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**THE ROAD TO EQUALITY.
SAME-SEX RELATIONSHIPS WITHIN THE
EUROPEAN CONTEXT: THE CASE OF ITALY**

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In memory of Gabriella

Francesco Alicino

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ABSTRACT

In Europe the same-sex couples are more and more considered social groups, which are legally sanctioned by either the ‘new’ contracts (such as registered partnerships, civil unions, same-sex pacts, Eingetragene Partnerschaft, etc.) or the same-sex marriage that, from the legal point of view, is nothing less than the opposite-sex wedlock. Other European States, though, continue to reserve the rights to marry and found a family for different-sex couples. Consequently, in Europe we are witnessing an anomalous situation, in which a same-sex couple may be legally recognised and protected in one State but not in another; what, in the context of both the European Union and the Council of Europe has given rise to a host of legal quandaries. That is exactly the sort of condition in which national and the supranational Courts have a legitimate role to play, also alighting intensive judicial dialogue that, in turn, is bringing about the interlocked process of ‘interaction’ and ‘contextualization’. On the one hand, in relation to the rights to marry and found a family, there is an interaction between national laws, the EU’s law and the ECHR. On the other, after having long been monopolized by the influence of religious rules and – hence – exclusively reserved for heterosexual people, these rights are nowadays contextualized in both the light of changes in the perception of civil-status relationships and in virtue of the equality and non-discrimination principles. With this paper the author tried to demonstrate that the judicial process presently underway in Italy is an illustrative example of that.

Keywords: *Marriage, Family, Rights, Traditions, Same-Sex, Couples, Constitutions, Courts, Europe.*

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1. INTRODUCTION. FROM A RELIGIOUS TRADITION TO A SECULAR CONCEPTION

Marriage and family have always played a central role in the Western legal system. Suffice to say that in the earliest period of the Greek *polis* the crucial distinction was not between the public and the private spheres. It was between the public and the domestic spheres. And the domestic sphere was understood as the sphere of the family worship.¹ The society in itself was considered an association of families, created and based on the domestic beliefs.²

Marriage and family were in effect considered both the focus and the medium of religions that, for this way, were able to shape important aspects of the ancient City-States' law, including the property rights.³ The boundaries of the family property were considered the borders of a sacred domain and the disposal of this property was not a matter of contract or individual choice, but a mean of perpetuating the household religion, strictly related with the worship of ancestors.⁴ Also, within the domestic circle, justice remained basically deriving from religion, which legitimized the authority of the father as priest and magistrate, initially extended to the right to repudiate or even kill his wife and his children. Besides, celibacy and adultery were account serious crimes, for they threatened, in different manners, family worship. So, little wonder that, when the model of the ancient City was extended to the Romans, "citizenship was available only to the paterfamilias and, later, his sons. Women, slaves and the foreign born (who had no hearth or worship of their own, no recognised ancestor) were categorically excluded".⁵

The advent of Christian belief reshaped these ideas and practices by, for example, transferring the authority from the paterfamilias to a separate priesthood. This is not the place to trace exactly the route of changes in the family life under the influence of the Christian religion. But it is quite clear that, in some circumstances, this 'new' belief led husband to treat his wife as equal, at least form the spiritual point of view.⁶ That explains why the condemnation of the adultery was extended to include husband, which reveals how far the ancient family had travelled since the time when man had the power of life and death over his wives and children.

¹ As the US Supreme Court has affirmed, "[f]rom their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage"; *Obergefell v. Hodges*, 576 U.S. (2015).

² L. Siedentop, *Inventing the Individual. The Origin of Western liberalism*, Allen Lane, London, 2014, p. 14.

³ See the classical study of F. de Coulanges, *La cité antique*, Librairie Hachette, Paris, 1900, pp. 52-68.

⁴ S.I. Johnston, *Restless Dead: Encounters between the Living and Dead in Ancient Greek*, University of California Press, Berkeley, 1999, pp. 250-288; J. Hall, 'Ethnic Identity in Greek Antiquity', 8 *Cambridge Archaeological Journal*, 1998, pp. 265-283; Gary B. Herbert, *A Philosophical History of Rights*, Transaction Publishers, New Jersey, 2003, pp. 3-5.

⁵ Siedentop, above n. 2, p. 18.

⁶ W.H.C Frend, *The Early Church: From the Beginnings to 461*, SCM, London, 2003, p. 196.

In reality, the marriage and family institutions would continue to travel through the intricate history of Western constitutionalism, from generation to generation, until our own day when, among other things, these institutions have lost much of their exclusive religious references. Nowadays a family can legally exist even where religious authorities and religious rules have not solemnized the marital union. Furthermore, to marry and found a family are considered part of individual rights⁷ that, as such, must be freely recognised and guaranteed to everyone, without unreasonable (unconstitutional) discrimination and irrespective of the persons' belief.⁸ Nonetheless, the rights to marry and found family remain both contingent and religiously grounded: contingent because their concrete existences depend on the State's action⁹. Faithfully grounded because very often the States' provisions regulating these rights are subject to the influence of a given religious tradition.¹⁰

The fundamental rights to practice freedom of thought, expression and conscience may be best described as negative rights¹¹: they consist in warding off interference from State, which normally has no duty to facilitate their exercise; the ability of people to practice these rights does not depend directly on positive action by the public government. By contrast, other fundamental rights, such as the right to a fair trial, could only exist if State has created an institution to which individuals can demand access: even though a Constitution guarantees no right to a fair trial, once a State affords it, this same legal order may not bolt the door to equal justice by, for example, denying access to indigent litigants. Similarly, the rights to marry and found a family are truly contingent because they depend on the State's recognition and protection. State confers and administers benefits, operates as agents of recognition, grants legal dignity to that kind of social groups we call families, created through marriages. As a result, the State's positive action continues to play a key

⁷ Take for example Articles 8 and 12 of the European Convention of Human Rights (“[e]veryone has the right to respect for his private and family life” and that “[m]en and women of marriageable age have the right to marry and to found a family”) or Article 9 of the Charter of Fundamental Rights of the European Union (“[t]he 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”).

⁸ Take for example the Article 16 of the Universal Declaration of Human Rights, which declares that “[m]en and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family”).

⁹ P.S. Karlan, ‘Let’s Call the Whole Thing Off: Can States Abolish the Institution of Marriage’, *California Law Review* 2010, pp. 699-701.

¹⁰ See H.P. Glenn, *Legal Traditions of the World. Sustainable Diversity in Law*, Oxford University Press, Oxford-New York, 2010, p. 45, where Patrick Glenn observes that the most dominating legal traditions are those related to the world religions (expressly the Christian religion for the Western Legal System and the Islam for the so-called Arab World), even though it depends on time and space, and depends on integration in different contexts. See also K. Pennington, *The Prince and the Law, 1200-1600. Sovereignty and Rights in the Western Legal Tradition*, University of California Press, Berkeley, 1993, p. 132; B. Tierney, *The Foundation of the Conciliar Theory. The Contribution of the Medieval Canonists from Gratian to Great Schism*, Cambridge University Press, Cambridge, 1955, p. 77; B. Tierney, *Church law and the Constitutional Thought, in the Middle Age*, Variorum Reprints, London, 1979, p. 56.

¹¹ In the words of I. Berlin, ‘Two Concepts of Liberty’. In I. Berlin, *Four Essays on Liberty*, Oxford University Press, Oxford, 1969, pp. 118-172.

role in the practical implementation and in the concrete exercise of the rights to marry and found a family. And in doing so the State's legislation is often rooted in religion¹². In this area, the State's (secular) law frequently reflects – if not codifies – religious rules.¹³

Individuals exercise complex citizenships, whereby they are simultaneously members of multiple communities. They frequently possess strong affiliations to a religious organization at the same time that they possess an affiliation to the civil State,¹⁴ which produces a wider network of forces and influences.¹⁵ For many people, though, marriage and family are more important as religious matters than civil matters. For them a marriage and the foundation of a family are not valid unless they are between two similarly religious individuals who have received appropriate solemnization by qualified religious authorities. Hence, considering the fundamental right to practice freedom of religion, in any constitutional democracy ministers of religion may refuse to marry people who are eligible for State marriage or, reversely, they can agree to marry people who are ineligible for civil marriage or, even, they can be among those entitled to perform legally binding marriages. In addition, a marital dissolution can be valid unless granted by competent religious authorities on adequate grounds via appropriate procedures.¹⁶

¹² Ch.J. Reid Jr., 'Marriage: Its Relationship to Religion, Law, and the State'. In D. Laycock, A.R. Picarello Jr., R. Fretwell Wilson, *Same-Sex Marriage and Religious Liberty*, Rowman & Littlefield Publishers (Inc.), Lanham etc., 2008, pp. 157-188.

¹³ A perfect example of that is given by the US Supreme Court ruling of the nineteenth century, dealing with a major tenet of Mormon belief, polygamy: "[t]he organization of a community for the spread and the practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and the civilization which Christianity has produced in Western world"; *Church of Jesus Christ of Latter Day Saint v. United States*, 136 U.S., 1, 49 (1890). In the same year the US Supreme Court also declared that "bigamy and polygamy are crimes by the laws of all civilised and Christian Countries"; *Davis v. Hardwick*, 133 U.S. 333, 341-342 (1890). See also *Reynolds v. United States* 98 U.S. 145 (1878). See also G. DeMar, *America's Christian History. The Untold History*, American Vision, Powder Springs, Ga., 2005, pp. 63-74; C. Weisbrod, 'The Law and Reconstituted Christianity: The Case of the Mormons'. In J. McLaren, H.G. Coward (eds.), *Religious Conscience, the State, and The Law. Historical Contexts and Contemporary Significance*, State University of New York Press, Albany, 1999, p. 140; N.F. Cott, 'Giving Character to Our Whole Civil Polity: Marriage and the Public Order in Late Nineteenth Century'. In L.K. Kerber, A. Kessler-Harris, K. Kish Sklar (eds.), *U.S. History as Women's History: New Feminist Essays (Gender & American Culture)*, The University of North Carolina Press, Chapel Hill and London, 1995, pp. 107-121; C. Weisbrod, 'Family, Church and State: An Essay on Constitutionalism and Religious Authority', 26 *Journal of Family Law*, 1988, p. 741.

¹⁴ A. Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights*, Cambridge University Press Cambridge, 2001; A. Shachar, 'Entangled: State, Religion, and the Family', 49 *Harvard International Law Journal*, 2009, pp. 132-145; A. Shachar, 'Faith in Law? Diffusing Tensions Between Diversity and Equality'. In J.A. Nichols (ed.), *Marriage and Divorce in a Multicultural Context. Multi-Tiered Marriage and the Boundaries of Civil Law and Religion*, Cambridge University Press, New York, 2012, pp. 341-356.

¹⁵ "If those two communities [civil State and religious group] lack alignment on a critical matter (such as marriage or divorce), individuals may feel competing normative pulls – and it is not a given that the civil state's normative stance will control. Instead, sometimes the "unofficial law" of the community (to use Ann Estin's phrase) has a stronger hold on individuals and communities than the sanctioned official civil law of the polity": J.A. Nichols, 'Introduction'. In J.A. Nichols (ed.), above n. 14, p. 2; see also A. Laquer Estin, 'Unofficial Family Law'. In *Id.*, pp. 92-119.

¹⁶ The Italian law gives us a clear example of that. In fact, on the basis of 1984 Agreement between the Catholic Holy See and the Italian Republic, that modified the 1929 Lateran Concordat, a marriage contracts made in accordance to the Canon Law has civil effects, when registered in the State's registers and notify in the local registry office. The marriage registration will not occur if the spouses do not have the age required by the civil law or if there

These examples show that in a secularized constitutional legal system religion too continues to play an important role in regulating the rights to marry and found a family. Furthermore, some constitutional rules sanctioning these rights are many times done on religious premises that, as such, aim at dignifying some relationships (referring to a given religious tradition)¹⁷ rather than others (believed to be in contrast with that tradition); what can explain the origin of several legal restrictions, such as those that are imposed upon the same-sex couple. These are restrictions that, not for nothing, are often based on religious disapproval.¹⁸

Now, the fact is that we live in legal systems where people have a wide range of different religious beliefs. It is true that these systems are supposed to respect the space within which people pursue their creeds. State cannot, however, agree that religion, by itself, is a sufficient ground for legal regulation, especially when fundamental rights are involved. In other words, State can approve that some religious ideas and practices have public credit, but it must be very careful about imposing these ideas and practices to all citizens. For example, observant Jews abhor the eating of pork, but this abhorrence cannot be a reason to make the eating of pork illegal. The prohibition rests on religious texts that not all citizens embrace. It cannot be translated into a legal imposition that neither people of other religions nor atheists must accept.¹⁹

State ought to pay particular attention to the impact that some religious rules can have on the fundamental rights, which imply the right not to be discriminated for the reasons relating to sex, race, colour, language, religion as well as the citizen's association with minority groups, such as those based on sexual orientations of the persons concerned.²⁰ And this becomes more evident when taking into account the rights to marry and found a family that, as said before, can no longer be exclusively solemnized by religious ritual and rules. These rights have also a public rite of

is an impediment that the civil law considers to be insurmountable. The application for registration is made in writing by the Catholic priest in no more than five days from wedding date. In any case, the marriage has civil effects from the moment of its celebration, even if, for whatever reason, the registration was made after the prescribed term. In addition, the sentence of annulment of a marriage pronounced by ecclesiastical tribunals is, at the request of the parties or one of them, effective in the Italian (civil-secular) State by the judgement of the competent Court of Appeal. On this question see F. Alicino, 'The Universal Constitutionalism in an Age of Religious Diversity. Western Secularism Tested by "New" Cultural Conflict'. *Stato, Chiese e pluralismo confessionale* (www. statoechiese. it), 2011, pp. 29-36.

¹⁷ Take for example the art. 29 of the Italian Constitution, which supports a "naturalistic" conception of marriage and family ("The Republic recognises the rights of the family as a natural society founded on marriage. Marriage is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family"), whose legal implementation is strongly influenced by the doctrine and traditions of the Catholic Church.

¹⁸ A. Shachar, 'The puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority', 35 *Harvard Civil Rights – Civil liberties Law Review*, 2000, p. 394: "Family law fulfils this demarcating function by legally defining only certain kind of marriage and sexual reproduction as legitimate, while labelling all others as illegitimate".

¹⁹ M.C. Nussbaum, 'A Right to Marry?', 98 *California Law Review*, 2010, p. 678.

