RIGHTS *ON THE MOVE*

Rainbow families in Europe

Conference proceedings

Trento, 16-17 October 2014

Carlo Casonato and
Alexander Schuster (eds.)

Rights On The Move – Rainbow Families in Europe

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Edited by

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and
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More on the *Rights on the move – Rainbow families in Europe* project at http://www.rightsonthemove.eu

Project partners

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Trento, 15 December 2014

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PART ONE

New constitutional and interpretative approaches

De l'égalité à l'équité
De l'ignorance à la reconnaissance du fait sexuel en droit constitutionnel comparé. Une approche sur la famille rainbow

Frédéric Mertens de Wilmars

Résumé

L'égalité, principe fondateur de l'Etat moderne et de droit, ignore à l'origine les caractéristiques des individus qui pourraient faire l'objet d'une différenciation, voire même d'une discrimination. Or, le principe égalitaire et ses variantes – égalités matérielle, de chances et de résultats – ont été amenés, non sans difficultés, à couvrir juridiquement la réalité humaine notamment dans sa dimension familiale.

Par le biais d'une approche comparée, nous observons que le droit constitutionnel reflète la difficile conciliation entre l'égalité «classique» et l'ampleur de la diversité des identités et des comportements humains (non-hétérosexuels, transsexuels ou intersexuels) et qui est accrue lorsqu'il s'agit de questions liées à la parentalité en général ou à la famille rainbow en particulier. Les hautes juridictions doivent parfois puiser jusqu'à l'extrême dans leurs capacités à préserver, à la fois, le principe d'égalité et le respect des sujets de droits dans leurs différences, leurs droits et leurs libertés, grâce à l'équité.

A la fois proche et distincte de l'égalité, l'équité contribuerait ainsi à une meilleur assise juridique pour le traitement juste et équilibré des individus et de leur situation qui ne sont pas identiques, contrairement à ce que présuppose le principe d'égalité. L'équité nous rappelle en effet les différences concrètes et multiples entre toutes les composantes de la société. Avec plus d'acuité que l'égalité, elle répond aux besoins et à la fluctuation des «modèles» de familles.

Mots-clés:

Égalité, famille, discrimination, équité, identité, équilibre, justice, rainbow

* * * * *

Aborder le concept de «famille rainbow» dans une perspective juridique est une entreprise délicate et périlleuse parce qu'elle peut déboucher sur des lieux communs alors que ledit concept ne l'est pas. Quoi de plus difficile de délimiter la nature et la portée juridique de cette figure présentée régulièrement comme atypique, étrangère, voire contraire à ce que d'aucuns conçoivent quant à la notion de famille.

Les raisons de ces difficultés sont trop nombreuses pour les évoquer toutes ici mais il en est

au moins une que nous pouvons relever du fait d'un paradoxe conceptuel lié à la notion-même de la famille. En effet, alors que nos codes civils, nos lois et constitutions ainsi que nos juges prétendent protéger celle-ci, force est de constater qu'il n'existe pas de définition juridique de la famille, du moins au regard du Droit International en général, et des droits de l'homme en particulier. Or, les obstacles à la reconnaissance de l'existence et des droits de la «famille rainbow» s'inscrivent justement dans le cadre d'une discrimination – pour les uns – ou d'une différenciation – pour les autres – basée sur une référence – la famille – dont le contenu n'est pas objectivement ni universellement reconnu comme le sont la couleur de la peau, l'âge, la langue ou… le sexe[1], par exemple.

En d'autres termes, ce paradoxe nous amène à nous interroger sur le fondement juridique de la distinction entre une «famille particulière» et celle censée constituer le «modèle» de référence – entendez par-là, la famille dont les parents sont de sexe biologique différent.

Probablement, au même titre que les familles monoparentales ou celles fondées en dehors du mariage le furent dans le passé – et le sont encore sous certains aspects et dans certains ordres juridiques – les familles rainbow souffrent de l'application aveugle du principe d'égalité qui, certes, régit l'Etat de droit mais qui ignore les réalités fluctuantes de la société. Le principe égalitaire ne reconnaît pas les spécificités des individus ni des groupes qu'ils composent. Ses exigences d'application et dont les juges constitutionnels veillent au scrupuleux respect font cas omis de l'ampleur de la diversité des identités et des comportements humains (non-hétérosexuels, transsexuels ou intersexuels), particulièrement dans le cadre de la parentalité (1).

Forcées par les impératifs de l'évolution des mentalités, l'évidence des changements sociétaux et soumises à l'influence du Droit international, les hautes juridictions constitutionnelles doivent parfois puiser jusqu'à l'extrême dans leurs capacités à préserver, à la fois, l'omnipotent principe d'égalité et le respect des sujets de droits dans leurs différences, leurs droits et leurs libertés, tout en s'appuyant sur l'existence de conflits de droits et des libertés fondamentales.

Partant de l'expérience des actions positives et du vaste champ d'application de celles-ci, un autre principe de droit, l'équité, contribuerait pourtant à établir une assise plus appropriée pour le traitement juste et équilibré – et non nécessairement égal – des individus et de leur situation qui ne sont pas identiques, contrairement à ce que présuppose le principe d'égalité. L'équité nous rappelle en effet les différences concrètes et multiples entre toutes les composantes de la société. Avec plus d'acuité que l'égalité, elle répondrait aux besoins des «modèles» de familles, s'il en existe ! (2).

Outre le Droit international, le cadre du droit de l'Union européenne (UE) et de la Convention européenne des droits de l'homme (CEDH) constitue la référence à laquelle se rapporte une analyse de droit comparé entre divers ordres juridiques nationaux européens dont les juridictions constitutionnelles jouent ou pourraient jouer un rôle prépondérant dans le cas de la protection et la promotion des droits des familles rainbow – et des autres types de familles.

Notre attention sera portée fondamentalement sur le droit constitutionnel espagnol parce que, par le biais de ses juges, il semble ouvert d'une part à la évolution du concept de la famille et

[1] Nous avons pris le parti d'évoquer le sexe comme critère dit objectif de discrimination ou de différenciation de traitement même si une partie de la doctrine réfute cette caractéristique.

d'autre part à un certain état des choses à propos de la question qui nous occupe, même s'il serait présomptueux d'affirmer que le système espagnol est réceptif à l'exercice des droits des familles rainbow.

1 Le principe d'égalité et ses exigences dans le cadre de la famille.

Dans un Etat de droit, le principe d'égalité régit les relations et l'organisation des individus entre eux. La forme la plus irréductible d'organisation en la communauté humaine est la famille. L'égalité dicte ainsi le comportement des membres des groupes familiaux mais aussi le traitement de ceux-ci par les autorités publiques et le droit qui les gouverne.

Tout comme le droit international, les droits nationaux considèrent aux travers de leurs textes et développements interprétatifs respectifs que la famille constitue le socle de la société et que, à ce titre, elle doit faire l'objet d'une protection juridique exhaustive.

Or, pour le moins depuis la perspective des droits de l'homme, la notion de famille ne fait l'objet d'aucune définition – juridique – universellement admise alors que, dans le même temps, nous assistons à une remise en cause de sa «traditionnelle» configuration, structure et finalités. En effet, à côté de la famille étendue ou nucléaire, apparaissent de nouveaux modèles de vie en commun – dont la famille rainbow mais aussi, la famille monoparentale, la famille recomposée, etc. – basés sur des éléments qui ne sont plus exclusivement la conjugalité ou la parenté. Il s'agit tantôt de l'affectivité, tantôt de la solidarité ou encore de la vie en commun.

Ces différents modèles de famille répondent à une redécouverte du rôle de la famille dans le développement et l'épanouissement de la personne ainsi que de l'indéniable dimension familiale de tout être humain qui rompt le «tabou individualiste-autiste» imposé par la postmodernité. De fait, le sujet, opprimé par les impératifs d'une société profondément individualiste et soumise à un économisme hédoniste, redécouvre la famille comme étant le cadre essentiel de la relation humaine, de l'altruisme, de la personnalisation et comme source essentielle d'appui affectif et émotionnel où se développe la solidarité que ni le marché ni l'Etat ne peuvent procurer.

A titre comparatif, le droit positif espagnol prétend protéger la famille mais dans le même temps il ne prononce pas sur le concept ni le contenu de qu'est – ou devrait être – la famille. Le Tribunal constitutionnel s'est prononcé en ce sens à plusieurs reprises[2]. D'aucuns affirment que les juges ont fait preuve de sagesse et d'ouverture à propos du caractère évolutif dudit concept.

Nous y voyons plutôt la prise de conscience que le Droit ne peut suivre et se modifier constamment en fonction de l'émergence de nouvelles et nombreuses variantes des types de famille.

La science juridique laisse – ou doit laisser – aux autres sciences le soin d'étudier l'évolution et les formes que la famille recouvre. Elle doit se consacrer tout au plus à une triple garantie: le respect, la protection et la promotion des droits fondamentaux liés à la famille. En d'autres termes, c'est l'institution de la famille qu'il convient de protéger juridiquement, laissant ainsi aux individus

[2] Voy. par exemple les arrêts STC 93/2013 du 23 avril 2013, in *BOE* du 23 mai 2013, p. 46 et STC 222/1992, du 11 décembre, fondement juridique nº 5.

la liberté la plus large quant aux choix du mode d'organisation familiale, et ce dans le respect des droits fondamentaux de leurs contemporains (enfants, femmes, handicapés, étrangers, etc.).

L'égalité, comme base des droits fondamentaux, régit l'institution familiale mais aussi toutes ses modalités de composition et d'organisation, et donc la famille rainbow au même titre qu'une famille monoparentale, recomposée ou nombreuse. Toutes ces familles devraient bénéficier d'une «égale» protection, eu égard à cette base des droits fondamentaux.

Comme pour tout trait ou caractéristique qui est l'objet d'une comparaison, l'égalité s'inscrit pour le moins au départ dans l'abstrait ou le formel. Elle ne prend pas en compte les particularités et réfute toute discrimination ou différence de traitement fondée sur celles-ci. Le développement parfois boiteux des notions d'égalité réelle, d'égalité des chances ou des résultats illustre les difficultés existantes entre les (légitimes) revendications de familles discriminées en raison de leur singularité et «l'ignorance» de l'égalité formelle.

Ainsi, la difficulté d'approche juridique réside-t-elle dans la question classique de l'égalité et de l'identité qui sont des notions à la fois proches et antinomiques[3]. Proches parce que l'égalité, dans son sens originel – universel et formel, implique l'identité des droits au bénéfice de tout sujet[4].

Nous entendons ici l'identité comme le traitement identique de situations identiques ou au contraire, le traitement différent de situations différentes. Les mêmes règles s'appliquent aux mêmes situations. Antinomiques parce que l'égalité ne permet pas la prise en considération des aspects factuels ni matériels des situations qui lui sont soumises. Le particularisme induit une différence de traitement dans la règle de droit; ce qui est contraire aux fondements de l'égalité.

En d'autres termes, la seule identité que l'égalité reconnaît, est celle de l' «identicité» des situations et non celle de l'élément différentiel. La prétention à l'identité marque en réalité les limites de l'égalité car elle porte exclusivement sur les situations identiques afin de recevoir un même traitement[5]. Or, celles-ci sont plutôt le fait d'une abstraction engendrée par le formalisme de l'égalité même si la jurisprudence laisse entrevoir les éléments d'une identité «relative» de situations que l'égalité contemplerait.

Dans le cas d'une identité parfaite à laquelle aspire l'égalité, la jurisprudence est peu féconde, tant dans les ordres juridiques internationaux, communautaire et nationaux. Ainsi, par exemple, la Cour de justice de l'UE se réfère parfois à cette identité mais indirectement dans des arrêts peu importants ou supplantés par d'autres arrêts qui font référence à l'identité relative[6].

Pour sa part, la Cour européenne des droits de l'homme (Cour de CEDH) utilise peu le vocable de «situations identiques» et quand elle le fait, souvent elle se situe en dehors du champ de l'article 14 de la CEDH[7]. Or, la même haute juridiction eut l'occasion de rappeler que la constatation de la discrimination est seulement possible s'il est démontré que les situations traitées de manière

[3] CHARPENTIER, L., "L'arrêt Kalanke. Expression du discours dualiste de l'égalité", in *RTDE*, n°2, 1996, p. 281.

[4] Art. 6 de la Déclaration des droits de l'homme et du Citoyen de 1793.

[5] LUCHAIRE, F., "Un janus constitutionnel: l'égalité", in *RDP*, 1986, p. 1229.

[6] Voy. par exemple les arrêts suivants: CJCE, 23 février 1983, *Kommanditgesellschaft in der Firma Wagner GmgH*, C-8/82, Rec., 1983, pt. 18; CJCE, 11 mars 1982, *De Pascale*, C-164/80, Rec., 1982, p. 909, pt. 20.

[7] Voy les arrêts suivants: CEDH, 25 août 1987, *Lutz c. Allemagne*, 9912/82, Série A., p. 123; CEDH, 23 mars 2002, *SA Immeubles groupe Kosser c. France*, 38748/97; CEDH, 21 mars 2002, *APBP c. France*, 38436/97, in *JCPG*., 2002, I, p. 157; CEDH, 16 avril 2002, *SA Dangeville c. France*, Rec., 2002-III.

différente étaient analogues ou comparables, et dans le cas concret, elle conclut que la situation des parties demanderesses était identique[8].

Quant aux jurisprudences constitutionnelles nationales, l'identité parfaite fut l'objet d'un nombre réduits d'arrêts, et ce pour les mêmes raisons. De fait, les juges ne prennent pas en compte l'«intensité» de l'identité – parfaite ou relative – quand ils ne la réfutent pas ouvertement[9]. De cette position surgit une double conséquence à propos de la prétention de l'identité dans le cadre de l'égalité.

La première se manifeste dans l'incompatibilité, ou à tout le moins, dans le cadre des limites des actions y discriminations positives. Celles-ci nécessitent de la constatation d'une différence de situation qu'elle soit reconnue par le législateur et le juge. Or, ce dernier a tendance à réduire les cas de différenciation en étendant l'identité relative appelée aussi l'équivalence des situations.

La seconde porte sur la question de l'autre identité: celle qui distingue les individus entre eux sur la base de critères comme la race, le sexe ou l'orientation sexuelle, pr exemple. La prétention à l'identité de traitement de la famille rainbow par rapport aux autres types de famille reflèterait le décalage entre celles-ci eu égard à l'égalité par le simple fait de la catégorisation des individus sans tenir compte de toutes les différences de leurs situations respectives.

En définitive, la raison-même de l'égalité offre un espace très réduit, voire nul, pour la mise en pratique de mesures correctrices destinées à concorder les normes avec les faits. Sa prétendue ouverture à un traitement spécifique, que plus d'un a découvert dans les jurisprudences européenne et nationales, a cependant fragilisé son essence en introduisant, d'une part, les formes d'égalité controversées – égalité formelle, réelle, d'opportunités, de résultats, etc. – et, d'autre part, des variations d' «intensité» du caractère identique des situations que le juge lui-même évalue difficilement.

Il en résulterait ainsi un «statu quo» de l'ignorance discriminante de la famille rainbow (et d'autres familles) si nous n'explorerions pas une autre voie qui reconnaîtrait les droits et la protection de celle-ci dans un cadre à la fois fondé sur l'égalité et l'équité.

2 De l'égalité à l'équité: pour une approche plus juste de la famille rainbow

En réalité, l'idée que nous proposons consiste en une approche plus flexible, pragmatique mais toute aussi rigoureuse que celle du principe d'égalité. En effet, pour contourner le relatif immobilisme des législateurs et des juges constitutionnels face aux fluctuations des «modèles» d'organisation familiale des individus, nous faisons appel à la notion d'équité qui, faut-il le reconnaître, a suscité longtemps la suspicion, voire même le rejet dans les ordres juridiques du Vieux

[8] CEDH, 23 octobre 1997, *National and provincial building sty, the leeds permanent building sty et the yorshire building sty c. Royaume-Uni*, Rec., 1997-VII, pt. 88.

[9] Voy. par exemple en Belgique l'arrêt de l'ancienne Cour d'arbitrage (devenue depuis 2007 la Cour constitutionnelle), 16 novembre 2000, n° 114/2000*, in M.B.*, 7 décembre 2000, p. 40955; ou encore l'arrêt de la Cour de cassation ,13 janvier 1997, in *Pas. belge*, nº 28, 1997. En Espagne, nous nous référons à l'arrêt du Tribunal suprême du 26 de novembre 2013, STS 5755/2013, 2013, FJ 5º et aux arrêts du Tribunal constitutionnel du 27 avril 2010, STC 22/2010, in *BOE*, nº129, du 27 mai 2010; 20 octobre 2008, STC 122/2008, in *BOE*, nº 281, 21 novembre 2008.

continent alors que les juges de ces derniers l'ont appliquée lorsqu'ils se trouvaient confrontés à des cas concrets frappés d'une «égalité injuste».

Notion aristotélicienne adaptée aux réalités du XXème siècle par le biais de courants de pensée politico-juridiques, l'équité a suscité un regain d'intérêt dans le cadre du développement des idées et des pratiques visant à rétablir sinon l'égalité, à tout le moins, l'équilibre entre les individus et les groupes dont ils font partie.

Simplifiant le contenu et les contours du concept de l'équité, il faut lui reconnaître le pragmatisme et la flexibilité qui lui sont propres et qui permettent d'adapter toute décision – normative ou judiciaire – aux situations singulières et évolutives. Aussi est-il remarquable que, contrairement à l'égalité, l'équité rend compte de l'identité comme critère différentiel (2.1) mais aussi de l'équivalence des situations (2.2), l'équilibre et la justice (2.3). En d'autres termes, elle reconnaît et protège ce que l'égalité ignore.

2.1 L'identité comme critère différentiel

En Europe, depuis les années 1980, le respect de la «diversité» a marqué les ordres juridiques nationaux et les politiques publiques en général. Diverses théories politiques défendent l'opportunité, voire la nécessité de reconnaître les identités différentes. Certaines d'entre elles ont été décisives en contribuant au développement de la «législation antidiscriminatoire» - internationale[10], européenne[11] et nationale – fondée sur cette reconnaissance[12]. En outre, elles ont participé à l'éclosion de la «politique identitaire» qui consiste en la reconnaissance politique et juridique des diversités de tout type, y compris, a fortiori, la diversité sexuelle.

L'équité s'inscrit dans cette reconnaissance puisqu'elle encadre les mesures correctrices que d'aucuns peuvent critiquer comme une recherche d'identité basée sur une vision simpliste et minimaliste des caractéristiques d'un groupe – la famille rainbow, par exemple. Cette recherche pourrait conduire à «réifier» l'existence de celui-ci en renforcement son exclusivité et sa polarisation avec d'autres groupes – la famille dite «traditionnelle», soit hétérosexuelle biologiquement et socialement.

2.2 L'équivalence

A la prétention identitaire des familles rainbow, vient se greffer leur prétention à l'équivalence des droits. Par le biais de l'équité, la reconnaissance identitaire exige une reconnaissance des droits équivalents entre elles et les autres types de famille mais non des droits égaux.

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[10] Voy. par exemple la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes adoptée et ouverte à la signature, à la ratification et à l'adhésion par l'Assemblée générale de l'ONU dans sa résolution 34/180 du 18 décembre 1979

[11] Voy le Conseil de l'Europe et le Protocole nº 12 à la Convention européenne des droits de l'homme (CEDH). Quant à l'Union européenne (UE), voy. notamment la directive 2000/78/CE du Conseil du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail, in *J.O.U.E.*, n° L 303 du 2 décembre 2000, p. 16 – 22.

[12] Voy. en ce sens TAYLOR, Ch., "The Politics of Recognition", in *Multiculturalism: Examining the Politics of Recognition,* Princeton University Press, Princeton, 1994.

La notion d'équivalence n'est pas inconnue dans le droit de la CEDH comme celui de l' UE. Ceux-ci recourent à elle lors de la prise en considération de diverses situations semblables et non identiques[13]. Ici, l'équivalence exige un traitement distinct dans l'exercice des droits et se fonde sur le critère différentiel qui est le sexe «choisi» du ou des membres d'une famille. Traitement distinct qui, pour expliquer et asseoir sa légitimité est connecté avec le principe d'égalité. Autrement dit, le fait de traiter différemment les familles sur base d'un critère qui est la cause de la discrimination, impose la satisfaction d'une équivalence de droits et non une égalité de ceux-ci.

2.3 L'équilibre et la justice

Faisant écho à l'idée de justice intégrée au concept-même de l'équité, l'objectif de l'équilibre reflète son lien étroit avec l'équivalence ainsi qu'une meilleur adéquation entre les mesures adoptées en faveur des familles rainbow et l'équité, en lieu et place de l'égalité. Alors que l'égalité est aveugle aux différences entre les individus et les groupes – les familles - qu'ils composent, l'équité recherche un équilibre entre les identités de ceux-ci.

Autrement dit, à la différence de l'égalité formelle, la justice se convertit en un objectif concret à réaliser[14]. L'équité constitue la base de la matérialisation de cette justice que d'aucuns qualifient «distributive» et d'autres, «sociale»[15]. Elle participe à l'idée selon laquelle la justice ne consiste pas en une hiérarchie de biens ni en une distribution des ressources, mais bien en l'établissement d'une relation sans domination entre les sujets de droit.

Outre le fait de répondre à un traitement plus juste des familles rainbow, notre approche se veut plus pragmatique face au principe abstrait et immuable de l'égalité. Sans pour autant rejeter celle-ci, la solution consiste à renforcer ou à créer une solide articulation entre l'égalité et l'équité, d'une part et à préserver le fondement de l'Etat de droit qui est le principe égalitaire dans son sens classique – universel et formel – d'autre part.

Cette articulation ou double base juridique devrait être inscrite tant dans les textes normatifs au sens large du terme que dans les décisions administratives ou judiciaires qui affecteraient les familles rainbow.

Du point de vue normatif, la loi, le décret ou le règlement reflèteraient une plus grande conscientisation de l'idée d'une justice effective et la prise en considération d'informations autres que juridiques – données statistiques, sociologiques, historiques, etc. – qui contribuent au rapprochement des textes à la réalité des individus. Concrètement, tout en se référant au principe général d'égalité, la norme qui s'appliquerait ou qui (ré)instaurerait un juste traitement des familles

[13] Sobre la noción de equivalencia en el Derecho comunitario, v. e.o. las sentencias TJCE, 10 de febrero de 1994, *Courage*, C-398/92, Rec., p. I-476; TJCE, 26 de septiembre de 1996, *Data delecta and Forsberg*, C-43/95, Rec., I-4661; TJCE, 15 de septiembre de 1998, *Edis*, C-231/96, Rec., p.I-4951. V. también OLIVER, P., "Le règlement 1/2003 et les principes d'efficacité et d'équivalence", en *CDE*, 2005, n° 3-4, p. 351.

[14] CONSTANTINESCO, V., "La justice dans l'Union Européenne", en *Philosophie politique*, n° 9, 1996, p. 99.

[15] Sobre el concepto de la justicia social y su alcance, v. e.o. SELEME, H., *Las fronteras de la justicia distributiva: una perspectiva rawlsiana*, Centro de Estudios Políticos y Constitucionales, Madrid, 2011; ROSANVALLON, P., *La société des égaux*, Édition du Seuil, París, 2011; BOUDON, R., "Justice sociale et intérêt général: à propos de la théorie de la justice de Rawls", en *RFSP*, 1975, pp. 193-221.

rainbow ferait simultanément appel à l'équité en tant que principe de droit. Cela permettrait à son auteur d'être plus créatif et d'éviter l'immobilisme juridique imposé par une lecture rigide de l'égalité.

Du point de vue décisionnel, le juge – au sens large du terme – procèdera à l'examen de la situation d'une famille rainbow atteinte dans ses droits par une éventuelle discrimination, sur la base de la relation entre les principes d'égalité et d'équité. Cette combinaison fixe le cadre interprétatif et la proportionnalité de la décision à prendre. En ce sens, la jurisprudence de la Cour de la CEDH a renforcé l'équité puisque, outre la consécration de celle-ci dans la CEDH, elle renforce, d'une part, le fondement de la marge d'appréciation des Etats pour déterminer les limites d'ingérence de la Cour et, le critère de proportionnalité qui sert au juge dans l'évaluation de la norme nationale examinée, d'autre part[16].

Grâce au binôme équité-égalité, le système de la CEDH et la jurisprudence de la Cour de la CEDH ont adopté une conception plus réaliste et concrète de l'égalité que dans beaucoup d'ordres juridiques des Etats membres du Conseil de l'Europe. En effet, le juge se Strasbourg emploie cette combinaison par le biais de la non-discrimination et du principe de proportionnalité en application de l'article 14 CEDH associé avec une autre disposition de la Convention ou du Protocole nº 12, par exemple[17].

Par ailleurs, si l'on compare plusieurs jurisprudences constitutionnelles, on observera par exemple que, alors que la jurisprudence espagnole semble plus encline à prendre en considération l'articulation de l'égalité et de l'équité[18].

Ainsi, par exemple, en 2012, le Tribunal constitutionnel eut à se prononcer sur un recours d'inconstitutionnalité contre la Loi 13/2005 du 1er juillet 2005 qui modifiait le Code civil en vue de réguler légalement le mariage entre personnes de même sexe[19]. Certes, il ne s'agissait pas d'une question relative aux familles rainbow mais indirectement la décision constitutionnelle pouvait ouvrir une couverture juridique en faveur de celles-ci, grâce à la combinaison «égalité-équité». En effet, pour le Tribunal, «le mandat de protection de la famille en général (art. 39.1 Constitution) et des enfants en particulier (art. 39.2 Constitution), contenu comme principe recteur de la politique sociale et économique dans l'art. 39, n'est pas enfreint[20].

Pour sa part, le juge constitutionnel belge fait preuve d'une certaine précaution dans son

[16] Voy. PETTITI, L.-E, "Le rôle de l'équité dans le système juridique de la Convention européenne des droits de l'homme", pp. 35-45, in *Justice, médiation et équité*, La Documentation française, Colloque "Droit et démocratie", Paris, 1992.

[17] Voy. notamment les arrêts de la Cour de la CEDH, 31 de mars 1998, *Reinhardt et Slimane-Kaïd c. France*, *Rec*., 1998-II; 6 avril 2006, *Stankiewicz c. Pologne*, Rec., 2006-IV; 5 avril 2007, *Kavakçi c. Turquie*, Rec., 2007; 18 février 2009, *Andrejeva c. Lettonie*, Rec., 2009-II.

[18] Nous relevons ainsi 34 arrêts et 10 décisions du Tribunal constitutionnel (http://hj.tribunalconstitucional.es/HJ/es-ES/Resolucion/List). Voy. e.a. REY MARTINEZ, F., «Homosexualidad y Constitución», in *Revista Española de Derecho Constitucional*, nº 73, 2005, p. 11.

[19] Arrêt STC 198/2012 du 6 novembre 2012, in *BOE*, 28 novembre 2012, p. 168.

[20] Voy. aussi les arrêts STC 93/2013 du 23 avril 2013, in *BOE*, 23 mai 2013, p. 46 et STC 222/1992, du 11 décembre, fondement juridique nº 5.

application[21]. Il met d'abord l'accent sur la prévalence du principe d'égalité et ensuite, il considère que l'équité suppose une prise en considération factuelle ou concrète des situations inégales et déséquilibrées[22].

Quant au juge constitutionnel français, celui-ci manifeste son hostilité apparente même s'il l'exerce par le biais d'un autre concept juridique comme l'intérêt général[23] ou dans le cas présent, l'intérêt de l'enfant[24]. Pour lui, le principe d'équité est un principe complémentaire à celui de l'égalité. Toutefois, même s'il considère qu'il s'agit d'une «simple conception équitable de l'égalité», l'abondance de la jurisprudence administrative française semble indiquer le contraire d'un caractère marginal ou secondaire de l'équité.

En conclusion, les juges et les législateurs ont le choix d'adopter une attitude équilibrée et juste à l'égard des familles rainbow en fondant leurs actes sur la combinaison des principes d'égalité et d'équité. Ils évitent ainsi le piège de l'ignorance à outrance du principe égalitaire à l'égard des réalités fluctuantes de la société et des communautés d'individus qui la composent.

[21] Voy. par exemple les arrêts suivants de la Cour constitutionnelle: 11 décembre 2008, nº 179/2008, in *MB*, 28 janvier 2009, pp. 6246-6249, considérant B.6.; 6 novembre 2008, nº 153/2008, in *M.B.*, 28 novembre 2008.

[22] Voy. aussi l'arrêt de la même juridiction: 12 juillet 2012, n° 93/2012, in *MB.,* 18 octobre 2012.

[23] Voy. les décisions suivantes du Conseil constitutionnel: Décision n° 2012-662 DC du 29 décembre 2012, *Rec*., 2012, p. 724; Décision n° 2003-483 DC du 14 août 2003, *Rec*., 2003, p. 430; Décision n° 97-388 DC du 20 mars 1997*, Rec*., 1997, p. 31

[24] Voy. Décision nº 2013-669 DC du 17 mai 2013 relative à la loi n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe, in *JORF* du 18 mai 2013, p. 8281.

Dilemmas of LGBT Politics

Jacek Kornak

Abstract

This paper investigates the current debates within LGBT communities regarding politics of the sexual minorities. I argue that equality politics played an immense role in contemporary LGBT politics but currently it is not efficient particularly when facing problems related to LGBT migration, diasporas, and economic exclusion. My argument is that LGBT politics needs to focus more in ideal of redistribution.

