step made by the ECtHR can be influential for national courts, whose decisions are also driven by the interpretations elaborated in Strasbourg, as confirmed by the analysis of judgments at national level.

The last section of the first chapter investigates the supranational level. As outlined, EU institutions – particularly the EU Parliament – have shown their concern about same-sex unions both in relation to the right of free movement within the EU, and in light of the principle of equality. The ECJ in this context has continuously played a crucial role. This part of the analysis explains how the ECJ has indirectly established its competence over 'family matters', by using as parameter an economic element.

In addition, this section highlights how the Luxembourg court has developed its jurisprudence from *Grant*<sup>17</sup> to *Römer*, establishing a doctrine of strict interpretation of the EU principle of equality, in which same-sex partners can find protection against unfair discrimination. This result has been achieved by the ECJ adopting the view that there is direct discrimination all the times two situations *de facto* identical are

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<sup>17</sup> ECJ, case C-249/96, *Grant v. South-West Trains*, delivered on 17 February 1998.

treated differently (registered partners and married couples). The reasoning embraced by the ECJ is discussed in order to understand why the ECJ has preferred to identify ‘direct discrimination’ in the German legislation differentiating between homosexual and heterosexual partners, instead of opting for ‘indirect discrimination’, which would have had far more reaching consequences.

The second chapter of this thesis approaches the argument of equality. The decision to elaborate in a separate chapter the concept of equality stems from the necessity to understand the theoretical reasons behind the argument that there exists a state’s duty to recognize same-sex unions, supporting those judicial decisions analyzed in chapter I. Evidently, an explanation of what equality means is to be provided if the premise is that homosexual people deserve equal treatment, as individuals as well as social units, when they decide to found a family.

The first section of chapter II answers the question on ‘why equality should be considered’. The attention is thus directed toward those arguments opposing the idea that equality represents a value on its own, illustrating how this concept – though seemingly self-evident – is in reality a complicated mix of historical, sociological, philosophical, and legal developments. The aim is thus to discuss the importance of analyzing equality in contemporary terms, going beyond a simplistic view rotating on the postulation that ‘equals should be treated equally’, in order to overcome the likeness/unlikeness paradigm in favor of an argument that conceives diversity and equality as two sides of the same coin.

The second section, borrowing from feminist and critical studies, identifies the number of meanings equality might assume depending on the context under

consideration. Hence, while equality is sometimes merely a descriptive tool ('descriptive equality'), other times is a prescriptive element ('prescriptive equality') able to establish relation among and between individuals in a given legal system. Along these lines, equality can be considered in its evaluative dimension, i.e. in the sense of creating relationships among individuals considering the value of the social community where the principle equality is eventually applied. It follows that the main risk undermining a discourse around equality is to create a system where the scheme superior/inferior governs the system: X is like Y, instead of X and Y are equals.

To reinforce this argument, the third section examines equality from a non-purely legal perspective. The sociological and psychological standpoints are considered in order to comprehend how 'tradition' and stereotypes might influence the idea of 'equals'. What is made evident is that 'the legal culture' transformed into a system of legal rules is able to influence the understanding of diversity and equality. Therefore, it is possible to conclude that individuals were not born equals; they have become equals once they have decided to grant each other rights. However, since the system of rights is dependent on the development of legal culture, the concept of equality is shaped/enhanced accordingly. In a constitutional democratic state, if politics is unable to realize how society is evolving, judges can thus play a prominent role in 'perceiving' when 'culture' has changed and the legal system needs to conform.

Another aspect of equality regards the difference between formal equality and substantial equality. In section four is thus developed a further argument concerning the difference between these two paradigms, considering how the application *in*

*concreto* of equality requires the adoption of policies aimed at removing historical disadvantages. Therefore, this section explores why formal equality does not ensure individuals the possibility to be treated equally, and why a neutral approach does not ensure social justice, whereas promoting diversity creates the basis for achieving full equality.

Section five continues on the premises of the previous section evaluating how in the name of substantial equality positive actions have been adopted by states in order to rebalance historical differences. The analysis shows how these instruments are now less appetizing than they were in the past, since they raise strong criticism by those who believe affirmative action create more problems than they are able to solve. However, as argued in opposition to these critics, affirmative action still represent a fundamental tool at states disposal to remove discrimination. Of course, as pointed out, since these measures are meant to advantage temporarily one specific group, they must be adopted bearing in mind their exceptionality. In this context the attitude of the ECJ is analyzed in order to understand how it developed its case law on the principle of equality.

In section six, the arguments developed around equality are used to consider directly those legal institutions for same-sex unions adopted by MSs. The purpose is to discuss whether these options comply with the principle of equality understood as an instrument to encompass diversity, while at the same time eradicating discrimination. Thus, opinions against same-sex marriage are described and discussed in order to verify their consistency. Thereafter, it is evaluated whether the idea of opening up the institution of marriage (e.g. through the intervention of the judicial

power) would signify an achievement for homosexual people through homologation of same-sex unions to the heterosexual paradigm, or rather a defeat, since it clashed with the idea of promoting diversity.

The third chapter pursues the aim of understanding the reasons behind judicial attitude/responses in relation to the claims raised by same-sex unions. The intention is to provide the theoretical frame able to conceptualize the role of judges – at national and supranational level – in constitutional democratic societies. As described, if on the one hand same-sex couples rightly address their claims before judges to be granted a fundamental right, i.e. the right to found a family, on the other, since judges acknowledge a '*duty to recognize*' upon states, they are not in the best position to provide the deemed 'one-single-answer' (e.g. deciding to open up marriage).

The first section of chapter III explores 'judicial law-making' and 'judicial interpretation' as two phenomena characterizing the evolution of a given legal order constructed around the system of rules provided by the constitution. The role of the constitutional judges is examined, and references are made to the most influential schools of thought emerged in the legal doctrine regarding interpretation. The argument is developed by introducing the theory of originalism, i.e. a very strict adherence to the text leaving a little space for interpretation, the 'living instrument' theory, that is the most flexible idea of constitutions as a system of values capable to evolve. In addition, the concept of courts' 'countermajoritarian' attitude, in the field of fundamental rights protection, is discussed opposing to this assumption the 'non-majoritarian' approach; this last concept is able to encompass both the need to preserve the democratic distinction between legislative power and judicial power, and

the necessity to allow the judiciary – within the rules of the constitutional order – to intervene whenever the political majority does not acknowledge a violation of fundamental rights.

In the second section, theories of constitutionalism illustrate the path toward the affirmation of constitutional courts as a means of democratic safeguard, in order to explain the rationale behind the attitude of judicial power in democratic constitutional states. For this reason, section third approaches the concept of ‘constituent power’. Indeed, ‘the constituent power’ might represent for judges one of theoretical obstacles on the possibility to interpret constitutional text according to society’s changes. For part of the constitutional doctrine, criticism on judicial activism stems from the idea that the separation of power confines judges in the application of law as strictly as possible. As clarified in this section, the constituent power is the ‘momentum’ in which the constitution has been elaborated and approved, thus it embraces the ‘spirit of the constitution’ that supreme judges are not allowed to betray.

In the fourth section the concept of ‘constituent power’ is examined in relation to the structure of the EU adopting the so called ‘*multilevel constitutionalism approach*’. As explained, the classical theory of constitutionalism is unable to explain the nature of the EU as a constitutional system autonomous and distinct from MSs. In this section it is underlined how the inclusion of the EU Charter of Rights within the Treaty of Lisbon represents a natural evolution of a constitutional order whose constitutional elements might be recognized even if the EU does not represent a State itself. As discussed, this theoretical approach might result helpful in the

understanding of the EU as an independent system of values, though it cannot provide an exhaustive explanation in relation to the problem of legitimacy of EU institutions.

The fifth section analyzes the European scenario and its specific structure for the protection of fundamental rights. Its multilevel structure is evaluated to understand how different levels are interconnected and influence each other. This, in turn, helps to shed light on the possibility to prompt the evolution in the meanings of rights through judicial law-making at different levels, i.e. the possibility to reshape the scope of application of principles in a dialogic judicial system, in which judicial actors move toward an harmonious interpretation of rights within the system. Nevertheless, this might create problems of legitimacy vis-à-vis the possibility for judges to substitute politics (legislative power) in very sensitive political areas such as the legal recognition and protection of same sex partners' rights.

It follows, as explained in the conclusion of this thesis, that notwithstanding '*the duty to recognize*' and the related violation of rights in case of '*indifference*' on the side of states, the complexity of the issue regarding same-sex unions cannot be reduce in an all-in-all comprehensive judicial answer. Therefore, it is highlighted how the now binding EU Charter, as enshrined in a multilevel system of fundamental rights protection, can produces its effects for same-sex unions within the EU only in relation to the possibility to reinforce the argument pro-legal recognition without creating, at least for the time being, the premises for judicial intervention; indeed, the achievement of full equality for same-sex partners is still a path to be walked and the process of legal recognition for same-sex unions cannot be considered a linear process.

## CHAPTER I

### CASE LAW DEVELOPMENTS ON SAME-SEX UNIONS: A COMPARATIVE ANALYSIS

**Summary:** Introduction; **1.** National dimension; **1.1.** Italy; **1.2.** France; **1.3** Hungary; **1.4.** Portugal; **2.** International dimension; **2.1.** The CoE Framework and the role of the ECtHR; **2.2.** From *Karner* to *Schalk and Kopf*; **3.** Supranational dimension; **3.1.** The EU level and the role of the ECJ; **3.2** From *Maruko* to *Römer*; **3.2.1** *Maruko*; **3.2.2.** *Römer*: a final response?; **4.** The duty to recognize and the comparability of same-sex unions..

#### Introduction

EU countries where same-sex couples have been granted legal recognition have adopted different legal models for regulating rights and duties of partners, and defining those legal consequences related to being recognized as life-partners (e.g. social benefits). However, the EU frame as case-study shows a highly differentiated situation that goes from non-recognition in some countries, to total inclusion in the same terms of heterosexual unions for couples of the same-sex in other countries. Hence, depending on the national case under analysis, not only legislation diverges, but also those answers courts have been issuing in these years are characterized by a different approach on the same issue.

Since the aim of this research is to demonstrate that the approval of the Lisbon Treaty (specifically, having regard for the now binding force of the EU Charter of Rights) might reinforce the idea that there exists a ‘*duty to recognize*’, thus ‘*indifference*’ of states in relation to same-sex unions configures a violation of fundamental freedoms – nationally, supranationally, and internationally defined –

this part of the thesis considers the recent responses elaborated by constitutional/supranational/international judges on the issue of same-sex unions.

This chapter adopts a comparative methodology considering three levels of analysis:

- (1) *National*: constitutional courts' case law; The national case law is used to explain how the meaning of family has to be reconsidered, and why it is possible to argue that whereas restrictions might be placed on the possibility to enter into matrimony for same-sex partners, the right to be legally recognized as life-partners is today acknowledged by the majority of supreme courts in the EU. To verify this hypothesis and conceptualize this conclusion this part of the research considers only recent constitutional courts' pronouncements. The Italian, the French, the Hungarian, and the Portuguese national constitutional case law are examined. The selection of these specific cases responds to two different criteria. First, the temporary element: the selected case law has been issued between 2008 and 2011, thus representing the most recent judicial developments on this issue considering also that in 2009 the Lisbon Treaty has entered into force. Second, the degree of protection afforded to same-sex unions in the selected countries: as described in the annual ILGA-Europe Rainbow Map<sup>18</sup> quoted in the introduction, these countries sensibly diverge as far as same-sex unions' rights are concerned. Hence, following a conceptual

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<sup>18</sup> The Rainbow Europe map reflects European countries' laws and administrative practices which protect or violate the human rights of LGBT people. Each country is ranked according to an overall average of 24 categories detailed in the Rainbow Europe Index. The rank is between -7 and + 17. It is possible to observe how Italy is ranked 0, France 5, Hungary 7, and Portugal 10. This document is available at: <http://www.ilga-europe.org> (last retrieved on 20 May 2011).

scale, while Italian legislation does not provide any legal instrument for the recognition of same-sex partnerships, in France *Pacs* – where rights and duty of partners are few – has been adopted, in Hungary registered partnership has been introduced, and in Portugal same-sex marriage is allowed.

- (2) *International*: the ECtHR's case law. The examination of this level clarifies how there has been a slow formation and sedimentation of a legal trend among States Member of the Council of Europe toward the recognition of same-sex couples. In 2010 in *Schalk and Kopf* a new important step toward the achievement of full equality for homosexual couples has been made. The role played by the ECtHR is in this context particularly salient since at national level its jurisprudence is considered as one of the elements for the interpretation of fundamental rights constitutionally defined.
- (3) *Supranational*: the ECJ's case law. EU countries are not only bound by their own constitutional principles when framing the concept of equality. Nondiscrimination is one of the cornerstones of EU law. The ECJ has several times specified the meaning of this principle enhancing the degree of protection offered to disadvantaged groups of people. To what concerns the issue of same-sex unions, the ECJ both in 2008 and 2011 had the occasion to specify its position in relation to the treatment reserved to family members, thus implicitly giving recognition to same-sex partners in the same terms of opposite-sex partners.

These three levels of analysis are all part of an interrelated system for the protection of fundamental freedoms in the EU. Although an explanation of this

multilevel system is provided in chapter III, it is now necessary to explain the reasons behind the decision of examining different jurisdictional dimensions when tackling the issue of same-sex unions. The exigency of considering all levels is justified by the observation that the sources of law in the EU are organized and recognized at different levels. An evidence of this assumption is provided by the new wording of art.6 of the TEU as amended by the Lisbon Treaty; it reads:

1. The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

As explained in chapter III, the ECJ has considered the ECtHR' case law and the constitutional tradition common to the MSs even before the reformulation of art.6 TEU, and it has soon entered into a judicial dialogic relation between jurisdictional levels. Hence, the new wording of art.6, and the possibility for the EU to accede the

European Convention gives more emphasis on the role of fundamental freedoms in the EU. Indeed, it should not be forgotten that the path leading to the formation of the EU has not been linear in the field of human rights protection. From a purely economic association, the EU has become a Union of values, and the ECJ has played a key role in this context. Some authors regard the ECJ as a *quasi*-constitutional judge able to harmonize the *acquis communautaire* with the necessity to protect fundamental freedoms within the entire EU space<sup>19</sup>. This new art.6 not only expresses the willingness of creating a common European space of rights, but it also pushes toward a strict collaboration among and between jurisdictional levels.

Furthermore, national supreme judges are now accustomed with the idea of conceiving supranational and international case law as sources of law/interpretation. To provide an example, both the German and the Italian Constitutional Court (hereinafter *Corte Costituzionale*) have elaborated a doctrine giving the ECJ's and the ECtHR's case law a crucial role in the interpretation of fundamental provisions. In its judgments n.348<sup>20</sup>-349<sup>21</sup> the *Corte Costituzionale* has referred to the ECHR provisions and its interpretation as '*norme interposte*', i.e. legal provisions whose collocation is to be found between the constitution and primary law, thus giving these provisions supremacy over ordinary law<sup>22</sup>. The German Supreme Court has also

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<sup>19</sup> S. LEIBLE, *Non-Discrimination*, in *ERA Forum*, vol. 6, n. 1, 2005, (pp. 76-89), p.78ss.

<sup>20</sup> *Corte Costituzionale*, judgment n. 348, delivered on 22 October 2007.

<sup>21</sup> *Corte Costituzionale*, judgment n. 349, delivered on 22 October 2007.

<sup>22</sup> N. PIGNATELLI, *Le sentenze della Corte costituzionale nn. 348 e 349 del 2007: la dilatazione della tecnica della "interposizione" (e del giudizio costituzionale)*, in *Quaderni Costituzionali*, n.1, 2008, (pp. 140-143); C. NAPOLI, *Le sentenze della Corte costituzionale nn. 348 e 349 del 2007: la nuova collocazione della CEDU e le conseguenti prospettive di dialogo tra le Corti*, in *Quaderni Costituzionali*, n. 1, 2008, (pp. 137-139); S.M., CICCONE, *Creazione indiretta del diritto e norme interposte*, in *Giurisprudenza costituzionale*, n.1, 2008. (pp. 565-575).

acknowledged that the ECtHR's judgments have to be taken into consideration, though it has clarified that these decisions may have to be integrated to fit into the domestic legal system<sup>23</sup>. In addition, as shown in the analysis of the selected case law, constitutional courts have dealt with the issue of same-sex unions' legal recognition using among the interpretative parameters also the ECJ's and ECtHR's jurisprudence.

Nonetheless, in legal doctrine the 'problem of sources' has been raised several times, in particular when examining the EU legal space. Indeed, the European scenario might create confusion in the context of application and interpretation of fundamental guarantees. As explained by Guazzarotti<sup>24</sup>, the entrance into force of Lisbon Treaty might persuade ordinary judges that the ECHR is now directly applicable on the entire EU space in light of both the art.6 TUE and the principles of *direct effect*<sup>25</sup>, and the *supremacy of European Union law*<sup>26</sup>. Another possibility is that ordinary judges could deem appropriate to consider the EU Charter of Rights as applicable to subjects outside the competence of EU law.

In this respect, the *Corte Costituzionale* court in its judgment n.80/2011 has made clear that the ECHR cannot be considered automatically applicable within the MSs

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<sup>23</sup> Bundesverfassungsgericht, 2 BvR 1481/04, judgment delivered on 14 October 2004. French translation available at: [http://www.bverfg.de/entscheidungen/rk20041014\\_2bvr148104fr.html](http://www.bverfg.de/entscheidungen/rk20041014_2bvr148104fr.html) (last visited 18 June 2009).

<sup>24</sup> A. GUAZZAROTTI, *I diritti fondamentali dopo Lisbona e la confusione del sistema delle fonti*, in *Rivista AIC*, n.3, 2011, (pp. 1-12), pp.2ss.

<sup>25</sup> The ECJ first articulated the doctrine of direct effect in the ECJ, case C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration.*, delivered on 5 February 1963.

<sup>26</sup> The ECJ established this doctrine since the case *Flaminio Costa v E.N.E.L.*, ECJ, case C-6/64, delivered on 15 July 1964.

since its relation with the EU is confined to the scope of application of EU law<sup>27</sup>. Thus, notwithstanding the Lisbon Treaty, the ECHR is unable ‘to penetrate’ into domestic jurisdiction *sic et simpliciter*<sup>28</sup>.

Additionally, as confirmed by the ECJ in its decision *Asparuhov Estov*<sup>29</sup>, the EU Charter of Rights is not applicable to those matters external to the competence of the EU. In specific, the Court of Justice held that it has clearly no jurisdiction to rule on the questions referred by the claimants, who contended that the application of the Bulgarian administrative law (non implementing EU law) was infringing their fundamental rights. This clear-cut position taken by the ECJ cannot be disregarded when approaching the issue of same-sex unions, since it is evidently related to national law governing marital status, expressly falling outside the competence of the EU. In fact, claims concerning discrimination of same-sex couples have been placed before the ECJ on the assumption that differential treatments reserved to married and registered partners or *de facto* unions are illegitimate vis-à-vis EU law (see, *after*, ‘the pay argument’).

Indeed, the scope of application of the EU law must be clarified before entering into a debate aimed at verifying whether the now binding force of the EU Charter of Rights might contribute to the enhancement of the rights of same-sex partners in the EU as a whole. In other words, in order to understand the answers given at national and supranational levels by the judiciary it is necessary to underline how those

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<sup>27</sup> A. RUGGERI, *La Corte fa il punto sul rilievo interno della CEDU e della Carta di Nizza-Strasburgo (a prima lettura di Corte cost. n. 80 del 2011)*, in *www.forumcostituzionale*, 2011.

<sup>28</sup> A. RANDAZZO, *Brevi note a margine della sentenza 80 del 2011 della Corte Costituzionale*, in *www.giurcost.org*, 2011.

<sup>29</sup> ECJ, case C-339/10, reference for a preliminary ruling, *Krasimir Asparuhov Estov, et all. v Ministerski savet na Republika Bulgaria*, delivered on 12 November 2010.

national rules governing marital status fall outside the competence of the EU, and how the Lisbon Treaty does not introduce any direct element of innovation in this context<sup>30</sup>.

Indeed, neither the EU Charter of Rights in art.9 and art.21 poses an obligation to provide same-sex partners legal recognition, nor the possible accession of the EU to the ECHR would extend the competence of the EU as far as to cover also family matters (new art.6.2 TUE). In fact, as it will be examined in the section concerning the role of the ECtHR, the Strasbourg judge has not considered the legal recognition of same-sex partners as an obligation Contracting States must fulfill under the ECHR.

However, it cannot be underestimate that both the EU Charter of Rights and the ECHR might provide the legal basis for future developments in this specific context. Indeed, by analyzing the ECJ's case since *Stauder* (see chapter III), it would not be surprising if the ECJ would decide to extend its competence also over family matters indirectly<sup>31</sup>, in those situations where discrimination between married and unmarried

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<sup>30</sup> It is better to remind that European Union law is a body of treaties and legislation, such as Regulations and Directives, which have direct effect or indirect effect on the laws of European Union member states. The three sources of European Union law are primary law, secondary law and supplementary law. The main sources of primary law are the Treaties establishing the European Union. Secondary sources include regulations and directives which are based on the Treaties. As for the competence of the EU, the consolidated version of the TFEU (as amended by the Lisbon Treaty) clearly states in artt. 2-6 those matters of exclusive competence of the EU, and those which are 'shared competence' between the EU and the MSs. As a matter of facts, those rules governing 'family law' do not fall within the exclusive competence of the EU. Nonetheless, as laid down in art. 81 TFEU (ex art. 65 TEC) the EU 'shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.' (art. 81, para.1)

<sup>31</sup> A strong case could be represented by a same-sex couple married in one MS moving to another one where no recognition is provided. In this case it would be possible to argue that mutual recognition of the status of married couples is necessary to fulfill the MSs' obligations under EU law.

couples create an unjustified differentiation among EU citizens. In other words, the ‘normogenetic’ value<sup>32</sup> of the EU Charter should not be underestimated.

Indeed the EU Charter of Rights has already been used by the ECJ as a legal reference to argue against discrimination. In fact, in the case *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*, the ECJ, when ruling in favor of the claimants, has explicitly referred to art. 21 and 23 of the EU Charter of Rights when framing its judgment against a national provisions differentiating between men and woman<sup>33</sup>. This attitude might be translated into future more proactive steps of the ECJ in the field of discrimination on the grounds of sexual orientation in relation to non-recognition of same-sex partners vis-à-vis married couples<sup>34</sup>.

The structure of this chapter is organized in three sections. In the first one, the national (horizontal) comparison is ordered following the *rationale* ‘from minimum to maximum’. Thus, Italy is analyzed as first case-study and Portugal as the last. Although the main focus remains on recent jurisprudence, references are made also to previous case law and legislation passed before 2008 in order to frame the argument.

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<sup>32</sup> As suggested by some authors in constitutional law, some provisions, though unable to produce a direct effect on given legal system, might provide the needed legal and cultural background for future judicial development. In other words, since these provisions are within the legal system, judges can decide to develop a series of guarantees using these ‘driving principles’ even the absence of a specific legislation. See on this point, S. BARTOLE, *Possibili usi normativi di norme a valore meramente culturale o politico*, in *Le Regioni*, 2005, pp. 15 ss.

<sup>33</sup> ECJ, case C-236/09, delivered on 1 March 2011. According to this ruling, insurers will no longer be able to use sex as a factor to determine whether someone represents a bigger risk in insurance terms, even though historical evidence shows that being male or female has a bearing on frequency and size of claims.

<sup>34</sup> Indeed, if Directive 2004/38/EC was read having regard to the principle of equality, i.e. considering the “equality among family members” in light of art.21 of the EU Charter of Rights – in particular when “families” move to one MS to another – it could be possible to find non-mutual legal recognition between MSs as a *de facto* discrimination for those unions (e.g. same-sex unions), whose members are not legally acknowledged as family members.

The second section examining the international level explores the path toward recognition of same-sex partnerships, i.e. the redefinition of the principles enshrined in the European Convention according to new emerging society's changes. This part explains the transition (through the adoption of a comparative analysis of European countries' legislation by the ECtHR) from a purely traditional approach to the concept of marriage overlapping/including also the concept of family, to a new understanding of both terms as separate elements encompassing two distinct rights.

The third section, related to the supranational level, underlines new EJC's judicial developments in the field of discrimination on the ground of sexual orientation. In particular, it is shown how the Luxemburg court does not differentiate *a priori* between spouses and life-partners, but establishes a new parameter (comparability) for determining whether discrimination had occurred. In this context, it is argued, the ECJ implicitly conceives same-sex partners in the same terms of opposite-sex partners, thus overcoming the issue of placing marriage above other legal institutions and reinforcing the argument – expressed in chapter II of this research – that sees in marriage 'one of the possible legal solutions' and not the standard/ideal legal type for granting families legal recognition.

The concluding section tries to summarize the findings of this comparative analysis in order to understand whether it is possible to affirm that within the EU, the lack of legislation granting same-sex couples legal recognition, or '*indifference*' on this issue by MSs, can configure a breach of fundamental freedoms, since states are called to respect '*their duty to*'.

## 1. National dimension

### 1.1. Italy

Among the selected cases, Italy is the only country in Western Europe where no legal institution has been introduced to legalize same-sex unions. For this reason it would be useful to provide some basic information about this specific national situation.

The discussion around the legal recognition of *de facto* families in Italy has been considered by both the Prodi's government (2006-2008) and the IV Berlusconi's government since 2008<sup>35</sup>. Although political parties have always presented this argument as regarding 'families in general' – trying not to focus on gay unions *per se* and calibrating the attention on those situation in which two individuals have freely decided to share their life without getting married<sup>36</sup> – strong opposition has always been raised in relation to the recognition of same-sex unions. Proposals regarding *de facto* families have all been designated maintaining a neutral legal approach in relation to the sexes of the partners, i.e. mentioning the possibility for individuals (including of same-sex) to enter into this legal institution.

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<sup>35</sup> In 2002, during the II Berlusconi's government, Deputy Franco Grillini presented his proposal called '*Disciplina del patto civile di solidarietà e delle unioni di fatto*', whose constitutive elements resembled those of the legal institution of *Pacs* (the French *pacte civil de solidarité*, a legal institution for the recognition of *de facto* families regardless of the sexes of partners). This proposal, in order to overcome critics from the Catholic Church lacked terms such as 'family' or 'marriage'. Nevertheless, the Parliament did not approve this bill. See, L. CECCARINI, *Unioni di fatto e divisioni politiche*, in M. DONOVAN, P. ONOFRI (eds), *Politica in Italia 2008. I fatti dell'anno e le interpretazioni*, Bologna, pp.259-280.

<sup>36</sup> The Italian Constitutional Court has dealt with the issue of *de facto* families several times in these years. Since 1988 in its judgment n. 404 (delivered on 24 March 1988) the Court has acknowledged the importance of protecting those unions outside the institution of marriage. See S. Rossi, *La famiglia di fatto nella giurisprudenza della Corte Costituzionale*, in [www.forumcostituzionale.it](http://www.forumcostituzionale.it), 2007.

The first draft bill presented by the left/centre majority was the so called DI.CO. (*Diritti e doveri delle persone stabilmente Conviventi*<sup>37</sup>). According to this bill, adult couples, of the same or different sex, united by reciprocal affective ties, in stable cohabiting relationships, could make a declaration of intents at the registry office<sup>38</sup>. After the lapse of a certain time period (which varied from six to nine years) certain rights – health, welfare, residence permits, allocation of public housing, and transfer of tenancy agreement – and duties – pertaining to alimony – would have been granted<sup>39</sup>. This proposal never reached the possibility to be discussed and approved, since the left/centre coalition in the Senate could count on a very narrow majority, and some of its members, i.e. the Christian Democrat Minister of Justice (C. Mastella), were strongly in opposition to any proposal allowing homosexual couples the possibility to be legally recognized.

During that period, civil society participated actively and demonstrations both in favor ('DI.CO. Day' on 10 March 2007) and against ('Family Day' on 12 May 2007) this bill were organized in 2007. This division both in society and among/between political parties<sup>40</sup> led to the decision of definitively abandoning this bill in favor of another draft proposal called CUS (*Contratto di Unione Solidale*<sup>41</sup>). This bill was considerably different and diminutive in its contents if compared with DICO. No

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<sup>37</sup> Translated: *Rights and duties of Cohabitants*.

<sup>38</sup> See, N. PIGNATELLI, *Obiettivo 1. Famiglie, convivenze di fatto, Costituzione. I DICO tra resistenze culturali e bisogni costituzionali*, in *Questione Giustizia*, n.2, 2007, pp.36-40.

<sup>39</sup> See, A DONÀ, *From Pacs to Didore: Why Are Civil Partnership Such a Divisive Issue in Italian Politics?*, in *Bulletin of Italian Politics*, vol. , n.2, 2009, pp.333-346.

<sup>40</sup> Indeed, while it was clear that the right-centre opposition, driven by Berlusconi, was presenting itself as 'the defender of the family', within the left-centre majority divisions on this subject were transversal, i.e. inside political parties (in particular the Margherita party) there were different ethical views on the concept of family and on the role of the Catholic Church as reference for political decisions.

<sup>41</sup> Translated: *Solidary Union Contract*.

reference to registration at the registry office was made – avoiding the ideological problem of ‘public recognition’ – and the entire legal scheme was designed as a pure contract between two individuals.

Indeed, CUS was aimed at regulating the arrangements between a cohabitating couple (of opposite or same sex) without entering into any consideration of ‘why’ individuals might be living together, and the organization of their ‘common affairs’ would have been regulated within a contract stipulated and registered in the archives of a notary<sup>42</sup> (seemingly to the French *Pacs*). Even in this case, the Catholic Church showed its concern arguing that there exists only one ‘natural family’<sup>43</sup>, i.e. a union of a man and woman. Finally, on 24 January 2008 the leader of the left-centre coalition, Romano Prodi, following the government crisis, decided to resign and the Senate Justice Committee in charge of discussing and approving the bill never met again.

The XVI Legislature under Berlusconi’s government has never seriously considered the issue of *de facto* families. The Lega Nord party has always shown its reluctance in relation to the recognition of other types of unions outside the ‘natural family paradigm’. Nevertheless, maintaining the electoral promise that no bill undermining the concept of family would have been discussed by the right-centre

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<sup>42</sup> See, M. SESTA, *Una disciplina per le convivenze*, in *Il Mulino*, n.3, 2007, pp.342-351.

<sup>43</sup> See, G. DALL’ORTO, *I comportamenti omosessuali e il diritto occidentale prima della rivoluzione francese*, in F. BILOTTA (ed), *Le unioni tra persone dello stesso sesso*, Udine, Mimesis, 2008, p. 19; M. MONTALTI, *Separazione dei poteri e riconoscimento del matrimonio tra persone dello stesso sesso*, in F. BILOTTA (ed), *Ibid*, pp.69-80; N. ESKRIDGE, *The case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment*, New York, 1996, pp.60ss..

majority, some of the most important members of the People of Freedom Party<sup>44</sup> (PdL) – Minister for the civil service Brunetta was one of the promoters – presented a new strongly criticized proposal called DiDoRe (*disciplina dei Diritti e dei Doveri di Reciprocità dei conviventi*<sup>45</sup>). According to this proposal, though marriage would have remained the only legal frame in which ‘family’ could be recognized as such, a union of solidarity between two individuals could have been formed, and some rights – mostly the same included in the DI.CO. proposal, with some significant exceptions such as residence permits – would have been granted to those who decided to live together in a stable relation.

This last proposal, though presented by right/centre parliamentarians was unlikely to be approved in that Legislature for several reasons. First, the issue of *de facto* families was not perceived as a priority by that government. Second, there was still a strong opposition within the PdL and Lega Nord members to any proposal that might raise criticism by the Catholic Church. Third, civil society seems to be (reasonably) more concerned about other issues, such as the economic crisis and its consequences. From 12 November 2011, the DiDoRe proposal can be finally considered as the last political failure in the context of *de facto* unions legislation due to the resignation by Prime Minister Silvio Berlusconi.

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<sup>44</sup> The party was founded in a congress (on 27–29 March 2009), when the party *Forza Italia* merged with the party *Alleanza Nazionale*; Berlusconi was elected President of the party.

<sup>45</sup> Translated: *Mutual rights and Duties for cohabiting partners*.

In 2009, in the lack of a political response, in two different proceedings – before the tribunal of Venice and the court of appeal of Trento<sup>46</sup> – ordinary judges have suspended their proceeding and asked the constitutional court whether the refusal by the municipality to issue a marriage license to a same-sex couple was to be considered illegitimate in light of Articles. 2<sup>47</sup>-3<sup>48</sup>-29<sup>49</sup> of the Italian constitution<sup>50</sup>. In particular, the judge in Venice was persuaded that changes in the Italian society and the legal obligations under the ECHR (arts.8-12) and the Charter of Nice (art.9) could create the basis for judicial intervention – through judicial law-making – in lack of political will to provide an appropriate answer to the issue posed by same-sex unions in Italy. In the case n. 138/2010, the *Corte Costituzionale* followed a similar but not identical line of reasoning adopted by the ECtHR in its judgment *Schalk and Kopf v. Austria* issued almost three months after<sup>51</sup>.

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<sup>46</sup> Available only in the Italian version: Venezia: *Ordinanza 3 aprile 2009*, available at: [http://www.amicuscuriae.it/attach/superuser/docs/ordinanza\\_venezia\\_2010.pdf](http://www.amicuscuriae.it/attach/superuser/docs/ordinanza_venezia_2010.pdf); Trento: *Ordinanza 29 luglio 2009*, available at: [http://www.amicuscuriae.it/attach/superuser/docs/trento\\_2009.pdf](http://www.amicuscuriae.it/attach/superuser/docs/trento_2009.pdf).

<sup>47</sup> “The Republic recognizes and guarantees the inviolable rights of man, as an individual, and in the social groups where he expresses his personality, and demands the fulfillment of the intransgressible duties of political, economic, and social solidarity”.

<sup>48</sup> “All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions, personal and social conditions (co.1). It is the duty of the Republic to remove those obstacles of an economic and social nature which, really limiting the freedom and equality of citizens, impede the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country (co.2)”.

<sup>49</sup> “The Republic recognizes the rights of the family as a natural society founded on matrimony (co.1). Matrimony 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 (co.2)”.

<sup>50</sup> On the functioning of the Italian Constitutional Court, see R. BIN and G. PETRUZZELLA, *Diritto Pubblico*, Torino, Giapichelli, 2009, pp.488-490; A. BARBERA and C. FUSARO, *Corso di diritto pubblico*, Bologna, Il Mulino, 2008, pp.391-393; P. CARETTI and U. DE SIERVO, *Istituzioni di diritto pubblico*, Torino, Giapichelli, 2008, pp.394-397; G. CASSANDRO, *The Constitutional Court of Italy*, in *The American Journal of Comparative Law*, vol.8, n°1, 1959, pp.1-14. See also: <http://www.cortecostituzionale.it>.

<sup>51</sup> ECtHR, Application no. 30141/04, 24 June 2010.

Since the argument regarding discrimination of same-sex partnerships was built around articles 2, 3 and 29 of the Italian constitution, the court framed its decision approaching each claims separately.

In relation to art.2 cost., the court acknowledged the fundamental right of individuals to express their personality as individuals as well as social unit regardless of the ‘nature’ of the union, thus conceiving homosexual unions as ‘units’ deserving constitutional protection. The court went even further by arguing that in light of art.2 cost., stable homosexual relations should not only be recognized but also protected by the State. However, in the court’s view, the legislator should decide ‘when’ and ‘how’ these relations should find their formal collocation in the legal system<sup>52</sup>.

As argued by some scholars, this position seems to be contradictory. Indeed, how can the legal transposition of a fundamental right be left in the hands of the legislator? A fundamental right either exists or it does not; if so, there is no margin of discretion on the ‘when’, but only on ‘how’ the enjoyment of a specific right is to be developed. As some authors underline, this line of reasoning contradicts the contemporary widespread assumption concerning fundamental rights and the role of constitutional courts as safeguards against abuses<sup>53</sup>.

In other words, when acknowledging the existence of a fundamental right, it seems difficult to maintain at the same time the position that only ‘when’ the

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<sup>52</sup> *Corte Costituzionale*, judgment n.138/2010, delivered on 14 April 2010, para. 8 *considerato in diritto*.

<sup>53</sup> P. CHIASSONI, *La grande elusione. Tecnica e cultura nella giurisprudenza sul matrimonio omosessuale*, in *Scritti in onore di Franco Modugno*, vol. I, Napoli, 2001, pp.863 ss.

parliament is willing to grant that right, then individuals will enjoy it<sup>54</sup>. It is reasonable to believe that the court did not want to create *ex novo* a new right by using a ‘creative interpretation’<sup>55</sup>, therefore, the result has been that the all reasoning concerning art.2 cost. – despite its potential – has not led to a concrete response to the issue at stake. According to art.2 cost. ‘*The Republic recognizes and guarantees the inviolable rights of man*’, thus if this right exists – and the court has recognized it – it follows that no discrimination should be tolerated<sup>56</sup>. This is even clearer if art.3(sect. I) cost. is considered, (i.e. principle of *formal* equality), which does not mention explicitly sexual orientation as a ground of discrimination but it has been interpreted as to cover also this aspect<sup>57</sup>.

It appears that the Court was indeed concerned about this issue, but at the same time it was unwilling to step into the highly conflictual debate over gay unions; for this reason this judgment led to a conclusion in which non-recognition finds its justification in a very weak argumentation. Indeed, although it could be possible to agree with the constitutional judge on the fact that an analysis *a fortiori* of foreign legal systems shows how it would be impossible to establish ‘a rule’ in relation to homosexual life-partnerships<sup>58</sup> – i.e. different legal solutions have been adopted and

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<sup>54</sup> See, F. ANGELINI, *I “compromessi sposi”: la Corte Costituzionale fa il punto su matrimoni e unioni fra omosessuali*, in [www.associazionedecostituzionalisti.it](http://www.associazionedecostituzionalisti.it), 2010, p. 2.

<sup>55</sup> As some Italian jurists argue, the Constitutional Court might find a violation of a constitutional provision but at the same time it might decide to leave in the hands of the legislator the right solution. However in this case the Court should indicate a reasonable period of time. See A. CERRI, *Corso di giustizia costituzionale*, V<sup>o</sup> edizione. Milano, 2008, p. 235.

<sup>56</sup> See, C. SILVIS, *Il matrimonio omosessuale fra il “non s’ha da fare” dell’art. 29 ed il “si può fare” dell’art. 2 della Costituzione*, in [www.forumcostituzionale.it](http://www.forumcostituzionale.it), 2010, p. 2.

<sup>57</sup> See, P. CARETTI, *I diritti fondamentali*, Torino, 2002, pp. 162 ss.; *Corte Costituzionale*, case n. 161, delivered on 24 May 1985.

<sup>58</sup> See A. MELANI, *Il matrimonio omosessuale dopo la pronuncia della Corte costituzionale: la questione resta aperta*, in [www.forumcostituzionale.it](http://www.forumcostituzionale.it), 2010, p.3.

allowing same-sex marriage is just one of the possible solutions, not ‘the solution’<sup>59</sup>— if no specific legal institution has been provided by the State, then discrimination continues to exist in the legal system with no remedy available, but the intervention of a court.

The Italian constitutional judge has avoided tackling the historical systemic discrimination of the Italian legal system using as parameter the principle of equality under art.3 cost. Indeed, according to part of the Italian legal doctrine art.3 cost. would have represented the natural lens through which it could have been possible solving the case in favor of the claimants<sup>60</sup>. It seems evident that the court’s intent was to step out the debate around same-sex unions. Hence, in order to justify the actual discrimination of homosexuals, the court focused on art.3 cost. only in conjunction with art.29 cost. (instead of considering art.2 cost.). The result has been that it has been possible to affirm that, when marriage is concerned, the differentiation on the basis of sexual orientation does not constitute an

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<sup>59</sup> For an exhaustive description of the different models of recognition adopted within the European Union and worldwide, see, F. BILLOTTA, *Le Unioni tra persone dello stesso sesso, profili di diritto civile, comunitario e comparato*, Udine, 2008; M. MONTALTI, *Orientamento sessuale e costituzione decostruita. Storia comparata di un diritto fondamentale*, Bologna, 2007; K. BOELE-WELKI and ANGELIKA FUCHS, *Legal Recognition of Same-Sex Couples in Europe*, Oxford, 2003.

<sup>60</sup> See, R. ROMBOLI, *Per la Corte costituzionale le coppie omosessuali sono formazioni sociali, ma non possono accedere al matrimonio*, in *Foro it.*, 2010, I, p.1367; M. CROCE, *Diritti fondamentali programmatici, limiti all’interpretazione evolutiva e finalità procreativa del matrimonio: dalla Corte un deciso stop al matrimonio omosessuale*, in *www.forumcostituzionale.it*, 2010; F. DAL CANTO, *La Corte costituzionale e il matrimonio omosessuale*, in *Foro it.*, 2010, I, p.1369; L. D’ANGELO, *La Consulta al legislatore: questo matrimonio “nun s’ha da fare”*, in *www.forumcostituzionale.it*, 2010; F. CALZARETTI, *Coppie di persone dello stesso sesso: quali prospettive*, in *www.forumcostituzionale.it*, 2010; P. A. CAPOTOSTI, *Matrimonio tra persone dello stesso sesso: infondatezza versus inammissibilità nella sentenza n. 138 del 2010*, in *Quaderni costituzionali*, 2010, n. 2, pp.361 ss.

unconstitutional discrimination since both men and women cannot enter into matrimony with a same-sex partner<sup>61</sup>.