²⁰ N. Colaianni, 'Matrimonio omosessuale e Costituzione', *Corriere giuridico*, 2010 p. 845, where it is demonstrated that, legally speaking, discrimination based on sexual orientation may be considered a subset of discrimination based on sex.

passage allowing citizens entry into a specific – privileged – civic status that, for some people, involves not only civil consequences. It is also regarded as a key for the pursuit of his/her own happiness and the development of his/her own personality, not necessarily based on religion. The rights to marry and found a family “extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs”.²¹

For these reasons, marriage and family are related to fundamental rights of individuals, implying an equality dimension. That does not mean that State cannot impose any legal restrictions in this field. Groups of people, though, cannot be fenced out of those rights without some reasonable (constitutionally based) justifications.²² For this, taking into serious account the dramatic changes in society, same-sex couples are now recognised as ‘legal realities’ in many European Countries (the same can be said about the United States of America before²³ the June 2015 historical *Obergefell v. Hodges* of the Supreme Court that, considering the differences among the States’ legislations, has declared same-sex marriage legal across the US). The 2015 Irish referendum gives one of the most recent examples of that.

After 22 years since Ireland decriminalised homosexuality, on May 22nd, 2015, Irish people voted in two referendums. One of them approved changing the Constitution to extend civil marriage rights to same-sex couples, which makes Ireland the first Country to do so through the ballot box. Voters were asked to answer one simple, specific question on whether to amend Article 41 of the 1937 Irish Constitution by adding a new clause to a section titled “The Family”: the referendum asked voters to support or reject the *Thirty-fourth Amendment of the Constitution (Marriage Equality) Act 2015*, which reads “[m]arriage may be contracted in accordance with law by two persons without distinction as to their sex”. Irish decisively voted in favour of marriage equality. Only one of the 43 constituencies chose against the proposal – Roscommon-South Leitrim – while the ‘yes’ vote exceeded 70% in many parts of Dublin. In sum, 62% of the Irish Republic’s electorate voted in favour of gay marriage. This result means that a Republic once socially and religiously dominated by the Catholic Church ignored the clear instructions of its religious authorities.²⁴ Whether we like it or not, the huge yes vote marked a milestone in Ireland’s

²¹ *Obergefell v. Hodges*, 576 U.S. (2015). See also *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)

²² A. Schillaci, ‘Costruire il futuro. Omosessualità e matrimonio’. In A. Schillaci (ed.), *Omosessualità, eguaglianza, diritti. Desiderio e riconoscimento*, Carocci, Rome, 2014, pp.195-214.

²³ See the data available from http://gaymarriage.procon.org/view_resource.php?resourceID=004857 (last accessed June 20, 2015). See also J. Pierceson, *Same-sex marriage in the United States: The Road to the Supreme Court*, Rowman & Littlefield Publishers, Lanham (Maryland) 2014.

²⁴ It is important to remember that on 26 May 2015 a senior Vatican official attacked the legalisation of gay marriage in Ireland. The referendum that overwhelmingly backed marriage equality was a “defeat for humanity”, he claimed. “I was deeply saddened by the result”, Cardinal Pietro Parolin, the Vatican’s Secretary of State, said at a conference in Rome: “the Church must take account of this reality, but in the sense that it must strengthen its commitment to evangelisation. I think that you cannot just talk of a defeat for Christian principles, but of a defeat for

journey towards a ‘more secular’ (and for some less discriminatory) conception of the rights to marry and found a family.²⁵

More generally, in Europe the same-sex couples are more and more considered social groups, which are legally sanctioned by either the ‘new’ contracts (such as registered partnerships, civil unions, same-sex pacts, *Eingetragene Partnerschaft*, etc.) or the same-sex marriage that, from the legal point of view, is nothing less than the opposite-sex wedlock. On the contrary, other European States continue to reserve the rights to marry and found a family for different-sex couples. Therefore, in Europe we are now witnessing an anomalous situation, in which a same-sex couple may be legally recognised and protected in one State but not in another; what, in the context of both the European Union (EU) and the Council of Europe (with the relative European Convention of Human Rights – ECHR), has given rise to a host of legal quandaries.

That is exactly the sort of condition in which national and the supranational Courts have a legitimate role to play,²⁶ also alimenting an intensive judicial dialogue that, in turn, is bringing about the interlocked process of ‘interaction’ and ‘contextualization’. On the one hand, in relation to the rights to marry and found a family, there is an interaction between national laws, the EU’s law and the ECHR.²⁷ On the other, after having long been monopolized by the influence of religious rules and – hence – exclusively reserved for heterosexual people, these rights are nowadays contextualized in both the light of changes in the perception of civil-status relationships²⁸ and in virtue of the equality and non-discrimination principles.²⁹ Supranational protection for same-sex relationship is a topic that has seen important developments recently, “reflecting more extensive national developments in a growing number of countries”. At least in

humanity” (see *Card. Parolin: nozze gay in Irlanda, sconfitta per l’umanità*, available at http://it.radiovaticana.va/news/2015/05/27/card_parolin_nozze_gay_in_irlanda_sconfitta_per_lumanit%C3%A0/1146979, last access 7 June 2015). On this questions see also C. Sbailò, ‘Same-sex Marriage. In Irlanda è stato necessario cambiare la Costituzione’, *Forum di quaderni costituzionali*, 27 May 2015.

²⁵ It is important to note that *Thirty-fourth Amendment of the Constitution (Marriage Equality) Act 2015* does not suggest any change to the definition of the family or remove any outdated references in the section, including those that state a woman’s place is at home. See Article 41 (2,1°) of the Constitution of Ireland, where it is stated that “[i]n particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved”.

²⁶ As it is demonstrated in D. Gallo, L. Paladin, P. Pustorino (eds.), *Same-Sex Couples before National, Supranational and International Jurisdictions*, Springer, Heidelberg etc., 2014. For a comparative analysis of the constitutional jurisprudence in Europe see also M.D. Poli, ‘Le mariage homosexuel dans les jurisprudences constitutionnelles’, 3 *Revue internationale de droit comparé*, 2014, pp. 843-856.

²⁷ See G. Martinico, O. Pollicino, *The Interaction Between Europe’s Legal Systems: Judicial Dialogue And The Creation Of Supranational Laws*, Edward Elgar Publishing, Cheltenham, 2012, pp. 3-56 .

²⁸ J.M. White, ‘The Current Status of Theorizing About Families’. In G.W. Peterson, K.R. Bush, *Handbook of Marriage and the Family*, Springer, New York Heidelberg Dordrecht London, 2013, pp. 11-33.

²⁹ Cf. S. Benhabib, ‘Another Universalism: On the Unity and Diversity of Human Rights’, *Proceedings and Addresses of the American Philosophical Association*, 2007, pp. 7-32; S. Benhabib, *Dignity in Adversity. Human Rights in Turbulent Times*, Polity Press, Cambridge, 2011, pp. 138-165; S. Benhabib, *Another Cosmopolitanism*, with commentaries by J. Waldron, B. Honig, W. Kymlicka, edited and introduced by R. Post, Oxford University Press, Oxford, 2006, pp. 13-84.

Europe, “these national and supranational developments are likely to continue and to reinforce each other”.³⁰

Recent law cases concerning the Italy’s existing constitutional order are very examples of that.

In the first part of this article I briefly underline the basic differences among the European States’ laws regulating the same-sex marriage and the forms of civil partnership. Then I focus the attention on the Italian case. In particular, after analysing the role of the ECHR’s provisions within the Italian constitutional order, I consider the State’s existing law in relation to the realities of same-sex relationship. Specifically, I consider these issues under two different perspectives, such as the (A) interaction between the ECHR and the EU and (B) the interaction between the ECHR’s system (the ECHR’s provisions as interpreted by the Court of Strasbourg) and the Italian legal order. This will allow me to describe the evolution of the Strasbourg and Italian jurisprudence ruling same-sex marriage and stepchild adoption in family centred on gay relationship. That, in turn, is alimending a process of ‘contextualization’, through which the rights to marry and found a family are gradually contextualized in the light of both the present-day conditions and the principles of equality and non-discrimination.

2. THE EUROPEAN PUZZLE

In Europe the phenomenon of same-sex relationship is a recent legal reality. It has been affirmed through a legislative trend that oscillates between two opposite approaches. While some European States let same-sex couples have access to the general status of marriage and family³¹, others exclude gay citizens from that status, which continues to be reserved for opposite-sex unions. Within these two extremes there are different solutions, such as the civil partnership forms³² that, in turn, can be broadly split into two kinds of regulatory regime:

³⁰ K. Waaldijk, ‘Same-Sex Partnership, International Protection’, *Oxford Public International Law* (<http://opil.ouplaw.com>), March 2013.

³¹ Within the Council of Europe, the Netherlands legalized civil marriage for same-sex couples in 2001, which made it the first Country in the world to do so. Ten other European states have followed so far: Belgium in 2003, Spain in 2005, Norway and Sweden in 2009, Portugal and Iceland in 2010, Denmark in 2012, and France and England and Wales in 2013, Ireland in 2015.

³² Denmark put in place a kind of registered partnerships in 1989, while Norway did the same in 1993, Sweden in 1995, Iceland in 1996, the Netherlands in 1998, France in 1999, Belgium in 2000, Germany in 2001, Finland in 2002, Luxembourg in 2004, Andorra and the United Kingdom in 2005, the Czech Republic and Slovenia in 2006, Switzerland in 2007, Hungary in 2009, Austria in 2010, and Liechtenstein and Ireland in 2011. Croatia put in place unregistered cohabitation in 2003.

- 1) a regime in which the same-sex relationship is considered different, if not inferior, from the status of opposite-sex union;
- 2) a regime in which the civil partnership status for same-sex couple is more or less equivalent to opposite-sex relationship.

In the first case, same-sex couples cannot marry, and the legal framework that is open to them is not of the same 'quality' as marriage that is available for different-sex couples. That can be seen as a form of potential discrimination, because there are privileges for people who enter into heterosexual marriages that lesbians and gay persons are prevented from sharing. Also, the opposite-sex couples could declare that they are discriminated because the alternative to marriage, the civil partnership, is not open to them. This was in fact the kind of question affirmed in the Netherlands, Belgium and France after the legal regime of civil partnership entered into force; what led these States to open the new regime to opposite-sex couples. Yet, this solution still continues to aliment discriminations, as opposite-sex couples can choose between two ways of formalising their relationship, whereas same-sex couples have only one option. That is the reason why later on the Netherlands (2001), Belgium (2003), France (2013), Sweden (2009), Denmark (2012), England and Wales (2013), as well as Ireland (2015) opened up marriage to same-sex couples.³³

Regarding those European States in which the civil partnerships for same-sex couple are more or less 'equivalent' to the traditional marriage and family, the only difference seems to be in the name that, despite its social and cultural relevance, has no legal consequence. Here what really matters is that the enjoyment of the rights to marry and found a family is secured without distinction on any ground, including sexual orientation. So, in order to underline the equality and non-discrimination dimensions of this form of civil partnership, some scholars suggest both adopting it in a general way and leaving the label of 'marriage' entirely to religious organizations. The State's law would only handle benefits under civil registration regime. If it is so divisive, and if it is also so unpredictable in its meaning, might a good solution be for the State to back out of the marriage, offering civil unions for both same-sex and opposite-sex couples? For Martha Nussbaum the answer is yes, simply because a Constitutional democracy does not "require the State to use this particular name rather than some others, although it does require the State to protect people's (equal) liberty in setting up households".³⁴

³³ J.M. Scherpe, 'The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights', *The Equal Rights Review*, 2013, pp. 84-85.

³⁴ Nussbaum, above n. 19, p. 695.

Others scholars, though, pronounce that the State should be more involved in regulating marriage, including extending it to same-sex couples. Even though marriage is often a troubling institution for many reasons, “we may face significant constitutional constraints on the ability to abandon it”. In other terms, regardless of whether States were initially required to create the marriage institution, it is now understood as a fundamental right: “to abolish marriage rather than to extend it to same-sex couples raises serious issues under the nondiscrimination and nonretrogression principles embodied in contemporary constitutional law”.³⁵

As we can notice, this is not merely a social and philosophical skirmish about same-sex marriage and same-sex relationship.³⁶ It also implies practical questions about the State’s role in regulating the rights to marry and found a family. That is more evident in the European legal contexts – namely the EU and the Council of Europe – where, although legislative avenues to advocate for same-sex marriage have been relevant in many Member States, opposition to legal recognition of the same-sex marriage and the same-sex relationship still persists in others.³⁷

Within the EU and in the larger framework of the Council of Europe (with its 47 Member States, 28 of which are the EU’s Members) there is a greater diversity in marriage and family law than has often been the case historically. And this explains not only the heightened issues about the ability of same-sex couples to enter such agreements, but also the continued ambiguity about extraterritorial recognition of same-sex marriage and civil union relationships between States.³⁸

³⁵ Karlan, above n. 9, p. 707. See also C.J. Reid Jr., ‘And the State Makes Three: Should the State Retain a Role in Recognizing Marriage?’, 27 *Cardozo Law Review*, 2006, pp. 1277-1309; E.A. Zelinsky, ‘Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage’, 27 *Cardozo Law Review*, 2006, pp. 1161-1220.

³⁶ J. Vanevery, ‘From modern nuclear family households to postmodern diversity? The sociological construction of “families”’. In G. Jagger, C. Wright, *Changing Family Values*, Routledge, London and New York, 1999, pp. 165-184. See also J. Newman, *Biblical Religion and Family Values. A problem in the Philosophy of Culture*, Praeger, Westport (Connecticut), London, 2001, pp. 1-6; Stephanie Coontz, ‘Let Scholars Bring Realism to the Debates on Family Values’, 32 *The Chronicle of Higher Education*, 21 October 1992; J.Q. Wilson, ‘The Family-Values Debate’, 95 *Commentary*, April 1993, pp. 24-31; C. Wringer, ‘Family Values and the Value of the Family’, 28 *Journal of Philosophy of Education*, 1994, pp. 77-88.