Keywords

Equality, LGBT politics, recognition, redistribution, exclusion.

* * * * *

I analyse the conceptual dilemmas of LGBT politics, particularly in relation to the term "equality". Most of LGBT communities focused their political agendas around the concept of "equality". In the name of equality they formulate various claims toward state and society. This concept serves various, often-contradictory political purposes. Major LGBT organizations understand "equality" in terms of recognition and use it as a means to demand certain rights e.g. right to marry. I suggest that we should rethink our concepts and test whether they are able to respond to current challenges that sexual minorities face.

In the US from the 1970s onwards, the term "gay" has become the hallmark of a new political agency. Driven by this agency, gay and lesbian communities started claiming political rights. Since that time, "equality" was one of the crucial terms in political activism of sexual minorities. It also played a crucial role in lesbian and gay political thought that was fast developing during the time. The focus of the organizations that emerged in the 1970s was on direct discrimination that existed within the US law. Such organisations intended to build a positive image of lesbian and gay people. They adopted a quasi-ethnic model of political activism based on examples of Afro-American activism. These political activists encouraged homosexual people to come out and launched the first gay pride parades, while new openly gay places appeared in major US cities. At the core of this gay political activism was the issue of representation and the key term was "equality". The activists assumed that, for sexual minorities, progressive politics involved building a strong positive cultural representation of gay and lesbian people. More lesbians and gays were visible in American popular

culture, more artists declared that their homosexuality has direct influence on their artistic expression, and, in addition, more politicians and academics started debating homosexuality.

In the US, major gay and lesbian organizations in the 1970s and the 1980s focused their political agenda around repealing anti-sodomy law and fighting for non-discriminatory laws and practices at places of work and equal access to services. Gay and lesbian people also fought for broader visibility in the media. The organizations of the time consisted mostly of white, middle class people living in cities. They did not represent immigrants, transgender people, ethnic minorities or even sexual minorities from rural areas of the United States. "Equality" was understood in terms of representation. The rights that these organizations fought for were often related to economy e.g. right for non-discrimination in places of work or equal access to services. Major political organizations of the time such as Lambda and National Gay and Lesbian Task Force did not consider their struggle to be related to a broader critique of the socio-economic system. The exception was Gay Liberation Front, the organization that had radical leftist and anti-militaristic agenda. It existed between 1969 and 1972. Of course, there were other smaller organizations that perceived their political goals to be related to a broad social critique. Nevertheless, major political players had limited political agenda and they believed that, with a tactics of small steps, they would eventually achieve full equality of sexual minorities within the US society.

With the AIDS crisis came a wave of new political activism. Initially the major organizations such as National Gay and Lesbian Task Force or Human Rights Campaign initially did not discuss HIV/AIDS related issues. The AIDS crisis opened up new equality politics of sexual minorities. Surprisingly, AIDS was a democratizing crisis that forced people from different classes, ethnicities and backgrounds to protest against the government's indifference towards the problem. New politically active groups were formed at the end of the 1980s, among them the most important was ACT UP. Their political agenda was different from agendas of many other lesbian and gay groups but they still used the concept of "equality", particularly in relation to healthcare. ACT UP considered their political struggle to be related not so much to building a positive image of lesbian and gay people or to advocacy of right to domestic/civil partnership. They remained distant from politics focused on issues of representation. Instead they developed confrontational political methods and refocused their aims towards issues related to redistribution. They also concentrated on violence experienced by sexual minorities. Conceptually although they use the term equality, they developed a new political language, replacing "gay" with "queer" and rather than lobbying, they performed direct political actions in public places. The AIDS crisis reshaped sexual minorities and helped forging new alliances.

New organizations such as ACT UP or Queer Nation focused also on internal politics of sexual minorities. They reflected on internal exclusions based on class, race, gender expression. They perceived homophobia to be part of a broader social problem. Their political agenda was centred on issues concerning access to healthcare, violence and direct discrimination of sexual minorities. They consider their political goals not to be achievable by lobbying or by gaining recognition but rather these were goals that required a direct political intervention and change within the socio-economic system. Organizations such as ACT UP and Queer Nation considered homophobia to be a

part of an unjust political system. Interestingly, in my archival research I found that in documents or leaflets produced by Queer Nation the term “equality” hardly ever appears.

Within recent decades many scholars reflected on the modes of political thinking that are dominant within the Western LGBT movement. Authors such as Lee Edelman or Jack Halberstam postulate certain negative politics or politics of withdrawal. They claim that the political system at its core is based on exclusion of some groups and privileging other groups at the expense of the excluded ones. These voices pose a powerful critique to the politics of equality but nonetheless they still function within the framework of representation. Partly I would agree with these approaches. Politics functions within certain limits. I nevertheless argue that the position of withdrawal is not available to everyone. It is often a luxurious position that not everyone can afford to occupy. Often we, sexual minorities, cannot withdraw from politics and negate or ignore it for the very reason that we depend on certain institutional recognition and often we simply need state institutions.

Moreover, I think that many debates that highlight issues of representation are very limited to certain groups, often white middle-class gays and lesbians. A good example is the right to marry in South Africa, where can see that those who exercise this right are white people.

The term “equality” relates to more individuals and the relations between them but I would suggest that the discourse of equality is centred on representation and it does not only reproduce exclusion at other levels, it often legitimises unjust system and the state with its institutions. It is often the state that is responsible for exclusion of the most vulnerable groups such as transgender people or gay immigrants. Economy is a crucial part of this. Certain rights that state offers to sexual minorities function as an absolution to the state and suggest that the responsibility for exclusion and violence lies with evil individuals.

I do not claim that recognition is unimportant. It is crucial to find ways to theorise experiences of various groups and individuals within sexual minorities. There are many that have no voice and no representation within current mainstream LGBT politics. But recent decades of LGBT thought focused narrowly on the issues of representation. I suggest that it might be more productive to look for new terms that would allow us to see marginalization in relation to state and its institutions. Perhaps the term “redistribution” would allow us to theorize exclusion on a broader scale and to see the reasons and structures that cause and guard it.

I would suggest that often the political discourse of recognition is more focused on individuals, choices, life-styles and groups seen in a limited perspective of their cultural identity. Besides, the very idea of “equality” seems to annihilate the basis of distinct sexual identity and therefore it makes problematic the very ground for gay and lesbian politics. Perhaps the framework of politics “redistribution” might be helpful for future gay and lesbian politics. There is also space here for recognition but within this framework group dynamics is perceived as a part of an economic system where violence and exclusion are not merely a responsibility of individuals but are caused by systemic injustice. Marginalization of certain social groups is a complex process and recognition of these groups by the law does not solute the problem. The politics of concepts that I advocate here is focused more on social system. In this context, political action should aim at challenging systemic injustice. An example of such political approach presents Dean Spade in *Normal Life*.

Some scholars such as Judith Butler argue that we should work on developing a political approach that would combine claims for recognition with claims for redistribution. I argue that it is very important that political activism of sexual minorities should perceive exclusion as part of the socio-economic system and in order to fight it, we need to engage in reforming not merely the law but broadly state and its institutions. I suggest that within gay and lesbian thought there is still lack of political thinking that would go beyond equality and recognition. This makes us often blind to the problems of the most vulnerable of us, such as trans people or gay immigrants, economically marginalised sexual minority members and many others.

I do not know in which direction gay and lesbian politics will go but I think when analysing the concepts used in the current political debates related to LGBT issues, it is important to remember that when they are attached to other themes and issues they carry theoretical and political implications. The language of LGBT politics evolves but we should be constantly aware of our long term political goals.

I do think that politics of recognition focused around the concept of “equality” played an immense role in LGBT movement but currently we face new challenges. Definitely it is harder to tackle non-direct forms of discrimination in but nowadays it is a crucial task for gay and lesbian politics to develop ways to theorise and fight forms of marginalization that have its roots not merely in unequal law but also in economic, social and cultural grounds. Perhaps to develop an efficient political response to multiculturalism, globalism, migration and diasporas we need to search for new concepts and strategies.

Homosexual Parenthood and the Legal Enforcement of Morals*

Pietro Denaro

Abstract

This paper deals with the issue of discrimination on the basis of sexual orientation in the context of contemporary European liberal democracies. In the first part, the main argument is aimed at showing that we do need to be trained in moral argumentation in order to adequately face the challenges posed by the protection of rights in the context of liberal democracies. Too often, moral reasoning and the analysis of moral arguments are discarded, in the context of legal debate, as a moralistic way of dealing with issues which should be solved by mere reference to, or even application of, constitutional provisions. I would like to defend an alternative view, which tries to find a proper place for moral argumentation in the specific context of contemporary liberal democracies. Afterwards, I explain how this argumentative practice has to be realized in connection with the issue of discrimination on the basis of sexual orientation, analysing how the law of a contemporary liberal democracy should regulate issues of homosexuality and sexual orientation. Finally, I present the case for a fine-grained moral argumentation, analysing the specific moral issues at stake when assessing the moral problems around homosexual parenthood.

Keywords

Legal Enforcement of Morals, Liberal State, Harm Principle, Homosexuality, Sexual Orientation, Homosexual Parenthood.

* * * * *

1 Introduction

This paper deals with the issue of discrimination on the basis of sexual orientation in the context of contemporary European liberal democracies. In the first part, the main argument is aimed at showing that we do need to be trained in moral argumentation in order to adequately face the challenges posed by the protection of rights in the context of liberal democracies. Too often moral reasoning and the analysis of moral arguments are discarded, in the context of the legal debate inspired by liberal values, as a moralistic way of dealing with issues which should be solved by the

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mere reference to, or even application of, constitutional provisions. Critical morality is considered an expression of moralism. Not infrequently, moral arguments are considered by lawyers and common citizens as a tool for imposing their own irrational conception of the good in the guise of rational argumentation.[1] I would like to defend an alternative view, which tries to find a proper place for moral argumentation in the specific context of contemporary liberal democracies. Afterwards, I explain how this argumentative practice has to be realized in connection with the issue of discrimination on the basis of sexual orientation, analysing how the law of a contemporary liberal democracy should regulate issues of homosexuality and sexual orientation. Finally, I present the case for a fine-grained moral argumentation, analysing the specific moral issues at stake when assessing the moral problems regarding homosexual parenthood.

2 Homosexuality and morality

If one looks at the origins of the legal debate on homosexuality during the 20th century, one finds a huge amount of literature debating the relations between law and morality, often based on the assumption of the immorality of homosexual orientations (or acts, or conduct, etc.), i.e. the inclusion of homosexual conducts among the acts prohibited by positive morality.2 Nowadays, this debate, and the underlying implicit assumption, appears to a large community of European liberal democracies as something which should be taken out of the legal or legal-philosophical agenda, the immorality of homosexuality having been taken out of the moral agenda. Among the sources which historically have determined a certain, negative, judgement on homosexuality, religion has been (and still is) one of the main normative grounds. But during the second half of the last century, Europe experienced a radical decline in religious belief and practice, and positive morality was less and less influenced by the dogmas of the dominant religions.3 Few people would argue today, in the context mentioned, for the immorality of homosexuality.4 It is true, as we will see, that under

[1] Some examples of the most common arguments about the moral correctness or wrongness of moral arguments can be found, for instance, in Soble 2013, 6-8. From this one can ascertain a (grounded) prejudice against the moral correctness of moral assessments on sex and sexual activities. My view is that this prejudice, even though grounded (see *infra* the paragraph on legal enforcement of morals), should better be overcome in light of the intrinsic morally laden features of contemporary constitutional democracies, which require lawyers and citizens to engage in moral argumentation.

[2] See, for instance, the famous Hart-Devlin debate. On this, see infra sec. 3 of this work.

[3] In this regard, the position that twenty years ago was called by some authors "the standard modern European position" cannot nowadays be considered topical anymore (in a modified version of the paper originally published in 1994 in the *Notre Dame Law Review*, John Finnis renamed it as the "standard modern position", at least because positive morality has maintained the first stance while it has started questioning the second one. This standard position held that "On the one hand, the state is not authorised to, and does not, make it a punishable offence for adult consenting persons to engage, in private, in immoral sexual acts (for example, homosexual acts). On the other hand, states do have the authority to discourage, say, homosexual conduct and 'orientation' (i.e. overtly manifested active willingness to engage in homosexual conduct)" (Finnis 1997, 31). We will see that the moral questions still today under discussion are those related to the second area of influence by the state: this area is now experiencing a change, and on this we will focus in the second part of this paper.

[4] Of course, one can easily find moral philosophers who argue for the immorality of homosexuality. However, they almost always do it on the basis of very debatable arguments, for instance on the condemnation of hedonism among classic Greek thinkers, ignorance of psychological findings, or recourse to unscientific ideas such as the biological

the label of the 'morality of homosexuality' a wide set of moral issues can be grouped, which cannot be reduced to the moral correctness of homosexual acts, or conduct (which is the content we implicitly attach to the concept of homosexuality when discussing its moral correctness or wrongness: on this I will further elaborate in the next sections). However, let us assume for the moment such a simplified argumentative scheme. If no moral authority or norm of secular morality forbids a love and sexual relationship between two same-sex adults, what other reasons could ever support such a prohibition? The progressive disappearance of religion among the main sources of moral normativity has represented an instrument for increasing the degree of autonomy of moral judgements, and autonomous moral judgements cannot but refer to a series of rational criteria, among which the harm principle, which altogether constitute a body of secular morality norms. Under this set of rational criteria of moral correctness, there are no reasons for considering a homosexual relationship immoral. This assumption about contemporary positive morality in the context of European liberal democracies will be the main starting point of this paper.

In this perspective, the question of whether law should sanction immorality as such seems not to be applicable to the domain of homosexuality. If for many years this question regarding homosexuality was understandable, in the cultural and social context mentioned, nowadays it is difficult to explain why homosexuality should be morally wrong. Other issues may be the object of this kind of philosophical assessment: for instance, we can morally assess whether insults, or adultery, but also theft or murder, should or should not be legally sanctioned. In all these cases, faced with a *prima facie* evil or wrong, one can build an understandable debate, though perhaps in some of these cases a boring one, leading to fully expected results (in those cases in which the evil is more than *prima facie*). In all these cases, one can see why a moral issue is at stake, as in each one of them to the conduct of one of the subjects involved there is *somehow* connected (whether this is always a causal connection or not is a matter of debate) harm to someone else's interests or assets. By contrast, with regard to homosexuality, one can only wonder how this feeling of affection for someone else should be a subject of moral analysis. Who is supposed to be harmed by the fact that two persons decide to love, or just love, each other? Why should this be morally relevant, in the perspective of a search for someone's responsibility?[5] As I will argue later on, this is the reason why one can, only with a certain discomfort, follow some arguments, common in moral debates still influenced by religious views, which distinguish between homosexual conduct, homosexual identity and homosexual thoughts (or thoughts about what homosexuality is and how one should cope with it).[6]

unity between man and woman. See Finnis 1997. Recognising John Finnis to have the status or role of a moral philosopher does not automatically grant the reasonableness of his arguments on the immorality of homosexuality. Philosophers like him would need to offer arguments, supported by scientific evidence or rational grounds, for the thesis that there is something wrong in being homosexual or living one's own homosexuality.

[5] On this sense of moral relevance, see Denaro 2012.

[6] It can be acknowledged that not all religions have contributed in the same way to this prejudice against homosexuality, and that in the Judeo-Christian there is nowadays a cultural movement open towards its acceptance. However, especially in the context of this tradition, there are still very strict, perhaps intrinsic and unavoidable, connections between sexual morality and religious dogmas, while secular morality requires one to consider sex and sexuality just an aspect of human life like many others, and reject any dogma which cannot be rationally justified.

I suppose that some main ideas have played a role for changing positive morality in such a way: the widely shared knowledge that being a homosexual is not a matter of choice, or not completely a matter of choice[7] (combined with a broader recognition of the relevance of individual autonomy, leaving aside all the philosophical problems related to the ascertainment of the conditions under which a person can be considered autonomous) and the conviction that what people do in their private lives is not the state's business, granted that what they do does not harm anybody (combined with a broader recognition that only harmful conducts may be sanctioned by state intervention and that living homosexuality does not harm anybody, except, perhaps, those who are homosexual). But these ideas have operated in a context in which a new set of relations between law and morality has been more and more widely accepted, and in which human sexuality tends to be considered just a human dimension among many others: "no conduct otherwise immoral should be excluded because it is sexual conduct, and nothing in sex is immoral unless condemned by rules which apply elsewhere as well." (Goldman 2013, 68)[8]

That positive morality has changed in such a way is an empirical assumption of this work, which I believe can easily be considered plausible. It must be acknowledged, however, that the decline in religious belief and practice does not necessarily indicate, by itself, a higher degree of social acceptance of homosexuality. It only highlights that one of the normative roots for condemning a certain conduct is nowadays less influential, but this may have been substituted by other prejudices, or religious views may now be embodied in secular views, which, without any reference to the will of an authority, are nothing more than prejudices or irrational assumptions. At the same time, homosexuality is more and more widely accepted by norms of positive morality also due to what has been acknowledged by contemporary science: psychiatry (represented by the American Psychiatric Association), for instance, has denied homosexuality the status of a mental disorder since 1973, insofar as homosexual relations can fulfil the requirements of a natural sexual encounter, in which mutual embodiment of the other person is made possible by an interactive mutual recognition and awareness of the partner's desires and perceptions.[9]

[7] See, infra, sec. 6.

[8] It seems to me now that what Hart was affirming fifty years ago is not valid any more: "in relation to the special topic of sexual morality… it seems *prima facie* plausible that there are actions immoral by accepted standards and yet not harmful to others" (Hart 1963, 5).

[9] These are Nagel's words, which, written some years before psychiatry overturned its scientific judgement on homosexuality, clearly manifest the cultural trend which in those years started to affirm itself. "Sexual desire involves a kind of perception, but not merely a single perception of its object, for in the paradigm case of mutual desire there is a complex system of superimposed mutual perceptions – not only perceptions of the sexual object, but perceptions of oneself" (Nagel 1969, 44). "Some versions of this overlapping system of distinct sexual perceptions and interactions is the basic framework of any full-fledged sexual relations and… relations only involving part of the complex are significantly incomplete" (46). A proposal such as Nagel's in my view is preferable, as it sticks to a certain level of objectivity, which in psychiatry is perhaps lower than in other sciences but nonetheless useful (or necessary) in order to ground more reliable normative judgements. It is true that any characterization of sexual behaviour, trying to identify a standard or paradigm case of it, will have normative implications (Moulton 1976). However, considering that normative enterprises, like morals and law, necessarily require some normative implications, it is wiser, in my view, to ground them in the even minimum level of objectivity granted by contemporary scientific findings. Of course, it is scientific enterprise itself which constantly questions the objectivity of *past* scientific findings in order to grasp the objectivity of *contemporary* ones. But this is another issue.

However, it has to be noticed that by affirming that the debate on homosexuality is not a moral debate any more, I do not mean to affirm that people simply accept homosexuality, or are indifferent to it. The thesis that, in the context mentioned, there are no elements for even starting a secular moral debate on the correctness of homosexuality, does not imply that the majority of people in the context mentioned accept it, or consider it irrelevant whether someone is, or is not, homosexual. It may well be, as I suspect, that the expunction of the issue of correctness of homosexuality from the topics under discussion in the moral arena does not correspond to wide social acceptance of its reality. That normally people do not have moral grounds for issuing a condemnation of homosexuality does not imply that there normally is full psychological acceptance of this aspect of human life and relations. This resistance, which in my view, in the context referred to, can no longer be justified by arguments in the context of a moral debate may be explained by recurring to the persistency of prejudices and psychological schemes which can be broadly labelled as homophobia.

In conclusion, affirming that the moral correctness of homosexuality is no longer, for a dominant community of the European population,[10] a matter of moral debate is an empirical thesis, which I am now assuming and which would need to be proved through some kind of falsification method. In this context, and for the sake of the arguments elaborated in this paper, I will rely on it as a working hypothesis. Furthermore, in the next sections, I will explain why this hypothesis, which I find plausible as a general assessment, will need some further refinement in order to be correctly appreciated. On the one hand, the very idea of excluding a certain issue from moral discourse is debatable, and perhaps wrong. I will focus on this in the next section. On the other hand, the idea of homosexuality as something which could be excluded from or included in the moral debate is too crude, in more than one way. If there is a sense in which it can be easily understood why homosexuality should not constitute any special issue in the moral debate (insofar as it can be considered just a form of sexuality, enacted between adult people in conformity with their psychological makeup, needs, desires, etc.), of course one can easily see why homosexuality (as well as any other form of sexuality) can be a matter of moral concern, as it involves human relations, at their most intimate level, which are, like any other kind of relationship, either potentially harmful or recipient of particular value.

3 Legislating morality

The task of legislating morality has often been associated with the issue of the legal enforcement of morals and with the idea that the law can enforce morals and whether, or under which conditions, this may be correct or not. Of course the law both influences and is influenced by positive morality, but the issue at stake here is not this mutual relationship. What has been debated for a long time is whether the law can legitimately enforce morality *as such*. H. L. A. Hart explains the meaning of this question in the following terms: “Is the fact that certain conduct is by certain

[10] I am not referring to a majoritarian community, but to a dominant one, in order to leave room for introducing qualitative criteria for assessing the reliability of such an empirical hypothesis.

standards immoral sufficient to justify making that conduct punishable by law?" (Hart 1963, 4). These were also the terms used by the famous Wolfenden Committee, which stated that "It is not the duty of the law to concern itself with immorality as such" (Wolfenden Report 1957).

This, as observed by Hart, is a question of critical morality about positive morality. To this question some general answers may be given without any reference to the more specific content of positive morality. First of all, it can be argued that considerations of prudence, or efficient use of scarce resources, pose some limits to the legal enforcement of all immoralities: some, only the most relevant ones, will have to be selected (Gerald Dworkin 1999, 933). Second, it can be argued that some immoralities, in the context of a pluralist account of morality, should not be sanctioned, in consideration of other moral principles (for instance hate speech in the light of free speech). However, here we already begin to realize that we do need to attach some features to the positive morality at issue, which need to be taken into consideration by our critical morality when assessing whether the law should enforce that *specific* system of positive morality. Are these substantive features? I cannot here analyse this issue in more detail, but I maintain that knowing whether the morality which should be enforced is a deontological or consequentialist morality, a pluralist or a monist morality, an objectivist or relativist morality, and so on, is different from knowing the content of each single norm which is contained in it. I think that there is still a sense in which one can question whether law should enforce this morality, *as such*. Moreover, I think that we do need to make this move, if we want to make sense, in the contemporary context I am assuming, of the question of whether the law should enforce morality as such. Indeed, the empirical hypothesis is grounded on the further assumptions that today's positive morality is much less influenced (in comparison with the positive morality of 50 years ago) by deontological constraints, and that the harm principle has acquired a much more prominent and exclusive role in determining moral rights and wrongs.

Among these further features of the legal enforcement of positive morality, which need to be taken into consideration, I would stress the relevance of two more. First, one should assess to what extent positive morality admits the existence of non-harmful immoralities. Broadly, this question may be answered looking at the deontological or consequentialist version of positive morality.[11] It has to be noticed, though, that when Mill wrote that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others" (Mill 1991, 14), his target was not only non-harmful immoralities (which I assume are not included anymore in contemporary European positive morality), but also immoralities through which one harms oneself: "His own good, either physical or moral, is not a sufficient warrant" (*Ibidem*). This is the moral domain which is normally defined as the debate on paternalism, which reflects on the legitimacy of the legal imposition of normative standards, inspired by a certain positive morality, tending to realize the good of the agent, not only avoiding potential harm to others. For this reason, the feature of positive morality which has to be investigated is not only whether this is a deontological or consequentialist morality, but also how the positive morality at issue endorses the harm principle requirements (for instance, whether it admits harm to self as a

[11] This clear-cut distinction may be questioned, but I cannot do it here.

relevant moral harm or not) (Feinberg).

This reference to paternalism can be connected to another profile which may be of interest, when assessing whether law should enforce morality as such. This profile has to do with the perfectionist or non-perfectionist version of the positive morality at issue: indeed, it is normally affirmed that the liberal state should restrain its paternalistic and perfectionist tendencies, and then various perfectionist moral ideals (which are the specific focus of virtue ethics but not only) – such as ideals of virtue, character or fairness – are contents of moral normativity which, *as such*, should not be enforced (Gerald Dworkin 1999, 930).

This discussion on the limits which legal enforcement should face with regards to perfectionist or paternalist tendencies embodied in positive morality suggests, however, a further line of specification which in my view is necessary for taking a stand with regard to most of the issues at stake in the debate on the legal enforcement of morals. Whether the law should enforce moral norms as such does not only depend on structural limits of efficiency, nor only on some formal features of the model of morality embodied by positive morality, but also on whether the legal system is committed to some moral values or not – and, in the case of an affirmative answer, which those values are. In this sense, one should distinguish between two different questions: first, whether law, *as such*, should enforce morality *as such*. On the basis of this question, however, we cannot address issues such as whether the law should enforce paternalist of perfectionist ideals. In order to do that, we need to know, and to clearly state, something more about the moral commitments assumed by the law in question. This brings us to the second question: whether the law *of a liberal state* (or any other specific legal order) should enforce morality *as such*. Otherwise, leaving these moral commitments unstated, we would end up defending just the ideal of the liberal state, not defending some theses in application of the liberal values embodied in the legal system in question.[12]

4 Legislating morality in the liberal state

As I have stated, the question of the legal enforcement of morals is more complex and multifaceted than it may appear, and nowadays, in our context of reference, it is to be settled in a completely different way. I have assumed that our positive morality mostly takes into consideration arguments derived from the harm principle. In the cultural and political context considered, until fifty years ago many norms condemned practices until that time considered immoral by positive morality, though they did not involve anything that could ordinarily be thought of as harm to other persons (Hart 1963, 25). Today a relevant number of these norms, in one way or another (constitutional revision or legislative reform) have been suppressed. However, as we have already seen, the harm principle is not only concerned with the necessary requirement of harm to other persons in order to establish moral correctness. It is also concerned with questioning the moral relevance of harm to self, and the moral legitimacy of legal norms that endorse moral norms

[12] However, are these two aims so clearly separable as I have now supposed?

prohibiting harm to self.

In this section, we will still deal with the initial idea that, in the cultural and political context mentioned, homosexuality should be taken out of the moral and legal agenda. In connection with this, we will highlight what further needs to be added to this crude idea to make its assessment possible. To this aim, three main lines will have to be followed. First, the theory of moral normativity to which we are committed: on this there depends whether taking some issues out of the moral agenda is feasible or not (on this I will say something in this section). Second, what we mean by homosexuality: until now we have made almost implicit reference to a certain aspect of human life, as presented in the mainstream discourse on it. However, it has to be further specified, in order to understand the crude idea that it should be taken out of the moral discourse, and to assess whether this intuition is correct or not (on this we will focus in the next two sections). Finally, something more will be needed to understand the role of the harm principle in contemporary European positive morality. This change in positive morality is the core idea and assumption of my empirical hypothesis. Apart from the need for some scientific support for this hypothesis (which I am only superficially offering in the context of this work), something has to be said about the rationale of the harm principle and how it is supposed to inform this system of positive morality (on this issue I will say something in this section, and its functioning will be further analysed in the context of the case-study contained in the last two sections of this work).

Is it possible or correct, in the context of European liberal democracies, to take some moral issues out of the moral agenda? I will immediately declare that I am convinced that, in line with certain criticisms of the doctrines of liberal neutrality, the law of a liberal state cannot but enforce morals, and that all we can judge is how it enacts this necessary feature of its functioning (in particular, whether it enacts it in accordance with positive morality, or respecting some procedural rules of fairness, or some basic human values, etc.). In the context of liberal democracies, the issue of legal enforcement of morals has to be framed with reference to specific philosophical presuppositions, which further legitimate its exercise. In particular, two of them are specifically relevant for our present purposes. First, the issue of how to enforce morals necessarily presupposes that one takes a stand with regard to the objectivity of moral values. The thesis that an authority, such as the law, should enforce certain values, also depends on the status they are recognized to have.[13] Second, the extent to which legal authority is justified in enforcing any decision it may take also depends on the basic moral values to which the same authority is committed, which in the case of liberal democracies are, roughly speaking, individual freedoms and autonomy, among the most prominent ones. With regard to this second profile, this has been the object of analysis by many philosophers, under the label of the moral neutrality of a liberal state. The idea, theorized most famously by John Rawls, is that liberalism obliges the state to be neutral about different conceptions of the good. As Ronald Dworkin puts it,

[13] On this issue, see Arneson 2003, sec. 5 on *Skepticism about knowledge as the basis for neutrality* (Arneson 2003, 22f). Incidentally, it is to be noticed that, apart from what would be specifically needed, in the context of this paper, in order to strengthen our empirical hypothesis, more generally the normative scheme proposed by the theories of moral neutrality requires some criterion for differentiating between controversial and non-controversial views of life and conception of the good.

> the government must be neutral on what may be called the question of the good life. …This means that political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life. (Ronald Dworkin, 191)

How this neutrality should be shaped was variously debated by philosophers during the second half of the last century (for instance, which subjects should be neutral, should this requirement only be imposed on public authorities, or also private people?), and the very idea that such neutrality is feasible and able to realize the established purpose has been questioned. Moreover, theorists have also remarked that different ways in which the state can be neutral about different conceptions of the good can be distinguished. Charles Larmore, for instance, has highlighted three different ways in which the state can be neutral with regard to different conceptions of the good: with regard to the aims – and then public policies should not be aimed at promoting one controversial view of life or conception of the good; with regard to the effects – and in this case public policies should not produce the effect of preferring a certain group of people that adhere to one among different controversial views of life or conceptions of the good;[14] and, finally, with regard to justification – prohibiting any justification which may rely on a certain controversial view of life or conception of the good.[15] This categorization (even presented in such a schematic way) is useful for our purposes, because by looking at it one can easily see that the concept of legal enforcement of morals has to be nuanced, taking into consideration that the law is able to enforce a certain value not only by prohibiting a certain conduct, but in many other ways.