The reasoning of the court in relation to the concept of marriage was undoubtedly the most contradictory part of the judgment. Due to the logic applied in that context, the final outcome – i.e. the denial to intervene judicially reshaping the meaning of those articles of the civil code pertaining to the stipulation of marriage – should in fact not be surprising. If on the one hand the constitutional court admitted that ‘family and marriage’ cannot be considered as possessing a ‘crystallized meaning<sup>62</sup>’, on the other hand it underlined two main elements according to which it would be impossible to enhance the scope of the right to marry as to cover also same-sex couples: (1) though art.29(sect. I) cost. does not mention ‘men’ or ‘women’ but speaks only about partners, at the time the constitution has been elaborated, framers did not considered homosexuals as individuals entitled to this right; (2) the traditional marriage has *potentially* a procreative element which *significantly* differentiate heterosexual unions (deserving protection under art.29 cost. from homosexual unions<sup>63</sup>.

With regard to the first point, no formal objections can effectively be made: framers of the Italian constitution were certainly not concerned with rights of

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<sup>61</sup> The principle of equality – which had played a fundamental role in other jurisdictions in favor of recognition of same-sex marriages as constitutionally protected – entrenched in art. 3 was invoked by the *a quo* judges to strike down a ban that was seen without rational basis and discriminatory against certain well-identified minorities. This would have been all the more true especially in light of recognition by the Italian Constitutional Court of the possibility for transsexuals – after change of their legal and biological status – to marry individuals of the same sex they had before the change took place (see decision no. 165/1985). See, [http://www.unisi.it/dipec/palomar/italy011\\_2010.html#1](http://www.unisi.it/dipec/palomar/italy011_2010.html#1) (last retrieved 10/05/2011).

<sup>62</sup> *Corte Costituzionale*, judgment n.138/2010, para. 9 *considerato in diritto*.

<sup>63</sup> *Ibid.*

homosexual couples; however an objection on the merit of this assumption might be placed: a judge that argues that ‘family’ and ‘marriage’ are concepts whose meaning is not crystallized, cannot simultaneously affirm that it is necessary to consider framers’ intents when writing the constitution. These two positions are simply antithetical.

To what concerns the second point, i.e. that the right to marry protected under art. 29 cost. would provide (proscribe) a legal institution aimed at procreation, this interpretation is in contrast with the majority of the opinions expressed both by the Italian legal doctrine and by the constitutional judge in its previous judgments. The word ‘natural’ in art.29 cost. was not used to describe a non-positivistic pre-judicial concept (natural law); on the contrary, it was thought to provide protection against instrumental and ideological usages of the concept ‘family’ by the State, or any other institution whose aim was to impose its own understanding of ‘family’<sup>64</sup>.

Indeed, by considering art.30 cost., the link between marriage, heterosexuality and procreation seems to blur completely in light of the constitutional guarantees ensured also to children born outside the marriage (i.e. outside the ‘traditional family’)<sup>65</sup>.The court did not conclude that there is constitutional ban on same-sex marriage, however, it was not persuaded that society’s changes would have already led to the point that the meaning of art. 29 cost. has evolved as far as to allow the court to intervene ‘opening marriage’ to same-sex partners. The Italian supreme court was very clear on this point. Recalling the EU Charter of Rights and its

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<sup>64</sup> See A. MELANI, 2010, *Ibid*, p.6.

<sup>65</sup> See A. SCHUSTER, *Riflessioni comparatistiche sull’art. 29 della Costituzione Italiana*, in F. BILLOTTA (ed.) *Le Unioni tra persone dello stesso sesso*, Udine, 2008, pp.185-199.

‘explanations’ of art.9<sup>66</sup>, it concluded that it was still a matter the legislator must autonomously provide a solution.

For some legal scholars, this position should be read as a compromise the constitutional court has preferred to adopt in order to preserve the possibility for the court to intervene *ex post*, i.e. whenever legislation on same-sex unions will be passed. In this scheme, the constitutional judge seems to be willing to behave as it did in relation to the *more uxorio* couples (unmarried) during the slow process of case law elaboration concerning *de facto* opposite-sex couples in Italy<sup>67</sup>. In other words, the court would verify whether the hypothetical legislation on this matter legitimately differentiate between heterosexual and homosexual couples.

In 2011, the constitutional court had the occasion to deal again with the contents of the right to marry. In the case n.245/2011<sup>68</sup>, the court has declared unconstitutional the law n.94/2009 in the part it prevented an Italian citizen to marry a migrant without a regular residence permit. In this judgment, the court highlighted how, despite the state has a margin of discretion in defining its security and migration policy, the right to marry is a fundamental right constitutionally recognized and also enshrined in all international human rights documents Italy has accepted to be bound.

According to the court, this fundamental right belongs to every human being in light of art.2 cost., and its spectrum covers individuals universally ‘bypassing’ the parameter of citizenship. As the court upheld:

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<sup>66</sup> See, Explanations by the Convention relating to the Charter of Fundamental Rights, document CONVENT 49 of 11.10.2000, available at: [www.europarl.europa.eu/charter/pdf/04473\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/04473_en.pdf).

<sup>67</sup> R. ROMBOLI, *La sentenza 138/2010 della Corte Costituzionale sul matrimonio tra omosessuali e le sue interpretazioni*, Relazione al Convegno su ‘La pronuncia della Corte sui matrimoni same-sex: quali effetti?’, Bergamo, 4 February 2011, disponibile in *Rivista telematica AIC*, n.3, 2011, p. 12.

<sup>68</sup> *Corte Costituzionale*, judgment n.245/2011, delivered on 20 July 2011.

...fundamental freedoms, as recognized by art. 2 cost., belong to each human being despite his/her membership of a specific political community, thus the condition of an alien cannot justify a differentiation in the enjoyment of these freedoms<sup>69</sup>.

Hence, while in the case 138/2010 the court has mainly focused on the semantic issue regarding the meaning of marriage, in this judgment the supreme judge has clarified that the right to marry is a fundamental right. Thus, it would not be surprising if in the future (called again to respond to issue of same-sex partners) the court would be more proactive in lack of political will to legislate. Indeed, if as the court affirmed in the case n.245/2011 the fundamentality of the right to marry is rooted in its universality, it would be now more difficult to understand a ‘shift from universal to particular’ only when the reference is sexual orientation<sup>70</sup>.

In addition, the court could be soon questioned again on this subject, but this time it should decide whether the different treatment between heterosexual married couples and homosexual married couples is consistent with the principles enshrined in the constitution. Specifically, on October 2011 an Italian man who married a Latin-American man in Spain, obtaining the visa for his partner as a family member, has moved back to Italy. Once back home, his Latin-American spouse has been refused the permission to stay as a family member by Italian administrative authorities. The case is now pending before the tribunal of Reggio Emilia<sup>71</sup> which has to decide

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<sup>69</sup> Ibid, *considerato in diritto 3.1*. Translation is mine. Original version: ‘...che i diritti inviolabili, di cui all’art. 2 Cost., spettano «ai singoli non in quanto partecipi di una determinata comunità politica, ma in quanto esseri umani», di talché la «condizione giuridica dello straniero non deve essere pertanto considerata – per quanto riguarda la tutela di tali diritti – come causa ammissibile di trattamenti «diversificati e peggiorativi»’

<sup>70</sup> M. DI BARI, *La lettura in parallelo delle sentenze n. 138/2010 e n. 245/2011 della Corte Costituzionale: una breve riflessione*, in [www.forumcostituzionale.it](http://www.forumcostituzionale.it), 2011, pp.1-6.

<sup>71</sup> See, [www.ilfattoquotidiano.it/2011/10/19/reggio-emilia-matrimonio-gay](http://www.ilfattoquotidiano.it/2011/10/19/reggio-emilia-matrimonio-gay).

whether to refer the case to the constitutional court, or whether asking for a preliminary ruling before the ECJ. Indeed, this case might configure both the violation of the principle of equality at national level, and also the EU supranational right to free movement.

## 1.2. France

On 15 November 1999 the French law introducing *Pacs* entered into force<sup>72</sup>. Differently from other countries' legislative choices, the French legislator has adopted a specific legal institution whose contents are sensibly different from other institutions aimed at the same goal. In other words, while in other European countries the introduction of registered partnerships has created a similar institution resembling the institution of marriage, *Pacs* possesses its own specificity among the possible solutions to regulate life-partnerships<sup>73</sup>. However, as some scholars have noticed, though *Pacs* is structured and identified within the civil code as a contract between two individuals who want to regulate their interests, in essence it delineates family relations<sup>74</sup>, thus falling *de facto* within the sphere of family law.

Indeed, if on the one hand *Pacs* provides for a significant margin of discretion in relation to the what obligations the partners decide to be bound, on the other hand solidarity, mutual assistance, and the recognition of rights such as advantages linked to property, (for example, tenancy can be inherited in the case of the decease of one of the partners, or the joint liability to repay the debt payable to a third person), gives

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<sup>72</sup> Loi n.99-994 approved by the Parliament on 3 October 1999.

<sup>73</sup> A. M. LECIS, *Le unioni di persone dello stesso sesso in Francia: dai Pacs alla sentenza sul mariage homosexuel*, in *Ianus*, n.4, 2011, pp.213 ss.

<sup>74</sup> Art. 515-1 *Civil Code* states: "The civil pact of solidarity is a contract binding two adults of different sexes or of the same sex, in order to organize their common life".

this institution a typical form of a family law institution<sup>75</sup>. Moreover, while a generic contract can be stipulated also between ascendants and descendants in direct line, *Pacs* cannot be stipulated by those in these situations<sup>76</sup>.

*Pacs* has undergone some relevant developments after its first instruction in French legislation. In 2005 the Finance Act has granted some benefits for the tax regime of the *pacésés*<sup>77</sup> allowing joint income tax, and has also introduced a new regulation in the field of donation and company law<sup>78</sup>. In 2006 a new legislative adjustment has reformed the discipline of *Pacs*. Before 2006 those who entered into *Pacs* did not have their record of birth mentioning their status. This condition has brought to a bizarre situation in which all the time it was necessary to know whether a person was or not into *Pacs* the *Tribunal d'Instance* had to deliver a certificate.

Thus, the introduction of the compulsory annotation on the birth certificate has responded to both practical and cultural exigencies. As for the former, it is now possible to know whether a person is single, as for the latter this makes *Pacs* more similar to 'a family law institution' than it was in the past. The 2006 reform has also introduced a new regime of property. Before 2006 *Pacs* and marriage both provided for joint property possession since it was presumed that partners would commonly

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<sup>75</sup> For a detailed overview of the French situation, see M. R. SPALLAROSSA, *Francia*, in F. B. D'USSEAU (ed.) *Il diritto di famiglia nell'Unione Europea. Formazione vita e crisi della coppia*, Cedam, Padova, 2005, pp.44 ss.; M. CLODE, L. THERY, *The Pacs and Marriage and Cohabitation in France*, in *International Journal of Law, Policy and the Family*, vol. 15, n.1, 2001, pp. 135-158; R. PROBERT, *From lack of status to contract: assessing the French Pact Civil de Solidarité*, in *Journal of Social Welfare and Family Law*, vol. 23, n. 3, pp.257-269; E. STEINER, *The spirit of the new French registered partnership law, promoting autonomy and pluralism or weakening marriage?*, in *Child and Family Law Quarterly*, vol. 12, n.1, pp. 1-14.

<sup>76</sup> Art. 515-2 co.1 *code civil*.

<sup>77</sup> This term is used to indicate individuals under *Pacs*.

<sup>78</sup> J. GODARD, *Pacs seven years on: is it moving toward marriage?*, in *International Journal of Law, Policy and Family*, vol. 21, n. 3, 2007, (pp. 310-321), pp. 315-316.

opt for this solution. Now the new regulatory regime automatically established separated possession for those stipulating a *Pacs* unless there is a contrary agreement<sup>79</sup>.

Nonetheless, *Pacs* still remains a contract for several aspects. First, it can be terminated either with the agreement of the two parties or by one of the partners unilaterally presenting a declaration before the *Tribunal d'Instance* which recorded the formation of *Pacs*<sup>80</sup>. Furthermore, although *Pacs* might be stipulated only between unmarried individuals<sup>81</sup>, it is not incompatible with marriage, i.e., two individuals in a mutual obligation under *Pacs* might get married (only opposite-sex partners)<sup>82</sup>. In this case, *Pacs* is considered terminated after marriage has been celebrated. Besides, guarantees offered to married couples are still far from being assimilated to those offered to *pacsés*. Therefore, it is not surprising that in 2010 a same-sex couple challenged the constitutionality of art.75 and 114 of the *Code Civil* – as it is interpreted – arguing that preventing same-sex marriage would violate the guarantees enshrined in the Constitution.

It is necessary to underline that the question of constitutionality was raised in connection to the interpretation of the aforementioned provisions. The *conseil constitutionnel* indeed, cannot exercise its constitutional scrutiny *a posteriori*. His supervision is exercised after Parliament has passed legislation but before the promulgation of the law, thus *a priori*. Nevertheless, the *conseil* through *la question*

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<sup>79</sup> Art. 515-4 *code civil*.

<sup>80</sup> Art. 515-5 *code civil*.

<sup>81</sup> Art. 512-4 *code civil*.

<sup>82</sup> C. SIMONA PASTORE, *I modelli di tutela delle unioni dello stesso sesso nel diritto europeo*, in F. BILLOTTA (ed.) *Le Unioni tra persone dello stesso sesso*, Mimesis, Udine, 2008, pp. 129-153, p.142.

*prioritaire de constitutionnalité* (QPC) might now consider to revise the actual interpretation given by ordinary judges of provisions whose meaning might have changed over the time<sup>83</sup>.

In 2010, the *cour de cassation* referred the case to the *conseil constitutionnel* considering that society's changes and the adoption of same-sex marriage in other legal systems could have led to a new interpretation of individuals' constitutional rights as protected by the French constitution as far as to allow same-sex partners to enter into marriage. As the court emphasized: '*...attendu que les questions posées font aujourd'hui l'objet d'un large débat dans la société, en raison, notamment, de l'évolution des mœurs et de la reconnaissance du mariage entre personnes de même sexe dans les législations de plusieurs pays étrangers ; que comme telles, elles présentent un caractère nouveau au sens que le conseil constitutionnel donne à ce critère alternatif de saisine ; Qu'il y a lieu, dès lors, de les renvoyer au conseil constitutionnel*<sup>84</sup>'. It is interesting to notice how the *Cour de Cassation* has changed its position ; as a matter of facts, in 2007 it clearly stated that: '*Selon la loi française, le mariage est l'union d'un homme et d'une femme ; ce principe n'est contredit par aucune des dispositions de la Convention européenne des droits de l'homme et de la Charte des droits fondamentaux de l'Union européenne qui n'a pas en France de force obligatoire*<sup>85</sup>'.

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<sup>83</sup> On this point, a clear explanation of the evolution of the French system is provided in A.M. LECIS COCCO-ORTU, *Il Conseil inizia a delineare i caratteri del controllo di costituzionalità successivo: l'interpretazione secondo diritto vivente e la discrezionalità del legislatore nelle questioni etiche*, in [www.forumcostituzionale.it](http://www.forumcostituzionale.it), 2011.

<sup>84</sup> *Cour de cassation*, Appeal n. 10-40042 judgment n. 1088, delivered on 16 November 2010.

<sup>85</sup> *Cour de cassation*, Appeal n. 05-16.627, judgment n. 511, delivered on 13 March 2007.

Thus, the *conseil constitutionnel* has been urged to address the *QPC* in relation to those provisions whose interpretation has since then been accepted as excluding same-sex couples. According to the claimants, Corinne C. and Sophie H., the prohibition of same-sex marriage should be considered contrary to the right to lead a normal life as enshrined in the Preamble of the 1946 Constitution, and would violate the principle of equality (art.6 cost.) as provided by the Declaration of Rights of 1789.

The French judge has not been persuaded by these arguments since in its view:

...that the right to lead a normal family life does not imply the right to marry for couples of the same sex; that, consequently, the provisions criticized do not infringe the right to lead a normal family life<sup>86</sup>. [and] ... the principle of equality does not prevent the legislator from settling different situations in different ways, or from derogating from equality for the general interest, provided that in both cases the difference in treatment that results is either in direct relationship with the subject of the law established thereby; that by maintaining the principle according to which marriage is the union of a man and a woman, the legislator has, in exercising his competence under Article 34 of the Constitution, deemed that the difference of situation between couples of the same sex and those composed of a man and a woman can justify a difference in treatment with regard to the rules regarding the right to a family; that it is not for the Constitutional Council to substitute its judgment for that of the legislator regarding the consideration of this difference of situation<sup>87</sup>.

Thus, while refusing to open up marriage, the *conseil constitutionnel* did not consider marriage as an exclusively opposite-sex prerogative. It did not explicitly

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<sup>86</sup> Decision n.2010-92, delivered on 28 January 2011, para. 8. English translation available at <http://www.conseil-constitutionnel.fr/conseil>.

<sup>87</sup> Ibid, para.9

exclude this possibility, i.e. it seems to be open for further legislative developments; however, it did leave in the hands of the legislative the exclusive competence for possible transformation of the institution of marriage.

### **1.3. Hungary**

Among the countries of the ‘Eastern Bloc’, Hungary was the first state introducing a legal framework for the regulation of same-sex unions. The process of elaboration and adoption of a legislative measure in this context has been characterized by a strong political opposition.

The constitutional court (*Alkotmánybíróság*) had the occasion to enter in the discussion on same-sex unions’ rights since 1995 when the first claim was brought before the Hungarian supreme court. In the decision n.14/1995 the petitioner questioned both the compatibility of the Hungarian family law with *ex*<sup>88</sup> arts. 66(I)<sup>89</sup> and 70(A)<sup>90</sup> of the constitution. Specifically, the question regarded the constitutionality of the ban on same-sex marriage, and the constitutionality of the law on unregistered cohabitation<sup>91</sup> which, at that time, did not apply also to homosexual couples.

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<sup>88</sup> The Hungarian constitution has undergone a profound revision in 2011 and a new constitution will enter into force in January 2012. This new text has raised several critics from the EU, Amnesty International, and other international organizations for its conservative attitude towards contemporary issues such as abortion, marriage, sexual orientation, etc.

<sup>89</sup> It reads: ‘The Republic of Hungary shall ensure the equality of men and women in all civil, political, economic, social and cultural rights’.

<sup>90</sup> It reads: ‘The Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, color, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever’.

<sup>91</sup> Art. 578/G of Act IV of 1959, Hungarian Civil Code.

In this judgment the court seems to have approached the issue in a very conservative fashion in connection with marriage, while it has opted for a very progressive understanding of individuals' rights in the context of unmarried couples.

As for the first question, the constitutional judge held that marriage was to be considered as a union of a man and woman and no discrimination could be found in section 10 (1) of Act IV on Marriage, Family and Guardianship of 1952. The court stated:

The legal provisions did not violate Arts. 66(1) or 70/A. As regards the latter, the institution of marriage is special, expresses constitutional protection and is generally recognized as the union between a man and a woman. Men and women separately comprised homogenous groups of legal subjects which had to be treated the same in order to prevent negative discrimination. This requirement of equal regulation of the conditions of marriage between persons of different sexes excluded the legal possibility of marriage between persons of the same sex. Moreover, in respect of Art. 66(1), the regulation restricting marriage to the relationships of persons of the same sex in the law on family, prohibited men and women equally from marriage with persons of their own sex. Taken together, the legal provisions did not discriminate on grounds of sex or otherwise<sup>92</sup>

Thus, by using 'sex' instead of 'sexual orientation' as a ground of exclusion, the court did not accepted to ascertain discrimination since both sexes, according to the law, were equally prevented from getting married if homosexuals. This part of the decision carries the more conservative understanding of marriage as it has always (traditionally) been defined. Indeed, although the court has acknowledged that in

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<sup>92</sup> Alkotmánybíróság, judgment n.14/1995 (III.13.) AB delivered on 13 March 1995, para.1, English translation available at <http://www.mkab.hu/index.php?id=decisions> (retrieved on 10.03.2011)

society the concept of family has undergone a process of re-conceptualization in its meaning as to include also other social entities outside marriage, it did not find sufficient reasons to allow a reconsideration of marriage including same-sex unions. The court has been clear on this point by affirming that according to ex art.15 cost., *‘marriage is typically aimed at giving birth to common children and bringing them up in the family in addition to being the framework for the mutual taking of care and assistance of the partners’*<sup>93</sup>.

However, the court has been able to distinguish between ‘the impossibility’ and ‘the possibility’ of providing a degree of protection for partners of the same sex. In fact, responding to the second question related to the law on domestic partnership the court has noticed:

The cohabitation of persons of the same sex, which in all respects is very similar to the cohabitation of partners in a domestic partnership – involving a common household, as well as an emotional, economic and sexual relationship, and taking on all aspects of the relationship against third persons – gives rise today, even if not to the same extent, the necessity for legal recognition just as it did in the fifties for those in a domestic partnership. [...] The sex of partners and relatives can be significant if the provision is in respect of a common child or – more rarely – if it concerns a marriage with another person. If these exceptional cases do not apply, however, the regulation of partners in a domestic partnership and relatives is arbitrary. It thus violates human dignity, which conflicts with Art. 70/A of the Constitution if those who are of the same sex are excluded from among persons living in a common household and in an emotional and economic union. [...] An enduring union of two persons may realize such values that it can claim legal acknowledgement on the basis of the equal personal dignity of the

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<sup>93</sup> *Ibid*, para. II.

persons affected, irrespective of the sex of those living together. Equal treatment always has to be interpreted with respect to the social relations that are subjects of the legal regulation. [Thus] a constitutional reason is required if the provision would legitimately discriminate on the grounds of sex between those living in such a union <sup>94</sup>.

Thus, the court has showed how, in light of the principle of human dignity and equality, the legislative should prevent unfair discrimination and social marginalization by allowing same-sex partners to enter into domestic partnership (on this perspective, *see* chapter II on the psychological meaning of equality).

In 1995 the Hungarian supreme court, though declaring unconstitutional the provision of the civil code excluding same-sex partners from the possibility to recognize *de facto* relations, has decided to suspend the decision for another year, leaving the Hungarian parliament the possibility either to enhance the scope of the legal institution on domestic partnership or to create an *ad hoc* legal institution for same-sex unions.

In other words, the constitutional ban was upheld solely in relation to marriage while other forms of recognition were deemed admissible and necessary. On June 1996 a new statutory regulation on unregistered partnership was adopted including also same-sex unions. This new provision (section 685 civil code) referred to 'life partners' as two persons living together in a common household, without marriage, in an emotional and economic union.

In 2008 the court was newly requested to rule on the issue of same-sex unions, but this time the law under judicial scrutiny was the Act CLXXXIV of 2007 on registered

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<sup>94</sup> *Ibid*, Part III of the '*Reasoning*'.

partnership (ARP). This bill presented contents which were extensively similar (if not identical) to those pertaining to marriage. Six petitions were brought before the constitutional judge and the law was eventually struck down by the court before entering into force.

In this judgment the court has remained coherent with its view of 1995 and has asserted that under the Hungarian constitution (art.15 cost.) ‘*marriage*’ represents a constitutional value which has a specific meaning not to be confounded or ‘diminished’ in association with other legal institutions.

This position rotates around a strict adherence to a monolithic understanding of the function of marriage as a union aimed at generating children and protecting them. The contents of the ARP considered unconstitutional were both Section 1<sup>95</sup> and Section 2<sup>96</sup> of the parliamentary act. Nonetheless, as clarified by the court, since the exclusion of these two parts would have compromised the unity of the statutory regulation, the whole piece of legislation had to be annulled<sup>97</sup>. Notwithstanding the relevance of the final conclusion reached by the constitutional judge, this judgment

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<sup>95</sup> Section 1 (1) ‘A registered partnership is established when two persons over the age of eighteen, being jointly present, personally declare in front of the registrar their intention to live together as registered partners’.

<sup>96</sup> “Section 2 (1) With regard to the questions not regulated in this Act of Parliament, the rules on marriage contained in the Act IV of 1952 on Marriage, Family and Guardianship (hereinafter: the AMFG) shall be applicable to the registered partnership as well. The rules of AMFG on adoption as common child and on bearing name by the spouses shall not be applicable to the registered partners.(2) Unless an Act of Parliament provides otherwise, a) the rules on marriage shall be applicable appropriately to registered partnership, 5 b) the rules on the spouses shall be applicable appropriately to registered partners, c) the rules of widows shall be applicable appropriately to the registered partner who lives longer than the deceased partner, d) the rules on the divorced person shall be applicable appropriately to the person whose registered partnership has been terminated, e) the rules on the married couple shall be applicable appropriately to the registered partners.”

<sup>97</sup> *Alkotmánybíróság*, judgment n.154/2008 (XII.17.) AB, delivered on 15 December 2008, para.4. English translation available at <http://www.mkab.hu/index.php?id=decisions> (retrieved on 10.03.2011).

represents an important instrument of interpretation since the court has explored step by step the ‘European trend’. It has examined foreign constitutional courts’ decisions, foreign legislation on this subject, the ECJ’s case law, and the position of the ECtHR on this issue.

The Hungarian constitutional judge has underlined that at the international level legal instruments for the protection of fundamental rights (art.16 UDHR, and art.12 ECHR) recognize marriage as a fundamental legal institution, and the ECtHR has dealt with the issue of same-unions several time opting for a non-all-comprehensive understanding of marriage<sup>98</sup>.

In particular the case of R. and F. v. United Kingdom<sup>99</sup> has been used by the *Alkotmánybíróság* to argue that ‘... *in the actual attitude of the State in questions regarding the role of marriage in society, no such obligation may be deducted from the interpretation of the rights granted by EHRC*<sup>100</sup>’. At the time of this judgment the Hungarian constitutional court could have not considered also the case Schalk and Kopf v. Austria<sup>101</sup> of 2010, to construe its argument. However it is possible that the conclusions reached by the ECtHR in its 2010 judgment would have even reinforced the Hungarian judge’ position, since the ECtHR confirmed that same-sex marriage is

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<sup>98</sup> *Ibid*, para.1.2

<sup>99</sup> ECtHR, case R. and F. v. United Kingdom, Application n. 35748/05, delivered on 28 November 2006.

<sup>100</sup> *Ibid*.

<sup>101</sup> Indeed, the ECtHR concluded that: ‘The Court cannot but note that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes’. Case Schalk and Kopf v. Austria, Application n. 30141/04, 24 June 2010, para.105.

still an option adopted by the minority of States Members of the Council of Europe (see, subsequent section).

To what concerns the EU level<sup>102</sup>, the Hungarian judge recalled the case *D. and Sweden v. Council of European Union* where the ECJ stated that ‘*It is not in question that, according to the definition generally accepted by the Member States, the term ‘marriage’ means a union between two persons of the opposite sex*’<sup>103</sup>. Furthermore, to strengthen its argument the *Alkotmánybíróság* has underlined (as its Italian counterpart in judgment 138/2010) how even the EU Charter of Rights does not impose MSs a specific solution in this field<sup>104</sup>. Indeed, according to art.9, ‘the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights’. The accordance with national laws’ seems indeed to leave a broad margin of discretion to MSs.

As for the examination of other national instruments and case law, the Hungarian court has highlighted how same-sex marriage was still a non-majoritarian alternative in Western countries. As argued, foreign constitutional courts have dealt with the issue of same-sex partnerships acknowledging the difference between marriage and registered partnerships. The example of the German Federal Constitutional Court’s understanding<sup>105</sup> of registered partnerships has been considered by the Hungarian

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<sup>102</sup> *Alkotmánybíróság*, judgment n.154/08, *Ibid*, para.1.3.

<sup>103</sup> ECJ, joined cases C-122/99 P and C-125/99 P, delivered on 31 May 2001. para.34.

<sup>104</sup> *Alkotmánybíróság*, judgment n.154/08, *Ibid*, para.1.2

<sup>105</sup> The *Alkotmánybíróság* refers to the German case 1 *BvF* 1/01 of 17 July 2002, and the case 2 *BvR* 1830/06 of 6 May 2008.

judge to reinforce the argument that marriage and other legal institutions for regulating life-relations must not be identical<sup>106</sup>.

Indeed, in 2008 the main concern of the court was related to the possibility of creating legal institutions strictly resembling marriage. Thus, the ARP was declared unconstitutional since it was considered a *quasi* marriage institution<sup>107</sup>. Undeniably, if on the one hand the court has stressed the importance of self-determination and equal dignity as guiding principles to afford legal recognition also to other types of relations outside marriage, on the other hand it has not been persuaded that the meaning of marriage had changed as far as to cover also same-sex partners.

In line with this reasoning the *Alkotmánybíróság* has dealt with the same issue again in 2010. In its decision n.32/2010 the court had newly to verify the constitutionality of the new Parliament Act XXIX of 2009<sup>108</sup>. This time, nine petitions were placed before the Constitutional Court challenging the constitutionality of the act. Opponents argued against this bill for several reasons: the bill was undermining (as argued in 2007) the institution of marriage; excluding opposite-sex couples was discriminatory; allowing same-sex couples to register was immoral, would promote disorder in society, and would harm children.

The supreme court has ruled in favor of the this bill by considering how a clear distinction was made between marriage and registered partnership, since as in Germany, this time the law only allowed same-sex couples to opt for this legal

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<sup>106</sup> Decision n.154/08, *Ibid*, para.2.1.

<sup>107</sup> *Ibid*, para 3.1.

<sup>108</sup> Alkotmánybíróság, judgment n.32/2010 (III.25.) AB, delivered on 23 March 2010.

solution<sup>109</sup>. In addition, although most of the rights available for married partners were the same of those in a registered unions (e.g. rules governing the establishment and dissolution of registered partnership were identical to those applied for marriage), there were some exceptions mainly aimed at differentiating this new institution from marriage by excluding some of the elements traditionally accompanied to marriage. In fact, in Hungary registered partners cannot adopt the partners' name, and are excluded from the right to adopt children and to participate in assisted reproduction.

The court in this judgment has confirmed its previous case law, highlighting how it is a constitutional duty to provide protection for those of same-sex who are connected in a long-life emotional, economic, and sexual relationships. As noticed by the court, a same-sex relationship is fundamentally different from other relations, such as those occurring between friends, relatives, co-tenant, etc., which might also share the characteristics of 'trust', or even 'emotional ties' typical of a partnership, but cannot be compared in terms of social relevance<sup>110</sup>. Thus, by using as driving principles equal dignity and equality the court has considered the exigencies of sexual minorities as deserving social and legal attention. Moreover, the court has acknowledged how it is important in a democratic regime to promote social acceptance of sexual minority<sup>111</sup>.

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<sup>109</sup> *Ibid*, para. 5.2.1.

<sup>110</sup> *Ibid*, para. 7.

<sup>111</sup> *Ibid*, para.8

#### 1.4. Portugal

The first step toward legal recognition of same-sex unions in Portugal was represented by the adoption of Act 7/2001<sup>112</sup>. However, it would be erroneous to argue that before the approval of this Bill the legal system did not acknowledge the existence of such unions. Indeed, even before 2001, a minimum set of guarantees was also afforded to same-sex couples. As a matter of facts, despite the lack of specific legislation, before 2001 if two individuals, regardless of their gender, were living together for at least five years in a regime of ‘joint household economy’, in case of death of one the partners, the surviving partner had the right to be granted a new lease<sup>113</sup>.

In 2001 the Portuguese legislator decided to reform the legal discipline regulating *união de facto* amending the Act 135/99 and modifying the literal disposition using the ‘plural’ to cover also non-heterosexual types of unions. From ‘*de facto* union’ to ‘*de facto* unions’<sup>114</sup>, under the new law, regardless of sexes of the partners, two individuals living together for more than two years were recognized by the law. Accordingly, the regulation provided for some protective measures mainly in relation to property rights and social security. In 2006 and 2007, new legislative measures have been introduced to extend some of the rights reserved to married couples also to *de facto* unions (e.g. the possibility for a foreigner who lived at least three years in a *de facto* union to acquire Portuguese nationality<sup>115</sup>).

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<sup>112</sup> Decreto n.349, Lei n. 7/2001, of 11 May 2001.

<sup>113</sup> G.COELHO, G. OLIVERA, *Curso de Direito da Família*, vol. I, 2003, pp.112-113.

<sup>114</sup> R. MARTINES, *Same-sex partnerships in Portugal, From de facto to de jure?* in *Utrecht Law Review*, vol. 4, n.2, 2008, pp. 194-195.

<sup>115</sup> *Ibid*, p.201.

The situation of same-sex couples did not undergo through significant changes during the period between 2001 and 2010. Only with the adoption of *Lei* n. 9/XI of 31 May 2010, entered into force on June 5, 2010, the scope of the legal institution of marriage has been extended as to cover also same-sex partners. This Bill was promulgated only after the *Tribunal Constitucional* had confirmed its constitutionality in ruling n.121/2010 with a majority of 11-2 of Judges. The President of the Republic of Portugal, Aníbal Cavaco Silva, though explicitly against the adoption of this law, did not exercise his right to veto and signed the Bill on 17 May 2010<sup>116</sup>.

The role performed by the Portuguese supreme court in the period 2009-2010 has been crucial in addressing mainly to issues: (1) whether the introduction of same-sex marriage was legitimate in light of other constitutional principles; (2) which role a constitutional judge should play in this context. In order to understand the answers provided by the *Tribunal Constitucional*, it is necessary to examine both ruling n.359/2009, and ruling n.121/2010.

In 2009, the *Tribunal Constitucional* has been enquired on whether the constitution required the elimination of the limit of sex in the institution of marriage. The argument prompted by the claimants – who were denied by the Lisbon court of Appeal the possibility of entering into matrimony – was that there existed an ‘unconstitutional omission’<sup>117</sup> in the law, impeding same-sex couples to enter into

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<sup>116</sup> Before signing the Bill the Portuguese President stated: ‘Given that fact, I feel I should not contribute to a pointless extension of this debate, which would only serve to deepen the divisions between the Portuguese and divert the attention of politicians away from the grave problems affecting us.’ See, [http://www.dn.pt/inicio/portugal/interior.aspx?content\\_id=1465015](http://www.dn.pt/inicio/portugal/interior.aspx?content_id=1465015).

<sup>117</sup> *Tribunal Constitucional*, judgment n.359/2009, delivered on 9 July 2009, para. 45 ss.

marriage. According to this position, since the Portuguese constitution does not only provide for the right to form a family and marry (art.36), but also protects individual's identity and the development of individuals' personality (art.26 co.1-2) forbidding discrimination also on the ground of sexual orientation (art.13)<sup>118</sup>, preventing same-sex partners to enter into marriage would have been unconstitutional.

Although the Court has firstly noticed that 'unconstitutionality by omission' could not be claimed before the supreme court – in view of the fact that it is possible to challenge only existing legislation – it has nonetheless decided to scrutinize the reasoning followed by the Lisbon court of Appeal in the concrete application of the existing civil code provision restricting marriage to opposite-sex couples (art.1577)<sup>119</sup>. Thus, the constitutional court has stated:

[F]elt that it should hear the appeal, because in the decision handed down by the Lisbon Court of Appeal, the latter effectively applied the challenged rule in a sense that the petitioners considered unconstitutional. However, in order to make the limits on its own decision perfectly clear, the Constitutional Court emphasized that the petition, the structure of which appears to be close to that of an allegation of the existence of an unconstitutionality by omission, necessarily had to restrict itself to the rule that was actually applied in an allegedly unconstitutional sense. This is why the Ruling underlines the fact that within the scope of the appeal before it, the Court was not only precluded

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<sup>118</sup> Sexual orientation has been introduced as a ground of discrimination in 2004 following the sixth revision of the Constitution. Art.13.2 reads: '*ninguém pode ser privilegiado, beneficiado, prejudicado, privado de qualquer direito ou isento de qualquer dever em razão de ascendência, sexo, raça, língua, território de origem, religião, convicções políticas ou ideológicas, instrução, situação económica, condição social ou orientação sexual*'.

<sup>119</sup> E. SORDA, *Same-sex marriage: il caso portoghese*, in *Ianus*, n.4, 2011, pp.173 ss; E. CRIVELLI, *Il matrimonio omosessuale e la ripartizione di competenze fra legislatore e organo di giustizia costituzionale: spunti da una recente decisione del Tribunale costituzionale portoghese*, in [www.rivistaaic.it](http://www.rivistaaic.it), 2010.

from adding rules needed to implement a hypothetical finding that the appeal should be upheld, but was also unable to evaluate the conformity with the law of other rules derived from the legal treatment of marriage, such as those concerning the latter's effects, which were manifestly not applied in the decision against which the present appeal was lodged<sup>120</sup>.

The court in its reasoning has extensively recalled foreign national examples (the U.S., Canada, South Africa, Germany, Spain, etc) and both the ECtHR's and the ECJ's case law in order to establish whether the Portuguese constitution essentially imposes the same treatment for opposite and same-sex unions. Indeed, claiming that the constitution does not forbid same-sex marriage is significantly different from arguing that it does impose this solution according to the aforementioned arts.13-26-36 cost. Finally, in ruling n.359/09 the supreme court concluded that 'marriage' possess its own cultural and historical meaning but since the two concepts 'family' and 'marriage' should not be overlapped, it is not compulsory to enlarge the scope of marriage to achieve full equality. In the court's view, while there exists a legislator's obligation to elaborate rules establishing a functional content for same-sex unions that are equivalent to marriage, there is no obligation to extend, purely and simply, the institution of marriage to persons of same-sex<sup>121</sup>.

The question on the admissibility of same-sex marriage was then addressed again by the constitutional court in 2010. In ruling n.121/2010 the constitutional judge had to decide whether the law establishing the possibility for persons of same-sex to marry was constitutional. The supreme judge has firstly made clear that although

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<sup>120</sup> See *Tribunal Constitucional*, English Summary judgment n.359/2009, available at <http://www.tribunalconstitucional.pt/tc/en>, para. 7.

<sup>121</sup> *Ibid*, para. 12.

there was no obligation under the Portuguese constitution to allow same-sex marriage (coherently to what it upheld in ruling n.359/09) there was also no constitutional ban preventing the parliament to pass a bill on this subject. What the constitutional court has clarified is that the fact that marriage had been for long time a heterosexual legal institution, could not automatically lead to the conclusion that the exclusion of homosexuals was to be considered as peremptory.

As underlined by the *Tribunal Constitucional*, there was a differentiation to be made when discussing marriage as a legal institution. In fact, one thing was to challenge the concept of marriage, i.e. trying to modify its essential characteristics as a legal institution; another thing was to use an historical parameter to restrict the right of individuals to enjoy the right to marry. The supreme court has thus noted how:

What the Constitution does guarantee is the individual freedom to form a family and to enter into matrimony, together with the existence of the legal format of marriage. In other words the norm that has been invoked as a parameter only requires that the state must guarantee the existence of the legal ‘institute’ of marriage and at the same time refrain from any forms of behavior that prevent citizens from exercising the aforementioned rights or make it difficult for them to do so<sup>122</sup>.

In addition to this point the court has affirmed:

Now, while there can be no doubt that from the biological, sociological or anthropological point of view, a lasting union between two persons of the same sex and that between two persons of different sexes constitute different realities, from the legal perspective treating them in equivalent ways is not without material grounds. In truth, it is reasonable for the legislator to be able to privilege the symbolic effect and optimise

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<sup>122</sup> *Tribunal Constitucional*, judgment n.121/2010, delivered on 8 April 2010, para 21. English version available at <http://www.tribunalconstitucional.pt/tc/en>.

the anti-discriminatory social effect of its normative treatment by extending the protection of the unitarian framework of marriage to such unions<sup>123</sup>.

According to the constitutional judge, the premise for entering into marriage was that two individuals have decided to form a family and legalize their relationship in light of their mutual commitment, “*a common life path governed by the law, with a tendentially perpetual nature*”<sup>124</sup>. This premise can be identified both in heterosexual and homosexual couples, thus:

As the Court has frequently stated, there can be no doubt that the principle of equality enshrined in Article 13(1) of the Constitution of the Portuguese Republic requires the legislator to treat that who is essentially equal equally, and to treat that who is essentially different differently. This maxim leads to the prohibition of arbitrariness, which functions as a negative principle of the control of legislative options. Treating situations that are *de facto* equal differently, and treating situations that are *de facto* different equally, both violate the principle of equality when it is not possible to find a reasonable motive that arises out of the nature of things, or is in some other way understandable in the concrete case in question, for the legal differentiation or the same legal treatment respectively – i.e. when the provision has to be qualified as arbitrary<sup>125</sup>.

