Fabio Corbisiero

Over the Rainbow City

Towards a new LGBT citizenship in Italy

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The Juridical Situation of Homosexuals. The Italian National Stance and a Comparative Viewpoint

Salvatore Prisco, Fulvia Abbondante, Marina Monaco (*)

4.1 Introduction

The issue of same-sex marriage has become a cornerstone of the political and constitutional debate of modern Western democracies in recent years. Such a theme does, indeed, possess a significant degree of complexity, itself linked to the fact that the idea of married life as actual and sentimental sharing was anchored, at least until some time ago, to the difference in sex between bride and groom.

It is worth noting that the recognition of same sex couples arises from a general change of heart concerning homosexuality. The process of recognition of gay marriage is just the final outcome of a very long road, which has begun with overturning century-old prejudices, themselves supported by religious stances (this is particularly the case with Christianity, but such behavior belongs to the other revealed religions as well)(Tomassone, 2013). Same-sex relationships have been considered "sins against nature" for centuries and such a warped viewpoint produced, juridically speaking, the criminalization of homophily (Goisis, 2012; Riccardi, 2013).

The enlightened outcome of decriminalizing same-sex relationships spread irregularly, as time went by, within the Western countries. The totalitarian periods experienced by continental Europe were the main *humus* involved in bringing negative and stereotyped viewpoints on homosexuality, and therefore homophobic culture, back into the limelight. It is in fact true that many European national law systems have for a long time kept in force penalizing

norms when dealing with same-sex relationships between adults and consenting partners, purging said norms from their law systems only recently; such a necessary starting point has not meant that Lgbt people have reached full citizenship yet.

The criminalization of same-sex love relationships was substituted, little by little, by a conception of homosexuality as a personality disorder to be addressed and healed. The Word Health Organization recognized that love and attraction between same-sex adults is to be considered as human behavior only recently (Riccardi, 2013).

The success, despite it being not a complete one, in going beyond such positions in both culture and frame of mind is, nevertheless, an important starting point towards the full recognition, especially in recent times, of those rights pertaining to both the personal and sentimental spheres of non-heterosexuals. Therefore, the rise of their juridical dimension is a meaningful starting point towards effective equality for Lgbt people.

In recent years, a strong stance by the constitutional court judges of several Western countries produced many different juridical solutions on the issue of same-sex marriage; these solutions have evidently been shaped by the different contexts they have arisen in and by the specific constitutional laws on marriage being in force in any given State. Therefore, the first section of this paper will describe and analyze the provisions and normative solutions enacted in the main countries using *common law* and *civil law* systems respectively.

The second section of this paper will examine the Italian case in detail. While analyzing it, the Authors found out that Italy is an *unicum* on the matter, since this country lacks a State law providing for unions and marriages other than the traditional ones. Despite the fact that the Italian Constitutional Court excluded, in 2010, the possibility of a law equalizing homosexual and heterosexual marriages; nevertheless this same institution clearly stated the need to identify and characterize different safeguards for same-sex unions. A flurry of activity is carring out from both local and municipality authorities. The former enacted social policies specifically targeted to the Lgbt world, whereas the latter, Mayors in particular acted on the matter by setting up registers to recognize those same-sex unions established abroad (Prisco, Monaco, 2014).

However, such interventions as often been antagonized by the central state level, giving birth to a contention, currently still underway, which involved both the *a quo* and the international judges.

The emerging framework is that of a extremely fragmented and disorganic discipline and that is both because of the different perceptions and sensitivity of local administrators and because of the significant diversity in juridical interpretations concerning actual cases.

4.2 Same-sex marriages in Western democracies

4.2.1 The North American context: The United States and Canada

The path the United States set themselves on to recognize homosexuals' rights may be divided into the following two phases. The first one began with the Lawrence vs Texas judgment, by means of which the Supreme Justice stated that those Texas laws sanctioning the crime of homosexuality between consenting adults were to be considered unconstitutional as they violated the rights to privacy (Passaglia, 2004). However, in the very same decision, the Court takes special care in excluding both the admissibility and the legitimacy of same-sex marriages. This judgment had a significant, twofold, importance. On one hand, the principle that "majority dictatorship" cannot affect those rights protected by the U.S. (Dolcini, 2012). Constitution through Amendments V and XIV combined was sanctioned; therefore all those State laws punishing sodomy are to be declared invalid by means of the stare decisis principle (Coles, 2005). On the other hand, the problem of same-sex marriage has to be solved by the single U.S. constituent States, as they possess full jurisdiction regarding civil law and are therefore free to regulate or not such juridical situations.

This judgment of the US Supreme Court broke the ground towards introducing, at least in some of the US constituent states, several instances of legislation focused on protecting same-sex couples both recognizing marriages or, in other cases, on setting up regulations on civil unions featuring both rights and obligations similar to those arising from marital life. A third case is the one of those US constituent states keeping norms, be they of ordinary or constitutional rank, containing evident prohibitions towards recognizing such unions.

Federally speaking, the Defence of Marriage Act, (DOMA, from now on) acknowledged, namely in its Section 3, only the lawful union between a man and a woman as a legitimate requirement to receive federal benefits. Allowing the US as a whole or to some constituents not to recognize homosexual marriages was tantamount to partly repealing the Full Faith and Credit Clause. It is precisely concerning such Act that the US Supreme Court intervened again through an unexpected judgment, namely US vs Windsor, itself still not facing the issue of defining "marriage" as a term and, still more importantly, not providing homosexual marriages with a place in the U.S. Constitution.

The reasoning the US Supreme Court followed three steps. First of all, the DOMA, in its prohibiting the extension of federal benefits to homosexuals, takes unlawfully away from the US constituent States some of their full-fledged competencies as well as introducing in discrimination based on two different marriage law frameworks: the first one belongs to each and every

U.S. constituent state and legally recognizes same-sex unions and the second, federal, one does not link any juridical consequence to these unions. The members of the couples themselves may fall under different legislative frameworks based on their sexual orientation; at the same time, in their being moral choices undertaken by federal subjects, they are under both the protection of the U.S. Constitution and of the will belonging to its single constituent States. Finally the fact that some of the aforementioned constituent States recognized the legal unions between same-sex people gives these unions and dignity and the social standing they previously had not. And that is why the US federal legislation on the matter goes against the Due Process of Law, as already expressed in the Lawrence case and in other previous cases, since the will of the majority cannot jeopardize the rights of a minority without the support of a strict rationality test (Conte, 2013; Fasone, 2011).

The U.S. Constitutional Court does not pinpoint a specific definition of marriage, despite its significant importance concerning personal dignity and the protection of people undergoing discrimination.

The U.S. Constitutional Judges choice not to rule on the most controversial issue is confirmed by a decision it took on the very same day within the Windsor judgment.

A similar decision was reached during the Hollingsworth vs Perry case, itself dealing with the appeal against the declaration of unconstitutionality for Proposition 8 to be added to the Constitution of California. Such a proposition would have sanctioned the exclusive recognition of heterosexual marriage in that state. In 2008, the California state legislator warranted protection, albeit a minimal one, to homosexual couples, introducing the possibility to register same-sex civil unions. Through a referendum, the Proposition 8 was introduced and it declared the marriage between different-sex couples to be the only valid one. Having challenged this Amendment, the judges of the US Supreme Court recognize the legitimacy of the referendum procedure since such an instrument did not appreciably limit the right of same-sex couples. Later on, a group of homosexual US citizens asked a federal Court to declare Proposition 8 invalid. This Court, receiving the requests by the plaintiffs, declared this revision of judgment to be unconstitutional because it was a violation of the V and XIV Amendments. However, this judgment was not challenged before the US Supreme Court by the Governor and the Government of California, but rather by the promoters of the referendum. The Supreme Court took no position since it deemed this question to be an inadmissible one since it lacked the requirement of damage to plaintiffs .