³⁷ For example, in January 2013 the Lower House of the Polish Parliament refused to legalize civil unions between same-sex partners. In June 2013 the Russian Duma passed a law banning “gay propaganda” while similar legislation had already come into force in several regions of Russia. The virulence of certain statements made at the French National Assembly in the context of the debates concerning “marriage for everyone” (*Loi no. 2013-404*, May 17, 2013, *Ouvrant le mariage aux couples de personnes de même sexe*) shows the degree to which the same-sex marriage debate remains sensitive in a European State like France, which takes pride in the claims of the Country’s strict separation between political and religious affairs. On these questions see, among others, Amnesty International, *Urgent Action: Discriminatory Law Backed In Russia* (2013), in http://www.amnestyusa.org/sites/default/files/uaa34812_1.pdf (last accessed September 3, 2014). See also the EU Parliament, *European Parliament resolution of 13 June 2013 on the rule of law in Russia*, B7-0290, June 13, 2013. On this point see K. Waaldijk, ‘Legal family formats for (same-sex) couples’. In O. Thévenon, Gerda Neyer (eds.), ‘Family policies and diversity in Europe: The state-of-the-art regarding fertility, work, care, leave, laws and self-sufficiency’, 7 *Families And Societies Working Paper Series*, 2014, pp. 42-55; A. Bodnar, A. Sledzińska-Simon, ‘Between Recognition and Homofobia: Same-Sex Couples in Eastern Europe’. In D. Gallo, L. Paladin, P. Pustorino (eds.), above n. 26, pp. 211-248.

³⁸ Take for examples the legal conflicts based on the international private law. See *ex multis* D. Gallo, L. Paladin, P. Pustorino (eds.), above n. 26, Section 2, ‘Private International Law Issues’, pp. 343-398; L. Gannagé, ‘Les méthodes du droit international privé à l’épreuve des conflits des cultures’, 357 *Recueil des cours de l’Académie de*

From here stems a complex legal puzzle, whose different pieces can be assembled by analysing the States' existing laws in the light of equality and non-discrimination principles; which, after all, remain the pillars of a constitutional democracy. And I do think that the Courts, namely the national high Courts, the European Court of Human Rights (also called Court of Strasbourg or ECtHR) and the Court of Justice of the European Union (CJEU) are much better placed to achieve the outcome.³⁹ This is because judicial discourse can prevent legal systems “from any winds that blow as havens of refuge for those who might otherwise suffer”, as they are part of minorities groups or “non-conforming victims of prejudice and public excitement”.⁴⁰

One of the most illustrative examples is given by the law cases arising from the Italian constitutional rules regulating the rights to marry and found a family. In the last years both the ECHR's provisions and the UE's law – as interpreted by the Court of Strasbourg and the CJEU – have challenged, in certain respects, these rules. That also represents an example of the three different levels of ‘interaction’:

- the interaction between the ECHR and national law.
- the interaction between the ECHR and the EU's law;
- the interaction among European constitutional traditions.

I should be noted that these interactions are also accompanied a parallel process involving what I call ‘contextualization’, through which the rights to marry and found a family are contextualized in the light of the current social-cultural changes, having regard to the principles of equality and non-discrimination. That, in the end of the day, contributes to make the ECHR, the EU, the national laws and the relative constitutional traditions living instruments.⁴¹

3. THE INTERACTION BETWEEN THE ECHR AND THE ITALIAN LEGAL ORDER

Regarding the ‘interaction’, this process is in particular alimented by the dialogue between the ECtHR and the national Courts, which also entail the State judges' fundamental function of

droit international de la Haye, 2013, pp. 223-490; M.C. Vitucci, ‘In viaggio per I diritti. Coppie omosessuali e diritto internazionale privato’. In Schillaci (ed.), above n. 22, pp. 112-130. It is interesting to note that this is exactly the kind of situation of the United States, where there is the growing set of alternative marriage options and the increasing decentralization of marriage regulation. See B.H. Bix, ‘Pluralism and Decentralization in Marriage Regulation’. In Nichols (ed.) above n. 14, pp. 60-77.

³⁹ P. Ridola, ‘Presentazione’. In Schillaci (ed.), above n. 22, p. 14.

⁴⁰ As the U.S. Supreme Court proclaimed in 1940, *Chambers vs. Florida*, 309 U.S. 227, 241 (1940).

⁴¹ For a detailed discussion of the ECHR as a ‘living instrument’ see Cf. G. Latsa, ‘The ECHR as a Living Instrument: Its Meaning and Legitimacy’. In A. Føllesdal, B. Peters, G. Ulfstein (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, Cambridge University Press, Cambridge, 2013, pp. 181-262. See also A. Mowbray, ‘The creativity of the ECtHR’, *5/1 Human Rights Law Review*, 2005, pp. 57-79.

participating in the development of the European system of human rights protection. The ECHR does not explicitly provide a role for national Courts in the implementation of the principles concerned. Their involvement is nevertheless implied in several Articles of the Convention as well as in important principles produced by the Strasbourg jurisprudence.⁴² The example is precisely given by the rules regulating the principle of subsidiarity, through which the States' Courts are eminent actors in ensuring the national safeguard of human rights⁴³, and the margin of appreciation, which allows national authorities, including judges,⁴⁴ a certain measure of discretion with respect to the construction and fulfilment of the obligations arising from the ECHR.⁴⁵

It should also be noted that the interaction between the Convention and national legal orders varies depending on many other aspects, such as the status afforded to the Convention's provisions within the State's law,⁴⁶ the national system of human rights protection, the institutional role played by domestic Courts in each Member State and, last but not least, the emergence of an European legal tendency, what is called the 'consensus approach',⁴⁷ in matters raising moral or ethical issues, like those related to marriage and family.⁴⁸

So far as Italy is concerned, in recent years the interaction between the ECHR and the national legal order has been largely monopolized by the jurisprudence of the Constitutional Court (CC). In this regard, the CC has been aided by Article 117(1) of the Italian Constitution, as amended by the

⁴² About the ECHR's provisions see Article 35 (1) whose purpose "is to afford the Contracting States the opportunity of reventing or putting right the violations alleged against them before those allegations are submitted to the European Court".

⁴³ The Strasbourg Court has constantly confirmed that the machinery of protection established by the Convention is subsidiary to national systems of human rights protection. See ECtHR, *De Souza Ribeiro v. France*, December 13, 2012, para. 77; ECtHR, *Kudła v. Poland*, October 26, 2000, para. 152; ECtHR (Grand Chamber), *Selmouni v. France*, July 28, 1999, para. 74; ECtRR, *Handyside v. UK*, December 7, 1976, para. 48.

⁴⁴ ECtHR, *X, Y and Z v. UK*, April 22, 1997, para. 44; ECtHR, *Frette v. France*, February 26, 2002, para. 41; ECtHR (Grand Chamber), *Christine Goodwin v. UK*, July 11, 2002, para. 85; ECtHR, *A v. UK*, February 19, 2009, para. 154.

⁴⁵ M. Adenas, E. Bjorge, 'National Implementation of ECHR Rights'. In A. Føllesdal, B. Peters, G. Ulfstein (eds.), above n. 41, pp. 181-262.

⁴⁶ I. Cameron, 'The Court and the Member States: procedural Aspects'. In A. Føllesdal, B. Peters, G. Ulfstein (eds.), above n. 41, pp. 25-61.

⁴⁷ E. Bribosia, I. Rorive, L. Van den Eynde, 'Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience', 32 *Berkeley Journal of International Law*, 2014, pp. 2-43, in part. pp. 18-25. On the "consensus approach" in relation to the national margin of appreciation doctrine see, among others, J. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine', 17 *European Law Journal*, 2011, pp. 80-120; G. Letsas, 'Two Concepts of the Margin of Appreciation', 26 *Oxford Journal of Legal Studies*, 2006, pp. 705-732; E. Brems, *Human Rights: Universality And Diversity*, Nijhoff, The Hague, 2001, pp. 411-419.

⁴⁸ In this case the consensus argument is mainly about a judicial policy instrument, which the Court of Strasbourg uses when it fears that going against consensus will render its rulings ineffectual. In other words, "the European consensus" serves to anchor the Court in legal, political and social reality on the ground". Furthermore, "if the Court appeared to force the views of a small minority of countries on all 47, it would risk a political backlash, which could cause some governments to threaten to leave the convention system"; R. Wintemute, 'Consensus is the right approach for the European court of human rights', in <http://www.theguardian.com/law/2010/aug/12/european-court-human-rights-consensus>, August 12, 2010 (last accessed August 31, 2014).

2001 constitutional reform.⁴⁹ While affirming the principle that national legislation shall be in compliance with the constraints deriving from international obligations,⁵⁰ that reform has made less controversial the problems stemming from the disapplication of the domestic legislation inconsistent with the ECHR.⁵¹ The 2007 ‘twin judgments’ (*sentenze gemelle*)⁵² are significant instances of that.⁵³

With these decisions the CC affirmed that the so-called ECHR’s system (that is the provisions stated in the ECHR, as interpreted by the Court of Strasbourg) must be included in the new constitutional parameter established by Article 117(1) of the Italian Charter.⁵⁴ This means that the ECHR’s system is considered an interposed source of law (*norme interposta*), which retains a sub-constitutional status⁵⁵: the violation of this source results in a violation of Article 117(1) itself.⁵⁶ But, this also means that the ECHR’s sources are not exempt from constitutional scrutiny,⁵⁷ whose scope is far-reaching than that involved in the counter-limits doctrine (*dottrina dei controlimiti*), which operates with regard to the EU’s law⁵⁸: while the scrutiny of the EU’s law concerns only the fundamental rights and principles of the Italian constitutional order,⁵⁹ the ECHR’s sources of law are subject to the Italian Constitution as a whole.⁶⁰ Consequently, the CC stated that ordinary judges cannot set aside domestic laws conflicting with the ECHR, as they do in relation to the

⁴⁹ Constitutional Statute no. 3/2001, October 18, 2001, *Modifiche al titolo V della parte seconda della Costituzione*.

⁵⁰ A. Ruggeri, ‘Rapporti tra Corte costituzionale e Corti europee, bilanciamenti interordinamentali e “controlimiti” mobili, a garanzia dei diritti fondamentali’, 1 *Associazione Italiana dei Costituzionalisti (AIC)*, 2011, pp. 2-5.

⁵¹ Cf. S. Sileoni, ‘Protecting Individuals Belonging to Minority and Other Vulnerable Groups in the European Court of Human Rights: Litigation and Jurisprudence in the Italian System’. In D. Anagnostou, E. Psychogiopoulou (eds.), *The European Court of Human Rights and the Rights of Marginalised Individuals and Minorities in National Context*, Martinus Nijhoff, Leiden, Boston, 2010, pp. 137-158.

⁵² *Corte costituzionale, sent. 348-349/2007*, October 22, 2007.

⁵³ F. Sorrentino, ‘Apologia delle “sentenze gemelle” (brevi note a margine delle sentenze nn. 348 e 349/2007 delle Corte costituzionale)’, *Diritto e Società*, 2009, p. 215.

⁵⁴ A. Guazzarotti, ‘Bilanciamenti e fraintendimenti: ancora su Corte costituzionale e CEDU’, *Forum di quaderni costituzionali*, aprile 2010, spec. pp. 2-3.

⁵⁵ G. Tesauro, ‘Costituzione e norme esterne’. In G. Brunelli, A. Pugiotto, P. Veronesi (eds.), *Scritti in onore di Lorenza Carlassare*, Jovene, Napoli, 2009, vol. I, p. 425.

⁵⁶ A. Bultrini, ‘Le sentenze 348 e 349/2007 della Corte costituzionale: l’inizio di una svolta?’, *I Diritto pubblico comparato ed europeo*, 2008, p. 178.

⁵⁷ A. Bonomi, *Il “limite” degli obblighi internazionali nel sistema delle fonti*, Giappichelli, Torino, 2008, p. 292.

⁵⁸ See, among others, U. Villani, ‘I “controlimiti” nei rapporti tra diritto comunitario e diritto italiano’. In R.A. Garcia et al., *Diritto comunitario e diritto interno. Atti del Seminario Svoltosi in Roma, Palazzo della Consulta, 20 aprile 2007*, Giuffrè, Milano, 2008, pp. 493-528; M. Cartabia, *Principi inviolabili e integrazione europea*, Giuffrè, Milano, 1995, p. 95; A. Ruggeri, ‘“Tradizioni costituzionali comuni” e “controlimiti”, tra teoria delle fonti e teoria dell’interpretazione’, *I Diritto pubblico comparato ed europeo*, 2003, p. 102; G. Morbidelli, ‘Corte costituzionale e Corti europee: la tutela dei diritti (dal punto di vista della Corte del Lussemburgo)’, *I Dir. proc. amm.*, 2006, p. 285; S. Gambino, ‘La Carta e le Corti costituzionali. “Controlimiti” e “protezione equivalente”’, G. Bronzini, V. Piccone (eds.), *La Carta e le Corti. I diritti fondamentali nella giurisprudenza europea multilivello*, Chimienti, Taranto, 2007, p. 45.

⁵⁹ A. Ruggeri, ‘“Tradizioni costituzionali” e “controlimiti”, tra teoria delle fonti e teoria dell’interpretazione’, *I Diritto pubblico comparato ed europeo*, 2003, pp. 102-120.

⁶⁰ E. Sciso, *Il rango interno della Convenzione europea dei diritti dell’uomo secondo la più recente giurisprudenza della Corte costituzionale*, Roma, Aracne, 2008.

domestic legislation conflicting with the EU's laws – especially Regulations and self-executive Directives – which have direct effect in the State's law.⁶¹

The CC has always distinguished the ECHR's system from the EU, even after the Lisbon Treaty entered into force in 2009. This means that at the national level the new provisions stated in the Article 6(2-3) of the Treaty on European Union⁶² neither affects the ECHR's status nor gives national judges the power to set aside domestic legislation incompatible with the Convention.⁶³ In this respect, though, the Italian ordinary Courts are under three specific duties:

- 1) they must construe the ECHR's provisions according to the meaning that has been given them by the Court of Strasbourg;
- 2) they must interpret the domestic law in accordance – as far as possible – with the provisions stated by the ECHR's system; what is called the consistent interpretation (*interpretazione conforme*);⁶⁴
- 3) whenever such an interpretation is not possible, they must raise a constitutionality issue before the CC on the grounds of violation of Article 117(1).⁶⁵

At the same time, the constitutional jurisprudence has emphasized the role of Article 53 of the ECHR, what Sabino Cassese calls the “constitutional principle of subsidiarity”⁶⁶, implying that an

⁶¹ *Corte costituzionale*, sent. 348-349/2007.

⁶² “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”.