Therefore, the conclusion of the court has been clear-cut: preventing homosexuals from getting married has nothing to do with ‘nature’ or ‘appropriateness’. On the contrary, it is merely a political choice. The parliaments is free to decide how to deal with this issue. However, attributing the right to marry to persons of the same sex does not affect the freedom to enter into wedlock enjoyed by persons of different sexes. It does not change both the rights and duties which apply to those persons as a

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<sup>123</sup> *Ibid*, para. 26

<sup>124</sup> *Ibid*, para. 6

<sup>125</sup> *Ibid*, para. 26

result of their marriage, or the representation or image which they or the community may attribute to their matrimonial state<sup>126</sup>. Again, in 2010 the Court has not foreseen any obligation stemming from the constitution to enlarge the scope of marriage; however it has recognized same-sex partners as ‘partners’ in the same terms of opposite-sex partners, and confirmed the legitimacy of *Lei* n. 9/XI of 31 May 2010 which entered into force on 5 June 2010.

## **2. International Dimension**

### **2.1. The CoE framework and the role of the ECtHR**

The Council of Europe (CoE) has shown its concern related to discrimination based on sexual orientation since 1981. At that time, national political discourses around this issue were incomparable to those of these days and were primarily aimed at promoting tolerance toward people belonging to sexual minorities. In *Resolution 756*<sup>127</sup> (1981) the CoE recommended the World Health Organization to eliminate homosexuality from the list of illness (*Res.* 756, para.6). In 1981 the CoE also adopted *Recommendation 924*<sup>128</sup> asking Member States to abolish those criminal provisions punishing homosexual consensual acts and harmonizing the age of consent for both heterosexual and homosexual sexual acts. In this document states were also urged to protect homosexuals from discrimination, to abandon every compulsory medical action or research aimed at preventing the expression of individuals’ sexual orientation (*Rec.* 924, para.7).

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<sup>126</sup> *Ibid*, para. 25.

<sup>127</sup> Text adopted on 1 October 1981 (10th Sitting) available at: <http://assembly.coe.int>.

<sup>128</sup> Text adopted on 1 October 1981, (10th Sitting), available at: <http://assembly.coe.int/>

From ‘tolerance to recognition’, the Parliamentary Assembly of the CoE acknowledged the issue of same-sex partnerships in its *Recommendation* 1470<sup>129</sup> (2000), and subsequently in *Recommendation* 1474<sup>130</sup> (2000). In the former document the Assembly underlined the need of protection – particularly for migrants – of those same-sex families moving from a country to another whose rights were usually not recognized as it happened for their opposite-sex counterparts. In the latter document, the Assembly recommended the Committee of Ministers to

‘add sexual orientation to the grounds for discrimination prohibited by the ECHR as requested by the Assembly’s Opinion n. 216<sup>131</sup> (2000)<sup>132</sup> [...] and call upon Member States: to include sexual orientation among the prohibited grounds for discrimination in their national legislation<sup>133</sup> [...] to adopt legislation which makes provision for registered partnerships<sup>134</sup>

Although the Committee of Ministers accepted the Assembly’s suggestions, it concluded that there was no necessity to include sexual orientation among the grounds for discrimination in the ECHR. As underlined by the Committee, this choice could have been merely symbolic since the ECtHR had already included through judicial interpretation this ground among those provided by art.14 ECHR<sup>135</sup>. In 2007 the Parliamentary Assembly newly addressed the issue of discrimination on the basis

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<sup>129</sup> Text adopted on 30 June 2000 (24th Sitting) available at: <http://assembly.coe.int>.

<sup>130</sup> Text adopted by the Assembly on 26 September 2000 (27th Sitting), available at: <http://assembly.coe.int>.

<sup>131</sup> Text adopted on 26 January 2000 (5th Sitting), available at: <http://assembly.coe.int>.

<sup>132</sup> *Rec.* 1474 (2000), para. 11 (i)

<sup>133</sup> *Rec.* 1474 (2000), para. 11 (iii) (a).

<sup>134</sup> *Rec.* 1474 (2000), para. 11 (iii) (i)

<sup>135</sup> Reply by the Deputies of the Committee, para. 4, text adopted on 19 September 2001, available at: <http://wcd.coe.int>.

of sexual orientation in its *Resolution* 1547<sup>136</sup> (2007), emphasizing how it was necessary to recognize same-sex unions within the broader aim of fighting discrimination against people with different sexual orientation<sup>137</sup>.

To what concerns the elimination of discrimination on the grounds of sexual orientation, there would be a number of cases to be cited, in which the ECtHR had the occasion to deal with this issue. Since the case of *Dudgeon*<sup>138</sup>, the Strasbourg court has considered legal discrimination of homosexuals as infringing the ECHR. However, while according to the judicial interpretation of art.14 ECHR discrimination on the ground of sexual orientation has become inadmissible in several fields, the specific issue of same-sex unions has been dealt with different emphasis, leaving Contracting Parties of the ECHR a greater margin of appreciation.

Under the ECHR the right to marry and to form a family is protected under art.12 which reads:

Men and women of marriageable age have the right to marry and to found a family,  
according to the national laws governing the exercise of this right.

According to this article, while a fundamental right to marry and to found a family exists, states remain responsible for its application/transposition according to their national legislation. Art.12 ECHR, differently from art.9 of the EU Charter of Rights, does not differentiate between the right to marry and the right to found a family. Therefore, it might be argued that the ECHR conceives both the possibility to enter into matrimony and to form a family as two complementary fundamental rights.

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<sup>136</sup> Text adopted by the Assembly on 18 April 2007 (15th Sitting), available at: <http://assembly.coe.int>.

<sup>137</sup> *Res* 1547 (2007), para 34 (14).

<sup>138</sup> ECtHR, case *Dudgeon v United Kingdom*, Application n.7525/76, delivered on 22 October 1981.

Indeed, this association might lead to a conclusion that marriage and family are overlapping concepts, i.e. there is no family without marriage, and there is no marriage without family: end of the story. Hence, the possibility to reconcile same-sex unions' rights with conventional guarantees would be strictly linked with the reconsideration of the legal institution of marriage, i.e. enhancing its scope as to cover also these new types of relation.

As interpreted by the ECtHR in *Rees*<sup>139</sup>:

the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite sex. This appears also from the wording of the Articles which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family<sup>140</sup>.

The same line of reasoning has been followed in the subsequent cases *Cossey*<sup>141</sup> (1990) and *Sheffield*<sup>142</sup> (1998). Exceptions have been formulated only in relation to transsexuality. In this specific situation, the ECtHR argued that biological difference cannot be considered as the only parameter to define marriage. As upheld by the ECtHR in *Goodwin*<sup>143</sup>:

the Court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision<sup>144</sup> [it also added]: There

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<sup>139</sup> ECtHR, case *Rees v. United Kingdom*, Application n.9532/81, delivered on 17 October 1986.

<sup>140</sup> *Ibid*, para. 49.

<sup>141</sup> ECtHR, case, *Cossey v. United Kingdom*, Application n. 10843/84, delivered on 27 September 1990, para. 43

<sup>142</sup> ECtHR, case, *Sheffield v. United Kingdom*, Application n. 22985/93, delivered on 30 July 1998 para. 60.

<sup>143</sup> ECtHR, case, *Goodwin v. United Kingdom*, Application n. 28957/95, delivered on 11 July 2002.

<sup>144</sup> Para 98

have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. [...] [Furthermore]: The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women<sup>145</sup>

Nevertheless, transsexuality represents the exception that confirms the rule on marriage, rather than a departure from the ideal type. Evidently, the main obstacle is still there. Even in the case of transsexual people, marriage is between a man and a woman, though one of the partners was initially of the same gender. Accordingly, the ECtHR declared inadmissible both *Parry*<sup>146</sup> and *R. and F.*<sup>147</sup>, where claimants complained that there would have been a breach of art.12 ECHR if national legislation required ending marriage in case one of the partners into matrimony wished to obtain full legal recognition of gender change.

However, although in *Goodwin* the ECtHR has implicitly clarified that the right to marry and to found a family are to be distinct, i.e. the inability of any couple to conceive or parent a child is not *per se* an element for removing the right to marry, it has not *a contrario* considered that the right to found a family was not strictly related to the fact of being married, thus enhancing the scope of the right to family as to cover also homosexuals.

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<sup>145</sup> Para 100.

<sup>146</sup> ECtHR, case *Parry v. United Kingdom*, Application n. 42971/05, declared inadmissible on 28 November 2006.

<sup>147</sup> ECtHR, case *R. and F. v. United Kingdom*, Application n. 35748/05, declared inadmissible on 28 November 2006.

This tendency to consider family in its traditional dimension has been confirmed by the ECtHR in *Estevez*<sup>148</sup> where the Court, declaring the application inadmissible, has stated that:

the Court reiterates that, according to the established case-law of the Convention institutions, long-term homosexual relationships between two men do not fall within the scope of the right to respect for family life protected by Article 8 of the Convention [...]. The Court considers that, despite the growing tendency in a number of European States towards the legal and judicial recognition of stable *de facto* partnerships between homosexuals, this is, given the existence of little common ground between the Contracting States, an area in which they still enjoy a wide margin of appreciation (see, *mutatis mutandis*, the *Cossey v. the United Kingdom* judgment of 27 September 1990, Series A no. 184, p. 16, § 40, and, *a contrario*, *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 104, ECHR 1999-VI). Accordingly, the applicant's relationship with his late partner does not fall within Article 8 in so far as that provision protects the right to respect for family life<sup>149</sup>

Whereas in this decision the ECtHR seemed to be particular reluctant to extend conventional guarantees to same-sex long-life relationships, in subsequent judgments there has been a development in the judicial elaboration of the concept of family, more similar in its contents to those enshrined in the EU Charter of Rights.

## **2.2. From *Karner* to *Schalk and Kopf***

Each of these two cases represents an important step toward the legal affirmation of same-sex unions as social units deserving protection. In *Karner*<sup>150</sup> the Court has

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<sup>148</sup> ECtHR, case *Estevez v. Spain*, Application n.56501/00, declared inadmissible on 10 May 2001.

<sup>149</sup> *Ibid*, Part B of the decision.

<sup>150</sup> ECtHR, case *Karner v. Austria*, Application n. 40016/98, delivered on 24 July 2003.

not gone so far as to determine the contents of ‘family life’, but has implicitly recognized a family relationship between the male applicant and his partner. This case originated from the denial of the Austrian Supreme Court (*Verfassungsgerichtshof*) to recognize Mr. W (Karner’s partner) the same benefits an opposite-sex partner could exercise in relation to tenancy after the death of the partner according to section 14 of the Rent Act (*Mietrechtsgesetz*). The Austrian constitutional court motivated its decision arguing that it was not in the intention of the legislator (in 1974) to encompass within the expression ‘life companion’ others than traditional opposite-sex partners.

Since this complaint was transmitted to the ECtHR in 1998 when the applicant was already dead, the Austrian government argued that the case should have been dismissed. The ECtHR however, was not persuaded by this objection and emphasized how the ‘*Karner*’ case would have represented a leading case in the field of discrimination against homosexuals, since, in the words of the Court:

[t]he Court has repeatedly stated that its “judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties” (see *Ireland v. the United Kingdom*, cited above, p. 62, § 154, and *Guzzardi v. Italy*, judgment of 6 November 1980, Series A no. 39, p. 31, § 86). Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards

of protection of human rights and extending human rights jurisprudence throughout the community of Convention States<sup>151</sup>.

The Court has avoided focusing on the concept of family, and has explicitly stated that it was not necessary to determine the notions of private life and family life to establish whether a breach of the Convention under art.8 ECHR had occurred<sup>152</sup>. In the reasoning of the Strasbourg judge, the main point to be considered was the proportionality of a measure discriminating between heterosexual and homosexual life companions regarding the possibility to succeed to a lease (as provided by the Austrian Rent Act).

As the Court has observed, though states are allowed a broad margin of appreciation in the context of protecting family life as an abstract concept, those concrete measures adopted to achieve that aim should be narrowly scrutinized. *Karner* in this sense shares some similarities with the ECJ's cases *Maruko* and *Römer* (analyzed in the next section) since in all the cases, the judge has been concerned about facts, i.e. whether states pursue a legitimate aim when differentiating between *de facto* identical situations. In other words, what the ECtHR has underlined in *Karner* is that the principle of proportionality should be concretely respected avoiding discrimination based on sex or sexual orientation if not strictly necessary. In the specific case of a homosexual life companion the ECtHR has not found convincing the arguments 'pro differentiation' advanced by Austria<sup>153</sup>.

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<sup>151</sup> *Ibid*, para. 26

<sup>152</sup> *Ibid*, para. 33.

<sup>153</sup> *Ibid*, para. 41.

The ECtHR has newly dealt with the issue of same-sex couples in 2010 in the case *Schalk and Kopf*<sup>154</sup>. This judgment has been the first in which the ECtHR has expressly considered same-sex relations as falling within the notion of ‘family life’, and has acknowledged the possibility to extend the meaning of marriage beyond its traditional conception. The case was brought before the ECtHR by an Austrian couple claiming that, though according to Austrian legislation same-sex partners could enter into registered partnerships<sup>155</sup>, the impossibility to enter into matrimony configured a breach of the Convention under arts.12 and 14 ECHR read in conjunction with art.8 ECHR.

When developing its reasoning, the ECtHR has made a comparative analysis. It has observed that within the CoE system national legal solutions adopted to recognize same-sex unions were still far from being harmonic. It has also considered the EU

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<sup>154</sup> ECtHR, case *Schalk and Kopf v. Austria*, Application n. 30141/04, delivered on 24 June 2010.

<sup>155</sup> The Registered Partnership Act (*Eingertragene Partnerschaft-Gesetz*) entered into force on 1 January 2010. This law allows only same-sex couples to register, while opposite-sex couples might not register (section 2 Registered Partnership Act) The rules on the establishment of registered partnership, its effects and its dissolution resemble the rules governing marriage. Registered partnership involves co-habitation on a permanent basis and may be entered into between two persons of the same sex having legal capacity and having reached the age of majority (section 3). A registered partnership must not be established between close relatives or with a person who is already married or has established a still valid registered partnership with another person (section 5). As in the case of married couples, registered partners are expected to live together like spouses in every respect, to share a common home, to treat each other with respect and to provide mutual assistance (section 8(2) and (3)). As in the case of spouses, the partner who is in charge of the common household and has no income has legal authority to represent the other partner in everyday legal transactions (section 10). Registered partners have the same obligations regarding maintenance as spouses (section 12). Dissolution of registered partnership occurs for the same reasons as for dissolution of marriage or divorce: (a) in the event of the death of one partner (section 13); (b) following a judicial decision. Some differences between marriage and registered partnership remain, apart from the fact that only two persons of the same sex can enter into a registered partnership. While marriage is contracted before the Office for matters of Personal Status, registered partnerships are concluded before the District Administrative Authority. The rules on the choice of name differ from those for married couples: for instance, the law speaks of “last name” where a registered couple chooses a common name, but of “family name” in reference to a married couple's common name. The most important differences, however, concern parental rights: unlike married couples, registered partners are not allowed to adopt a child; nor is step-child adoption permitted, that is to say, the adoption of one partner's child by the other partner (section 8(4))

Charter of Rights (art. 9) underlying how the scope of art.9 was broader in its potential legal interpretation if compared to other international instrument referring to marriage and family<sup>156</sup>. Indeed, as already highlighted, while the ECHR provides in art.12 ‘only’ for the right to marry, the EU Charter of Rights ‘distinguishes’ in art.9 between the right to marry and the right to found a family, thus conceiving these two fundamental rights separately. The court has also mentioned EU Directive 2003/86/EC and Directive 2004/38/EC as instruments providing protection to those families whose members belong to sexual minority (see next section on the EU level).

This reference to the EU legal instruments by the ECtHR has been unusual, because traditionally the Strasbourg court has limited itself to the European Convention<sup>157</sup>. However, the ECtHR has underlined the importance of the ‘Explanation to the Charter’ in order to stress how it was still a matter of national discretion to decide upon this matter.

Declaring the case admissible the Court in relation to art.12 ECHR has upheld that:

...the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State<sup>158</sup> [and] In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a

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<sup>156</sup> Schalk and Kopf v. Austria, *Ibid*, para.25.

<sup>157</sup> C.M. CERNA, *Schalk & Kopf v. Austria (Eur. Ct. H.R.)*, *Introductory Note*, in *International Legal Materials*, vol. 49, n. 5, 2010, p.1303.

<sup>158</sup> *Ibid*, para.61

different-sex couple, a same-sex couple cannot enjoy ‘family life’ for the purposes of Article 8<sup>159</sup>.

However, on the other hand it has once again affirmed how:

marriage has deep-rooted social and cultural connotations which may differ largely from one country to another<sup>160</sup> [and] it must not rush to substitute its own judgment in place of that of national authorities, who are best placed to assess and respond to the needs of society<sup>161</sup> [and] the Convention does not impose an obligation [...] to grant same sex couple [...] access to marriage<sup>162</sup>.

Despite the final outcome, this case has represented a victory for LGBTI people in relation to art.8 ECHR, since in *Schalk and Kopf* the ECtHR has reversed its previous position elaborated in *Estevez*, acknowledging the growing trend toward legal recognition of same-sex couples in many Contracting States<sup>163</sup>.

Specifically, the ECtHR has recognized same-sex families in the same terms of opposite-sex families, and has adopted a more comprehensive understanding of the right to marry under the ECHR which might now be considered as covering also same-sex partners. Nevertheless, the lack of a consolidated national practice among Contracting States has led to the conclusion that there is no obligation yet under the ECHR to allow same-sex marriage. For this reason, the ECtHR has not found a violation of art.14 ECHR in conjunction with art.8 ECHR. States, in the court’s view, should be allowed a certain margin of appreciation both in relation to the possibility

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<sup>159</sup> *Ibid*, para. 94. See, G. REPETTO, *Il matrimonio omosessuale al vaglio della Corte di Strasburgo, ovvero: la negazione “virtuosa” di un diritto*, in *Associazione Italiana dei Costituzionalisti*, available at: <http://www.associazionedeicostituzionalisti.it/rivista/2010/00/Repetto01.pdf>.

<sup>160</sup> *Schalk and Kopf v. Austria*, *Ibid*, para. 61

<sup>161</sup> *Ibid*, para. 62.

<sup>162</sup> *Ibid*, para. 63.

<sup>163</sup> J. M. SCHERPE, *Same-Sex Couples Have Family Life*, in *The Cambridge Law Journal*, vol. 69, n. 3, , p. 464.

to allow same-sex marriage, or to provide alternative means of recognition. Hence, restrictions in the enjoyment of rights typical of marriage would not configure *per se* a breach of the Convention<sup>164</sup>.

As some authors dispute, the decision in *Schalk and Kopf* has been partially ambiguous<sup>165</sup>. Whereas the ECtHR has accepted and confirmed that there exists a European *idem sentire* toward the recognition of same-sex unions, it is still unclear whether Contracting States are bound to provide legal recognition. Indeed, by analyzing these jurisprudential developments it is possible to conclude that ‘family life’ might be fully enjoyed only through appropriate legal means of recognition, but the court has preferred to remain silent on this point. In other words, it seems the ECtHR has advanced the idea that ‘ignoring’ the issues of same-sex unions would configure a breach of the Convention, without stating this principle explicitly. This position, if compared to the above analyzed case of Italy in judgment n.138/2010, shares a similar line of reasoning, i.e. it emphasizes the existence of a ‘*duty to recognize*’, without entering into the delicate debate about the specific contents of this duty.

### **3. Supranational dimension**

#### **3.1. The EU level and ECJ role**

The ECJ has represented one of the main actors aimed at broadening the scope of European nondiscrimination law. Its role has been relevant firstly in removing

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<sup>164</sup> *Ibid*, para. 108.

<sup>165</sup> L. HODSON, *A Marriage by Any Other Name? Schalk and Kopf v Austria*, in *Human Rights Law Review*, vol. 11, n.1, p. 176.

discriminating attitudes both from private and public actors toward homosexuals, and secondly in reshaping the understanding of equal treatment in those situations where it was unclear if discrimination had occurred. However, before entering into the analysis of the ECJ's jurisprudence between 2008 and 2011 involving same-sex partners, it is useful to remind the legal framework around which these judicial decisions have been elaborated. It is thus necessary to investigate those developments EU law has undergone in the specific field of nondiscrimination on the ground of sexual orientation.

Within the EU, the prohibition to discriminate on the grounds of sexual orientation was not mentioned in the first legal agreements regarding the European Communities. However, to what concerns EU primary law, art.10 of the Treaty on the Functioning of the European Union (TFEU)<sup>166</sup> has established that 'in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. As mentioned at the beginning of this chapter, art.6.1 of TEU explicitly refers to EU Charter of Rights as a binding document, consequently stressing the inderogability of art.21 (nondiscrimination principle). In addition, art.19.1 (ex art.13 of the Amsterdam Treaty) of the Treaty of Lisbon empowers EU Institutions with the capacity to take appropriate actions to combat discrimination.

As for EU secondary legislation the main instrument is represented by Directive 2000/78/CE<sup>167</sup> of 27 November 2000, establishing a general framework for equal

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<sup>166</sup> Consolidated version, Official Journal C 115 of 9 May 2008.

<sup>167</sup> OJ L 303, 2.12.2000, pp.16-22.

treatment in employment and occupation. Directive 2000/78/EC is of prominent importance since it has been used to construe, i.e. to apply *in concreto*, the meaning of equal treatment within the EU. Although it is primarily related to economic issues, the conceptual scope of this Directive has gone far beyond its economic dimension. As this analysis demonstrates, the ECJ – when interrogated on this point – has recently built around the principles enshrined in this document a judicial attitude aimed at providing same-sex unions the same protection of opposite-sex couples, thus realizing the EU nondiscrimination principle for people belonging to sexual minorities.

The first step ever made by Community Institutions to promote homosexuals' rights was the adoption of the European Parliament (EP) resolution following the discussion on the report *on Sexual Discrimination at the Working Place* in 1984<sup>168</sup>. In 1991 the EU Commission adopted the *Recommendation on the protection of the dignity of women and men at work*, emphasizing how 'some specific groups are particularly vulnerable to sexual harassment [...] gay men and young men are also vulnerable to harassment. It is undeniable that harassment on grounds of sexual orientation undermines the dignity at work of those affected and it is impossible to regard such harassment as appropriate workplace behavior<sup>169</sup>.' In 1994, the EP adopted the *Resolution on equal rights for homosexuals and lesbians in the EC*<sup>170</sup>

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<sup>168</sup> EP 1-1356/83, PE 87.477.

<sup>169</sup> Commission Recommendation 92/131/EEC of 27 November 1991 on the protection of the dignity of women and men at work [OJ L 49 of 24.02.1992].

<sup>170</sup> OJ C 061 , 28/02/1994 p. 40.

urging the Commission and MSs to ensure and promote equality also for those belonging to sexual minorities.

In connection to the specific issue of same-sex unions, the EP Report of 2003<sup>171</sup> framed the concept of family regardless of the sex of the partners, thus implicitly acknowledging and supporting those unions. Nonetheless, the European Commission and the European Council rejected this proposal<sup>172</sup>. The EP indeed, in opposition to the Commission and the Council, has shown its concern in relation to the freedom of movement, as protected by *ex art.39 TEC*<sup>173</sup>, now art.45 TFEU. Evidently, the free movement right would be an empty right if the worker's family could not be allowed to follow the 'moving person'. For this reason, *ex art.39 TEC* has been completed by Directive 2004/38/EC<sup>174</sup> which operates in the direction of extending the right to free movement also to family members. It reads:

‘...the right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality<sup>175</sup>. For the purposes of this Directive, the definition of ‘family member’ should also include the registered partner if the legislation of the host Member State treats registered partnership

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<sup>171</sup> European Parliament Report A5-0009/2003, *on the proposal for a European Parliament and Council directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*; Rapporteur Giacomo Santini.

<sup>172</sup> M Bonini Baraldo, *Lo Spazio Europeo di Libertà, Sicurezza e Giustizia: Pluralismo di Valori e Pregiudizi Nazionali a Confronto*, in F. Bilotta (ed), *Le unioni tra persone dello stesso sesso*, Udine, Mimesis, 2008, p.112.

<sup>173</sup> Read in combination with *ex Arts 12,18, 40, 44 and 52 TEC*.

<sup>174</sup> Directive 2004/38/EC, *On the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

<sup>175</sup> The ECJ in *Reed* has clearly forbidden discriminations based on nationality. *Reed v. Netherlands*, case 59/85, 17April 1896.

as equivalent to marriage<sup>176</sup>. [Moreover] in order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen<sup>177</sup>.

In 2011, the EU Parliament and the Commission have enacted a new *Regulation on freedom of movement for workers within the Union*<sup>178</sup> in which at paragraph 6 of the explanatory introduction states:

The right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers be eliminated, in particular as regards the conditions for the integration of the worker's family into the host country<sup>179</sup>

Nonetheless, both Directive 2004/38/EC and this Regulation remain silent on the definition of 'family members', and this omission has been (is) particularly salient in the case of same-sex unions. As a matter of facts, if the possibility for same-sex families to move freely within the EU is subordinated to a prior recognition of the hosting State of the union contracted in the country of origin, these families are *de*

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<sup>176</sup> *Ibid, supra* note 115, para.5.

<sup>177</sup> *Ibid*, para.6.

<sup>178</sup> OJ L 141/1 27/05/2011.

<sup>179</sup> *Ibid*, para. 6.

*facto* prevented to move in all of the EU countries if they want to maintain their status as families (e.g. a Spanish married same-sex couple moving to Italy is not considered married under Italian legislation).

The wording of Directive 2004/38/EC seems to mirror the Explanatory Commentary on the EU Charter of Rights about art.9, in which the *Praesidium* clarified that the right to marry enshrined in art. 9 should be interpreted as follow: *‘The wording of the Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex.’*<sup>180</sup>.

Again, same-sex unions, though legally recognized by their own country, do not possess any specific entitlement vis-à-vis another EU Member States which does not provide legal recognition. Even if the Charter also comprises art.21, the Explanatory Commentary would seem to prevent an extensive interpretation of art.9 forcing MSs to provide at least a minimum degree of recognition. In this respect, it should not be forget that these explanations, though accompanying the EU Charter of Rights, cannot be given more importance than articles themselves . As argued by Advocate General Ruiz-Jarabo Colomer in its *Opinion* before the ECJ in the case of *Maruko*:

legislative provisions describe facts, situations or circumstances and attribute certain consequences to them. The factual situation and the legal result are therefore the two essential elements of a legal rule. But the explanatory memorandum, the preamble or the introductory recitals, which merely seek to illustrate, state the reasons for or explain,

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<sup>180</sup> See Text of the explanations relating to the complete text of the Charter as set out in Charter 4487/00 CONVENT 50.

do not form part of these essential elements, since, although they accompany, and usually precede, the enacting terms of the measure, forming a physical part of it, they have no binding force, notwithstanding their usefulness as criteria for interpretation, a role which the Court has frequently cited. Accordingly, [they] merely assists with the interpretation of the provisions [...] and its significance must not be overstated<sup>181</sup>.

In this respect, it is now necessary to verify the position of the ECJ related to the specific problem posed by the existence of same-sex unions. The ECJ has never directly dealt with the issue related to the recognition of same-sex unions, as national courts or the ECtHR have. However, the Luxemburg court had the occasion to express its position on the ‘essence’ of family relations a number of times. Thus, indirectly, it has contributed to the evolution of the concept of family. As it has happened in the other levels previously analyzed, this judicial process has undergone a series of small developments.

The first relevant decision in which the ECJ was asked whether discriminating against a same-sex couple was compatible with EU law was the case of *Grant*<sup>182</sup>. In this case the court concluded that the refusal by an employer to allow travel concession to the person of the same sex with whom a worker had a stable relation, where such concession were allowed to a worker’s spouse or to the person of the opposite sex with whom the worker had a stable relationship outside marriage, did not constitute discrimination.

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<sup>181</sup> Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, Case C-267/06, *Opinion* delivered on 06 September 2007, para 76.

<sup>182</sup> Grant v. South-West Trains, C-249-96, of 17 February 1998.

In the reasoning of the ECJ, both female and male same-sex couples were denied the benefits, thus there was no discrimination based on sex<sup>183</sup>. In 1998, as the ECJ itself underlined, the reference to sexual orientation was still to be introduced by the subsequent Amsterdam Treaty and the Framework Directive 2000/78/EC<sup>184</sup>, thus the possibility for the ECJ to intervene was restricted to sex-based discrimination.

As stated by Advocate General Mazak, although it would be true to assume that a general principle of equality implies potentially a prohibition of any discrimination on specific grounds, it is also true that any specific prohibition is an expression of that general principle<sup>185</sup>. Thus, MSs should device appropriate measures to combat discrimination, specifying what the general principle truly means.

### **3.2. From *Maruko* to *Römer***

Since both the cases originated from a claim submitted in relation to a violation of EU law, in particular Directive 2000/78/EC, to understand these two cases, it is

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<sup>183</sup> The opposite conclusion has been reached by the ECJ in the subsequent cases *Kingdom of Sweden and others v. Council of the European Union* (Joined Cases C-122/99 and C-125/99, of 31 May 2001) in which the Court argued that depriving a Swedish official of an allowance to which her married colleagues was entitled, solely on the basis that the partner with whom she was living was of the same-sex constituted a sex-based discrimination. It is important to notice how 'the argument of sex' has been proven unsuccessfully several times in the case of discrimination based on sexual orientation. Courts might find an easy way out by arguing that since both sexes are denied a specific behavior, then there is no discrimination based on sex. On this point, see D. A. WIDDIS, E. L. ROSENBLATT, D. NEJAIME, *Exposing sex stereotypes in recent same-sex marriage jurisprudence*, in *Harvard Journal of Law and Gender*, vol. 30, 2007, pp. 462-505.

<sup>184</sup> OJ L 303/18 02/12/2000.

<sup>185</sup> *Felix Palacios de Villa v. Cortefiel ServiciosSA*, C-411/05, *Opinion* delivered on 15 February 2005, para. 91-97.

necessary to comprehend the structure of Directive 2000/78/EC before moving into the analysis of the judgments<sup>186</sup>.

It is crucial to focus on two main aspects of this document:

- (1) The concept of discrimination in employment and occupation.

According to this Directive, discrimination might be distinguished in ‘direct discrimination’ and ‘indirect discrimination’ (art. 2). The former (art. 2 [a]) occurs when one person is treated less favourably than another is on the grounds set for in art. 1 (religion or belief, disability, age or sexual orientation). The latter (art.2 b) arises when an apparently neutral provision put a person at a particular disadvantage compared with other people. In this respect, indirect discrimination might be justified if it is appropriate, necessary and it is meant to pursue a legitimate aim (art. 2 [b] [i-ii]). Affirmative action might fall within this scheme.

- (2) Recital 22 which provides that the Directive is without prejudice to national law on marital status and the benefits dependent thereon. This reference delineates the limit on the application of the Directive, establishing that public benefits (e.g. pension treatment) remain reserved only to married couples (if so provided by national law) without encountering the risk of being declared inadmissible under EU law. This provision responds to the exigency of Member States to

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<sup>186</sup> See generally, C. DANISI, *Il principio di non discriminazione dalla CEDU alla Carta di Nizza: il caso dell'orientamento sessuale*, available at (last retrieved on 20 March 2011) [http://www.forumcostituzionale.it/site/images/stories/pdf/documenti\\_forum/paper/0154\\_danisi.pdf](http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/paper/0154_danisi.pdf).

autonomously legislate on ‘family-reserved’ benefits and freely decide who to include (exclude) from some social benefits<sup>187</sup>.

### 3.2.1. *Maruko*

In the case of *Maruko*<sup>188</sup> the applicant claimed that he was discriminated on the ground of sexual orientation since he was denied a widower’s pension though he was in a same-sex union regularly registered under the *Lebenspartnerschaftsgesetz* (German law on registered partnerships, ‘LPartG’) since 2001. The pension institution<sup>189</sup> did not authorize Mr. Maruko to obtain his death partner’s pension, opposing that according to the institution’s regulation<sup>190</sup>, this benefit was reserved only to married couples.

Mr. Maruko thus challenged this decision before a domestic German court, debating on the rationality of this prohibition, and arguing that this ban on his possibility to accede this benefit would have discriminated him on the ground of sexual orientation, expressly prohibited under EU law. The Bavarian administrative court in Munich decided to refer the case to the ECJ for a preliminary ruling<sup>191</sup>.

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<sup>187</sup> D. IZZI, *La direttiva 2000/78 tutela le aspettative previdenziali del parner omosessuale di un lavoratore deceduto?*, in *Il lavoro nella giurisprudenza*, vol. 16, n.12, 2008, (pp.1223-1234) p. 1231.

<sup>188</sup> Case C-267/06, decided on 01 April 2008, hereinafter *Maruko*

<sup>189</sup> The body responsible for administering the insurance scheme is the *Versorgungsanstalt der deutschen Bühnen* (‘Vddb’), a legal person governed by public law, which is represented by the *Bayerische Versorgungskammer*. The body has its headquarters in Munich and its activities cover the whole territory of the Federal Republic.

<sup>190</sup> In particular, Paragraphs 32 and 34 of the Regulations provide that a ‘wife’ or ‘husband’ is entitled to a widow’s or widower’s pension, provided that the ‘marriage’ was in force on the date of the insured’s death.

<sup>191</sup> A. O. COZZI, *Il diritto alla pensione di reversibilità del partner di un’unione solidale registrata: la Corte di Giustizia al bivio tra il divieto comunitario di discriminazione in base all’orientamento sessuale e il diritto nazionale*, in *www.forumcostituzionale.it.*, pp.1-6.

The ECJ had firstly to address the question on whether the widower's pension issued by the *Vddb* could be classified as 'pay' within the meaning of art.3 Directive 2000/78/EC<sup>192</sup>. This passage of the case has been essential for the entire *rationale* of the judgment. The Court indeed, on one hand has maintained that, under Recital 22, Directive 2000/78/EC does not apply to provisions of national law related to civil status or benefits accruing from that status, but on the other hand it has concluded that those benefits deriving from the professional relation under its scrutiny, could be considered 'pay' within the meaning of art.141 EC, thus falling within the scope of Directive 2000/78/EC<sup>193</sup> (the 'pay argument').

Moreover, in *Maruko* the ECJ has recalled how 'in the exercise of that competence [i.e. legislation on marital status and its consequences] the Member States must comply with Community law, and in particular with the provision relating to the principle of nondiscrimination'<sup>194</sup>.

Once established that *Maruko*'s claim concerned a differentiation in the attribution of a 'pay', the ECJ had to verify whether this was a case of direct or indirect discrimination. Both Advocate General Ruiz-Jarabo Colomer<sup>195</sup> and the Commission<sup>196</sup> indicated in their observations that this was a case of indirect discrimination as enshrined in art. 2b of the Directive 2000/78/EC. Their argument considered that an apparently neutral provision such as the one provided by the *Vddb*, consisting in a differentiation between married and unmarried couples (considering

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<sup>192</sup> F. SAVINO, *L'orientamento sessuale come fattore di discriminazione. Problemi di tutela*, in *Lavoro e Diritto*, vol. 24, n. 2, 2010, p. 243.

<sup>193</sup> *Maruko*, para. 43-60.

<sup>194</sup> *Ibid*, para. 59.

<sup>195</sup> *Ibid*, *Opinion* delivered on 06 September 2007, para 96-103.

<sup>196</sup> *Ibid*, para. 63

that only heterosexual might get married), was *de facto* discriminating on the ground of sexual orientation.

The ECJ was not persuaded by this conclusion. The Court reasoned on the factual situation and it concluded that a surviving life-partner was comparable with a spouse. Thus, no distinction between married and registered couples could be adduced as exceptions, and the denial to concede a survivor's benefit constituted a violation of art.1 and 2(2) of Directive 2000/78/EC (i.e. direct discrimination).

What the Court has highlighted in this judgment is the importance of 'facts'. As the ECJ has noticed, 'the harmonization between marriage and partnership [through subsequent legislative reform after the introduction of the LPartG] places persons of the same sex in a situation comparable to that of spouses in relation to the survivors' benefit at issue in the main proceeding'<sup>197</sup>. From *Grant* – where differences between same-sex and opposite sex were conceived the essential element of distinction – to *Maruko*, the ECJ has thus considerably changed its view on same-sex partners.

As argued, in *Maruko* the court 'sought to render a decision that was "true-to-life" and "down-to-heart"'<sup>198</sup>. In doing so, the ECJ has left national judges the responsibility to verify whether the situation of registered partnerships was *de facto* comparable with married couple on a case by case analysis<sup>199</sup>. Comparability has thus become the main element to emphasize direct discrimination suffered by same-sex partners.

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<sup>197</sup> *Ibid*, para. 69.

<sup>198</sup> A. ERIKSSON, *European Court of Justice: Broadening the scope of European nondiscrimination law*, in *International Journal of Constitutional Law*, vol.7, n. 4, (pp. 731-753), p.743.

<sup>199</sup> *Maruko*, para.80 (2).

This conclusion is controversial if read considering the structure of the German LPartG. Since only person of same-sex can register, and only opposite-sex can marry, the argument of comparability could have been preceded by a reasoning related to the specific discrimination suffered by those who cannot enter into marriage. The denial of widower's pension was based on the assumption that only married couple can benefit from it. Since only heterosexual persons can enter into matrimony, then the easier conclusion could have been that an indirect discrimination occurred as, *per analogy*, in the case of *Schnorus* (see, chapter II, section 4).

It is possible to argue that by identifying a direct discrimination the ECJ has enhanced the protection for homosexuals insomuch as no justification to direct discrimination is allowed under Directive 2000/78/EC, whereas according to the Directive indirect discrimination might be justified if a legitimate state aim is pursued (in this respect, national judges would have been entitled to verify whether a compelling interest would have justified a different treatment). Nevertheless, the problem posed by 'comparability' is that it is narrowly applicable in other cases. In France for instance, or Italy, where people of same-sex can enter into *Pacs* or cannot at all be recognized, a claim formulated in the same terms of *Maruko* would be impossible to be placed before the ECJ<sup>200</sup>.

Furthermore, the decision to leave ultimately on national judges the responsibility 'to compare', i.e. to establish whether the situation of registered partners and spouses are comparable, does not ensure an harmonious application of nondiscrimination for

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<sup>200</sup> M. BONINI BARALDI, *La pensione di reversibilit  al convivente dello stesso sesso: prima applicazione della Direttiva 2000/78/CE in materia di discriminazione basata sull'orientamento sessuale*, in *Famiglia e diritto*, vol.7, 2008, (pp. 653-668), p. 665,

each case. An evidence can be found in the decision of the German Federal Constitutional Court issued in 2008, one month after the decision of *Maruko* has been issued<sup>201</sup>.

The *BVerfG* has indeed interpreted *Maruko* in the sense of emphasizing differences instead of considering similarities, i.e. on the basis of the ECJ's case law, the German constitutional judge has elaborated the *rationale* for treating same-sex partners differently<sup>202</sup>. In this case, the plaintiff submitted a question to the German constitutional judge related to the constitutionality of a provision which granted only to married civil servants a specific subsidy (*Familienzuschlag der Stufe 1*). The claimant, who entered into a life partnership in 2004, brought his claim before the competent administrative court<sup>203</sup> but the case was dismissed in the first instance as well as on appeal<sup>204</sup>.

German national courts elaborated their judgment coherently with the previous *BVerwG*'s case law which had already established that Directive 2000/78/EC would not automatically compel states to extend those benefits reserved to married couples also to other type of unions. This case was thus brought before the Constitutional Court arguing that the benefit-regulation was violating the constitution<sup>205</sup> (principle of equality, art.3 cost. GG).

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<sup>201</sup> M. MÖSCHEL, *Germany's Life Partnerships: Separate and Unequal?*, in *Columbia Journal of European Law*, vol. 16, n.1, 2009, (pp.37-65), p. 65.

<sup>202</sup> *BVerfG*, 2 BvR 1830/06, of 6 May 2008.

<sup>203</sup> *Verwaltungsgericht Dusseldorf*, (decision of the Court of first instance) of 9 March 2005.

<sup>204</sup> *Oberverwaltungsgericht für das Land Nordrhein-Westfalen*, (decision of the Court of Appeal) of 25 July 2006.

<sup>205</sup> *BVerfG*, 2 BvR n.1830/06, of 6 May 2008, para. 40.

The *BVerfG* responded by rejecting the complaint on the basis that it did not constitute a violation of fundamental rights. In doing so, the German court acknowledged the ECJ 's decision in *Maruko*, but it used this case to frame an argument against the possibility to grant the same benefits to both married and registered couples. In the reasoning of the *BVerfG*, *Maruko* confirmed that there exists a difference between the two situations, and only courts should decide when, by comparison, it possible to equalize treatments reserved to both registered and married couples<sup>206</sup>.