Both these decisions, despite their being incomplete, had the effect to legitimate the issuing of laws regulating same-sex marriages, as well as offering- through their landmark reference to dignity- a powerful tool to the Supreme Courts of the US constituent States in order to declare those laws still denying a place to same-sex couples as unconstitutional.

Suffice it to say that the US Supreme Court recently (and that is why the relevant judgments have not been published yet) rejected the appeals against

same-sex marriages by five states, namely Virginia, Oklahoma, Utah, Wisconsin and Indiana where Courts of previous instance had prohibited them (Faletti, 2014).

Besides the more technical and juridical aspects, a critical role has been played by Lgbt lobbying groups on the matter. In the United States, pressure groups are considered to be a part of the system and a cornerstone of democracy, as they provide public policymakers with important elements to effectively direct their decisions. In particular, homosexual lobbies prove essential not only in adjudicating legislative decisions, both federally and in any given US constituent State, concerning the issues they support, but they are also active during the electoral phase by financing Presidential candidates, Congressmen and Governors. Therefore, unlike European associations, lobbies in the US directly or indirectly affect political choices, obtaining a discipline they deem adequate to satisfy their stakes (Petrillo, 2011). A significant example of the important work carried out by pressure groups lies in the action of the Human Rights Campaign association, itself engaged on several issues, namely: a) supporting openly gay and lesbian gubernatorial candidates, especially in the Southern States, which are notoriously more conservative and traditionalist b) economical and juridical support in appealing to authorities in case of sexually-based discriminations; c) setting up dialogue opportunities with members of the Republican Party and with clergymen, as well as building up educational and awareness projects concerning Lgbt issues.

Also Canada saw a fundamental role of its Supreme Court on these matters. The Maple Leaf Country tackles these issues through many law sources, albeit they differ from one another. The Canadian Constitution regulates the relationship between the various government levels in the country, particularly bestowing the jurisdiction in marriage and divorce upon the Federal Parliament. Likewise, the Canadian Charter of Rights and Freedoms protects both groups' and individual rights but it does not identify those traits characterizing family and marriage drawing them, at least from a point onwards, from the common law tradition qualifying legal different-sex unions.

The Canadian Supreme Court, basing his decision on Art. 15 of the Charter, itself listing, as it is the case with Article 3 of the Italian Constitution, the differentiation hypotheses the lawmaker cannot draw upon, stated that said list is by no means an absolute. That is to say that all those discriminations substantially similar to the ones listed therein, albeit not present, are likewise prohibited. Therefore, any discrimination based on sexual orientation is a violation of the equality principle.

These precedents make up the base upon which further openings to same-sex marriage have been built. Already in 1999, it was stated in the judgment on the M.v.H.case that the status as a spouse could not apply only to the members of a different-sex couple, lest it qualified as a significant violation of human dignity; this led to the abrogation of an item regulating family law in Ontario. Following this judgment, lawmakers in all Canadian provinces strove to make their legislation on the matter more compatible to the letter of the

Canadian Charter of Rights and Freedoms. However, the Federal Parliament reaffirmed the heterosexual nature of marriage, acknowledging only the rights and obligations of unmarried different-sex couples. Once again, it was the judges based in the Canadian provinces to consider the exclusion of same-sex legal unions to be contrary to the equality principle. This three judgments, which were not challenged, provided an opportunity to propose draft legislation, called the Re same sex marriage, whose definition of marriage did not exclude same-sex couples. Before its approval, this proposal was submitted to the Court advisory. The questions asked by the Parliament concerned the following: a) whether the competence of regulating the juridical capacity on the matter belonged to the Federal Parliament; b) if, in the absence of a precise definition of marriage, the extension of such an institution was legitimate also according to the Canadian Charter of Rights and Freedoms. It is interesting to note how the constitutional judges considered the extension of the institution of marriage to same-sex couples starting from two important observations. First of all, the concept of marriage, as it was intended up to then, was the legacy of a society where marital unions and religion. The absolute intangibility of the sex difference in marital affairs is, according to the Canadian Supreme Court, a element shaped by cultural factors and that cannot find place in a society as pluralist as the Canadian one. Furthermore, following the criterion of the living tree doctrine, the text of any given Constitution must be progressively adapted to the evolving times and society. Secondly, there is no doubt that recognizing same-sex marriages and Article 15 of the Charter; furthermore it is precisely the prohibition of discriminations based on sexual orientations which authorizes federal lawmakers to regulate the issue (Marfoli, 2011).

4.2.2 The two-speed Europe: Registered partnerships and same-sex marriage

The European framework on the matter is much more varied, as it features significant differences in recognizing the rights of homosexual couples.

The diversity of discipline on the matter arises from the deep differences in defining and protecting marriage and/or family as envisioned in a given State's Constitution. Except the United Kingdom, who does not possess a written Constitution, Europe presents one of the following frameworks: a) Constitutions completely lacking references to family and marriage (such is the case of Austria, Belgium, Denmark, Iceland, Finland, Norway and the Netherlands); b) other Constitutions, containing provisions protecting family in a generic or vague manner (and that is what happens in Germany, France, Spain, Portugal, Switzerland and Luxembourg); c) those fundamental charters and that is mostly the case with the Constitutions of the former Soviet countries - where same - sex marriage is expressly forbidden. As it has been rightfully noted «Constitutions in Europe, when dealing with the legitimacy of same-sex marriage, range from the rule of pretermission with regards to specific directions, and the occasional explicit prohibition» (Passaglia, 2010, p. 5).

Being impossible to analyze the juridical and legislative evolution experienced by all the countries in Europe, we deemed to be more useful to focus our attention on the most important law systems of the old World or on those featuring certain degree of cultural and juridical similarities to Italy, in order to describe a path- and almost always a bumpy one at that - ending in various forms of recognition for same-sex unions (Prisco, Monaco, 2014).

A group of countries adopted a "double track mechanism", that is to say full protection for legitimate heterosexual unions and a plafond of rights and obligations for more uxorio couples.

Article 6 of the Basic Law for the Republic of Germany ratifies, in its subsection 1, that «Marriage and family are especially protected by State laws». Legitimacy and protection of cohabiting same-sex couples began with the Länder, i.e. regions, in Germany as well. On that, even since 1999, a law of the City of Hamburg regulated same-sex unions. In its being a local law, its range was evidently a limited one, both in its requirements-it was in fact necessary that one of the two partners resided in Hamburg-and its juridical effects as it bestowed no rights nor duties on such a couple. In 2001, following the advent to power of the Center-Left coalition, the German Parliament approved a law opening registered unions for same-sex couples; this law was challenged within those Länder led by center-right coalitions. The judgment passed by the German Federal Court on July 17, 2002 confirmed the legitimacy of this law, underlining the fact that «same-sex unions pose no competition to traditional marriages, since they do not concern the same kind of people, but rather gays and lesbians specifically». Therefore, the German Federal Court, starting with a restrictive interpretation of the concept of marriage, who does in fact remain only the union between a man and a woman, nevertheless admits the constitutional compatibility of registered unions exactly in their being "something else" compared with marriage, further clarifying that the degree of protection to be guaranteed to registered unions remains at the lawmakers' discretion. Lawmakers will indeed be able to provide same-sex partners with the very same rights and duties usually connected to brides and grooms or setup less intense forms thereof. The aforementioned judgment nevertheless gave the German legislator the opportunity to integrate the 2001 discipline, something that, after a modification in 2005, approached the regulations for registered unions to the one concerning heterosexual marriage all the more (Saitto, 2011).