⁶³ *Corte costituzionale*, sent. n. 80/2011, March 11, 2011. This position was affirmed by the Grand Chamber of the Court of Justice of the EU in the *Servet Kamberaj v. Istituto per l'Edilizia Sociale della Provincia autonoma di Bolzano et al.* (case C-571/10, Grand Chamber 24 April 2012), where it is in particular stated that the “reference made by Article 6(3) TEU to the ECHR does not require the national court, in the case of conflict between a provision of national law and the ECHR, to apply the provisions of that convention directly, disapplying the provision of national law incompatible with the convention”. According to the EU Court, Article 6 is “neutral”, reserving to the national systems the competence of defining the ECHR's status in their respective legal orders. See also *Åklagaren v. Hans Åkerberg Fransson*, Case C-617/10, Grand Chamber 26 February 2013, request for a preliminary ruling from the Haparanda tingsrätt, Sweden.

⁶⁴ G. Martinico, ‘The Importance of Consistent Interpretation in Subnational Constitutional Contexts: Old Wine in New Bottles?’, 4 *Perspectives on Federalism*, 2012, p. 283; G. Martinico, ‘Is the European Convention Going to Be ‘Supreme’? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts’, 23 *European Journal of International Law*, 2012, pp. 401-423; E. Lamarque, ‘The Italian Courts and Interpretation in Conformity with the Constitution, Eu Law and The ECHR’, 4 *Associazione Italiana dei Costituzionalisti*, 2012, pp. 1-27; M. Raveraira, ‘Le critiche all'interpretazione conforme: dalla teoria alla prassi un'incidentalità “accidentata”?’, 8-9 *Giurisprudenza italiana*, 2010, p. 1669; M. Luciani, ‘Le funzioni sistemiche della Corte costituzionale, oggi, e l'interpretazione “conforme a”’. In *Studi in memoria di Giuseppe G. Floridia*, Jovene, Napoli, 2009, p. 425; V. Manes, ‘Metodo e limiti dell'interpretazione conforme alle fonti sovranazionali in materia penale’, *Arch. pen.*, 2012, pp. 17.

⁶⁵ *Corte costituzionale*, sent. 239/2009, July 16, 2009.

⁶⁶ S. Cassese, *La crisi dello Stato*, Laterza, Roma-Bari, 2002, p. 126.

higher level of national protection of fundamental rights must prevail over a lower level of European protection.⁶⁷

To be more specific, the CC has affirmed that protection provided by the ECHR's system must be balanced with other interests protected by the Italian Constitution. That gives the domestic Courts an opportunity to affirm an overall enhancement of protection related to some rights provided by the Convention, without sacrificing others, equally recognized by the Italian Constitution.⁶⁸ Yet, if this is true, as a logical consequence, the constitutional principle of subsidiarity also infers that at the national level the respect of obligations stemming from the ECHR cannot result in a protection inferior to that ensured by the Strasbourg jurisprudence.

Thus, with the aim of reconciling these two features, the CC has established that the higher protection of the rights provided by the ECHR's system might command a further development of the potentialities inherent in the Italian constitutional rules, especially when regulating the same matters.⁶⁹ Here national ordinary Courts remain eminent actors, whose role is further strengthened by the margin of appreciation doctrine. This, as the ECtHR declared in the 2011 *SH and others v. Austria* case, is particularly true “where there is no consensus within the Member States, either as to the relative importance of the interest at stake or as to the best means of protecting it, especially where the case raises sensitive moral or ethical issues”.⁷⁰ That is exactly the kind of situation involving the right to marry and found a family, which are generating an intensive dialogue between the ECtHR and the Italian Courts.

3.1. Same-Sex Relationships and the Italian Law

⁶⁷ *Corte costituzionale*, sent. 317/2009, November 30, 2009. See R. De Caria, ‘Il bivio dopo Strasburgo: tutela effettiva o vittoria morale? L’obbligo per gli Stati di “conformarsi alle sentenze definitive della Corte EDU” nella prospettiva italiana’, 4 *Giurisprudenza costituzionale*, 2009, pp. 2191-2192.

⁶⁸ See *Corte costituzionale*: sent. 311/2009, November 16, 2009; sent. 187/2010, May 26, 2010; sent. 196/2010, May 26, 2010. See also S. Sonelli, ‘The Dialogue between National Courts and the European Court of Human Rights: Comparative Perspectives’, 14-12 *University of Leicester School of Law Research Paper*, 2014, pp. 11-18; O. Pollicino, ‘Margine di apprezzamento, art. 10, c. 1, Cost. e bilanciamento “bidirezionale”: evoluzione o svolta nei rapporti tra diritto interno e diritto convenzionale nelle due decisioni nn. 311 e 317 del 2009 della Corte costituzionale?’, *Forum di quaderni costituzionali*, December 16, 2009, p. 7.

⁶⁹ *Corte costituzionale*, sent. 317/2009, above n. 67. In this sense, in 2011 the Constitutional Court affirmed that national judges shall respect the ‘substance’ of the Strasbourg jurisprudence, to be interpreted as a direction to discard a “strict and formalistic application of the criteria adopted by the” ECtHR (*Corte costituzionale*: sent. 303/2011, November 9, 2011; sent. 326/2011, December 2, 2011). Besides, this is a criterion established by the Strasbourg Court itself in the *Scordino and others no. 1 v. Italy* (March 27, 2003). However, while the ‘substance’ criterion can ensure an adequate degree of flexibility in approaching the Strasbourg jurisprudence, it also produces the risk of being applied in such a way as to elude this same jurisprudence. This is because the essential characteristic of that criterion has not been clarified by the Italian Constitutional Court. See A Ruggeri, ‘Tutela dei diritti fondamentali, squilibri nei rapporti tra giudici comuni, Corte costituzionale e Corti europee, ricerca dei modi con cui porvi almeno in parte rimedio’, <http://www.giurcost.org/studi/Ruggeri12.pdf>.

⁷⁰ ECtHR, *SH and Others v. Austria*, November 3, 2011, para. 94.

The attention is focused on the 2010 decision (no. 138), through which the CC categorically asserted that in Italy same-sex marriage does not have any constitutional ranking. In particular, it stated that Articles 2, 3 and 29 of the Italian Constitution could not be interpreted in such a way as to legally recognise same-sex wedlock. Rather, the Court insisted that, in the spirit of Christian tradition, Article 29 – specifically devoted to family and marriage – embodies a “naturalistic definition of family” that, in turn, is based on a “traditional concept of marriage”⁷¹, both presupposing a gender diversity.⁷²

In reality, the language of Article 29 seems to be characterized by a gender-neutral notion, as it declares that, recognising the rights of the “family as a natural society founded on marriage”, the Italian Republic proclaims “the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family”. So, from a linguistic point of view, Article 29 leaves room to legitimize a non-traditional definition of family, which may imply non-conventional forms of marriage, including same-sex unions. Nonetheless, the CC ruled that the content of Article 29 reflects the provisions affirmed by the 1942 Italian Civil Code and secondary legislation adopted thereafter, which reserve the rights to marry and found a family for different-sex couples only.⁷³ Furthermore, in the 2010 decision the Italian judge pronounces that the constitutional notions of family and marriage are based on the “(potential) procreative purpose”,⁷⁴ which differentiates these notions from those relating to “homosexual unions”.⁷⁵

Now, the procreative purpose is in reality an essential – i.e. traditional – element of the Catholic notion of marriage, as clearly stated in Canon 1055 (§ 1) of the *Codex Iuris Canonici*⁷⁶. On the contrary, this aim is not essential where civil marriage is concerned. In all constitutional democracies the civil marriage does not *necessarily* presuppose a procreative aspiration that, in effect, can be deliberately removed from the wedlock; as the US Supreme Court has clearly stated

⁷¹ *Corte costituzionale*, sent. 138/2010, April 14, 2014, para. 5 e 9.

⁷² In this case it should be underlined what the US Supreme Court affirmed in its 2015 judgement *Obergefell v. Hodges*, 576 U.S. (2015): “[t]he limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter”. On the interpretation of Article 29 of the Italian Constitution see R. Bin, ‘Per una lettura non svalutativa dell’art. 29’. In R. Bin, G. Brunelli, A. Guazzarotti, A. Pugiotto e P. Veronesi (eds.), *La “società naturale” ed i suoi “nemici”. Sul paradigma eterosessuale del matrimonio*, Giappichelli, Torino, 2010, p. 41.

⁷³ *Corte costituzionale*, sent. 138/2010, above n. 71. See also *Corte costituzionale*, sent. 161/1985, May 23, 1985.

⁷⁴ Purpose that according to the Constitutional Court is also affirmed by the contiguity of this Article with Article 30, devoted to the legal protection of children. See *Corte costituzionale*, sent. 138/2010, above n. 71, para. 9.

⁷⁵ *Corte costituzionale*, sent. 138/2010, above n. 71, para. 9: “[t]he necessary and fair protection guaranteed to biological children does not undermine the constitutional significance attributed to the legitimate family and the (potential) creative purpose of marriage which distinguishes it from homosexual unions” (translation is mine).

⁷⁶ Can. 1055 §1: “[t]he matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life and which is ordered by its nature to the good of the spouses and the procreation and education of offspring, has been raised by Christ the Lord to the dignity of a sacrament between the baptized”.

in what is called the historical judgment dated 26th June, 2015, “the right to marry cannot be conditioned on the capacity or commitment to procreate”.⁷⁷ Besides, even in the context of the Catholic Church, since the Second Vatican Council (1962-1965) the so-called procreative aim has become less rigid than it was in the past.⁷⁸

In any case, the CC declares that the provisions of the above-mentioned Article 29 – in conjunction with Article 30(1)⁷⁹ – must be interpreted in the traditional manner, in the same way as the constitutional drafters contemplated them in 1948, when the Italian Charter entered into force. So far as Article 29 of the Italian Constitution is concerned, only opposite-sex marriage is recognized by the Italian legal order.⁸⁰

The constitutional judges are nevertheless aware of socio-cultural changes occurring over time in this field.⁸¹ So, in the same 2010 decision they add that Article 2 of the Italian Constitution provides a constitutional protection for same-sex unions that, for this way, are considered ‘social groups’, within which everyone has the right to develop his personality.⁸² Hence, for the first time in the history of the Italian Republic, gay unions receive a constitutional recognition. And it should be assumed that, since being part of a social group (as referred to in Article 2 of the Constitution), same-sex couples must have the rights stemming from the principle of equality, which implies the prohibition of unreasonable discriminations, including those based on sexual orientation.⁸³ The Constitutional Court made it clear that the Italian Parliament has the duty to regulate the status of same-sex social groups, providing appropriate forms of legal protection for them.⁸⁴ This also implies that, although the Parliament retains a degree of discretion in this area, the legislation must in any case safeguard the fundamental rights of persons concerned.⁸⁵ That is also requested by the European-supranational system of human rights protection, especially the

⁷⁷ *Obergefell v. Hodges*, 576 U.S. (2015).

⁷⁸ See N. Colaianni, *Diritto pubblico delle religioni. Eguaglianza e differenza nello Stato costituzionale*, Mulino, Bologna, 2012, p. 256. See also P. Moneta, *Il matrimonio nel nuovo diritto canonico*, Ecig, Genova, 2008, p. 26 and p. 127; P. Veronesi, *Il corpo e la Costituzione. Concretezza dei «casi» e astrattezza della norma*, Giuffrè, Milan, 2007, p. 80. See also M. Croce, *Diritti fondamentali programmatici, limiti all'interpretazione evolutiva e finalità procreativa del matrimonio: dalla Corte un deciso stop al matrimonio omosessuale*, Forum di quaderni costituzionali, 23 April 2010.

⁷⁹ “It is the duty and right of parents to support, raise and educate their children, even if born out of wedlock”.

⁸⁰ A.C. Jemolo, *Il matrimonio*, Utet, Torino, 1961, p. 3.

⁸¹ See N. Lipari, ‘Riflessioni su famiglia e sistema comunitario’, *Famiglia*, 2006, p. 13.

⁸² In fact, Article 2 of the Italian Constitution states that “[t]he Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups within which human personality is developed”. Cf. *Obergefell v. Hodges*, 576 U.S. (2015), where the US Supreme Court stated that “[c]hoices about marriage shape an individual’s destiny”.

⁸³ See (among many other decisions of the) *Corte costituzionale*, sent. 236/2008, June 27, 2008; sent. 206/1999, June 3, 1999; sent. 46/1993, January 28, 1993; sent. 81/1992, February 2, 1992.

⁸⁴ N. Colaianni, ‘Matrimonio omosessuale e Costituzione’, 7 *Corriere giuridico*, 2010, pp. 845-854.

⁸⁵ *Corte costituzionale*, sent. 138/2010, above n. 71, para. 8. On this question see also *Corte costituzionale*, sent. 404/1988, April 7, 1988; sent. 559/1989, December 20, 1989;

ECHR, to which the Constitutional Court – also taking into account its previous jurisprudence concerning Article 117(1) of the Italian Charter – refers explicitly in its 2010 decision.⁸⁶

In fact, in matters of same-sex marriage this European system seems open to evolution, as demonstrated by the ECtHR's judgment ruling the *Schalk and Kopf* case⁸⁷, handed down two months later (24 June 2010) the mentioned decision of the Italian Constitutional Court.

4. THE INTERACTION BETWEEN THE ECHR AND THE EU'S LAW

In reality, at the time of the *Schalk and Kopf* decision the ECtHR had already declare that “the inability of any couple to conceive a child cannot be regarded as *per se* removing the right to marry”.⁸⁸ This statement, however, did not mean to grant the right to marry to same-sex couples. So what does it mean? The *Schalk and Kopf* case gave the ECtHR the opportunity to answer, clarifying its position on this very issue.

In doing so the Court of Strasbourg focused its attention on Article 12 of the ECHR, where it is stated that “[m]en 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”. So, at first sight it seems that, while this right is subject to the States' laws, the limitations thereby introduced cannot restrict or reduce it to such an extent that its very essence would be significantly impaired.⁸⁹ From here stems a crucial problem: on the basis of this finding, can we imply that the Member States have the duty to legally recognise and protect the same-sex marriage or, at least, the same-sex relationship?