In such a context, how can we assess the proposal that homosexuality should be left out of the debate? Is homosexuality non-controversially morally permissible, in the framework of the positive morality of European liberal democracies? Or should we rather assess whether it is controversial or not at the level of critical morality?[16] Apart from the answers to these questions, which I am not going to address here, I propose to introduce two necessary specifications.

First, a crucial element of this starting idea and working hypothesis, that the moral correctness of homosexuality is no longer in question, is too crude. More specifically, it is too vague, or restrictive. Even if our empirical hypothesis, if proven correct, implied that in the relevant context homosexual relations are permitted, it does not have any specific implications, for instance, about whether homosexuality can be considered part of a view of life or conception of the good (without considering, in the case of an affirmative answer, whether these are controversial or not). The reference to homosexuality when assessing its correctness needs to be further specified, in order to be assessed. Until now I have maintained implicit reference to homosexuality as sexual or sentimental relations between two adults of the same sex. But admitted that positive or critical morality in the mentioned context does not find anything wrong in such a relationship, other aspects need to be taken into consideration in order to assess whether homosexuality is a controversial issue or not, and how the liberal state should cope with it. Even endorsing the harm principle, and

[14] This can hardly be defended by a supporter of liberal moral neutrality, which focuses more on the starting conditions, on the rules of the game, than on its result: see Arneson 2003, 3-4.

[15] So called *Justificatory Liberalism*: Larmore 1987.

[16] This is a genuine question.

admitting that two adults who engage in a homosexual relationship do not harm anybody else, one could ask whether they harm themselves, or whether their example could harm someone, or whether their ideas about homosexuality could be harmful, or whether some public interest is harmed by the promotion of their conception of the good, etc. Reference to the harm principle, in itself, does not offer a clear and unambiguous answer to all these questions, but a theoretical framework in the context of which many different answers can be given, in consideration of different theoretical coordinates (Harm to others? Harm to self? Harm to private interests? Harm to public interests? What kind of harms have to be taken into consideration? Etc.). I find it a big mistake to forget the complexities of moral argumentation, as it would be for a lawyer ignoring the complexities of legal argumentation when defending a case. I will go back to these arguments analysing a specific case (the moral case of homosexual parenthood) in the last two sections of this work.

I will now shift to a second specification, which can be useful for assessing the feasibility or correctness of any proposal of excluding any subject (whatever it is, no matter how defined) from the moral debate.[17] Here I elaborate on the nature and function of the kind of normative reasoning which is morality. In the framework of a certain theory of morality, which I find convincing, it cannot really be affirmed that some areas of human life are not potential objects of moral assessment. Among others, Samuel Scheffler defends this view under the label of the pervasiveness of morals. As he observes, when questioned whether the requirements of morality should take into consideration reasonable limits determined in consideration of the average individual agent's psychology and well-being,[18] theories of moral normativity give different answers, more or less able to account for them, and which correlatively configure, respectively, a less or more exigent morality. Among the less exigent moral theories, one can distinguish between those that consider that these reasonable limits operate as external limits that restrict the domain of morality (there are some actions, like brushing one's teeth or preferring one's relatives, friends or partners,[19] which are not

[17] This issue also influences the thesis about the existence of controversial and non-controversial areas of morality, but in the context of this work I will not elaborate more on this specific relation.

[18] This feature, the reference to the standard human being, could be more or less influenced by the endorsement of a more particularistic or universalistic approach, but I maintain this is a matter of degree.

[19] Scheffler elaborates on both Susan Wolf's and Bernard Williams' arguments on these issues, presented respectively in her *Moral Saints* and his *Persons, Character and Morality*. Scheffler 1992, 17-25. The tendency to locate outside morality the duties towards those with whom we have special relationship derives, for authors like Williams, from the need to consider certain lines of action outside moral assessment. This "though too many" is considered out of place, too moralistic. "Agents do not need moral permission to do certain kinds of things" (19). However, it is always a moral requirement that can lead us to expect, from people who are close to us, special treatment waiving the universality of moral assessment. And at the same time, as observed by Scheffler, "There may be a clue in Williams's response to the question whether the fact that one of the people is the man's wife might not provide a justification for his deciding to save her instead of the stranger: 'It depends on how much weight is carried by 'justification': the consideration that it is his wife is certainly, for instance, an explanation which should silence comment…" (*Ibidem*). Indeed, it has to be stressed as well that this debate can only be assessed in the context of a deeper consideration of the role and features assigned to moral judgement (whether it is considered to be always a matter of pondering and evaluating, or it also gives space to requirements of instinctual and emotional responses — and then, more broadly, to requirements of character and virtue). In any case, and incidentally, I think that stressing the relevance of these special relationship can be, indirectly, useful for building arguments for pretending a stronger acknowledgment of the relevance of homosexual relations for those who need them to fulfil their existence.

within the scope of moral assessment) and those views which consider that such a distinction is not feasible, and that every action is potentially within the scope of moral assessment, some reasonable limits of demandingness being internal to the rationale of any moral judgement. Scheffler endorses this second perspective, in conformity with the account of the pervasiveness of morals he defends. As he writes,

> the judgement that a particular act is too trivial to warrant moral evaluation always depends on an assessment of the act and its context. And for any given act that is said to be too trivial, we can imagine a change of context that would render it suitable for moral evaluation. (Scheffler 1992, 24)

If one decides to endorse this view, one cannot distinguish between acts that are morally permissible and acts that are too trivial to be subject to moral evaluation.

In this way, we can conclude that it would make little sense affirming that homosexuality, whatever it means, is either morally permissible or too trivial to warrant moral evaluation.[20] However, Scheffler's arguments elaborate on the moral assessment of actions, and when assessing the moral correctness of "homosexuality" we cannot only refer to the actions strictly involved in a homosexual sexual or sentimental relationship, but need to take into account a much wider set of manifestations of humanity, other actions which do not strictly constitute the relationship, as well as identities, beliefs and thoughts. Then what we urgently need to do is to render more explicit the wide assortment of issues behind our too vague or restrictive label of homosexuality.

5 Legislating homosexuality

In the previous section I outlined the fundamental reasons for considering that the general idea of leaving an action out of the moral agenda is not really feasible, considering the nature and aims of morals. In this way, the thesis that homosexuality, insofar as it is no longer condemned by positive morality, should be excluded from the moral agenda has shown some of its weaknesses. However, as we have already suggested, reducing homosexuality to an action, or a stable relationship, would be inappropriate, perhaps reductive, as if all that would be involved would be the sentimental and/or sexual relationship between two adults of the same sex. In this section I will try to outline some of the lines which may be followed to understand the complexity of the issue(s) of homosexuality, as an object of moral assessment.

The reference to homosexuality we have made till now, as a subject to be excluded from moral debate, has shown itself on more than one occasion to be too vague or restrictive. It is clear now why it is too vague. Otherwise, if implicitly specified by referring to the homosexual relations between two adults, it is obviously too restrictive. Until this moment, I have tentatively and almost implicitly described homosexuality as sexuality characterized by attraction to an individual of the same sex, or perceived (subjectively and/or by the community of reference) as pertaining to the

[20] In this sense, Devlin could have been right in affirming that in general, "it is not possible… to define inflexibly areas of morality into which the law is in no circumstance to be allowed to enter" (quoted in Gerald Dworkin 1999, 934).

same sex. Here we can already see some of the difficulties of such a definition of homosexuality. Indeed, defining homosexuality as a kind of sexuality, or a sexual orientation, do we refer to an identity, or an activity, or something in between? Should it be defined from the point of view of the subjects involved, or from the point of view of the observers? And what is sexuality? Is a categorization of different *forms* of sexuality appropriate? The relevance of these questions is partially the same relevance which may be attributed to similar questions about race: what is race? Is a categorization of different races appropriate? There is something in the mere use of these categories (even a *fair* use), which sounds discriminatory. In this sense one may argue that homosexuality, or sexual orientation, should be taken out of the moral agenda. This line of argument, on which we will focus in the next section, aims at questioning the reliability of the notion of sexual orientation, on which the concept of homosexuality is grounded. Following this line, I will suggest that there are indeed some reasons for requiring homosexuality, or sexual orientation, to be left out of the moral agenda: not because homosexuality is morally correct, but because of the epistemic deficiencies of the vast majority of beliefs, and the irrelevance of the categorizations based on these concepts. For the moment, before analysing this issue, I would rather focus on the reasons why, not questioning the reliability of the common categories based on sexual orientation, we do need to analyse the issue of homosexuality as something more complex than the mere sexual and/or sentimental relation between two adults of the same sex.

The moral relevance of homosexuality cannot be reduced to this basic issue. It can be noticed that in the literature on homosexuality, especially when its moral assessment is at issue, some distinctions are made: for instance Catholic doctrines differentiate between homosexual conduct (or acts), homosexual identity, moral judgement on homosexuality and beliefs on homosexuality. Unfortunately, however, this literature does not help to understand the complexity of the issue at stake, because it is over-influenced by prejudices and dogmas, and in particular by stigmas attached to sex as a relational activity potentially more harmful than other human relations, in relation to which human beings have specific, and more stringent, responsibilities. It is under this influence that religious doctrines elaborate a theory of responsibility for homosexuality which completely ignores basic notions of human psychology, attributing responsibility for courses of actions which are completely harmless, requiring attitudes which can only be maintained at the cost of great psychological distress, restricting the most basic freedoms, among which freedom of expression, and sanctioning, without any rational basis, a fundamental dimension of human nature and psychology, which does not harm anybody and for which, by consequence, nobody can be held responsible. These doctrines normally state that people can be charged with a kind of homosexual fault for what is the consequence of their choice, in a word for what they do, not for what they are. These theses, however, in this respect too are very simplistic and far from being morally justified, if one has a closer look at them. Apart from deserving more careful investigation in connection with the very intricate issues which may be grouped under the category of freedom of the will (which are particularly relevant to understanding to what extent a homosexual can be held responsible for his or her homosexual acts), they completely ignore the intrinsic psychological links existing between one's own identity (comprehensive of one's own sexual identity) and freedom to behave

accordingly. One cannot fulfil one's own life if one is not allowed to love and to express this love as one wishes. These doctrines, at the same time, endorse a very naïve account of human choice, ignoring that being homosexual is indeed, in part, a matter of choice, but not the kind of choice for which one can normally held people responsible (not only because nobody is harmed, but also because the choice in question is not fully deliberate). The kind of attitude required by this doctrine leads to psychological distress and unhappiness, while the forbidden course of action would not hurt anybody: those who have a homosexual identity, orientation or attractions should morally condemn their way of being, restrain from fully experiencing their existence in the world (as far as its relational dimension is taken into consideration), without any grounded reason. One can easily see how homophobia has been able to spread in such a context: if you feel this kind of attraction (which is something which almost everybody, in his or her psychological development, feels towards members of one's own sex), you will have all possible reasons to be afraid, in a context in which positive morality influenced by religious dogmas and prejudices will condemn you to unhappiness.

In the context of this paper, leaving apart the deficiencies manifested by the categorizations used by religious doctrines as in the Judeo-Christian tradition, I would rather focus on some valid reasons why the moral issue at stake, homosexuality, is too generic and should be analysed under different and more specific categories, which are not, however, those configured by a religious doctrine influenced by a prejudicial approach to a natural aspect of human life and psychology.[21] Homosexuality, as a subject of moral assessment, cannot be reduced to the issue of the legitimacy of a sexual or sentimental relationship between two adults of the same sex. A variety of related issues have to be examined, which all involve assessment of human patterns of identity, conduct and epistemological and moral beliefs, and which cannot be reduced to the one mentioned. A discussion of the moral correctness of homosexuality covers a much broader field, in which many other complex matters have to be discussed, and which does not only involve the subjects of a homosexual relation.

First of all, what should be the object of assessment? A belief? An action? An identity? An emotion? An attraction? Should it necessarily involve sexual activity or not? And, in the case of a positive answer to the latter question, what should count as sexual activity? Indeed, the previous distinctions, insofar as they are based on an attempt at characterizing, in a more or less essentialist fashion, what is homosexual conduct, or act, or identity, and so on, are affected by the same deficiencies which affect any attempt to characterize what sex is.[22] Here, obviously, epistemologists and philosophers argue about whether sex and sexual activities should be better conceptualized as a physical or a communicational activity, and whether physical or intellectual patterns of this activity should be given priority in order to establish what should count as sex.[23] Something similar, as we

[21] Also among Christian theologians one can find less prejudiced view on human sexuality. See for instance Gudorf 1994, 65, where the author defends the view that God's designs on human sexual activity are not only to be explained in terms of procreation, but also of sexual pleasure for its own sake, as demonstrated by the existence of the clitoris, which does not have a procreative function and whose only purpose is to be a means for sexual pleasure.

[22] On this, but also as a reflective exercise in analytical epistemology, see Christina 2013.

[23] For instance, Goldman theorizes that sexual activity is an activity aimed at fulfilling sexual desire of the agent: "sexual desire is desire for contact with another person's body and for the pleasure which such contact produces" (Goldman 2013, 58) as opposed to Nagel's definition of sexual relation (more inclined to give relevance to psychological

will also see in the next section, can be said about sexual orientation: "people need have neither a homosexual identity nor homosexual sex to have a homosexual orientation."[24] This, in itself, does not mean that we do not need these characterizations: it only means that we should use them carefully.

Moreover, acknowledging the moral correctness of homosexuality, in relation to some of the previous specifications, many other moral questions are involved: for me would it be irrelevant whether I myself, my relatives or my closest friends were homosexuals? Would it be irrelevant for me whether I myself, my relatives or my closest friends had this kind of sentimental or sexual relations with persons of the same sex, independently of being homosexuals as a matter of identity? Would it be irrelevant for me whether my children were taught by a teacher who might openly talk to them about his or her same-sex partner? How have I elaborated, during my psychological and personal development, feelings of attraction towards both males and females? Am I willing to acknowledge that homosexual parents are just parents like anybody else, or do I think that here is something wrong in being a homosexual parent? Am I ready to grasp the differences and complex relations existing between sex, reproduction and partnership? Am I ready to admit that the family cannot be defined through reference to the sexual orientation of its members? Am I willing to admit that singles too could be granted the right to adopt children, independently from their sexual orientation?

These are just some of the questions (the first which come to my mind) which, in my view, correspond to many controversial moral issues and which are not (at least not so directly or not yet) solved by the moral acceptance of homosexuality (as related to the mere dimension of the homosexual partnership) in the context of European cultures and societies. From the truth of our empirical hypothesis, that in the relevant context the dominant view admits that two adult persons do not do anything morally wrong when building a sentimental and/or sexual relationship (whatever their sex), there does not follow any conclusion about many of the questions mentioned. In my view, many of these open questions could find an immediate answer, fully derived from the acknowledgement of the moral correctness of the partnership. Many of these questions, indeed, precisely pose the problem, common to many moral issues, of the universalization of the norm (Hare). In other cases, however, the moral issues at stake are more complex and require careful consideration of a wider set of moral arguments, which cannot be found in the principles (even in their most universalized state) which lead us to consider homosexual partnerships morally correct. Analysis of all these questions not only will lead to giving new contents to the positive morality in the context of European liberal democracies, but will also lead to new legal orders and regulations on these subjects, which nowadays are still controversial.

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and intellectual patterns, or to Moulton's relativist account (see footnote n. 9). Goldman defends an idea of sex as defined in terms of physical rather than communicational activity ("Sex is a way of relating to another, but primarily a physical rather than intellectual way" (66), in opposition to "the Platonic-Christian moral tradition, according to which the animal or purely physical element of humans is the source of immorality, and plain sex in the sense… defined... is an expression of this element, hence in itself to be condemned) (*Ibidem*).

[24] "Their orientation can be experienced as persisting feelings of attraction, sexual fantasies, or other private episodes." Wilkerson 2013, 196. On this, see also Stein 1999, 39-70.

6 Legislating sexual orientation

The previous overview on the complexity of the practical issues at stake in connection with homosexuality has shown some of the moral problems which are still open and which should be assessed, in the context considered, in the light of the moral principles of a liberal state. We have seen that acceptance of homosexuality not only regards a minority, but also involves a cultural shift for society at large. It requires questioning common assumptions about education and psychology, and perhaps more radically it challenges deeply rooted psychological and cultural schemes about the significance of sex and the roles to be attributed to males and females. This explains why political reform on the issue of homosexuality is very complex and entrenched with much broader contemporary cultural challenges which humanity at large is facing. Until now I have maintained that many difficulties have to be encountered when describing different aspects of homosexuality (which cannot be reduced to the sexual and sentimental relationship between two adults of the same sex). However, I have not really questioned the reliability of a basic notion of homosexuality as a kind of sexual orientation: addressing the complexities of a concept is already, at least in part, questioning it. Recognizing that homosexuality is not only a sexual orientation, but many other things (a feeling, an identity, an attraction, an activity, a relation), is already questioning common cultural assumptions. A further stage, however, can lead to questioning the moral relevance of the categories of sexual orientation, among which homosexuality. Why should the law attach relevance to this feature of human identity? Is it really relevant for some purposes, other than exploring human psychology or defining one's own identity in the context of a culture structured on them? Why should we differentiate among people on the basis of it?

Here the matter is not assessing whether we should better differentiate on the basis of how people behave in relation to sexual attraction, or how people sexually identify themselves, or what kind of sex people practice, or what kind of sexual attraction people feel and so on. Making all these distinctions may be useful, as I have suggested, because they help to realize how complex the phenomenon we label as homosexuality (or sexual orientation) is. However, we could also ask ourselves for what reason we should use such a conceptual scheme, even if refined and more detailed. Such a scheme can be a useful instrument for describing reality (and for instance for studying psychology, or anthropology), but when the law sets out to attach normative consequences on the basis of these categories and of supposed moral differences (which are still in need of justification), we may also desire to describe reality in some other, less dangerous, way. Also referring to the colour of the skin can be a useful instrument for describing reality, for some scientific purposes (let's say, biology or dermatology). But when the law has set out to attach normative consequences, with neither scientific nor moral grounding whatsoever, to this feature of reality, someone fortunately has felt the urge to subvert previous conceptual and cultural schemes in order to build new and safer ones. In this perspective, one could dream that human culture could proceed to ignoring any distinction between heterosexual and homosexual relations, identities, acts, attractions, in order to endorse a view in which everybody can express their own identity, also made up of their sexuality, insofar as this does not cause harm to anybody's fundamental interests. In this

perspective, the fight for freeing homosexual conduct or orientation should be clearly restated as a fight for acknowledging to every human being the freedom to pursue their happiness and self-fulfilment. And those who would like to argue against the promotion of homosexual conduct and orientation should face up to the need to justify their arguments against this, in my view more powerful and decisive, argument.

This perspective is supported by the results of some of the most recent studies on sexual orientation, which highlight how this mainstream concept, which is common both to supporters of homosexual rights and to those who object to this recognition, is in more than one way problematic, as it does not correspond with basic features of human psychology. First of all, the category of sexual orientation assumes stability of people's sexual desires, and most often only focuses on one aspect of the sexual or erotic desire, leaving unaddressed the psychological variety of feelings, attractions, emotions which should be taken into consideration, in order to take into consideration how different people, in the same or different cultural contexts, actually experience sexual attraction. William S. Wilkerson, in a work recently published on this issue (Wilkerson 2013), challenges these mistaken assumptions, in order to highlight the deficiencies of our mainstream concept of sexual orientation (and perhaps of any such concept), in consideration of the inconsistencies of some assumptions on which it is based. In particular, he addresses the view – on which now, in the relevant cultural context, opponents and promoters of homosexuals' rights agree – that sexual orientation is something everybody possesses, independently of choice and of cultural and historical differences.

> 'Sexual orientation' thus names a psychological feature of people that precedes and guides the choices people make in life; the idea of *orientation* seems to imply a persistent and nonchosen direction in people's attitudes and desires. (Wilkerson 2013, 196)

In his work, Wilkerson convincingly argues against this view, questioning three fundamental features of this mainstream concept of sexual orientation: first of all, he defends the view, which is consistently confirmed by psychology, that sexuality involves many different sorts of attractions, and sexual orientation does not account for this complexity: does sexual orientation define an attraction toward a certain sex, a certain gender, or both? And then, how should these feelings of attractions be labelled, in consideration of one's sex and gender? As a result, a much more complex scheme should be offered to account for human sexual orientations. Moreover, as suggested by Wilkerson, this line may be followed, and "as we keep adding different sexual possibilities, there seems to be no end to how many things we should include as objects of sexual orientation."[25]

[25] Wilkerson 2013, 198. "The concept gets so diluted that it loses the ability to explain particular features of human sexuality. This raises a dilemma: either we can retain the concept of orientation for all sexual proclivities, using it so broadly that it has no more explanatory power than the trivial claim that each individual has his or her own sexual proclivities (and this is putting aside asexual people), or we can restrict the concept to the narrow confines of attraction based on sex, in which case people with stable desires not directed towards sex will actually *lack* sexual orientations" (199). "To summarize, the difficulty is that so many people's sexual lives do not fit the pattern of the popular concept of sexual orientation – a stable attraction based on sex or gender" (201).

Conclusively, sexuality is too various and individual to be fully restrained under the conceptual schemes offered by the concept of sexual orientation. A second weakness of the mainstream concept of sexual orientation affects its necessary reference to a stable psychological disposition, "capturing something about their psychology and sexuality that remains constant throughout most of their lives." (201) However, this feature leaves out of the picture the portion of humanity which, throughout the course of their lives, experiences a fluid, changing sexuality (note that this does not necessarily nor only refer to bisexuals, once we have accepted that the concept of sexual orientation should – if it can – take into account a very wide range of sexual interests and attractions). If sexual orientation is neither strictly linked to sex nor stable, it seems that the concept of sexual orientation as we know it already seems to vanish. To this, this author adds the criticism against the essentialist accounts of sexual orientation, which claim that sexuality is the same across different cultures. Anthropology and sociology suggest, indeed, that homosexuality can better be explained in terms of a social construction, different across different ages and cultures. In particular, Wilkerson proposes to endorse a convincing account of interpretive constructivism which states that humans are not characterized by a sexual orientation or by straightforward sexual desires, but by less clear-cut feelings, "that can be interpreted in a variety of possible ways to fit different sexualities."[26] Once this complex scenario is explained, one can either reject any reference to the concept of sexual orientation, considered too compromised with a certain mistaken account of human beings' sexuality, or, as Wilkerson suggests, maintain the reference to sexual orientation, but clarifying its meaning and making it clear that it is "neither a naturally occurring, persistent desire nor merely a concept that disregards the complexity of our desires."[27] This is perhaps a good proposal, in terms of cultural change, even though I do not think it would be feasible for the functioning of the principle of non-discrimination on the basis of sexual orientation. But this is another issue, which I will not be able to address – not even rapidly – in this context.

7 Homosexual parenthood

In the last two sections of the paper, I will focus on a specific issue, which I suggest should be tackled having in mind the previous remarks about how issues of homosexuality and sexual orientation should be a direct or indirect object of legislation. The specific issue on which I am focusing is the supposed discrimination suffered by persons involved in family relations characterized by the presence of homosexual parents. I will call it the issue of homosexual parenthood. This is, of course, one of those cases which are not solved by the supposed truth of our

[26] 207. This view is also supported by anthropology, which can show (for instance, in the case of *berdache*) how completely different accounts of sexuality (hardly explainable in terms of our mainstream concept of sexual orientation) have characterized cultures different from ours.

[27] 208. "Instead, it is a convergence of individual feelings, social constructs, and the interpretive choices individuals make about how to live their sexuality. Sexual orientation is more akin to an existential project than a psychological fact: it designates features of our existence that we take up and live in a particular social setting. People do have feelings, and some might have content that guides them toward some interpretations and away from others, but this content does not fully determine their sexual being" (208). In this sense sexual orientation is not fully determined by facts but also, partially, a matter of choice.

working hypothesis, i.e. the fact that in contemporary Europe the dominant opinion is that there is nothing morally wrong in having a homosexual relationship. These cases add further elements to the basic situation mentioned, which require a more complex moral assessment. There is a variety of cases of homosexual parenthood which all seem to be characterized by the fact that the parents cannot both be biological parents. Apart from this element, situations vary a lot: a couple of men who have had recourse to maternal surrogacy instruments to procreate their children; a couple of married men who have done the same; in both cases these couples could raise a number of children, as brothers and sisters, having a genetic relation with only one or both of the members of the couple. The same situations could be envisaged in the case of a couple formed by two women who could each procreate by having recourse to the more accessible instruments of artificial insemination. To these, one could also add the case in which either men or women could raise children generated thanks to the cooperation of a friend, who could make their sperm or uterus available. Of course, the homosexuality of the father or the mother does not affect their reproductive capacities. With all these variables, we can already envisage quite a varied set of situations, in which a child could be born and raised by homosexual parents. But more cases have to be taken into consideration.

To these situations, one should add the case of a child not born and raised by a couple of parents, in the non-biological sense described, but by a single parent. Of course, given that in the cases of homosexual parenthood being a child of a couple means having a biological relation with only one of the parents, following this same pattern of parent-child relation, a child may well be raised as well by a single homosexual parent. In this case too, the same different possibilities might be envisaged, due to different reproduction techniques, depending on whether the parent is male or female: in this case, however, the family relationship would not be characterized by the presence of a couple of homosexual parents, but only by one homosexual father or mother.

Moreover, one should also take into consideration cases in which a child is raised, after adoption, by a couple or by a single parent, for those countries in which legal regulations have allowed homosexual couples or singles to adopt children.

Finally, it should be observed that at the beginning I assumed that all these situations were characterized by the fact that the parents could not both be biological parents. But, after having briefly elaborated on how difficult it is having one definitive characterization of homosexuality, we can also assume that a child could also by raised by a couple of persons, of different sex, who are their biological parents and are nonetheless homosexuals: for instance, they could be homosexuals (under some specification of this label) involved in a heterosexual sentimental relation. Indeed, one can be homosexual, under a certain definition of homosexuality, without having a homosexual partnership. This may happen in a variety of cases, for instance, because a man and a woman, both homosexual, decide to live together and build their family without grounding it, among other things, on a sexual relationship; or because one of the members of a male/female couple decides, at a certain stage of their relationship, to follow his or her homosexual feelings, then interrupting their sexual relation but not their project for life (which may be based on other elements, as often happens in a variety of family situations).

The previous list of cases does not claim to be exhaustive, but only to offer a broad account of the variety of situations which can be grouped under the issue of homosexual parenthood. This list also aims to present a consistent counterargument, based on empirical evidence, against those who affirm that homosexual parenthood is a kind of science-fiction, something which does not exist and should not be created.[28] Given this reality, how can the law influence these relationships, in the context of contemporary liberal democracies? And, more importantly, how should the law, in such a context, influence them?

The first question is aimed at mapping the many different ways in which the law, in the reference context, can influence these relationships. Of course, I am still assuming the truth of our basic empirical hypothesis and by consequence excluding the effects which may derive from a prohibition of homosexuality, as embodied in those norms sanctioning homosexual conducts which were still valid in some parts of Europe till the second half of the 20th century. At the same time, I do not claim to list here all the ways in which the law can influence these relationships, both because of the protean form of these relations and because of the limits of the present work. I will just focus on some ways, and in particular on those which are enlightened by the discussion of the second question, i.e. how the law, in the context of contemporary liberal societies, should regulate and influence these relationships.

Of course, in the context mentioned, legal regulations on family relations have to warrant a certain level of autonomy for the individual. This is made clear by the study of any of the different, but to a certain degree homogeneous, legal regulations present in Europe. Family law varies from country to country, and indeed the EU has, among its goals, stronger harmonization of EU member states' legal regulations on the matter, in the framework of civil law cooperation. Substantial family law rules pertain to the competence of EU member states (once there are no provisions transferring competence to the EU in the context of domestic family law: art. 3-4 TFEU *a contrario*).

This degree of homogeneity among existing regulations of family law does not cover, for instance, the issue of same-sex marriage, which is, to all effects, a controversial matter in the EU (Fiorini, 13). This shows, given the truth of our empirical hypothesis (and unless this could be used to falsify our hypothesis…), that the perception that nothing morally wrong can be found in a homosexual relation has not yet produced the result of giving same-sex couples the right to marry. This can be considered as caused by the slowness of the process through which moral principles are embodied in legal rules, or it can be taken as a symptom of the need for further elaboration of the moral principles involved in the recognition of such a right. I am more inclined to endorse the second option, but in the context of this paper, analysing this issue would lead us far afield.

All this is just to show how in this case, as in many other cases, the issue of homosexuality is

[28] All those who receive the affection and love of a homosexual parent can only be deeply offended by the words of one of the most reputed Christian moral philosophers. One may ask what is the Christian message transmitted by these words, which are an expression of ignorance and insensitivity: "whatever the generous hopes and dreams and thoughts of giving with which some same-sex partners may surround their 'sexual' acts, those acts cannot express or do more than is expressed or done if two strangers engage in such activity to give each other pleasure, or a prostitute pleasures a client to give him pleasure in return for money, or (say) a man masturbates to give himself pleasure and a fantasy of more human relationships after a gruelling day on the assembly line" (Finnis 1997, 40).

far from being settled as a whole, and in the context of different liberal democracies different conclusions can be reached by constitutional and legislative orders with regard to the respect of individual autonomy in the field of family law. This is just an example in order to show how complex moral argumentation in this field is, and, in the following section, I will outline how the moral issues connected to homosexual parenthood should be faced, in the context of liberal democracies committed to the harm principle.