Concerning France, the issue of non-traditional unions begins with national law 99-944 of November 15, 1999 who underwent, since then, two modifications one in 2006, concerning law 99-419, where the concept of "common life", something absent from the previous iteration, is inserted. Another modification, this one from national law number n. 2009-1346 of November 24, 2009,

has been the one concerning the so-called "Civil Pacts of Solidarity", (from now on, PACS, following their French acronym). This modification introduced a form of registered union for same-sex unions or for common law, different-sex couples. Such pacts are akin to marital agreements, as they have no influence on the remaining parts of French civil law. With regards to the latter, both the PACS and the instances of more uxorio cohabitation have the same juridical value.

The intervention of the Conseil Costitutionnel was required in France following a preliminary ruling by the Court de Cassation, as this latter institution detected a blatant discrimination between those couples made up by a man and a woman, as they were able to choose different degrees of protection (such as the full, marriage-based one or the lesser one offered by the PACS) and the same-sex couples who evidently had a single path ahead of them. The rejection of this issue is based on the following three cornerstones: 1) the freedom of homosexual not to choose homosexual marriage is not limited, as they can express their individuality with no limitation anyway; 2) only the French National Parliament has the power to modify the content of the laws concerning marriage, as it is a constitutionally guaranteed competence and, at least within the French Constitution, there is no such thing as a right to marriage; 3) protection, albeit of a different kind, is afforded also to same-sex couples, and that is because the lawmaker as a discretion to tackle different situations in different ways and similar situation in similar ways (Ferrari, 2007; Lecis, 2011). Following the electoral victory by the French Socialist Party and President Hollande (who promised - amongst other things - the drafting and entry into force of a law recognizing same-sex marriages), the French Parliament approved, in 2013, the loi mariage pour tous after a difficult iter. The French opposition challenged this item of law before the Conseil Costitutionnel; this institution confirmed, by means of its Decision n. 2013-669 of May 17, 2013, the full constitutional legitimacy of this norm. While recent polls show that a majority of French adults support the law, opposition to the change has been intense.

The case of Spain is different. Similarly to what happened in North America, the recognition of couples differing from the traditional ones followed a bottom-top approach; more precisely it started from the Comunidades Autonomas, i.e. the autonomous communities and regions of Spain, then succeeding in being enshrined at the central level. Before the relevant law on the matter was passed in 2005 both Catalonia and Aragon granted juridical effects to the so-called "common-law marriages", both ope legis and by the consent of the parties involved. By means of Law 13/2005, the same-sex marriages were recognize at the national level as well. It may be important to notice that the constitutional base of homosexual marriage should not be looked for only in the literal data contained in Art. 32 of the Spanish Constitution, which still expressly describes marriage as the union between man and woman, but rather in a joint examination of other constitutional principles, such as the one stating formal and substantial equality, as well as in an interpretation of

the concept of heterosexual marriage as a "guaranteed minimum", not preventing its extension to same-sex subjects.

Such an interpretation is also supported by recent jurisprudence from the Spanish Tribunal Costitutional which, following a different argument, reads Article 32 of the Spanish Constitution as an anti-discriminatory norm. This constitutional provision, besides being a cultural legacy of the era it was issued in, intended to protect women as the weaker elements of any given couple. Therefore, nothing is said in it about the sex of the couple to be married. Therefore, the Spanish lawmaker, the name of human dignity and full personality development, themselves binding super-values, can legitimately extend a fuller protection to homosexual couples (Ibrido, 2014; 2013).

Portugal as well, another country sporting many affinities with Italy in its juridical and social traditions, experienced, so to speak, a "progressive" evolution. Since 2001, Lisbon recognizes and protects same-sex unions. In 2009, the Constitutional Court, stating his opinion on a recurso de amparo, excluded the fact that same-sex marriages could be forced by the principles of dignity and equality, as well as by the right to a family.In February 2010, a new law amending Article 1577 of the Portuguese Civil Code was passed; it amended the "two persons of different sexes", substituting it with "two persons", actually making same-sex marriage legitimate.

This law was preemptively challenged but, following its 2009 judgment, the Constitutional Court declared the amendment to be fully legitimate (Sorda, 2011; Crivelli, 2010).

A "double track" has been initially followed also by the Belgian law system which, through its 1998 law on "legal cohabitation" a series of marital obligations, excluding tax and social rights. Precisely because of the limited effects of the "cohabitation pact" and following some pressure, especially from the Flemish Community, the Belgian Council of Ministers adopted draft legislation aimed at "ouvrant le marriage a`des personnes de meme sexe et modifiant certaines dispositions du Code civil" (opening to same-sex marriage and modifying some dispositions of the Belgian Civil Code). The main aim of this legislation was to realize the existence of the deep social changes the institution of marriage had undertaken, as it was no longer envisioned as a "union towards procreation", but as the most tangible effect of "an intimate relationship between two people". The draft legislation – submitted to the opinion of the Belgian Council of State- was rejected by the latter because, amongst several reasons, the Supreme administrative Justice noted that the main reason for marriage was, and remained, procreation. Despite the contrary avis (i.e., opinion) expressed by the Belgian Council of State, this draft law was approved, even if it was submitted to a constitutionality control in 2004, as it was deemed to violate the equality principle, religious freedom and the international compacts qualifying marriage as the union between a man and a woman. This control was rejected, based on the fact that since the Belgian Constitution does not provide a specific definition of marriage, leaves the legislator free in determining the conditions thereof. Furthermore, the Cour

d'arbitrage complied with the "sociological" reason of the legislator, according to which the institution of marriage, having lost its original goal of procreation, can be extended to homosexuals (Dicosola, 2011).

The United Kingdom, the only European country usingcommon law, set its own example. The protection of rights for homosexual couples has been doubtlessly favored by the approval and the endorsement of the Human Right Act in 1998. Said Act, integrating the European Convention on Human Rights within the UK law system, gave this system a list of written rights. This Act has also provided an important jurisprudential base towards a reference framework in leaving the discriminations between traditional and same-sex families behind. Such an evolution ended with the redefinition of the concept of "family life" towards including homosexual unions as well. This brought the UK Parliament to recognize registered unions through the Civil PartnershipAct in 2005 and, recently, also same-sex marriages. The 2005 law could be actually be considered very similar to traditional marriages concerning the protection of rights and duties between partners. As observed within this doctrine: «Considering its practical consequence, one might say that civil partnership is a full-fledged marriage in all but name» (Passetto, 2010, p. 78).

The differences can be found, and it could not be any different, in forming consent, in the specific terminology used and in the reasons for annulment. Even if such legislation is significantly wider and more complete compared to the other ones analyzed within this paper, the Conservative-Lib-Dem UK government approved, in 2013, a law recognizing same-sex marriages.

4.2.3 The Italian exception

On the other hand, Italy is an anomaly within the European framework on the matter.

No national legislation does in fact protect common-law marriages, be they hetero-or homosexual, despite the fact that several legislation drafts have come and gone in recent years.

Unlike what happened in other cases, judgment 138/2010 of the Italian Constitutional Court seems to exclude the possibility to introduce same-sex marriage in Italy.

According to the interpretation of the aforementioned Court, an innovative reading of Article 29 of the Italian Constitution would prevent same-sex marriages, since family in the Italian law system seems to be intended as a "natural society" based on marriage and therefore only heterosexual unions could qualify as the needed prerequisite to a lawful union. This would authorize the Italian legislator to provide for a discipline warranting minimal protection to same-sex couples, given the fact that common-law marriages are social structures where persons can fully express and develop themselves and are therefore protected by Article 2 of the Italian Constitution. Therefore, lawmakers may decide the "when" and "how", but not the an of the matter. A cautionary

judgment, which lawmakers are still silent about right now (Prisco, 2012; Prisco, Monaco, 2014).

As Part II of this paper will explain in further detail, the substantial silence of the Italian national legislator has been met by a strong activism by the Italian Regions and Lgbt associations.