We just noticed that Article 12 grants the rights to marry and found a family to men and women. Thus, it seems that the ECHR reserves these rights for different-sex couples only. The ECtHR, however, pronounces that the Convention is a living instrument, which must be interpreted in a contemporary manner, in the light of present-day conditions.⁹⁰ It is true that – literally – the first sentence of Article 12 refers to man and woman. Nevertheless, the ECtHR is not persuaded that it is a determination of gender by purely biological criteria; what is also support by the fact that the inability of any couple to conceive a child cannot be regarded as *per se*

⁸⁶ In particular, the Italian Constitutional Court referred to ECtHR (Grand Chamber), *Christine Goodwin v. UK*, above n. 44; See *Corte costituzionale*, sent. 138/2010, above n. 71, para. 1.

⁸⁷ ECtHR, *Schalk and Kopf v. Austria*, June 24, 2010.

⁸⁸ ECtHR (Grand Chamber), *Christine Goodwin v. UK*, above n. 44, para. 98.

⁸⁹ See ECtHR, *F. v. Switzerland*, December 18, 1987, para. 32.

⁹⁰ ECtHR, *Tyrer v. the United Kingdom*, 25 April 1978, para. 31; ECtHR (Grand Chamber), *Christine Goodwin v. UK*, above n. 44, para. 75; ECtHR (Grand Chamber), *Vallianatos and others v. Greece*, 7 November 2013, para. 84. See also ECtHR (Grand Chamber), *Christine Goodwin v. UK*, above n. 44, para. 98.

removing the right to enjoy marriage and family life. For these reasons, the ECtHR “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”.⁹¹ It is important to highlight that to reach that conclusion the Court of Strasbourg makes a specific reference to Article 9 of the Charter of Fundamental Rights of the European Union (EU Charter).

Article 9 of the UE Charter provides that the “right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights”. Hence, this provision is modelled on the corresponding Article 12 of the ECHR, apart from the words ‘men’ and ‘women’ that, in fact, have been purposely sidelined. Article 9 has been formulated in a gender-neutral manner,⁹² which is a contribution of the EU’s legislator “to the relevant legal area, since it provides more extensive protection than other human rights instruments”.⁹³ In short, the scope of Article 9 of the EU Charter has been extended to comprise other forms of marriage than the traditional ones.⁹⁴ It must be noted that to justify this alteration (between Article 12 of the ECHR and Article 9 of the EU Charter)⁹⁵ the EU’s legislator has taken into account the jurisprudence of the ECtHR.⁹⁶ The Court of Strasbourg, in turn, has used the reference to national laws in order to explain that the decision whether or not to allow same-sex marriage is in the hands of the Member States.⁹⁷ That, at the very end of the day, is a significant result of the interaction between the ECHR’s system (as the Italian Constitutional Court calls it)⁹⁸ and the EU’s law.

In other words, the ECtHR considers that in this field the Member States retain a broad margin of appreciation because among these different constitutional traditions there is not a large consensus yet:⁹⁹ the Court of Strasbourg acknowledges an emerging European trend towards legal recognition of same-sex couples;¹⁰⁰ in the absence of a majority of the Contracting Parties providing for that recognition, it nevertheless grants a margin of appreciation in the timing of the

⁹¹ *Id.*, para. 61.

⁹² S. Rodotà, *Eguaglianza e dignità delle persone LGBTI*, in A. Schuster (Ed.), *Equality and Justice. Sexual Orientation and Gender Identity in The XXI Century (With an Introduction By Stefano Rodotà)*, Forum, Udine, 2011, pp. 11-13.

⁹³ The EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, June 2006, p. 98.

⁹⁴ *Id.*, p. 99.

⁹⁵ See *Id.* p. 98, note 380.

⁹⁶ As stated in *Id.* pp. 97-100. *Id.*

⁹⁷ ECtHR, *Schalk and Kopf v. Austria*, above n. 87, para. 60.

⁹⁸ See *supra* para. 3.

⁹⁹ C. Danisi, ‘How Far Can the European Court of Human Rights Go in the Fight Against Discrimination? Defining New Standards in Its Nondiscrimination Jurisprudence’, *9 International Journal of Constitutional Law*, 2011, pp. 793-807.

¹⁰⁰ ECtHR, *Schalk and Kopf v. Austria*, above n. 87, para. 105.

introduction of legislative changes.¹⁰¹ More specifically, the ECtHR held that the Member States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition of same-sex couples.¹⁰²

Having said that, the ECtHR points out that the same-sex relationship is part of the notion of ‘family life’ for the purposes of Article 8 of the Convention. Which can be seen as a turning point in the marriage and family issues in the European context.

4.1. Same-Sex Relationships and the Right to family life

Article 8 of the ECHR provides that “[e]veryone has the right to respect for his private and family life, his home and his correspondence”. Until 2010 the ECtHR had considered the relationships of same-sex couples exclusively from the viewpoint of the right to respect for private life, but not from the viewpoint of the right to respect for family life. The *Schalk and Kopf* case was a step in this direction.¹⁰³

While valuing the rapid evolution of social attitudes towards same-sex couples in many Member States, the Court of Strasbourg held that a stable relationship between same-sex partners falls within the scope of the notion of family life, just as a stable relationship between opposite-sex persons would.¹⁰⁴ In concrete terms, this means that a cohabiting same-sex couple living in a stable *de facto* partnership may be considered a family, just as the relationship of a different-sex couple in the same situation is.¹⁰⁵ Despite this premise, the ECtHR did not conclude for a positive obligation to provide a satisfactory framework, which would offer, at least to a certain extent, same-sex couples the protection all families should enjoy.¹⁰⁶ Quite the contrary, the Court of Strasbourg stated that the Member States retains a margin of appreciation in assessing whether and

¹⁰¹ *Id.*, para. 106. See also ECtHR, *UK Courten v. U.K.*, November 4, 2008. ECtHR, *M.W. v. the UK*, June 23, 2009.

¹⁰² ECtHR, *Schalk and Kopf v. Austria*, above n. 87, para. 108.

¹⁰³ See Bribosia, Rorive□, Van den Eynde, above n. 47, p. 11.

¹⁰⁴ G. Willems, ‘La vie familial des homosexuels au prisme des articles 8, 12 et 14 de la Convention Européenne des Droits de l’Homme : mariage et conjugalité, parenté et parentalité’, 93 *Revue trimestrielle des droits de l’homme*, 2013, p. 65.

¹⁰⁵ ECtHR, *Schalk and Kopf v. Austria*, above n. 87, para. 94.

¹⁰⁶ As stated by judges Rozakis, Spielmann, and Jebens in their Joint Dissenting Opinion of the ECtHR, *Schalk and Kopf v. Austria*, above n. 87. See Bribosia, Rorive□, Van den Eynde, above n. 47, pp. 12-13: “When the dissenting judges refer to a “satisfactory framework” intended to protect the family life of stable same-sex couples, they do not specify which type of legal recognition would be judged compatible with the requirements of the ECHR. Although it appears that the absence of any legal recognition should be condemned, it does not clearly follow whether, and under which conditions, a registered partnership could be judged satisfactory”.

to what extent differences in otherwise similar situations justify differences in treatment: the Member States may treat a same-sex family differently.¹⁰⁷

However, the ECtHR also affirmed that where there is no reasonable justification, such differences of treatment are discriminatory.¹⁰⁸ Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification.¹⁰⁹ The same-sex relationship must thus be protected for the aims established by ECHR's system, which includes the rights not to be discriminated for the purpose of Article 8 taken in conjunction with Article 14 of the Convention.

Yet, regarding the right to marry, the ECtHR did not do the same, as it did not address the issue of discrimination related to Article 12 taken in conjunction with Article 14. The 2010 ECtHR's decision only concerned whether the right to marry (Article 12) had been violated. As a result, this remains an open question, especially in relation to the European States that refuse to grant to same-sex couples the status of marriage and the relative legal benefits granted to opposite-sex partnership. That brings to challenge the reasons for which a minority is excluded from an opportunity that is legally provided to the majority.

4.2. Traditional Marriage and Same-Sex Relationships

The fact that, at the end of a gradual evolution, some European States find themselves in a minority position as regards of their legislation regulating marriage and family does not necessarily imply a contrast between these national legislations and the ECHR's system. The protection of the family in the traditional sense can be, in principle, a legitimate reason for justifying differences in treatment. Nonetheless, in the light the Strasbourg jurisprudence the State's authorities must offer convincing and weighty explanations capable of legitimising the exclusion of same-sex couples from the marriage and family status, as provided for different-sex partners.¹¹⁰ For example, some European States must explain why gay people are not held to have civil marriage status whereas convicted felons, divorced parents who fail to pay child support,

¹⁰⁷ ECtHR, *Schalk and Kopf v. Austria*, above n. 87, para. 96.

¹⁰⁸ *Id.*, para. 96.

¹⁰⁹ *Id.*, para. 97. The ECtHR has repeatedly affirmed this principle in its jurisprudence. See in particular ECtHR, *Karner v. Austria*, July 24, 2003, para. 37; ECtHR, *L. and V. v. Austria*, January 9, 2003, para. 45; and *Smith and Grady v. UK*, September 27, 1999, para. 90. See also Council of Europe, Committee of Ministers, *Recommendation on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Activity*, Marh 31, 2010, para. 23: “[w]here national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor's pension benefits and tenancy rights”.

¹¹⁰ Cf. P. Pustorino, ‘Same-Sex Couples Before the ECtHR: The Right to Marriage’, in D. Gallo, L. Paladin, P. Pustorino (eds.), above n. 26, pp. 405-406.

persons with a record of domestic violence, drug abusers, delinquent taxpayers and even murderers are held to have the rights to marry and found a family; so long as they choose to do so with someone of the opposite sex.¹¹¹

In more concrete – i.e. juridical – terms, in relation to the Council of Europe’s context, the Member States opposing to the same-sex marriage must demonstrate that in their legislation there is no violation of Article 14 taken in conjunction with Articles 8 and 12 of the ECHR which, as the 2013 ECtHR’s *Vallianatos* decision stated, may also be interpreted in conjunction with the provisions established by the EU’s law. Not only Article 9 of the EU Charter, but also Articles 7 and 21 of this Charter as well as a number of the EU’s Directives, starting from the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.¹¹²

To this regard, it is important to remember what the Court of Justice of the European Union (CJEU) has affirmed in relation to the difference in treatment between same-sex couples (which in some Member States are recognised as registered life partnership) and the opposite-sex unions (based on traditional marriage). The EU’s law does not require that the situation referring to same-sex couples be identical to those relating to opposite-sex marriage, but only that they be comparable. The assessment of this comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner, in the light of the rights and interests concerned. For example, in relation to the refusal to grant a survivor’s pension to the life partner of a deceased member of an occupational pension scheme, the CJEU has carried out an overall comparison between marriage and registered life partnership under German law, as interpreted by the national Courts (namely the *Arbeitsgericht Hamburg*). In this manner, the CJEU has made it clear that registered life partnership is to be treated as equivalent to marriage as regards the widow’s or widower’s pension.¹¹³ In other words, the difference in treatment based on the employees’ marital status and not expressly on their sexual orientation is “still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the

¹¹¹ Nussbaum, above n. 19, p. 670.

¹¹² See also the European Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification lays down the conditions for the exercise of the right to family reunification by third country nationals residing lawfully on the territory of a Member State. The Directive 2004/38/EC of the European Parliament and Council of 29 April 2004 concerns the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. See ECtHR (Grand Chamber), *Vallianatos and Others v Greece*, above n. 90, paras. 33-34.

¹¹³ CJEU (Grand Chamber), *Jürgen Römer v. Freie und Hansestadt Hamburg*, Case C-147/08, 10 May 2011, para. 42. See also CJEU (Grand Chamber), *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, Case C-267/06, 1 April 2008, para. 42

condition required for obtaining the benefit claimed”.¹¹⁴ So, as the discrimination is direct, it may be upheld not on the basis of a legitimate aim within the meaning of Article 2(2)(b)¹¹⁵ of Directive 2000/78 (as this provision covers only indirect discrimination), but only on one of the grounds referred to in Article 2(5) of that Directive – namely public security, the maintenance of public order and the prevention of criminal offences, the protection of health and the protection of the rights and freedoms of others.¹¹⁶ It is worth noting that both the Directive 2000/78 and the CJEU’s jurisprudence make explicit reference to fundamental rights, as guaranteed by the ECHR, as they result from the constitutional traditions common to the Member States, as general principles of Community law¹¹⁷.

Also, it should not be forgotten that on 20 February 2015 the European Parliament (EP) voted to approve its *Annual Report on Human Rights and Democracy in the World 2013 and the European Union’s policy on the matter*, which declares same-sex marriage to be fundamental human right. For this reason, the EP takes note of the legalisation of same-sex marriage or same-sex civil unions in an increasing number of Countries – 17 to date – around the world: it “encourages the EU institutions and the Member States to further contribute to reflection on the recognition of same-sex marriage or same-sex civil union as a political, social and human and civil rights issue”.¹¹⁸ In addition, on 9 June 2015, the EP explicitly supports family rights for same-sex couples, approving by a large majority a report on gender equality in Europe. In this case the EP highlights the evolution of the definition of family, affirming that the rules in that area (including implications for workplace leaves and other family rights) take into account phenomena such as single parents and same-sex parenting: the EP recommends that, as the composition and definition

¹¹⁴ CJEU (Fifth Chamber), *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, Case C-267/12, 12 December 2013, para. 44.

¹¹⁵ “Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons”.

¹¹⁶ CJEU (Fifth Chamber), *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, above n. 114, para. 45.

¹¹⁷ Council Directive 2000/78/EC of 27 November 2000 *establishing a general framework for equal treatment in employment and occupation*: “[w]hereas: ... (1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects 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, as general principles of Community law”. On the interaction between the EU’s law and the ECHR in this specific matter see D. Sardo, *Percorsi della differenza. L’orientamento sessuale nella giurisprudenza della Corte di Giustizia*. In Schillaci (ed.), above n. 22, pp. 131-147. Cf. M.F. Orzan, ‘Employment Benefits for Same-Sex Couples: The Case-Law of the CJEU’. In D. Gallo, L. Paladin, P. Pustorino (eds.), above n. 26, pp. 493-510.

¹¹⁸ European Parliament *on the Annual Report on Human Rights and Democracy in the World 2013 and the European Union’s policy on the matter*, (2014/2216(INI)), Plenary sitting, 20.02.2015, A8-0023/2015, para. 162, p. 36.

of families change over time, “family and work legislation be made more comprehensive with regard to single-parent families and LGBT parenting”.¹¹⁹

In the meantime, at the national level, the Italian Court of Cassation (ICC) has marked a fundamental change in the legal treatment of same-sex partnership. And in doing so, together with the 2010 above-mentioned decision (no. 138/2010) made by the Constitutional Court, the ICC considered the European supranational provisions, namely the ECHR and what the ECtHR had declared in its jurisprudence.