Thus, according to the constitutional court, under German law there was no obligation to treat equally married and registered partners. On the contrary, the legal rules governing marriage or registered partnership were meant to distinguish between the two (i.e. between heterosexual and homosexual couples). The conclusion achieved by the German supreme court reversed the *rationale* developed by the ECJ in *Maruko*. In fact, while the ECJ was concerned with *de facto* similarities, the German judge considered the *de jure* differentiation to justify different treatments.

### **3.2.2. Römer: a final response?**

The case of *Römer*<sup>207</sup>, though similar to *Maruko*, posed a further problem in relation to scope of application of the EU nondiscrimination principle. The ECJ this time had to clarify whether this principle prevails also on national constitutions. In specific, the referring national court, Mr. Römer, the Commission, and the Advocate

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<sup>206</sup> *Ibid*, para. 13.

<sup>207</sup> Jürgen Römer v. Freie und Hansestadt Hamburg, C-147/08, of 10 May 2011.

General<sup>208</sup> all agreed on the assumption that, in analogy with the case *Mangold*<sup>209</sup> (discrimination on the grounds of age), nondiscrimination on the ground of sexual orientation would constitute a general principle of EU law<sup>210</sup>, thus directly applicable and automatically effective on the entire EU space. Furthermore, the question on whether same-sex unions suffer indirect discrimination if national legislation only grants married couples some benefits was raised again.

Mr. Jurgen Römer, as Mr. Maruko, entered into a registered partnership according to the German *LPartG* in 2001. He decided to apply for the application of social benefits as provided by the law of the Land of Hamburg on supplementary pensions (*Hamburgisches Zusatzversorgungsgesetz*). He was employed as an administrative employee for the City of Hamburg from 1950 until 1990 when he became incapacitated to work. He then applied for amending his monthly pension in accordance with the supplementary retirement pension reserved to married couples under the regulation of his employer office, and he also claimed for obtaining a recalculation of his retirement pension since 2001 (i.e. the year when he entered into partnership with his companion).

In December 2001, the *Freie und Hansestadt Hamburg* replied negatively to Römer's request, opposing that this benefit was reserved only to married couples. According to the City of Hamburg, this restriction in the enjoyment of this benefit

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<sup>208</sup> Advocate General Niilo Jääskinen, *Opinion in Römer* of 15 July 2010, para. 180.

<sup>209</sup> ECJ, case C-144/04, *Werner Mangold v Rüdiger Helm*, delivered on 22 November 2005.

<sup>210</sup> In *Mangold*, the EJC, building upon its previous case law, highlighted how the principle of non-discrimination is of fundamental importance within the EU and it could be considered as 'a constitutional principle' of EU law. See on this point D. SCHIEK, *The ECJ Decision in Mangold: A Further Twist on Effects of Directive and Constitutional Relevance of Community Equality Legislation*, in *Industrial Law Journal*, vol. 35, n. 3, 2006, pp.333-335.

was justified by the special protection the German Constitution provides for marriage. Mr. Römer appealed against this decision before the Labor Court in Hamburg (*Arbeitsgericht Hamburg*) which decided to refer the case before the ECJ for a preliminary ruling in 2008.

The referring court transmitted the case to ECJ wondering whether:

- (1) The benefit at stake was to be considered ‘pay’ under EU law, thus falling within the scope of Directive 2000/78/EC despite Recital 22 of the Directive.
- (2) Under EU law the denial of this benefit would constitute a direct discrimination and what relevance should be given to the constitutional provision concerning special protection for marriage.
- (3) The right to equal treatment in relation to non-discrimination on the ground of sexual orientation is a general principle of EU law, so that the right to obtain the same pension amount arose since 2001.

The ECJ firstly identified in the disputed benefit a ‘pay’, in accordance with its previous decision in *Maruko*<sup>211</sup>, recalling how Recital 22 cannot affect the application of Directive 2000/78/EC if the benefit at issue is a ‘pay’ within the meaning of art.157 TFEU<sup>212</sup>. Secondly, it again emphasized how, in order to establish whether there has been a direct discrimination, it was not necessary for two situations to be identical.

Thus, the ECJ concluded that national courts should consider in their determination that:

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<sup>211</sup> *Römer, Ibid.*, para. 30-34.

<sup>212</sup> *Maruko, Ibid.*, para. 60.

[the two factual situations, i.e. married and registered life-companions must] be comparable and, , 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<sup>213</sup>.

In this sense, there would be no necessity to verify whether the protection of marriage under the German constitution is in contrast with the principles of EU law as wondered by the national referring court, since as the ECJ has pointed out, the claim under its scrutiny did not require to equalize the two legal institutions<sup>214</sup>. In other words, EU law simply requires to treat equally equal situations.

The focus has thus been shifted by the ECJ on the consequences of being married or registered rather than on the legal institutions as such. Therefore, it has been uncontroversial for the ECJ to hold that the registered life partnership regime created under German law has gradually become equivalent to marriage, and for this reason there was no significant discrepancies between the regimes of marriage and registered life partnerships. Hence, as logical result, the ECJ has decided, as in *Maruko*, that in *Römer* the German legislation directly discriminated on the ground of sexual orientation in this specific case.

In addition, addressing the last question on whether the prohibition to discriminate on the ground of sexual orientation constitutes a general principle of EU law the ECJ has stated:

It should be recalled that the Council of the European Union adopted Directive 2000/78 on the basis of Article 13 EC, and the Court has held that the Directive does not itself lay

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<sup>213</sup> *Römer, Ibid*, para. 42.

<sup>214</sup> *Ibid*, para. 41-44.

down the principle of equal treatment in the field of employment and occupation, which derives from various international instruments and from the constitutional traditions common to the Member States, but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds (see *Mangold*, paragraph 74, and Case C-555/07 *Küçükdeveci* [2010] ECR I-0000, paragraph 20), including sexual orientation<sup>215</sup>.

Therefore, as for the ‘temporal validity’ of this principle, the ECJ has concluded that it is possible to establish a right to equal treatment encompassing also the prohibition to discriminate on the ground of sexual orientation (and consequently a claim that it has been violated) only since 2003, i.e. the time of expiry of the period for transposition of the Directive 2000/78<sup>216</sup>. This seems to contradict partially the statement concerning the possibility to identify nondiscrimination based on sexual orientation as a general principle of EU law. Indeed, it would be possible to argue that if this is a general principle stemming from the common constitutional traditions of MSs, dating its temporal validity back to 2003 would not be reasonable. On the other hand, coherently with its previous case law in *Grant*, the ECJ has considered the issue of sexual orientation only once it has been translated into a specific legal document such as the Directive 2000/78/EC.

#### **4. The duty to recognize and the comparability of same-sex unions**

This chapter has analyzed through the lens of the comparative method the answers given to the claims raised by same-sex unions in the EU space. The main purpose of this chapter was twofold: (1) to verify whether the general ‘*duty to recognize*’, and consequently the violation of fundamental rights related to states’ ‘*indifference*’, were two concepts commonly endorsed by the judiciary at all levels of analysis in the EU;

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<sup>215</sup> *Ibid*, para 59.

<sup>216</sup> *Ibid*, para. 64.

(2) whether judges have so far demonstrated their willingness to address the issue of same-sex unions directly, i.e. bypassing the legislative power and imposing their idea of recognition through judicial law-making in light of the rights guaranteed either by the constitution, or the EU Charter of Rights, or the ECHR.

As for the first this point, it is possible to conclude that there exists in the EU a shared understanding among judges on the importance of providing a solution to the situation of same-sex partners. In other words, states cannot legitimately continue to ignore the issue since the rights of same-sex unions are covered by the set of rights rooted in constitutional, supranational, and international provision on human rights.

Recalling the *Tribunal Constitucional*' position, the legislator has the duty to set up a series of rules able to guarantee family-life in the context of same-sex unions<sup>217</sup>. The same line of reasoning has been adopted by the *Corte Costituzionale* court when recognizing homosexual couples as '*formazioni sociali*'<sup>218</sup> deserving protection under art.2 of the Italian constitution<sup>219</sup>.

Indeed, this analysis shows how at national level differences in the reasoning of courts might not be found in relation to question of whether same-sex couples deserve legal protection, but solely on how this recognition should be afforded and how it should operate.

In specific, although the Portuguese *Tribunal Constitucional* has clarified that there is neither a prohibition nor an obligation to open up marriage to same-sex couples under the Portuguese constitution, it has however upheld that while

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<sup>217</sup> *Tribunal Constitucional*, judgment n. 359/2009, *Ibid*, para.12

<sup>218</sup> Translation: social units.

<sup>219</sup> *Corte Costituzionale*, judgment n.138/2010, *ibid*.

‘marriage’ cannot be modified as legal institution, the opposite sex of the spouses is not a preliminary/necessary condition to enter into this legal institution<sup>220</sup>. In doing so, the Portuguese supreme court has acknowledged a change in the social understanding of marriage and has adhered to a pragmatic approach detached from traditionally driven arguments, thus considering marriage in its concrete dimension, i.e. ‘a common life path governed by the law<sup>221</sup>’.

The Hungarian constitutional court, though conceiving the importance of providing a legal frame to regulate same-sex unions, has embraced an opposite perspective. According to its jurisprudence, the constitution does prohibit the enhancement of the scope of marriage as to cover also same-sex unions. This conservative position has been justified in the name of tradition. Marriage, in this scheme, is understood as the premise for the formation of a family aimed at giving birth to children. Hence, marriage conserves its own specific ‘reproductive function’ and for this reason cannot be extended to other types of unions unable to perform this task. This perspective has been coherently upheld by the court in both 2008 and 2010 judgments.

Nonetheless, confirming the conclusion that there exists a ‘*duty to recognize*’, despite the argument of same-sex marriage, the Hungarian court has confirmed the attitude of its European counterparts. Indeed, for the court same-sex partners deserve protection according to the constitution, since both the principle of equality and human dignity create an obligation on the side of the State. The Court has thus

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<sup>220</sup> *Tribunal Constitucional*, judgment n.121/2010, *Ibid*, para. 26.

<sup>221</sup> *Ibid*, para. 6.

emphasized the social value of long-lasting relations between same-sex partners, and the importance of promoting social acceptance of sexual minorities. Hence, the only relevant point for the Hungarian court is the distinction to be made between marriage and other types of legal institutions, giving for granted that same-sex unions fall within the scope of application of constitutional guarantees<sup>222</sup>. Therefore, as long as marriage and registered partnership are differently structured, and each one is available only for either opposite-sex or same-sex couples, there is no question of constitutionality to be raised.

The reasoning expressed in 2010 by both the French *Conseil Constitutionnel*<sup>223</sup> and the Italian constitutional court are similar, though the situations in these two countries are not identical at all. In fact, while in France it is possible for homosexuals to enter into *Pacs*, in Italy no mean of legal recognition is available for these same-sex partners. In this context, both courts have been deferential to the legislative, i.e. both have endorsed the view that it is up to parliaments to address the issue of same-sex unions, deciding whether to allow same-sex marriage or adopting a legislation *ad hoc* for same-sex partners. In addition, the Italian Court in its judgment n.138/2010 has partially adhered to the same line of reasoning of its Hungarian colleagues. By explaining how marriage possesses its own ‘typical’ (natural) meaning in the constitution, and observing how different legal solutions have been adopted by other European countries, the court has reached the conclusion that it is not possible for a judge to provide one right answer to this issue.

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<sup>222</sup> Alkotmánybíróság, judgment n.32/2010 (III.25.) AB, *Ibid.*

<sup>223</sup> *Conseil Constitutionnel*, decision no. 2010-92, *Ibid.*

As underlined by the Strasbourg Court, it is now possible to argue that a common European *idem sentire* has been developed during these years, thus ‘*it would be artificial to maintain the view that ... same-sex couples cannot enjoy family life*<sup>224</sup>’. Nevertheless, the ECtHR is still reluctant to declare that the ECHR imposes an obligation upon Contracting Parties toward the recognition of same-sex couples. In other words, the Strasbourg judge has acknowledged that these unions might enjoy the guarantees offered by the ECHR but the decision to legislate on this field is left in the hands of States as the margin of appreciation is applied in this context. The reasons behind this attitude can be better understood when discussing the role of judges in democratic constitutional orders in chapter III.

Accordingly, also the ECJ, while upholding the formal distinction between married couples and registered partnerships, and formally excluding that family law falls as such within its competence, has made clear that the margin of discretion left to MSs in their possibility to differentiate between ‘unions’ is limited by the EU general principle of nondiscrimination, which does not allow distinctions whenever two situations are merely and formally unequal but equal *in concreto*. In this specific context, it would be interesting to analyze an ECJ’ s case involving mutual recognition among MSs, i.e. a case in which the ECJ was called to decide whether under EU law there exists an obligation for a MS to recognize a same-sex married couple moving in a country where only heterosexual married couples are legally recognized. Indeed, although at national level the recognition of a foreign marriage act might be refused by a MS arguing that it is against the ‘public order’, the ECJ

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<sup>224</sup> ECtHR, case Schalk and Kopf v. Austria, *Ibid*, para. 94.

could be persuaded that such a refusal is infringing EU principles, rooting its argument in the normogenetic value of the now binding principles enshrined in the EU Charter of Rights .

As for the second point, notwithstanding differences in the final outcome national, supranational, and international judicial decisions have prompted, it is possible to conclude that the judiciary at large has acknowledged and endorsed the view that the protection of fundamental rights provided at all levels does require states to intervene. The EU Charter of Rights has become relevant in the elaboration of courts' judgments, and it has indeed become an essential reference for judges. Nonetheless, as the Portuguese case clearly demonstrates, supreme judges are unwilling to substitute the legislator in its prerogatives.

In other words, judges are ready to confirm (e.g. as shown in the Portuguese case-study) or narrowly define (e.g., the Hungarian and the ECJ case-study) the limits of legislative choices. In this context, the ECJ's cases *Maruko* and *Römer* provide a strong example of this attitude. In fact, the ECJ's decision to use the parameter of direct discrimination instead of indirect discrimination, has limited the scope of application of its decisions on Germany. This choice reveals a judicial approach aimed at preventing discrimination against same-sex couples, while at the same time preserving the legislator's prerogative on the elaboration of legal models.

This tendency, as examined in the next chapters, can be explained by investigating the meaning of equality in the contemporary debate (chapter II), and by analyzing the role of the courts in constitutional democratic systems (chapter III). Indeed, though it is possible to affirm that states' '*indifference*' toward same-sex unions constitutes a violation of fundamental rights in the EU, the path leading to the elaboration of an

harmonious European common standard is still far from being completed. Thus, in the lack of all-in-all comprehensive answer to this issue at EU level (i.e. encompassing all MSs' legislation), while the '*duty to recognize*' cannot be questioned, the way in which states decide to address this issue remains uncertain.

Indeed, the situation could have been different if within the systems examined in this chapter there had been the possibility to issue a *Declaration of Incompatibility*<sup>225</sup>. This instrument is a declaration issued by judges in the United Kingdom when they consider that the terms of a statute is incompatible with the UK's obligations under the Human Rights Act 1998, which incorporated the European Convention of Human Rights into the UK domestic law<sup>226</sup>. This possibility would give national courts and the ECJ the possibility to recall MSs on their duty to recognize same-sex unions, directly emphasizing how 'omissions' in the legal system do represent a violation of the rights of same-sex partners. Such a declaration could have far more reaching effects than those statements made at national level<sup>227</sup> (the Corte Costituzionale is one example) in which Courts merely acknowledge that it is necessary to provide legal recognition without having the possibility to declare contemporary legislation in contrast with constitutional, supranational, and international principles.

In conclusion, as the ECJ had the occasion to clarify twice in *Maruko* and *Römer*, MSs do not enjoy an unlimited discretion when differentiating among 'couples'. Thus, though it is possible to argue that there is no time limit on 'when' the obligation to recognize upon states should be fulfilled, the parameters of unfair discrimination are being already shaped by judges.

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<sup>225</sup> F. DAVIS, *The Human Rights Act and Juridification: Saving Democracy from Law*, in *Politics*, vol.30, n.2, 2010, pp.91 ss.; K.D. EWING, *The Human Rights Act and Parliamentary Democracy*, in *The Modern Law Review*, vol.62, n.1, 1999, pp.79 ss.

<sup>226</sup> Section 3(1) of the Human Rights Act 1998 reads as follows: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". Where the court determines a piece of legislation is inconsistent with the Convention rights, the court can issue a declaration of incompatibility under section 4 of the Human Rights Act 1998.

<sup>227</sup> Indeed, a 'Declaration of Incompatibility' would have a greater impact on policy-makers. In other words, supreme judges would compel the legislature to take those reasonable steps able to remove discrimination among 'unions', in order to fulfill States' obligations under constitutional, supranational, and international human rights provisions.

## CHAPTER II

### EQUALITY AND ITS MEANINGS

**Summary:** Introduction; 1. Why should equality be considered; 2. Definitions; 3. Sociological and psychological approaches; 4. Formal equality v. substantial equality; 5. Application of the principle of equality; 6. Considering equality in the of same-sex unions; Concluding remarks.

#### **Introduction**

The first chapter has provided an insight on the situation of same-sex couples in the EU by adopting a comparative analysis of the case law so far developed at national, supranational, and international level. As shown, either in those countries where legislation on same-sex unions has been enacted, or those in which there is no legal institutions available for homosexual families, judicial actors perceive this issue as ‘a duty to recognize’ upon states to be fulfilled in order to reverse *de facto* discrimination. This ‘national approach’ to same-sex union is also confirmed at both supranational and international levels; in particular, while the ECtHR has now accepted to conceive same-sex unions within the scope of the right to form a family, the ECJ has demonstrated its willingness to consider partners regardless of sex when situations are *de facto* identical.

As previously described, the Lisbon Treaty– entered into force on 1 December 2009 – has amended both the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). In addition, the Lisbon Treaty has

incorporated the EU Charter of Rights<sup>228</sup>. All these documents, representing EU primary law<sup>229</sup>, refer to the principle of nondiscrimination, including sexual orientation<sup>230</sup>, as a tool to enhance equality among EU citizens in all the Member States. EU institutions have also enacted a number of subsequent legal instruments – as underlined in chapter I – (so called EU secondary legislation<sup>231</sup> to fight discrimination against people belonging to sexual minorities<sup>232</sup>).

When discussing upon fundamental rights a preliminary distinction should be made between individual and collective rights. In the case of same-sex unions, the fact that those who struggle for legal recognition are homosexuals could lead to the conclusion that collective rights are at stake. Therefore, it is necessary to clarify that the claim posed by LGBTI people is not related to their sexual orientation, i.e. it is not a claim rooted in their belonging to a minority group (i.e. a sexual minority). The opportunity to be legally recognized as social units for partners, regardless of their

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<sup>228</sup> Charter of Fundamental Rights of the European Union, Dec. 7, 2000, O.J. (C 364/1).

<sup>229</sup> Primary law (primary or original source of law) is the supreme source of law of the European Union, that is it prevails over all other sources of law. The Court of Justice is responsible for securing that primacy through a variety of forms of action, such as the action for annulment (Article 263 of the Treaty on the Functioning of the European Union (TFEU) and the preliminary ruling (Article 267 of the TFEU). Primary law consists mainly of the Treaties of the EU. These Treaties contain formal and substantive provisions, which frame the implementation of the policies of the European institutions. They also determine the formal rules that allocate the division of competences between the European Union and Member States. They also lay down substantive rules that define the scope of the policies and provide a structure for the action taken by the institutions regarding each of them. See, [http://europa.eu/legislation\\_summaries/institutional\\_affairs/decisionmaking\\_process/114530\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/114530_en.htm) (retrieved on 10/03/2011).

<sup>230</sup> See art.19.1 of the Lisbon Treaty; see art. 6.1 of the TEU; see art. 10 of the TFEU; See art. 21 of the Charter of Fundamental Rights.

<sup>231</sup> It is the kind of law made under the powers created and invested in the EU by the treaties - the EU primary legislation. EU secondary legislation are those listed in Article 288 of the Treaty on the Functioning of the EU: regulations, directives, decisions, opinions and recommendations, and those not listed in Article 288 of the Treaty on the Functioning of the EU, i.e. "atypical" acts such as communications and recommendations, and white and green papers. See [http://europa.eu/legislation\\_summaries/institutional\\_affairs/decisionmaking\\_process/114534\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/114534_en.htm) (retrieved on 10/03/2011).

<sup>232</sup> One example is represented by the EU Directive 2000/78/EC.

gender, it is the expression of an individual right. As for instance the Italian constitution reads in Art.2 '*The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed*'. In other words, LGBTI people's rights can be considered as collective rights when the activity of lobbying political parties is considered ('the minority group asks for'), while the fact of forming a family represents an individual right, a free individual choice ('a person is entitled to').

However, family matters imply the involvement of subconscious feelings regarding personal autonomy, motherhood, reproduction, masculinity, and sex-roles. When debating upon the opportunity of giving a legal status to same-sex unions, the archetype of cultural gender relations is questioned. Indeed, gender has been 'the key' for identifying the social status of sexes, first in marital relations, and then in society. The challenge posed by the consideration of different sexual attitudes is an element of pressure for standardized gender rules. Love, sex, and individuals' expectations about the future are all involved in this debate<sup>233</sup>. In this context, homosexuality questions the dual and complementary relation between the male and the female as social (natural) unity. This is the *leitmotiv* of the reasoning proposed by those who identify marriage as a pre-legal value to be defended against arguments in support of the legal recognition of same-sex unions (in this context, see chapter I in relation to the case of Hungary).

As underlined by Koppelman:

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<sup>233</sup> B. PEZZINI, *Dentro il mestiere di vivere: uguali in natura o uguali in diritto*, Relazione al Convegno Amicus Curiae, 26 Febbraio 2010, Ferrara, available at: [http://amicuscuriae.it/attach/superuser/docs/relazione\\_pezzini.pdf](http://amicuscuriae.it/attach/superuser/docs/relazione_pezzini.pdf).

the two stigmas – sex-inappropriateness and homosexuality – are virtually interchangeable, and each is readily used as a metaphor for the other. Moreover, both stigmas have gender-specific forms that imply that men ought to have power over the women. Gay men are stigmatized as effeminate, which means insufficiently aggressive and dominant. Lesbians are stigmatized as too aggressive and dominant [...] they appear to be guilty of some kind of insubordination<sup>234</sup>.

Thus, individuals' identity is under pressure, and a series of deep-rooted stereotypes must firstly be acknowledged, analyzed, and eventually resolved before considering equal rights in the context of family law (to the extent that also same-sex partners could enjoy those guarantees offered to heterosexual couples)<sup>235</sup>. Indeed, although in democratic societies the principle of equality and personal autonomy seem to be peacefully interiorized by citizens, when the issue of same-sex unions is raised the debate tends to blur into something contradictory and demagogic. According to which principle should heterosexual partnerships be the only ones granted recognition and protection before the law? Answering this question requires a careful analysis of the meaning of equality and its translation *in concreto*. In fact, there would be no sufficient and rational basis for an argument supporting the recognition of same-sex unions if equality was not framed in appropriate terms.

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<sup>234</sup> A. KOPPELMAN, *Romer v. Evans and Invidious Intent*, in *William & Mary Bill of Rights Journal*, vol. 6, n. 1, 1997, p. 129.

<sup>235</sup> M. BONINI BARALDI, *Family vs. Solidarity. Recent epiphanies of the Italian reductionist anomaly in the debate on the facto couples*, in *Utrecht Law Review*, vol. 4, n. 2, 2008, pp. 175-176.

The principle of equality functions against discrimination<sup>236</sup> and it has been described as ‘a treacherously simple concept’<sup>237</sup>, though there is no widespread agreement on what equality is and what a society should pursue (in terms of policies, legislation, jurisprudence) in order to enhance its scope. The aim of this chapter is to examine the several conceptions of equality, and then verifying whether the forms of inclusion granted to homosexual couples in the MSs adhere to idea of equality as an instrument able to promote differences without creating first and second-class citizens. This chapter emphasizes the importance of reflecting on the meaning of equality before debating on the possible remedies aimed at the eradication of discrimination in this specific field. This operation helps understanding the reasons behind those judicial decisions described in the first chapter.

The first section challenges the idea that the principle of equality is unnecessary to solve the issue of discrimination in the enjoyment of rights. The second section, borrowing from the results achieved in feminist studies, explains the importance of terminology and the discrepancy emerging when considering individuals’ relations in terms of equality.

The third section analyzes how the principle of equality is framed in democratic constitutional orders in order to verify whether ‘neutrality’ can be a solution to defeat discrimination. The third section focuses on the sociological and psychological

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<sup>236</sup> E. GRANT, *Dignity and Equality*, in *Human Rights Law Review*, vol. 7, n. 2, 2007, p. 300; C. MCCRUDDEN, *Equality and Non-Discrimination*, in D. FELDMAN (ed.), *English Public Law*, Oxford University Press, Oxford, 2004, pp. 581 – 668.

<sup>237</sup> R. HOLTMAAT, *The Concept of Discrimination*, Academy of European Law Conference Paper, 2004, p.2, (available at: [http://www.era.int/web/en/resources/5\\_1095\\_2953\\_file\\_en.4193.pdf](http://www.era.int/web/en/resources/5_1095_2953_file_en.4193.pdf)).

dimension of norms, explaining how the formation of social attitudes creates the basis for social exclusion.

The fourth section addresses the issue of formal equality versus substantial equality by explaining the weakness of those arguments based on rationality. The following part provides a description of the application by the ECJ of the principle of equality, underlining the problematic aspects associated with the adoption of special measures (promotion of equality) for the inclusion of individuals in historical vulnerable positions.

The sixth section explores the situation of same-sex unions in the EU, i.e. it describes how EU MSs have adopted different legal instruments for the recognition of these unions. In this context, it is questioned whether advocating for same-sex marriage would be consistent with the idea of equality as recognition and promotion of differences.

### **1. Why should equality be considered?**

The legal protection of fundamental freedoms stands for the purpose of protecting human beings from states' abuses. They ensure individuals' physical and psychological integrity and safety regardless of the age, gender, physical or mental disability, national origin, race, sexual orientation, etc. Rights are usually linked to the concept of dignity and equality. Freedoms could not be defined as fundamental if they would protect only élites, or the majority. 'Fundamentality' is thus associated with 'universality': an ethical position that perceives each and every human being as deserving the same degree of protection for the mere fact of belonging to

humanity<sup>238</sup>. Therefore, in the contemporary debate, rights require equality as a vehicle. Hence, a reasoning about equality represents the first step to be made to enhance the scope of the guarantees offered to individuals by the law.

However, according to some authors, equality should not be confused with the idea of rights and liberties. According to Peter Westen equality is an empty concept. In his view, while there might exist a multitude of different rights, equality is singular. In his scheme, rights are non-comparative in nature – having their source in a person's individual well-being – while equality is comparative, i.e. it is derived by the treatment of others. Consequently, the main difference between the two is that rights are individualistic (I am entitled to), while equality is social (it depends on the context)<sup>239</sup>. In other words, rights might be precisely identified, i.e. they are *de jure* and *de facto* simultaneously, so that either you are entitled to something or you are not, while equality needs to be constructed by considering whether individuals actually enjoy their set of rights.

If this reasoning is to be followed, the legal value of equality, separated and distinct from the individualistic scheme of rights, loses its meaning in favor of a view in which equality is given, taken for granted, already achieved in a 'society of rights'. This postulation implies that there should be no reason to concentrate the attention on equality *per se*, since the basis for any theoretical speculation should begin with the consideration of the nature of rights and their concrete application.

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<sup>238</sup> See, generally, A. PAPISCA, *Il sapere dei diritti umani nel disegno educativo*, Eurooffset, Maerne (Venice), 2002, pp.21-49; M. Nowak, *Introduction to the International Human Rights Regime*, Martinus Nijhoff Publishers, Leiden, 2003, pp.9-16.

<sup>239</sup> P. WESTEN, *The empty idea of equality*, in *Harvard Law Review*, vol. 95, n. 3, 1982, p. 537.

Individuals living within a democratic society – if they belong to the majority group – might tend to relegate minority rights to the margin because of the presumption that equality is somehow implicit and there is no need to explicitly refer to it when debating upon rights. *Per contra*, discussing the meaning of the concept ‘equality’ and its implications, means going beyond the analysis of the simple ideal standard that ‘people who are alike should be treated alike’ and its correlative that ‘people who are unlike should be treated unlike’<sup>240</sup>. Indeed, as shown in chapter I in the analysis of the ECJ’s case law – in light of a changed understanding of equality – what has been established in *Grant*<sup>241</sup>, has been reversed in *Maruko*<sup>242</sup> and *Römer*<sup>243</sup>.

Likeness and unlikeness represent the two highly complicated paradigms on which scholars of constitutional law (and constitutional judges) ought to concentrate before assessing whether discrimination has occurred. It is not exclusively a matter of applying them in order to prompt a fair protection of rights. On the contrary, what is necessary is to understand how likeness and unlikeness are formulated, constructed, and then applied to concrete cases within a legal system. The risk is otherwise to disregard how equality tends to behave as a ‘living concept’ during the time and how the social context is relevant in its elaboration<sup>244</sup>. The ‘simplistic idea of equality’ is

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<sup>240</sup> POLYVIOS G., *The equal protection of the laws*, London, Duckworth, 1980, pp. 7-24; W. SIMONS KENNETH, *Equal Protection: A Closer Look at Closer Scrutiny*, in *Michigan Law Review*, vol. 76, n.5, 1978, p.781.

<sup>241</sup> ECJ, case C-249-96, delivered on 17 February 1998.

<sup>242</sup> ECJ, case C-267/06, delivered on 01 April 2008.

<sup>243</sup> ECJ, case C-147/08, delivered on 10 May 2011.

<sup>244</sup> The majority of the legal doctrine considers constitutional texts as living instruments, that is their meaning (the meaning of principles enshrined in the constitution) might change over the time according to societal changes. See generally, C. OVEY, R.C. WHITE, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2006, pp. 273 ss.; C. ZANGHI, *La protezione internazionale dei diritti dell'uomo*, Giappichelli, Torino, 2006, pp.112 ss.

unable to explain how and why the legal scope of rights have been extended as far as to cover situations once thought to be against the law, the moral and religion<sup>245</sup>.

The idea of equality/inequality is rooted in human history. Its meaning has changed considerably through the centuries. In ancient Greece, Antiphon was the first who spoke about equality underlining how ‘we all breathe into the air with our mouths and with our nostrils, and we all laugh when there is joy in our mind, or we weep when suffering pain’<sup>246</sup>. However, in that period this view was provocative enough to be disregarded since the distinction between Greeks and Barbarians and also among Greeks themselves was perceived as ‘natural’. The entire Platonic discourse around *politeia* and *nomos*, was centered on the assumption that in nature a natural inequality exists among individuals. Inequality for Plato stems from the observation that individuals’ capabilities serve different purposes within the *polis*. Thus, inequality is not only natural, but essential since otherwise society would collapse<sup>247</sup>.

According to Aristotle equality and justice are synonymous: ‘to be just means to be equal, to be unjust is to be unequal’<sup>248</sup>. This formula expresses a concept which seems to be self-evident, i.e. equality is the basis of justice<sup>249</sup>. Nonetheless, considering likeness/unlikeness as the point of departure for defining what is equal

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<sup>245</sup> M. DURAND, *From a political question to human rights: the global debate on same-sex marriage and its implication for U.S. law*, in *Regent Journal of International Law*, 2007 (269-298), p. 269

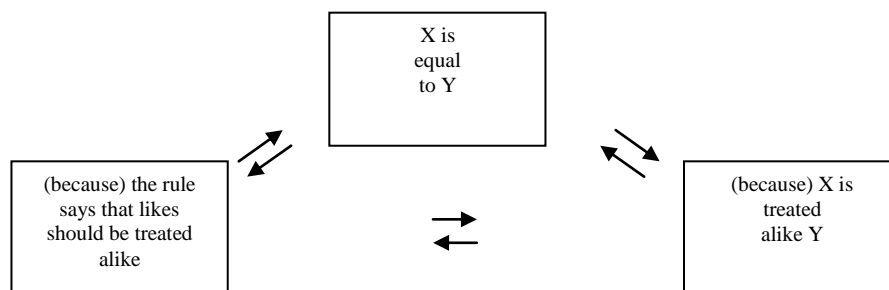
<sup>246</sup> M. OSTWALD, in *Nomos and Physis in Antiphon's Peri Alêtheias*, University of California, Berkeley, 1990, p.294. available at <http://escholarship.org/uc/item/7kg1w5zm>.

<sup>247</sup> G. ZANETTI, *Eguaglianza*, in A Barbera (ed.), *Le basi filosofiche del costituzionalismo*, Laterza, Milano, 2005, (pp. 44-66); N. BOBBIO, *Eguaglianza e libertà*, Einaudi, Torino, 1995.

<sup>248</sup> Aristotle, *Nicomachean Ethics*, Book V, part III, translated by W.D. ROSS, available on-line at: <http://ebooks.adelaide.edu.au/a/aristotle/nicomachean/book5.html> (retrieved on 01/03/2010).

<sup>249</sup> See, F. TODESCAN, *Etiam si Daremus, Studi Sinfonici sul Diritto Naturale*, Cedam, Padova, 2003.

does not represent a linear process, and creates a paradoxical situation in which equality is explained only as a circular argument which does not provide for any explanation of the reasons subtending the value of equality. Equality in this paradigm could be conceived as in this figure:



The modern idea of equality elaborated within the context of the liberal state has been framed focusing mainly on individual rights, abandoning the discourse around the contents and definition of equality. Equality was perceived as a potential risk for individuals' aspirations, since equality was associated with conformity<sup>250</sup> ('the risk of communism'). Thus, while leaving equality apart, the discussion has been centered on the limits to the principle of equality. Within this conceptual frame, inequality might exist if the State is able to guarantee (at least) equal opportunities for all<sup>251</sup>. In other words, shifting from equality to inequality, the approach has become negative: without discussing what equality means, social actors must avoid inequality. The

<sup>250</sup> G. ZANETTI, *Ibid*, pp.62-65.

<sup>251</sup> R. DWORKIN, *Sovereign Virtue. The Theory and Practice of Equality*, Harvard University Press, Cambridge, 2000, pp. 65-119; R. DWORKIN, *Eguaglianza*, in *Enciclopedia delle scienze sociali*, Treccani, Roma, pp. 478-491.

problem remains: how is it possible to realize whether there has been discrimination if it is arduous to know what being equal truly means?

## 2. Definitions

‘Equality’ is a contested concept: "People who praise it or disparage it disagree about what they are praising or disparaging<sup>252</sup>". In this context feminist studies are of particular interest, since within this theoretical framework equality has been observed and discussed analyzing the relations between equals. As underlined by MacKinnon, since women’s interests have been disregarded in the formation of the liberal states policies, ‘no woman had a voice in the design of the legal institutions that rule the social order under which women, as well men, live<sup>253</sup>’.

Assuming that equality has a self-evident meaning – i.e. focusing only on its implementation and enforcement – might lead to the perpetration of discrimination since discrimination cannot be removed if it is not understood where inequality comes from. Cutting a tree-branch does not eliminate the trunk, and cutting the trunk is not sufficient to eradicate the plant: the roots remain and might reform.

Therefore, the first question to be answered is: what does ‘equal’ means? As a preliminary step, it is necessary to clarify that equal does not mean identical, and this is not only a semantic issue. Indeed, *A* is identical to *A* and there is no need to establish a relation in terms of equality since the two terms are identical. On the

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<sup>252</sup> R. DWORKIN, *Ibid*, 2000, p.2.

<sup>253</sup> C. A. MACKINNON, *Reflection on Sex Equality Under Law*, in *The Yale Law Journal*, vol. 100, n. 5, 1991, p.1281.

contrary, the relationship between **A** and **B** is significant in terms of equality since it might be established by using equality as a relational link<sup>254</sup>.

Thus, **A** and **B** are diverse, i.e., they are not identical so that **A** is not **B** and *vice versa*. Thus, **A** and **B** 'are said' to be equal when both are endowed with the same relevant characteristic within the context in which the equality principle is applied. Conversely, **A** and **B** are diverse when one of the two possesses a characteristic which is exclusive, or if the relevant characteristic is mainly manifest in either **A** or **B**<sup>255</sup>.

In this scheme, the difference between **A** and **B** is relevant only in relation to the context, or concretely, in relation to the legal order where rules are constructed and subsequently applied. An example: two students are equally enrolled in the same school; they are equally students though they decided to study different subjects. For the purpose of the school regulation all students are bound by the same rules, and they are diverse only if one considers the courses they are enrolled in.

Formulated in these terms, and bringing the argument more strictly into the legal discipline, equality configures a relation between two or more individuals vis-à-vis a legal system in which a given legal rule creates a type of relation describing the subjects and the objects of this relation, and prescribing who is entitled to do something. Thus, another distinction must be introduced, that is, the difference between '*descriptive equality*' and '*prescriptive equality*'. The first is necessary to affirm that two or more individuals are equals *because* they share a common characteristic; the second establishes a rule according to which two or more

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<sup>254</sup> L. GIANFORMAGGIO, *Eguaglianza, donne e diritto*, in G. BONACCHI & A. GROPPi (eds.) *Il dilemma della cittadinanza. Diritti e doveri delle donne*, Laterza, Roma, 1993, pp. 214-40.

<sup>255</sup> *Ibid.*, p. 216.

individuals should be treated alike since they are *entitled to something*. Both concepts are relative, i.e., both might assume an infinitive set of possible similarities in relation to the context under consideration. It is one thing to say that two individuals are students, but quite another is to prescribe that being a student qualifies a subject as entitled to some rights or benefits.

However, while *descriptive equality* is useful only in terms of describing qualitatively the relation of equality, e.g. ‘being students’, *prescriptive equality* establishes the legal rule, the circumstances under which two entities are considered equals, e.g. ‘treated as students’. The former is complementary to the latter to the extent it is needed to recognize the elements of similarity. In this scheme, both concepts of equality are reciprocal and the relation between **A** and **B** is transitive. **A** is equal to **B**, and if **B** is equal to **C**, then **C** is equal to **A**. Nonetheless, if reciprocity can be established in terms of equality, no matter whether in its descriptive or prescriptive meaning, diversity does not follow the same rule<sup>256</sup>.

Diversity is reciprocal but the relation is not a transitive one. Indeed, if **A** and **B** are diverse, **B** and **C** might be equal so that only **A** is diverse if compared to **B**, while **B** and **C** might instead be equal<sup>257</sup>. This reasoning is necessary to understand how the terminology associated with both equality and diversity implies a series of sub-speculations which are mostly unconsidered when discussing the principle of equality. Terminology is essential in this context.

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<sup>256</sup> L. GIANFORMAGGIO, *Ibid*, p. 217.

<sup>257</sup> See, P. WESTEN, *Speaking of Equality. An Analysis of the Rhetorical Force of Equality*, in *Moral and Legal Discourse*, Princeton University Press, Princeton, 1990.

Moving further in this analysis, it is now important to underline that the relation occurring between two entities requires a neutral parameter as a reference in order to identify ‘why’, ‘how’, and to ‘what extent’ they are diverse/equal. In other words, **A** and **B** are equal or diverse according to the **X** element. Here, the issue becomes more problematic when transferred from ‘the game A and B’ to a concrete scenario. If the **X** parameter is the legal rule, it should be neutral and ‘third’ in relation to ‘person **A**’ and ‘person **B**’.

An example is: contemporary democratic constitutional legal systems consider men and women as equal before the law. This seems to be a neutral-based approach. The **X** parameter, the legal rule, establishes equality considering that all individuals belong to humanity. Thus, each person deserves to be treated equally. Diversity becomes an ‘absolute property’. An individual is diverse as a person, but she/he is equal to everyone else before the law.

In theory, this is what is provided for by democratic constitutions. Nevertheless, the path toward the achievement of full equality between men and women, persons with disabilities and the others, white people and black people, heterosexuals and homosexuals, shows how the argument of equality has always been framed around a non-neutral parameter. Using the scheme proposed above, when struggling for achieving equality, **A** wants to be treated like **B** – rather than be treated equally – according to the standards pre-defined by **B** itself (people belonging to the ‘B group’ are already equally treated). The neutral legal rule (the **X** parameter) does not exist in reality; there is only the presumption that if **A** is similar to **B**, then it deserves the same treatment, while **B** does not need to be equal to **A** or anyone else. Only **A** must

conform to **B**, while **B** is at the same time one of the objects of the relation of equality and the standard parameter. **B** becomes not only the standard; it represents the best position in society, the superior one. Thus, the entire argument shifts from the equality/diversity paradigm to the superior/inferior paradigm<sup>258</sup>.

In feminist studies, this situation has been highlighted several times, observing how in the very beginning the legal doctrine – to advance the demand for equality between men and women – has presented the question of inclusion of women in the same terms of men. This leads to another aspect of the issue-equality: the *evaluative equality*<sup>259</sup>. While *prescriptive equality* considers under which circumstances two entities should be treated alike, according to *evaluative equality* the relationship between two terms is expressed in accordance to the system of value of a specific society. Does a woman deserve to be treated equally to a man at work? Does a black person deserve to be treated the same as a white person? Do gay people deserve the same recognition of heterosexual people in their daily life? In the context of gender, manliness is the element around which the rule of equality is built. In the context of race, whiteness is the standard. When referring to sexual orientation, heterosexuality/masculinity is the ideal standard.