4.2.4 Towards a conclusion of sorts

From our previous analysis - despite we have no pretense of having offered a complete framework - some similarities may nevertheless be drawn from all the experiences we considered.

In all those countries featuring strong decentralization the local entities – all of them different in each law system - pushed the State level towards recognizing the rights of non-heterosexual persons. The action of higher State levels and functions, provided it is compatible with the center-periphery model, begins whenever it becomes aware of deep undergoing social changes and because it must uniform the system, lest it feature differences in protecting fundamental rights.

Another continuity element lies in the interactions between judges - by no means only constitutional ones – and lawmakers. The former have in fact perceived, both clearly and firsthand those anthropological changes concerning the institutions of marriage and family, espousing a deeply changing sensitivity on such themes.

Furthermore, it should be noted that all the law systems we considered in this paper experienced intermediate stages of cohabitation pacts, themselves the juridical and cultural threshold towards giving legitimacy and acceptance to gay marriages. Finally, the preeminent role of Lgbt Associations should be put into the limelight. These associations have actually become, wherever possible, an important interlocutor for policymakers (on this, suffice it to mention the cases of the United States and Canada) and a pressure group acting on civil society and therefore on Parliaments.

Whereas, as it has been the case with Italy, the resistance of national lawmakers has not even budged, the Lgbt Associations and local entities effectively substituted the State concerning the assistance, support, awareness and respect of homosexual issues.

However, it should be noted that the full juridical acknowledgment of Lgbt people also triggered homophobic and culturally backwards phenomena. Such events show that not all of the social fabric is ready to accept the Lgbt world yet (ILGA-Europe, 2014).

4.3 Italy, the law and non-traditional stable relationships. An overview of the problems and possible solutions

4.3.1 General premise: the strategy of the Italian parliament's "repressive silence" on this issue and the necessary contribution of the courts. Some recent examples

The peculiarity of the Italian approach to the legal questions regarding biopolitics in general, and bioethics in particular, lies in the fact that despite the civil law nature of the legal system, there is still an absence - or a limited and controversial presence - of laws on this vast and problematic field, and a tendency for questions in this area to be regulated by the courts in a way that recalls the "case" approach typical of the common law. Any existing laws have often led ordinary and administrative judges to raise objections about their alleged unconstitutionality, where no previous interpretations of conformity to the Constitution exist (a preliminary test that has to be done before any judgment on constitutionality can be handed down), and there have thus been subsequent decisions of the Corte Costituzionale on the question. An obvious example of this modus procedendi may be found in the remarkable, and increasingly heated, dispute that has developed around the positive regulation of assisted reproduction, disciplined by law 40/2004 and on which (constantly, but especially after judgment 162/2014 of the Constitutional Court, which has allowed a heterologous variant, and while awaiting further provisions from the Ministry of Health and Parliament, but even more so after the Rome Pertini Hospital case on the so-called double "erroneously heterologous" medically assisted reproduction (m.a.r.), which we briefly comment on at the end of this paper).

There has been talk of tolerance, therefore, through the conscious choice of parliamentary "repressive silence" (Dall'Orto, 1988; Bin, 2013; Nussbaum, 2001; Greblo, 2008), or at least - in a different and kinder assessment of the phenomenon - the wish that more decisive options be left to changes in custom, without this necessarily implying any prejudice towards more "open" solutions, but leaving the responsibility of sharing them to the necessarily slow and gradual formation of a widespread social consensus on the various practices, before (or instead of) translating the balances and compromises reached into formal laws and regulations.

It is well known that in Italy there is no overall national legislation on the rights of unmarried couples as such (heterosexual or otherwise: for single cases cf. the brief overview in section 4) or the individuals of which they are formed, so it is up to the courts to act on the issue, as the judiciary cannot claim not to know or want to decide on a controversial issue referred to it

(technically, it can not avail itself of the "non liquet"), if prompted to recognise rights against discrimination (Winkler, Strazio, 2011; Torino, 2012; Mannella, 2013).

In the light of the foregoing, we can mention some of the conclusions contained in recent case law on the matter at hand.

According to judgment 138/2010 of the Corte Costituzionale (Bin *et al.*, 2010; Pezzini, Lorenzetti, 2011; Prisco, 2012), the constitutional paradigm of marriage presupposed in art. 29 of the Constitution is heterosexual, following the centuries-old tradition in Italy. It is up to the legislator - in the sense that it pertains thereto - to provide protection for de facto couples and the individual rights of their components, pursuant to art. 2 of the Constitution because of the effects extending also beyond existing family relationships, such as questions of inheritance. Similarly, judges examining merit and legitimacy, as well as those of the Corte Costituzionale are required to protect specific rights, and in the event of violations, they must ascertain any harm suffered on a case-by-case basis.

Under the subsequent judgment of the Supreme Court 4184/2012, since Italy is part of the ECHR system (which requires, under art. 117, Section I of the Constitution, its national and regional legislation to be exercised «within the constraints deriving from EU and international obligations», so that it is required - among other things - to observe the principle of non-discrimination set out in article 14, concerning both patrimonial rights and others - not primarily and exclusively patrimonial, e.g. regarding dwelling, health, those associated with work or social security), it must be borne in mind that the system recognizes the right to set up a family and to marry according to national laws as distinct but connected (in particular under art. 12; in the Charter of Fundamental Rights of the EU, the same principle is upheld by art. 9), as is the right to private and family life under art. 8 of the ECHR.

However, according to the Strasbourg Court, marriage contracted abroad in countries where national law permits it (which is in fact a form, although not the only possible one, of "family life") is therefore a legal act, even if, for reasons of internal public order, it is not transferrable into our system.

From the above-mentioned international and community provisions, it emerges that the choice lies with national legislators to grant or deny the legality of a request to publish banns, or to transcribe the records of lawful same-sex marriages, where the legal systems so permit.

"As things stand", in particular, the Supreme Court notes that the established interpretation of this clause prevents these claims being considered legitimate, but the legislator could well assess the same content differently in the future, since the notion of "public order" is not static, and tends to shift with time. It is not bound to the "legal tradition" of a specific country, which - if it were, in the assumption of the judgment of the Corte Costituzionale referred to above, and according to the summary of the operative part of the judgment - would render the marriage undertaken not only invalid, but even non-existent.

More recently, a highly controversial judgment - handed down by the Court of Grosseto in a ruling of April 3, 2014[1] held that there is no legal impediment to the transcription of marriages of homosexual persons validly undertaken abroad in the register of marriages because a) there is not textual reference in the Italian Civil Code to the fact that persons undertaking marriage must be of different sex, nor b) are there obstacles in terms of internal public order sufficient to consider a valid same-sex marriage entered into abroad non-existent, as the ECHR (as we have just seen) has given the term a much broader meaning than has been understood in Italy up to now, so that the judge may very well order the public officer competent to keep the registers to do so, and the registrar has no choice but to comply.[2]

In an order dated February 9, 2013, the Court of Reggio Emilia considered unlawful the deportation of a foreign citizen married to an Italian woman and who had a sex change after the marriage. In this case it was proven that the couple had continued to live together and that marriage had not been undertaken with the sole purpose of the foreign citizen obtaining Italian citizenship.

Another case that has received much attention, and which may lead to further interesting legal developments, began with a decision of the Modena Court, but was reversed by the Bologna Court of Appeal and then came before the Supreme Court raising (in judgment 14329/2013) the question of the constitutionality of certain provisions of the law on gender reassignment and those linked to them relating to the law on marital status.

In this case, the husband began the gender reassignment process after heterosexual marriage. Having corrected the register of civil status and marriage records with the re-allocation of gender, the municipal registrar also arranged for the cessation of the civil effects of the marriage, but without the spouses (who in fact accepted the new condition) having the gender reassignment of the husband "covered" by a final judgment, as is required by art. 31, paragraph VI of legislative decree 150/2011 referring to law 898/1970 on the cessation of the civil effects of marriage: this therefore resulted a case of "forced divorce" due to the supervening change of sex of a member of the couple.