8 How should the liberal state legislate homosexual parenthood?

First of all, I would like to stress that the debate on homosexual parenthood in my view is often affected by reliance on the mistaken assumption that two supposed different aims of law can be clearly distinguished. On the one hand, "supervising the truly private conduct of adults", and on the other hand "supervising the public realm or environment."[29] While the former is normally considered to be an aim which cannot legitimately be pursued by a liberal state, the latter is considered a legitimate aim of liberal legislation, although, of course, the limits of such an intervention are not clear once and for all and will have to be determined, each time, in the moral arena. In connection with this conceptual binary scheme, it is also affirmed that two different kinds of attitudes toward sexual orientation may be assumed: first, those targeted at assessing "psychological or psychosomatic disposition inwardly orienting one towards homosexual activity"; and second, those targeted at assessing

> the deliberate decision so to orient one's public behavior as to express or manifest one's active interest in and endorsement of homosexual conduct and/or forms of life which presumptively involve such conduct. (Finnis 1997, 34)

Then, the argument goes on, while in the first domain, the liberal state has to recognize full respect, in conformity with a prohibition of any interference in the private conduct of adults, on the second issue the state may legitimately impose restrictions on the exercise of these behaviours in the public realm, also because from these activities, which are publicly carried out, significant damage could derive for society as a whole, or for the families, associations and institutions which have "organised themselves to live out and transmit ideals of family life that include a high conception of the worth of truly conjugal sexual intercourse" (34).

I think that the case of family and family relations is a perfect example for noticing the limits of this distinction based on two different aims of the liberal state. Families, indeed, cannot be connected to only one of the domains mentioned. Truly, the decision to form a family is very closely connected to the decision to commit oneself to a project of stable partnership, or in any case to a life project which involves the life of other subjects, and is one of the most intimate and private

[29] Finnis 1997, 32: "The importance of the latter includes the following considerations: (i) this is the environment or public realm in which young people (of whatever sexual inclination) are educated; (ii) it is the context in which and by which everyone with responsibility for the wellbeing of young people is helped or hindered in assisting them to avoid bad forms of life (…)"

decisions a person may take; at the same time, however, families, as social entities, also have a fundamental role in the public realm, as they are recognized and protected, as they guarantee a certain level of social stability and share many of the same tasks which are also attached to the state. It is in this sense that, for instance, the Italian Constitution, art. 29, recognizes the rights and interest of the family, viewed as a social entity which pre-exists the state (this pre-existence is questioned by many commentators, especially in Italy, as it is affirmed that only the law can establish what is family and what is not).[30] In consideration of this, one can hardly understand how a family life-project could only be restrained in the narrow binaries of private autonomy, protected by state interference. It is comprehensible how, at any rate, the state has to be granted a higher degree of legitimate intervention in the public realm or environment. However, in order to respect the fundamental principles of the liberal state, this intervention should be limited to what is strictly necessary for avoiding harm to persons (including some cases of harm to self, which may be more or less justified in consideration of other interests which may be harmed) and, indirectly, to public goods which are instrumental to the persons' wellbeing and interests. These are the requirements of the harm principle. Of course those who oppose homosexual parenthood, while not questioning homosexual parents' rights to raise children, nonetheless find this situation harmful, perhaps not so much for the children themselves (in this case, this would constitute a case of neglect, in which the court should intervene and take the child into custody), but for society at large or for the other families (not characterized by homosexual parenthood). The first danger is the one evoked by Devlin's famous "disintegration argument", which has been very effectively counteracted by H. L. A. Hart's observation that many societies have benefited from individual acts which were harming a certain societal interest (Hart) (in short, it all depends on the features of the society in question, whether its interests should be reserved or promoted or not…). The second danger can be hardly understood, and it is also based on a "highly ambitious empirical generalization" (Hart 1963) which is not supported by facts.[31] By the way, in this case too, the fact that a certain model or ideology of family relations is questioned by individual divergences is, in many respects, a good sign.

On the basis of these premises, we can present an overview of the position which should be taken up by the liberal state with regard to the issue of homosexual parenthood. With regard to the homosexual parenthood situations previously envisaged, in some cases (in those cases in which the homosexual parents are single parents) the law of a liberal state does not normally pose major obstacles. In Italy, for instance, coherently with the judgement of positive morality which does not consider homosexuality morally wrong, judges have recently discarded the hypothesis of

[30] On this issue, recently many authors have debated the decision n. 138/2010 of the Italian Constitutional Court. On the unavailability of a legal concept of family in the framework of the Italian legal system, see Trabucchi 1999, 255.

[31] On this point, a huge amount of literature focuses on the crisis which is facing the traditional model of family which cannot be associated, for instance in Italy, with the existence of alternative and less valuable models, among which same-sex marriages. It is difficult to understand how by offering same sex couples the right to marry, opposite sex couples would be damaged. Of course, what is supposedly damaged is society at large: in consideration of what has been observed about the intrinsic value of respecting one's own sexual orientation, which is still almost completely unknown in its deepest meanings, one can easily understand why society, in the relevant context, while more open than before with regard to the moral correctness of homosexual relationships, is not yet able to eliminate the homophobic cultural imprinting, which leads it to consider homosexuality a social danger.

considering one of the parents unable to take care of the child because he or she is homosexual (or because of his or her homosexual relationship) (Mastrangelo 2011). This is plainly correct, and consistent with the contents of positive morality which I have assumed in my working hypothesis. In some other cases the law of a liberal state poses serious obstacles, instead. They cannot be overcome through the kind of argument I would like to present here, focused on the superiority of the best interest of the child. These are the cases in which the liberal state is accused of being unsupportive toward homosexual couples, especially male couples, who would like to have access, or easier access, to surrogate maternity techniques. In these cases, I think that the moral judgement should take into consideration a more complex set of questions, which will perhaps be addressed in the near future. These questions, in my view, mainly involve the role of the women who should carry the pregnancy, and the legitimacy of decisions about disposing of their body in such a way. In this case the rights of children do not easily come into question, nor can the right to become a father be considered so important as to solve any ethical question about the role of the women involved. My view is that with regard to these issues, more time will be needed to reach a positive morality determination in the social and political context taken into consideration.

I will rather focus on those issues which do pose legal problems but which, in my view, should be considered as solved with regard to the positive morality of European liberal democracies. In many of the cases considered, the best interests of the children involved require the liberal state to protect their family relations, to allow them to grow up in a context involving the same treatment and relations as any other child who grows up in one of the vast array of family relations, which are not characterized by the homosexuality of one or both of their parents. If their parents' relations were considered immoral, this would be a clear case for the liberal state to intervene, exercising its legitimate dose of paternalism, in order to prevent the harm caused to the child (and in the case of neglect to place the child in custody). This regularly and legitimately happens, in many contexts, in connection with judgements about personal features of the parents or the family members considered, by positive morality, morally wrong or at least constituting a legitimate reason to limit the sphere of autonomy of the individuals involved, impinging, sometimes dramatically, on the parents/children relations.

Someone might argue that, in the case under scrutiny, with regard to the homosexual relation of the parents, the issues at stake are not whether this relation is morally correct or not (because it is morally correct), nor whether the couple of parents are in a condition to take care of the child (which can be assessed independently from any determination about their sexual orientation): that relationship is morally correct, and the parents are able to fulfil their parental duties. It only would be *preferable* to have a heterosexual couple of parents, or to be raised by both biological parents. This thesis, of course, even admitting that it could be supported by good arguments,[32] is not strong enough to maintain a legal regulation which ignores the rights of these children. On the basis of these considerations, and admitting the validity of these arguments, the state should rather be responsible for limiting as much as possible any other condition of inequality between these

[32] One can hardly find any serious psychological study showing these results. By contrast, official psychology and paediatrics tend to affirm the opposite (Pawelski et al. 2006).

children and those raised by heterosexual parents.

Sometimes this line of argument is, often obscurely, linked to those arguments which rely on the harm, in terms of psychological distress, disorder, or more generally effects, which may derive from having two parents of the same sex. The idea is that both psychological distress or disorders and homosexual tendencies of the children should be monitored, because they could influence judgement on the legitimacy of homosexual parenthood. This kind of argument relies on a notion of harm which is common both to the opponents and the supporters of homosexual parenthood, and which is often, in my view, vitiated by an original sin. Indeed, if the correctness of homosexual parenthood has to be established assessing whether children will be more easily homosexual, if they are raised by a same-sex couple, one should more directly argue that being homosexual is bad, so that homosexual parenthood is bad as well. If being homosexual is considered a kind of harm which should be avoided, then any further discussion makes little sense.[33] This line of argument is not necessarily vitiated in such a way, it has to be admitted. Psychology may demonstrate that some kinds of psychological distress or disorders may be more frequent among children raised by same-sex couples than among children raised by heterosexual couples, and for reasons which are not contingent but intrinsically connected with the homosexuality of the parents' relationship. Unfortunately, however, these kinds of findings would hardly lead to results different from the one I am supporting here. First of all, these findings would need to ascertain to what extent these effects are to be attributed to the conditions of the parents or the condition of social discrimination experienced by these families. Second, the same kind of reasoning should lead toward some kind of sanction against unhappy families, divorced parents and workaholic fathers, among others.[34] Fortunately, contemporary psychology tends to find a connection between the psychological conditions of children and those of their parents, which, apart from describing links which are not exactly causal (as one may imagine), considers relevant the psychological and behavioural patterns of the parents among whom sexual orientation does not have a place (Biblarz and Stacey 2001).

This line of consideration, focused on the harm caused to the already existing children of homosexual parents, in my view provides a decisive support for acknowledging a wide set of family rights in the majority of the contexts of homosexual parenthood mentioned. These arguments, which may be further supported by a detailed analysis of the debate on the best interest of the child, are also at the heart of one of the most important legal decisions which have recently recognized the deep injustice and humiliation which many liberal states are protracting, not taking seriously the basic human need of living one's own existence and sentimental relations in conformity with one's own identity. As Justice Anthony Kennedy, writing for the majority of the Supreme Court Justices, has stated in the United States vs. Windsor, any difference in treatment between same-sex and opposite-sex marriages

[33] It may only make some sense, would one argue on the basis of an account of homosexuality as a harm not in itself, but in the social reality in which children will grow up, because of the social conditions in which they will find themselves. In any case, recent psychological studies deny this kind of causal relation.

[34] Unfortunately family law regulations often indulge in this kind of moral assessments, and this is another issue which should be taken into consideration with regard to the issue of the right to adopt children granted to homosexual individuals, either as singles or as couples.

> places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see Lawrence, 539 U. S. 558, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives. (27)

Perhaps my arguments and considerations, like Justice Kennedy's, do not yet support state intervention to facilitate homosexual parenthood, but in my view they suggest the best, necessary further step to be taken in the context of this anti-discrimination fight.

9 References

Arneson, Richard J. 2003. "Liberal Neutrality on the Good: An Autopsy." In *Perfectionism and Neutrality*, edited by Steven Wall and George Klosko. Oxford: Rowman & Littlefield.

Biblarz, Timothy J., and Judith Stacey. 2001. "(How) Does the Sexual Orientation of Parents Matters?" *American Sociological Review* 66: 159-183.

Christina, Greta. 2013. "Are We Having Sex or Not?" (1992). In *The Philosophy of Sex*, edited by Nicholas Power, Raja Halwani and Alan Soble, Sixth ed., 25-31. Lanham: Rowman and Littlefield.

Denaro, Pietro. 2012. "Moral Harm and Moral Responsibility: A Defence of Ascriptivism." *Ratio Juris*: 149-79.

Dworkin, Gerald. 1999. "Devlin Was Right. Law and the Enforcement of Morality." *William and Mary Law Review* 40, 3: 927-946.

Dworkin, Ronald. 1985. "Liberalism." Reprinted in R. Dworkin, *A Matter of Principle*, 181-204. Cambridge (Mass.): Harvard University Press.

Feinberg, Joel. *The Moral Limits of the Criminal Law*. Oxford: Oxford University Press.

Finnis, John M. 1997. "Law, Morality, and 'Sexual Orientation'." In *Same Sex. Debating the Ethics, Science, and Culture of Homosexuality*, ed. by John Corvino, 31-43. Lanham: Rowland and Littlefield.

Fiorini, Aude. 2012. *Which Legal Basis for Family Law? The Way Forward*. European Parliament: Manuscript. Accessible at: < http://www.europarl.europa.eu/studies >

Goldman, Alan. 2013. "Plain Sex." In *The philosophy of Sex*, ed. by Nicholas Power, Raja Alwani, Alan Soble, Sixth ed., 57-75. Lanham: Rowland and Littlefield.

Gudorf, Christine. 1994. *Sex, Body, and Pleasure: Reconstructing Christian Sexual Ethics*. Cleveland: Pilgrim Press.

Hart, HLA. 1963. *Law, Liberty and Morality*. Oxford: Oxford University Press.

Larmore, Charles. 1987. *Patterns of Moral Complexity*. Cambridge: Cambridge University Press.

Mastrangelo, Gennaro. 2011. "L'affidamento dei figli minori nella crisi coniugale: le istanze di censura morale al vaglio della giurisprudenza." In *Omogenitorialità. Filiazione, orientamento*

sessuale e diritto, ed. by Alexander Schuster. Milano: Mimesis.

Mill, John Stuart. 1991. *On Liberty and Other Issues*. Oxford: Oxford University Press.

Moulton, Janice. 1976. "Sexual Behavior: Another Position." *Journal of Philosophy* 73: 537-46.

Nagel, Thomas. 1969. "Sexual Perversion." In T. Nagel, *Mortal Questions*, 39-52. Cambridge: Cambridge University Press.

Pawelski, J.G., *et al*. "The effects of marriage, civil union, and domestic partnership laws on the health and wellbeing of children." *Pediatrics* 118: 349-364.

Scheffler, Samuel. 1992. *Human Morality.* Oxford: Oxford University Press.

Soble, Alan. 2013. "The Analytic Categories of the Philosophy of Sex." In *The Philosophy of Sex*, edited by Nicholas Power, Raja Halwani and Alan Soble, Sixth ed., 1-21. Lanham: Rowman and Littlefield.

Stein, Edward. 1999. *The Mismeasure of Desire. The Science, Theory, and Ethics of Sexual Orientation*. Oxford: Oxford University Press.

Trabucchi, Alberto. 1999. *Istituzioni di diritto civile.* Padova: Cedam.

Wilkerson, William S. 2013. "What is 'Sexual Orientation?' In *The Philosophy of Sex*, edited by Nicholas Power, Raja Halwani and Alan Soble, Sixth ed., 195-214. Lanham: Rowman and Littlefield.

Wolfenden Report. 1957. Accessible at <http://www.humandignitytrust.org/uploaded/Library/Other_Reports_and_Analysis/Wolfenden_Report_1957.pdf>

The interpretation of generic terms related to 'gender' in international and regional mechanisms for human rights protection: losing battles or win-win situations for Rainbow families?

Eleni Polymenopoulou

Abstract

The paper examines interpretations of human rights instruments by international and regional mechanisms for human rights protection focusing on the concept of 'gender'. It suggests that a number of regional mechanisms of human rights protection have managed to overcome formal difficulties, progressively interpreting conservative legal norms in a way that includes Sexual Orientation and Gender Identity rights. Yet there is still a long way to go. At a UN level, developments have been mainly focusing on the extension of discrimination grounds to sexual orientation, to some extent politicized, and with little attention being given to the interpretation of the more generic terms, such as 'man', 'woman', 'marriage' and 'family'. As a result, as much as the progress observed might have a positive impact on rainbow families, it might also well perpetuating a traditional understanding of gender and sexuality issues, which considers heteronormativity as the rule. Drawing from the impact of the Yogyakarta Principles on domestic jurisdictions' case law, as well as regional mechanisms' for human rights protection recent case-law, the paper submits that the only sustainable way forward for rainbow families is an inclusive approach to SOGI rights.

Keywords

SOGI rights, LGBT rights, gender, sexuality, sexual orientation.

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1 Introduction

Since its very foundations, the international human rights law movement was based on a binary construction of sexuality and gender. Back in 1948, when the Universal Declaration was drafted, and when the larger part of the world was under colonial occupation, the expansion of the gay rights movement was unthinkable for the founders of the international community. As noted by Co-Director of ARC, John Fisher, still in the early 1990s, when the Vienna World Conference took place, even pronouncing the word 'gay' at an official event was an extremely controversial attitude,

creating extreme reactions from the Southern States.[1] Yet, today, three generations later, sexual Orientation and Gender Identity ('SOGI') rights have achieved status of recognition within the United Nations and other intergovernmental institutions.

Such developments are indeed promising and mark indeed significant achievements in international law. However, there is still a long way until Rainbow families, and specifically the questions of marriage and adoption, are treated in equal terms with heterosexual facts. In fact, in order to fully understand and assess the sustainability of these admirable recent achievements, and indeed their success, one should also examine their *rationale*, as well as their *impact*. At this level, however, things have not been equally successful. First, the empowerment and protection of sexual rights an international and regional human rights level, has been largely based on sexual identity, especially as grounds for non-discrimination, in expense of a holistic understanding of the nature of human sexuality and the understanding of gender as a whole. Second, to a large extent, the concept of SOGI rights, and in particular LGBT rights, has been a battleground between the west and the non-west at a UN level, having as a result their contestation by a number of States, including those that apply severe sentences for homosexuality. Third, the progress for LGBT empowerment, has been marked in specific cases which have not been followed in the human rights organs practice consistently, and rather at a regional, and national, level, as opposed to the much more limited developments within the United Nations. Additionally, the *rationale* of these developments does not necessarily promote an inclusive interpretation of gender, while any movement to promote SOGI rights at a United Nations level causes counter-reactions from Southern states.

Allow me to start by defining the problem, and outlining certain points with respect to the progress made in the interpretation of terms in international human rights law provisions. I will be continuing in a second part by explaining what an inclusive approach means and why it is an essential aspect of the development of SOGI rights.

2 Minimal progress made in the interpretation of terms

As you probably already know, the first landmark judgment, that marked a change of direction at an international level, has been *Toonen*, issued by the Human Rights Committee in 1994.[2] It is in this case that the Committee, a universal human rights body, interpreted the term 'sex' (included in article 26 of the ICCPR among the legitimate grounds of discrimination) in a way to include sexual orientation. In practice, this meant that for the first time, an international body found that a national law (*in casu,* the Tasmanian law) that criminalized homosexuality was in breach of the right to privacy and the principle non-discrimination. Since then, other positive steps have followed: the inclusion of sexual orientation issues as a 'checklist' in a number of periodic review reports at the United Nations level; the recognition of gay marriages in an increasing number of States (currently

[1] See 'Vienna Declaration And Programme Of Action + 20' (2013) Human Rights Monitor Quarterly, 1.
[2] *Toonen v. Australia*, no. 488/1992, 30 March 1994.

26);[3] the initiation of a debate on sexuality, gender and traditional values, and even religions, in the context of the most conservative societies of the world; as well as the rise of international activism for LGBTI individuals (especially men having sex with men) in many parts of the world and their financial support by western states NGOs, the UNDP and the UNAIDS.

Toonen has been the first case to perceive biological sex as including sexuality and sexual orientation among the rest of the discriminatory grounds provided in the Covenant. The case has been celebrated as a success, even though it was decided more than a decade after the European Court had come to similar findings, and despite the fact that SOGI rights have been, to use Saiz's expression, constantly bracketed out from United Nations expert meetings and global fora, at least until the new millennium, [4] and that the prohibition of discrimination of sexual orientation was not reiterated not even in the UNs following year initiatives, such as the Cairo Population Forum; or in the declaration of violence against women negotiations; or in the Fourth World Conference on Women in 1995 – all three occasions touching upon aspects of sexuality and gender, that could have examined LGBT rights as part of their respective agendas.

As for the term 'marriage', though, in the eyes of the Human Rights Committee, it is still not considered in way to consider that it also includes homosexual marriage. Excluding same-sex couples from the opportunity to unite in such way, is still not considered a breach of equality neither as generally breaching the International Covenant of Civil and Political Rights (ICCPR). Unlike several national cases, where domestic laws have been changed in order to accommodate gay marriages, the general interpretation of the term marriage at a regional and international level has been subject to the States determinations. In the case of *Joslin v New Zealand* (2002),[5] the UN Human Rights Committee, observed a violation of the Covenant for States that fail to recognize same sex marriages on equal footing as heterosexual marriages; yet, it did not go as far as to impose to States their general acceptance. The main problem for such a view is that the relevant provision, article 23(2) ICCPR, addresses 'the right of men and women of marriageable age to marry and to found a family shall be recognized', as opposed to 'everyone', or 'every human being' as in the *Yogyakarta principles,*[6] for instance. The case of *Joslin* has been decided ofcourse 12 years ago; it seems however unlikely for the Committee to change its views in the very near future, since, the European Court, whose case-law is generally more developed on the matter, has also held a conservative view in a case against Finland that has been decided by the Grand Chamber of the Court in July this summer,[7] and that in another case decided by in 2012,[8] there was not a single Judge finding it necessary to refer to the Yogyakarta principles in order to establish that rape of a gay person by

[3] See the more recent ILGA report, Lucas Paoli Itaborahy and Jingshu Zhu, *World survey of laws: Criminalisation, protection and recognition of same-sex love* (2014).

[4] Ignacio Saiz, 'Bracketing Sexuality: Human rights and sexual orientation- a decade of development and denial at the United Nations' in: Richard Parker & Peter Aggleton, *Routledge handbook of Sexuality, Health and Rights* (2010) 459, 465.

[5] *Joslin v. New Zealand*, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002).

[6] Yogyakarta Principles on the Application of International Human rights law in relation to Sexual Orientation and Gender Identity (26 March 2007).

[7] *Hämäläinen v. Finland* [GC], application no 37359/09, 16 July 2014.

[8] *Zontul v. Greece,* no 12294/07, 17 April 2012.

State authorities is an act of torture. The Court seems to be staying constant in its views that discrimination is prohibited (as shown in *Vallianatos v Greece*[9] in 2013, that the fact that the discrimination between different-sex and same-sex couples is prohibited under the Convention), not going, however, as far as accepting substantial equality for LGBT couples.

In adoption matters, the more generous interpretation of the 'family' is the one by the Inter-American Court. In 2012, in a case against Chile, that Court warranted the adoption by a lesbian woman.[10] Considering expert statements by authorities in the field (*inter alia* Rob Wintemute and Allison Jernow) that Court noted that 'speculations, assumptions, stereotypes, or generalized considerations regarding the parents' personal characteristics or cultural preferences regarding the family's traditional concepts are not admissible'. [11] These views gain more significance given that in cases of adoption, the European Court had come to opposite conclusions.[12] Only in the case of exercise of parental authority has the European Court held a more open-minded view: when in 2000, a father complained for being excluded from parental responsibility by the domestic Portuguese courts because of his sexual orientation, the Court had then held that 'traditional Portuguese family' to which the national Courts referred to was 'a distinction which is not acceptable under the Convention', and constituted discrimination on the grounds of sexual orientation.[13]

Likewise, 'gender' in international law is still understood as including only mainstream dual, and socially- constructed gender, i.e. male and female individuals –therefore entirely excluding the so-called 'third gender' or any other variant of gender identity. Ten years after the problematic debates on the construction of the International Criminal Court (ICC) statute,[14] there is now a trend of inclusion at a UN level, especially since the CEDAW Committee is pressuring States during the consideration of their periodic reports – asking questions directly on homophobia and stereotyping, and holding them accountable States for violations of the prohibition of discrimination [against women] based on sexual orientation – this could be also due to the increased participation of NGO representatives from a number of organisations such as ILGA, IGLHRC and ARC. Yet, as long as the CEDAW is the main binding instrument related to sexuality and gender, no real equality can be found; as many authors have pointed before me, this is an instrument which, at least at a conceptual level, is 'too narrow a focus for issues of gender equality and balance' and largely based on the presumption that there is a universally accepted 'normal' woman's behaviour –as opposed to, another, 'deviant' behaviour. As a result, despite the work of the CEDAW Committee on combatting gender stereotyping, there is still a lack of an inclusive approach. As it has correctly criticized by Roseman & Miller, the inclusion of SOGI 'in the laundry list of characteristics of women, such as

[9] *Vallianatos & Mylonas v. Greece, C.S. & Others v. Greece,* Applications Nos. 29381/09 & 32684/ 09, 7 November 2013.

[10] *Atala Riffo and Daughters v. Chile,* Case 12.502, Judgment of 24 February 2012.

[11] ibid at 38, para 109.

[12] *Frette v. France*, no 36515/97, 26 February 2002.

[13] *Salgueiro da Silva Mouta v. Portugal,* no. 33290/96, 21 March 2000, paras 34-5.

[14] ICC art 7(3). The signatory States agreed that '[f]or the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society' explicitly also noting that the term "gender" does not indicate any meaning different from the above'.

"race, ethnicity, religion or belief, health, status, age, class, caste' among the grounds of discrimination in particular has indeed rather the opposite effect, entirely disconnecting sex and gender. [15] Most evidently, in a statement adopted in 2014 on sexual and reproductive health and rights, the Committee categorizes between SOGI rights of 'women and men, girls and boys' and wishes to ensure 'that the prohibition of discrimination based on sex and gender and the protection and promotion of human rights are at the centre of any efforts towards sustainable development and social justice'. [16]

3 Towards a more inclusive approach for gender and sexuality

The protection afforded to SOGI rights in international law is still at an extremely fragile state and the political target of Southern States that are still hostile to the very notion of acceptance human sexuality and gender diversity. As an illustration, one may think of the alarming situation within the political bodies of the United Nations. Shortly after the controversial voting of the Council in favour of the SOGI Human Rights Council resolution in 2011,[17] and the High Commissioner's for Human Rights report that followed it the year after,[18] it seems that a new resolution negotiation serves as a battleground within the Council: this time, on the 'traditional values of humankind', a concept elaborated by the Advisory Committee of the Council, on Russia's initiative. Hence, a new draft resolution is now sponsored by Pakistan, Saudi Arabia and the UAE, that reaffirms that 'the family is the natural and fundamental group unit of society', [19] in a way that excludes any reference to either SOGI or LGBT rights, and that leaves open to interpretation the wording 'natural'. Needless to say, that straight away, the United States representatives suggested as an amendment that 'in different cultural, political and social systems, various forms of the family exist', therefore guaranteeing the legitimacy of same sex marriages, at least at apolitical level. As in the case of the defamation of religions debate, and on the controversies that proceeded the 2011 SOGI resolution, [20] the debate is centred between the OIC and the Western states, both pursuing their own political agendas.

It is therefore of a crucial importance to promote an inclusive interpretation of generic terms such as 'man', 'woman', 'spouses', 'gender', and 'family' in international human rights law, as well as to take into consideration human rights instruments such as the Yogyakarta principles, which indeed do promote such approach.

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[15]Mindy Jane Roseman & Alice M. Miller, 'Normalizing sex and its discontents: Establishing Sexual Rights in International Law', (2004) 34 Harvard Journal of Law & Gender 313, 321.

[16]CEDAW, Statement of the Committee on the Elimination of Discrimination against Women on sexual and reproductive health and rights: Beyond 2014 ICPD review (Fifty-seventh session 10 – 28 February 2014).

[17] U.N. Doc. H.R.C. 17/19 (17 June 2011) on 'Human rights, sexual orientation and gender identity'.

[18] Navi Pillay, 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity', 17 November 2011, A/HRC/19/41.

[19] U.N. Doc. A/HRC/22/71 (6 December 2012); A/HRC/AC/9/L.3 (9 August 2012); /HRC/AC/9/1 2; A/HRC/AC/9/1 2aviii.

[20] See Javaid Rehman & Eleni Polymenopoulou, 'Is Green a part of the Rainbow? Sharia, homosexuality and LGBT rights in the Muslim World' (2013) 36 (4) Fordham International Law Journal 1, 39 *et seq*.

Such inclusive approach is found in domestic jurisdictions case law, rather than the regional mechanism' case-law and is an optimistic sign for the adjudication of SOGI rights. An example is the *Naz Foundation* case, discussed in 2009 regarding the legitimacy of the offense of the colonial 'unnatural intercourse' – an offence that is still part of the South Asian penal codes of Pakistan, Bangladesh, and India (the common 377 offense, present in these States' respective penal codes).[21] When the question came to the High Court of Delhi, the latter made a strong argument based on individuals' autonomy and dignity, referred to the principles extensively –principles that talk about *persons,* and *human beings*, rather than *LGBT* individuals. Yet, the UN Nations organs still see LGBT persons separate from the rest of the world: hence, the executive director for UN Women, for instance, in its 2014 statement, proclaims that 'women's rights and women's empowerment will not be complete until LGBTI people are also free', therefore, perpetuating the all-time distinction between the 'normal' men and women on the one hand, and the LGBTI on the other.[22]

Apart from the direct beneficiaries of an inclusive interpretation, such as, for instance transgender, transsexual and intersex individuals, there are also other obvious impacts for the empowerment of SOGI rights –for all. First, the facilitation of the inclusion of a *per se* category of discrimination grounds based on sexual orientation and identity – in the cases that this has not been yet explicitly affirmed. Second, the expansion of the concept of a family in a way to include homosexual couples, as well as adoption or in vitro fertilization processes for homosexual or transgender, or transsexual couples. Third, the inclusion of gender sensitive aspects in all other situations of sexual violence, including in the case of international crimes prosecuted by the ICC, but also, family-related crimes, such as honour crimes, that unfortunately still persist in a large part of the world. Fourth, the facilitation of the process of divorces, especially in culturally sensitive contexts where custody and alimonies are still subject to biological criteria. Fifth, making the debate on LGBT rights more genuine – for instance by interpreting the offenses of 'unnatural' intercourse as in the section 377. Sixth, allowing instruments such as the Yogyakarta principles to replace, progressively, the more traditional ones such as the CEDAW.