In this scheme, an individual is equal as far as she/he is treated as everyman/white/heterosexual in society. In feminist legal theory this assumption has been reshaped bringing to the idea of a ‘unisex’ approach. ‘The idea of sexual equality and the interchangeability of gender roles became, in reality, permission for

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<sup>258</sup> L. GIANFORMAGGIO, *Ibid*, p. 219.

<sup>259</sup> *Ibid*, p. 219.

some women to take on male gender roles, as the trope of the wig signifies. This is where we are now: some – generally privileged – women can choose to assume male gender roles<sup>260</sup>. Thus, instead of standardizing principles using equality as a guideline, legal orders tend to adopt one historically defined standard and try to enhance its scope beyond its original meaning. In doing so, contradictions might emerge and create a strong cultural opposition.

The cultural element clearly appears. Once the predominant stereotype has been established, equality follows the rule pre-formulated by society as if it was the natural one, the only one. The discussion is not built around the concept of equality *per se* – considering diversity as a structural element in society – but only on its consequences.

### **3. Sociological and psychological approaches:**

Sociology of law might be helpful in explaining the phenomenon described above. Legal sociology is perceived as either a sub-discipline of sociology or an interdisciplinary approach to legal studies. In very general terms, it might be argued that sociology observes society and those interactions occurring between social actors (both at individual and institutional levels)<sup>261</sup>. As for all the other social sciences, sociology uses both empirical investigation and critical analysis in order to refine knowledge about human social activities<sup>262</sup>.

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<sup>260</sup> J. K. PETERS, *Gender Remembered: The Ghost of “Unisex” Past, Present, and Future*, in *Women's Studies*, vol. 34, n. 1, 2004, p. 72.

<sup>261</sup> See, A. COMTE, *A Dictionary of Sociology* (3rd ed.), J. SCOTT & G. MARSHALL (eds), Oxford University Press, 2005.

<sup>262</sup> D. ASHLEY, D.M. ORENSTEIN, *Sociological theory: Classical statements* (6th ed.). Boston, MA, USA: Pearson Education, 2005, pp. 3–5, 32–36.

The important contribution of sociology in the legal knowledge is to be found in both the possibility to comprehend how legal provisions represent a given society, and how societal understanding of normative values shape the attitude of the competent social actors (mainly, but not only, judges) in the interpretation of the law. Sociology tries to answer the question about the function of law in relation to social systems, i.e. how problems in society might be solved adopting different legal provisions.

Since the effort is to understand how equality is framed in society, it is useful to concentrate the attention on two elements, namely the relation between law and society, and the concept of ‘legal culture’. The former might be explained by considering the debate between Kelsen and Ehrlich on the essence of law, the latter by analyzing Weber’s theorization.

According to Ehrlich, a legal system is a social structure which identifies the position of an individual (a subordinate or higher position) in society. In doing so, a legal system resembles other systems whose structure is not legal at all, e.g., religious systems, moral systems, etc. In other words, he notices how the law should be understood not only as a sum of statutes and judgments. This means overcoming a simplistic approach that would be inadequate to explain the reality behind interactions within a community<sup>263</sup>. Thus, conceiving the principle of equality in solely legal terms is not enough to comprehend the reasons behind *de facto* discrimination.

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<sup>263</sup> A. FEBBRAJO, *Sociologia del diritto*, Il Mulino, Bologna, 2009, pp.31-37.

In opposing Kelsen's formalistic view of law, Ehrlich emphasizes the importance of non-legal provisions, observing how uncoded rules might condition behaviors at the individual and institutional levels. A formalistic approach to law might explain how a legal system works 'from within', i.e., according to formal procedures of norms-generation and norms-application, whilst it is not able to do so 'from the outside'. Where does legitimacy come from? Indeed, depending on the observer – a jurist or non-jurist – a legal provision is perceived either as legal or as legitimate. Within the system as far as a norm is perceived legal there is no issue; outside the system, a norm might well be legal but at the same time perceived as illegitimate.

Thus, legal provisions do not only impose rules (lawfulness), they also recognize previous normative values, as they are in society before the creation of a legal text (legitimacy). Ehrlich tries to demonstrate his assumption by observing how some social groups follow a set of rules despite their codification and, though legal provisions exist, traditional behaviors might persist over written rules<sup>264</sup>.

The law might encompass a number of traditional behaviors, thus regulating them in formalistic terms, but this does not mean that law is able to embrace the essence of society since society evolves over the time, and custom changes accordingly. This is why Ehrlich was fascinated by Savigny and his conception of law in its historical dimension<sup>265</sup>. Indeed, if it is accepted that legal provisions are amended over the time, the reasons behind changes can be described in historical terms<sup>266</sup>.

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<sup>264</sup> *Ibid*, p. 33.

<sup>265</sup> See, H. J. BERMAN, *The Historical Foundations of Law*, Research Paper n.05-3, pp. 5 ss, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=666123&rec=1&srcabs=946160](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=666123&rec=1&srcabs=946160).

<sup>266</sup> A. FEBBRAJO, *Ibid*, p. 34.

However, even if it would be possible to agree on the fact that the process of law formation is historically and traditionally driven, the main issue remains how to identify which traditions are to be codified. Indeed, although a pure formalistic approach tends to disregard reality in its entirety, it has the merit to create boundaries, gives certitude to the system, and project society toward developments within a defined path<sup>267</sup>. Ehrlich' theory has the merit of reconsidering the relationship between law and society but it does not provide instruments to comprehend what is the casual relation between norms-generation and social custom. In other words, when do traditions become law?

To answer this question it is possible to refer to Weber and his theorization on the concept of legal cultures. According to Weber the distinction between law and society should not be conceived as a model in which X precedes Y (e.g. social norms precede legal norms). In society a number of different cultures might coexist and the legal system does not consider one of them as more valuable than another when the process of codification begins. The need for a legal system stems from the exigency to create a rational space for social interactions among individuals. In this scheme a formal and rational model is deemed necessary since it is *prima face* neutral in relation to particular cultural instances.

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<sup>267</sup> Indeed, if a democratic system is established and rules of procedure are drawn in way that a system will preserve its democratic structure over the time, tradition or custom might not be used as the basis to reverse the system into another type of regime. An assumption that gives to history, nature, culture an absolute relevance might easily conduct to reinterpretation of values according to the mood of the historical moment. Of course, a sociological understanding of law as a product of human interactions gives us an insight of the reasons behind norms-formation and norms-application, but an exacerbation of an argument giving centrality to concepts such as custom might induce to the conclusion that there are no 'fundamental values' but only 'valuable values', i.e. only those recognized by one group. This leads to the conclusion that each and every legal system (no matter what is the aim pursued) is uncontestable, since its validity cannot be proved from outside.

Thus, the legal culture of a given system does not represent ‘the perspective’, but it is merely perceived as an instrumental device to resolve possible societal conflicts. This view places on institutions the role of balancing different interests, and individuals play ‘their game’ according to the rules of the game. What happens outside the game is irrelevant<sup>268</sup>. Judges in this context can proactively realize and acknowledge (as they do) when a community has changed its perception about the contents of rights and decide accordingly in their judgments (e.g. as the ECtHR in *Schalk and Kopf*<sup>269</sup>, see chapter I).

Nonetheless, when assuming that a system is fair and coherent whenever it is rationally built up and its structure is formally designed, a series of postulates in legal doctrine recalling fundamental principles and their value can be unconsidered. Of course, legal sociology does not speak about values as such. It considers groups and their beliefs but not from the stand point of someone who wants to assign a major or a minor influence to one group or the other.

However, in contemporary democratic countries it is deemed necessary to consider differences in society in order prevent social conflicts. Stigmatization on the basis of race, religion, gender, sexual orientation, etc., is a very common situation. This ‘natural attitude’ toward discrimination is intrinsic in society and a legal system might decide to either correct or disregard this issues. To understand the causes behind this ‘natural attitude’, it is possible to refer to Festinger, a socio-psychologist who emphasized the integral interdependence of the individual and group by noting

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<sup>268</sup> A. FEBBRAJO, *Ibid*, p.71.

<sup>269</sup> ECtHR, *Schalk and Kopf v. Austria*, Application n. 30141/04, delivered on 24 June 2010.

that ‘an attitude’ is correct, valid, and proper to the extent it is anchored in a group of people with similar beliefs<sup>270</sup>. Social groups to which people belong play a fundamental role in attitude formation, attitude-behaviour consistency, and attitude change.

Psychologists working in the tradition of social identity and self-categorization theories have proposed that when a particular social identity is made salient, people will categorize themselves in terms of that social category<sup>271</sup>. As Terry and Hogg pointed out, ‘when social identity is salient, a person's feelings and actions are guided more by group prototypes and norms than by personal factors’<sup>272</sup>. When people see themselves as group members, group norms will be more likely to influence the ways in which they form, act upon, and change their attitudes. Groups can provide information and exert normative pressures on individuals, which will influence attitude formation.

The denial of full humanity to other individuals, and the cruelty and pain that accompany it, is a very familiar phenomenon and it is often the basis for an intergroup discrimination and intergroup hostility. In fact, this mental process called dehumanization is often associated with ethnic, racial and intergroup conflicts, issues relating to immigration and, in the most unfortunate case, genocide.

Scholars have primarily focused attention to the ways in which Jewish people during the Holocaust, Bosnians in the Balkan wars, and Tutsis in Rwanda were

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<sup>270</sup> See L. FESTINGER, ‘*Informal social communication*’, in *Psychological Review*, vol. 57, 1950, p.275.

<sup>271</sup> See J. TURNER, *Social Influence*, Pacific Grove, CA: Brooks & Cole, 1991, p. 790.

<sup>272</sup> See D. J. TERRY & M. A. HOGG, ‘*Group norms and the attitude-behavior relationship: A role for ingroup norms*’, in *Personality and Social Psychology Bulletin*, vol. 22, 1996, p.780.

dehumanized both during intergroup violence by its perpetrators, and beforehand through images and stereotypes that likened the victims to vermin. Similar animal metaphors are common in images of immigrants, who are seen as threats undermining the stability of the status quo, and corrupting the social order. Dehumanization does not only speak about racial issues and ethnic conflicts, but it is also commonly discussed in feminist writings, mostly on the depiction of women in pornography<sup>273</sup>.

Women in pornography are usually dehumanized because they are represented in an objectified fashion. Such an objectification is usually used to remove women from full moral consideration and it is offered as a legitimating factor for rape and victimization<sup>274</sup>. Nussbaum<sup>275</sup> identified seven components of this objectification: ‘instrumentality’ and ‘ownership’, which involve treating women as tools and possessions; ‘denial of autonomy’ and ‘inertness’, which involve seeing them as lacking autonomy and agency; ‘fungibility’, which involves seeing women as interchangeable members of that category, thus neglecting subjective characteristics; ‘violability’ represents others as lacking integrity; and ‘denial of subjectivity’ which is the belief that their experiences and feelings can be neglected. In other feminist works it is also argued that women are typically attributed fewer human qualities than men. According to Sherry B. Ortner, women are ‘seen as representing a lower order

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<sup>273</sup> See L. LEMONCHECK, *Dehumanizing women: Treating persons as sex objects*, Totowa, NJ: Rowman & Allanheld, 1985.

<sup>274</sup> See, J. CHECK & T. GULOINE, ‘Reported proclivity for coercive sex following repeated exposure to sexually violent pornography, non-violent dehumanising pornography, and erotica’ (pp. 159-184), in D. ZILLMANN & J. BRYANT (eds.), *Pornography: Recent research, interpretations, and policy considerations*, Hillsdale, NJ: Lawrence Erlbaum Associates Inc., 1989.

<sup>275</sup> See, M.C. NUSSBAUM, *Sex and social justice*. Oxford University Press, Oxford, 1999.

of being, as being less transcendental of nature than men' across cultures, and femaleness is associated with animality, nature, and childlikeness<sup>276</sup>.

Kelman investigated the moral dimensions of dehumanization. According to Kelman, dehumanization involves denying a person 'identity'; a perception of the person 'as an individual, independent and distinguishable from others, capable of making choices' and 'community' a perception of the other as 'part of an interconnected network of individuals who care for each other'<sup>277</sup>. When people are deprived of the quality of agency and other communal aspects of humanness they are de-individualized, that is they lose the capacity to evoke compassion and other moral emotions, thus leading to a potential inhumane treatment. Schwartz and Struch offer a theoretical approach that stresses the central position of human values in dehumanization. People's values 'express their distinctive humanity', so 'beliefs about a group's value hierarchy reveal the perceiver's view of the fundamental human nature of the members of that group'<sup>278</sup>. When the ingroup and outgroup are perceived as having dissimilar values, the outgroup is perceived to lack shared humanity and its interests can be ignored or dismissed.

Schwartz and Struch argued that values reflecting a people have 'transcended their basic animal nature and developed their human sensitivities and moral sensibilities'

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<sup>276</sup> S. B. ORTNER, 'Is female to male as nature is to culture?' (67-87), in M. Z. ROSALDO & L. LAMPHIER (eds.), *Woman, culture, and society*, Stanford University Press, Stanford, CA, 1974, p.73.

<sup>277</sup> See H.C. KELMAN, *Violence without restraint: Reflections on the dehumanization of victims and victimizers* (pp. 282-314), in KREN G. M. & RAPPOPORT L. H. (eds.), *Varieties of psychohistory*, New York: Springer, 1976.p. 301.

<sup>278</sup> S. H SCHWARTZ & N. STRUCH, 'Values, stereotypes, and intergroup antagonism' (pp. 151-167), in D. BAR-TAL, C. F. GRAUMAN, A. W. KRUGLANSKI, W. STROEBE (eds.), *Stereotypes and prejudice: Changing conceptions*, Springer-Verlag, New York, 1989.p. 153.

directly reflect a group's humanity<sup>279</sup>. 'Prosocial' values (e.g., equality, helpful, forgiving) are transcendent in this sense, whereas 'hedonism' values (pleasure, a comfortable life) reflect 'selfish interests shared with infra-human species'. People can therefore be dehumanized by the perception that they lack prosocial values and that their values are incompatible with one's ingroup values.

Thus, it is possible to conclude using Hannah Arendt's statement : "equality is not given but it is the result of human societal infrastructures to the extent they are built around the concept of justice; we were not born equals; we become equals as member of a group since among us we decided to grant each other rights<sup>280</sup>".

Therefore, principles are ethically, morally, politically, and socially constructed. Fundamental norms mirror societies<sup>281</sup> and appear appropriate to a group because they achieved a *cultural validation* through a (democratic) decision-making process<sup>282</sup>. Changes in society might push the boundaries of traditional interpretations and legal scholars as well as judges have to deal with the issue of 'actualizing provisions'. In legal history it is the reshaping of traditional legal materials, the bringing in of the other materials from outside, and the adaption of these materials as a whole that has provided satisfaction of human wants under new condition of life in civilized society<sup>283</sup>

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<sup>279</sup> *Ibid*, p. 155.

<sup>280</sup> H. ARENDT, *Le Origini del Totalitarismo*, Comunita, Milano, 1967, p.417 (translation is mine).

<sup>281</sup> L. PALADIN, *Diritto Costituzionale*, (3rd edition), Cedam, Padova, 2006, p.32.

<sup>282</sup> A. WEINER, *Contested Meanings of Norms: A Research Framework*, in *Comparative European Politics*, vol.5, 2007, (pp. 1-17), p.5

<sup>283</sup> R. POUND, *The Theory of Judicial Decision*, in *Harvard Law Review*, vol. XXXVI, n.6, 1923, p.642.

If culture is responsible for the definition of values, and if values are the premise for the construction of the legal order, then discussing the ‘order’ only in terms of ‘validity’ does not allow for a true definition of the principle of equality. Borrowing Nedelsky’s relational model of rights and using it to construe the meaning of equality, one should understand equality as a product of a relational approach to equality in which the terms of equality are built around the societal consequences of a specific meaning<sup>284</sup>. ‘Treating equally’ is significant to the extent this behavior is perceived legitimate in a democratic society.

#### **4. Formal equality v. substantial equality**

Today the majority of legal scholars support the idea that formal equality is complementary to substantial equality and *vice-versa*. Traditionally, equality has been translated in (inter)national legal systems has a system of rules, a set of formal requirements that the law should respect to be uniformly applied. Several constitutions adopt this version of equality and literal provisions usually read ‘everyone is equal before the law without distinction’. ‘Everyone’ represents ‘generality’, i.e., it encompasses (potentially) every individual situation. This assumption works on the premise that whenever the law is neutral no discrimination will take place; the state would not be allowed to intervene, and if ‘intrusions’ from the state occurs this leads to unfair discriminations.

Recent constitutions have developed and introduced more sophisticated elaborations of the concept of equality by considering the *de facto* discrimination

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<sup>284</sup> J. NEDELSKY, *Reconceiving Rights and Constitutionalism*, in *Journal of Human Rights*, vol. 7, n. 2, 2008, (pp. 139-173), pp. 139-142.

suffered by those who are historically in a vulnerable position and are marginalized for several reasons (e.g., gender, race, ancestry origins, economic situation, etc.).

For example, the Italian constitution at art.3 states

‘All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions, personal and social conditions (I sect.); It is the duty of the Republic to remove those obstacles of an economic and social nature which, really limiting the freedom and equality of citizens, impede the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country’ (II sect.).

Thus, the state is bound to provide incentive, and take any reasonable step to remove the causes of discrimination.

According to Piechowiak, fundamental rights exist because a human being exists as a person who is directed towards personal development. This development takes place through the actualization of the potentialities of a human being<sup>285</sup>. It follows that states play a crucial role in individuals’ development through appropriate policies of inclusion.

If two persons are conceived normatively as equal, the consequence is that they must be granted the same treatment equally. This *formal* assumption is not immune from criticism. Obviously, the premise for the application of this principle is the establishment of a relation of similarity and difference. As it has been previously

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<sup>285</sup> M. PIECHOWIAK, *What are Human Rights? The Concept of Human Rights and Their Extralegal Justification* (pp. 3-15), in R. HANSKI and M. SUKSI (eds), *An Introduction to the International Protection of Human Rights*, Åbo: Åbo Akademi University, 2004, p. 11.

underline, this operation is heavily influenced by the socio-historical context. To overcome this problem, some scholars argue that a rule of rationality should be used when defining what is 'equal'. Rationality would be consistent with the formal demand of equality, regardless of preliminary moral assumptions about justice.

Proponents of formal equality usually consider neutrality as the best solution. However, this formal approach is built upon a debatable assumption: since each individual is different to another, to avoid discrimination the law should disregard these differences when pursuing a given goal. This is what is called the liberal argument. In essence, setting out formal equal requirements for social benefit is necessary to promote not only equality but also the culture of merit around which democratic states develop and prosper<sup>286</sup>. If a legislative choice favors a specific category (e.g. an ethnic minority) this automatically leads to an arbitrary disfavor for other persons. The decision-making process would then be unreasonably influenced by the consideration of irrelevant differences, while according to libertarians arbitrary criteria should be kept out of the process of policy-elaboration to prevent unfair decisions<sup>287</sup>.

Although this approach might fascinate those who support equality, it should not be underestimated how rationality is a product of human intellect, thus intrinsically subjected to stereotypes of different nature. Thus, the assumption that the only basis of equal/unequal treatment is the final outcome of an objective consideration of the features of a specific situation when compared to the others might lead to

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<sup>286</sup> C. MCCRUDDEN, *Merit Principles*, in *Oxford Journal of Legal Studies*, vol. 18, n. 4, 1998, p. 544 ss.

<sup>287</sup> P. BREST, *In Defense of the Antidiscrimination Principle*, in *Harvard Law Review*, vol. 90, 1976, p. 1.

unwarranted results. Neutrality in this context translate into a mere illusion<sup>288</sup>. The legislator, the judiciary, or the law in general, represent a specific political will, and thus a claim of neutrality should not be made<sup>289</sup>.

Of course, formal equality might perfectly work as principle when it is associated to laws regulating specific human activity. If a law provides for ‘keeping off the grass’, neutrality does make sense. Instead, there could easily be a law which is presented as neutral but creates unfair discrimination (see chapter I on the difference between direct and indirect discrimination). An example is represented by some laws for public selections: if a law proscribes that among the requirements to participate in the selection of civil servants one should have served as a soldier, in a country where women are forbidden to serve, this law is only apparently neutral since it discriminates on the basis of gender<sup>290</sup>.

This approach is consistent with ECJ’s view in *Schnorbus*, where the Court contested the German legislation regulating ‘prior access’ to practical legal training

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<sup>288</sup> O. M. FISS, *Groups and the Equal Protection Clause*, in *Philosophy and Public Affairs*, vol. 5, 1976, pp. 107ss.

<sup>289</sup> To provide an example, the Italian Constitutional Court in 1961 issued a well-know decision in the Italian legal doctrine (Judgment n.64/1961) in which it upheld the constitutionality of different treatments for wives and husbands in case of adultery, considering the principle of equality respected in the name of a sort of ‘natural diversity’. This judgment was eventually reversed in 1968 (Judgment n. 126/1968) showing how ‘equality’ is closely linked with the societal environment. The entire reasoning was reversed in light of a new understanding of gender roles.

<sup>290</sup> Another good of example of how the concept of formal equality between men and women is misconceived and ambiguous is offered by the reservation to the CEDAW by the Egyptian government: “...In respect of article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic *Sharia*’s provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. [...]. The provisions of the *Sharia* lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The *Sharia* therefore restricts the wife’s rights to divorce by making it contingent on a judge’s ruling, whereas no such restriction is laid down in the case of the husband. *Reservation to the Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), General Assembly, Resolution n. 34/180, 1979.

for those who had completed military service, when only men were obliged to perform this service in Germany<sup>291</sup>. The same reasoning seems to have inspired the ECJ in *Maruko*<sup>292</sup> and *Römer*<sup>293</sup> in which the ECJ was asked whether a legislation discriminating between spouses and life-time partners was allowed under the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation<sup>294</sup>.

There are numbers of examples of laws which are *prima facie* neutral but instead create a disadvantage for certain individuals. In this sense, rights might exist without being at disposal for each citizen, creating a dichotomy between fundamental rights and equality, and separating what should be united: either individuals are equally entitled to rights and obstacles in the enjoyment of these rights are removed, or these rights are not at their disposal even if they are entitled to them. Diversity cannot be ignored. The price to be paid is living in a legal system where equality is respected *de jure* (i.e. in theory) but not *de facto*.

From this perspective, the principle of equality is strictly associated with the concept of equal opportunities according to which policies and subsequent legislation are specifically formulated to promote the inclusion (in the job-market, public administration, representative institutions) of those who have historically encountered obstacles in society. Diversity plays a central role in this context and the recognition

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<sup>291</sup> Case C-79/99, Schnorbus v. Land Hassen, delivered on 7 December 2000.

<sup>292</sup> Case C-276/06, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, delivered on 4 April 2008.

<sup>293</sup> Case C-147/08, Jürgen Römer v Freie und Hansestadt Hamburg, delivered on 11 May 2011.

<sup>294</sup> This Directive was designed to address Article 13 of the EC Treaty, introduced by the Treaty of Amsterdam, in which the Community commits itself in combating discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation. Text is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:303:0016:0022:EN:PDF>.

and subsequent promotion of diversity is perceived as the main vehicle to enhance equality among individuals.

When shifting from a neutrality approach (formality) to a promotional approach (equal opportunities) the key concept of justice can be revised. In other words, justice does not only ensure fair and equal treatment, it also affords individuals the possibility to reverse their disadvantage situation. It considers historical discriminations and follows a redistributive model in which – given that individuals and groups depart from different starting points – the central point is to rebalance differences from the very beginning<sup>295</sup>.

Some authors suggest that due to the ambiguity of the equality concept, it would be better to centre the discourse on the concept of dignity<sup>296</sup>. ‘Dignity’ brings into the debate a greater moral character, and embodies the universality, indivisibility, and the interdependence of fundamental rights. It operates as an internationally shared value that would be more difficult to contest by libertarians<sup>297</sup>. This argument could be potentially useful since there is no doubt that “the dignity of the human person” and “human dignity” are phrases that have come to be used as an expression of a basic value accepted in a broad sense by all peoples<sup>298</sup>.

Therefore, though it is possible to disagree on the appropriate approach to equality, it would be arduous to neglect the importance of respecting human dignity since it represents the Kantian categorical imperative: ‘Act in such a way that you always

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<sup>295</sup> C. MCCRUDDEN, *The New Concept of Equality*, in *ERA-FORUM*, vol. 4, n. 3, 2003, (pp. 9-29), p. 17 ss.

<sup>296</sup> P. WESTEN, *The Empty Idea of Equality*, *Ibid*, p. 537.

<sup>297</sup> S. FREDMAN, *Discrimination Law*, Oxford University Press, Oxford, 2002, p. 18.

<sup>298</sup> O. SCHACHTER, *Dignity as a Normative Concept*, in *The American Journal of International Law*, vol. 77, n. 4, 1983, pp. 848-850.

treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end'<sup>299</sup>. Thus, the problem should be solved simply by abandoning 'equality' in favor of 'dignity', as if this was a purely semantic issue. Nonetheless, if on the one hand 'dignity' receives a greater attention at national and international level, on the other, its contents are far from being clearly identified. As it has been suggested in relation to human rights, they 'centers on a moral argument that cannot be empirically proven'<sup>300</sup>, and this creates a margin of interpretation allowing the interpreter to choose among possible meanings.

What does dignity implies? Some would rightly argue that substantial equality is still at stake when discussing dignity, since it is a necessary condition to have equal opportunities for the respect of each human person, since otherwise there will always be dominating peoples and dominated people.

## **5. Application of the principle of equality:**

Discussing theories concerning the principle of equality in philosophy, sociology, legal doctrine, etc, creates the conceptual basis for its application to concrete cases. Judges find themselves in a delicate position when deciding how to better respond to

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<sup>299</sup> This definition has been borrowed from the *Routledge Encyclopedia of Philosophy*, online version, available at: [www.rep.routledge.com/article/DB047SECT9](http://www.rep.routledge.com/article/DB047SECT9). On Kant's *Kritik der praktischen Vernunft* (Critique of Practical Reason) (1788), see, H.E. ALLISON, *Kant's Transcendental Idealism*, Yale University Press, New Haven and London, 1983; G. BUCHDAHL, *Kant and the Dynamics of Reason: Essays on the Structure of Kant's Philosophy*, Basil Blackwell, Oxford, 1992; S. GARDNER, *Kant and the Critique of Pure Reason*, Routledge, London, 1999; G. FORNERO, *Itinerari di filosofia*, vol. II, tomo B, Paravia, Milano, 2003; G. MARINI, *La filosofia cosmopolitica di Kant*, Laterza, Roma-Bari, 2007.

<sup>300</sup> See D.P. FORSYTHE, *Human Rights Studies: On the Dangers of Legalistic Assumptions*, in F. Coomans, and Grünfeld, F., and Kamminga, M.T. (eds) *Methods of Human Rights Research*, 2010.

demand of equality. In this context it is useful to schematize possible approaches at judges' disposal.

McCrudden has offered a schematic explanation of the 'new concepts' of equality within the system of EC law. It is possible to detach this categorization from an embedded European version of equality, since it is possible to observe the same understanding of the equality principle in other western jurisdictions. Indeed, by analyzing the U.S. Supreme Court's case law, though there are several distinctions to be made, similarities can be clearly found<sup>301</sup>. According to McCrudden there are at least four dimensions of equality. This categorization is not meant to represent a fixed system of meanings in which one approach is clearly defined and separated from the others. On the contrary, all these approaches are considered as potentially influencing and overlapping each other depending on the context<sup>302</sup>.

The first approach conceives equality as the result of a rational choice<sup>303</sup>. This *modus operandi* reflects the classical attitude of 'treating likes alike'. The premise is considering likeness, difference, acceptability, and justification as parameters to scrutinize whether the law is discriminating against individuals. Accordingly, discrimination, both direct and indirect discrimination, would operate directly against individuals or groups on arbitrary basis. A judge should then consider whether the criterion adopted (such as race, gender, etc.) is manifestly illegitimate. This 'test' is necessary for the other proposed approaches. In this context, the reasoning adopted

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<sup>301</sup> L. FABIANO, *Le categorie sensibili dell'eguaglianza negli Stati Uniti d'America*, Giappichelli, Torino, 2009, pp. 51 ss.

<sup>302</sup> C. MCCRUDDEN, *The New Concept of Equality*, in *ERA FORUM*, vol. 4, n. 3, 2003, (pp. 9-29), p. 16 ss.

<sup>303</sup> *Ibid*, p. 16.

by the ECJ in *Grant* responded to the necessity of adopting a neutral/rational approach vis-à-vis the determination of the validity of a differential treatment for same-sex partners (see chapter I).

The second approach adheres to idea that equality serves also to protect rights<sup>304</sup>. The focus here is shifted from discrimination *per se* to the interests pursued by the legislation (or the legislator). What is relevant is the goal to be achieved through a selective discrimination aimed at preserving a public good. Balancing interests is the main aspect to be weighted. In *Mangold*<sup>305</sup>, the ECJ has opted for this line of reasoning when declaring in violation of EU law the German legislation entailing a differential treatment on the basis of age<sup>306</sup>.

The third approach refers to equality as a tool to prevent status harm. In this context, equality serves to identify those characteristics associated with individuals who are discriminated on these grounds. Instead of perpetuating the ideal ‘likes should be treated alike’, the principle is reversed in ‘unlikes should not be treated alike’, i.e., a law should consider historical disadvantages and take them into consideration when pursuing its goal. Thus, ‘equality involves the recognition of diverse identities, and the failure to accord due importance to such differing identities is a form of oppression and inequality in itself’<sup>307</sup>.

The fourth approach addresses equality as a proactive mean of individuals’/groups’ promotion<sup>308</sup>. This could be also called the substantial equality

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<sup>304</sup> *Ibid*, p.17.

<sup>305</sup> ECJ, *Werner Mangold v. Rüdiger Helm*, case C-144/04, delivered on 22 November 2005.

<sup>306</sup> A. ERIKSSON, *Ibid*, p.734.

<sup>307</sup> C. MCCRUDDEN, *Ibid*, p.23.

<sup>308</sup> *Ibid*, p. 21.

approach, i.e., States should take reasonable steps to eliminate historically stratified disadvantages suffered in light of specific individuals' or groups' status (age, gender, race, sexual orientation, etc). In *Marshall*<sup>309</sup>, the ECJ, differently from the position expressed in *Kalanke*<sup>310</sup>, has acknowledged the importance of adopting policy and legislative measures able to overcome historical discrimination, though maintaining the limit of proportionality and exceptionality<sup>311</sup>.

This categorization does not exactly define the boundaries of one meaning over the other. However it has the merit of identifying several aspects of equality applied by the ECJ, all of them necessary to legitimate public authorities' actions. The fourth approach is the most problematic. It requires a preliminary recognition of inequality – which implies a deep introspection about culture and stereotypes – and then a positive response in terms of promotion through legal remedies.

Achieving equality might entail the elaboration of specific policies aimed at reversing the imbalance of opportunities among and between groups. For this reason, affirmative action<sup>312</sup> have been regarded as a potentially effective remedy available for policy-makers and private actors. As some authors argue, affirmative action policies have also the merit to promote a never ending debate over the different

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<sup>309</sup> ECJ, *Hellmut Marschall v. Land Nordrhein-Westfalen*, case C-409/95, delivered on 11 November 1997.

<sup>310</sup> ECJ, *Kalanke v. Freie Hansestadt Bremen*, case C-450/93, delivered on 17 October 1995.

<sup>311</sup> D. CARUSO, *Limits of the Classic Method: Positive Action in the European Union after the New Equality Directives*, in *Harvard International Law Journal*, vol.44, n.2, 2003, pp.332 ss.

<sup>312</sup> Again, it could be useful to refer to the CEDAW and its Committee. This International Body has acknowledge how the Convention requires State Parties under CEDAW to go beyond a formal interpretation of equal treatment between men and women to counter and improve the *de facto* situation of women and to address prevailing gender relations and the persistence of gender-based stereotypes that affect women. See *General recommendation n. 25*, on temporary special measures, 30 January 2004, para. 6.

purposes of equality between those who conceive equality in its liberal dimension and those who believe equality should play a central role in diverse societies<sup>313</sup>.

Affirmative action represent what Bobbio would call States' 'positive obligations' whose intent – opposed to 'negative obligations' in which States self-restraint themselves from intervening – is '*facere*', i.e., to take any necessary step is deemed necessary to remove historical disadvantages in society<sup>314</sup>. Thus, what becomes crucial is the 'result' since the insurance of an equal starting point for each and every individual is perceived as not sufficient to safeguard vulnerable positions. The apparent dichotomy rotates around the two concepts of 'descriptive equality' and 'evaluative equality'; as Dworkin would argue, one thing is to treat everyone as equal (as everyone was perfectly equal), another is to treat individual equally<sup>315</sup>.

Affirmative actions have been firstly introduced in the United States by the President Kennedy's Executive Order 10925 promoting the 'affirmative action policy'<sup>316</sup> aimed at restoring equality between racial groups (whites and Afro-American). These legislative and regulatory measures, together with judicial activism

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<sup>313</sup> M. ROSENFELD, *Affirmative Action and Justice, A Philosophical and Constitutional Inquiry*, Yale University Press, New Haven-London, 1991, p. 5.

<sup>314</sup> N. BOBBIO, *Sulle sanzioni positive*, in *Scritti in onore di Antonio Raselli*, Giuffrè, Milano, 1971, pp. 227 ss; see also, G. LOMBARDI, *Funzione promozionale del diritto, Pubblica Amministrazione e 'sanzioni positive'*, in *Amministrare*, vol. 1, 1976, (pp. 98-118), pp. 98 ss; G. GAVAZZI, *Diritto premiale e diritto promozionale*, Giuffrè, Milano, 1983, pp. 37 ss.

<sup>315</sup> R. DWORKIN, *I diritti presi sul serio*, translated by G. Rebuffa, Il Mulino, Bologna, 1982, p. 297; see also, A. CERRI, *Eguaglianza giuridica ed egualitarismo*, Japadre, L'Acquila, 1984, p. 35.

<sup>316</sup> See, L. TRIBE, *American Constitutional Law*, 2<sup>nd</sup> ed., Foundation Press, New York, 1987, pp. 1521 ss; M. ROSENFELD, *Ibid*; M. ANIS, *Le azioni positive e principio d'eguaglianza*, in *Giurisprudenza costituzionale*, 1992, pp. 582 ss.; L. GIANFORMAGGIO, *Eguaglianza e differenza: sono veramente incompatibili?*, in G. BONACCHI & A. GROPPI (eds.), *Il dilemma della cittadinanza. Diritti e doveri delle donne*, Laterza, Roma, 1993, pp. 214 ss; L. ANTONOLLI DEFLORIAN, *Breve quadro ricostruttivo delle azioni positive nel sistema giuridico statunitense*, in S. SCARPONI (ed.), *Le parti opportunità nella rappresentanza politica e nell'accesso al lavoro. I sistemi di 'quote' al vaglio di legittimità*, Università degli Studi di Trento, Trento, 1997, pp. 119 ss;

in this context, were broadly accepted in the U.S. during the first years of their elaboration; it was evident that a sort of compensation was due to those (blacks) who had suffered slavery and segregation. Stereotypes and prejudice were so deeply endorsed in society that affirmative actions represented a valid and fast solution for including blacks and promoting their societal status.

The Supreme Court that in *Plessy v. Ferguson*<sup>317</sup> established the ‘separate but equal doctrine’<sup>318</sup>, – arguing that the phenomena of segregation was justified since it mirrored division in society and it prevented racial conflicts – reversed its opinion in *Green v. New Kent County Board of Education*<sup>319</sup> stating that the State should promote racial integration favoring the inclusion of Afro-American in schools. As rightly underlined by some scholars, the adoption of affirmative action was not only relevant for those who were favored by these measures, it also constituted a benefit for society as a whole; ‘the integration of police forces through strong affirmative action has often led to better relations between minority communities and the police, a result that improved public safety for all’<sup>320</sup>.

The U.S. model had a great impact on other legal systems – such as in European countries and within the EU as a supranational organization – though different reasons have prompted the adoption of special measures for enhancing equality. In the U.S. the ideological frame was centered on ‘compensation’, while in Europe affirmative action have been considered as an instrument of promotion. In other

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<sup>317</sup> 3 U.S. 537 (1986).

<sup>318</sup> S. VOLTERRA, *Corte suprema e assetti sociali negli Stati Uniti d'America (1874-1910)*, Giappichelli, Torino, 2003, pp. 30 ss.

<sup>319</sup> 391 U.S. 430 (1968).

<sup>320</sup> R. KENNEDY, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, in *Harvard Law Review*, vol. 99, n. 6, 1986, (pp. 1327-1346), p. 1329.

words, in U.S. affirmative action are enshrined in a complex discussion about the negative behaviors of previous generations, in Europe they represent part of a broader debate about the achievement of full equality among and between groups. It is possible that for this reasons, while in Europe affirmative actions are still conceived a viable and legitimate solution against *de facto* discrimination, in the U.S. their legitimacy is now put into question.

Indeed, during the 1980s, the idea that affirmative actions were raising more problems than providing a solution to the problem of discrimination, started to be questioned by the policy-makers, legal expert, and the judiciary. One of the first elements called into question was the idea that affirmative action would function as an element of inclusion. Opponents argued that ‘forcing inclusion’ – despite the honorable intention of rebalancing – had the effect of exacerbating marginalization and exclusion of those benefiting from reverse discrimination. This claim was based on the assumption that affirmative action implicitly create a difference among individuals which might emphasize the perception of superiority: individuals who benefit from affirmative would be perceived as unable to compete on an equal basis with others members of society<sup>321</sup>.

Nonetheless, a deeper speculation leads to another conclusion: marginalized groups are historically in a lower societal position, and adopting preferential treatments represents a way of reversing this trend; thus, if in society the paradigm superiority/inferiority is already well-established, it does not make sense to oppose

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<sup>321</sup> L. P. POJMAN, *The Moral Status of Affirmative Actions*, in F. J. BECKWITH & T. E. JONES (eds.) *Affirmative Actions. Social Justice or Reverse Discrimination?*, Prometheus Book, New York, 1997, pp. 167 ss.

measures aimed at restoring a balance among and between groups pointing out that these measures create marginalization. Marginalization was there before the adoption of compensative measures.

Another argument against the adoption of special legal provisions for discriminated groups is based on the idea that affirmative policies would actually be detrimental for historically stigmatized minorities. According to this view, favoring some individuals would undermine peaceful social cohabitation since it would create intense inter-groups resentment. The un-favored group would perceive compensative (promotional) legislative measures as anti-meritocratic and dysfunctional for society as a whole (would you be cured by a doctor hired in a hospital solely on the basis of his/her race/gender?).

In this context, the meritocratic argument seems to be the most convincing<sup>322</sup>. Of course, each person should be granted better opportunity proportionally to what s/he deserves in relation to his/her capacity. Nonetheless, it would be naïve to ignore that the ‘starting point’ and the ‘relational network one is living in’ heavily influences the individual’s chance to achieve a good position in society. . The idea that a ‘golden age’ governed by meritocratic standards has ever existed is ill-founded, or at least to be demonstrated.

There is also another argument focusing on self-esteem: those targeted by affirmative action would perceive themselves as morally and physically inferior since what they eventually earned is not linked to their capacity but only to their belonging

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<sup>322</sup> M. CAIELLI, *Le azioni positive nel costituzionalismo contemporaneo*, Jovene, Napoli, 2008, pp. 41 ss.

to one group, thus causing the lowering of the internal morale of a community<sup>323</sup>. By contrast, one should be able to verify whether this feeling is real, i.e., sociological studies should prove this is what the minority feels (while it is easy to prove the contrary, that is, minorities ask for rebalancing and redistribution).

Indeed, it should not be underestimated that if an individual has been historically discriminated it is more likely s/he could perceive affirmative action as an opportunity to finally meet his/her own aspirations on an equal basis rather than provoking a sense of moral disvalue. Indeed, the stigma suffered by a minority (or in the case of gender by females, or the in the case of sexual orientation by LGBTI people) is particular relevant in relation to many jobs requiring relatively little specialized training, so that, if a person has undergone his/her training and he/she is hired according to a system of quotas there is no reason to suspect that person is less qualified or morally inferior than his/her historically-advantaged counterpart.

Bearing in mind these objections to affirmative action, now it is useful to analyze when and how these measures should be considered a legitimate instrument to remove discrimination in society. First, these measures must be justified: according to Isaiah Berlin, while there is no need to justify an equal treatment, a differentiation must be justified<sup>324</sup>; this explains why legislation providing for special adjustments for those in vulnerable positions are usually accompanied by explicit motivations. Indeed, when the legislator (or a private company) derogates from the general

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<sup>323</sup> R. KENNEDY, *Affirmative Action and Justice, A Philosophical and Constitutional Inquiry*, *Ibid*, p. 1332.