The Corte Costituzionale, in judgment 170/2014, declared articles 2 and 4 of Law No 164 of 14 April 1982 unconstitutional. - i.e., certain laws relating to gender reassignment, in addition to a related and consequential laws in the Civil Code - with reference to art. 2 of the Constitution «insofar as they do not provide that the ruling on the gender reassignment of one of the spouses which brings about the dissolution of the marriage, permits them, if both request it, to maintain a legally regulated relationship by means of another form of registered partnership able to adequately protect the rights and obligations of the couple, disciplined according to the discretion of the law maker».

1 After this article was written was annulled on formal grounds, as the mayor had not been called before the court in his role as "government official" and thus as a representative of the State in that area.

2 On this point, see point section 3 for the developments concerning relations between the government and individual mayors.

Despite this frequently repeated reservation, the core of the grounds is fundamental (Section 5.1 of the Legal Considerations), as shown below, due to its obvious importance also for the future.

«The situation [...] of a married couple who, despite the reassignment of sex obtained by one of them, do not wish to end their life as a couple, is, of course, outside of the model of marriage - which, upon the loss of the requirement of two sexes essential to our legal system, cannot continue as such - but it cannot be simplistically equated to a union of persons of the same sex, as this would be tantamount to cancelling out, from the legal standpoint, a previous experience, wherein that pair accumulated mutual rights and obligations, also of constitutional significance, which, though they can no longer be included in the form of marriage, cannot not for this reason, all necessarily be dispensed with».

There followed, in the reasoning of the Corte Costituzionale, a reference to its previous case-law mentioned above, i.e. judgment 138/2010 and the new and urgent invitation to the law maker, within the terms of a proper implementation – on their part - of art. 2 of the Constitution, relying for the occasion on a decision technically classifiable as "indicating the principle to be followed," which the earlier judgment did not. In short, this is where progress was made from the jurisprudential point of view, i.e., in reiterating the reserve on the matter to the law maker, but at the time same - faced with the latter's ongoing silence and inactivity - serving a "notice of default" explicitly and not merely by implication or cryptically.

Recently, the Court of Siena (Trib. Siena, sent. 412/2013 in its judgment of 12 June 2013), with only three sporadic precedents to take into consideration, held that it is possible to reassign gender and name also without prior recourse to surgery, which is required only if this is necessary for the lasting psycho-physical well-being of the person concerned. The recent judgment 240/2015 of the Corte di Cassazione, in line with the Constitutional Court judgment, 138/2010, confirms that under Italian law (despite the silence at textual level of art. 29 of the Constitution and Civil Code, which implicitly presupposes different sexes when referring to a married couple as "husband" and "wife"), it is not possible to enter into a homosexual marriage (the question arose from another request, which was rejected, for the publication of the banns of a gay couple). The decision reiterates, however, that the emotional-relational nucleus characterising a union between people of the same sex is nevertheless recognised by article 2 of the Constitution, and through a process of adaptation and equivalences imposed by the constitutional importance of the rights in question, may be protected and safeguarded as if arising from marriage in all those situations where the lack of legislation brings about a loss of fundamental rights relating to the relationship in point.

4.3.2 The LGBT world and the local authorities in Italy. a) Regional intervention

In the light of the situation summarized above, one wonders if there is "coverage" (and if so to what extent) within regional legislation in this context, whereby it may be deemed possible to overcome the monopoly of the national law by calling up interpretation on matters regarding citizenship, marital status and registers, «under art. 117 paragraph II, letter i of the Constitution, as well as civil and criminal law» (*ibid.*, letter l).

The Statutes - not the original ones of the 1970s, lacking in assumptions not only of a merely organizational nature, but also the so-called "second generation" ones, following the reform of Title V of the Constitution (2001; the Statutes were reformulated in 2004-2005 and the Constitutional Court, in its judgment no. 304/2002, emphasizes its importance at the "top" of the "sources of regional law") contained statements of the anti-discrimination principle, also important for de facto heterosexual and homosexual couples and people with a special gender identity; for example, prohibitions regarding discrimination in terms of health, work, and inclusion on waiting lists for access to council housing on the basis of sexual orientation or gender, as well as commitments to develop a wide-ranging culture of monitoring and integrating human differences, respecting specific individual guidelines .

Following appeals from the government concerning a number of Statutes, with a view to having these statements declared illegitimate due to lack of competence in the matter, as they ought to be, at best, the preserve of a unified and homogeneous national legislative framework on the status of persons, the Constitutional Court (judgment 2/2004 concerning the Calabria Region, 372, 378 and 379/2004, concerning respectively the Tuscany, Umbria and Emilia Romagna Regions) ruled, however, that it was possible for the abovementioned modified statutes to contain such axiological options, considering them however as not immediately binding nor therefore, in the technical-legal sense, operational (but deemed them to have delayed effects and to be implemented gradually), but rather as a mere intent, of an essentially forward-looking political-ideological nature with regard to the policy to be developed in different local communities and, as a tertium genus, in terms of effectiveness.

On the enactment of the statutes through legislation, the Tuscany Region, with l. 63/1994, recognizes that the services included within the scope of matters within its competence must be performed without discrimination of gender or sexual orientation; it introduces specific support in the workplace for people exposed to social exclusion on these grounds; it prohibits subjective discrimination with regard to overseeing end-of-life choices, as well as identifying who is designated or appointed to make decisions regarding specific wishes relating to accepting or refusing medical treatment, where the power to make one's own decision is lost and specific psychological support is

granted to those deciding to embark on a path of gender realignment; it prohibits discrimination by providers of public, tourism and commercial services; it requires Corecom to ensure the quality and fairness of radio and television broadcasting in this area and adequate information must be made available to those with a special interest in the subject.

The Constitutional Court (judgment 253/2006) stated, in response to an appeal by the Government for alleged breach of regional jurisdiction - which the region presumed it had complied with, having acted within it - that the complaints were unfounded, with regard to actions in the field of education and training (for which the provisions of the law specifically outlined areas and commitments), but upheld the others, as they directly confer rights and benefits.

In implementing these guidelines ("saved", in terms of constitutional legitimacy), the region thus launched information and awareness-raising campaigns to combat homophobia, setting up permanent consultation with representatives of Lgbt associations, an Observatory on the dynamics and problems of the Lgbt world, ruling that the local authority must fund these measures using their own resources.

The Liguria Region, with Law 52/2009 and the Marche Region, with law 8/2010 consequently approved regulations for both cases, with some shared features, on the issue of gender discrimination and sexual orientation.

To avoid issues similar to those leading to the partial annulment of the above-mentioned Tuscan law, and even though they cover a broad range of subject matter (education, vocational training, employment, public housing, health, monitoring the fairness of broadcasting on the problems at hand), they point out that they only aim to adapt the application of constitutional principles to the acts coming under regional jurisdiction, but with each region staying within the area of its material competence.

When the Government challenged the Liguria law, the arguments advanced (substantially similar to those supporting the legal challenge against the Tuscan law) were, however, declared unfounded by the Constitutional Court (judgment 94/2011).

The law for the Marche, in particular, has all the appearance of laying the ground for future interventions.

Similar bills are pending in the Regions of Piemonte and Emilia Romagna and, more generally, the two regions are marked by the adoption of policies for the provision of regionally financed services of a clearly anti-discriminatory character.

In particular, the Emilia-Romagna Region, with its law of 24/2009 (the regional financial law) ordered (among other things) that private services had to be available to all on equal terms and to all cohabiting couples, also with the declared intent of applying the notions of direct and indirect discrimination on a regional scale (both of which have to be countered and eliminated) on the basis of the European Union legislation and case law (Directives 2000/43/2000/78/EC 2006/54/EC), the first relating to the principle of equal

treatment for all persons irrespective of racial or ethnic origin, and the second creating a general framework for equal treatment in the world of work, while the third relates to applying the principle of equal opportunities and equal treatment of men and women in matters relating to employment).