4 Conclusion

My point is not to discourage gay rights activism, as such activism is indeed a pressing need for the implementation of the equality principle in respect of all human rights at a global level. My aim is merely to highlight that the way that the so-called 'sexual minorities' have been empowered in the recent years has not been coherent, but rather fragmented, subject to political pressure and not sufficiently challenging, or critical, of the traditional binary perspective of international human rights instruments and organs. This is the case especially considering the interpretation of generic

[21] *Naz Foundation v. Govt. of NCT of Delhi*, 2 July 2009. Unfortunately the Indian Supreme Court did not uphold the Delhi court's findings, see paras 42-45.

[22] U.N. Women, Executive Director Statement on the International Day Against Homophobia and Transphobia, 17 May 2014, available at: http://www.unwomen.org/en/news/stories/2014/5/statement-international-day-against-homophobia-and-transphobia, last accessed 20 September 2014.

concepts related to gender, the biological sexes, and / or the family. In order to make the international human rights law approach a more inclusive one, it should be more appropriate to change the perspective of considering the issues, and develop an all-genders sensitive and non-heteronormative understanding of human rights. There is indeed a clear need for constructive interpretation of international human rights instruments and mechanisms to progress, and embrace the concept of sexual and gender diversity at the highest levels of decision making and international law drafters, rather than pin-pointing to sexual orientation alone as legitimate grounds of discrimination. Perhaps the only way to achieve this is an increased sexual and gender diversity of international and regional bodies.

PART TWO

The European Convention on Human Rights

Activating the Courtroom for Same-Sex Family Rights
"Windows of Opportunity" for Strategic Litigation before the European Court of Human Rights (ECtHR)[1]

Marion Guerrero

Abstract

In the past few decades, the European Court of Human Rights (ECtHR) has decided a high number of cases dealing with Lesbian, Gay, Bi and Transsexual (LGBT) rights. Its judgments importantly shape the European Convention of Human Rights (ECHR) and, thus, the legal obligations of the Member States to the Convention. Therefore, a benevolent decision by the ECtHR can be an important victory in the struggle for LGBT rights. Decisions by the ECtHR have the character of *de facto* policies. This fact opens up promising opportunities for advocates; by means of litigation, they can engage in the judicial decision making process.

This paper will shortly introduce the topic of LGBT rights litigation before the ECtHR (1), discuss the Court as a policy maker (2) and the purpose of strategic litigation (3), and examine the opportunities for LGBT rights advocates within the Court's jurisprudence (4, 5). By proposing an activist-centred reading of the case law, it will discern different "windows of opportunity" for advocacy within the ECtHR's same-sex family case law (5) and suggests that strategic litigation can be an interesting route towards more equality (6).

Keywords

European Court of Human Rights, Sexual Orientation, Strategic Litigation, LGBT, Cause Lawyering, Human Rights, Family, Jurisprudence

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"The beauty of standing up for your rights is others will see you standing and stand up as well." (Cassandra Duffy)

[1] This paper is based on a part of my dissertation project at the European University Institute (PhD expected: 2015).

1 Introduction

In the past two decades, the European Court of Human Rights (ECtHR) has decided a plethora of cases dealing, in one way or another, with Lesbian, Bi, Gay and Transgender (LGBT) rights. Within Europe, the ECtHR plays a significant role in shaping policies and influencing Member States' political landscapes by its judgments.[2] It possesses judicial review powers, meaning that it can examine (national) legislation against a higher-order legal text of superior values (the European Convention of Human Rights or ECHR) and call on Member States to set aside legislation which is not, according to the Court's assessment, in conformity with this text.[3] Even though the ECtHR knows no formal obligation to adhere to precedent (such as a doctrine of *stare decisis*), there is a broad consensus among most scholars that the Court usually aims to follow its previous case-law in the name of legal certainty and transparency, or otherwise present convincing reasons for not doing so.[4] This means that its rulings can establish principles which transcend one particular case, thus shaping the legal order. In other words, ECtHR decisions are not only relevant for the particular individual who is directly involved in a specific trial, but actually have the potential to affect a much wider range of people who are in similar situations. Hence, judgments have a *de facto* political impact beyond the specific case which is to be decided.[5]

[2] See, e.g., Laurence R. Helfer and Erik Voeten, 'Do European Court of Human Rights Judgements Promote Legal and Policy Change?' (preliminary draft, 2011) 2, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1850526 (accessed 27 February 2012).

[3] In its judgments, the ECtHR has the power to review national legislation against the ECHR (European Convention of Human Rights). In case that the ECtHR finds that national laws violate the ECHR, the respective state is obliged to change these laws.

[4] In 2000, Luzius Wildhaber, then president of the ECtHR, wrote: "… I would suggest that precedents are followed regularly, but not invariably; that 'for the sake of attaining uniformity, consistency and certainty', precedents should normally be observed, where 'they are not plainly unreasonable and inconvenient' …" Luzius Wildhaber,'Precedent in the European Court of Human Rights' in Paul Mahoney and others (eds), *Protecting Human Rights: The European Perspective* (2nd ed, Carl Heymanns Verlag 2000) 1529. See also: In *Christine Goodwin v UK*, the Court stated: "While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases … However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved … It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement …" *Christine Goodwin v UK* (App no 28957/95) ECHR 11 July 2002, para 74.
This shows that although the Court observes that there is, *de facto*, an adherence to precedent, it will depart from it for the sake of effective human rights protection. However, this also suggests that the Court certainly cannot ignore its previous case law at random: there need to be convincing reasons. This structured and moderate flexibility might be one of the corner stones for advocates to – on one hand – rely on positive rulings, and on the other hand present convincing reasons for the Court to reconsider antiquated notions.
For a comprehensive review of the Court's approach regarding overruling its own case-law, see: Alastair Mowbray, 'An Examination of the European Court of Human Rights' Approach to Over-Ruling Its Previous Case Law' (2009) 9 HRLR 179.

[5] This is explicitly endorsed by the ECtHR: "The Court has repeatedly stated that its 'judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties' … Although the primary purpose of the Convention system is to provide individual relief,

This opens up interesting avenues for LGBT rights activists; after all, a precedent by the ECtHR creates binding obligations for a high number of states. Since a victory might thus ultimately shape legal orders, a victory before this Court provides activists with remarkable leverage.

This paper aims to point to the possibilities that this phenomenon holds for civil society groups – specifically, advocates of LGBT rights. It aims to re-tell excerpts of the Court's LGBT rights case law as an activist "work in progress" by analysing the evolution of same-sex rights before the ECtHR through the lenses of activist opportunities. This approach permits to explore the potential of law and litigation as a tool of emancipation.

To this end, I will discern a few instances within the Court's reasoning which create opportunities for activist intervention; for example, when the Court uses vague or ambiguous terms, displays inconsistency, hesitation or disagreement or invites expert opinions. This makes visible avenues which advocacy groups can use to participate in judicial decision-making by advancing supportive or counter-arguments, or by introducing novel approaches. Excerpts from the ECtHR's same-sex family case-law should illuminate these points: Whereas the ECtHR started from a rather traditional conception which expressly excluded same-sex couples from protection of family life, it gradually changed its view by both broadening the understanding of "family" and simultaneously narrowing the margin of appreciation afforded to States in this respect.[6] Hence, it created a concept which was at the same time more inclusive in terms of same-sex rights and more binding on Member States. In my examples, I will point to windows of opportunity for activist interventions.

Ultimately, the sustainability of change through the courtrooms is difficult to assess; engaging in strategic litigation carries a number of potentially problematic implications, such as the risk of fighting symptoms and not systemic roots of inequality and ultimately, advancing assimilative tendencies instead of triggering more comprehensive change.[7] It is clear that litigation strategies can just be one complementary strategy in a more comprehensive social change project. However, this paper argues that litigation is one method (albeit not the only one) which same-sex advocates can choose to advance their agendas.

2 The Court as Policy Maker – Theoretical Debates

Strategic litigation[8] rests on the assumption that courts are political spaces. It recognizes that judges are not merely executing black letter law, but actually engage with law and legal doctrine in

its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States." *Karner v Austria* (App no 40016/98) ECHR 24 July 2003, para 26.

[6] The ECtHR ultimately accepted that same-sex families should be awarded protection as families under Art 8 ECHR in *Schalk and Kopf v Austria* (App no 30141/04) ECHR 24 June 2010.

[7] William N. Eskridge Jr, 'Channeling Identity-Based Social Movements and Public Law' (2001-2002) 150 U. Pa. L. Rev. 419, 459-467.

[8] Also sometimes referred to as impact litigation or cause lawyering. For an overview of respective terminology and literature, see, e.g., Jeff Goodwin and James M. Jasper, *The Social Movements Reader: Cases and Concepts* (Wiley-Blackwell 2009); Austin Sarat and Stuart Scheingold (eds), *Cause Lawyers and Social Movements* (Stanford University Press 2006).

a creative way. David Robertson compares the activity of judges to that of appliers of political theory.[9] In other words, judges, when looking for an adequate interpretation of the law, are bound by a complicated apparatus of doctrine, precedent and legal methodology,[10] within which they navigate when looking for direction and which they respect when making decisions. The parameters by which they operationalize this body of legal thought are legal reasoning and argumentation. As Robertson puts it: "Politicians negotiate; judges argue."[11]

The fact that (constitutional) judges,[12] when judging, exert political power, is mostly accepted, even if grudgingly, as true.[13] The debate of whether or not this is legitimate has been raging for decades.[14] Critics tend to point to democratic deficits of judge-made policies and the elitist nature of court-based approaches (among other things),[15] whereas supporters emphasise the upsides of the courts' non-majoritarian activity: After all, minority protection and the efficient defence of constitutional principles and values sometimes require to rule against populist opinion, a task that might be better carried out by the courts than by the legislature, which is more prone to succumb to everyday politics.[16]

There are many things to be said to endorse either one of these positions; however, it remains a fact that high courts' quasi-legislative activities have increased considerably over the past decades, also (or especially) in Europe. Therefore, the normative assessment of this development, as

[9] "[I] take judicial argument seriously as one of the major, if not the sole, determinant of decisions courts make." David Robertson, *The Judge as Political Theorist. Contemporary Constitutional Review* (Princeton University Press 2010), 21.

[10] *Id.*, 282.

[11] *Id.*, 36; see also the notion of the "thoughtful judge," as advanced by Aharon Barak in his seminal work *The Judge in a Democracy* (Princeton University Press 2006).

[12] I use the term "constitutional" here in a wide sense, to refer to the activity of high courts which have the power of questioning certain legislative acts (e.g., by judicial review), or which are often asked to assess, interpret and balance values. In my opinion, this applies to the ECtHR.

[13] David Robertson, *The Judge as Political Theorist. Contemporary Constitutional Review* (Princeton University Press 2010) 16; see also (regarding the role of the judge as adapting law to social reality, among other things): Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006), 7-9.

[14] For an overview of the most relevant positions, see: Richard Bellamy (ed), *Constitutionalism and Democracy* (Ashgate/Dartmouth 2006). See also (specifically connected to the European debate): Alec Stone Sweet, 'The European Court of Justice', in in Paul Craig and Gráinne de Burca (eds), *The Evolution of EU Law* (2nd edn, Oxford University Press 2011); Alec Stone Sweet, 'The European Court of Justice and the judicicialization of EU governance' (2010) 5 Living Reviews in European Governance 2; Mitchel Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* (Oxford University Press 2009);
Helfer and Voeten, for instance, look particularly at the ECtHR in this respect: Laurence R. Helfer and Erik Voeten, 'Do European Court of Human Rights Judgements Promote Legal and Policy Change?' (2011) 10 preliminary draft, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1850526 (last visited: 27 February 2012).

[15] Ran Hirschl, for instance, contends that the origins of judicial empowerment are connected to hegemonic processes, and that thus, political power-holders are the ones that most likely will benefit from expansive juridical powers. Ran Hirschl, *Towards a Juristocracy. The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004), 39; Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale L.J. 1346, 1369, 1395; John Hart Ely, 'Toward a Representation-Reinforcing Mode of Judicial Review' (1978), 37 Md. L. Rev. 451, 485; Richard Bellamy, *Political Constitutionalism* (Cambridge University Press 2007), 32; John Hart Ely, 'Toward a Representation-Reinforcing Mode of Judicial Review' (1978), 37 Md. L. Rev. 54, 451, 485-487.

[16] Ronald Dworkin is a famous defender of the view that certain rights have to trump majority rule; see, e.g., Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977); as is Rawls, e.g., John Rawls, 'The Idea of Public Reason Revisited' (1997) 64 U. Chi. L. Rev 765.

interesting and important as it is, might not be the most relevant aspect to consider, since it is not likely that this development will be reversed anytime soon.

Given this situation, it is rather vital to assess the role of civil society in this process: If courts can actually be considered spaces of political decision-making, then the question arises of whether and how civil society can participate.

3 Activist Interventions: Introducing Strategic Litigation

Access to justice is not egalitarian. Since judicial proceedings are costly and complicated, court proceedings tend to favour those who are already advantaged in terms of education, resources and hegemonic power.[17] Courts, thus, appear likely to perpetuate existing power-structures instead of challenging them.[18] Audrey Lorde has famously postulated that "the master's tools will never dismantle the master's house,"[19] fundamentally putting in question the mere endeavour of engaging hegemonic institutions in the achievement of social justice. This assessment prima facie seems to confirm concerns about the democratic legitimacy of an extensive role of the courts, since the socially privileged with access to resources tend to benefit more from the judicial system than others. However, it also poses the question of how to proceed with even greater urgency: What can the ones on the wrong side of the power scale do not to be left out of influential judicial discourses?

A famous reply to this dilemma comes from the "lawyering for social change" movement which originated in the USA. In his ground-breaking article Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change, Marc Galanter analyzed the opportunities for civil society to use strategic litigation in their struggle for social reform.[20] He identified a core problem which affects equality in litigation and frustrates the use of the social reform potential of law: certain "repeat players" in the legal system have a considerable strategic advantage over people who only occasionally appear before courts.[21] "Repeat players" – such as transnational corporations with a legal department or access to high-profile law firms – "are engaged in many similar litigations over time,"[22] usually disposing of extensive resources, legal expertise and ample practical experience. Therefore, they are in a position to intentionally use litigation not only to succeed in a particular case, but to pursue long-term goals, as well; for instance, by aiming for decisions establishing a legal precedent. Galanter's main argument was that the judicial system was not fairly balanced, being used disproportionally by one particular segment of society. He suggested that civil society should organize in agencies which could also afford to pursue long-term strategies by prioritizing general

[17] Ran Hirschl, *Towards a Juristocracy. The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004), 39.

[18] Richard Bellamy, *Political Constitutionalism* (Cambridge University Press 2007), 54. For a collection of essays on this issue, see, e.g., David Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon Books 1982).

[19] Audre Lorde, *Sister Outsider* (Crossing Press 1984), 112.

[20] Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law and Society Review 95.

[21] *Id.* at 9.

[22] *Id.*

interests above the immediate interests of a single litigant.[23] Galanter did not, however, suggest that these organizations should step in the place of litigants (as would be the case with class-actions). Rather, he proposed that they should offer legal counsel for selected cases, carefully chosen based on their potential to establish precedents.

Advocates of strategic social reform litigation view their approach as a deeply democratic endeavour.[24] They underline the participatory character of "lawyering for social change," claiming it would open a gateway for civil society to directly take part in a form of policy making which had usually been reserved for certain elites. Apart from establishing a more balanced access to the judicial system, "lawyering for social change" might be an especially promising route for minority groups with scarce hopes to harness politicians to their agendas, be it due to a lack of support in the general population or because they do not dispose of a powerful political lobby.[25]

However, some scholars point out that using the courts to achieve societal change might backfire, especially if the population is not on board; legislatures might react with restrictive legislation, producing a backlash which would compromise social justice projects.[26] A recent example is the fight for marriage equality in California: After an initial victory for LGBT advocates before the California Supreme Court which allowed same-sex marriage,[27] California enshrined the definition of marriage as between a man and a woman in its state constitution, backed by strong popular support.[28] This, however, was not the end of the story: in a follow-up decision, the (federal) U.S. District Court for the Northern District of California has dubbed this provision unconstitutional,[29] which was affirmed by the U.S. Court of Appeals for the 9th District.[30] The issue eventually reached the U.S. Supreme Court, which did not disagree with the federal courts, but evaded to discuss marriage equality in a principled way.[31]

Therefore, the dynamics between courts and legislatures might be more aptly described as a kind of ping pong match,[32] in which a hit by one side already mobilizes the opponent. In this light, it is questionable whether the mere possibility of negative results justifies the neglect of the courts as a possible venue for societal intervention. Social progress usually incites reactionary responses[33] –

[23] *Id.* at 44.

[24] *Id.* at 95.

[25] Nan Hunter, 'Lawyering for Social Justice' (1997) 72 N.Y.U. L. Rev. 1009, 1017; See also: Bruce A. Ackerman, 'Beyond Carolene Products' (1985) 98 Harv. L Rev. 713, 732 (describing how some minority groups are so stigmatized or overlooked that they are unlikely to generate the necessary political sympathy for pushing for their claims on the legislative level).

[26] A powerful account regarding the backlash thesis comes from Gerald Rosenberg: Gerald N. Rosenberg, *The Hollow Hope. Can Courts Bring About Social Change?* (2d ed., University of Chicago Press 2008).

[27] *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008) (USA).

[28] Proposition 8 became law in 2008. See CAL. CONST. art. I, § 7.5, invalidated by *Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009) (USA).

[29] *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (USA).

[30] *Perry v. Brown*, 671 F. 3d 1052 (9th Cir. 2012) (USA).

[31] *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013) (USA).

[32] This term was used by Elisabeth Holzleithner (2010) 'Emanzipatorisches Recht: Über Chancen und Grenzen rechtlicher Geschlechtergleichstellung' 1 juridikum 2010 6,8.

[33] William N. Eskridge Jr, 'Channeling Identity-Based Social Movements and Public Law' (2001-2002) 150 U. Pa. L. Rev. 419, 471.

but this is not necessarily a sole feature of judicially induced change.[34] After all, there will always be parts of the population who oppose progress, and every social strategy is vulnerable to contingencies. Furthermore, Douglas NeJaime pointed out that even a loss in court can produce positive results for same-sex movements, for instance, by inciting activism.[35]

4 The Struggle for LGBT Rights before the European Court of Human Rights

In recent decades, the European Court of Human Rights (ECtHR) has been dealing with a high number of issues which are relevant in the struggle for LGBT rights; among them family related rights such as marriage or parental rights;[36] a wide range of anti-discrimination cases, often connected to family status (partnership) and benefits flowing from that status;[37] freedom of expression;[38] freedom of assembly and association;[39] hate speech, violence and ill treatment;[40] criminalization of sexual orientation;[41] and lately, matters relating to asylum[42] and the intersection of religious freedom and sexual orientation.[43]

However, the ECtHR has dealt most comprehensively with same-sex family rights. Consequently, Article 8 of the European Convention of Human Rights (ECHR) has played an important role in this context. In its first paragraph, the Article states that "[e]veryone has the right

[34] The infamous Lochner era in US legal history is an example of the opposite development: After the legislature introduced a number of progressive laws concerning health care and workers' protection at the turn of the 19th to the 20th century, the Supreme Court struck down these provisions in a number of cases. Most famously: *Lochner v. New York* 198 U.S. 45 (1905) (USA). For a comprehensive overview of this period, see, e.g.: David E. Bernstein, 'Lochner v. New York: A Cenntenial Retrospective' (2005) 85 Washington University Law Quarterly 1469. It might even be argued that the European Court of Justice's Viking and Laval decisions are also examples of a High Court striking down extensive workers' rights protections. Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] IRLR 160; Case C-483/05 *International Transport Workers Federation v Viking Line ABP* [2008] IRLR 143.
In any case, it is evident that the framing of courts as "overly progressive" and of legislatures as "responders to reactionary populist sentiments" is an oversimplification and, in many cases, plainly wrong.

[35] Douglas NeJaime, 'Winning Through Losing' (2011) 96 Iowa L. Rev. 941.

[36] *Fretté v France* (App no 36515/97) ECHR 26 February 2002; *E.B. v France* (App no 43546/02) ECHR 22 January 2008; *Schalk and Kopf v Austria* (App no 30141/04) ECHR 24 June 2010; *Gas and Dubois v France* (App no 25951/07) ECHR 15 March 2012; *X and Others v Austria* (App no 19010/07) ECHR 19 February 2013; *Vallianatos and Others v Greece* (App nos 29381 and 32684) ECHR, 7 November 2013; and others.

[37] *Kozak v Poland* (App no 13102/02) ECHR 2 March 2010; P.B. and J.S. v Austria, App no 18984/02 (ECtHR, 22 July 2010); *Karner v Austria* (App no 40016/98) ECHR 24 July 2003; and others.

[38] *Vejdeland and Others v Sweden* (App no 1813/07) ECHR 9 February 2012; *Bayev v Russia* (App no 67667/09) ECHR (application pending); *Kiselev v Russia* (App no 44092/12) ECHR (application pending); *Alekseyev v Russia*, App no 56717/12 ECHR (application pending); and others.

[39] *Baczkowski and Others v Poland* (App no 1543/06) ECHR, 3 May 2007; and others.

[40] *X. v Turkey* (App no 24626/09) ECHR, 9 October 2012); *Aghdgomelashvili and Japaridze v Georgia* (App no 7224/11) ECHR (application pending); and others.

[41] *Dudgeon v UK* (App no 7525/76) ECHR 22 October 1981; and others.

[42] *I.I.N. v the Netherlands* (App no 2035/04) ECHR 9 December 2004; *M.K.N. v Sweden* (App no 72413/10) ECHR 27 June 2013*; M.E. v Sweden* (App no 71398/12) ECHR (application pending); and others.

[43] *Eweida and Others v the United Kingdom* (App nos 48420/10, 59842/10, 51671/10 and 36516/10) ECHR 15 January 2013.

to respect for his private and family life …",[44] and that an interference in this right from a public authority is only possible if it is "in accordance with the law and … necessary in a democratic society …"[45] The Article goes on to list a number of reasons which might justify such interference.[46] Although the Court has found already in the 1980s that same-sex couples' private life fell under the scope of Article 8,[47] it took several more decades for the Court to decisively state that same-sex couples could also enjoy the protection of their family life.[48]

Article 14 is also often evoked in the context of LGBT rights.[49] It prohibits discrimination (sexual orientation discrimination was expressly included by the Court in 1981)[50] and functions as an accessory right, meaning that it can only be claimed in connection with other Convention rights.

Lastly, Article 12 states the right of men and women to marry and found a family.[51] Even though LGBT applicants have sometimes tried to claim this right, they have so far not been very successful.[52]

5 Windows of Opportunity within the ECtHR's Case Law

There are a number of different ways to analyse the potential of strategic LGBT rights litigation before the ECtHR. For instance, one could attempt to delineate the development of particular cases from the outset (the national level) to the level of the ECtHR, and then describe (in an empirical and descriptive manner) the impact of respective decisions on national legal orders.[53] Another way to analyse relevant adjudication could be to trace and evaluate instances of present and past LGBT group participation. However, this paper is particularly concerned with the examination of the *legal possibilities* on the level of judicial argumentation. Rather than assessing whether advocacy has *actually* taken place, or to what extent judges were *de facto* influenced by advocacy groups, I want to outline opportunities provided within the reasoning of the Court itself.

In this section, I will present examples from the same-sex family case-law of the European

[44] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 8.

[45] *Id.* par 2.

[46] It explicitly mentions that an interference is possible if it is needed "in the interests of national security, public safety or the economic well/being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." *Id.*

[47] Most famously in the Dudgeon case: *Dudgeon v UK* (App no 7525/76) ECHR 22 October 1981.

[48] *Schalk and Kopf v Austria* (App no 30141/04) ECHR 24 June 2010.

[49] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 14.

[50] *Salgueiro Silva da Mouta v Portugal* (App no 33290/96) ECHR 21 December 1999.

[51] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 12.

[52] One of the latest cases to bring up Art 12 in the context of LGBT rights was *Schalk and Kopf v Austria*. Whereas the Court ultimately denied that same-sex couples could rely on Art 12 in order to marry, its decision did not close the door completely. It reiterated that the Convention was a living instrument which had to adapt to changing times, and that the text of Art 12 did not, *per se*, prevent a reading which also granted same-sex couples Art 12 rights.

[53] This has been done, for instance, by Keller and Stone Sweet. Alec Stone Sweet and Helen Keller, *Assessing the Impact of the ECHR on National Legal Systems* (Oxford University Press 2008).

Court of Human Rights. Within these, I attempt to discern and evaluate certain aspects of the ECtHR's adjudication which provide especially promising ground for LGBT rights advocates to make their case. The emerging patterns should demonstrate how the Court's reasoning has opened up "windows of opportunity" for same-sex rights litigation, providing a more complex understanding of the genesis of respective successes and set-backs, which in turn can transform into prospects for activist advocacy. Of course, these windows of opportunity cannot be understood as fixed entities; the Court's case law cannot be neatly categorized. There are frequent overlaps between the different windows, and some instances are more clear-cut and easily identifiable than others. Therefore, this framework rather wants to provide an analysis tool for the Court's case-law, a kind of reading guide from an activist viewpoint.

5.1 Strategic Intervention – the Role of Advocates and Activists

Advocates have the possibility to engage with the Court's decision making process by advancing progressive interpretations: this interpretative activity can be used in a strategic way.

Reading a text means interpreting it.[54] This phenomenon has not only been highlighted by legal debates about constitutional interpretation techniques,[55] but it has also been extensively covered by philosophical movements like language philosophy, linguistics, hermeneutics or philosophy of science.[56] There is no one right way to understand a text, since reading it already is interpreting.[57] These processes cannot be separated. Hence, there is no pre-interpretative meaning of a text;[58] and usually, a text enables a number of different interpretations.[59]

When talking about a legal concept, this means that interpretation shapes law.[60] The ECtHR's practice of understanding the ECHR as a "living instrument" and constructing its Articles in light of present day realities ("evolutive approach")[61] underlines this notion.

For same-sex advocates, this means that contributing to the interpretation of a term is an active way of participating in judicial decision making. The more successful they are in suggesting a

[54] Aharon Barak writes: "There is no pre-exegetic understanding." Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005), 9.

[55] The literature on constitutional interpretation methods is over-abundant; any constitutional law text book will have an overview of the most relevant current trends. Therefore, this paper does not need to elaborate on this issue.

[56] See, e.g., Hans-Georg Gadamer, *Truth and Method* (2nd rev. edition. trans. J. Weinsheimer and D.G.Marshall, New York: Crossroad 1989).

[57] In the context of the ECHR, Greer makes this point when he observes that the Convention demands the exercise of discretion, since the text itself requires interpretation in order to be applicable: "…the general and abstract language of the text, and the fact that the overall purpose and meaning of the Convention require interpretation, make the exercise of discretion by both national authorities and the Court inevitable." Steven Greer*, The margin of appreciation: interpretation and discretion under the European convention on Human Rights* (CoE Human Rights files No. 17 2000) 14.

[58] Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005) 9.

[59] *Id.*, 9; 19-21.

[60] Aulis Aarnio, *Reason and Authority. A Treatise on the Dynamic Paradigm of Legal Dogmatics* (Dartmouth 1997) 123-125.

[61] First in *Tyrer v UK* (App no 5856/72) ECHR 25 April 1978, para 183; see also, e.g.: *Schalk and Kopf v Austria* (App no 30141/04) ECHR 24 June 2010, para 57.

certain interpretation, the greater influence they exert.[62]

5.1.1 Vague and Ambiguous Terms

This kind of "interpretative intervention" will be more successful when applied to some concepts than to others. Certain terms such as "family," "discrimination," or "societal consensus" (just to name a few) are regularly employed by the Court; however, their definition is not clear-cut, but malleable. Such ambiguous or vague terms permit discussion, since they allow for a multitude of possible interpretations. Due to their meaning-shifting nature, the Court has greater leeway for their reinterpretation than for well-established, largely uncontested notions. The employment of such broad terms thus can provide gateways for the participation of advocacy groups; by arguing for favourable interpretations, they can contribute to the shaping and categorizing of these very concepts.

This especially holds true for concepts such as "marriage" or "family." These terms have acquired legal significance (also based on their recurring usage in ECtHR adjudication), but are nonetheless rooted in and draw their meaning from lay term usage. These two meanings tend to influence each other: Largely imprecisely defined and ever-changing ideas of "traditional" constructions figure prominently into the Court's respective case-law;[63] on the other hand, a change in the "civilian" understanding of a term can affect its usage by the Court and thus, amend its legal significance.[64] Due to their flexible character, these terms present especially promising potential for interpretative intervention by LGBT advocates.[65]

Since the Court has repeatedly stated that the ECHR is a living instrument which needs to be defined in present day conditions, the concepts of "societal consensus" or "common ground"[66] are also highly relevant arguments in the ECtHR's reasoning. There is no coherent account on what societal views actually consist of; sometimes, the Court refers to the views of societies within

[62] Nan Hunter writes: „In my view, however, the single most common and powerful activity within social change lawyering has become the use of litigation to secure enforcement and expansive interpretation of statutes." Nan Hunter, 'Lawyering for Social Justice' (1997) 72 N.Y.U. L. Rev. 1009, 1012.