<sup>324</sup> I. BERLIN, *Equality*, in W.T. BLACKSTONE (ed), *The Concept of Equality*, Burgess Publisher, Minneapolis, 1969, pp. 14 ss.

principle of equality (formal equality) a clear compelling interest must be pursued<sup>325</sup>. Another fundamental component is represented by the ‘temporary element’: whether it is needed to derogate from the normalcy, this must be clearly an exception limited in time. Conversely, favoring one group over the others without a temporal limit would likely create the basis for a consolidated reverse discrimination, i.e. instead of ‘equalizing situations’ the result would be creating a new discriminated category.

In this sense, affirmative action could be considered a ‘legal antibiotic’: once the patient has been cured it would be harmful to continue the therapy. Using this metaphor, it is possible to explain also why ‘proportionality’ together with ‘rationality’ is another key element. If it has been identified the best antibiotic for a specific disease (rationality), and the necessary dose of antibiotic is 1mg-pill per/day it is deleterious to take twice the dose. Thus, if for example the legislator wants to enhance women participation, it would be disproportionate a legislation proscribing that the 80 % of the seats in the Parliament should be reserved as a fixed quota for females<sup>326</sup>.

## **6. Considering equality in the case of same-sex unions**

When LGBTI people started their struggle for achieving public recognition in society the issue of marriage was not an issue at all. The main concerns were to decriminalize homosexual behaviors and combating discrimination against LGBTI people in everyday life. During ‘the sexual revolution’ in the 1970s, people belonging to sexual minorities envisaged the possibility to stand before discriminatory state

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<sup>325</sup> M. ANIS, *Cinque regole per le azioni positive*, in *Quaderni costituzionali*, n. 2, 1999, p. 361.

<sup>326</sup> R. J. FISCUS, *The Constitutional Logic of Affirmative Actions*, Durham, London, 1992, pp. 54 ss.

legislation and fight politically and judicially those homophobic elements in society<sup>327</sup>. Hence, legal recognition of homosexual families represented a second stage in the fought against discrimination

Denmark was the first country in which same-sex unions were legally recognized. The Danish legislator granted gay people the right to register their partnerships (*registreret partnerskab*) providing them almost the same guarantees offered to heterosexual married couples<sup>328</sup>. The Netherlands was the first State which has introduced the possibility for same-sex partners to get married in 2001<sup>329</sup>. It first allowed same-sex unions the possibility to register their relations in 1998<sup>330</sup> and subsequently opened the legal institution of marriage also to same-sex couples. Other EU Member States have followed the Dutch example. In Belgium registered cohabitation was allowed since 2000<sup>331</sup> and same-sex marriage became legal in 2003<sup>332</sup>. In Spain, under Zapatero's government, notwithstanding strong political opposition by the Catholic Church and the Popular Party, same-sex marriage was introduced in 2005<sup>333</sup>. In Sweden it was possible for same-sex unions to be legally

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<sup>327</sup> See, F. HERTZ, E. DOSKOW, *Making It Legal, A Guide to Same-Sex Marriage, Domestic Partnership & Civil Union*, Nolo, Berkeley, 2009, pp.5-8.

<sup>328</sup> See, L. NIELSEN, *Family Rights and the 'Registered Partnership' in Denmark*, in *International Journal of Law, Policy and the Family*, vol. 4, n. 3, 1990, pp 297-307; F. FINOCCHIARO, *La legge danese 7 giugno 1989, n.372, sulla partnership registrata*, in *Diritto ecclesiastico*, 1990, pp 319 ss; B. SØLAND, *Queer Nation? The Passage of the Gay and Lesbian Partnership Legislation in Denmark*, 1989, in *Social Politics*, vol. 5, n. 1, pp 48-69.

<sup>329</sup> Act of 21 December 2000 amending Book 1 of the Civil Code, followed by the Royal Decree of 20 March 2001 (*Staatsblad* 2001, nr. 145) entered into force on 1 April 2001.

<sup>330</sup> Law on *geregistreerd partnerschap* entered into force on 1 January 1998.

<sup>331</sup> *Loi sur la cohabitation legale*, Royal Decree, of 14 December 1999, entered into force on 1 January 2000.

<sup>332</sup> *Loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil*, of 13 February 2003, entered into force on 1 June 2003.

<sup>333</sup> Ley 13/2005, approved on 21 April 2005, published in the *Boletín Oficial del Estado* n.157 on 2 July, and entered into force on 3 July 2005.

registered since 1995<sup>334</sup>, and by 2009 marriage was also permitted to same-sex partners<sup>335</sup>. In Portugal *de facto* unions were recognized since 2001<sup>336</sup> and marriage was eventually allowed in 2010 after the decision of the *Tribunal Constitucional* n.121/2010<sup>337</sup>.

In other EU Member States, although strictly speaking marriage remains an exclusively heterosexual legal institution, the forms of recognition, such as registration, have been adopted with characteristics which make these new legal institutions comparable if not identical to marriage. By 2011, sixteen of the twenty-seven EU Member States, representing roughly the 65 percent of the ‘EU population’, have already adopted legislation recognizing same-sex unions<sup>338</sup>. In addition, since in the majority of the cases where same-sex marriage is allowed or where same-sex couples can benefit from other legal means for recognition, rights related to adoption are restricted if not excluded, it is possible to argue that apart from some exceptions, same-sex marriage and registered partnerships result very similar (or comparable, *see* chapter I, the ECJ’s new developments).

Thus, it could be affirmed, by observing non-harmonious legislative choices made by States on this subject, that ‘marriage’ is not ‘the solution’. Instead, it could be said that it represents one of the possible legal instruments able to provide recognition to

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<sup>334</sup> The bill was passed in 1995.

<sup>335</sup> The bill was passed on 1 April 2009 and took effect on 1 May 2009.

<sup>336</sup> *Decreto* n.349, *Lei* n. 7/2001, of 11 May 2001.

<sup>337</sup> *Lei* n. 9/XI of 31 May 2010, entered into force on June 5, 2010.

<sup>338</sup> Same-sex unions recognition has been granted in Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Luxembourg, the Netherlands, Portugal, Slovenia, Spain, Sweden, the United Kingdom.

same-sex unions<sup>339</sup>. Thus a question arises: why should a legal system opt for marriage? Would it be better to choose another type of legal institution? These questions should be preliminarily answered before discussing the legal reasoning behind constitutional courts' decision on this issue. As first step, it is useful to recall the main arguments opposed to the legal recognition of same-sex unions.

One of the main arguments put forward to impose a differential treatment of individuals within the institution of marriage is that the primary aim of marriage is procreation<sup>340</sup>. The argument of procreation or "finalized marriage" is commonly considered weak in light of the number of couples without children, or by observing how legal systems do not prevent individuals to enter into marriage in non-fertile age<sup>341</sup>. In addition, if procreation would be the aim, then it would be reasonable to forbid the use of contraception<sup>342</sup>. Others opposed to same-sex marriage argue that policy-makers should only allow traditional families to get married since otherwise the concept of family would be undermined, and this would lead to a lower birth-rate. Nevertheless, empirical studies have shown how allowing same-sex partners to marry did not lead to a decrease in the number of heterosexual marriage (or increased divorce) and how the birth rate has not been influenced<sup>343</sup>. As Eskridge notices,

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<sup>339</sup> N. PIGNATELLI, *I livelli europei di tutela delle coppie omosessuali tra "istituzione" matrimoniale e "funzione familiare"*, in *Rivista di Diritto Costituzionale*, 2005, (pp. 243-308), p. 281.

<sup>340</sup> FENOUILLET T., 1996, p. 13.

<sup>341</sup> See J. CARBONNIER, *Terre et Ciel dans le droit français du mariage*, in G.RIPERT (ed.), *Le droit privé français au milieu du XXe siècle*, LGDJ, Paris, 1950, p.334.

<sup>342</sup> This argument has been put forward also by BORRILLO who argues that marriage has become a civil contract and it is no longer a religious act. See BORRILLO D., 2001.

<sup>343</sup> M. V. LEE BADGETT, *When Gay People Get Married*, New York University Press, New York, 2009, pp.64 ss.

instead of negative impact on heterosexual marriage, allowing same-sex marriage has contributed to resuscitate marriage among heterosexuals<sup>344</sup>.

Other objections refer to the admissibility of certain limitations on the ability to marry given that States are interested in promoting health, safety, and stability, thus, for these reasons they may justify prohibiting or not recognizing certain types of marriages, such as incestuous, underage, or polygamous. However, the health and consent rationales that justify the prohibition of such marriages are not applicable to same-sex unions. States prohibit consanguineous marriages because such unions both threaten the biological health of the family. Same-sex marriages, however, cannot increase the chance of genetic deterioration. States prohibit underage marriages because the parties are not old enough to give meaningful consent, but the parties who enter same-sex relationships, and ask for legal recognition, are adults whose consent is presumed to be meaningful.

Finally, States prohibit polygamous marriages because such marriages might undermine the stability of family relationships. More specifically, the multiplicity of parties in polygamous marriages raises concerns about knowledge and consent, support, and inheritance. Same-sex adult couples involve no more parties, and therefore raise no more concerns, than non-polygamous heterosexual marriages do. The distinction between the number of parties and gender of parties also provides the logical rope that prevents a slide down the slippery slope.

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<sup>344</sup> W. ESKRIDGE, *Equality Practice: Civil Unions and the Future of Gay Rights*, Routledge, New York, 2002, pp. 64 ss.

Another argument put forward, is the importance of tradition. This is the *leitmotiv* of the reasoning proposed by those who identify in marriage a pre-legal value to be defended against any argument in favor of same-sex unions recognition.

Nonetheless, this position does not take into consideration that traditions change over time. The history of marriage is neither monolithic nor as monogamous as sometimes it is suggested. In recent years, contracts have come to provide a significant alternative to marital status for governing reciprocal economic relations of couples and this trend has reduced the differences between married and unmarried couples.

As underlined by Wintemute:

The progression from the second stage of ‘sex rights’ to the third stage of ‘love rights’ requires a society to acknowledge that there is more to the lives of LGBT individuals than a search for sexual pleasure, or a need to change their physical appearance and dress. Rather they have the same human capacity as heterosexual and non-transsexual individuals to fall in love with another person, to establish a long-term emotional and physical relationship with them, and potentially to want to raise children with them. When they choose to do so, they will often want the same opportunities as heterosexual individuals to be treated as a ‘couple’, as ‘spouses’, as ‘parents’, as a ‘family’<sup>345</sup>.

Therefore, arguments against legal recognition of same-sex couples could not reasonably prevent legislative authorities to legalize relations between couples of

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<sup>345</sup> R. WINTEMUTE, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter*, Claredon Press, Oxford, 1995, p. 191 ; See also, M. ANDENAES and R. WINTEMUTE, *The Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law*, Hart Publishing, Oxford, 2001.

same-sex. Legal recognition is matter of citizenship. It works against the formation of second-class citizens. EU countries – with some exceptions – clearly express a trend that goes in the direction of ‘providing rights’ to homosexual families instead of limiting them. It follows that the most interesting question is not whether recognition should be provided, but what kind of legal solution should be adopted. As discussed in chapter I, the guardian of fundamental rights, i.e. supreme courts, are now ready to acknowledge the existence of homosexuals’ rights also in relation to family matters. Nevertheless, if on the one hand national courts have supported the idea that ‘*indifference*’ constitutes a violation of fundamental freedoms, on the other hand they have preferred not to interfere with the legislative.

In other words, could marriage be considered the standard ideal type to regulate family relations? It is interesting to consider the opinions of those who advocate for recognition *pro* or *contra* the enhancement of the concept of marriage.

This question, if considered in the light of the previous section when the principle of equality has been discussed, is of crucial importance. Indeed, if marriage is considered ‘the standard’, a possible conclusion is that equality in this case does not mean the recognition of differences but homologation. Hence, regardless of the fact that homosexuals have not participated in the elaboration of the notion of marriage, and might not conceive marriage as a viable solution, if they want to be equal they should conform.

On the contrary, those who advocate for same-sex marriage argue that establishing different legal models for persons of same-sex would prompt the idea of second class citizens. As suggested by Merin, ‘the fact that models are self-consciously separate

from marriage [explains why] marriage substitutes constitute second-class marriage<sup>346</sup>. This position seems to imply that marriage is *per se* a human rights, thus it should be enjoyed by all regardless of their sexual orientation. For this reason, some authors suggest that ‘substitute legal institutions’ represent one of the steps toward the achievement of same-sex marriage<sup>347</sup>.

It seems, again, the scheme inferior/superior (see section 2). This is a reasonable position, but If marriage is understood as the only instrument available (or the best), and if the focus is not on the right to form a family but on marriage, then diversity might blurs into homologation. Indeed, in contrast with the idea that marriage is the ultimate equal rights goal<sup>348</sup> for gays and lesbians, opponents argue that marriage is an element representing a historical site of oppression for women<sup>349</sup>, and the introduction of same-sex marriage may reduce the possibilities for wider-reaching reform of marriage increasing the possibilities of assimilation of same-sex relationships into the heterosexual norm<sup>350</sup>. In addition, as highlighted by Butler, by extending same-sex couples the possibility to marry, marriage itself would be strengthened as a legal institution, further marginalizing those on the outside of this institution<sup>351</sup>.

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<sup>346</sup> Y. MERIN, *Equality for same-sex couples: The legal recognition of gay partnerships in Europe and United States*, University of Chicago Press, Chicago, 2002, p.279.

<sup>347</sup> K. WAALDIJK, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in R. WINTERMUTE and M. ANDENAES (eds) *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law*, Hart, Oxford, 2001, (pp. 437–646).

<sup>348</sup> W. N. Eskridge, (2002), *Ibid*, pp. 23ss.

<sup>349</sup> S. JEFFREYS, *The Need to Abolish Marriage*, in *Feminism & Psychology*, vol. 14, n. 2, 2004,(pp.327–31), p. 330.

<sup>350</sup> R. AUCHMUTY, *Same-Sex Marriage Revived: Feminist Critique and Legal Strategy*, in *Feminism & Psychology*, vol. 14, n. 1, 2004, (pp. 101–26), pp. 106 ss.

<sup>351</sup> J. BUTLER, *Is Kinship Always Already Heterosexual?* in *Differences: A Journal of Feminist Cultural Studies*, vol. 13, n. 1, 2002, (pp. 14–44), pp. 17ss.

Indeed, as other authors suggest, marriage might instead represent a conservative position in society, since historically has been a heterosexual prerogative. Thus the need to enhance the scope of marriage as to cover also homosexuals might derive more from the necessity to feel similar to the heterosexual mainstream rather than configuring a solution for the achievement of full equality<sup>352</sup>.

The balance between these two positions might be found in the possibility to provide individuals both instruments, i.e. allowing persons to opt freely for one or the other legal institution (marriage or registered partnership), thus leaving on individuals the decision on what better responds to their interests. However, the trend in the EU countries shows a different approach: in the majority of the cases, either individuals can enter into matrimony or can enter into registration (e.g. in Germany, Hungary, etc.).

### **Concluding remarks**

As reminded in the introduction of this chapter, one of the first questions advocates of LGBTI people's rights must answer – in relation to the issue of same-sex unions' legal recognition – concerns the reasons why it is possible to argue that non-recognition infringes LGBTI people's rights in light of the principle of equality. Hence, the discussion about rights, or as this research points out, '*the duty to recognize*' requires a speculation about the meaning of equality and its translation *in concreto*. In opposition to those arguments that perceive equality as an empty

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<sup>352</sup> M. WARNER, *The trouble with normal: Sex, politics, and the ethics of queer life*, Free Press, New York, 1999, pp. 146-149

concept, to be given for granted in a system of rights, this chapter has contested the idea that equality is a self-evident concept.

Indeed, as underlined also in chapter I, equality does change its meaning over time and legislation change accordingly. The selected cases examined in the first chapter have shown how both the legislator and judicial actors have begun to consider the rights of homosexual families as deserving the same attention of others. The example of the ECJ in this context is emblematic: while in *Grant*<sup>353</sup> there was no ground of discrimination to be addressed, in *Maruko*<sup>354</sup> and *Römer*<sup>355</sup> the situation has drastically changed. Portugal represents a further evidence of this assumption: the approval of same-sex marriage has considerably changed the situation of homosexual couples.

To discuss the importance of speculating about equality, this chapter has firstly introduced the arguments elaborated in feminist and critical studies regarding the various dimensions of equality considering how the use of the word equality represents more than a semantic issue about this concept. Thus, from descriptive equality to evaluative equality, it has been highlighted how equality operates in terms of superior/inferior, therefore posing the basis for discrimination.

A multidisciplinary approach has thus been adopted to understand how social norms are created and how stereotypes penetrate society. Sociology of law has contributed in explaining how equality is value-driven, and social-psychology has introduced stigmatization and marginalization as the typical element of conceiving

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<sup>353</sup> ECJ, case C-249-96, delivered on 17 February 1998.

<sup>354</sup> ECJ, case C-267/06, delivered on 01 April 2008.

<sup>355</sup> ECJ, case C-147/08, delivered on 10 May 2011.

equals in terms of likeness. As debated, societies and legal systems are built around principles which are ethically, morally, politically constructed. Thus, equality cannot be considered as an obvious and separate concept. Instead, its meaning is redefined according to exigencies of the period under analysis. As illustrated, judges in this context can play the crucial role of detecting changes in society and addressing new claims accordingly.

The dichotomy between formal equality and substantial equality has been analyzed to comprehend how these two concepts are to be conceived as two complementary elements in the elaboration of policies of inclusion. Within this logical frame, references have been made to the ECJ's case law to stress how the Luxembourg court has changed its attitude toward the principle of nondiscrimination.

In the last section, this chapter has firstly examined those arguments against the legal recognition of same-sex unions in order to verify their consistency. As discussed, the main weakness of these positions is to be found in their rationale (e.g. the association of polygamy and same-sex partners does not convince). Secondly, this section has approached the discussion about the possibility to grant same-sex unions either through 'marriage' or by other legal means. As debated, if the principle of equality is conceived as an element for the promotion of diversity, instead of a tool of minimizing differences, it cannot be argued that 'the duty to recognize', as described in chapter I, can be fulfilled only by opening up the heterosexual marriage.

In conclusion, this chapter, in connection with chapter I, has emphasized the reasons behind judicial developments in the context of same-sex unions, by pointing out the fluidity of the concept equality.

## CHAPTER III

### THE ROLE OF JUDGES IN A DEMOCRATIC AND CONSTITUTIONAL SYSTEM

**Summary:** Introduction; 1. The constitutional judge; 2. Constitutionalism; 3. Constituent power; 5. Constituent power and the EU: what is missing?; 5. The legitimacy of the EU multilevel system of protection of fundamental rights.

#### **Introduction**

In the first chapter of this research, a comparative analysis of the case law associated with the issue of same-sex unions in the EU has been provided to understand the attitude of the judiciary, at different jurisdictional levels, towards claims brought by same-sex partners before courts. In particular, it has been verified whether courts acknowledge the existence of a duty upon states in this respect. The second chapter has investigated the evolution and the changing intrinsic nature of the concept of equality stressing the importance of reconsidering equality when debating about rights, or states' obligations.

Both chapters have tried to conceptualized *in concreto* the implications associated with the transformation of the understanding of rights associated with the idea of family, or more generally, 'basic social units'. However, the first two chapters have remained silent on 'the issue of legitimacy'. Specifically, if the '*duty to recognize*' exists, and if '*indifference*' constitutes a violation of fundamental rights, who is in charge of detecting this 'duty' and/or condemning 'indifference'? In addition, if a violation persists, how should judges behave? Purpose of this third chapter is to

understand what is the role a constitutional court, or as in the case of the ECJ a *quasi*-constitutional judge, in a context where a fundamental right does not find protection and is ignored by the political majority.

Therefore, the aim of this part is to understand the role supreme judges might play in a constitutional democratic system when interpreting and enhancing the scope of the meaning of fundamental rights provisions through judicial law-making. This theoretical speculation can help to comprehend why, though same-sex unions' non-recognition constitutes a violation of fundamental rights, this does not automatically lead to judicial intervention.

As this research tries to demonstrate, when judges are asked to address minoritarian claims which do not find a way to enter into the political decision-making process, they need to consider not only the interests of the conflicting parties but also whether it is appropriate to intervene 'judicially' or rather be deferential, thus leaving in 'the hands of politics' the decision on whether, and how to deal with a given issue.

Hence, to understand the attitude of judges, i.e. the reasons why judicial activism or restraint prevails over a given period, such as the period under analysis (2008-2011), it is necessary to frame the argument in a broader context considering the theories regarding the role of the constitutional judge. Indeed, as stated in the introduction of this thesis, one of the purpose of this research is also to understand whether there is now, after the EU Charter of Rights has become binding, a broader margin of intervention for judges. Undeniably, the number of cases pending before courts involving the issue of same-sex unions' recognition is likely to increase in the

next future. However, this theoretical effort is not made to elaborate statistics or to predict future judges' behavior. Instead, the argument of this chapter is whether it would be appropriate and desirable an affirmation of rights through judicial law-making in the specific context of same-sex unions.

As a matter of fact, these two issues, i.e. appropriateness and desirability are of crucial importance. The first is mainly related to legitimacy: in a constitutional democratic system the separation of powers would endow the legislator with the competence to decide over family matters, thus defining social policy through legislation, while leaving the judicial power a residual role to be exercised in exceptional cases.

To what concerns desirability, this aspect is related to the possibility, considering what has been discussed in chapter II, of conceiving different legal solutions as more or less responding to the principle of equality meant as a tool able to promote differences. In other words, if in a given system there is no legal recognition for same-sex unions, and the only option is to open up marriage through judicial law-making, this solution could only partially resolve the issue of discrimination between 'couples', since for some individuals marriage would still represent a heterosexual legal institution.

This chapter in the first section explores theories of constitutional interpretation. The issue of 'counter-majoritarian' judicial law-making is examined to evaluate what are the interpretative margins for creative judicial elaborations in a democratic system where the separation of powers might be regarded as imposing judicial restraint in matters usually of legislative competence.

Accordingly, the second sections examines ‘constitutionalism’ as a system of ideas developed by philosophers, political scientists, and legal scholars. In particular, a description of the main schools of thought that led to the elaboration of contemporary constitutions is offered in order to explain how the process of theoretical elaboration has led to the introduction of constitutional courts. On this premise, the third section approaches the argument of what ‘constituent power’ is, and how it should be considered by judicial authorities. This concept is developed to understand those difficulties in the interpretation of constitutional texts in a changing society, i.e. the difficulty to reconcile literal provisions written at the time the constitution has been adopted with the exigencies a society might subsequently express.

The fourth section examines the concept of constituent power from an EU perspective, analyzing the theory of *multilevel constitutionalism* in order to verify whether the EU structure might represent a constitutional system even the absence of the classical State-structure.

In section five, the chapter describes the European system for the protection of fundamental rights explaining its multilevel structure. Specifically, it underlines how the relations between different levels of adjudication are heterarchically organized instead of following a hierarchic scheme, thus raising the issue of legitimacy within this system. This in turn might allow the development of a dialogic process of redefinition of the meaning of rights.

## 1. The constitutional judge

In a democratic constitutional system the role played by a constitutional court is of crucial importance for two main reasons: (1) it ensures the resolution for those conflicts occurring between state's organs, i.e., it decides whether according to the constitution one institution has exclusive or concurring competence on a specific subject; (2) it rules on whether laws that are challenged before it are constitutional or infringe constitutional rights enshrined in the constitution<sup>356</sup>.

Since this research has analyzed the role constitutional courts have played in the specific context of same-sex unions, this second point is now the main reference to be considered. Nondiscrimination and legal recognition of these unions, in the light of constitutionally, supranationally, and internationally defined principles, are investigated from the perspective of what constitutional courts could do to when addressing this issue.

Of course, though the first point is not the predominant reference, it would be inappropriate to underestimate the fact that, when deciding over one subject, a supreme court should also verify whether it is in its competence to intervene. In other words, as it is shown in this thesis, when deciding over some relevant issues such as the legal recognition of same-sex couples, a court has primarily to assess whether it is competent to solve the issue judicially or whether it might solely recall other constitutional powers to do so (e.g. the Italian judgment n.138/2010, *see* chapter I, *section 1.1.*).

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<sup>356</sup> G. BONGIOVANNI, G. GOZZI, *Democrazia*, in A. BARBERA (ed.), *Ibid.*, pp.236-238.

Indeed, in light of the democratic principle of the separation of powers, constitutional adjudication might be subjected to strong criticism by those who believe the legislative power should not be censored by a non-representative state's organs. As underlined by Habermas, 'the competition between the constitutional court and the democratically elected legislature becomes acute primarily in the sphere of abstract judicial review'<sup>357</sup>.

A constitutional court, at least formally, neither adds nor creates anything: norms enshrined in the constitution possess their specific meanings which have to be reminded whenever laws seem to ignore them. However, despite the meaning of constitutional provisions might seem self-evident, thus binding judges in their interpretation, the operation constitutional judges have to carry out is neither a mathematical equation nor an application of syllogism<sup>358</sup>.

When analyzing constitutional courts' case law, what is immediately clear is that judicial decision-making is a complex process of balancing. Indeed, 'if no value can claim to have an inherently unconditional priority over other values, this weighting operation transforms the interpretation of established law into the business of realizing values by giving them concrete shape in relation to specific cases'<sup>359</sup>. In this respect, the example provided by the two analyzed Portuguese judgments, namely ruling 359/2009<sup>360</sup> and ruling 121/2010<sup>361</sup>, shows how judicial interpretation

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<sup>357</sup> J. HABERMAS, *Between Facts and Norms, Contributions to a Discourse Theory of Law and Democracy*, The MIT Press, Cambridge, (translated by William Rehg), 1996, p. 241.

<sup>358</sup> D. ROUSSEAU, *The Constitutional Judge: Master or Slave of the Constitution?*, in M. ROSENFELD (ed.), *Ibid*, p.261

<sup>359</sup> J. HABERMAS, *Ibid*, p. 254,

<sup>360</sup> *Tribunal Constitucional*, ruling 359/2009, delivered on 9 July 2009, English summary available at: [www.tribunalconstitucional.pt/](http://www.tribunalconstitucional.pt/)

is able to address differently the same issue depending on the question concerned. In fact, the *Tribunal Constitucional* has realized the right to marry for same-sex unions by acknowledging first that there was no constitutional obligation<sup>362</sup>, and second that there was no constitutional ban<sup>363</sup> (*see*, chapter I, *section 1.4*).

Therefore, justices are not in charge of discovering the true meaning of the constitution, and the normative understanding of principles might be subjected to different interpretations according to the constitutional system under analysis. Since provisions are made of words, these words are contextualized. However, words have their own meanings and this represents one of the main aspects/limits of judicial interpretation, i.e. meanings cannot be unlimitedly/unreasonably overstretched.

A legal provision is the literal transposition of a rule, or a value, which is not a concrete thing (though it leads to concrete consequences). It falls within the realm of intellectual activity, thus judges must preliminarily construe the meanings of these words and subsequently interpret them<sup>364</sup>. Then, the question on how the process of interpretation should be carried out becomes crucial.

One possibility is represented by textualism. According to this theory of statutory interpretation, the interpreter should consider the ordinary meaning of the words composing legal provisions. In doing so, the interpreter is more similar to a reader, i.e. any reference to ‘history’ or ‘socio-political evolutions’ is deemed unnecessary

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<sup>361</sup> *Tribunal Constitucional*, ruling n. 121/2010, 8 April 2010, English integral version available at: [www.tribunalconstitucional.pt/](http://www.tribunalconstitucional.pt/)

<sup>362</sup> Ruling n.359/2009, para.7-12.

<sup>363</sup> Ruling n.121/2010, para 21.

<sup>364</sup> A. BARAK, *Hermeneutics and Constitutional Interpretation*, in M. ROSENFELD (ed.), *Ibid*, p.253.

since interpretation is strictly linked to the meaning a person could objectively and reasonably attribute to the words of the provision.

In contrast with ‘intentionalism’, a legal theory according to which the interpreter should also consider the legislature’s intentions beyond the mere literal transposition of a rule, textualism opposes that it would be unreasonable to conceive a ‘genuine collective intent’ of representatives, and that considering legislative history as a tool for the interpretation of norms would offend the constitutionally mandated process of bicameralism<sup>365</sup>. In this theoretical frame, a constitutional judge is bound by the text and creative interpretation of constitutional principles would betray his/her mandate.

A similar but not identical line of reasoning is adopted by those who embrace ‘originalism’. This approach has developed in the USA<sup>366</sup> while in Europe has not been invoked as a driving principle by judges. It is possible to distinguish two subcategories of originalism, namely ‘the original intent theory’ and ‘the original meaning theory’. According to the former, a supreme court is in charge of reconstructing the intent of the drafter when interpreting constitutional provisions.

It follows that judges should ascertain as accurately as possible what drafters meant by the words they used. Therefore, clarification might be found in the legislative history of the bill but any departure from the ‘true and original’ meaning is

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<sup>365</sup> J.F. MANNING, *Textualism as a Nondelegation Doctrine*, in *Columbia Law Review*, vol. 97, n.3, 1997, pp.674-677. See also, J. F. MANNING, *Textualism and Legislative Intent*, in *Virginia Law Review*, vol. 91, 2005, pp.419-420; E. M. DAVIS, *The Newer Textualism: Justice Alito’s statutory interpretation*, in *Harvard Journal of Law & Public Policy*, vol.30, n. 3, 2007, p.988.

<sup>366</sup> In the U.S., Justices of the Supreme Court Hugo Black, Antonin Scalia, and Clarence Thomas have embraced this theory. The term "originalism" has been most commonly used since the middle 1980s. Earlier discussions often used the term "interpretivism" to denote theories that sought to derive meaning from the constitutional text alone ("textualism"), or from the intentions of the originators ("intentionalism"). See, generally, J. H. ELY, *Democracy and Distrust: a Theory of Judicial Review*, Harvard University Press, Cambridge, reprinted version in 2002; G. BASSHAM, *Original Intent and the Constitution*, Rowman & Littlefield Publisher, New York, 1992.

allowed. The latter, which tends to overlap textualism to some extent, holds that the interpretation of a constitution should be based on what a reasonable person, living at the time of its adoption, would have conceived as the actual meaning of the used words<sup>367</sup>.

In both cases, originalism is a principle of interpretation that imposes constitutional courts to discover ‘the original truth’ of the constitution. The preservation of the legal system, the safeguard of the *status quo* is the primary aim of this theoretical approach. Thus, judges are not supposed to create, amend, or interpret laws entering into conflict with the legislative branch.

Consequently, the constitutional meanings of norms might not undergo an evolution adhering to transformations in society. Indeed, if the focal point of the interpretative reasoning rests on the framers’ conception, judicial review (but also the legislative power) cannot legitimately enhance the scope of application of constitutional provisions maintaining their literal form. As a consequence, constitutional amendments would be necessary each time a new social demand has emerged.

The case of LGBTI rights can provide an enlightening example in this context: since no issue was raised at the time the constitution was elaborated, their legal recognition and inclusion would be impossible unless the constitution is amended accordingly. Within the originalist theory, the example provided in chapter I

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<sup>367</sup> L.J. STRANG, *The clash of rival and incompatible philosophical traditions within constitutional interpretation: originalism grounded in the central western philosophical tradition*, in *Harvard Journal of Law & Public Policy*, vol. 28, n. 3, 2005, pp. 909-910. See also, K. E. WHITTINGTON, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*, Lawrence, University Press of Kansas, 2001, pp.30ss.

concerning Portugal would not be acceptable, since marriage would remain inevitably confined in its historical interpretation with no possibility to undergo transformation.

However, according to another school of thought, the meaning of constitutional provisions might change over the time given that a constitution should be understood as a ‘living instrument’<sup>368</sup>. Conceiving the constitution as a ‘living constitution’ allows the text to be adaptable to modern issues without forcing the legislative to pass new amendments (which are indeed procedurally complex and often require greater parliamentary majority). According to this perspective, the constitution is phrased in broad and flexible terms in order to promote a dynamic understanding of constitutional provisions.

In the western world, though accompanied by criticism by part of the legal scholarship, this conceptualization of the constitutional text has been effectively embraced by supreme courts. Particularly in the European scenario, national, supranational and international courts have adhered to this line of reasoning, specifically in the field of fundamental rights protection<sup>369</sup>. This conception follows the idea that fundamental freedoms might undergo transformation through reinterpretation, to the extent that even those claims previously considered

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<sup>368</sup> An example related to LGBTI rights of this approach is given by the Canadian Supreme Court in the case of same-sex marriage, when it applied the so called ‘living tree doctrine’. In that case, the interveners had argued that the meaning of marriage is fixed into convention beyond the reach of the constitution and that the living tree doctrine is constrained within the ‘natural limits’ of interpretation and cannot be stretched to anything the court would like it to be. The Court rejects these claims, stating that they are not trying to find the definition of marriage, but are only looking if a proposed meaning is within the definition. The meaning of marriage is not fixed to what it meant in 1867, but rather it must evolve with Canadian society which currently represents a plurality of groups. [2004] 3 S.C.R. 698, 2004 SCC 79.

<sup>369</sup> A. MOWBRAY, *The Creativity of the European Court of Human Rights*, in *Human Rights Law Review*, vol.5, n. 1, pp. 60-71; J. GOLDSWORTHY, T. CAMPBELL, *Judicial Power, Democracy and Legal Positivism*, Dartmouth, Aldershot, 2000; G. MORBIDELLI, *Ibid*, pp.173-175.

unconceivable can find protection. Adopting Dworkin's classification, while rules possess their own 'rigidity' as far as they identify concrete procedural aspects, principles are in need of interpretation due to their nature as general principles<sup>370</sup>. A constitutional judge is hence in charge of operating a pragmatic recognition of changes in society in order to reconcile abstract literal provisions to concrete cases. As underlined in chapter II when discussing the sociological dimension of law, judges might detect changes in society and balancing different constitutional values accordingly (*see*, chapter II, *section 3*)

The process of democratization and cooperation among states has meant the beginning of a dialogue between different cultural traditions, which has taken place at different levels among different actors. The legal doctrine has not been immune from this process of interacting. Opinions, ideas, approaches have become soon familiar to every person working in a specific field. Judges, as other important actors of the organized social life become more and more prone to the idea of exploring new legal understandings coming from other legal traditions. Indeed, as shown in chapter I, national judges have framed their reasoning looking for guidance in other legal experience. In the case of Hungary, the German experience has been used to strike down the 2007 Hungarian Act CLXXXIV, introducing the institution of registered partnerships resembling marriage<sup>371</sup> (*see* chapter I, *section 1.3*)

As many scholars recognize, it is now usual for judges to refer to decisions of foreign jurisdictions, particularly, when interpreting domestic human rights

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<sup>370</sup> R. DWORKIN, *I diritti presi sul serio*, translated by G. Rebuffa, Il Mulino, Bologna, 1982, p. 82.

<sup>371</sup> *Alkotmánybíróság*, decision n.154/2008 (XII.17.) AB, delivered on 15 December 2008, para.2.1.

guarantees. The phenomenon of borrowing and transplanting relevant precedents is now more than an episodic attitude<sup>372</sup>. As explained in last section of this chapter, in the EU this dialogic process, mostly between national courts of MSs and the ECJ, has contributed to the harmonization of the EU legal space. Conversely, supranational and international tribunals faced with analogous legal issues might refer to domestic courts' decisions<sup>373</sup>.

According to Kirsh, the reasons influencing this dialogic process between courts are mainly three: attitudinal, normative, and strategic. The attitudinal factor refers to the behavior of judges in relation to their political view, i.e. it assumes that, on average, conservative judges should have a stronger nationalist attitude that makes them more skeptical over the possibility to look at foreign case law, while left-leaning judges should be more inclined towards judicial dialogue (in terms of referring to outside sources)<sup>374</sup>.

The strategic factor regards the possibility to favor or contrast judicial dialogue in order to obtain legitimacy or, conversely, strengthening the position and the authority of the court as an autonomous institution<sup>375</sup>. The normative factor is related to the judges' cultural heritages, i.e., the attitude of judges would be shaped by their

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<sup>372</sup> C. MCCRUDDEN, *A Common Law of Human Rights?: Transnational Judicial Conversation on Constitutional Rights*, in *Oxford Journal of Legal Studies*, vol.20, n. 4, 2000, p.501. As the author suggests, although most post-Second World War constitutions have specifically laid down elements which set them apart, most of them also have a common core of human rights provisions that are strikingly similar; they often derive from the Universal Declaration of Human Rights, the European Convention on Human Rights, the Inter-American Convention on Human Rights, and the two United Nations Covenants of 1966.

<sup>373</sup> See the examination of the 'cooperative relationship' between Courts in Europe by A.M. SLAUGHTER, *Judicial Globalization*, in *Virginia Journal of International Law*, vol.40, 2000, p.1105..

<sup>374</sup> See the American study by J.A. SEGAL, H.J. SPAETH, *The Supreme Court and the Attitudinal Model*, Cambridge University Press, New York, 2000.

<sup>375</sup> L.R. HELFER, A.M. SLAUGHTER, *Toward A Theory of Effective Supranational Adjudication*, in *Yale Law Journal*, vol. 107, n.2, 1997, p.273.

psychological internalization and socialization of constitutional settings. For instance, if the predominant idea among judges is that of parliamentary supremacy, it is more likely that this will lead to some skepticism as regard to the possibility to refer to foreign jurisprudence or to accept supranational supremacy claims<sup>376</sup>.

However, since supreme judges do not represent a constituency, i.e. they do not have to follow a political agenda, this interpretive operation must be carried out bearing in mind that their legitimacy can be questioned whenever they decide in a counter-majoritarian fashion. Accordingly, if judges examine the purpose of the law, they must examine also the ethical, the social, and economic objective that the law is pursuing contextualizing the legal reasoning in historical terms<sup>377</sup>. Nonetheless, judicial discretion cannot be unlimited. The pursued aim must be consistent with the values of the legal system (as they are or as they have presumably changed). In this scenario, judges find themselves at the center of the dispute between those who oppose conservative arguments to judicial activism and those who claim that the meaning associated to constitutional provisions is never definitive.

As Habermas argues, the main problem posed to judges is how to preserve simultaneously the certainty of law, its rightness, and the legitimacy of the judicial decision-making process<sup>378</sup>. Since decisions at judicial level must be consistent in their rationality, constitutional judges must justify their decisions adopting a line of reasoning able to overcome the risk of losing legitimacy. Hence, the counter-

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<sup>376</sup> N. KIRSH, *Open Architecture of European Human Rights Law*, in *The Modern Law Review*, vol.71, n.2, 2008,, (pp.183-216), p.212.

<sup>377</sup> A. BARAK, *Ibid*, p.255

<sup>378</sup> J. HABERMAS, *Ibid*, p.199.

majoritarian dilemma and the related issues of legitimacy for ‘judicial intervention’ might become an obstacle for supreme courts.

The definition ‘counter-majoritarian difficulty’ was first adopted by Bickel in 1961, who explained how judicial review could be conceived illegitimate to extent it allows the unelected individuals (judges) to overrule what elected representatives have decided<sup>379</sup>. In this conception, democracy is assumed to be legitimate as far as it implements the majority’s will; democracy is thus ‘reduced’ to its procedural dimension and the problem of enforcing constitutional rights even against the will of the temporary political majority is unconsidered.

This concern emerges particularly in those environments characterized by political pluralism, where constitutional courts might favor differentiation through judicial law-making, or might prompt conformity<sup>380</sup>. In both cases judicial review poses a risk: (1) undermining the perception of legitimacy on the side of constitutional judges by affording non-majoritarian views legal recognition; (2) discouraging the democratic political debate by diminishing pluralism, hence ‘freezing’ democracy on majoritarian positions<sup>381</sup>.

In legal doctrine, some scholars emphasize how judicial law-making relates to compensation, i.e. constitutional interpretation operates as safeguard and reparation

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<sup>379</sup> A. M. BICKEL, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Yale University Press, 2<sup>nd</sup> edition, 1986.

<sup>380</sup> M. SCHWARZSCHILD, *Pluralism, Conversation, and Judicial Restraint*, in *Northwestern University Law Review*, vol. 95, n.3, 2001, (pp. 961-976), pp.961-962.

<sup>381</sup> As Schwarzschild underlines: ‘When the courts reach out to constitutionalize a public question, the result, in principle, will be a single answer, not the plurality of answers that might coexist if the question were left to the “political” branches, state and federal. This suggests that pluralism will usually weigh in favor of judicial restraint, although even from a pluralist point of view circumstances will sometimes justify more active review. Such circumstances, logically, are those in which there would be even less pluralism without a judicially imposed constitutional norm than there would be with one.’ M. SCHWARZSCHILD, *Ibid*, 2001, p.966.

for abuses<sup>382</sup>. Thus, courts would act as engines of principles and judges would be in charge of shaping the meaning of constitutional values to make rights concretely available<sup>383</sup>. Again, the main issue is translated into a problem of interpretation (what approach, among textualism, original intent, living instrument, etc. should prevail?), rather than focusing on the structural position a supreme court occupies in its constitutional democratic system ‘to secure’ its legitimacy.