The Government challenged this law which it took to be a surreptitious attempt to broaden the types of couples to be protected - in an alleged breach of the State's prerogative over the rules on civil status, specifically on account of the call to remember the need to protect "all forms of cohabitation", but the Government's claim was declared unfounded (in substance) with regard to the objections relating to equal treatment, since the rules are simple reiterations of principles laid down from Community principles, and inadmissible with regard to the part (connected, but for the purposes of this work more interesting) referring to the protection of other forms of cohabitation, because the Constitutional Court considered that the appeal had been presented without argument and therefore on formal grounds (sent. 8/2011).

Still on the regional, but not legislative level, a "National Network against discrimination in public administrations" (RE.A.DY) has been created to bring to the fore the issues relating to Lgbt people, and resolutions to combat homophobia have been approved by the Regional Councils of Valle d'Aosta and Veneto.

In general, in the light of the inertia or litigious action in this direction by the legislator, it is commonly held in the literature that the local institutions are more responsive to calls from society and anti-discrimination talks within the European Union than the central institutions are. This is the situation pending the application of best practices which must attain the role of first impact for the local authorities and Regions in the application of the principle of vertical and horizontal subsidiarity, in the second case because of the current dialogue with associations representing Lgbt associations, involved in the preliminary stage of proceedings in public decisions) (Danisi, 2011; 2012).

In this sense, Puglia Region law 19/2006, entitled «Rules for the integrated system of social services for the dignity and welfare of women and men in Puglia» is of particular note, establishing a network of services in the field of social rights to be provided - making them effective - to citizens engaged in various forms of cohabitation (art. 27, c. 2: parties linked to others by bonds «of kinship, affinity, adoption, guardianship and... other forms of solidarity are considered to have the right to protection, as long as the interested parties have been living together regularly and continuously and dwelling in the same Municipality» specifying that «living together habitually and continuously means that two or more people have been cohabiting for at least two years» There arise from this (as has been noted) significant consequences on the subject, for example, entitlement to benefit payments for those living with a disabled family member, access to family guidance services or waiting lists for nursery school admittance.

4.3.3 (*to follow*) b) The room for manoeuvre available to municipal authorities

In the new Title V of the Constitution, currently under revision, the local sub-regional authorities, (i.e., the municipalities, the provinces which are being phased out) become the primary locus of reconstruction and reorientation - from the bottom up and from the periphery to the centre - of the legal system, in terms of how to exercise the functions and powers of the public administration, in the light of the "principle of subsidiarity", mentioned above.

Worthy of note at this level are an assortment of activities to support associations focusing on single issues, involving concrete actions and monitoring by local authorities, providing social and cultural support in particular instances, including the Lgbt environment with the introduction in particular of regulations and resolutions of the various Councils - of "Registers of Couple Living Together" (Romboli, Rossi, 1996; Rotelli, 2005; Imarisio, 2013) (not to create new rights, but to certify an existing situation) and, more broadly, also of a number of people registered as cohabiting, be they heterosexual or homosexual, and with a view to sharing in a loving and sexual relationship, but also sharing their solidarity and mutual sacrifice, but these have met with varying degrees of success in the eyes of the beneficiaries.

There is often some scepticism about the practical value of these instruments, if not actual "mistrust" about possible "profiling", in a time when there is still no regulatory framework providing guarantees at regional and national level.

We can also observe a varying degree of presence and maturity of specific local experiences in relation to the different degrees of intensity of the "civic culture" and the social ties perceived, as well as persistent resistance from certain institutions representing local communities to adopt incisive policies for the real integration of minority orientations and lifestyles (D'Ippoliti, Schuster, 2011).

Nevertheless some provisions do stand out, such as the very recent action of the Mayors of Naples (June 23, 2014) and Bologna (21 July 2014), essentially on similar grounds, which, recalling in particular - but not solely - the principles of the above-mentioned Supreme Court judgment of 2012, ordering registrars to register same-sex marriages validly entered into abroad, according to the lex loci (with the power to order, in accordance with art. 28 of Law 218/1995, the reform of private international law).[3]

[3] On this question, a circular from the Ministry of the Interior subsequently (and after this article was finished and the above-mentioned Grosseto judgment was quashed) recalled that in the absence of a national law on the matter, a mayor (as government official of the State, that he represents locally) cannot register acts of this kind and ordered that they be annulled by the prefectures. Various "mayors" protested and threatened to take legal action.

4.3.4 (*to follow*) c) The law regarding couples living together. Some examples from legislation and case law acknowledging the importance of the phenomenon

Having mentioned the peculiar nature of the Italian "heteronomous" (national or regional) legislation, namely that it is almost completely absent, mention should be made of a different solution, not based on the public law regulation of non-traditional unions, as has been possible elsewhere for some time. One recalls - for the sake of brevity and referring to countries geographically close to Italy - the various solutions offered by the French Pacs (a model indeed at least originally "contractual" and open to unmarried heterosexual and same-sex couples, later supplemented by an opening up to marriage not determined by gender) or the German Lebenspartnerschaftsgesetz (an "organic" model solely for same-sex couples) (Caggia, 2007; Ferrando, Querci, 2007; Brunetta d'Usseaux, D'Angelo, 2000; Amram, D'Angelo, 2011).

One solution which can be created by the interested parties is when unmarried couples or those who cannot marry, whatever their gender – create bonds for themselves, according to a long established line of thought, but taken up today with particular interest by those exercising the function of notary, in such a way as to provide a contingent remedy for a normative lacuna which is in any case inexcusable, as the legislator continues to avoid the dilemma of the extension of the institution of marriage to "different" couples or a specific, but different, regulation reserved for them.

Before offering (in the next section) some considerations in this regard, it should be emphasized how, in reality, the lack of a comprehensive legislative framework in Italy for the widespread experience known as "cohabitation" does not also mean that, in specific cases, this condition will not take on importance in legal, legislative or judicial terms.

From the legislative point of view, some equivalence is provided for by the Civil Code, for example, on the allocation of the family home, if the assignee is also the person with custody of the children (art. 337 part six). However, this law "is not applicable if the recipient no longer lives or ceases to live permanently in the family home or cohabits more uxorio or remarries." Additionally, in the case of measures against violence and abuse of a spouse or other partner, under art. 342-bis, the two positions are, as may be seen, normatively equivalent, and as regards choosing the administrator of any support, according to art. 408, this may be the responsibility, through a decision of the probate judge and where the person concerned has not done so, not only of a subject related to the interested party by ties of kinship, but also a «person permanently living with them» and the instance of interdiction or incapacitation, under art. 417 of the Civil Code, may be applied for by the person permanently living with them.

An examination of legislation not deriving from the codes (what used to be called "special", being considered residual – in comparison with the provi-

sions of the Code), again highlights a provision on the removal and transplant of organs and tissues, art. 3 of Law 91/1999, according to which information regarding the operation can be provided (among other things) to the "cohabiting partner" of the person concerned, or - in art. 5 of L. 40/2004 in the field of assisted reproduction - there is a provision that the relevant instruments are available to «adult couples of different sex, married or cohabiting of childbearing age, and both living».

Concerning rules on the alienation of property owned by autonomous institutes for public housing, art. 1, paragraph 598, of Law 266/2005 provides that the right to exercise the right of option to purchase must be recognized first to «assignees and their spouse, if married with community of property», or, in the following order, assignees without community of property, "with a cohabiting partner", provided that the cohabitation has existed for at least five years and only after the children (firstly those living in the family home, and then those living separately) have been taken into consideration.