5. THE ITALIAN LAW IN THE LIGHT OF EUROPEAN LAW AND WITHIN THE PRESENT-DAY CONDITIONS

First of all, our attention is focused on analysing the 2012 ICC’s decision (no. 4184/12), which does not lie in a sort of constitutionalization of same-sex marriage; what can be done only by reinterpreting Article 29 of the Italian Charter or amending it. Rather, with the 2012 decision the ICC re-considers the 1948 Italian Constitution’s provisions in the light of the ECHR’s system that, as said in relation to Article 117(1), integrate the Italian constitutional parameters. This means that the ECHR’s system may demand further development of the potentialities inherent in the Italy’s existing law – including constitutional provisions –¹²⁰ regulating the rights to marry and found a family.¹²¹ That gives the ICC the possibility to study from a different perspective the ‘potentialities’ inherent not only in Article 29, but also, and above all, in Articles 2 and 3 of the Italian Constitution.¹²²

This new perspective is in particular given by Articles 8, 12 and 14 of the ECHR as well as Article 9 of the EU Charter, as specifically interpreted in the *Schalk and Kopf* decision. The ICC is thus able to make an interaction between the ECHR’s system and the Italian provisions, contextualizing them in the light of both the present-day conditions and the rapid evolution of legislations that, since the beginning of this century, have taken place Europe in the field of marriage and family.¹²³ As a result, although the ICC refuses to recognise (i.e. register) in Italy a same-sex marriage that has been formally sanctioned in another European State, it does so not

¹¹⁹ European Parliament on the EU Strategy for equality between women and men post 2015, at 16 and 34 (2014/2152(INI)).

¹²⁰ M. Di Masi, ‘Il riconoscimento delle unioni «same-sex» al vaglio della Corte costituzionale’, 2 *Rivista critica del diritto privato*, 2009, pp. 335-352.

¹²¹ See *Corte costituzionale*, sent. 317/2009, above n. 67.

¹²² *Corte di Cassazione*, *Sez. I civ.*, sent. 4184/12, March 15, 2012, p. 74.

¹²³ *Id.*, pp. 32-35.

because the effects of that recognition are in contrast with the Italian public order (*ordine pubblico*) – as expressly stated in the 2007 document of the Italian Minister of Interior.¹²⁴ The ICC refuses to legally recognise a same-sex marriage only for technical reasons: given the current legislation regulating the civil wedlock, that marriage is technically unable to produce legal effects in the Italian legal order.¹²⁵

In other terms, the ICC does not declare the ‘non-existence’ or ‘non-validity’ of the same-sex unions, as the previous jurisprudence stated with the specific reference to the gender diversity. Quite the contrary, for the ICC the gender diversity remains a prerequisite for a traditionally-religiously grounded definition of marriage and family, but it is no longer a precondition for the purposes of the civil union.¹²⁶ This means that, in the lights of the ECHR’s system, same-sex relationships are now considered legal realities in Italy. They *exist* and, as such, *oblige* the Italian authorities to consider the fundamental rights of persons concerned.

The ICC decision grants gay couples the right to found a social union (Article 2 of the Italian Constitution) on the basis of the principle of equality (Article 3 of the Constitution) of the persons involved in this kind of relationship.¹²⁷ This produces the need for a new legislative action, which must take into serious consideration the rights of gay people, including the right not to be discriminated for their sexual orientation.¹²⁸ And this brings the ICC’s decision more into line with the Strasburg jurisprudence.

As affirmed by the Court of Strasbourg in a recent case,¹²⁹ in its action designed to protect the family and secure respect for family life, the Italian legislator must necessarily take into account changes in the perception of social and civil-status issues and relationships, which implies the fact that there is not just one way or one choice when it comes to leading one’s family or private life.¹³⁰ Thus, whether we like it or not, the margin of appreciation afforded to the Member States becomes more and more narrow. Where the difference in treatment based on sex or sexual orientation is concerned, a Member State must demonstrate that it is necessary, in order to apply the ECHR, to exclude certain categories of people – in this instance persons living in a same-sex relationship – from the scope of application of the provisions at issue.¹³¹ To put it in another way, the burden of proof is on the Member States, which must prove that it is necessary, in pursuit of the aims that they invoke, to bar same-sex couples from entering into the general status of civil

¹²⁴ On this notion *Id.*, pp. 12-13.

¹²⁵ *Id.*, p. 75

¹²⁶ *Id.*, p. 71.

¹²⁷ *Id.*, p.74.

¹²⁸ *Id.*, p. 73; see also pp. 40-44.

¹²⁹ ECtHR (Grand Chamber), *Vallianatos and Others v Greece*, above n. 90.

¹³⁰ *Corte di Cassazione, Sez. I civ.*, sent. 4184/12, above n. 122, pp. 62-63.

¹³¹ ECtHR (Grand Chamber), *Vallianatos and Others v Greece*, above n. 90, para. 85.

marriage and the relative benefits.¹³² And that, unquestionably, plays down the importance of the above-mentioned consensus approach, paving the way for an equal recognition of the same-sex couples' rights. When a fundamental right is at stake and weighty reasons are not provided to deny this recognition, the absence of common standards within the Member States cannot play any role.¹³³

All of that suggests national Courts should apply strict scrutiny not only to the ban on same-sex marriage, but also to the differences in treatment between traditional opposite-sex marriage and same-sex civil unions. This is because both that ban and those differences can deprive gays and lesbians some basic rights and the interests, such as to live their partnership freely, without infringing the rights and the interests of other human beings, starting with vulnerable people, like children, in need of higher protection. From here stems what the Italian Courts and the ECtHR established in their 2013-2014 decisions concerning the stepchild adoption.¹³⁴

5.1. Same-Sex Relationships and Stepchild Adoption

One of these decisions concerns the custody right of an Italian woman who has given birth to a child from a relationship with a man. After this connection broke down, the woman established a relationship with another person of the same sex. At this point, the natural father claimed exclusive custody of his son: the woman's lesbian relationship is harmful to the child and, constitutionally speaking, the same-sex couple could not be qualified as family, he said. According to his own words, the Italian Constitution protects the "natural family and marriage in the traditional sense of the terms".¹³⁵ Conversely, the ICC did not accept this reasoning.

First, the Court qualified same-sex relationship as "family centred on homosexual couple". Then the ICC examined whether such a family context was harmful to the child. Finally, the Italian judge affirmed that those claims "are not based on science or experience, but on the mere prejudice that living in a family centred on homosexual couple is harmful to the child's healthy development".¹³⁶ In the 2013 decision, however, the Italian Supreme Court of Cassation made no reference neither to the ECHR nor to the jurisprudence of the Court of Strasbourg, which one

¹³² *Id.*, para. 86.

¹³³ C. Danisi, 'How far can the European Court of Human Rights Go in the Fight Against Discrimination? Defining new Standards in Its Nondiscrimination Jurisprudence', 9 *International Journal of Constitutional Law*, 2011, p. 807.

¹³⁴ *Corte di Cassazione, Sez. I civ.*, sent. 601/2013, January 11, 2013.

¹³⁵ *Ibidem.*

¹³⁶ *Ibidem.*

month later went back to the issue with the *X and others v. Austria* judgement, stating very similar conclusions.¹³⁷

The case regards two women who were living in a stable relationship with the son of one of them, a child who was born outside marriage. His father recognised paternity and his mother had sole custody of him. The two women have been living in a common household since the child was about five years old and they have been taking care of him jointly. On 26 September 2005, the child (represented by his mother) and the other women involving in the same-sex relationship requested the Austrian authorities – namely the District Court, the Regional Court and the Supreme Court – to approve the adoption agreement, to the effect that both the natural mother and the other woman would legally be the parents of the child. In their submissions the applicant explained that they had developed close emotional ties and that the child had benefited from living in a household with two caring adults. In short, their aim was to obtain legal recognition of their *de facto* family cohabitation.¹³⁸

Here the ECtHR reiterates that the prohibition of discrimination enshrined in Article 14 of the ECHR extends beyond the enjoyment of the rights and freedoms that the Convention requires a State to guarantee. Beside, this principle must be applied to additional rights falling within the general scope of any Convention's provision, for which the 47 States have voluntarily decided to provide.¹³⁹ So, while Article 8 of the ECHR does not expressly guarantee a right to adopt, the Court of Strasbourg has many times held that, when a State creates a right going beyond the obligations under Article 8, this same State may not apply that right in a manner which is discriminatory within the meaning of Article 14.¹⁴⁰ There is no obligation under Article 8 of the ECHR; for example, a State can choose not to extend the right to second-parent adoption to unmarried couples. But, that also means that if the national law allows second-parent adoption to unmarried different-sex couple, the State must demonstrate that the exclusion of same-sex couples from this kind of adoption aims at protecting both the family (in the traditional sense of the term) and, above all, the child's rights and interests.

In other words, the ECtHR must examine whether refusing of the adoption to (unmarried) same-sex couples serves as a legitimate aim and is proportionate to that aim; which, as said, includes the protection of the traditional family and the child's rights and interests.¹⁴¹ In this

¹³⁷ ECtHR, *X and others v. Austria*, February 13, 2013. See G. Repetto, 'Figli irricognoscibili. Le adozioni omoparentali davanti alla Corte europea dei diritti dell'uomo'. In Schillaci (ed.), above n. 22, pp. 162-165.

¹³⁸ *Id.*, paras. 145-146.

¹³⁹ *Id.*, para. 135.

¹⁴⁰ *Id.*, para. 136. See also ECtHR, *E.B. v. France*, January 22, 2008, para. 49.

¹⁴¹ ECtHR, *X and others v. Austria*, above n. 137, para. 136. See also ECtHR, *Emonet and Others v. Switzerland*, December 13, 2007, paras. 79-88.

sense, the principle of proportionality refers to a ‘proportionality test’ that must be conducted to check whether an interference with a right provided by the ECHR is proportionate to the legitimate aim pursued by the legal restriction imposed at the national level.¹⁴² For this, the Austrian Government has to demonstrate that it will be detrimental to the child to be brought up by the same-sex couple or to have two mothers for legal purposes. And, in this regard, the Government adduces the lack of evidence, which produces considerable doubts on the proportionality of the absolute prohibition on second-parent adoption in same-sex couple family context. Here is the violation of Article 14 taken in conjunction with Article 8 of the ECHR, which is even more evident when the Austrian applicants’ situation is compared with that of an unmarried different-sex couple.¹⁴³

Based on this same viewpoint, on 30 July 2014, for the first time in Italian history, the Juvenile Court (*Tribunale per i Minorenni*) of Rome granted permission for the adoption of a child living with a lesbian couple.

The case was about a little girl of five years old, who was conceived in a European country with assisted fertilization. The two women were married abroad and, as we saw, this marriage could be recognized in Italy. Nevertheless, the non-biological parent was allowed to adopt the child, under the clause stated in Article 44(1-d) of 1983 Italy’s adoption Act (no. 184), as amended by the 2001 Act (no. 149). The clause authorizes adoption in particular cases, prioritising the best interest of the child in order to maintain the emotional relationship and cohabitation with the ‘social parent’; such as a person who has raised the child other than a biological mother or father.¹⁴⁴

As a result, along with the need of the child to maintain a relationship with both women (not only with the biological mother), the Italian Court considered the lesbian couple as a family, whose members cannot be discriminated in relation to their sexual orientation. And in doing so, the Juvenile Court expressly upheld two previous decisions: the mentioned ICC’s sentence made on 11 January 2013 (no. 601) and the *X and others v. Austria* judgement handed down by ECtHR just one month later. In this manner, the Italian judge was able to re-consider Italy’s existing law regulating the adoption in the light of the principles established by the ECHR’s system (the ECHR

¹⁴² See ECtHR, *Karner v. Austria*, above n. 109, para. 40: “[t]he Court can accept that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment. It remains to be ascertained whether, in the circumstances of the case, the principle of proportionality has been respected”. More generally see Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the jurisprudence of the ECHR*, Intersentia, Antwerp, 2002, pp. 211 ff.

¹⁴³ ECtHR, *X and others v. Austria*, above n. 137, paras. 11-112. See G. Willems, above n. 104, p. 90.

¹⁴⁴ *Tribunale per i Minorenni di Roma*, sent. 299/2014, July 30, 2014.

as applied by the Court of Strasbourg)¹⁴⁵ that, as said, integrates the national constitutional parameters.¹⁴⁶ On the one hand, the relationship between the two women and the child were considered as a family within the meaning of Article 8 of the ECHR. On the other, as Italian Constitutional Court had stated in the 2010 mentioned judgment (no. 138), the two women involving in same-sex relationship “were held to have the right to freely live in couple (*vivere liberamente la propria condizione di coppia*)”.¹⁴⁷ That, according to the Juvenile Court of Rome, implies the right to have biological or adopted children.¹⁴⁸

In more general terms, this juridical approach means that if the ordinary judges apply Article 44 of Italy’s adoption Act in such a way that the same-sex couples are excluded from the adoption because of their sexual orientation, this interpretation would be considered in contrast not only with the ECHR (Article 8 taken in conjunction with Article 14), but also with Article 2 (devoted to the inviolable rights of the person, as an individual and in the social groups, including *de facto* same-sex couples) of the Italian Constitution.¹⁴⁹

Tot this respect, it should be emphasized that in 2014 the Italian Constitutional Court itself clarified its jurisprudence on this very sensitive issue. In the decision no. 170/2014 the CC upheld an Italian Act imposing divorce to trans married person who had changed his gender. However, the CC found unconstitutional this same Act when it does not recognize the new legal situation, created by the change gender identity. This relationship is no longer a marriage (Article 29 of the Italian Constitution). This is nevertheless a ‘social group’ (Article 2 of the Constitution) that the Parliament should regulate by adequate legislative forms – civil registered partnership – in order to recognize and guarantee the fundamental rights of human beings involved in it.¹⁵⁰

5.2. Opposite-Sex Marriage and Same-Sex Couples

The 2014 constitutional judgement involves two persons, Alessandro and Alessandra, who got married in 2005. Some years after their marriage, Alessandro realized to be (or feel) a woman and

¹⁴⁵ *Ibidem*.

¹⁴⁶ See *supra*, para. 3.