[63] For instance, the ECtHR has, until recently, mostly accepted the "protection of the traditional family" rationale as an excuse for differential treatment of same-sex couples. More on this below.

[64] And *vice versa*.

[65] To provide an examples: In the area of ECtHR jurisprudence, such is the case with "family" (as mentioned above) or "*de facto* family" and – connected to it – the rationale of the "protection of the traditional family" which is often invoked by governments to justify difference in treatment of same-sex couples. Family is a highly contested, complex concept; it is both used as a lay and as a legal term, and both usages are synergistically connected. Thus, the legal significance of "family" is heavily influenced by (often unconscious) assumptions and societal notions regarding the societal understanding of "family." Ruthann Robson, 'Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory' (1993-1994) 26 Conn. L. Rev. 1377, 1385.
Other examples of concepts which provide ample room for interpretation are "societal consensus" or "social attitudes;" the ECtHR repeatedly employs them in its reasoning (especially in the context of gay rights, see discussion below). These terms require contextualization and an additional process of knowledge generation for becoming viable: in order to do normative work, they call for an inquiry into the particular societal situation at a given point. This awards them with considerable flexibility.

[66] As it did, e.g., in its decision *Schalk and Kopf v Austria* (App no 30141/04) ECHR 24 June 2010.

Member States,[67] sometimes it looks at the legislations of States to find commonalities,[68] sometimes it considers scientific evidence and statistical reports,[69] and sometimes it gives importance to a form of "qualified" societal consensus, asking which views can legitimately be upheld in a "democratic society" characterized by "broadmindedness" and "tolerance."[70] Usually, the Court refers to "social reality" in order to determine the appropriate margin of appreciation which it wishes to afford to a State. The Court has not yet developed a concise framework of when and in which way to examine social realities, and to which extent they should matter.

An example for the above is the ECtHR's development of the term "family" in the context of same-sex relationships. Early cases regarding the question of whether Art 8 protected the rights of same-sex couples were linked to immigration issues (e.g., dealing with the question whether a same-sex partnership provided an entitlement for a residence permit).[71] The European Commission of Human Rights (and later the ECtHR) conceded that although a same-sex relationship could not classify as family life according to Art 8, it could enjoy protection under the scope of private life.[72] In the 1980s and 90s, the Court applied the same rationale to a few other cases involving same-sex couples.[73] The late 1990s and early 2000s saw some advances: for instance, in 1999, the Court explicitly included discrimination based on sexual orientation in the scope of Art 14.[74] Three years later, it slowly started to question the wide margin of appreciation that it had assumed until then.[75] However, it felt not yet comfortable to draw a parallel to cases such as *Dudgeon*[76] (a case dealing with the criminalization of sexual acts between two men), which required weighty reasons for a justification of discrimination based on sexual orientation. Instead, it accepted that a legitimate aim and proportionate measures were all a state had to show when disadvantaging gay people in matters concerning interpersonal relationships (in non-criminal contexts).[77]

In 2003, the Court finally narrowed the margin of appreciation afforded to states in matters of sexual orientation discrimination in the Karner case, by stating that "very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively

[67] *Dudgeon v UK* (App no 7525/76) ECHR 22 October 1981, para 60; *Schalk and Kopf v Austria* (App no 30141/04) ECHR 24 June 2010, para 93.

[68] *Gas and Dubois v France* (App no 25951/07) ECHR 15 March 2012, para 66.

[69] *E.g., Christine Goodwin v UK* (App no 28957/95) ECHR 11 July 2002, paras 81-83; *X and Others v Austria* (App no 19010/07) ECHR 19 February 2013, paras 55-56; etc.

[70] *Dudgeon v UK* (App no 7525/76) ECHR 22 October 1981, para 53. Throughout this paper, I will refer to "societal views" as an umbrella term.

[71] *X and Y v UK* (App no 9369/81) (1983) 32 DR 220; *W.J. and D.P. v UK* (App no 12513/86) (1987) unpublished (ECommHR); *C. and L.M. v UK* (App no 14753/89) (1989) unpublished (EComHR).

[72] Here, the Commission relied heavily on the Dudgeon case – *Dudgeon v UK* (App no 7525/76) ECHR 22 October 1981.

[73] The notion that same-sex couples enjoyed the protection of private life, but not family life, was upheld in several cases dealing with a number of different issues, such as tenancy rights or survivor's pension. See, e.g., Simpson v UK, App no 11716/85 (Commission Decision, 14 May 1986); *Kerkhoven and Others v the Netherlands* (App no 15666/89) (1992) unpublished (EComHR).

[74] *Salgueiro Silva da Mouta v Portugal* (App no 33290/96) ECHR 21 December 1999.

[75] *Fretté v France* (App no 36515/97) ECHR 26 February 2002, para 40.

[76] *Dudgeon v UK* (App no 7525/76) ECHR 22 October 1981.

[77] *Fretté v France* (App no 36515/97) ECHR 26 February 2002, para 40.

on the ground of sex as compatible with the Convention … ."[78] It also started to question whether a Member State could legitimately claim that it needed to distinguish between homosexual and heterosexual people in order to protect the "traditional family":

> "The aim of protecting the family in the traditional sense is rather abstract and broad variety of concrete measures may be used to implement it. In cases in which margin of appreciation afforded to States is narrow, as is the position where there is difference in treatment based on sex or sexual orientation, the principle of does not merely require that the measure chosen is in principle suited for realising aim sought. It must also be shown that it was necessary in order to achieve that aim exclude certain categories of people – in this instance persons living in a homosexual relationship …"[79]

2008 marked an upward trend for gay families in Strasbourg. In *E.B. v France*,[80] the Court examined the case of a lesbian woman who wanted to adopt a child; her petition was refused by the authorities based on the claim that the child would lack a father figure in its life, and that thus, the adoption would not be in the child's best interest. The ECtHR did not accept the validity of the "lack of paternal referent" argument, mostly due to the fact that French legislation does allow for adoption by single parents.[81] After all, if a single woman adopted a child, the lack of a father figure would be just as blatant.

It is noteworthy that the argument that homosexuals might not be suitable to raise children (which basically rests on the "traditional family" rationale, since it assumes that a traditional family provides the best environment for a child) completely fell under the table in this case; the French government did not even try to rely on it, as it still had done (successfully) six years earlier in a similarly situated case, *Fretté v France*.[82] Instead, it chose the strategy of denying that homosexuality had played any role at all for the negative outcome of the applicant's adoption petition. However, the government did refer to the lifestyle of the applicant, and implied that her relationship (with another woman) would provide an unstable environment for a child, since it was not clear whether E.B.'s partner would stick around or not (even though the two women had lived in a durable relationship for many years).[83] Notwithstanding the fact that France refrained from expressly mentioning "traditional families," it seems likely that the core of the argument basically carried the same conviction as in *Fretté*: the traditional family is the best place for a child. This line of reasoning was rejected by the Court; it found that there had been a violation of Art 14 taken in conjunction with Art 8. Hence, *E.B.* implicitly overruled *Fretté.*[84]

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[78] *Karner v Austria* (App no 40016/98) ECHR 24 July 2003, para 37.
[79] *Id.*
[80] *E.B. v France* (App no 43546/02) ECHR 22 January 2008.
[81] *Id.*, paras 86, 87, 94.
[82] *Fretté v France* (App no 36515/97) ECHR 26 February 2002, para 36.
[83] *E.B. v France* (App no 43546/02) ECHR 22 January 2008, para 39.
[84] Robert Wintemute, 'Sexual Orientation and Gender Identity Discrimination: The Case Law of the European Court of Human Rights and the European Court of Justice' (2008), Summary prepared for ILGA-Europe to submit to Mr. Thomas Hammarberg, Commissioner for Human Rights, Council of Europe, 5.

Four years later, the Court expressly included same-sex constellations in the protection of "family" under Art 8. In *Schalk and Kopf v Austria*,[85] the ECtHR recognized for the first time that homosexual partners can form a *de facto* family. In order to support its decision, the Court cited a changed "evolution of social attitudes towards same-sex couples."[86] This assessment then led the Court to its most important finding:

> "In view of this evolution the Court considers it artificial to maintain the view that, in that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for life' for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would. … The Court therefore concludes that the facts of the present case fall within the notion of 'private life' as well as 'family life' within the meaning of Article 8…"[87]

Schalk and Kopf was a definite step towards the recognition of lesbian and gay families. However, the Court did not go so far as to present any kind of comprehensive theory of what a "family" actually is, under which conditions it is created, or which features it displays; it merely pointed out that societal views had changed. Thus, stating that gay couples can also enjoy "family life" might remain a somewhat vacant declaration which could or could not have factual consequences. The joint dissent by Judges Rozakis, Spielmann and Jebens addresses this shortfall:

> "Having decided … that 'the relationship of the applicants falls within the notion of 'family life', the Court should have drawn inferences from this finding. However … the Court at the same time endorses the legal vacuum at stake, without imposing on the respondent State any positive obligation to provide a satisfactory framework, offering the applicants, at least to a certain extent, the protection any family should enjoy."[88]

Indeed, as later cases have shown,[89] the Court has been rather inconsistent in protecting same-sex families.[90] Nonetheless, the mere fact that same-sex families were recognized by the Court in 2010 has opened up numerous roads for argumentation, giving advocates the chance to

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[85] *Schalk and Kopf v Austria* (App no 30141/04) ECHR 24 June 2010.

[86] *Id.,* para 93.

[87] *Id.,* paras 94, 95. However, given that Austria had in the meantime introduced the Registered Partnership Act with provided certain rights to stable homosexual relationships (with regard to, e.g., tenancy, inheritance and other associated rights), the Court ultimately saw no violation of Art 8 in conjunction with Art 14.
The applicants had also claimed a violation of Art 12 (right to marry). Whereas the Court ultimately denied their claim, it did state that Art 12 would, potentially, allow for a construction which would include same-sex couples in their scope, since it had to be interpreted in present day conditions. It held that – as the applicants argued, as well – societal views were important when interpreting the Convention. This time, it examined the existence of a "European consensus" regarding the permission of same-sex marriage – and came to the conclusion that a minority of States allowed it at the present time. Thus, it expressed doubts whether the societal consensus had changed enough as to demand a reading of the Article which would include gay couples. *Id*., paras 57-61.

[88] Joint dissent by Judges Rozakis, Spielmann and Jebens, para 4. *Id.*

[89] Particularly: *Gas and Dubois v France* (App no 25951/07) ECHR 15 March 2012 and *X and Others v Austria* (App no 19010/07) ECHR 19 February 2013.

[90] *Id.* Both cases dealt with step-parent adoption and were similarly situated, but had a totally different outcome.

promote workable suggestions of what a *de facto* family could look like. The definition and scope of the term is still very flexible and thus, contestable. LGBT advocates could well contribute to filling it with meaning.[91] Furthermore, activists have time and again managed to convince the Court that the protection of *de facto* families (that is, interpersonal constellations which function like families, but which are not based on a formal legal act such as marriage) was in the best interest of the child, thus expressly urging the Court to link the rights of gay families to adjudication regarding child protection issues (such as illegitimacy).[92] The possibilities provided by this connection might be a very fruitful field for exploration in the future.[93]

5.1.2 Inconsistency, Hesitation and Disagreement

As already mentioned above, the Court's jurisprudence regarding same-sex family and marriage rights is riddled with inconsistency, hesitation and disagreement.[94]

For one, there is a constant debate regarding the width of the margin of appreciation afforded to States in the area of Art 8 (family life) and Art 12 (marriage).[95] The Court often employs a proportionality test when assessing the breadth of the respective margin. Factors like societal views, the best interest of the child, or the possibility of personal choice are quite relevant throughout the Court's case-law when determining the margin of appreciation.

In the realm of Art 8, the Court has developed its respective jurisprudence from a point where the rights which same-sex family constellations enjoyed were subjected to a wide margin of appreciation, to holding that in the area of sexual orientation, the margin was always narrow, as described above.[96] However, the Court has been quite inconsistent in the application of this doctrine; has not yet developed a consistent methodology for examining state interferences with the right to family life. Sometimes, the Court embarks on a very principled and substantive evaluation, considering in detail the facts of the case and looking at the whole situation.[97] On other occasions, however, it retreats into a brief, formalistic assessment which appears to distort the

[91] Nan Hunter, 'Lawyering for Social Justice' (1997) 72 N.Y.U. L. Rev. 1009, 1013.

Indeed, the Court has already shown itself sympathetic to respective argumentation, for instance in *X and Others*: "The Court finds force in the applicants' argument that *de facto* families based on a same-sex couple exist but are refused the possibility of obtaining legal recognition and protection. The Court observes that in contrast to individual adoption or joint adoption, which are usually aimed at creating a relationship with a child previously unrelated to the adopter, second-parent adoption serves to confer rights vis-à-vis the child on the partner of one of the child's parents." Thus, the Court follows the assessment of the applicants and the third party interveners on behalf of the applicants. *X and Others v Austria* (App no 19010/07) ECHR 19 February 2013, para 145.

[92] *E.g., Marckx v Belgium* (App no 6833/74) ECHR 13 June 1979.

[93] Indeed, the Court itself refers to jurisprudence dealing with parental rights of a father of a child born out of wedlock, hinting that there were parallels to the present case. *X and Others v Austria* (App no 19010/07) ECHR 19 February 2013, para 152.

[94] he fact that the Court's jurisprudence is inconsistent when it comes to its sexual orientation jurisprudence is also pointed out, e.g., by Graupner. Helmut Graupner, 'Sexuality and Human Rights in Europe' (2008) 48:3-4 Journal of Homosexuality 107, 121.

[95] The margin of appreciation regulates the permissible interference of a Member State into an area protected by a Convention right. In other words, it defines the scope of the negative obligations of a State regarding such a right.

[96] *Karner v Austria* (App no 40016/98) ECHR 24 July 2003, para 37.

[97] *E.g.*, in *E.B. v France* (App no 43546/02) ECHR 22 January 2008.

circumstances, instead of illuminating them.[98] Understandably, there is a certain tendency of the Court to do the former whenever it intends to change its previous case-law. Nonetheless, in some cases, a very brief assessment can be a sign of hesitation – hinting at discordance among the judges, or signalling that the Court was unsure which road to take and thus, settled for the smallest common denominator. Accordingly, such decisions are often issued with a high number of dissents and could be read as indicators of impending transition.

The above-mentioned adoption cases illuminate this point.[99] In *Fretté v France*,[100] a gay man was prevented from adopting a child based on his sexual orientation, and claimed that this was a discriminatory violation of his right to family life. As described before, the Court felt the need to ponder on the breadth of the margin of appreciation afforded to Member States in this respect – but without narrowing it just yet.[101] It also discussed *Dudgeon*[102] and reasoned why the applicants in the present case did not enjoy the heightened protection afforded thereby: In cases such as *Dudgeon*, according to the Court, there had been an interference in the applicants' private lives. In the case at hand, however, there was no such interference, because the applicant *had not formed a family yet* – and the right to form a family was not protected by Art 8 ECHR, according to the Court. However, the Court did not take into consideration that the French law's blanket prohibition of adoption for homosexual people not only prevented the formation of a family, but also made it impossible to legitimize pre-existing *de facto* family ties. Arguably, the Court assumed in *Fretté* that criminal law called for stricter scrutiny than other areas of law, and that the protection of privacy enjoyed a higher status than the protection of family life. Thus, it accepted the government's claim that denying the applicant's adoption followed the legitimate aim of protecting the traditional family.

Nonetheless, this line of argumentation is illuminating in terms of future windows of opportunity:

First, the Court's display of increasing hesitation as to the width of the margin of appreciation afforded to States in the area of sexual orientation is noteworthy. It was well aware that *Dudgeon* could potentially be read as establishing a general barrier to sexual orientation discrimination; even though it came to a different conclusion in the present case, there was ample discussion regarding this point.[103] This shows that at least some of the judges were aware of the Court's inconsistency regarding its own case-law, thus indicating possible routes of argumentation for advocates.

Second, this case is interesting in terms of the Court's ever-inconsistent reliance on societal views. Unsure of how to react to a new, but increasingly common phenomenon – gay parenting – it

[98] *Gas and Dubois v France* (App no 25951/07) ECHR 15 March 2012. For a more thorough assessment of the inconsistencies due to excessive formalism in this case, see Marion Guerrero and Ines Rössl, 'Die neuen Bastarde. Kinder in homosexuellen Partnerschaften' (2012) juridikum 2012, 241.

[99] *Fretté v France* (App no 36515/97) ECHR 26 February 2002; also: *Karner v Austria* (App no 40016/98) ECHR 24 July 2003.

[100] *Fretté v France* (App no 36515/97) ECHR 26 February 2002.

[101] *Id*., para 40.

[102] *Dudgeon v UK* (App no 7525/76) ECHR 22 October 1981.

[103] Joint Partly Dissenting Opinion by Judges Bratza, Fuhrmann and Tulkens, *Fretté v France* (App no 36515/97) ECHR 26 February 2002.

examined "common ground" among the Member States, reaching the conclusion that adoption by homosexual individuals was not legally permitted in many countries and that thus, the Court would remain silent on the matter. This poses very interesting questions regarding the use of societal views: In this case, the laws of the Member States were the object of inquiry for the Court. However, it could have constructed its inquiry in a different way, for instance, by understanding "common ground" or "societal beliefs" as examining the *de facto* occurrence of gay parents (for instance in foster family contexts), or by regarding scientific evidence on the consequences for the children involved.[104] Had it done so, the outcome might have been different.

Indeed, the mere use of the concept of societal views in this case is not without contention. Judges Bratza, Fuhrmann and Tulkens pointed out in their partly dissenting opinion that citing societal views might not be indicated in situations where discrimination based on sexual orientation was involved, since this "paves the way for States to be given total discretion, … [which is] at variance with the Court's case-law relating to Article 14 of the Convention, and, [which is], when couched in such general terms, liable to take the protection of fundamental rights backwards."[105]

In general, the judgement in *Fretté* seems to reflect a certain perplexity and hesitation of the Court regarding same-sex rights. Even though the majority opinion ultimately reached the conclusion that there was no violation of Art 14 in conjunction with Art 8 ECHR, a lot of question marks remained, as put into words by the partly concurring opinion of Judge Costa joined by Judges Jungwiert and Traja:

> "Might it legitimately be said that the very reasons for the negative response constituted an interference in his private life in that they stigmatised a certain choice of lifestyle? There may be some hesitation on this point but ultimately I do not believe it can be true … ."[106]

The fact that three judges were partly dissenting and three judges partly concurring, but insisting to deliver their own opinion, implies that the Court was far from sure that what it was claiming here was carved in stone; it seemed to almost invite suggestions to help it conceptualize a more coherent approach – a perfect opportunity for resourceful activists to step in and make a convincing case.

And indeed, as mentioned above, they have succeeded only five years later, in *E.B. v France*.[107] The Court went to great lengths to establish a violation of the Convention, presenting a well-argued opinion.

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[104] For instance, the Court refers to scientific developments in *X and Others v Austria*, claiming that the government had failed to provide scientific evidence about the detrimental effects of same-sex parenting on children. *X and Others v Austria* (App no 19010/07) ECHR 19 February 2013, para 142; see also: paras 55-56. In its transgender case law, the Court also repeatedly referred to scientific consensus, e.g. .g., *Christine Goodwin v UK* (App no 28957/95) ECHR 11 July 2002, paras 81-83.

[105] Joint Partly Dissenting Opinion by Judges Bratza, Fuhrmann and Tulkens, c, *Fretté v France* (App no 36515/97) ECHR 26 February 2002.

[106] Partly Concurring Opinion of Judge Costa joined by Judges Jungwiert and Traja, *Fretté v France* (App no 36515/97) ECHR 26 February 2002.

[107] *E.B. v France* (App no 43546/02) ECHR 22 January 2008.

However, the case which paved the road for *E.B.* happened four years before. In *Karner v Austria,*[108] the (male) applicant had lived in a stable relationship with another man; after the death of his partner, he faced eviction from the shared residence, since his partner had been the only legal tenant. In Austria, family members have a right to succeed to a tenancy; the applicant claimed that his eviction therefore would amount to a violation of Art 14 in conjunction with Art 8 ECHR.

In its judgment, the Court cites, as mentioned above, from its *Dudgeon* decision,[109] thus closing the circle from *Dudgeon*'s view of sexual orientation as a suspect reason for state interference to cases where sexual orientation is used to discriminate against same-sex relationships. By changing the margin of appreciation assessment, it created a stricter standard for discrimination based sexual orientation, thus expressly elevating same-sex rights from being subject to national preferences into the realm of human rights protection. Therefore, it diminished its previous inconsistency regarding the breadth of the margin of appreciation in sexual orientation claims, which had varied in cases such as *Dudgeon* and *Fretté*.

Moreover, *Karner* exemplifies, once again, the importance that the ECtHR attaches to societal views – especially in instances of hesitation, where it either seems unsure of which way to take, or is looking for further argumentation material to depart from its former stance. Given that societal views are an ambiguous concept which needs to be filled with meaning each time it is used, this is a window for advocates to bring forward evidence (such as statistics, reports, scientific materials, etc.) supporting their cause. Of course, their opponents will likely do the same. [110]It is all the more important to present well-prepared and convincing points, and to establish and emphasize competence in this regard.

This development reshaped the basis that same-sex advocates could now argue from.

5.1.3 Activists as Experts

Karner opened yet another interesting "window of opportunity" for same-sex rights advocates. It is perhaps the most noteworthy testimony to the influence which advocacy groups can exert when the Court, in its reasoning, expressly refers to information provided by advocacy groups. Civil society advocates are usually experts in their field; a fact sometimes recognized by the Court.[111] LGBT groups have repeatedly intervened as third parties in same-sex rights cases, and the Courts have relied on their expertise, especially when trying to establish whether a changed social reality needs to be accommodated within its jurisprudence.

In *Karner*, The Court relied heavily on the expertise and evaluation of advocacy groups when determining the scope and nature of a changed social reality.[112] Furthermore, it expressly admitted the third party intervention of several gay rights groups:

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[108] *Karner v Austria* (App no 40016/98) ECHR 24 July 2003.

[109] *Dudgeon v UK* (App no 7525/76) ECHR 22 October 1981; *Smith and Grady v UK* (App no 33985/96 and App no 33986/96) ECHR 27 September 1999.

[110] The fact that the use of "societal views" can backfire (from an LGBT rights perspective) was shown, e.g., by *Fretté*. See above.

[111] See, e.g., the ECtHR's decision in *Karner v Austria* (App no 40016/98) ECHR 24 July 2003, para 27.

[112] *Id.*, para 36.

> "The Court has repeatedly stated that its 'judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention …' … . Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States. … The Court considers that the subject matter of the present application – the difference in treatment of homosexuals as regards succession to tenancies under Austrian law – involves an important question of general interest not only for Austria but also for other States Parties to the Convention. In this connection the Court refers to the submissions made by ILGA-Europe, Liberty and Stonewall, whose intervention in the proceedings as third parties was authorised as it highlights the general importance of the issue. Thus, the continued examination of the present application would contribute to elucidate, safeguard and develop the standards of protection under the Convention."[113] (emphasis added)

This shows both a consciousness of the Court regarding its policy making responsibility, as well as a hint to the fact that the arguments brought forward by gay rights advocacy groups such as ILGA-EUROPE, Liberty and Stonewall can actually exert a certain influence on the Court's deliberations, especially in cases such as the one at hand where there is considerable need for legal certainty.[114] Here, the Court mentioned and accepted not only *de facto* the expertise and opinion of advocacy groups; it included their intervention explicitly in the judgement itself, thus making their reasoning part of the judicial discourse.

In *Karner*, advocacy groups have effectively been able to engage in an exchange of ideas with the Court, which ultimately lead to a reconsideration of the Court's previous case-law. Robert Wintmute, submitting written comments on behalf of ILGA-Europe, Liberty and Stonewall,[115] outlined some points (which the Court explicitly referred to later in its judgment) as reasons to rethink the width of the margin of appreciation afforded to states. Wintmute argued that this margin should (always) be narrow when it comes to sexual orientation; and he succeeded. In its judgement, the Court explicitly referred to the written comments and effectively followed their reasoning.[116]

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[113] *Id.*, paras 26, 27.

[114] However, the wording chosen by the Court is still worth mentioning, since it is not only the *de facto* influence of advocate groups which is remarkable. By including their arguments in the judgement, the Court made their reasoning part of the judicial discourse. An optimistic view might take this as proof that civil society can, effectively, participate in judicial decision making by raising good points. See also, in this respect, David Robertson, *The Judge as Political Theorist. Contemporary Constitutional Review* (Princeton University Press 2010), 36.

[115] Joint Written Comments of ILGA-Europe, Liberty and Stonewall (submitted 12 March 2002) *Karner v Austria* (App no 40016/98) ECHR 24 July 2003.

[116] *Karner v Austria* (App no 40016/98) ECHR 24 July 2003, paras 36, 37.

5.2 Windows of Opportunity: An Activist Reading of the Case Law

These excerpts of the ECtHR's case law are merely meant as punctual examples of windows of opportunity which have arisen in the Court's jurisprudence. They mostly intend to show how a change of perspective – namely, looking at the Court's case history from the viewpoint of activist intervention possibilities, instead of assuming an allegedly objective bird's eye view – will reveal certain synergies and opportunities which might otherwise stay hidden.

Re-telling the Court's adjudication as a field of activist possibilities puts litigants (applicants as well as third party interveners) in the centre of the story and elevates them from mere addressees of the law to actors who can use the circumstances they encounter to further their agendas. I do not mean to insinuate that they will always be successful; however, there are, I believe, some interesting windows for LGBT advocacy. Given that same-sex issues tend to be highly contentious – and taking in mind the many instances of hesitation and inconsistency in the Court's case-law – it is safe to say that activists might at the very least be able to provide potentially favourable Judges with food for thought and argumentation.

6 Conclusions

Martha Minow has stated that "(l)aw … is not merely the formal official rules adopted by legislatures, courts and executives nor solely the procedures of these institutions. Law is also the practices of governance and resistance people develop behind and beyond the public institutions. Those practices may alter formal, public law; they also alter the meaning and shape of law and provide a potentially rich context for social change."[117] This means that law is more than the sum of statutes and court decisions; law also includes its application and usage. Seyla Benhabib describes it as a flexible, discoursive body which is at once power and meaning.[118] While it binds a people normatively, its meaning is not inscribed nor fixed, but constantly re-negotiated – and this fluidity provides opportunities for civil society to intervene, for instance, by advancing alternative interpretations of a term and thus being "not only the *subject* but also the *author of the law*."[119] An example for this is the development of the legal term "family" in the jurisprudence of the ECtHR which ultimately lead to the inclusion of gay couples; by contributing to the reshaping of this term, civil society organisations have effectively taken part in judicial decision making and ultimately improved the situation for same-sex families.

What does this imply? First of all, law can be a hegemonic tool which power-holders apply in elitist institutions, as some have suggested.[120] But it can also be a strategic instrument in the struggle

[117] Martha Minow, 'Law and Social Change' (1993-1994) 62 UMK L. Rev. 171, 176.

[118] Seyla Benhabib, Another Cosmopolitanism (Oxford University Press 2006), 47-51.

[119] *Id.* at 49. Benhabib talks of "democratic iterations." She writes, referring to the work of Fank Michelman and Robert Cover: "The disjunction between law as power and law as meaning can be rendered fruitful and creative in politics through 'jurisgenerative processes.' In such processes, a democratic people, which considers itself bound by certain guiding norms and principles, engages in iterative acts by reapproporiating and reinterprating these, thereby showing itself to be not only the subject but also the author of the laws." *Id.*

[120] Audre Lorde, *Sister Outsider* (Crossing Press 1984), 112.

for societal justice. Courts don't operate in a vacuum; in order to act, they usually need to be approached by litigants first. Moreover, judges may only decide on the issue at hand and after considering the arguments brought forward by the parties. This means that the structure of the judicial process itself already requires a certain amount of citizen participation. This means that there is space for social change advocates to intervene. How big this space actually is has been the issue of numerous contentious debates.[121] However, if it is there at all – no matter how small – it could potentially provide an avenue for social reform agents to promote their agendas and thus, take part in judicial decision making.

The sustainability of change through the courtrooms is difficult to assess; engaging in strategic litigation carries a number of potentially problematic implications, such as the risk of fighting symptoms and not systemic roots of inequality and ultimately, advancing assimilative tendencies instead of triggering more comprehensive change.[122] However, this is an argument that can also be brought forward against other, non-litigation-based strategies. A paradoxical truism of social change seems to be that in order to remain a hundred percent loyal to the idea of the perfect reform, an agent of change would either need to incite a revolution or do nothing at all, since everything in between requires pragmatic compromises. Moreover, maintaining a position of theoretical supremacy is the privilege of those who fare comparatively well in the existing system; on the other hand, those who would benefit most from social change often cannot afford to pass by opportunities for intervention, as imperfect and incomplete as they may be.[123]

It is clear in any case that litigation strategies can just be one instrument in an orchestra of social change. It has not been the intention of this paper to pose an either/or question by assessing whether it is better to produce change through legislative or judicial action, as it is beyond its scope to distinguish concrete strategies which might lead to the best outcomes. However, there is a point to be made that civil society should take every possible avenue to participate in decision making, and the courts are certainly one of them (although by no means the only one).