Lastly, from the point of view of criminal procedure, on one hand there exists the right of relatives to refuse to testify against the defendant under art. 199 of the criminal code, and is extended also to those who «despite not being the spouse of the accused, as such cohabit or have cohabited with him or her», but only with regard to what (s)he learned during the cohabitation itself. On the other hand, art. 30 of Law 354/1975 on penitentiaries, states that «in the case of imminent danger to the life of a family member or a partner, convicts may be granted permission by the supervising judge to travel to visit the sick person, with the due precautions required by the regulations».

The case law on the recognition of certain rights specifically pertaining to the assets of partners is now assuming an incisive (and increasing) importance.

It should also be noted that the Constitutional Court declared the art. 6, of Law 392 of 27 July 1978 392 unconstitutional, «in so far as it does not provide for the transferral of the lease agreement from the tenant who is no longer cohabiting to the other partner with custody of the children, as is in fact required by law in the event of the separation of spouses» (judgment 404/1988) and held that, upon the breakup of a non-marital cohabitation, from which there are under-age minors or, if adult, but not economically self-sufficient, the house held in common at that time must be assigned to the parent with custody, putting the interests of the child above all else (sent.166/1998. Also in judgment 308/2008, «the legal framework and case law show that not only the assignment of the family home, but also its cessation, have always been subordinate, even before the silence of the law, to an assessment by the judge, able to satisfy the interest of the children» even when an unmarried cohabitating couple breaks up).

Another important case was concluded with Constitutional Court judgment 203/1997, after which it was held - thus declaring unconstitutional art. 4, paragraph 1, of Law 943 of 30 December 1986 on the subject of the employment and treatment of foreign workers and immigrants, and against illegal immi-

gration - that an immigrant parent of a minor who is legally resident with the other one in Italy has the right to be reunited with the family, even if father and mother are not married to each other, and have no intention of doing so, provided that the one who re-joins the family can enjoy normal living conditions in Italy.

There are also many decisions from the Corte di Cassazione. In one of these, compensation was awarded for a fatal injury also for those who cohabited with the deceased and could prove that the relationship was a life partnership based on mutual moral and material assistance (III civ., Sent. 23725/1998); in another case, the court deemed applicable to life partners the status of family business as defined in art. 230 bis of the Italian Civil Code, considering that work also involving unmarried couples cannot generally be deemed to be regulated in the same was as the employment relationships envisaged by the current law (Lav., Sent. 5632/2006) and, further, that the normal supply of money and goods to a cohabiting partner, as an expression of an attitude of socially valuable moral solidarity, cannot be the subject of proceedings for restitution (1 civ., Sent. 1277/2014).

Yet it has recently been stated that «cohabitation as a form of society gives rise to an authentic family unit and provides, with respect to the home where it develops and where the shared life takes place, a de facto power based on an interest on the part of the cohabitant that is very different from that arising from a sense of mere hospitality, conferring a qualified ownership so that violent or clandestine ejection from the dwelling becomes unlawful» (Cass., civ II., 7/2014, in the case of the partner of a man confined to hospital for a long period of time, whose partner was ejected from her home by one of the man's brothers who had granted use of the dwelling to the sick sibling). Sometimes, then, a lengthy cohabitation actually creates a de facto situation that constitutes an «impediment in the Italian Republic to the declaration of effectiveness of the final judgments of nullity of marriage pronounced by the ecclesiastical courts, for any genetic defect in the marriage determined and declared by the ecclesiastical court under canon law, despite the existence of conjugal life», given the dissociation of the act of marriage from the marriage relationship, of which the validity of the second is a consequence even after the religious annulment of the first (as previously stated by Cass., 1343/2011): see lastly, SS. UU. Civ., 16379/ 2014.It is not easy to free oneself of a marriage previously declared invalid if the couple has continued to live together for a long time afterwards and this is obviously in order to protect the weaker party, and especially any children, as well as of the social aspect of a situation as it was and especially as it continued over time. Increasingly, the fact itself shapes the law (in the field of family relationships) and can even rectify the original defect.

4.3.5 Cohabitation agreements in private law

The alternative way mentioned above has re-emerged more recently in Italy, as a possible method of regulating (according to those who support them) relations between cohabiting partners, in the absence of binding legal instruments in public law, in order to attribute to them certain rights and duties relating to their assets, by means of agreements with largely reciprocal effects, through private law.

According to the published guidelines of the National Council of Notaries, «in the case of a married couple, the law establishes the reciprocal rights and obligations of the spouses, also relating to their patrimony, both during the period living together and afterwards (due to the death of either spouse, separation or termination of the effects of civil marriage» (Consiglio Nazionale del Notariato, 2014).

In the case of cohabitation, however, the lack of a system of rules similar to those for spouses creates a precarious situation, which is particularly problematic when the cohabitation comes to an end. It is therefore up to the partners to fill the regulatory vacuum, disciplining their relationship from the point of view of their patrimony using the conventions most appropriate to their needs.

For cohabiting couples, the means of negotiation (all acts, including contracts, that can be used to regulate the enjoyment of their rights, such as a will) and contractual instruments (acts whereby two or more people regulate their relationships) envisaged by the law thus become extremely important, because - if drawn up during the time of cohabitation – they make it possible to avoid very complicated situations and litigation when the relationship comes to an end (by mutual consent or death).

This form of negotiation becomes essential for the partners, in order to ensure a minimum part of the mutual protection guaranteed to married couples by law, an essential stopgap to fill "the legislative vacuum".

In general, in fact, one should remember that, according to the first paragraph of art. 1322 of the Civil Code, «the parties may freely determine the content of the contract within the limits established by law» (thus, for example, under Article 458 of the same Code, there is no provision for so-called "mutual wills" and they would therefore result null and void if actually drawn up, but it is possible however - under art. 456 - to bequeath freely respecting the so-called "available quota" of one's assets, i.e. those that do not infringe on the rights of legitimate "heirs" as defined by articles. 536 ff.), i.e. to draw up a contract in place of the standard contracts, possibly adapting them to their own needs, but - and what is more - it is always possible (art. 1322, paragraph II) to «enter into contracts that do not belong to types with a particular set of rules, provided they are intended to achieve interests worthy of protection under the law».

To this framework - admittedly very general and variable in terms of actual content - we can also include the so-called "cohabitation agreements", alt-

hough it is possible to make use of a standard contract for the transfer of ownership, pursuant to art. 2645-ter of the Civil Code (we shall not discuss here an analysis of what is valuable in the technical makeup, criticized by many, of the provision and how the institution for which it provides can be identified with the Anglo-Saxon trust - or to what extent it seems to be a "fragment" of this - and to what extent it differs from it), with subtraction of an asset from the general collateral of creditors.

Even in 1993, the Supreme Court (III civ., Sent.6381), however, was able to establish (and this is the moment of transition between the outline briefly presented in the preceding paragraph and the reflections that follow) that «cohabitation between single people does not constitute unlawfulness and, consequently, the nullity of a contract conferring property rights (especially loan for use) associated with the cohabitation, insofar as such cohabitation, while not being regulated by the law, is not inconsistent with either binding regulations, there being no regulations of this nature to prohibit it, nor is it inconsistent with public order, which includes the fundamental principles behind the legal order, nor with the principles of morality, understood in accordance with the provisions of the Civil Code (see art. 1343, 1354), as the set of ethical principles that constitute social morality in a particular historical moment, but has an important role in the current order for the attribution of parental authority in the circumstances regulated by art. 317 bis of the Civil Code and the regulation found in law 392 of 27 July 1978, relating to succession in lease agreements».

In court rulings, there is also mention of a previous one whereby the cohabiting couple living as husband and wife can validly enter into a contract with each other in which they establish a right of usufruct of property to mutual benefit, without consideration, being based on the assumption of the very existence of the cohabitation (Trib. Savona, 7 marzo 2001], which was a long awaited way of overcoming the initial trends that were establishing cohabitation as husband and wife (only) as relationships based on mutual hospitality, not making actionable conflicts arising from their crisis, because they are based on "natural obligations".