¹⁴⁷ *Corte costituzionale*, sent. 138/2010, above n. 71.

¹⁴⁸ *Tribunale per i Minorenni di Roma*, sent. 299/2014, above n. 144.

¹⁴⁹ *Ibidem*.

¹⁵⁰ For some comments on this constitutional decision see, among others, A. Ruggeri, ‘Questioni di diritto di famiglia e tecniche decisorie nei giudizi di costituzionalità (a proposito della originale condizione dei soggetti transessuali e dei loro ex coniugi, secondo Corte cost. n. 170 del 2014)’, *Consulta Online*, 2014; R. Romboli, ‘La legittimità costituzionale del “divorzio imposto”: quando la Corte dialoga con il legislatore, ma dimentica il giudice’, *Consulta Online*, 2014; P. Bianchi, ‘Divorzio imposto: incostituzionale ma non troppo’, *Forum di quaderni costituzionali*, 7 July 2014; V. Baldini, ‘Diritto al matrimonio, unioni omosessuali e volontà del costituente (breve note a Corte costituzionale, sent. n. 170/2014)’, *www.dirittifondamentali.it*, 15 September 2014; R. Cataldo, ‘Coppia o famiglia? L’implicito interrogativo lasciato aperto dalla Consulta nella sentenza costituzionale sul c.d. “divorzio imposto”’, *Osservatorio costituzionale*, December 2014; A. Rapposelli, ‘Illegittimità costituzionale dichiarata ma non rimossa: un “nuovo” tipo di sentenze additive?’, *Osservatorio costituzionale*, January 2015.

decided to transition to the female sex: she had always felt that she had been a female in a male body. For this reason, she underwent gender reassignment surgery and, under the Italian law, Alessandro became Alessandra in 2009. Few months later the couple discovered that the local registry office (*ufficio di stato civile*) had dissolved the matrimony because the couple was in a same-gender marriage. As a consequence, the couple asked the Civil Court of Modena to nullify the act of the registry office. The Court of Modena sided with the applicants on October 27, 2010. Afterwards the Italian Ministry of Interior appealed the Civil Court's judgement to the Court of Appeal of Bologna, which reversed the trial decision. After that, the couple went to the Supreme Court of Cassation, which on June 6, 2013, asked the Constitutional Court how to deal with this issue: the CC was called upon to decide on the questions concerning the effects of a gender reassignment ruling on a pre-existing marriage.¹⁵¹ Finally, on June 10, 2014, the CC heard arguments on the case and the day after delivered the decision.¹⁵²

As one might notice, in 2005 two persons lawfully contracted a marriage. Few years later one of them exercised the right to change his/her gender identity. Despite the new identity, neither the person concerned nor the spouse intends to dissolve the marital relationship. The Italian legislation, though, contains the 'compulsory divorce', introduced in by Article 4 of the Act of 14 April 1982 (no. 164).¹⁵³ This means that in Italy the change of gender identity has the automatic effect of dissolving the marriage. The CC must therefore determine whether in this case the compulsory divorce is compatible with the Constitution.

Taking into account what is affirmed in the 2010 decision (no. 138), in the 2014 judgement the CC makes it clear that the reference parameter under constitutional law is not Article 29 of the Italian Charter: this Article protects the institution of marriage, as defined under the 1942 Civil Code, which provided (and still provides) that married couples must be of the opposite sex. In addition, the CC states that a person who changes his (or her) sex is not prevented from founding a family by contracting marriage once again with someone of the opposite sex. But, that is not the case of Alessandra, for which Article 29 is not relevant. What is really at stake here is the concept of 'social group', as stated in Article 2 of the Constitution, which exactly provides that the Italian "Republic shall recognise and guarantee the inviolable rights of the person as an individual and in the social groups within which human personality is developed". And the CC holds that the

¹⁵¹ See F. Saitto, 'Finché "divorzio imposto" non vi separi. Famiglia, rettificazione di sesso e scioglimento ex lege del matrimonio'. In Schillaci (ed.), above n. 22, pp. 170-173.

¹⁵² *Corte costituzionale*, sent. 170/2014, June 11, 2014.

¹⁵³ This Act was not amended by Article 7 of the Act no. 74 of 6 March 1987 (*The Act referring to New provisions setting out rules relating to the dissolution of marriage*) and subsequently confirmed by Article 31 of Legislative Decree of 1 September 2011, no. 150 (*The Act referring to Complementary provisions to the Code of Civil Procedure on the reduction and simplification of civil cognisance proceedings, enacted pursuant to Article 54 of Law no. 69 of 18 June 2009*).

conception of social group must include homosexual unions, understood as the stable cohabitation of two individuals of the same sex.¹⁵⁴ These individuals are vested with the fundamental right to live out their situation as a couple and obtain legal recognition thereof along with the associated rights and duties, according to the time-scales, procedures and limits specified by legislative Acts. This is an aim that cannot solely be achieved by rendering homosexual unions equivalent to marriage; as it is confirmed moreover by the different choices made in the European Countries that have already recognised such unions. For the purposes of Article 2 of the Italian Constitution, it is therefore for the legislator to determine – exercising its discretion – the forms of guarantee and recognition for the aforementioned (same-sex) couples.

In any case, that the power of the Parliament to regulate the matter does not preclude the possibility that the CC might intervene in order to protect specific rights and interests, as part of a review of the reasonableness of the future legislation. On the one hand, the rights and interests of the Italian State in not altering the heterosexual nature of marriage, since in Italy the essential prerequisite of a marriage is the opposite sex; or so says the CC. On the other, the rights and the interests of Alessandra and her spouse, which includes changing sex: she (or he) must be able to exercise the freedom to choose her (or his) identity. Moreover, the State should ensure that a significant aspect of his/her personal identity is not excessively penalised by the complete sacrifice of the legal dimension provided for his/her previous relationship, which the couple wishes to maintain.

The problem is that the existing legislation resolves those conflicting rights and interests by granting protection exclusively to the Italian State in not changing the fundamental characteristics of the institution of marriage. This legislation results, on the contrary, in a lack of protection consisting in the indiscriminate sacrifice, without any compensatory mechanisms, of the right to choose the personal identity, of which the sexual sphere is one of the most important constituents. In brief, the Italian legislation remains closed to a fair constitutional balance between the rights and interests of the States and the rights and interests of couples that are not (or no longer) heterosexual.

More generally, all this means that gay people have the right to freely live their social-couple dimension, which must be recognized and guaranteed by the State. That dimension is characterised by the stable cohabitation of two individuals; under the principles and rights provided by Article 2 of the Italian Constitution, this kind of ‘social group’ is capable of permitting and favouring the free development of the person through relationships. Nonetheless,

¹⁵⁴ *Corte costituzionale*, sent. 170/2014, above n. 152, para. 5.5.

these principles and rights have not yet found a concrete endorsement at the legislative level. The Italian legislator should then introduce and define an alternative arrangement, different from marriage, which avoid a situation where opposite-sex couples enjoy the utmost legal protection and, on the contrary, the protection of the same-sex couples' rights are absolutely uncertain. The Parliament is called upon to comply with this task with the utmost dispatch, in order to resolve the unconstitutionality of the legislation under examination due to the current lack of protection for the individual rights involved.¹⁵⁵ Even though, as established by the interpretation of Article 29 of the Constitution, same-sex people cannot get married in Italy, it is necessary that the Parliament finds adequate legislative forms to recognize and guarantee rights to same-sex couples. In brief, the future legislation must allow civil registered partnership that grants adequate protection to the rights and obligations of same-sex couples.

In sum, gay people do not have the right to marry. However, they retain the right to live in couple, which must be legally recognised as civil partnership. The legislator may consider this civil partnership different from the marriage, treating same-sex couples differently in respect to those legal unions based on Article 29 of the Italian Constitution. But, this difference cannot legitimize unreasonable distinctions, meaning unconstitutional discriminations.¹⁵⁶ Thus, although the 2014 constitutional judgement affirms that the reference to Articles 8 and 12 of the ECHR is not relevant, the CC reaches substantially the same conclusion of the ECtHR when referring to these Articles.¹⁵⁷

In fact, on 11 June 2014 the CC states that where there is no reasonable justification,¹⁵⁸ such differences in treatment are likely to be interpreted as forms of discriminations, which cannot be legitimized under the Italian constitutional order. Likewise, one month later (16 July 2014), for a very similar law case, the *Hämäläinen v. Finland*, the Court of Strasbourg considers that “a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised”.¹⁵⁹

Furthermore, in the *Hämäläinen* judgement the ECtHR holds that there has been no violation of the European Convention because in Finland the same-sex partners may have their relationship legally confirmed by registering it. The applicant who has changed his/her sex may continue

¹⁵⁵ *Ibidem*.

¹⁵⁶ On this question see the critical remarks of Schillaci, above n. 22, pp. 195-205.

¹⁵⁷ Article 8 and 12 as interpreted by the ECtHR in *H. v. Finland* decision (of 13 November 2012) and in *Schalk and Kopf v. Austria* decision (of 22 November 2010). *Corte costituzionale*, sent. 170/2014, above n. 152, para. 5.3.

¹⁵⁸ That is to say where there is not a fair balance between the rights granted to opposite-sex couples (under Article 29 of the Constitution) and the rights granted to same-sex couple (under Article 2 of the Constitution).

¹⁵⁹ ECtHR, *Hämäläinen v. Finland*, 16 July 2014, para. 108.

his/her relationship in all its essentials and could also give it a legal status akin, if not identical, to marriage, through a civil partnership, which carried with it almost all the same legal rights and obligations.¹⁶⁰

5.3. Another Step toward Equality

The development of the Italian legislation is more evident by comparing the two mentioned judgements of the Italian Constitutional Courts, namely the no. 138/2010 and the no. 170/2014. With the 2010 decision the Court addressed itself to the legislature in the form of a ‘warning’ (*sentenza di monito*), which contained suggestions and guidance for resolving legislative issues in closer accord with the Constitution – what is in fact part of the Court’s permanent dialogue not only with the judiciary but also with the legislature.¹⁶¹ It remains, though, that the questions raised by the *Tribunale di Venezia* and the Trento Court of Appeal (the so-called *giudice a quo*)¹⁶² was declared inadmissible. By contrast, with the 2014 decision (no. 170) the CC sustained a constitutional challenge (*sentenza di accoglimento*), declaring some parts of the legislative Act – related to the compulsory divorce – unconstitutional.¹⁶³

In order to reduce the risk of a ‘legislative vacuum’, produced by that declaration of unconstitutionality, in 2014 the Court also described the provisions that would replace them, extrapolating from the Constitution itself; which is methods of ‘manipulative’ or ‘additive’ judgements in the sense that the CC somehow rewrites the law or adds new elements, always drawn from the Italian Charter. In particular, the 2014 decision operated under the more specific designation of the ‘principle-additive decision’ (*sentenza additiva di principio*), in the sense that CC did not add new norms to the Italian law.¹⁶⁴ It specified the guiding principles that the

¹⁶⁰ *Ibidem*. See also ECtHR, *Karner v. Austria*, above n. 109, para. 40.

¹⁶¹ In general, on the ‘*sentenze monito*’ see L. Pegoraro, *Le sentenze-indirizzo della Corte costituzionale italiana*, CEDAM, Padova, 1984; M.C. Grisolia, ‘Alcune osservazioni sulle “sentenze comandamento”’, *I Giurisprudenza costituzionale*, 1982, p. 926.

¹⁶² That is to say the are ordinary Courts (the so-called *giudice a quo*) that had moved to decide the incidental question concerning the constitutionality of Articles 93, 96, 98, 107, 108, 143, 143a and 156-bis of the Italian Civil Code, which regulate the different-sex marriage in Italy. On the *giudice a quo* see L. Delli Priscoli, P.G. Demarchi, *L’eccezione di incostituzionalità: profili processuali*, Zanichelli, Bologna, 2012.

¹⁶³ In accordance with Article 136 of the Constitution, the parts of the Act no. 164 of 14 April 1982 (related to compulsory divorce) automatically loosed effect from the day after publication of the Court’s decision in the *Gazzetta Ufficiale*. So, any judicial organ could no longer apply these rules: the Court’s declaration was definitive and generally applicable, in that its effect is not limited to the case in which the question was certified.

¹⁶⁴ P. Veronesi, ‘Un’anomala additiva di principio in materia di “divorzio imposto”: il “caso Bernaroli” nella sentenza n. 170/2014’, *Forum di quaderni costituzionali*, 6 July 2014; A. Rapposelli, ‘Illegittimità costituzionale dichiarata ma non rimossa: un “nuovo” tipo di sentenze additive?’, *Osservatorio costituzionale (AIC)*, 25 January 2015; F. Biondi, *La sentenza additiva di principio sul c.d. divorzio “imposto”: un caso di accertamento, ma non di tutela, della violazione di un diritto*, *Forum di quaderni costituzionali*, 24 June 2014.

legislature must concertize into unambiguous rules when amending or replacing the measure that had been declared unconstitutional.¹⁶⁵

In fact, the 2014 judgement declared some parts of the Act (regulating the compulsory divorce) unconstitutional not for what it provided, but for what it failed to provide. This Act failed to guarantee and protect the inviolable rights and duties of the same-sex couple that, under Article 2 of the Italian Constitution, are now defined social groups. To be more precise, the 2014 CC's decision added to the Italian constitutional order a new legal subject, namely same-sex couple or same-sex *de facto* relationship, drawing it from the Constitution (Article 2); in doing so, the CC also took into account what the ECtHR had, in the meantime, established on the basis of the European Convention (especially Article 8 of the ECHR). So, with the 2014 judgment, the CC transformed itself into a role that in the Italian system belongs principally to the Parliament.¹⁶⁶

Yet this result cannot be wholly attributable to the Court. Rather, it is manly due to both the present-day conditions and the changes in the evolution of civil-status issues, as the CC had already made it clear with the 2010 decision (no. 138). The fact is that since then (2010) the Parliament has not approved any rule capable of remedying the violated constitutional principles (Article 2) concerning same-sex social groups. Therefore, the 2014 judgement offered the only way for constitutional law to perform its task, as clearly illustrated by another important judgement (no. 8097) made by the Court of Cassation one year later.