Indeed, according to those who support judicial intervention, since a constitutional democratic system is made of several political checks also on constitutional judges (e.g. the way judges are appointed) the counter-majoritarian dilemma is a moot point. In this scheme, the risk that courts would be totally out of line vis-à-vis the majority of the population is ill-founded<sup>384</sup>. In addition, other commentators argue that judicial law-making serves as the last resort for individual rights often disregarded by political majority. Instead of adopting a ‘counter-majoritarian dilemma’ approach, the non-majoritarian perspective is conceived as a structural feature of democratic regimes.

Accordingly, supreme courts are perceived as one of the main instrument of democracy to preserve fundamental rights. Those who support this idea underline how in modern constitutional democracy the non-majoritarian attitude of courts is

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<sup>382</sup> R. W. BENNETT, *Counter-conversationalism and the sense of difficulty*, in *Northwestern University Law Review*, vol.95, n.3, 2001, (pp. 845-906), p. 848.

<sup>383</sup> A. M. BICKEL, *Ibid*, 1986; R. DWORKIN, *Ibid*, 1982.

<sup>384</sup> According to Ackerman, courts are able to achieve changes in constitutional understandings only when they have a supporting mobilized majority behind them. In between these ‘constitutional moments’, an ‘ordinary’ form of politics prevails, and courts are relegated to the mundane business of consolidating the ‘momentous’ changes and integrating them with what had transpired before. B. ACKERMAN, *We the People: Volume 2: Transformations*, Harvard University Press, Cambridge, 2000, pp.10 ss.

inherently associated with the democratic necessity of enhancing the scope of fundamental rights despite the mood of political majority, thus going beyond the idea that legislative enactment is always needed to acknowledge changes in society<sup>385</sup>.

In other words, in describing *constitutional democratic systems*, while the ‘counter-majoritarian dilemma’ puts emphasis on the word ‘*democratic*’, the ‘non-majoritarian attitude’ concentrates on the word ‘*constitutional*’, thus solving the problem of legitimacy in judicial law-making within the normalcy of constitutional checks and balances. In addition, at least by examining what has emerged from the comparison made in chapter I, it seems evident that when the issue of same-sex unions has been raised, judges has not attempted to substitute the legislator; conversely, they have reminded the legislative power, by acknowledging the existence of a duty to recognize, its duty to intervene.

## **2. Constitutionalism**

After having analyzed where the process of judicial law-making finds its justification, it now necessary to understand in which theoretical frame constitutional courts have been enshrined, i.e. where their legitimacy comes from.

Democratic regimes encompass a series of different mechanisms and institutions aimed at preserving the ‘civic cohabitation’ of several individuals’ and groups’ social instances<sup>386</sup>. Although interests in society might compete for their establishment as

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<sup>385</sup> G. GENTILI, *A “Worldwide Rights’ Culture”: A comparative perspective on transjudicial communication, counter-majoritarian difficulty and same-sex marriage*, Working Paper presented at the International Conference Equality and Justice, LGBTI Rights in the XXI century, Florence 12-13 May 2011.

<sup>386</sup> As has been argued by Whitehead, “democracy has some indispensable components without which the concept would be vacuous”. However those components are not stagnating and can be differently

social and legal norms, the democratic structure allows this competition to be conducted within a given set of rules. Liberal polities are thus constructed following the bedrock of separation of powers. In very general terms the legislative is in charge of making laws, the executive implement them through its administrative branches, and the judiciary applies them in case of disputes.

There exists no accepted definition of ‘democracy’ since in both political science and legal doctrine a number of different explanations might be associated with the phenomenon ‘democracy’<sup>387</sup>. However, democracy in its Greek etymology *demokratos* means ‘the people rule’<sup>388</sup>. In the modern idea of democracy, fundamental rights and their protection have also become one the relevant elements to classify a regime as a democratic one<sup>389</sup>.

Therefore, participation, the protection of fundamental rights, and the separation of powers represent the main features for a democratic regime. Forms of participation are then regulated and developed through political institutions able to collect social instances and bring them into the democratic process of elaboration of the legal provisions.

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arranged. One of such components is elections. Many political scientists have also regarded democracy as a system where the “most powerful collective decision makers are selected through fair, honest and periodic elections” (S.P.Huntington). This electoralist approach has found many followers, especially before the 1990s. Further on the scholars of democracy have started including features corresponding to the established industrial democracy, which entails certain political, economic, and social features associated with social rights and the idea of welfare. See, L. WHITEHEAD, *Democratization, Theory and Experience*, Oxford University Press, Oxford, 2002, p.20; S.P. HUNTINGTON, *The Third Wave: Democratization in the Late Twentieth Century*. University of Oklahoma Press, Norman, 1991, p.7.

<sup>387</sup> According to Dahl, democracy (ideally) is a form of government that provides opportunities for: 1) effective participation; 2) equality in voting; 3) gaining enlightened understanding; 4) exercising final control over the agenda; 5) inclusion of adults. R. DAHL, *On Democracy*, Yale University Press, New Haven, 1998, p. 38.

<sup>388</sup> D. HELD, *Models of Democracy*, Polity Press, Oxford, 1987, p.2.

<sup>389</sup> A. J. LANGLOIS, *Human Rights without Democracy? A Critique of the Separationist Thesis*, in *Human Rights Quarterly*, vol. 25, n° 4, 2003, p.1019.

The democratic process of legislating needs to be built according to a predefined set of rules in order to provide legitimacy to potential outcomes deriving from the elaboration at institutional level of individuals' or groups' interests. The perception of legitimacy stems from the recognition of a 'common frame' around which each and every social instance is formed, discussed, and eventually rejected or developed as a new legal instrument responding to need of a social claim. This 'common frame' is provided by the constitution. This 'fundamental norm' identifies: principles and fundamental rights; the separation of powers and its institutionalization; the functioning of democratic mechanisms through procedures legally predefined.

In this context, it might seem that participation would play the key role in ensuring that societal demands are addressed properly. As long as electoral systems provide for the possibility of changing majority, and 'the people' is entitled to decide who will govern, there should be no concern. Nonetheless, in the contemporary debate about democracy and fundamental rights it is accepted that basic constitutional guarantees are not *per se* sufficient.

As in the case of minority groups, it is possible that some groups' interests are marginalized if the governing majority is not willing to deal with them. It is better to clarify that the reference to minority in this context is not meant to refer to an electoral minority (e.g. a potential parliamentary opposition which might become a majority the next electoral turn), but instead it indicates a social group whose members are numerically unable to create a political majority. In this case, within democratic regimes constitutions provide means of protection through institutional mechanisms aimed at promoting and protecting minority groups' interests (e.g. affirmative action).

However, despite those mechanisms constitutionally constructed for those belonging to specific minorities, there is a number of social instances which could be left apart by political parties, and thus disregarded and never addressed by the governing majority, despite changes in the political majority over the time. In this case, since as underlined above, the protection of fundamental rights remains an essential feature of democracy, the role of the constitutional judge has become more and more important in the interpretation and *de facto* application of fundamental rights through case law. Supreme courts (have) play(ed) in this context a specific role of protecting, even irrespective of the will of the majority (nonmajoritarian attitude), the rights of those who are unable to bring their claims directly to the legislative through elections.

LGBTI people's rights have often been addressed to constitutional courts in the lack of a political will to approach their claims. As shown in this research in chapter I, supreme courts have been repeatedly asked to investigate the meaning of equality in relation to LGBTI's rights, and provide a solution for discrimination suffered by homosexuals. The ECJ's cases of *Maruko* to *Römer* can provide a good example (*see*, chapter I, *section 3.2.*).

To do so, it is necessary to investigate the meaning of constitutionalism, i.e. the process leading to the elaboration of contemporary democratic constitutions<sup>390</sup> and

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<sup>390</sup> Western democratic countries are all characterized by the fact of possessing a written constitution. One exception is represented by the United Kingdom which does not have a written constitution but it is nonetheless characterized by a set of law and principle with constitutional character. In addition, in 2005 in the United Kingdom was established a Supreme Court whose task is also to verify whether primary legislation compatible with the rights contained in the European Convention on Human Rights (the Court cannot overturn primary legislation, but in case it declares incompatibility with the ECHR,

the establishment of those organs, namely constitutional courts, whose competence is to preserve a deformation of the constitutional order and ensure the protection of fundamental rights as enshrined in the constitution through their ‘evolving’ interpretation over the time. Constitutionalism is usually approached from a historical, philosophical, political, and legal perspective since this phenomenon can be observed historically, noting how its evolution has been influenced by the socio-political and cultural environment in which it developed.

For this reason, providing a comprehensive explanation of constitutionalism able to explain exhaustively its theoretical complexity through the investigation of the influence of each discipline mentioned above would be extremely arduous and would constitute a separate analysis. However, to provide the necessary theoretical background explaining the context in which supreme courts have been created and now operates, thus ‘grasping the structure’ of the speculative frame leading to their establishment, it is possible to focus narrowly on some specific theoretical points developed in the western philosophical, political, and legal tradition<sup>391</sup>.

Simplifying at the extreme, the consequences in the structure of contemporary democratic constitutional orders – deriving from the development of constitutionalism – can be identified by observing how constitutional orders all posses: (1) an autonomous public sphere, i.e. politics is secularized and distinct from religion; (2) citizenship is the premise for being part of society, and from citizenship

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this declaration [section 10 of the Human Rights Act 1998] allows ministers to amend the legislation by statutory instrument to remove the incompatibility).

<sup>391</sup> Since this research is concerned with those legal developments occurring in the European Union, both at national and supranational level, no reference is made to other constitutional tradition, e.g. the process leading to the adoption of constitutions in the Islamic world.

stems the set of rights an individual is entitled to<sup>392</sup>; (3) fundamental rights are those values around which the collectivity recognizes itself; the task of protecting these rights is attributed to autonomous organs, usually a constitutional court<sup>393</sup>; (4) the exercise of power is legitimate because it stems from ‘the will of the people’ and it is lawful to the extent it respects the procedural rules established according to the constitution; (5) the separation of powers in a system of checks and balances integrated in the constitution<sup>394</sup>.

These features might be observed, with some distinctions, in all western countries, and in particular in those countries where this research (chapter I) focuses its attention when considering the case law related to same-sex unions legal recognition in a comparative perspective. These structural constitutional characteristics represent the result of the influence of two main schools of philosophical thoughts, namely the Anglo-Saxon (common law) and the continental (civil law) constitutional traditions. These two competing ideas of the state and the citizen have been the most influential ‘theoretical engine’ for the elaboration of modern and contemporary constitutions.

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<sup>392</sup> The recognition of some basic rights is also granted to non-citizens in contemporary democracy. Indeed, it is now accepted that aliens are also entitled to some fundamental rights, i.e. the right to life, since they are considered firstly as individuals.

<sup>393</sup> The declaration of unconstitutionality of legal provisions is regulated differently from country to country. There is usually a distinction to be made between common law and civil law systems. In the former case it is possible for ordinary judges to declare the constitutionality of a provisions. In the second case there is an *ad hoc* organ, i.e. a Constitutional Court. Where there exist a Constitutional Court judicial review might intervene before the entrance into force of a law (e.g. in France with the *Conseil Constitutionnel*) or after. In addition, while in some countries, e.g. Italy, ordinary judges cannot directly deal with the issue of constitutionality, in others, as in the United States there is a mixed model of judicial review since both ordinary judges and the Supreme Court might scrutinize the compatibility of a statute with the constitution. For a comprehensive explanation of each of the models of judicial review, see G.DE VERGOTTINI, *Diritto costituzionale comparato*. Cedam, Padova, 2010.

<sup>394</sup> A. BARBERA, Le basi filosofiche del costituzionalismo, in *Le basi filosofiche del costituzionalismo*, Laterza, Milano, 2005, pp.4-5.

The analysis of western constitutions shows indeed how constitutional designs adhere to one or the other conception or even to both.

Both conceptions refer to the theory of ‘the social contract’<sup>395</sup>, but their understanding of the reasons leading to the formation of the social contract and of its contents is different. These differences have led to a different elaboration of the consequences of this contract, thus, consequently to a different constitutional design.

One of the main scholars of the Anglo-Saxon tradition is John Locke. In the 17<sup>th</sup> century he became one of the most influential philosophers of his time and his conception of the individual created the basis for elaborating the idea that States exist to safeguard human beings from arbitrary abuses. Unlike Thomas Hobbes who assumed that human beings needed absolute monarchy to govern their malicious attitude toward each other, Locke believed that human nature is characterized by reason and tolerance<sup>396</sup>. Like Hobbes, Locke believed that human nature allowed men to be selfish. In a natural state all people were equal and independent, and everyone had a natural right to defend his ‘life, health, liberty, or possessions’<sup>397</sup>.

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<sup>395</sup> The ‘social contract’ is an intellectual construct used to explain how society has been created in history and how the process of attributing power to governments has occurred. According to theorists of the social contract, the process leading to the formation of the contract was characterized by mutual consent of contractors (individuals at the state of nature). The aim of this agreement was to create a set of common rules, accepting corresponding duties, in order to prevent violence and harms in society. Social contract theory played an important role in the emergence of the idea that political authority must be derived from the consent of the governed. See, D. BOUCHER, P. KELLY, *The Social Contract from Hobbes to Rawls*, Routledge, New York, 1994.

<sup>396</sup> See, J. LOCKE, *Lettera sulla tolleranza*, Laterza, Bari-Roma, 2008.

<sup>397</sup> The idea of natural rights has been elaborated since Thomas Aquinas, then reconstructed by Grotius, Pufendorf, Hobbes, Locke, and all the other philosophers conceiving fundamental rights as grounded not in rationality but in nature. On this point, see, A. ANDREATTA, A. ENZO BALDINI, *Il pensiero politico dell'età moderna*, Utet, Torino, 1999; B. CONSTANT, *La libertà degli antichi paragonata a quella dei moderni*, Liberilibri, Macerata, 2001; M. D'ADDIO, *Storia delle dottrine politiche*, E.C.I.G., Genova, 2002; B. TIERNEY, *L'idea dei diritti naturali, legge naturale e diritto canonico*, in *Rivista di Studi Politici Internazionali*, vol. 71, no 1, (2004), (pp.1150-1625); F. TODESCAN, *Compendio di storia della filosofia del diritto*, Cedam, Padova, 2009.

According to Locke the state must protect its citizens, and in case this task is not performed or governmental authorities abuses of their powers, revolution is a right individuals should exercise<sup>398</sup>. In accordance with the Lockean idea of the state, Montesquieu, Hamilton, Madison, Jay, and Tocqueville subsequently elaborated their theorization of the liberal state. Tocqueville in his famous *De la Démocratie in Amérique*, firstly emphasized how putting too much emphasis on parliamentarism and the majoritarian principle would have meant to disregard the risk of a new kind of authoritarianism represented by the dictatorship of the majority<sup>399</sup>. Thus, subsequently the liberal state was thought and designed bearing in mind that individuals are entitled to some basic rights exercised through their representatives and protected by the separation of powers. Parliamentarism, the majoritarian principle, the separation of powers, and in those cases such as the US by adopting federalism, have become the main features of this new idea of constitutional structure.

While the Anglo-Saxon philosophical tradition has influenced the United States and the British legal systems<sup>400</sup>, in continental Europe constitutionalism has been characterized mainly by the theoretical work of Jean-Jacques Rousseau. Although Rousseau shares with Locke and Hobbes the contrattualistic nature of the State, their understanding of the reasons bringing together individuals for the stipulation of the social contract and its results are different.

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<sup>398</sup> N. BOBBIO, *L'età dei diritti*, Torino, Giapichelli, 1997, pp.60-61.

<sup>399</sup> See S. CHIGNOLA, *Fragile cristallo. Per la storia del concetto di società*, Editoriale scientifica, Napoli, 2004.

<sup>400</sup> The United Kingdom also adheres to the typical Rousseauian conception of supremacy of the parliament. Evidences can be found in the impossibility for the judiciary, also for the newly created Supreme Court to overturn primary legislation. See *note 6*.

In Rousseau's theory, in the state of nature individuals were isolated and dispersed without a structured community and they freely decided to create a community without abandoning their freedom for the sake of their wellness. In Rousseau, the social contract is not a '*pactum subjectionis*' as in Hobbes but rather a '*pactum unionis*'. In this scheme, individuals are not separated from the State. The community, its members as citizens are the nation. Thus, in Rousseau the separation between State and citizens is overcome in favor of a vision that perceives the social contract as the moment in which an individual gives up his rights as a *uti singulus* and receive them back as a *utis civis*<sup>401</sup>.

Democracy is established as a direct form of participation since each individual exercised his right to participate directly through the '*volonté générale*'. The 'general will' is not the sum of each individuals' will, but it is something transcendent that exists within each and every human being<sup>402</sup>. The law is the concrete outcome of the general will to which all individuals participate. This postulate has been crystallized in the Declaration of the Rights of Man and of the Citizen of 1789. Art.6 of the Declaration reads: '*La Loi est l'expression de la volonté générale. Tous les Citoyens ont droit de concourir personnellement, ou par leurs Représentants, à sa formation. Elle doit être la même pour tous, soit qu'elle protège, soit qu'elle punisse. Tous les Citoyens étant égaux à ses yeux, sont également admissibles à toutes dignités, places*

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<sup>401</sup> F. TODESCAN, *Etiam si Daremus, Studi Sinfonici sul Diritto Naturale*, Cedam, Padova, 2003 p.199.

<sup>402</sup> J. SWENSON, *On Jean-Jacques Rousseau*, Stanford University Press, Stanford, 2000, p. 162.

*et emplois publics, selon leur capacité, et sans autre distinction que celle de leurs vertus et de leurs talens*<sup>403</sup>.

In this model, the parliamentary assembly plays the key role and the separation of powers is organic to the functioning of the system rather than representing a way of preventing an authoritarian drift. Government and judiciary are considered subordinate entities of the State vis-à-vis the parliament, i.e. a government is in charge as long as the parliament confers its trust, and judges must apply the law and cannot interfere with the legislative.

The underlying risks related to the general will doctrine resulted evident after the French revolution where from the aim of creating a society of equal citizens, France went through the period of the Napoleonic Empire.

From the premises of contractualism under both the Anglo-Saxon and continental traditions of the 17<sup>th</sup> and 18<sup>th</sup> century, the philosophical elaboration concerning constitutionalism has developed in the 19<sup>th</sup> and 20<sup>th</sup> century with the fundamental contribution of Hans Kelsen. This prominent scholar, who personally participated in the elaboration of the Austrian constitution (1920), conceived the constitution as the ‘top’ and the ‘centre’ of a legal order<sup>404</sup>. A fundamental norm encompassing those values typical of a given political community (written down in the text as of fundamental rights), and ‘the zenith’ of the legal order since no legal provision might

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<sup>403</sup> This conception seems to be all-comprehensive since no one can be excluded from the formation of the general will because the general will stems from everyone. However, as underlined by Hannah Arendt in her *‘The Origin of Totalitarianism’* this theoretical frame has supplied the intellectual basis for the formation of totalitarian regimes. *In concreto*, on the premise that no one could oppose the general will, once a majority has established its rule, opposing it means contrasting the general will. See, H. ARENDT, *Le Origini del Totalitarismo*, Einaudi, Torino, 2004.

<sup>404</sup> H. KELSEN, *I fondamenti della democrazia*, in H. KELSEN, *La democrazia*, Il Mulino, Bologna, 1981, p.154

contrast with constitutional provisions. In this pyramidal scheme hierarchy governs the legal system from the top to the bottom.

Kelsen's main concern was to design a system in which the issue previously underlined by Tocqueville, that is majoritarian despotism, could be overcome by introducing a new constraint on the exercise of power by representative bodies, namely a constitutional judge. In contrast with Schmitt<sup>405</sup>, who rejected the idea of a constitutional court as guardian of the constitution against the will of political majorities, Kelsen argued that a democratic system needs a constitutional judge. In his view, since it would be unlikely to expect impartiality by a derivation of a majority (e.g. parliament or government), a judicial body is better equipped to provide an impartial decision over issue concerning legitimacy and constitutionality of institutional acts<sup>406</sup>.

Given that the number of socio-political problems might conduct to institutional conflicts on 'whether', 'when', and 'how' it is appropriate to address them, the constitution represents that device able to prevent or resolve clashes between competing identities and interests. In this environment, a supreme court plays a crucial role in defining, limiting, or prompting the answers of representative authorities. Indeed, as Rosenfeld observes, there would be no reason to impose a constitution if a society was peacefully homogeneous so that interests are the same

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<sup>405</sup> See, C. SCHMITT, *Constitutional Theory*. JEFFREY SEITZER, trans., London, Duke University Press, 2007; M. NICOLETTI, *Trascendenza e potere. La teologia politica di Carl Schmitt*, Morcelliana, Brescia, 2002.

<sup>406</sup> H. KELSEN, *La garanzia giurisdizionale della costituzione*, in H. KELSEN, *La giustizia costituzionale*, Giuffrè, Milano, 1981, p.277.

for each and every member of society<sup>407</sup>. The case of LGBTI s' claims for legal recognition is emblematic in this context. They represent a social minority since homosexual sexual orientation is typical of only a part of the population which is not the majority. Thus, their demands for social inclusion, welfare benefits, etc., might be easily ignored by politics as far as their electoral power is relatively weak. In this context, the possibility for homosexual people to vehicle their claims through political representation does not ensure that their fundamental rights are firstly recognized and subsequently protected.

### **3. Constituent power**

History of constitutionalism might help understanding the mechanisms of contemporary democracy and explaining the theoretical frame giving birth to the creation of supreme courts. However, in order to comprehend more precisely the role played by judicial review, it is also of crucial importance to understand the concept of 'constituent power'<sup>408</sup>. This term is used in legal doctrine to indicate 'the momentum' in which a constitution has been created. Its relevance for the elaboration of this research stems from the fact that when a constitutional judge interprets constitutional values in light of social changes, it should do so without betray the 'spirit of the constitution', i.e. bearing in mind what the constitution stands for. This operation

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<sup>407</sup> M. ROSENFELD, *Modern Constitutionalism*, in M. Rosenfeld (ed.), *Identity, Difference, and Legitimacy, Theoretical perspectives*, Duke University Press, London, 1994, p.5.

<sup>408</sup> G. MORBIDELLI, *Lezioni di Diritto Pubblico Comparato, Costituzioni e Costituzionalismo*, Monduzzi, Bologna, 2000, pp.90-96.

implies the recognition of an intrinsic meaning enshrined in the constitution<sup>409</sup>. It follows, that the stronger is conceived the relation between the constitution and the constituent power, the lesser is allowed for the possibility of supreme courts to reinterpret the meanings of its provisions. The German constitutional court – in the proceeding against the parliamentary act on the Lisbon Treaty – had to occasion to clarify how the ‘...*the constituent power of the Germans which gave itself the Basic Law wanted to set an insurmountable boundary to any future political development. Amendments of the Basic Law affecting the principles laid down in Article 1 and Article 20 of the Basic Law shall be inadmissible (Article 79.3 of the Basic Law). The so-called eternity guarantee takes the disposal of the identity of the free constitutional order even out of the hands of the constitution-amending legislature. The Basic Law thus not only assumes sovereign statehood but guarantees it*<sup>410</sup>’.

Questions regarding the nature of the constituent power and its relation with the textual dimension of a constitution lead to different responses according to different theoretical perspectives. According to contrattualists as Locke or Rousseau, in the moment the social contract has been stipulated it is possible to perceive the constituent power. Thus, according to this view, the power to make a constitution should be the power to create a political and legal order *ex nihilo*.

On the contrary, the observation of historical developments at socio-political level shows how legal orders have undergone transformations after the collapse of previous

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<sup>409</sup> See, F. RIMOLI, *Stato di eccezione e trasformazioni costituzionali: l'enigma costituente*, in [www.associazionedeicostituzionalisti.it](http://www.associazionedeicostituzionalisti.it), (2007); A. PACE, *Potere costituente, rigidità costituzionale, autovincoli legislativi*, Cedam, Padova, 2002.

<sup>410</sup> BVerfG, 2 BvR 182/08, Judgment delivered on 30 June 2009, para.216.

systems or subsequent to a series of tumultuous events (e.g. the French revolution, the Second World War). A revolution as well as a war might pose the basis for the emergence of the constituent power *ex novo*, thus leading to the elaboration of a new constitutional text.

In democracy, the legitimacy of the constituent power resides in the people's will. The idea, typical of natural law theories, that the origin of political orders and fundamental rights was an innate process of recognition of a metaphysical truth (revealed by God), is abandoned in favor of the contemporary assumption that the constituent power is a moment of rational elaboration. In other words, the constituent power represents the secularized version of the divine power to create *ex nihilo*<sup>411</sup>. Therefore, the constituent power is an extraordinary moment of making fundamental choices. However, the main issue posed by the idea of constituent power is related to what it represents.

Usually, when referring to constituent power, concepts such as 'people' or 'nation' are used as preliminary reference to indicate 'who' this power legitimately represents. Both references seem *prima face* overlapping, i.e. the people forms the nation, the nation is formed by the people. In addition, both terms endorse a rhetorical construct that gives constituent power a strong resistance *vis-à-vis* possible ideological conflicts: if everyone is part of the nation or part of the people, the constituent power is all-in-all-comprehensive and the process of drafting a constitution is legitimate by definition.

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<sup>411</sup> U. K. PREUSS, *Constitutional Powermaking*, in M. ROSENFELD (ed.), *Identity, Difference, and Legitimacy, Theoretical perspectives*, Duke University Press, London, 1994, p.144.

Nonetheless, ‘people’ and ‘nation’ are two distinct words and this difference is not only semantic, but it is linked to the socio-political environment in which these words are used. ‘Nation’ indicates a plurality of individuals whose similarities (the sense of belonging) might be understood in terms of ethnicity or in terms of residency on a given territory: ‘we are all English’ or ‘we all were born and live in Italy’. In the first case, ‘nation’ refers to communalities (ethnicity, religion, language) among individuals and this is the linking element. The constituent power expresses the will of a specific social group and is legitimate because include each one equally. The nation is thus a sort of pre-political community whose constitutive elements are represented by race, language, religion, culture, history, and the like<sup>412</sup>.

In the second case, ‘People’ is the group individuals all belong to, thus the linking element is the territory. Citizenship is the ‘belonging adhesive’. The concept of people in this perspective covers civil society as a whole, i.e. individuals despite their ancestral origins are considered equally part of the *demos*. There is no need for a homogenous collectivity and differences blur within the constituent power, since the system of values and rules are decided according to a true spirit of cooperation regardless of individuals’ peculiarities or groups’ interests.

In this model, the constituent power envisages a true commitment toward the creation of a fair social order. As in Rawls theorization<sup>413</sup>, individuals in this context pursue their goal of constituting a society through a process of bargaining and

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<sup>412</sup> E. J. HOBBSBAWM, *Nation and Nationalism since 1780, programme, myth, reality*, Cambridge University Press, 1990, p.14-45.

<sup>413</sup> See, J. RAWLS, *Theory of Justice*, Belknap Press of Harvard University Press, Cambridge, reprinted version, 1999, (1971).

compromises which excludes arguments of self-interest to favor an elaboration of shared principles<sup>414</sup>.

In all cases, the constituent power represents the moment in which a polity decides its future by designing a functional constitutional order able to regulate and maintain the social order. In this respect, another issue to be addressed regards the relation between the constituent power and the constitution. In fact, constitutions are subjected to both amendments and judicial reinterpretation of their provisions, thus between the moment of drafting and subsequent periods the constitution might undergone through changes without the necessity of resorting the constituent power, but by using the amending power as provided by the constitution itself<sup>415</sup>.

However, in the former case, as long as the legislator acts according to the procedures and within the limit set in the constitution, there should be no issues to be raised. Instead, in the latter case, when a supreme court interprets constitutional principles in light of societal changes, the constituent power, representing the ‘spirit of the constitution’, could work as a constraint on the judicial activity of ‘modernizing principles’<sup>416</sup>.

In this context, courts cannot betray the spirit of the constitution. Human rights provisions might indeed pose a challenge to judicial review, since they possess a natural *vis expansiva* which allows them to be reinterpreted beyond their original meanings, i.e. ‘permitting definitions’ that would have been unconceivable at the time

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<sup>414</sup> J. ELSTER, *Constitutionalism in Eastern Europe: An Introduction*, in *University of Chicago Law Review*, vol.58, n.2, 1991, (pp.447-482), p. 447.

<sup>415</sup> M. LOUGHLIN, N. WALKER, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, in *International Journal of Constitutional Law*, 2008, vol. 6, n.2, (pp 358-370), p. 362.

<sup>416</sup> U. K. PREUSS, *Ibid*, p.156.

the constitution was written<sup>417</sup>. Thus, either the constituent power is considered mediated forever in the constitution and confined in its historical frame, or it might create clashes whenever it is necessary to modernize the meanings of constitutional texts.

The role of a supreme court in this framework of reshaping meanings maintaining the spirit underlying the constitutional order is of crucial importance. The equilibrium judicial review is able to preserve represents a safeguard against the possibility of collapsing for the legal system. This aspect might sound in contrast with a purely procedural understanding of democracy which conceives representation (through the legislator) as the main guarantee for the safeguard of individuals' interests.

However, as underlined above, a democratic regime is not 'by default' able to accomplish its duty of addressing individuals' demands for protection, especially in the case of minority groups. In a number of occasions, an electoral majority might disregard 'the others' interests' without infringing democratic rules<sup>418</sup>. A constitutional court, acting as an impartial guardian of those values contained in the constitution can actually provide, through judicial law-making, the necessary protection for those who are historically in a vulnerable position and are unable to raise their claims through the electoral system.

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<sup>417</sup> The attitude of Courts in the light of situations not envisaged by the drafters of the Constitution, resulting from the inevitable evolution of societies and their changing ethical standards, has led to consider new techniques of interpretation such as the 'living instrument' approach, which acknowledges that fundamental rights are subjected to reinterpretation which gives constitutional text the possibility to undergone modernization without requiring formal amendments. The living instrument doctrine has firstly been adopted by the European Court of Human Rights. For an explanation of the living instrument doctrine, see, A. MOWBRAY, *The Creativity of the European Court of Human Rights*, in *Human Rights Law Review*, 2005, vol.5, n.1, (pp. 57-79).

<sup>418</sup> R. TONIATTI, *Minoranze e minoranze protette: modelli costituzionali comparati*, in T. BONAZZI, M. DUNNE (eds), *Cittadinanza e diritti nelle società multiculturali*, Il Mulino, Bologna, 1994, p.275.

In opposition to this reasoning, some scholars argue that supreme courts should restraint themselves in the context of ‘values-reshaping-meanings’, and focus mainly on maximizing participation<sup>419</sup>. In other words, judicial review should favor an all-inclusive representation within the political arena, so that participation is able to ensure that each individual’s interest is heard and possibly addressed.

In this model there is no need for balancing different interests because the system guarantees *a priori* individuals’ positions (X is involved in the decision-making process thus Y is not left alone to decide marginalizing X). Therefore, the role of constitutional judges becomes collateral to the entire system and it is functional only to extent it is able to ensure participation<sup>420</sup>. The same logic is applied by those who conceive a democratic regime as a ‘free market of ideas’. As long as the market is free ideas will compete fairly<sup>421</sup>.

*Per contra*, these arguments seem to underestimate that due to the enormous numbers of possible claims a collectivity might express, in order to be sure that each of them is heard, it should be preliminarily defined what is the optimal, or at least sufficient, degree of participation. In addition, even in a ‘free market of ideas’ there will always be majoritarian ideas prevailing over minoritarian ones. Since fundamental rights are not constructed on the basis of belonging to a majority, but they define the spectrum of rights individuals are entitled to as human beings, representation can ensure that most of the claims are discussed, but some of them

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<sup>419</sup> See, J. H. ELY, *Democracy and Distrust: A Theory of Judicial Review*, Harvard University Press, Cambridge, reprinted version in 2002, p.45ss.

<sup>420</sup> Y. DAWOOD, *The Antidomination Model and the Judicial Oversight of Democracy*, in *The Georgetown Law Journal*, vol.96, n.5, 2007, (pp. 1411-1485), p.1422.

<sup>421</sup> S. ISSACHAROFF, R.H. PILDES, *Politics as Markets: Partisan Lockups of the Democratic Process*, in *Stanford Law Review*, vol.50, n.3, 1998, (pp.643-717), p. 645ss.

would inevitably be ignored. Thus, an *a posteriori* remedy would still be needed to safeguard individuals' rights.

Again, as shown in this research, the struggle of LGBTI people for their rights is emblematic. Homosexuality has always existed but the right not to be discriminated in relation to sexual orientation has been achieved in a number of cases through jurisprudential elaboration of the principle of equality. In this sense the ECtHR's case law on sodomy law might provide a good example (*see*, chapter I, *section 2*). In addition, the history of the 'rainbow movement' since the 1970s shows how judicial review has played in this field a strong role of 'driving politics' toward a new understanding of LGBTI rights as fundamental rights<sup>422</sup>.

#### **4. Constituent power and the EU: what is missing?**

The Lisbon Treaty has represented a step toward the constitutionalization of the EU system, though the process of elaboration of its contents has been characterized by a strong political commitment at national level aimed at avoiding the definition 'EU constitution'. Indeed, the decision to call this new institutional device 'the Treaty of Lisbon' instead of adopting the word 'EU Constitution', the adoption of protocols (opting out clauses), and the elimination of symbolic references to the constitutional nature of the EU (as it was in principle when the European Convention was appointed after the Laeken European Council in December 2001<sup>423</sup>), could drive to the

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<sup>422</sup> F. HERTZ, E. DOSKOW, *Making it Legal, A guide to Same-Sex Marriage, Domestic Partnerships and Civil Union*, Nolo, Berkley, 2009, pp.6-8.

<sup>423</sup> The Treaty establishing a Constitution for Europe (TCE), (commonly referred to as the European Constitution or as the Constitutional Treaty), was an unratified international treaty intended to create a consolidated constitution for the European Union (EU). It would have replaced the existing European

conclusion that this is ‘just another international treaty’. However, as many authors in legal doctrine suggest, the Lisbon Treaty does push the entire EU system toward the elaboration of a proper constitutional system<sup>424</sup>.

Certainly, an analysis of the Lisbon Treaty through the lens of classical constitutional law theory cannot be very helpful to understand the importance of this new European development.

Instead, by adopting the theoretical lens of ‘*multilevel constitutionalism*’ it is possible to conceive the constitutional nature of the Lisbon Treaty, thus its relevance for future developments in the direction of a stronger European integration<sup>425</sup>. In fact, the EU institutional architecture developed by this new treaty, which emends the previous TEU and TFEU, follows the ideological path aimed at elaborating a greater integration among MSs. A path that has been also delineated by the creative contribution of the ECJ in the elaboration of the doctrine of direct effect and supremacy of EU law (*see*, chapter I).

While constitutionalism places emphasis on the relations between governed and governing within the State, and justifies the legitimacy of the constitutional system in

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Union treaties with a single text, given legal force to the Charter of Fundamental Rights, and expanded Qualified Majority Voting into policy areas which had previously been decided by unanimity among member states. The Treaty was signed on 29 October 2004 by representatives of the then 25 EU member states. It was later ratified by 18 member states, which included referenda endorsing it in Spain and Luxembourg. However the rejection of the document by French and Dutch voters in May and June 2005 brought the ratification process to an end.

<sup>424</sup> J.H.H. WEILER, *La trasformazione dell'Europa*, in F. MARTINES (ed.) *La Costituzione dell'Unione Europea*, Bologna, Il Mulino, 2003, pp. 33 ss; A.A. CERVATI, *Integrazione europea e valori costituzionali comuni*, in *Per uno studio comparativo del diritto costituzionale*, Torino, Giappichelli, 2009, pp.233 ss.

<sup>425</sup> A. RUGGERI, *Una Costituzione ed un diritto costituzionale per l'Europa unita*, in P. COSTANZO, L. MEZZETTI, A. RUGGERI (eds), *Lineamenti di diritto costituzionale dell'Unione Europea*, Giappichelli, Torino, 2010, pp.1 ss; E. CASTORINA, *Diritto costituzionale comune e diritto costituzionale europeo: il problema dell'identità dell'Unione*, in *Riflessioni sul processo costituente europeo*, Giappichelli, Torino, 2010, pp. 63 ss.

light of the democratic process of formation of constitutions – i.e. the constituent power is legitimate because it represents citizens' will, thus it expresses those national values around which citizens recognize their identity – *multilevel constitutionalism* is detached from the classic idea of the State, meant as the only subject able to perform each and every task in a globalized and interdependent world.

As Harbemas has pointed out, contemporary States are unable to fulfill certain tasks of common interest. In his view, the so called 'postnational constellation' imposes a changing in the understanding of governance and constitutional systems, since the preservation of liberty, peace, and citizens' welfare, require cooperation among States<sup>426</sup>.

The EU is a *sui generis* organization that tries to respond to contemporary issues which cannot be dealt with directly and autonomously by one single State. As suggested by Pernice: '*multilevel constitutionalism* is meant to describe and understand the ongoing process of establishing new structures of government complementary to and building upon – while also changing – existing forms of self-organization of the people or society'<sup>427</sup>. The main distinction to be made – according to those who support *multilevel constitutionalism* theory – between classical constitutionalism and *multilevel constitutionalism*, rests on the reasons behind the decision to create supranational institutions (e.g. a multilevel structure beyond the State). In fact, while constitutions are usually created under the empowerment of representatives of the groups of people concerned to negotiate a

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<sup>426</sup> J. HARBEMAS, *The Postnational Constellation: Political Essays*, MIT Press, 2001, pp. 20 ss.

<sup>427</sup> I. PERNICE, *Multilevel constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited?*, in *Common Market Law Review*, vol.36, 1999, p.703,

draft that is later submitted to people ratification in order to regulate intra-State relations and protect fundamental freedoms, European Treaties have been adopted and developed to regulate inter-States relations, in order to pursue (only) certain common goals.

Thus, the State and the supranational organization are organized following the criterion of competence, i.e. some of the tasks previously performed at national level are transferred to the supranational one. In other words, the relation between European law and national law is not hierarchical but functional (e.g. complementarity), i.e. the former regulates – ‘commonly’ – those matters MSs have decided that should be elaborated at EU level and then applied in each MS uniformly (e.g. reciprocity). The uniform application of both national and supranational law is however guaranteed by national judicial actors (and by the ECJ if called to intervene) since EU law is *de jure* and *de facto* one of the sources of law national authorities must acknowledge.

European citizenship follows this scheme. All MSs’ citizens are both national and EU citizens. EU citizenship is complementary to the national one and provide EU citizens with the possibility to enjoy the liberties of the internal market, and the rule of non-discrimination is applied to all EU citizens in each MS. As EU citizens, individuals might vote at local and European level, they might freely move within the EU, and their rights as EU citizens can be claimed before every national courts. As discussed in chapter I, the possibility to move freely within the EU is applied also to family members, and this, in turn, creates the issue concerning those who are not

recognized as family members (e.g. same-sex partners in those countries where no legislation on same-sex unions is provided by the national legal system)

In this structure, the *Europäische Verfassungsverbund*<sup>428</sup> does not need a direct reference to the concept 'State', national or federal State, since its primary aim is to perform a subsidiary and complementary function in relation to those issues MSs have decided to transfer at the supranational level. In addition, since MSs are constructed according to a democratic constitutional order, the process of transferring competences to the EU is intrinsically legitimate since intergovernmental decisions are supported by national parliaments. Thus, the EU represents a complex constitutional system which is at the same time: (a) united when considering the supremacy of the EU law, the principle of direct effect, and the EU Charter of Rights; (b) pluralistic when considering those matters falling outside the scope of application of EU law, and when looking at the constitutional common traditions of the MSs<sup>429</sup>.

This theoretical approach explains how is thus possible the coexistence of two different and autonomous entities, namely the EU and the MSs which are at the same time independent and interdependent depending on the matters under consideration. The EU Treaties designed this constitutional architecture in a way that it is possible to affirm that a legitimate European constitutional order does exist, though it operates differently from the classical nation-state constitutional paradigm.

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<sup>428</sup> I PERNICE, *Multilevel Constitutionalism in the European Union*, in *European Law Review*, vol. 27, n.5, 2002, pp. 511 ss.

<sup>429</sup> M.L. FERNANDEZ ESTEBAN, *La Corte di giustizia quale elemento essenziale nella definizione di costituzione europea*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 1996, 221 ss.; A. ANZON, *La costituzione europea come problema*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 2000, pp. 629 ss.

Nevertheless, before the entrance into force of the Lisbon Treaty, the establishment of a common system of protection of fundamental rights (which is commonly accompanied by the establishment of contemporary democratic constitutional systems) at the EU level was mainly left in the hands of the ECJ. Its case law has favored the creation of the so called European dialogic judicial system in which the vertical relations (EU-MSs) among Courts are based on the assumption that the ECJ will supervise EU law conformity with fundamental rights as provided for by national constitutions and by EU Treaties (see, next section).