In a changing society, the idea that "everything that is not forbidden is allowed", in line with the "natural" spirit of private law, whose modern form is, also in the national adaptations gradually emerging, starting from the very idea of codification, at the heart (inspired by the individualistic and liberal-bourgeois ideals of the Enlightenment) of the Code Napoleon.

The sticking point is, however, that homosexuals are now legally "allowed very little" in Italy, in terms of equality with heterosexuals under ordinary law - in their enjoyment of rights arising from their personal relationships. They have no access to a "matrimonial contract" in Italy, and there is thus an impediment by definition to its use.

A distinguished authority on civil law comments on the dynamics of social selection and the legal regulation of interests as follows:

«We arrive at legal typicality [...] through social typicality, represented by the typicality of case law, because it is at judgment level that the real problems that the lawmaker is required to solve through uniform regulation are found. Case law phenomena, if they are in future to be legislated for, presuppose recurrent behaviour, a general practice that, although not yet a custom, could become the basis for one, already establishing a rule. Thus outside the limits of this definition remain only individual conduct or at any rate conduct not socially generalized, conduct that, from the point of view of typicality has been classified as socially immature, and which is to be considered unworthy of protection under art. 1322, paragraph II».

The Court of Cassation (III civ., 2288/2004) held that «one can define all non-standard contracts not contrary to the law, public order and morality as aiming to achieve interests worthy of protection under the law, according to Article 1322, paragraph 2, of the Civil Code».

"Public order", "good faith" (Cavagnoli, 2013; Scarponi, 2014); i.e. tools showing a deliberate and wise "openness" (in fact, in German, the term used is Ventilbegriffen or "escape-valve" concepts) in a legal order otherwise entirely - and unsustainably today - self-referential and closed to the impulses arriving from the ethical and social reality, through the creative integration of the judge, who calls upon - with the authorization of the lawmaker - similar parameters of assessment of the facts to alleviate the rigidity of the legislation.

The common ground between the heterosexual and the homosexual states should actually be sought by "skipping a level", so to speak, in the hierarchy of sources, i.e. from the assumptions of principle in the Constitution: article 2 («The Republic recognizes and guarantees the inviolable human rights, both of the individual and in the social groups in which people express their personality, and requires the fulfilment of the peremptory duties of political, economic and social solidarity»), and article 3, paragraph 1 («All citizens have equal social dignity and are equal before the law, without distinction of sex», interpreted in an evolutionarily light, taking account of Community Standards, such as, at this time, the obligation not to distinguish before the law with regard to gender and sexual orientation).

It is in this sense then that we must reconsider fundamental needs that emerge, starting from this uniformity in terms of dignity, requiring the autonomous development of the individual personality of each persona (for example housing, health, welfare and social security, but also, and perhaps above all, mutual care and - perhaps in an even more controversial way - the need to plan for a future project of coexistence, through child custody, natural parentage - even obtained by means of technology - or adoption).

So at this point we have the point of divergence concerning the concept of family as set out in the codes (in relation to gender, in this case, regarding the concept expressed in art. 29 of the Constitution: "based on marriage"), and thus the interests of the human community that constitutes it and the individuals who are part of it; a way of thinking that has resulted in a necessary re-

reading of the model received in scholarship from more sensitive tradition and jurisprudence (now indeed widespread in Europe and at home).

Judgment 138/2010 of the Italian Constitutional Court was very cautious about it. When the decision was published, the writer observed in his commentary, however, that it was «a [...] prudent judgement, taking into account a historical and cultural tradition, but at the same time it is not in the least bit "closed", as a first, superficial reading might lead one to believe, and most importantly, I am convinced that it will not be the last pronouncement of the Constitutional Court on this matter. Essentially it does not cut short a discussion that deserves to be continued: in fact it is the starting point of the journey that begins today. The road is opening up without barriers» (Prisco, 2011).

«Within the scope of Article 2 of the Constitution. – we read at the end of paragraph 8 of the "Legal Considerations" - that it is the responsibility of Parliament, at its sole discretion (which does not mean of course omission or deferral ad libitum of necessary intervention, as subsequent judgment 170/2014 reiterated in no uncertain terms, faced with the permanent "absent-mindedness" of the lawmaker, author's note.) to identify forms of protection and recognition for these couples, while it remains the prerogative of the Constitutional Court to intervene in order to protect specific situations (as has happened in the case of a couple living together as an unmarried couple, with judgment no. 559 of 1989 and n. 404 of 1988). It may happen, in particular situations, that there is the need for a uniform treatment of married and homosexual couples, which this Court can ensure by applying the canon of reasonableness».

The next step in the evolution of case law seemed to corroborate the impression of a weak dam, which, instead of closing the bulkheads, opened the way for a flood, and this is precisely what subsequently happened.

The question that a public lawyer asks then, in the light of the obvious differences found everywhere today, at least in the Euro-American West, regarding anthropological models of the family (understood in the broadest sense, comprising individuals who have spontaneously come together in sentimental and emotional solidarity and with the intention of forming a lasting relationship), is whether the objective of protecting the assets of the partner bound by a potentially lasting association (within the limits, of course, of the hope that the relationship, like all human ties, will last over time) can be protected - whatever the sexual orientation - in the ways being discussed here, as having been deemed "worthy of protection".

It is noted in civil law that from 1942 to date, that only one judgment has declared an atypical contract lawful but undeserving of protection). And an authority in comparative law notes that «the law [...] has not yet found the opportunity to find a contract void under art. 1322; and - adventurously invoking the article, and this was a mere screen to attack contracts visibly contrary to good morals, or otherwise defective». (The question is therefore whether conduct which is now reasonably common and enjoying increasing

social acceptance (or - as Betti would say (Betti, 1966) - maturity, referring here to homosexual couples; a fortiori the same could be said for heterosexual unmarried couples living as husband and wife, on which the established case law is based) is "undeserving of protection" (which is the parameter for the eligibility of non-standard contracts under article 1322, paragraph II, c. c., mentioned above), on the grounds of the unsuitability "of an instrument drawn up by individuals to serve as a legal model typifying the interests, given the absence of legislation, understood as a mere typifying of schemes", or better - at least in this case - because this typifying has insurmountable "limits" to the lawfulness of the consideration (being contrary to good morals and/or public order, as stated in art. 1343 Civil Code, since the abstract type of "marriage" exists, though it is legally impossible in our legal system - but not in conceptual terms, so much so that other jurisdictions recognize it - due to the sexual identity of the couple, so it is necessary to explore the feasibility of other legal forms to meet the interest to be protected).

The answer - in the writer's view - is precisely in the fluid dynamics of social relations, first of all thanks to a custom that by its very nature develops, also thanks to opportunities coming from science and technology, never remaining static, and also in the nature of the law that must necessarily reflect this change which means that today constitutional jurisprudence and, still at an early but developing stage, that of legitimacy and merit, grants substantive legitimacy to same-sex cohabitation as well: not only is this form of cohabitation not criminalized, but the former now considers that parliament has unacceptably delayed - as mentioned earlier - some form of protection albeit recognising its discretion not to introduce marriage.

(*) The reflection was essentially intended to be a report mainly documenting for non-Italian readers a range of problems and possible Italian solutions on this issue as well as the degree of openness to the European and comparative context in question to be found in the Italian legal culture. It is the joint work of the writers, who have been in constant dialogue but §§ 4.1 and 4.2 are the work of Fulvia Abbondante. §§ 4.3.2 and 4.3.3 are the work of Marina Monaco. Salvatore Prisco has reviewed the text as a whole and written the remaining parts.

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