In particular, on the basis of the 2014 constitutional judgement, on 21 April 2015 the Civil Section of the Court of Cassation definitively nullified the act of the local registry office concerning Alessandra.¹⁶⁷ That means that, as long as the Italian Parliament does not approve an Act regulating civil same-sex social groups, Alessandra (who until 2009 had been male) and her partner continue to benefit from the marital status.¹⁶⁸ Even though they can no longer be considered married under Article 29 of the Constitution, which is reserved for opposite-sex relationships, they should be treated in the same way and with the same respect as married couples.¹⁶⁹ This is because, as said, the CC's 170/2014 judgement could not be merely understood

¹⁶⁵ See G. Zagrebelsky, V. Marciànò, *Giustizia costituzionale*, il Mulino, Bologna, 2012, pp. 400-405.

¹⁶⁶ In fact, this kind of decision runs contrary to Kelsen's model of constitutional review, according to which a constitutional court ought to be a 'negative legislator'; H. Kelsen, 'La garantie juridictionnelle de la Constitution (La justice constitutionnelle)', *Rev. dr. pub. sc. pol.*, 1928, pp. 224-225. On this question see A. Ruggeri, A. Spadaro, *Lineamenti di giustizia costituzionale*, Giappichelli, Torino, 2004, pp. 139-144. M. Calamo Specchia, *La Costituzione garantita. Dalla sovranità alla ragionevolezza: itinerari francesi*, Giappichelli, Torino, 2000, pp. 228-229; R. Guastini, *Teoria e dogmatica delle fonti*, Giuffrè, Milano, 1998, p. 264; L. Favoreu, 'La notion de Cour constitutionnelle', in L. Favoreu et alii, *De la Constitution. Études en l'honneur de Jean-François Aubert*, Bâle/Francfort, Helbing & Lichtenhahn, 1996, pp. 15-18.

¹⁶⁷ *Corte di Cassazione, Sez. I civ.*, sent. 8097/2015, April 21, 2015, p. 18.

¹⁶⁸ See *supra*, para. 5.2.

¹⁶⁹ *Corte di Cassazione, Sez. I civ.*, sent. 8097/2015, above n. 167, p. 13.

as a ‘warning’ (like the 138/2010 decision). It is a principle-additive decision, which ‘obliges’ the Italian Parliament to regulate same-sex couples, as contemplated by Article 2 of the Constitution.¹⁷⁰

In effect, this obligation derives without any doubt from fundamental principles, inviolable rights and infrangible duties established by that Article 2 that, as the CC said at the end of 2014, identifies the essential elements of the Italian constitutional order.¹⁷¹ That explains why legislative vacuum translates into a lack of protection that, in turn, generates the unconstitutional indiscriminate sacrifice of same-sex couples. To put it in the US Supreme Court’s words, “same-sex couples are denied benefits afforded opposite-sex couples and are barred from exercising fundamental rights, which works a grave and continuing harm, serving to disrespect and subordinate gays and lesbians”.¹⁷² For the reasons, the vacuum in the Italian legislation creates an important deficit in terms of both human rights and general duties: a deficit that, as such, should be addressed as soon as possible, without waiting for the entry into force of new legislation. From here stems the decision of the Italian Court of Cassation, which nullifies the act of the local registry office: as long as the Parliament does not approve an Act regulating the civil same-sex social groups, Alessandra (who used to be Alessandro) and her partner continue to benefit from the marital status.¹⁷³

That, once again, shows how the processes of interaction (between national and supranational laws) and the contextualization (of the rights to marry and found a family) can operate in the light of the present-day conditions and in relation to the changes in the perception of civil-status issues.¹⁷⁴

¹⁷⁰ *Id.*, p. 12. On this very important point see M.M. Winkler, ‘Unioni tra persone dello stesso sesso: la Corte di Cassazione chiude il cerchio’, *Il quotidiano giuridico*, 12 February 2015.

¹⁷¹ *Corte costituzionale*, sent. 238/2014, 22 October, 2014, *Considerato in diritto*, para. 2.1.

¹⁷² *Obergefell v. Hodges*, 576 U.S. (2015).

¹⁷³ *Corte di Cassazione*, Sez. I civ., sent. 8097/2015, above n. 167, p. 18. Under this aspect it should be noted what the US Supreme Court stated in the judgement concerning *Obergefell v. Hodges*, 576 U.S. (2015): “[t]he dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act”.

¹⁷⁴ It is not by chance that on 15 March 2015 the leading Italian Democratic Party (PD) appears to be moving towards same-sex civil unions. This is stated in a draft law (called *Disciplina delle coppie di fatto e delle unioni civili* – Law regulating *de facto* couples and civil unions) presented to the parliamentary justice commission by PD Senator Monica Cirinnà. Her draft: introduces cohabitation contracts that would govern the rules of unmarried heterosexuals living together; recognizes key rights for heterosexual and same-sex couples, such as stepchild adoption, or the adoption of the biological child of one of the two partners in a civil union. The bill also calls for same sex-civil unions to be registered by municipalities and institutes a series of juridical rights and duties including inheritance protection, health assistance and a reversibility clause for pensions. It should be noted that the Italian bishops conference has warned that this will usher in a regime of “ideological enforcement” of the so-called gender ideology. The Cirinnà’s bill, said the general secretary of the Italian bishops’ conference, Bishop Nunzio Galantino, confuses the “proper respect for rights with the flattening of the reality [of the family] that historically, culturally and anthropologically are

6. CONCLUSION. TREATING PEOPLE 'EQUALLY' VS TREATING THEM AS 'EQUALS'

The English term 'contextualization' is derived from the Latin word *contextus*, conveying the idea of weaving together. When an idea or a principle from one context is weaved seamlessly into another, contextualization has taken place. Contextualization is not like taking a grown tree from one breeding ground and transplanting it into another place: a tree grown and nourished in one context, with characteristics of one area, will appear foreign if simply transplanted into another milieu. Quite the contrary, contextualization happens when trees grows, absorbing the nutrients from the soil of the same area. Most of the time the resulting tree looks different than it was in the past. Yet, it derives from the same species.

Similarly, to contextualize the institutions of marriage and family is to place them within a new social, cultural and religious context that, as said, is different from the context within which these same institutions were originally affirmed. In this sense, the optic of contextualization allows (at least) to understand how these institutions act in practice in different environments and from time to time; like an arithmetic problem may not seem very practical until it is seen within a story problem. As the real-life situation contextualizes the math problem and makes it more understandable, the changed perception of civil-status relationships make us realize how laws regulating the institutions of marriage and family work in practice in the present-day conditions; that is to say, in the lights of the current context, made of both new social relationships and multi-faceted emergent identities.¹⁷⁵

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage, for instance, is one of both continuity and change: that "institution – even as confined to opposite-sex relations – has evolved over time".

¹⁷⁶ The same, the right to found a family is fundamental as a matter of history and tradition, but

different from each other". "There will be a time when families with a father, a mother and their children will have to apologize for existing", Galantino said (see *Galantino: unioni civili, una forzatura*, available at <http://www.avvenire.it/Chiesa/Pagine/galantino-unioni-civili-no-testo-cirinna.aspx>, last access 7 June 2015).

¹⁷⁵ For this, "the institution of family cannot be fixed, be it historically, sociologically or even legally"; ECtHR, *Mazurek v. France*, February 1, 2000, para. 52. See A. Ratti, 'La protezione dell'identità sessuale nello Stato costituzionale'. In A. Schillaci (ed.), above n. 22, pp. 27-40.

¹⁷⁶ *Obergefell v. Hodges*, 576 U.S. (2015).

“rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era”.¹⁷⁷

The principles of equality and non-discrimination – the pillars of constitutional democracies – force public authorities not to make decisions and arguments that they would never accept in other similar social contexts. Thus, if they find it charming and legally correct when 80-year-olds marry, they cannot tell same-sex couples that you cannot legalize your love because you cannot have children or because marriage and family are reserved for traditional families or, worst, because you are part of a minority that, as such, must be subject to the majority law. And in this sense – in this context and under these problems – national and supranational Courts have a crucial role to play.¹⁷⁸

Laws that differentiate people based on sexual orientation often reflect flawed democratic deliberations. Majorities frequently monopolize political and legislative power with little more than half of the votes and, consequently, use the democratic processes as means of securing their interests at the expense of the minority.¹⁷⁹ This explains why, where the majority prevails, the minority groups are less well-placed to defend their rights via classical parliamentary channels.¹⁸⁰ It must be recognized that, in fact, the traditional definitions of the rights to marry and found a family, as between one man and one woman, are definitions that were “designed by a heterosexual majority for a heterosexual majority”. But, we should also note that in many Countries there is a white majority and an African-American minority, there is a Christian majority and a Jewish minority, and there is a heterosexual majority and a lesbian and gay minority. So, this debate is mainly “about reforming a *discriminatory* definition that excludes a minority from a public institution”.¹⁸¹

From here stems the importance of judicial review, which can ameliorate democratic deficits instead of undermining deliberative democracy.¹⁸² After all, “the possibility of legislative action

¹⁷⁷ *Id.*, p. 19.

¹⁷⁸ K. Waaldijk, ‘The Right to Relate: A Lecture on the Importance of “Orientation” in Comparative Sexual Orientation Law’, 24 *Duke Journal of Comparative & International Law*, p. 168: “The right to establish and develop relationships has been recognized as one aspect of the human right to respect for one’s private life. Both the European and Inter-American Courts of Human Rights and the highest courts of several countries now recognize this right”.

¹⁷⁹ Cf. H. Lau, ‘Sexual Orientation: Testing the Universality of International Human Rights Law’, 71 *University of Chicago Law Review*, 2004, pp. 1689–1720.

¹⁸⁰ E. Benvenisti, ‘Margin of Appreciation, Consensus, and Universal Standards’, 31 *International Law and Politics*, 1999, pp. 848-850.

¹⁸¹ R. Wintemute, ‘International Trends in Legal Recognition of Same-Sex Partnerships’, 23 *Quinnipiac Law Review*, 2004, pp. 577-595. See also G. Romeo, ‘The Recognition of Same-Sex Couples’ Rights in the US. Between Counter-Majoritarian Principle’. In D. Gallo, L. Paladin, P. Pustorino (eds.), above n. 26, pp. 15-32.

¹⁸² H. Lau, ‘Rewriting Schalk and Kopf: shifting the locus of deference’. In E. Brems (ed.), *Diversity and European Human Rights. Rewriting Judgments of the ECHR*, Cambridge University Press, Cambridge, 2012, p. 248. On relation among the principle of equality, the concept of deliberative democracy and the same-sex marriage see M.

does not justify judicial abdication”, and respect for democracy has never meant: ‘Courts must permit discrimination’.¹⁸³ Perhaps, that can explain why in many Western Countries the legislation highlights the meaning of judicial action.¹⁸⁴

In this perspective, the internal legal orders, the EU’s law, the European Convention and the relative Courts may possibly reaffirm one on the most important aspect of constitutional democracies:¹⁸⁵ “the promotion of minorities’ rights against the rule of the majority”.¹⁸⁶ If the responsibility of protecting human rights lays on the national Parliaments, the domestic Courts and the supranational Courts remain the ultimate guardians of those rights. Under this role, the Courts are called to meet new challenges, such as the adoption of a consistent approach towards discriminations, including those referring to sexual orientations. Calling certain rights ‘fundamental’ means that they will hold legislations to a higher standard in distinguishing cases.¹⁸⁷ The national Constitutions, the ECHR’s system and the EU’s law may – via laws as living instruments – allow gays and lesbians to frame their arguments in terms of equality (they want to be treated as everybody else), eliminating unreasonable discriminations between same-sex and dual-gender marriage.

Opposite-sex couples and same-sex couples are not equal. But, from a legal point of view, they must be treated equally. Or better, treating these people as equals entails that every person is treated with equal concern and respect.¹⁸⁸

Yee Karen Lee, *Equality, Dignity, and Same-Sex Marriage. A Rights Disagreement in Democratic Societies*, Martinus Nijhoff, Leiden, Boston, 2010, pp. 206-212.

¹⁸³ *Brief of International Human Rights Advocates as Amici Curiae*, submitted to the US Supreme Court in *support of respondents, Hollingsworth v. Perry* (570 US, 12-144, 2013), February 28, 2013, p. 18. See also S.L. Cooper, ‘Review of the Concurrent Debates about the Legal Recognition of Same-Sex Relationships in the Council of Europe and the United States’, 5 *Phoenix Law Review*, 2011, pp. 39-70.

¹⁸⁴ In the U.S., for examples, before the 2015 Supreme Court’s decision relating to *Obergefell v. Hodges* (which stated that the “same-sex couples may exercise the fundamental right to marry” across the US) the States often had approved laws recognizing same-sex marriage after national Courts determined that such recognition is constitutionally required. On this aspect see L.H. Tribe, ‘The Constitutional Inevitability of Same-Sex Marriage’, 71 *Maryland Law Review*, 2012, pp. 471-489; E. Gerstmann, *Same-Sex Marriage and the Constitution*, Cambridge University Press, Cambridge etc., 2008, pp. 73-118.

¹⁸⁵ A. Ratti, above n. 175, pp. 32-37.

¹⁸⁶ Danisi, above n. 133, p. 807.

¹⁸⁷ In fact, “more and more same-sex couple are going to court to claim that their rights are not protected”. And, regardless of the final outcome, it is indisputable that the continuous flow of new decisions has produced a considerable body of jurisprudence that deserve close attention”; D. Gallo, L. Paladin, P. Pustorino, *Same-Sex Couple, Legislators and Judges. An Introduction to the Book*. In D. Gallo, L. Paladin, P. Pustorino (eds.), above n. 26, p. 3

¹⁸⁸ On this see R. Dworkin, *Taking Rights Seriously*, Harvard University Press, Cambridge-Mass, 1977, p. 227. See also *ex multis* D.L. Philips, *Towards a Just Social Order*, Princeton University Press, Princeton, 2014, pp. 273-297; P. Westen, *Speaking of Equality. An analysis of the Rhetorical Force of Equality in Moral and legal Discourse*, Princeton University Press, Princeton, 1990, pp. 102-105; R. West, *Normative Jurisprudence: An Introduction*, Cambridge University Press, Cambridge, 2011, pp. 25-35; N.M. Smith, *Basic Equality and Discrimination. Reconciling Theory and Law*, Ashgate, London, 2011, pp. 21-26; R. Bhargava, ‘The Distinctiveness of Indian Secularism’, in A. Singh, S. Mohapatra (eds.), *Indian Political Thought. A reader*, Routledge, Abingdon, 2010, p. 110.

As I tried to demonstrate, the judicial process presently underway in Italy is an illustrative example of that.

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