The entrance into force of the Lisbon Treaty and the inclusion of the EU Charter of Rights as a binding legal instrument for the EU system, and the possibility for the EU to accede the ECHR has given a greater emphasis on the constitutional character of the EU itself as an autonomous entity vis-à-vis MSs. As some scholars argue, from a *multilevel constitutionalism* approach, this new formulation of art.6 TEU has provided the legitimation and the natural evolution of the EU as a system governed by the same principles typical of national constitutional orders<sup>430</sup>, though without creating a proper federal State. The issue of the constituent power from an EU perspective is thus mediated by the introduction of the formal recognition of common principles, and by the formal definition of a set of EU rights enjoyed by all EU citizens under the supervision of the ECJ (the constitutional judge of this constitutional order).

In addition, as the Lisbon Treaty confers a greater importance to national parliaments (i.e. according to art.12 TUE, national parliaments contribute actively to

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<sup>430</sup> L. TORCHIA, *Una Costituzione senza Stato*, in *Diritto Pubblico*, n. 2, 2001, pp. 405 ss.

the good functioning of the Union), the lack of democratic representation in the EU seems to be overcome by the possibility of national legislative authority to be involved in the decision-making process. It follows that by adopting the *multilevel constitutionalism* approach, the role of the judiciary in this multilevel architecture, at both the national and supranational level is divided according to their respective competences, and the two levels are to be conceived legitimate since both are framed within a constitutional order.

This theoretical frame helps to analyze the issue of constituent power also from an EU perspective, and seems to solve the issue of judicial legitimacy on the side of the ECJ by giving a constitutional character to the EU. In other words, the same arguments discussed in the previous section concerning the role of constitutional courts within a nation-state, could be considered valid also in relation to the EU. Nonetheless, the *multilevel constitutionalism* theory seems to overstretch the limits of the meaning ‘constitutionalism’ and ignore the lack of a direct link between EU citizens and EU institutions.

As some authors contend, contemporary constitutionalism is strictly associated with the idea of democratic participation and transparency, and the link between governed and governing authorities is of crucial point. On the contrary, *multilevel constitutionalism* seems more focused on procedural aspects, i.e. a syllogism is applied: if decisions are taken intergovernmentally, since governments are democratic, then decisions are democratic. Indeed, by arguing that EU institutions are the results of democratic MSs interactions/decisions, *multilevel constitutionalism*

does not consider the importance of citizens involvement in the formation, elaboration, and acceptance of common European values<sup>431</sup>.

As for the legitimacy of the entire system, the question to be answered remains: who do EU institutions represent? States or citizens?. If the answer is States, then there would be no reason to refer to constituent power since it would be merely a question of international agreements between States. If the answer is citizens, then it would be possible to argue that the constituent power require individuals' participation.

Elements of participation can be observed at the EU level. The EP is indeed elected directly by EU citizens, and citizens might present petitions. However, the EP is still marginal to the functioning of the EU and the intergovernmental nature of the decision-making process is still the main feature of the EU system. In conclusion, this situation, as examined in the next section, might pose a number of problems in relation to the legitimacy of the ECJ, specifically in connection to the possibility to define the meaning of European fundamental rights.

## **5. The legitimacy of the EU multilevel structure of human rights protection**

The analysis of the role of courts in democratic constitutional regimes explains the reasons behind judicial law-making. However, these theoretical approaches when adopted to analyze the EU multilevel system of protection of fundamental rights

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<sup>431</sup> P. SCARLATTI, *Costituzionalismo multilivello e questione democratica nell'Europa del dopo-Lisbona*, in *Rivista AIC*, n.1, 2012, pp.2 ss.

might help understanding the reasoning of judicial decisions at various levels (national, supranational, international).

In order to verify whether the now binding EU Charter of Rights can contribute in prompting new developments in relation to legal recognition of same-sex unions among EU Member States given its normogenetic value, it is necessary to understand ‘theoretically’ and legally how the EU system for the protection of fundamental rights functions. Indeed, the recognition of same-sex unions at national level, in the lack of an EU-harmonized system of mutual recognition between MSs, generates several theoretical problems.

The EU is more than international organization but less than a federal state. As some authors describe it, the EU is a quasi-federal state<sup>432</sup>. A hybrid legal creature, whose different bodies (e.g. Parliament, Commission, ECJ, etc.) resemble those typical of a state, but whose decisional procedures vary (simple majority, qualified majority, unanimity) depending on the subject considered, give alternatively the idea of a ‘Unity’ or the idea of ‘Diversity’. While leaving aside an analysis of the entire EU system, for this research it is necessary to understand how the mechanisms for the protection of rights function.

The European system for the protection of human rights is characterized by a complex multilevel structure: (a) the national level - constitutional courts; (b) the supranational level - the ECJ; (c) the international level - the ECtHR. Despite this differentiation, one should not conceive this seemingly vertical categorization as governed by hierarchical rules. On the contrary, this legal (dis)order represents a

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<sup>432</sup> S. LIEBLE, *Non-Discrimination*, in *ERA Forum*, n.10, 2009, (pp.76-89), p.78.

pluralist system in which the relationships between constituent parts are governed not by legal rules (hierarchy) but primarily by politics, often judicial politics (heterarchy)<sup>433</sup>. In other words, the definition of rights is made by different judicial authorities institutionalized at different level, within and beyond the state<sup>434</sup>.

This system, differently from a constitutional state's order, though organized, it is not constructed according to rules typically applied to constitutional state. At supranational and international level, the institutional architecture does not provide for a 'legislative power', and the system of check and balances is substitute by the self-restraints of judges. Indeed, constraints usually applied to constitutional courts do not apply to the ECJ and the ECtHR.

In order to understand the complexity of the EU scenario it is necessary to analyze how, at different levels, courts understand their role as guardians of fundamental freedoms. Thus, from a system governed by dogmatism, where predefined (constitutional) rules regulate the relationship between different actors, the system seems to move toward an order where 'the criterion of competence' is prevailing over written rules, (e.g., the ECJ is responsible to protect individuals' rights when scrutinizing EU law, while the ECtHR supervise compliance to the ECHR).

National constitutional courts (see, chapter I, section 1) have demonstrated their willingness to comply with their European counterparts' case law (either the ECJ or the ECtHR), though preserving their autonomy as independent institutions.

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<sup>433</sup> N. KIRSH, *Ibid*, p.185; S. DOUGLAS-SCOTT, *A Tale of two Courts: Luxemburg, Strasburg and the growing European Human Rights Acquis*, in *Common Market Law Review*, vol.43, n. 3, 2006, (pp. 629–665), p.630 ss.

<sup>434</sup> See M. DELMAS-MARTY, *Towards a Truly Common Law: Europe as a Laboratory for Legal Pluralism*, Cambridge University Press, translated by N. Norberg, 2002, pp.14ss.

The idea of a dialogic process among jurisdictions in the EU stems from the observation of those interactions occurring between the ECJ and national courts. For instance, the German constitutional court has established the conceptual margins of its ‘judicial relationship’ during these years. Indeed, the *Bundesverfassungsgerichts* has defined, through *Solange I* and *Solange II*, its relation with the ECJ in the field of fundamental rights protection. In particular, while in *Solange I*<sup>435</sup> the German court was skeptical that the European system was able to provide an adequate protection for fundamental freedoms, in *Solange II*<sup>436</sup> the *BVerfGE* gave up its reservation considering that the ECJ had developed an extensive case law in the area of fundamental rights.

In fact, before the adoption of a EU Charter of Rights, binding for EU institutions, in the lack of EU catalogue of fundamental rights the ECJ autonomously expanded the competence of the European Community to the field of protection of human rights through judicial law-making<sup>437</sup>, particularly through judgments such as

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<sup>435</sup> In this Judgment the Court stated that: “...as long as the integration process has not progressed so far that Community law receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, a reference to the Federal Constitutional Court [...] is admissible and necessary [...] in so far as [EC law] conflicts with one the fundamental rights of the Basic Law”. *BVerfGE* 37, 271: [1974] 2 CMLR 551

<sup>436</sup> In *Solange II* the German Court changed its attitude toward the ECJ by stating that “...As long as the European Communities, in particular the European Court case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they general safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation ...” *BVerfGE* 73, 339: [1987] 3 CMLR 225.

<sup>437</sup> As a matter of facts, the Treaty establishing the European Community did not provide for any reference to fundamental freedoms, since the purpose of the European integration process was primarily to integrated European economies in order to promote cooperation among and between Member States. However, the judicial body of the Community, i.e. the European Court of Justice (ECJ) soon after the entry into force of the funding treaties established its authority beyond the possibility to resolve conflicts strictly related only to the implementation of economic policies. While

*Stauder*<sup>438</sup>, *Internationale Handelsgesellschaft*<sup>439</sup>, *Nold*<sup>440</sup>, and *Les Verts*<sup>441</sup>. As explained in the previous section, this attitude of the ECJ might be explained through the theoretical lens of *multilevel constitutionalism*, i.e. the ECJ has deemed necessary to perform its constitutional task in a system that might be understood as a constitutional one even in the absence of a typical State architecture.

Moreover, this decision was driven by the exigency of overcoming the challenge national constitutional court could have made to the supremacy of EU law and over the competence of the ECJ. However, as underlined by Schimmelfennig, ‘... the ECJ became entangled in a dilemma. Binding its jurisdiction to the human rights norms of the ECHR helped to placate national constitutional courts but made it difficult to refuse the formal adherence of the European Community (EC) to the ECHR. As much as it could entrap national constitutional courts to accept the supremacy of the ECJ with regard to Community law, the ECJ was entrapped itself to acknowledge the supremacy of the ECtHR with regard to human rights. The most important but

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the court's fundamental rights jurisprudence was approved by the institutions in 1977 (*Joint Declaration by the European Parliament, Council and the Commission concerning the protection of fundamental rights and the ECHR* [OJ C 103, 27/04/1977 P. 1-2]) and a statement to that effect was inserted into the treaties by the Maastricht Treaty, it was only in 1999 that the European Council formally went about the process of initiating the drafting a codified catalogue of fundamental rights for the EU.

<sup>438</sup> Judgment of the Court of Justice, Case C-29/69, *Stauder v. City of Ulm* of 12 November 1969.

<sup>439</sup> Judgment of the Court of Justice, Case C-11/70 *Internationale Handelsgesellschaft v. Einfuhrund Vorratsstelle Fuer Getreide Und Futtermittel*, of 17 December 1970.

<sup>440</sup> Judgment of the Court of Justice, Case C-4/73 *Nold Kohlen und Baustoffgroßhandlung v. Commission of the European Communities*, of 14 May 1974

<sup>441</sup> Judgment of the Court of Justice, Case C-190/04, *Parti écologiste ‘Les Verts’ v European Parliament*, of 25 February 1988.

initially unintended outcome of this strategic interaction was the progressive institutionalization of human rights in the EU<sup>442</sup>.

For this reason, the same attitude can be found in the judgments of the ECJ and ECtHR to what concerns their bilateral relationship within the European space. Indeed, since 1970, when for the first time the ECJ stated that it was also bound to protect fundamental rights<sup>443</sup>, the relationship between Strasbourg and Luxemburg has deeply evolved<sup>444</sup>. The ECJ has usually, but not always, chosen to follow the interpretations of fundamental rights given by the ECtHR, even if the first direct reference to the latter's jurisprudence appeared in 1996. In turn, the ECtHR has elaborated, starting with its decision *M. & Co*<sup>445</sup> (at that time the European Commission on Human Rights), a theory providing that even if the EU MSs remain responsible for violations of fundamental rights committed by international organizations to which they have transferred part of their powers, the protection of fundamental rights within the EU is substantially equivalent to that guaranteed by the ECHR.

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<sup>442</sup> F. SCHIMMELFENNIG, *Competition and community: constitutional courts, rhetorical action, and the institutionalization of human rights in the European Union*, in *Journal of European Public Policy*, vol. 13, n. 8, (pp. 1247-1264) p.1248.

<sup>443</sup> See also on this point R. Toniatti, *Il principio di Rule of Law e la formazione giurisprudenziale del diritto costituzionale dell'Unione Europea*, ed. S. Gambino, *Costituzione Italiana e Diritto Comunitario*, Giuffrè, Milano, 2002.

<sup>444</sup> Since the *Handelsgesellschaft* case, the ECJ has established its competence also in the field of human rights protection, thus providing the EU (EEC at that time) with an internal system of guarantees. However, since the EU is not a member of the European Convention on Human Rights the ECJ had to find in the common legal tradition of EU members its source of inspiration. Until now, as the ECJ's and ECtHR's case law show, both Courts tend to remain on a parallel level rather than looking for supremacy. Both judiciaries are aimed to protect fundamental freedoms but at the same time they seem to be very concerned about their authority, so that 'dialogue becomes non-interference'.

<sup>445</sup> Decision of European Commission of Human Rights, *M. & Co. v. Germany*, Application n. 13258/87, of 9 February 1990.

For some years this theory has allowed the ECtHR to declare the judgments concerning Community acts inadmissible, but this trend changed with the *Cantoni*<sup>446</sup> case and the *Matthews*<sup>447</sup> case in the 1990s. In the former case the ECtHR reviewed the legality of a French law reflecting an EC Directive word by word, while in the latter case it found the UK responsible for the violation of the rights of a citizen residing in Gibraltar, since he was not allowed to vote in the elections of the European Parliament, even if the law on such elections was Community legislation that could not be unilaterally modified by the UK. Finally in its *Bosphorus*<sup>448</sup> case the Court confirmed the approach adopted in *M&Co*, but affirming that such presumption of equivalent protection is rebuttable and that it will review the legality of community acts in cases of manifest deficiencies in the protection of fundamental rights.

As Douglas–Scott suggests, the European human rights landscape provides a strong example of legal pluralism, illustrating a variety of interesting interactions and relationships, and the current human rights *acquis* leaves room for possibilities behind the binary poles of certainty and chaos, anticipating the conceptualization of fuzzy logic, not the constricting “either/or” of a formal mechanistic jurisprudence, but the “both/and” of a less clockwork-like world<sup>449</sup>. In other words, the behavior of national, supranational, and international judiciaries, in the field of human rights protection, shows how there exists a true dialogic process of judicial interaction, in

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<sup>446</sup> Judgment of ECtHR, *Cantoni v. France*, Application n. 17862/91, delivered on 22 October 1996..

<sup>447</sup> Judgment of ECtHR, *Matthews v The United Kingdom*, Application n. 24883/94, delivered on 18 February 1999.

<sup>448</sup> Judgment of the ECtHR, *Bosphorus v. Ireland*, Application n. 45036/98, delivered on 30 June 2005.

<sup>449</sup> S. DOUGLAS-SCOTT, *Ibid*, p.665.

which each part recognizes the legitimacy of the other without questioning its independence and authority. In this context, the *BVerfG* 's 'identity decision' can effectively explain how the European system functions. According to German judge:

The elaboration of the principle of democracy by the Basic Law is open to the objective of integrating Germany into an international and European peaceful order. The new shape of political rule which is thereby made possible is not schematically subject to the requirements of a constitutional state applicable on the national level and may therefore not be measured without further ado against the concrete manifestations of the principle of democracy in a Contracting State or Member State. The empowerment to embark on European integration permits a different shaping of political opinion-forming than the one that is determined by the Basic Law for the German constitutional order. This applies as far as the limit of the inalienable constitutional identity (Article 79.3 of the Basic Law). The principle of democratic self-determination and of participation in public authority with due account being taken of equality remains unaffected also by the Basic Law's mandate of peace and integration and the constitutional principle of the openness towards international law (*Völkerrechtsfreundlichkeit*)<sup>450</sup> [In addition] The German constitution is oriented towards opening the state system of rule to the peaceful cooperation of the nations and towards European integration. Neither the integration *pari passu* into the European Union nor the integration into peacekeeping systems such as the United Nations is tantamount to submission to alien powers. Instead, it is a voluntary, mutual commitment *pari passu*, which secures peace and strengthens the possibilities of shaping policy by joint coordinated action<sup>451</sup>

However a distinction should be made between different levels of adjudication. If, as described, legitimacy would be linked only to 'right interpretation', the problem of

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<sup>450</sup> *BVerfG*, 2 BvR 182/08, Judgment delivered on 30 June 2009, para.219.

<sup>451</sup> *BVerfG*, 2 BvR 182/08, Judgment delivered on 30 June 2009, para.220.

adjudication would become a secondary issue. Therefore, a court would merely be in charge of concretely addressing claims according to the driving constitutional (national constitutional courts) or European (ECJ), or Conventional (ECtHR) principles.

Nonetheless, as underlined above, legitimacy derives also from the position a democratic institution occupies within a given system in particular when the judiciary adopts a nonmajoritarian perspective in its judgments. Adopting the ECtHR doctrine of the margin of appreciation, a national court would be in the best position to deal with a sensitive political issue, since it also legitimated by the fact of being part of that specific constitutional system. Indeed, the legitimacy of a constitutional court is rooted in the constitution and in its ‘cultural proximity’ with the constitutional order, whereas a supranational or international court might be perceived as collateral to the system, or even extra-system.

In addition, while the ECtHR has repeatedly referred to the margin of appreciation doctrine recognizing its subsidiary role in the system of protection of fundamental rights, i.e. it has defined itself as the guardian of the CEDU but at the same time preserving national Contracting States differences, the ECJ has instead tried to create a uniform European space of values operating in accordance to the general principles of EU law and considering the common constitutional traditions of MSs.

However, as explained in the previous sections, the main issue at stake when observing the attitude of the ECJ toward the definition of ‘EU rights’, regards the legitimacy of the EU system itself as a (multilevel) constitutional order in which the supranational court plays a roles similar to a national constitutional court. In this

context, the EU Charter of Rights might be perceived as the natural reference for reinforcing the authority of the ECJ in the field of human rights protection in the EU, though, given the nature of the EU, the main risk is to overstretch the limits of the ECJ competence. In fact, as discussed in chapter I, the scope of application of EU law is clearly defined in the Lisbon Treaty. As already underlined, neither the introduction of the EU Charter of Rights, nor the possibility to accede the EU (new Art.6 TEU) will affect the EU's competences as defined in the Treaties.

The so called 'European heterarchy' might enhance the degree of protection afforded to individuals, but at the same time might pose a problem of legitimacy. If an order is not organized into a Kelsenian hierarchy, the recognition of the competences typical of an authority, such as a judicial authority, might blur and lead to conflicts in relation to which constitutional powers is competent in addressing one specific issue (e.g. the legislative, or the executive) thus pushing the judiciary to be deferential.

## CONCLUSIONS

### 1. Preliminary observations

Within the broader discussion about LGBTI people's rights in the EU, this research has developed its argument adopting a comparative constitutional law perspective. It has approached one of the issues debated both in legal doctrine and by politics, i.e. the right to be legally recognized as a family for those of same-sex. One of the premises of this work has been that there is now a widespread social acceptance of homosexuality as a human phenomenon within MSs (e.g. in most of MSs homophobia is condemned as a criminal offence<sup>452</sup>). In other words, today it is no longer a matter of preventing direct discrimination against people belonging to sexual minorities. Indeed, the so called sodomy laws have been declared in violation of human rights several years ago (*see* chapter I, '*The CoE framework and the role of the ECtHR*'). Therefore, the daily issue is what equality really means for same-sex partners.

Hence, this research has been centered on the specific right of homosexuals to found a family, adopting an EU-centered perspective. Nonetheless, the specific issue of the right to found a family for same-sex partners has been dealt with choosing purposely to focus on '*the duty to recognize*' instead of stressing the argument of the '*the right to recognition*'. This choice has found its *raison d'être* on four main considerations emerged during the period of research.

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<sup>452</sup> Italy represents one exception of this trend.

The first motivation regards ‘*the incertitude on the contents of rights*’. Despite the recognition of sexual orientation as a forbidden ground of discrimination – implicitly through case law at international level (ECtHR) or national level (in those states where constitutions do not mention this ground directly), and explicitly in EU law (Regulation, Directives, and the EU Charter of Rights) – the spectrum of rights to be afforded to homosexuals is still far to be uniformly accepted in the whole EU, in particular with reference to family matters (social benefits, parental rights, etc.). Evidences have been provided in chapter I.

At national level, all examined countries, excluded Portugal, sharply distinguish between married couples and other types of unions, thus conferring couples outside marriage specific rights and duties. In all national cases, constitutional courts have expressed their concern about the lack of legal recognition for family-life of same-sex couples, but the lines of reasoning adopted diverge from country to country, and consequently what ‘legal recognition’ means is uncertain (i.e. the contents of rights associated with the idea of family).

For instance, while in Portugal the *Tribunal Constitucional* in its judgment n.121/2010<sup>453</sup> did not foresee any significant distinction to be made between heterosexuals and homosexuals, in Hungary the constitutional court has made clear that legislation on same-sex unions needs to be dissimilar from the institution of marriage to be constitutionally legitimate. The main question is however how to delineate specifically which rights should be granted to same-sex partners, and which

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<sup>453</sup> *Tribunal Constitucional*, case n.121/2010, delivered on 8 April 2010

are not available<sup>454</sup> (e.g. parental rights). The Hungarian court has indeed excluded parental rights, but it has not clearly defined the differences between opposite-sex and same-sex partners.

The French case could be placed in between these two positions, since the *Conseil Constitutionnel* has not neglected the possibility to introduce a new piece of legislation enhancing the rights of same-sex unions<sup>455</sup>, though it has preferred to leave the matter in the hands of the legislator. In Italy, the *Corte Costituzionale* in its 2010 judgment has deemed necessary a parliamentary intervention, without urging the parliament, and without indicating the possible contents of a specific legislation on this subject<sup>456</sup>.

At the international level the position taken by the ECtHR in *Schalk and Kopf*<sup>457</sup> confirms the judicial attitude to consider the parliament the best place where to elaborate policy of recognition for same-sex unions. However, the recognition of two separated rights, i.e. the right to marry and the right to found a family has confirmed an evolution of the ECtHR's jurisprudence in the direction of covering also same-sex partners in the sphere of family-life.

As for the ECJ, both in *Maruko*<sup>458</sup> and *Römer*<sup>459</sup>, the Luxembourg court's decision to consider same-sex and opposite-sex couples *de facto* identical in the these cases, adopting however a 'direct discrimination approach', emphasizes the ECJ's willingness to refrain from a general intervention. Indeed, as underlined in chapter I,

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<sup>454</sup> *Alkotmánybíróság*, case n.32/2010 (III.25.) AB, delivered on 23 March 2010.

<sup>455</sup> *Conseil Constitutionnel*, Decision n. 2010-92, delivered on 28 January 2011

<sup>456</sup> *Corte Costituzionale*, case 138/2010, delivered on 14 April 2010.

<sup>457</sup> ECtHR, case *Schalk and Kopf v. Austria*, Application n.30141/04, delivered on 24 June 2010.

<sup>458</sup> ECJ, case C-276/06, delivered on 4 April 2008.

<sup>459</sup> ECJ, case C-147/08, delivered on 10 May 2011.

considering the situations in both *Maruko* and *Römer* a case of direct discrimination has allowed to confine these cases in their geographical dimension. i.e. in Germany. On the contrary, upholding indirect discrimination would have meant enhancing the scope of application of these judgments as to cover all the situations in the EU where same-sex couples are discriminated vis-à-vis opposite-sex couples. In addition

The second consideration acknowledges that constructing the argument on ‘*the duty to*’ leaves states a greater flexibility on the possibility to legislate considering their own specific legal traditions, and according to the claims expressed by their own national sexual minorities. In turn, this would also respect the EU motto ‘united in diversity’. In fact, as stressed in the Italian judgment n.138/2010, in the EU several legal models of recognition have been adopted to grant same-sex unions’ legal protection. The EU situation on this specific aspect presents a multitude of options. Imposing one model over the others would create a number of problems. As considered in chapter II, the sociological dimension of equality is rooted in tradition and its evolution moves in combination with society changes. Judges in this context play the role of detecting changes, but without overstressing their competence<sup>460</sup>.

In fact, as discussed in chapter III, doubts might be raised regarding the legitimate authority in charge of deciding which solution would be the best for same-sex partners. This research has demonstrated how the issue of legitimacy tends to increase in a multilevel system, and how the lack of political will to solve an issue related to fundamental rights cannot automatically lead to judicial intervention, since

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<sup>460</sup> See, B. PEZZINI, A. LORENZETTI, *Unioni e matrimoni same-sex dopo la sentenza 138/2010: quali prospettive?*, Jovene, Napoli, 2011, pp. 15ss.

in constitutional democratic systems both the legislative and the judiciary tend to function in respect of their sphere of competence.

In this sense, as underlined in chapter I, EU law specifically addresses the issue of ‘marital status’ leaving MSs exclusive competence over this subject. Thus, what would be acceptable in one country could be perceived unacceptable in another. In constitutional democratic states nonmajoritarian decisions might indeed pose evident problems of legitimacy. As described in chapter III, this concern is characteristic of those systems such as the EU in which political pluralism can accentuate both the differences and the struggle between values<sup>461</sup>. In addition, although the EU could be understood as a constitutional order according to the theory of *multilevel constitutionalism* as described in third chapter (sec.4), the main problem, i.e. the lack of democratic participation is still an issue that creates a gap between EU citizens and EU institutions.

The third motivation is rooted in the idea that ‘*the duty to*’ approach, since it does not clearly lay down a series of specific rights, would not crystallize the rights of sexual minorities, thus allowing further developments whenever the necessity to change emerges in society. In this context, the Portuguese case analyzed in chapter I can provide a good example: whereas in 2009 the *Tribunal Constitucional* did not accept the argument of an automatic right to legal recognition for same-sex unions stemming from a ‘violation by omission’ on the side of the parliament, in 2010 it has been ready to acknowledge that ‘while there can be no doubt that from the biological, sociological or anthropological point of view, a lasting union between two persons of

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<sup>461</sup> M. SCHWARZSCHILD, *Ibid.*, p.966.

the same sex and that between two persons of different sexes constitute different realities, from the legal perspective treating them in equivalent ways is not without material grounds<sup>462</sup>.

As highlighted in chapter II, the idea of equality does change over time, and rights consequently expand their scope accordingly. Moreover, while for some authors marriage represents the point of arrival, for others it might lead to homologation. In the next section this aspect is further developed.

The fourth motivation conceives ‘*the duty to*’ as an approach that leaves the judiciary the opportunity to play a crucial role in defining the margins of fair differentiation whenever states decide to distinguish between heterosexuals and homosexuals. This line of reasoning overcomes the parallelism/antagonism between the judicial power and the legislative power since it focuses on the possibility to intervene *a posteriori* for judges. As the ECJ has demonstrated in *Maruko*<sup>463</sup> and *Römer*<sup>464</sup>, the competence of the judge is to verify whether differentiation is legitimate on a case by case analysis. According to some scholars, the same attitude can be observed when considering the Italian judgment of 2010. The Italian constitutional court has preferred to remain silent on the contents of rights to be granted to same-sex unions in order to be able to exercise its supervision on the constitutionality of future legislation on this subject<sup>465</sup>.

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<sup>462</sup> *Tribunal Constitucional*, case 121/2010, *Ibid*, para. 26.

<sup>463</sup> ECJ, case C-276/06, delivered on 4 April 2008.

<sup>464</sup> ECJ, case C-147/08, delivered on 10 May 2011.

<sup>465</sup> R. ROMBOLI, *La sentenza 138/2010 della Corte Costituzionale sul matrimonio tra omosessuali e le sue interpretazioni*, in [www.associazionedeicostituzionalisti.it](http://www.associazionedeicostituzionalisti.it), n.3, 2011, pp.1-13.

As shown in this research, the path toward the affirmation of the right to found a family for same-sex partners has been supported at all analyzed levels of adjudication, but the steps to be made are still a matter of national discretion. National parliaments remain in charge of finding the most appropriate solution to this issue, whereas courts preserve their role of guardians in relation to unfair discrimination. It follows that, while it is possible to argue that ‘indifference’ by states constitute a violation of a fundamental right, the regime of protection cannot be established *a priori*. For the time being, each state might opt for the solution it finds more reasonable. However, as demonstrated in the two examined cases before the ECJ, states’ discretion finds its limits in the application of the EU principle of equality and nondiscrimination, now reinforced by the EU Charter of Rights. In particular, it would be interesting to analyze an ECJ’s decision concerning a same-sex married couple moving to a MS where legal recognition is not provided in order to verify whether the ECJ would consider the absence of mutual recognition as infringing EU law (primary legislation, as well as secondary legislation).

## **2. Marriage and civil partnership should be available for all citizens**

In the first chapter, the selected cases law demonstrates how this issue is not anymore an ‘extraordinary’ issue but an ordinary one, and the attitude of judges at all levels is consistent with the idea that states’ ‘indifference’ cannot be justified and does constitute a violation of fundamental rights. One clear conclusion can be drawn by chapter I: there exists an EU trend toward the recognition of same-sex unions as an element of achieving equality, though marriage remains one option among the

others. This conclusion it is not meant to denote a ‘normative statement’. Instead it represents ‘the picture’ of this specific period of time, thus it is possible to imagine a change in the next future. As the EU Charter of Rights clarifies, the right to marry and the right to found a family are two distinct and fundamental rights. This has been also confirmed by the ECtHR in *Schalk and Kopf*, where the Strasbourg court had the occasion to distinguish between marriage and family life, considering this latter one as applicable also to same-sex partners.

In the third chapter, when discussing the role of the constitutional judge, another point has emerged: although it is possible to affirm that the right to found a family is a fundamental right belonging to each individual universally, the role a court might play is limited by the social and cultural context and by the fact that the judicial power cannot substitute the legislator without putting at risk its legitimacy. In constitutional democratic systems this creates a tension between the willingness of constitutional courts to protect minoritarian claims, and the legislative power, i.e. the right of a political majority to decide over policy matters, such as family law within the limits of the constitution. In turn, this becomes a greater obstacle if the EU level is concerned. Indeed, since the ECJ operates in multilevel system in which the constitutional elements typically associated with the idea of constitutional orders are not identical to those usually accompanying the idea of a State (e.g. the lack of democratic participation within the supranational system), its legitimacy might be put a risk when decisions over very sensitive issues are taken.

Nevertheless, the fallacy of ‘the right to marry approach’ related to same-sex unions is firstly rooted in the understanding of the principle of equality. As discussed

in chapter II, the principle of equality works mainly in two directions: (1) it favors equal treatment removing discrimination; (2) it acknowledges differences and promotes them. As already explained, the discussion around equality is the preliminary step to be made before entering into the deliberation about rights. This implies a never ending debate able to reconcile changes in society with new interpretation of legal provisions. In the EU, MSs have opted for several different solutions in relation to same-sex unions, and same-sex marriage remains just one of the options.

It follows that the decision to open up marriage to homosexuals, instead of elaborating other legal institutions, might apparently remove discrimination, while *de facto* perpetrating the stereotype of normalcy. As highlighted, equality should not pursue the aim of homologating situations which are not identical. Certainly, as observed in legal scholarship, and also upheld by the *Corte Costituzionale* court in its judgment 138/2010, marriage is not a crystallized legal institution. In other words, changes in the understanding of the rights and duties associated with marriage might occur. Thus, allowing same-sex partners to get married is not *per se* a way to enhance homologation, since it might be perceived just as an evolution of the cultural and legal system of a given community.

However, the contemporary ‘constitutionalization’ of marriage has been elaborated with the idea of a union between a man and woman. Therefore, at least originally, the institution of marriage has functioned as a *conventio ad excludendum*, i.e. same-sex partners have been *de jure* and *de facto* forbidden to enter into matrimony. Indeed, this position has been upheld by the Hungarian constitutional

court when deciding over the Parliament Act XXIX of 2009<sup>466</sup>, when it did not declare the unconstitutionality of the registration act in light of the clear distinction between this legal institution and marriage.

A reference to marriage as ‘the standard ideal type’ can reinforce the stereotype that homosexuality is unnatural and should be stigmatized. Moreover, the right to found a family as enshrined in the EU Charter of Rights is distinct from the right to marry. This means that the two situations can be considered separately. In other words, while ‘a family’ is a union of two persons, marriage represents one of the possible legal institutions to regulate partners’ commitment.

In this scheme, marriage is not ‘the standard’, and possible substitute institutions such as registration can show their importance as tools for restoring the imbalance between those who can marry and those who cannot. In this sense, the strict adherence to the heterosexual stereotype is overcome in favor of a vision that perceives all ‘families’ as all deserving protection. Nevertheless, as suggested in chapter II, to achieve full equality a legal system has to allow both solutions, i.e. marriage and registration, to all citizens regardless of their sexual orientation. This would represent the only way to defeat the scheme inferior/superior intrinsic to the view of marriage as the ‘normal/ideal type’ of union, avoiding the categorization of citizens in first and second-class citizens.

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<sup>466</sup> Alkotmánybíróság, *Decision* 32/2010 (III.25.) AB, of 23 March 2010.

### **3. The impact of the EU Charter Rights**

The EU Charter of Rights has introduced a new set of rights within the context of the EU. It is now a binding instrument whose potential is to strengthen the protection of fundamental rights within the EU, promoting a common space of rights for all EU citizens. Although as repeatedly underlined in this research the scope of application of EU law is not expanded in light of the EU Charter of Rights, its normogenetic impact might create the basis for future judicial developments at both national and supranational level.

This research had the aim to verify whether this new instrument could have an impact on the situation of same-sex unions in the EU. In particular, the purpose has been to understand whether the entrance into force of the Lisbon Treaty would have enhanced the chances to succeed for same-sex unions' claims before courts (judicial intervention). As this thesis shows, the EU Charter of Rights has become a reference-element at all levels of adjudication. At national level constitutional courts regard the Charter as a system of driving principles.

However, a distinction should be made between what the EU Charter of Rights introduces as characteristic element of novelty and what this instrument is able to produce in a practical way. As underlined in chapter I, the rights enshrined in the EU Charter of Rights according to new art.6 TEU are binding only for EU institutions and MSs in the fields of application of EU law. However, both the EU Charter of Rights, and the possible accession of the EU to the ECHR will not affect the scope of application of EU law outside the competences identified by the Treaties.

As argued, the ECJ, – which has now started to refer to the EU Charter in its judgment (e.g. ‘insurance case’, see chapter I) – has been clear on this point: this new set of EU rights applies only to those matters falling within the competence of the EU<sup>467</sup>. Hence, formally speaking, it could be affirm that the spectrum of guarantees for same-sex unions in the EU has neither been transformed nor enhanced by the entrance into force of the Lisbon Treaty. However, there are several elements to believe the EU Charter of Rights will produce its effect on this specific subject.

One argument supporting this assumption is rooted in the now consolidated attitude of judges to consider the EU Charter of Rights as a reference to construe the argument about rights (the normogenetic value of the EU Charter of Rights). In the first chapter of this research the analysis shows how national constitutional judges are now referring to this document in order to frame their reasoning. Additionally, the EU Charter of Rights in art.9 introduces a specific innovation in relation to family-life. In effect, art.9 represents a far more comprehensive guarantee for partners, regardless of the sexes of partners, than any other human rights document. In comparison with art.12 ECHR, art.9 of the EU Charter of Rights distinguishes between the right to marry and the right to found a family. This distinction is an essential one.

As already stated, this differentiation is salient for several aspects. Firstly, it overcomes that idea that marriage and family are two complementary concepts.

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<sup>467</sup> ECJ Case, C-339/10: Reference for a preliminary ruling, Krasimir Asparuhov Estov, et all. v Ministerski savet na Republika Bulgaria, delivered on 12 November 2010.

Secondly, by stressing the ‘fundamentality’ of the right to found a family, and considering art.21 of the Charter (nondiscrimination principle) it helps reinforcing the argument of those who claim that same-sex partners should be legally recognized despite the possibility to enter into matrimony, since the fundamental and universal reference-right is the right to found a family; The Italian case is emblematic in this context since the constitutional court, though leaving the parliament the prerogative to intervene, explicitly pointed out that same-sex unions are social units deserving protection under the constitution.

Thirdly, having regard for the right to free movement in the EU (*ex* Art. 39 TEC<sup>468</sup>), neglecting the right to found a family in one EU country compromise both the principle of nondiscrimination and the right to free movement (the issue of mutual recognition). As further explained in the first chapter, in light of the right to free movement, and according to the EU principle of equality the possibility for families to move and reside freely within the EU is seriously compromised by the non-harmonious recognition of same-sex families within the EU.

Opponents of the ‘free movement approach’ argue that EU law clearly states that recognition of families is mutual between MSs as far as the country of origin and the hosting country both recognize those unions outside marriage. Some others contest the validity of art.9 in relation to the right to free movement underlining how the Explanations to the Charter explicitly confines the scope of application of this

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<sup>468</sup> Read in combination with *ex* Arts 12,18, 40, 44 and 52 TEC.

article<sup>469</sup>. However, this position has been neglected by Advocate General Ruiz-Jarabo Colomer in his *Opinion* before the ECJ in the case of *Maruko*<sup>470</sup>, when he affirmed that explanatory memorandum – though it represents one of the means of interpretation – cannot be regarded as an imperative rules. Besides, it is possible to read the explanations of art.9 in the opposite sense: an opening-clause modernizing the concepts of family and marriage instead of freezing their scope of application.

Furthermore, as highlighted in chapter III, it should not be forgotten that the EJC in a number of occasions has demonstrated its willingness to push forward a common European standard of equality, *de facto* implementing the EU social policy despite MSs' national sovereignty<sup>471</sup>.

In addition, as shown by the case now pending before an Italian ordinary judge, the heterogeneity of the EU system in this context leads to the paradoxical situation in which an Italian man can legally marry in Spain a Latin-American man, obtaining the visa for his spouse as a family member, and then moving back to Italy losing the status of married person, and most importantly, losing the possibility to obtain the permission to stay for his partner. Put it differently, the situation makes clear how the refusal to recognize same-sex unions, i.e. 'indifference' of some MSs on this subject, produces a great impact on individuals, and deprives them of the possibility to enjoy the fundamental right to form a social unit. A situation which needs to be dealt with since these kind of cases are likely to increase.

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<sup>469</sup> Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50.

<sup>470</sup> ECJ, case C-267/06, *Opinion* delivered on 06 September 2007, para 76.

<sup>471</sup> See, H. TONER, *Partnership Rights, Free Movement, and EU Law. Modern Studies in European Law*, Hart Publishing, Oxford, 2004.

In conclusion, the EU Charter of Rights is unlikely to produce immediate effects for the situation of same-sex unions in the EU. Hence, there should be no surprise if during the analyzed period, i.e. 2008-2011, the attitude of judges, both nationally and supranationally, has been prudent on this subject. To simplify at the extreme, judges in the EU are today: (1) willing ‘*to listen and invite parliaments*’ in those cases where same-sex partners do not enjoy family protection (e.g. Italy or France), i.e. they acknowledge the existence of an issue to be solved; (2) willing ‘*to enhance equality*’ in those cases where recognition has been achieved but is contested (e.g. in Portugal when the same-sex marriage Act was referred to the *Tribunal Constitucional*) or works discriminating between partners (e.g. the ECJ’s cases *Maruko* and *Römer*.)

Nonetheless, it is realistic to believe that this issue will soon find its solution ‘judicially’ if politics continues to be unable to provide an effective answer. As stated above, the main obstacle is represented by the contents of rights associated with the right to found a family. Since these contents might include not only social-economic benefits but also parental rights, judicial actors are not in the best position to solve this issue.

As observed in chapter III, the issue of appropriateness and desirability is of crucial importance when the judiciary is called to fill the gap left by the legislator. As argued, in light of the principle of equality, if in a given system there is no legal recognition for same-sex unions, and the only option is to open up marriage through judicial law-making, this solution could only partially resolve the issue of discrimination between ‘couples’, since for some marriage would still represent a heterosexual legal institution.

Therefore, it is reasonable to expect that judges will leave additional but not infinite time to the legislator. In fact, as reminded above, despite the incertitude on the contents of rights, there exists a duty to recognize upon states, and ‘indifference’ configures a breach of fundamental freedoms.

As a matter of fact, the guardians of the constitution can be trusted (or the *quasi*-guardian of the *quasi*-constitution of the EU) but politics must realize that it is time to begin performing its duty to address the issue of same-sex partners in accordance with the democratic principle of equality. Otherwise, the main risk is to reinforce the idea that the EU is not ‘a community of law’<sup>472</sup>, an integrated system of values in which each and every citizen is granted her/his rights on equal basis, but (still) merely an institutional device aimed at economic integration, i.e. very close to the market and very distant from individuals.

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<sup>472</sup> ECJ case C-402/05 delivered on 3 September 2008, the so called ‘*Kadi case*’, The ECJ has referred to the EU as a Community bound by the respect of the principle of the rule of law and fundamental rights. In *Kadi*, the Court annulled a Community regulation, enacted in reference to a common position under the Common foreign and security policy of the European Union, which implemented a Security Council (SC) resolution designed to freeze funds of individuals and organizations associated with terrorist networks. The ECJ found the sanction measure to be in breach of certain fundamental rights guaranteed under EU law. The judgment, which was delivered against the background of the global war on terror, constitutes one of the most high-profiled and contested issues of the European constitutional debate. The three main topics: Community competence, the reception of international law in the EU legal order and the protection of fundamental rights. In this judgment the ECJ stated that ‘... any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system...’ (para.316)

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