Finally, I want to sum up the points that I have tried to make: 1) The fact that the European Court of Human Rights creates policies is a reality, disregarding the normative question of whether

[121] This has been discussed, *inter alia,* in the "indeterminancy debate" of the 1980s. It was caused by the CLS assessment of law as being incapable of predicting the outcome of a specific legal problem; policies, political power structure or other factors have, according to most CLS scholars, a much higher and influential stake in legal and judicial conflicts than black letter law or doctrine. Mark Tushnet, for instance, concludes his seminal work on Constitutional Analysis by remarking "Critique is all there is." Mark Tushnet, *Red, White and Blue: A Critical Analysis of Constitutional Law* (Harvard University Press 1988), 318. Indeed, the roots of this view are much older: See, for instance, Jerome Frank, *Law and the Modern Mind* (1930). See also: Peter Goodrich & David Gray Carlson (eds), Law and the Postmodern Mind: Essays on Psychoanalysis and Jurisprudence (University of Michigan Press 1998); Roberto M. Unger, *What Should Legal Analysis Become?* (Verso 1996); Peter Gabel,'The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves' (1984) 62 Tex. L. Rev. 1563; among others.

[122] William N. Eskridge Jr, 'Channeling Identity-Based Social Movements and Public Law' (2001-2002) 150 U. Pa. L. Rev. 419, 459-467.

[123] Scholars such as Patricia Williams and Angela Harris have pointed out that feminist ambiguity towards using rights to advance social change is usually only an option for the relatively privileged, whereas the ones who are most powerless – for instance, black lower class women – don't have the luxury to choose the means of their empowerment in line with theoretical purity. Patricia Williams, *The Alchemy of Race and Rights. Diary of a Law Professor* (Harvard University Press 1992); Angela Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 Stan. L. Rev. 581.

this is legitimate or not. 2) The quasi-legislative power of the ECtHR provides opportunities for civil society to take part in judicial decision making, which should be taken up even though it is not a flawless endeavour. 3) It is actually possible (albeit not always) to promote social change through the ECtHR, at least in the area of LGBT rights.

Gays and the European Court of Human Rights: the Equality Argument

Frances Hamilton[1]

Abstract

This piece articulates specific difficulties for the European Court of Human Rights ('ECtHR') in engaging with equality arguments in relation to same-sex marriage. It is argued that it is a necessity to engage with equality arguments due to the close connections between equality, citizenship and marriage. The text of the European Convention of Human Rights ('ECHR') does not assist as Article 14 (equality) is a conditional right only. Whilst earlier cases concerning gay rights were secured by a right to privacy (Article 8) with a narrow margin of appreciation which reflected a universally understood concept, in relation to equality arguments there is greater relativist scope leading to a wider margin of appreciation. Lastly, in seeking to engage in equality arguments comparisons between different groups categorised by sexual orientation are required, thereby further emphasising the concept of the dominant heterosexual norm.

Keywords

Same-Sex Marriage, Equality, Citizenship, Margin of Appreciation

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1 Introduction

Traditionally, privacy arguments have been the most successful in the advancement of gay rights before the ECtHR. This point has been asserted by other authors[2] and is also reflected in the case law of the ECtHR.[3] It is argued that locating the protection of gay rights specifically within the

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[2] Other authors who also argue this point include Paul Johnson, 'An Essentially Private Manifestation of Human Personality': Constructions of Homosexuality in the European Court of Human Rights' (2010) 10(1) *Human Rights Law Review* 67; Barbara Stark, 'When Globalization Hits Home: International Family Law Comes of Age', (2006) 36 *Vanderbilt Journal of Transnational Law* 1551 and Carmelo Danisi, (2011) 'How far can the European Court of Human Rights go in the Fight Against Discrimination? Defining New Standards in its Non-Discrimination Jurisprudence' 9(4) *International Journal of Constitutional Law* 793.

[3] Cases include for example *Dudgeon v UK,* Application No 7525/76, Judgment of 22 October 1981; *Sutherland v UK,* Application No 25186/94, Judgment of 21 May 1996; *Smith and Grady v UK*, Application Nos 33985/96 and

protection of privacy has limited the scope for the evolution of gay rights.[4] In contrast until recently there have been far fewer arguments made under Article 14, which is the non-discrimination clause in the ECHR. Article 14 (equality) is a conditional right which can only be asserted where another alleged violation of the ECHR is made simultaneously.[5] Throughout its earlier judgments in the area of gay rights the ECtHR did not find it necessary to consider the arguments brought forward on the basis of Article 14. In *Dudgeon v UK,* the ECtHR found that 'there is no call to rule on the merits' of Article 14 as the same complaint had already been examined under Article 8'[6] and this set a trend for further cases following the same approach.[7] Whilst more recent cases have given credence to arguments o equality,[8] these continue to have to be made in connection with Article 8. The success of equality arguments has also been limited.[9] In relation to same-sex marriage, a wide margin of appreciation was afforded to contracting states to determine their own policies, due to a lack of consensus.[10]

Concentration upon the protection of privacy, means that the ECtHR has not evaluated and developed equality arguments under Article 14. It is necessary to engage in equality arguments in relation to the case for same-sex marriage, which is a concept very much on the public stage. Equality arguments make a strong case for same-sex marriage because of the close connections between equality, citizenship and marriage. This piece considers specific difficulties for the ECtHR in utilizing the equality argument.

2 The Limitations of the Privacy Argument in Relation to Same-Sex Marriage

Arguments based on privacy[11] result in basic protections for gays, and would not be successful in relation to same-sex marriage. The stress on privacy before the ECtHR has resulted in what Johnson describes as a 'significant limitation… in respect of the 'evolution' of lesbian and gay human

33986/96, Judgment of 27 September 1999 and *Lustig-Prean and Beckett v UK*, Application Nos 31417/96 and 32377/96, Judgment of 27 September 1999.

[4] Paul Johnson, 'An Essentially Private Manifestation of Human Personality': Constructions of Homosexuality in the European Court of Human Rights' (2010) 10(1) *Human Rights Law Review* 67.

[5] See for further explanation George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26(4) *Oxford Journal of Legal Studies* 705 at 708.

[6] *Dudgeon v United Kingdom* (1982) 4 E.H.R.R. 149 at paragraph 69. Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14(5) *European Journal of International Law* 1023 reports at 1030 that in this case the '[c]ourt did not find it necessary to examine the case under Article 14.'

[7] See for example *ADT v UK* (2001) 31 E.H.R.R. 33 at paragraph 40, *Lustig-Prean and Beckett v UK* (2000) 29 E.H.R.R .548 at paragraphs 107-109 and *Smith and Grady v UK* (2000) 29 E.H.R.R. 493 at paragraphs 114 – 116.

[8] Cases where the ECtHR has given more emphasis to equality arguments include for example *Karner v Austria*, Application No 40016/98, Judgment of 24 July 2003,*Salgueiro da Silva Mouta v Portugal,* Application No 33290/96, *Lardner v Austria*, Application No 18297/03, Judgment of 3 February, *EB v France*, X and Others v Austria, Application No 19010/07, Judgment of 19 February 2013.

[9] For example *Schalk and Kopf v Austria* 53 E.H.R.R. 20.

[10] *Schalk and Kopf v Austria* (2011) 53 E.H.R.R. 20 at paragraph 105.

[11] The right to privacy has traditionally been defined as containing a focus on a right to be 'let alone.' It is described by Mill as 'a circle around every individual human being which no government … ought to be permitted to overstep.' John Stuart Mill, *Principles of Political Economy* (London, New York and Toronto: Longmans Green and Co, 1936) at 943.

rights across Europe.'[12] Marriage is a concept very much on the public stage and cannot be protected by a right to be 'let alone.' Whilst privacy was a valuable argument when considering the early gay rights cases such as the decriminalisation of sodomy, this argument is no longer so effective when gays want to obtain public rights such as same-sex marriage.

The difference between being protected under privacy as opposed to equality has a huge impact upon the extent of the rights protected. Bamforth argues that this debate is important on a constitutional level.[13] Whilst privacy is a right to be 'let alone,' in contrast equality is associated with citizenship and its public status.[14] An important part of citizenship in this context concerns its connections with marriage.[15] Thus, depending on whether the ECtHR relies upon privacy or equality determines whether it will be possible to recognise same-sex marriage. In a traditional reliance upon privacy arguments, the ECtHR has limited its remit for development. This is in contrast to other jurisdictions that have relied successfully upon the equality argument in relation to same-sex marriage.[16] It is argued that it is necessary for the ECtHR to engage with this argument in order to recognise same-sex marriage. Obstacles remain for the ECtHR in using the equality argument. Firstly, the equality argument has a wider margin of appreciation than that of privacy. Secondly, the equality argument requires categorisation of different groups of sexual orientation therefore re-inforcing the idea of the heteronormative standard.

3 Equality has a Wider Margin of Appreciation than Privacy

In this section a specific disadvantage for the ECtHR in seeking to utilize the equality argument before the ECtHR is identified. The doctrine of margin of appreciation[17] has come under criticism for

[12] Paul Johnson, 'An Essentially Private Manifestation of Human Personality': Constructions of Homosexuality in the European Court of Human Rights' (2010) 10(1) *Human Rights Law Review* 67 at 76. For further criticism see also Eve Sedgewick, *Epistemology of the Closet* (Harmondsworth: Penguin, 1990) at 71 and Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14(5) *European Journal of International Law* 1023 at 1040

[13] Nicholas Bamforth, 'Sexuality and Citizenship in Contemporary Constitutional Argument' (2012) 10(2) *International Journal of Constitutional Law* 477.

[14] Nicholas Bamforth, (2012) 'Sexuality and Citizenship in Contemporary Constitutional Argument' (2012) 10(2) *International Journal of Constitutional Law* 477-492 at 478 referring to Marshall, 'Citizenship and Social Class', in Marshall and Bottomore (eds), (1992) *Citizenship and Social Class* 18**.**

[15] See for further discussion Angela Harris, 'Loving Before and After the Law' (2007-2008) 76 *Fordham International Law Review* 2821 at 2822, Nicholas Bamforth, (2012) 'Sexuality and Citizenship in Contemporary Constitutional Argument' (2012) 10(2) *International Journal of Constitutional Law* 477, Nancy Cott, *Public Vows: A History of Marriage and the Nation 2* (2000) at 1, Brenda Cossman, (2007*) Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging 27,* Dimitri Kochenov (2009) 'On Options of Citizens and Moral Choices of States: Gays and European Federalism' 33(1) *Fordham International Law Review* 156 at 163.

[16] See for example *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/40)[2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC), 1 December 2005 and and *United States v. Windsor*, 570 U.S. (2013) (Docket No. 12-307).

[17] The margin of appreciation has been described as 'amount of discretion...in fulfilling their obligations under the ECtHR' Petra Butler, 'Margin of Appreciation - A Note towards a solution for the Pacific' (2008-2009) 39 *Victoria University Wellington Law Rev*iew 687 at 695 referring to Howard Charles Yourow, *Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Netherlands: Brill, 1996) at 13 who describes the margin of appreciation as '[t]he latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies.'

many reasons, including vagueness, lack of transparency[18] and the fact that it leaves the door open for potential discrimination against mintorities.[19] The criticism of the margin of appreciation here relates to the varying widths given to the margin of appreciation in respect of specific rights. In relation to privacy cases the ECtHR has confirmed that there is a narrow margin of appreciation,[20] leading to a strong protection of privacy interests. This was justified in respect of privacy arguments because of the harm which the restriction of private sexual lives could do to individuals and also the consensus among contracting states that there is no need to criminalise such activities. Such arguments do not apply to same-sex marriage. Same-sex marriage cannot be brought forward on the basis of a privacy argument as it is a concept on the public stage. Instead an equality argument has to be used. In areas of little international consensus the ECtHR applies a wide margin of appreciation.[21] It is therefore no surprise that when it came to same-sex marriage a wide margin of appreciation was found. In *Schalk and Kopf v Austria*, the ECtHR stated that '[t]he issue of same-sex marriage concerned a sensitive area of social, political and religious controversy. In the absence of consensus, the State enjoyed a particularly wide margin of appreciation.'[22] In moving from privacy as the main focus of gay rights to an equality argument, the ECtHR has potentially weakened protection for gays by moving from the universally understood right of privacy to the more

[18] See Emily Wada, 'A Pretty Picture The Margin of Appreciation and the Right to Assisted Suicide' (2005) 27 *Loyola of Los Angeles International and Comparative Law Review* 275 at 280; Petra Butler, 'Margin of Appreciation - A Note towards a solution for the Pacific' (2008-2009) 39 *Victoria University Wellington Law Rev*iew 687 at 702; Michael Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48 *International and Comparative Law Quarterly* 638 at 641 and Jeffrey Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004-2005) 11 113 at 121.

[19] See Loveday Hudson, 'A Marriage by any other name? Shalk and Kopf v Austria' 11(1) *Human Rights Law Review* 170. See also Eyal Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1998-1999) 31 *New York University Journal of International Law and Politics* 843 and George Letsas, 'Strasbourg's Interpretative Ethic: Lessons for the International Lawyer' *European Journal of International Law* 509, Sweeney, 'Margin of Appreciation: Cultural relativity and the European Court of Human Rights in the Post-Cold War Era' (2005) 54 *International and Comparative Law Quarterly* 459 at 462 quoting Lester, 'Universality versus Subsidiarity: a Reply' (1998) 1 *European Human Rights Law Review* 73 at 76 and Frances Hamilton, 'Why Margin of Appreciation is Not the Answer to the Gay Marriage Debate'2013(1) *European Human Rights Law Review* 47.

[20] See *Dudgeon v United Kingdom* (1982) 4 E.H.R.R. 149 at paragraph 52, *Lustig-Prean and Beckett v UK* (2000) 29 E.H.R.R. 548 at paragraph 82 and in *Smith and Grady* (2000) 29 E.H.R.R. 493 at paragraph 89 the ECtHR discussed the fact that since these cases concerned 'a most intimate part of an individual's private life', there must exist 'particularly serious reasons' before such interferences can satisfy the requirements of Article 8 paragraph 2 of the Convention.' See also *ADT v UK* (2001) 31 E.H.R.R. 33 at paragraph 38.

[21] Tom Lewis, 'What not to wear: Religious rights, the European Court and the Margin of Appreciation' (2007) 56 *International and Comparative Law Quarterly* 395 at 397; Rafaella Nigro, 'The Margin of Appreciation Doctrine and the Case Law of the European Court of Human Rights on the Islamic Veil' (2010) 11 *Human Rights Law Review* 531; Michael Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48 *International and Comparative Law Quarterly* 638 and Emily Wada, 'A Pretty Picture The Margin of Appreciation and the Right to Assisted Suicide' (2005) 27 *Loyola of Los Angeles International & Comparative Law Review* at 279 who comments that while the 'presence of a consensus does not of itself mean that there is a [narrow] margin of appreciation… the absence of a consensus is probably a decisive factor in finding that there is a [wide] margin of appreciation.' See also Jeffrey Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004-2005) 11 *Columbia Journal of European Law* 113 at 128.

[22] *Schalk and Kopf v Austria* 53 EHRR 20 at paragraph 45.

amorphous right of equality.[23] The next section considers a further difficulty with the use of the equality argument by the ECtHR.

4 The Equality Argument Requires Categorisation of Individuals into Classes of Sexual Orientation

Throughout its case law the ECtHR refers to gays as 'homosexuals', creating a clear categorisation of sexual interests.[24] This was the common practice of the ECtHR, but in using a privacy argument there was scope for moving away from this practice should it become to be seen as unfavourable. Categorisation of individuals into different groups dependent upon sexual orientation means that the idea of the heteronormative stereotype is reinforced.[25] When the equality argument is deployed it becomes a requirement to categorise individuals into classes of sexual orientation, as equality necessitates comparisons to be made between different groups. The categorisation of individuals is harmful as it means that minority groups are asserting their 'other'ness against the 'heteronormal' group, and further it creates an identitarian crisis as individuals have to fit themselves within specific boxes which may be inappropriate. The deployment of the equality argument exacerbates these critiques.

Queer theorists challenge the categorisation of relationships into homosexual and heterosexual and argue that categories should not be seen 'fixed and given.'[26] This could lead to an identitarian crisis for those individuals who are forced to identify with a certain group, thereby eroding the true variety of identities to which individuals may ascribe.[27] By ascribing labels to certain categories such as the use of homosexual, this is turn forcing individuals to join a particular group in order to bring legal challenges. It also confirms the dominance of the heteronormative norm. Grigolo explains that categorisation into different sexual groups is disadvantageous because it 'reinforces the dichotomy within which the 'other' ...is defined' meaning that the 'position for the dominant (the heterosexual man) is confirmed and stabilised.'[28] It is argued that the use of equality

[23] See also Douglas Lee Donoho, 'Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights' (2001) 15 *Emory International Law Review* 391 at 416-417.

[24] See for example *Dudgeon v United Kingdom* (1982) 4 E.H.R.R. 149 at paragraph 32; *Sutherland v UK,* Admissability, Application Number 25186/94, 21 May 1996 at paragraph 2; *Lustig-Prean and Beckett v UK* (2000) 29 E.H.R.R. 548 at paragraph 67; *Smith and Grady* (2000) 29 E.H.R.R. 493 at paragraph 74 and *Salgueiro da Silva Mouta v Portugal* (2001) 31 E.H.R.R. 47 at paragraph 30.

[25] Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14(5) *European Journal of International Law* 1023 on this practice.

[26] See Ibid. and Felicia Kornbluh, 'Queer Legal History: A Field Grows Up and Comes Out' (2011) 36(2) Law and Social Inquiry 537.

[27] See Ibid. See also Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14(5) *European Journal of International Law* 1023 at 1027-1028; and Felicia Kornbluh, 'Queer Legal History: A Field Grows Up and Comes Out' (2011) 36(2) *Law and Social Inquiry* 537 at 539.

[28] Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14(5) *European Journal of International Law* 1023 at 1025.

argument has exacerbated the need to categorise individuals into groups of sexual interests, as equality necessitates a comparison to be made.[29]

5 Conclusion

This piece sets out some of the specific difficulties facing the ECtHR in seeking to engage in the equality argument as opposed to privacy. It is necessary to deploy the use of the equality argument because of the close connections between the interlocking concepts of marriage, equality and citizenship. International examples from South Africa and the US have also demonstrated the importance of the equality argument on the international stage.[30] As Polikoff, a queer theorist, states 'when the claim for same-sex marriage is based on equality it can still be problematic.'[31] It has been demonstrated that the ECtHR traditionally focused on privacy as a justification, meaning that equality has not been the main focus for the ECtHR. The text of the ECHR itself does not aid the ECtHR as article 14 is a conditional right. The free standing right to equality under Protocol 12 has not been ratified by the UK. Also in deploying the equality argument the ECtHR is moving from the privacy concept which has a narrow margin of appreciation, to a much wider margin of appreciation under an equality doctrine around which there is a variable standard and therefore less guaranteed protection for gays and same-sex couples. Finally, the equality argument presupposes categorisation of individuals into certain specific boxes of sexual interest. This may not be desirable either because of the strengthening of the heteronormative approach of the ECtHR or because of the difficulties of individuals in identifying with certain set categories. It has become necessary for the ECtHR to deploy arguments based on equality when cases are brought concerning same-sex marriage, but the author has here articulated some of the specific difficulties for the ECtHR in this regard. The way forward based on equality is not easy, and it is arguably for that reason that the ECtHR in *Schalk and Kopf v Austria* settled for a lack of consensus argument.[32]

[29] See Marta Cartabia, 'The European Court of Human Rights: Judging non-discrimination' (2011) 9(4) *International Journal of Constitutional Law* 808-814 at 812 Cartabia notes that 'the very structure of the discrimination test as such is responsible for the unpredictable outcomes of the controversies' because '… [as] a matter of fact, judging non-discrimination implies drawing a comparison between different persons and situations.'

[30] See for example *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/40)[2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005) and *United States v. Windsor*, 570 U.S. (2013) (Docket No. 12-307).

[31] Nancy Polikoff, 'Equality and Justice for Lesbian and Gay Families and Relationships' (2008-2009) 61 *Rutgers Law Review* 529 at 547.

[32] *Schalk and Kopf v Austria* 53 EHRR 20 at paragraph 45.

Les apports des revendications de la communauté LGBTI à l'évolution de la notion de «famille» en droit européen des droits de l'homme

Céline Husson-Rochcongar

Abstract :

Amenée à examiner des situations individuelles, la Cour européenne des droits de l'homme replace cependant toujours l'individu dans une relation à l'autre pour trancher les questions qui lui sont soumises. Dans les affaires traitant directement d'homosexualité ou de transsexualisme, cette relation à l'autre prend toutefois une importance particulière dans la mesure où l'orientation ou l'identité sexuelle des requérants se trouve alors considérée au-delà de la sphère de l'intime dont elle relève pourtant. Or, une analyse de la jurisprudence élaborée depuis une trentaine d'années démontre que cette approche très englobante a reflété un changement de mentalités au niveau européen et entraîné d'importantes conséquences quant à la manière dont le droit est susceptible de se saisir de certaines questions et d'autoriser certaines avancées fondées sur le respect du principe de non-discrimination

En effet, qu'il s'agisse du couple lui-même ou de la relation de chacun de ses membres à ses propres enfants ou à ceux de son conjoint ou concubin, les revendications portées année après année par la communauté LGBTI ont contribué puissamment à l'évolution de la notion de *famille* telle qu'entendue par le droit européen des droits de l'homme. Ainsi, tout comme l'arrêt *Marckx c. Belgique* de 1979 a fait évoluer la situation des enfants nés hors mariage sur un mode égalitaire, un ensemble d'arrêts (concernant la situation de requérants homosexuels ou transsexuels) a progressivement permis des avancées notables, aux retombées considérables au-delà même de la communauté LGBTI directement concernée : reconnaissance d'un véritable statut du couple homosexuel, considération des conséquences (médicales ou sociales – et notamment familiales) d'une opération de conversion sexuelle sollicitée par un transsexuel (même si celle-ci interroge avant tout la relation de l'individu à son propre corps), mais aussi et peut-être surtout prise en compte des homosexuels et des transsexuels en tant que parents ou parents potentiels

C'est cette évolution que nous nous proposons d'étudier ici. Tout d'abord, en constatant que la reconnaissance du statut de parent s'envisage avant tout en lien avec la question du mariage, laquelle demeure délicate pour la Cour dans la mesure où le mariage continue à incarner bien souvent dans les droits internes européens le fondement même de la famille. Puis, en montrant de quelle manière, plus encore que l'évolution des relations qu'un individu peut continuer à entretenir avec les enfants qu'ils aurait eus avant de vivre son homosexualité ou d'entamer un traitement médical en vue de sa réassignation sexuelle, ce sont surtout les questions de l'insémination artificielle et de l'adoption qui se trouvent mises en lumière. Nous pourrons ainsi questionner le passage d'une argumentation fondée sur le *droit à la vie privée* à un raisonnement privilégiant davantage le *droit à la vie familiale*.

* * * * *

1 Introduction

En droit, le mot « famille » désigne couramment « a) L'ensemble des personnes qui sont unies par un lien du sang, qui descendent d'un auteur commun […]. b) Le groupe restreint des père et mère et de leurs enfants (mineurs) vivant avec eux (famille conjugale, nucléaire) [...]. c) Les seuls enfants, descendants directs »[1]. L'analyse de cette cellule fondamentale de la vie en société – puisque « [c]'est par elle que l'espèce humaine se survit : elle transmet la vie, les moyens de vivre, les raisons de vivre »[2] – permet de souligner la manière dont le droit constitue un processus de régulation sociale. En effet, à travers l'institution du mariage et les liens étroits que celle-ci entretient avec la famille – dont elle continue à former le socle –se dessinent les évolutions des mentalités et la façon dont le droit s'y adapte sous l'effet des revendications portées devant les juges. Les requêtes présentées devant la Cour européenne des droits de l'homme ont ainsi fortement pesé sur son interprétation de la notion de « famille ». C'est tout spécialement le cas ces dernières années, même si la jurisprudence connaît de ces problématiques depuis les années 1970, la Cour ayant considérablement fait évoluer la situation des enfants nés hors mariage sur un mode égalitaire dès son arrêt Marckx c. Belgique de 1979.

Pour comprendre cette influence ambigüe, il convient ici d'envisager la famille en tant qu'institution[3] pour souligner avec Durkheim qu'« en même temps que les institutions s'imposent à nous, nous y tenons ; elles nous obligent et nous les aimons ; elles nous contraignent et nous trouvons notre compte à leur fonctionnement et à cette contrainte même »[4]. Ainsi, en tant qu'*unité de base* de la société occidentale, « [l]a famille est [...] naturellement, en quelque sorte, l'enjeu d'une volonté politique qui cherche à la modeler »[5]. Il en va de la stabilité sociale puisque c'est dans ce cadre que les enfants sont éduqués et que leur sont transmis les modes de pensée et les valeurs qui caractérisent la société dans laquelle ils naissent. Il n'y a donc rien de curieux à ce que le droit soit amené à se pencher avec une attention particulière sur des situations qui peuvent être perçues comme susceptibles de mettre en danger la pérennité de la société dont il est chargé de réguler le

[1] « Famille » in *Vocabulaire juridique* (G. Cornu (dir.), Association Henri Capitant, Paris, PUF, Quadrige, 9e éd., 2011, p. 445-446). L'ouvrage précise également que le mot « désigne parfois (et dans des acceptions limitées) : a) L'ensemble des parents et alliés. b) Le groupe des parents et alliés entre lesquels existe une obligation alimentaire. c) Le groupe des personnes vivant sous le même toit (domus). d) Le conseil de famille ».

[2] A. Lefebvre-Teillard, « Famille », in D. Alland et S. Rials (dirs.), *Dictionnaire de la culture juridique*, Paris, Lamy-PUF, Quadrige, 1re éd., 2003, p. 698.

[3] Selon la formule de Durkheim, « On peut appeler *institution* toutes les croyances et tous les modes de conduite institués par la collectivité » (*Les règles de la méthode sociologique*, Préface de la seconde édition, Paris, F. Alcan, 1901, p. XXIII).

[4] *Les règles de la méthode sociologique*, *ibid.*, p. XX. Durkheim précise : « Cette antithèse est celle que les moralistes ont souvent signalée entre les deux notions du bien et du devoir qui expriment deux aspects différents, mais également réels, de la vie morale. Or il n'est peut-être pas de pratiques collectives qui n'exercent sur nous cette double action, qui n'est, d'ailleurs, contradictoire qu'en apparence ». Voir également M. Plouviez, *Normes et normativité dans la sociologie d'Émile Durkheim*, Thèse de doctorat, Université Paris I – Panthéon Sorbonne, 2010, 662 p.

[5] *Ibid.*, p. 700.

fonctionnement. Or, c'est bien le cas des revendications portées par la communauté LGBTI dès lors que celles-ci cherchent à faire reconnaître juridiquement des manières différentes de « faire famille ». On comprend ainsi l'intérêt des États à tenter de protéger leurs structures sociales lorsqu'ils choisissent de défendre ce qu'ils nomment souvent une « conception traditionnelle de la famille ». On comprend également pourquoi il importe particulièrement aux membres de la communauté LGBTI de porter leurs revendications sur la scène juridique, le droit constituant l'outil par excellence de la reconnaissance sociale de leur identité, dans la mesure où lui seul est susceptible de faire produire des effets à cette reconnaissance. On comprend, enfin, pourquoi le juge de Strasbourg, dont la mission consiste à harmoniser le droit sur le territoire des États membres dans le respect de la Convention européenne des droits de l'homme, est amené à se pencher de manière aussi précise sur les aspirations des populations et sur leur degré d'imprégnation religieuse pour tenter d'évaluer l'évolution des mentalités sur le Continent. Le travail de la Cour et l'approche qu'elle adopte revêtent ainsi une importance capitale car déterminer quel droit s'appliquera en la matière a de très fortes implications quant au projet de société européenne tout entier.

Amenée à examiner des situations individuelles, la Cour replace cependant l'individu dans une relation à l'Autre pour trancher les questions qui lui sont soumises – que cet Autre s'avère identifiable en tant qu'individu ou groupe d'individus ou qu'il s'incarne plus largement dans l'intérêt général. Dans les affaires traitant d'homosexualité ou de transsexualisme, cette relation à l'autre prend une importance particulière dans la mesure où l'orientation ou l'identité sexuelle se trouve alors considérée au-delà de la sphère de l'intime dont elle relève pourtant. Dès lors qu'il est question de revendiquer la prise en considération d'une différence, qu'il s'agisse d'identité, de relations de couple ou de la possibilité de devenir parents, les recours présentés par les homosexuels ou les transsexuels concernent toujours la famille dans la mesure où elles interrogent la légitimité de la conception traditionnelle dominante en droit européen. Une analyse de la jurisprudence strasbourgeoise montre d'ailleurs d'importantes évolutions dans la manière dont la Cour s'est saisie de certaines problématiques, évolutions fondées notamment sur le respect du principe de non-discrimination.

S'il convient bien sûr d'envisager la famille à travers la question de la filiation, il importe toutefois de considérer également ici l'encadrement du mariage dans la mesure où cette institution constitue le moyen privilégié de donner des effets à la parenté en droit occidental. Envisageant conjointement ces deux questions, on pourra alors constater que, si la situation des membres de la communauté LGBTI a certes évolué sous l'influence de la jurisprudence, en retour, leurs revendications ont aussi puissamment contribué à modeler la conception de la « famille » qui prévaut en droit européen des droits de l'homme. Allant de pair avec l'adoption d'un ensemble d'instruments européens que la jurisprudence a participé à impulser[6], cette double évolution se

[6] Résolution du Parlement européen sur l'égalité des droits des homosexuels et des lesbiennes dans la Communauté européenne (JO C61, 28 février 1994), Charte des droits fondamentaux (dont l'article 21 interdit « toute discrimination fondée notamment sur le sexe […] ou sur l'orientation sexuelle »), Recommandations de l'Assemblée Parlementaire du Conseil de l'Europe 1470 (2000) et 1474 (2000) (suggérant au Comité des Ministres « d'ajouter l'orientation sexuelle aux motifs de discrimination prohibés par la Convention européenne des droits de l'homme » et « d'inviter les États membres à inclure l'orientation sexuelle parmi les motifs de discrimination prohibés dans leurs

veut le reflet des mutations progressives des mentalités européennes. Elle apparaît dans la manière dont la Cour envisage à la fois le couple (I), les relations impliquant des transsexuels ou des homosexuels s'imposant peu à peu comme légitimes, et la parenté (II), transsexuels et homosexuels faisant progressivement figure de parents potentiels, même si cette question demeure plus délicate.

1 Le couple comme fondement de la famille

Rien n'est plus intime que l'identité ou l'orientation sexuelle. Ces deux éléments conditionnent pourtant l'accès à certains droits en droit européen puisque c'est par l'alliance ou par la parenté que l'individu trouve à s'insérer au sein du groupe social, toute la relation individu-société se donnant donc à voir à travers la notion de « famille ». En la matière, ce sont les avancées conquises par les transsexuels, obtenant de la Cour qu'elle fasse application à leur égard de l'article 12 de la Convention qui protège le droit au mariage (A), qui ont permis l'évolution de la situation des homosexuels à travers l'extension de la notion de couple (B).

1.1 L'évolution du droit de se marier et ses conséquences sur la famille

Dès les années 1970, la Commission puis la Cour statuèrent sur le droit, pour les transsexuels opérés, de voir rectifier la mention de leur sexe sur les registres d'état-civil ou de contracter mariage avec des personnes de même sexe biologique que le leur, sous leur nouvelle identité[7] (1). Toutefois, à partir des années 2000, la Cour s'est également trouvée saisie d'affaires dans lesquelles des transsexuels se plaignaient de ce que la reconnaissance officielle de leur nouvelle identité les empêchaient de pouvoir rester mariés avec celle qu'ils avaient épousée avant leur opération de réassignation sexuelle (2). Dans l'un et l'autre cas, c'est une certaine conception européenne de la famille qui se trouvait en jeu, que la jurisprudence a ainsi progressivement contribué à façonner.

législations nationales »), Résolution du Parlement européen sur le respect des droits de l'homme dans l'Union du 16 mars 2000 (surtout § 57), Directive du Conseil de l'Union européenne 2000/78/EC du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail, Directive 2003/86/CE du Conseil du 22 septembre 2003 relative au droit au regroupement familial (disposant que « [l]es États membres peuvent, par voie législative ou réglementaire, autoriser l'entrée et le séjour […] du partenaire non marié ressortissant d'un pays tiers qui a avec le regroupant une relation durable et stable dûment prouvée, ou du ressortissant de pays tiers qui est lié au regroupant par un partenariat enregistré »), Directive 2004/38/CE du Parlement européen et du Conseil du 29 avril 2004 concernant le droit des citoyens de l'Union et des membres de leurs familles de circuler et de séjourner librement sur le territoire des États membres (incluant parmi les « membres de la famille » « le partenaire avec lequel le citoyen de l'Union a contracté un partenariat enregistré, sur la base de la législation d'un État membre, si, conformément à la législation de l'État membre d'accueil, les partenariats enregistrés sont équivalents au mariage, et dans le respect des conditions prévues par la législation pertinente de l'État membre d'accueil », art. 2 b), ou Protocole n° 12 à la Convention européenne des droits de l'homme (élargissant le champ d'application de l'article 14 et contenant une liste non-exhaustive des motifs de discrimination).

[7] Voir notamment l'arrêt B. c. France (n° 13343/87, 25 mars 1992), dans lequel la Cour conclut pour la première fois à la violation de l'article 8 du fait de l'impossibilité, pour un transsexuel, de faire modifier ses documents d'identité. Pour un panorama de l'évolution jurisprudentielle sur la question, nous nous permettons de renvoyer à notre ouvrage *Droit international des droits de l'homme et valeurs*, Bruxelles, Bruylant, 2012, sp. p. 645 et s.

1.1.1 Du droit des transsexuels à l'identité à leur droit au mariage

Dès 1979, dans son rapport concernant l'affaire Van Oosterwijck, la Commission considéra qu'« en opposant par avance à toute demande de mariage une objection indirecte tirée des seules mentions de l'acte de naissance et de la théorie générale de rectification des actes d'état civil, sans plus ample examen, le Gouvernement [avait] méconnu […] le droit du requérant de se marier et de fonder une famille au sens de l'article 12 » (§ 60). Elle affirma également dès 1989 que l'article 12 trouvait à s'appliquer même « lorsque le couple n'est pas biologiquement du même sexe mais que l'un des partenaires a obtenu le même statut sexuel que l'autre partenaire grâce à un acte volontaire reconnu par la loi interne »[8]. La Cour, en revanche, adoptait une posture plus conservatrice, fondée sur l'attachement aux critères biologiques, en soutenant que « l'article 12 vise le mariage traditionnel entre deux personnes de sexe biologique différent […] le but poursuivi consist[ant] essentiellement à protéger le mariage en tant que fondement de la famille »[9]. Ainsi, tout en reconnaissant que le transsexualisme soulevait « des questions complexes de nature scientifique, juridique, morale et sociale »[10] et en « constat[ant] une augmentation de l'acceptation sociale du phénomène et une reconnaissance croissante des problèmes auxquels ont à faire face les transsexuels opérés »[11], elle se borna jusqu'en 2002 à renvoyer au « pouvoir dont jouissent les États contractants de réglementer par des lois l'exercice du droit de se marier »[12].

Ce n'est que dans ses arrêts Christine Goodwin et I.[13], qu'elle opéra un revirement de jurisprudence spectaculaire en rejetant les critères scientifiques et médicaux au profit du critère social du genre. Rejetant la pertinence du critère morphologique d'identification à la naissance et soutenant que « la notion de juste équilibre inhérente à la Convention fai[sait] désormais résolument pencher la balance en faveur de la requérante » (§ 93), c'est en déstructurant partiellement la notion de famille à travers une nouvelle définition légale du sexe qu'elle put étendre aux transsexuels la protection du droit de se marier[14]. S'attachant à l'existence d'un « conflit entre la réalité sociale et le droit qui place la personne transsexuelle dans une situation anormale » (§ 77), la Grande chambre nota l'absence de consensus européen, mais se contenta de juger qu'elle n'était « guère surprenante, eu égard à la diversité des systèmes et traditions juridiques ». Elle dépouilla

[8] ComEDH, Eriksson et Goldschmidt c. Suède, n° 14573/89, dc, 9 nov. 1989.

[9] CEDH, Rees c. Royaume-Uni, n° 9535/81, 17 oct. 1986, § 49. Voir également l'arrêt Cossey c. Royaume-Uni (n° 10843/84, 27 sept. 1990), dans lequel la Cour rappela que l'article 12 vise « le mariage traditionnel entre deux personnes de sexe biologique différent » et considéra «l'attachement [à ce] concept traditionnel » comme un « motif suffisant de continuer d'appliquer des critères biologiques pour déterminer le sexe d'une personne aux fins du mariage ».

[10] CEDH, X, Y et Z. c. Royaume-Uni, n° 21830/93, 22 avr. 1997, GC, § 52 repris dans Sheffield et Horsham, n° 22985/93 et 23390/94, 30 juil. 1998, GC, § 58.

[11] CEDH, Sheffield et Horsham, *précité*.

[12] Ibid., § 67.

[13] CEDH, Goodwin c. Royaume-Uni et I. c. Royaume-Uni, resp. n° 28957/95 et 25680/94, GC, 11 juil. 2002. Les extraits cités ici sont tirés de l'arrêt Goodwin.

[14] « L'évolution des connaissances médicales permet[tant] quelques doutes sur la validité absolue d'un tel critère », la Grande chambre affirma n'être « pas convaincue que l'état des connaissances médicales et scientifiques fournisse un argument déterminant quant à la reconnaissance juridique des transsexuels » (§ 81-82).

alors totalement l'État de sa marge d'appréciation[15] au motif que « la situation insatisfaisante des transsexuels opérés, qui vivent entre deux mondes parce qu'ils n'appartiennent pas vraiment à un sexe ni à l'autre, ne p[ouvai]t plus durer » (§ 30)[16]. Elle refusa pourtant l'argument relativement simple présenté de longue date par les transsexuels, selon lequel l'évolution des mœurs était telle que le mariage aurait cessé d'impliquer obligatoirement des partenaires de sexes opposé[17], préférant affirmer que « l'incapacité pour un couple de concevoir ou d'élever un enfant ne saurait en soi passer pour le priver du droit de se marier » (§ 98)[18]. C'est donc sur une évolution de la définition légale du sexe qu'elle fit reposer sa solution en considérant que le mariage n'était plus aussi étroitement lié à la procréation[19]. Ayant ainsi étendu aux transsexuels la protection offerte par le droit au mariage, la Cour s'est logiquement trouvée saisie de requêtes concernant un hypothétique droit, pour les transsexuels, de rester mariés après leur opération, qui l'amenèrent à examiner la question du mariage entre individus de même sexe biologique.

1.1.2 Du droit de se marier au droit de rester mariés

Déposées par deux couples britanniques[20], les premières requêtes concernaient l'obligation qui leur était imposée par l'État de mettre fin à leur mariage pour permettre la pleine reconnaissance juridique du « nouveau » sexe de celui d'entre eux qui était transsexuel. La Cour accepta de les examiner sous l'angle du droit à la vie privée et familiale, en affirmant que le « dilemme » auquel se trouvait confrontée la première requérante (« faire le choix délicat de sacrifier soit son identité sexuelle soit son mariage ») avait « une incidence directe et intrusive sur la jouissance » de ce droit et, plus précisément, qu'« il serait artificiel et indûment formaliste d'exclure la question de la vie familiale, puisque [...] l'annulation affecterait nécessairement et par définition la vie familiale que mènent actuellement les requérantes en tant que couple marié »[21].

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[15] Selon la Cour, il lui appartenait seulement de déterminer « les conditions que doit remplir une personne transsexuelle qui revendique la reconnaissance juridique de sa nouvelle identité sexuelle pour établir que sa conversion sexuelle a bien été opérée et celles dans lesquelles un mariage antérieur cesse d'être valable, ou encore les formalités applicables à un futur mariage (par exemple les informations à fournir aux futurs époux) » (§ 103).

[16] « Au XXIe siècle, la faculté pour les transsexuels de jouir pleinement, à l'instar de leurs concitoyens, du droit au développement personnel et à l'intégrité physique et morale ne saurait être considérée comme une question controversée exigeant du temps pour que l'on parvienne à appréhender plus clairement les problèmes en jeu » (§ 90).

[17] Les requérants avaient à plusieurs reprises souligné qu'il était « artificiel d'affirmer que les personnes ayant subi une opération de conversion sexuelle ne sont pas privées du droit de se marier puisque, conformément à la loi, il leur demeure possible d'épouser une personne du sexe opposé à leur ancien sexe ».

[18] La Commission avait estimé dès l'affaire Van Oosterwijck que « [s]i le mariage et la famille sont effectivement associés dans la Convention comme dans les droits nationaux, rien ne permet toutefois d'en déduire que la capacité de procréer serait une condition fondamentale du mariage, ni même que la procréation en soit une fin essentielle » (§ 59).

[19] Notant l'évolution de la société depuis l'arrêt Rees de 1986 et s'appuyant sur l'article 9 de la Charte des Droits fondamentaux de l'UE qui n'évoquait pas expressément l'homme et la femme pour protéger le droit au mariage, elle affirma que les termes *homme* et *femme* figurant à l'article 12 ne pouvaient plus être compris comme impliquant une détermination du sexe sur des critères purement biologiques.

[20] CEDH, R. et F. c. Royaume-Uni et Parry c. Royaume-Uni, resp. n° 35748/05 et 42971/05, dc, 28 nov. 2006.

[21] Il s'agit d'une évolution par rapport à la décision Roetzheim c. Allemagne (n° 31177/96, 23 oct. 1997) dans laquelle la Commission avait jugée irrecevable la requête d'un transsexuel qui n'avait pu faire rectifier son acte de naissance au motif que, marié et encore apte à procréer, il ne remplissait pas les conditions imposées pour cela par le droit interne.

Elle refusa cependant d'y faire droit, au motif que le droit interne ne reconnaissait pas le mariage homosexuel et que l'État pouvait légitimement chercher à protéger l'institution du mariage, qui incarnait une forme d'intérêt général face à l'intérêt particulier des requérants. Or, cette solution repose sur un double paradoxe. D'une part, « la valeur historique et sociale » de l'institution du mariage amenait à la fois les requérantes à vouloir rester mariées (du fait de « l'importance émotionnelle qu'elles [y] attach[ai]ent ») et la Cour à constater un « obstacle à la satisfaction de leur demande par les autorités britanniques ». D'autre part, c'est en soulignant la proximité des régimes offerts par le mariage et l'union civile – qui était ouverte aux requérantes – que la Cour choisit d'exclure celles-ci de la protection offerte par l'article 12[22], notant seulement que les quelques dépenses occasionnées par la procédure ne s'avéraient pas prohibitives, même si « la question des conditions au mariage posées par les lois nationales ne p[ouvai]t toutefois pas être laissée entièrement à l'appréciation des États contractants »[23] : « Compte tenu du caractère sensible des choix moraux concernés et de l'importance à attacher en particulier à la protection des enfants et au souci de favoriser la stabilité familiale, la Cour doit se garder de substituer précipitamment son propre jugement à la réflexion des autorités qui sont le mieux placées pour évaluer les besoins de la société et y répondre ». Et peu importe en définitive que l'un des deux couples concernés soit âgé d'une soixantaine d'années et n'ait pas d'enfant... Ce raisonnement met en évidence l'imbrication des différentes notions et la manière dont une évolution dans la façon d'interpréter l'une d'entre elles est susceptible de produire des effets assimilables à une réaction en chaîne.

Dans une affaire plus récente[24], la Cour conclut à la non-violation de l'article 14 combiné avec l'article 8, au motif que la requérante – qui se plaignait de devoir, pour obtenir la reconnaissance légale de son nouveau sexe sur ses documents d'identité, transformer son mariage en partenariat civil, en obtenant l'accord de son épouse – n'était pas « dans la même situation que les autres catégories de personne qu'elle évoqu[ait] ». Soulignant explicitement la concurrence entre « le droit de la requérante au respect de sa vie privée » et « l'intérêt de l'État à maintenir intacte l'institution traditionnelle du mariage », elle conclut également à la non-violation de l'article 12 en s'appuyant à nouveau sur la proximité des statuts offerts aux couples par le mariage et le partenariat civil[25]. La Grande Chambre parvint à une solution identique mais en s'appuyant sur le fait que le système

[22] « Si les couples requérants divorçaient, ils pourraient tout de même poursuivre leur relation dans l'essentiel de ses aspects actuels et même lui conférer un statut juridique, qui, s'il n'est pas identique au mariage, en est proche, en contractant une union civile qui comporte presque les mêmes droits et obligations. » Un argument relatif à la proximité entre régimes juridiques perçus comme plus ou moins légitimes socialement avait déjà été utilisé par la Cour dans l'arrêt X., Y. et Z. c. Royaume-Uni de 1997, relatif au transsexualisme et à l'insémination artificielle avec donneur.

[23] Voir également l'arrêt B. et L. c. Royaume-Uni (n° 36536/02, 13 sept. 2005, § 36). Ici, elle se contenta de considérer qu'« [o]n ne p[ouvai]t exiger de l'État contractant qu'il fasse des aménagements pour le petit nombre de mariages où les conjoints désir[ai]ent tous deux poursuivre leur union malgré le changement de sexe de l'un d'entre eux. »

[24] CEDH, Hämäläinen c. Finlande, n° 37359/09, 13 nov. 2012 et, GC, 16 juil. 2014.

[25] Selon la Cour, le partenariat civil « représent[ait] un choix réel offrant une protection juridique pour les couples de même sexe qui est pratiquement identique à celle du mariage » (§ 50) et rien n'indiquait que quiconque, pas même l'enfant du couple, « serait affecté par la transformation du mariage [...] en partenariat civil » (§ 51), laquelle n'aurait aucun effet sur les droits et obligations de la requérante découlant soit de la paternité soit de la parentalité.

adopté par l'État finlandais lui permettait de remplir ses obligations positives[26]. Ce raisonnement l'amena à constater l'absence de consensus entre les États membres du Conseil de l'Europe, alors pourtant que, comme le soulignèrent les juges Sajo, Keller et Lemmens dans leur opinion dissidente commune, cet élément ne lui sert généralement qu'à déterminer l'ampleur de la marge nationale d'appréciation, et non la nécessité pour l'État d'intervenir ou non dans un domaine[27]. Or, ce choix, qui reflétait un attachement à une conception traditionnelle de la famille, conditionna la solution puisque, faisant fi des convictions religieuses des requérantes, la Grande chambre considéra qu'« il import[ait] peu, du point de vue de la protection offerte à la vie familiale, que la relation de la requérante avec sa famille [ait été] fondée sur des liens maritaux ou sur un partenariat enregistré » (§ 85). Elle accepta ainsi une distorsion faible de cette conception (la famille peut légitimement être fondée sur un couple non-marié ayant conclu un partenariat civil) pour éviter une distorsion plus importante (la famille ne peut pas être fondée sur la persistance d'un mariage entre une transsexuelle opérée et son épouse). On mesure ici l'importance du rôle tenu par le juge dans la stabilité de l'institution familiale, la protection de celle-ci amenant la Cour à affirmer que la reconnaissance juridique du mariage entre personnes biologiques de même sexe porterait atteinte à cette institution alors que cela ne serait apparemment pas le cas de l'existence *de facto* de familles formées sur ce modèle mais affirmées comme moins légitimes par le statut offert par un partenariat civil. C'est toutefois grâce à l'extension de la protection du droit au mariage que la Cour a pu faire évoluer plus largement son interprétation de la notion de « couple », notamment via sa jurisprudence consacrée aux relations homosexuelles.

1.2 L'évolution de la notion de couple à travers le passage du droit à la « vie privée » au droit à la « vie familiale »

Estimant que les États membres ne sont pas encore parvenus à un consensus, la Cour ne va pas jusqu'à affirmer que les homosexuels seraient titulaires d'un véritable « droit au mariage ». L'acceptation progressive des comportements homosexuels l'a toutefois conduite à reconnaître aux

[26] « [L]a relation juridique initiale [qui] se poursuit simplement sous une dénomination différente et avec un contenu légèrement modifié » ne serait pas « assimilable à un divorce », la requérante ne perdant en réalité aucun droit, notamment car « [l]a durée du partenariat est […] calculée à partir de la date à laquelle il a été contracté et non à partir du changement de dénomination » (§ 84). De plus, « [l]e système fonctionne dans les deux sens, et il prévoit ainsi non seulement la transformation du mariage en un partenariat enregistré mais également la transformation du partenariat enregistré en un mariage, selon que l'opération de conversion sexuelle a pour effet de transformer la relation existante en une union entre partenaires de même sexe ou en une union entre partenaires de sexe opposé » (§ 80).

[27] Constatant que « seuls trois États membres [avaient] ménagé des exceptions permettant à une personne mariée ayant changé de sexe d'obtenir la reconnaissance juridique de ce changement tout en conservant ses liens maritaux » (§ 73), elle nota l'absence de consensus « sur l'autorisation du mariage homosexuel [et], dans les États qui interdisent pareil mariage, sur la façon dont il convient de réglementer la reconnaissance des changements de sexe dans les cas de mariages préexistants ». Constatant que « les exceptions ménagées pour les transsexuels mariés [étant] encore plus rares » et rien n'indiquant une évolution « significative » depuis ses décisions antérieures (§ 74), elle conclut qu'une ample marge d'appréciation, devait « en principe s'appliquer tant à la décision de légiférer ou non sur la reconnaissance juridique des changements de sexe résultant d'opérations de conversions sexuelles que, le cas échéant, aux règles édictées pour ménager un équilibre entre les intérêts publics et les intérêts privés en conflit » (§ 75).

couples homosexuels la protection d'un ensemble de droits plus ou moins largement « calquée » sur celle qu'elle reconnaît aux couples hétérosexuels. S'appuyant sur l'évolution des mentalités pour réduire peu à peu la marge d'appréciation des États en envisageant des buts légitimes différents, elle améliora tout d'abord la protection des homosexuels en tant qu'individus (1). Cela lui permit d'étendre ensuite la protection de certains droits aux couples homosexuels en optant pour une approche plus large du « couple » (2).

1.2.1 Evolution des buts légitimes et variation de la marge nationale d'appréciation : l'homosexuel considéré dans son individualité

Le couple homosexuel a été pendant si longtemps considéré différemment du couple hétérosexuel qu'on a pu écrire récemment encore qu'il était « certain que le couple homosexuel n'entre pas dans le champ d'application de la vie familiale, les instances européennes le cantonnant à la vie privée ou au droit au domicile »[28]. Les premières requêtes portées devant la Cour par des homosexuels concernaient d'ailleurs essentiellement la possibilité d'affirmer son identité sexuelle sans encourir de poursuites, que les États prétendaient nécessaires à la protection des tiers (et particulièrement des mineurs), de la santé, de la morale ou de la famille. Ainsi, c'est en s'intéressant à l'âge à partir duquel des relations homosexuelles n'étaient plus interdites (souvent différent de l'âge retenu pour les relations hétérosexuelles et parfois plus élevé pour les gays que pour les lesbiennes), à la confiscation de magazines « s'emplo[ya]nt activement à propager des pratiques qui [étaie]nt des délits en droit anglais »[29] ou, plus largement, à l'incrimination des pratiques homosexuelles masculines[30], que la Cour prit en compte l'évolution des mentalités, réduisant progressivement la marge d'appréciation initialement laissée aux États jusqu'à parvenir à assurer aux homosexuels une protection de leur droit à la vie privée très largement similaire à celle dont jouissent les hétérosexuels : lorsque seuls quelques États lui ont semblé continuer à réserver aux homosexuels un sort moins favorable qu'aux hétérosexuels, elle a considéré qu'une telle différence de traitement pouvait s'analyser en une discrimination fondée sur l'orientation sexuelle.

Cependant, les résistances furent nombreuses. En effet, en 1975, la Commission – pourtant réputée faire preuve de plus de libéralisme que la Cour de l'époque – affirmait que, si « [l]a vie sexuelle relève à n'en pas douter du domaine de la vie privée dont elle constitue un aspect important [c]ertaines de ses manifestations peuvent néanmoins faire l'objet d'une ingérence de l'État »[31]. De même, en 1977, bien que notant l'évolution de l'« environnement moral et culturel », elle jugeait « réaliste » la thèse du Gouvernement qui soutenait « qu'étant donné le caractère

[28] A. Gouttenoire, « Vie familiale », in J. Andriantsimbazovina et a. (dirs.), *Dictionnaire des Droits de l'Homme*, Paris, PUF, Quadrige, 1re éd., 2008, p. 982.

[29] X. c. Royaume-Uni, n° 7308/75, dc, 12 octobre 1978. Pour la Commission, les mesures prises visaient à « protéger la société dans son ensemble ».

[30] Dudgeon c. RU, n° 7525/76, dc, 3 mars 1978 et arrêt, 22 oct. 1981, Norris c. Irlande, n° 8225/78, C. plén., 26 oct. 1988 ou Modinos c. Chypre, n° 15070/89, 22 avr. 1993.

[31] ComEDH, X. c. RFA, n° 5935/72, dc, 30 sept. 1975. Selon la Commission, la législation visait légitimement à « éviter que des expériences homosexuelles avec des adultes n'aient une influence néfaste sur le développement des tendances hétérosexuelles des mineurs » afin de les « guider vers une véritable autonomie dans le domaine de la vie sexuelle ».

controversé et très délicat de la question, les hommes de 18 à 21 ans impliqués dans des relations homosexuelles seraient soumis à de fortes pressions sociales pouvant nuire à leur épanouissement psychologique »[32], et n'hésitait pas à affirmer qu'« hétérosexualité et lesbianisme ne donnent pas lieu à des problèmes sociaux comparables »[33]. De même, lorsque, dans l'arrêt Dudgeon, la Cour conclut pour la première fois à la violation de l'article 8, en raison du risque, pour un homosexuel, de faire l'objet de poursuites[34], ce ne fut toutefois qu'en réaffirmant la nécessité d'un contrôle : « il incomb[ait] d'abord aux autorités nationales de décider quelles garanties de ce genre command[ait] la défense de la morale dans leur propre communauté, et en particulier de fixer l'âge avant lequel les jeunes d[e]v[ai]ent jouir de la protection du droit pénal » (§ 62). Les opinions dissidentes témoignèrent d'ailleurs sans ambiguïté de l'importance tenue par les considérations morales dans le raisonnement adopté. Ainsi, dans un élan d'empathie, le juge Zekia écrivait que, « [s]i un homosexuel se plaint de souffrances d'ordre physiologique, psychologique ou autre et si la loi ne tient pas compte de ces circonstances, il peut faire l'objet d'un non-lieu ou se voir octroyer des circonstances atténuantes, selon que ses tendances sont ou non irréversibles » (pt. 4)[35]. Le même conservatisme apparaissait également sous la plume du juge Matscher[36].

Ce n'est finalement qu'au tournant du siècle que la Cour en vint à affirmer que, « [c]omme les différences fondées sur le sexe, les différences fondées sur l'orientation sexuelle doivent être justifiées par des raisons particulièrement graves »[37]. Par la suite, reprenant ce principe, elle

[32] X. c. Royaume-Uni, n° 7215/75, dc, 7 juil. 1977 et arrêt, 5 nov. 1981, § 154. Dans son arrêt, la Cour souligna qu'« une importante fonction du droit pénal dans une société démocratique est de fournir des garanties permettant de protéger les individus du danger, particulièrement ceux qui sont tout spécialement vulnérables en raison de leur âge » (§ 137).

[33] ComEDH, Johnson c. Royaume-Uni, n° 103989/83, 17 juil. 1986. La Commission évoquait alors les travaux de la Commission britannique de révision du droit pénal, se demandant s'il ne faudrait pas augmenter l'âge de consentement pour les femmes homosexuelles et non s'il faudrait baisser l'âge de consentement pour les homosexuels masculins…

[34] « On comprend mieux aujourd'hui le comportement homosexuel qu'à l'époque de l'adoption de ces lois et l'on témoigne donc de plus de tolérance envers lui : dans la grande majorité des États membres du Conseil de l'Europe, on a cessé de croire que les pratiques du genre examiné ici appellent par elles-mêmes une répression pénale, la législation interne y a subi sur ce point une nette évolution que la Cour ne peut négliger. […] On ne saurait dès lors parler d'un 'besoin social impérieux' d'ériger de tels actes en infractions, faute d'une justification suffisante fournie par le risque de nuire à des individus vulnérables à protéger ou par des répercussions sur la collectivité » (§ 60).

[35] Selon lui, « [l]orsqu'on envisage le respect dû à la vie privée d'un homosexuel, garanti à l'article 8 § 1, on ne doit pas oublier ou perdre de vue que ce respect est également dû à ceux qui soutiennent l'opinion inverse, surtout dans un pays peuplé d'une forte majorité de gens opposés aux pratiques immorales contre nature. Dans une société démocratique, la majorité a certainement droit elle aussi [...] au respect de ses croyances religieuses et morales et elle a le droit d'instruire et d'élever ses enfants en accord avec ses propres convictions religieuses et philosophiques. Dans une société démocratique, majorité fait loi. Il me paraît quelque peu étrange et troublant, quand on considère la nécessité du respect de la vie privée d'un individu, de sous-estimer la nécessité de conserver en vigueur une loi qui protège les valeurs morales tenues en haute estime par la majorité » (pt. 3).

[36] « La différence de nature entre comportement homosexuel et comportement hétérosexuel [...] paraît manifeste, et ils ne soulèvent en aucune manière des problèmes moraux et sociaux identiques. De même, il existe une différence réelle, de nature comme d'ampleur, entre les problèmes moraux et sociaux posées par les deux formes d'homosexualité, la masculine et la féminine. Le traitement différencié de celles-ci en droit pénal repose donc [...] sur des justifications objectives évidentes. »

[37] Puisqu'un « aspect des plus intimes de la vie privée était en jeu » (Smith et Grady c. Royaume-Uni et Lustig-Prean et Beckett c. Royaume-Uni, resp. n° 33985/96 et 33986/96 et 31417/96 et 32377/96, 27 sept. 1999, § 90 et § 74). Il s'agissait d'une adaptation du principe posé dans l'arrêt Abdulaziz, Cabales et Balkandali c. Royaume-Uni, relatif à

appellera d'ailleurs systématiquement « préjugés » toute allégation quant à la prétendue dangerosité particulière des conduites homosexuelles masculines : « ces attitudes, même si elles reflètent sincèrement les sentiments de ceux qui les ont exprimées, vont d'expressions stéréotypées traduisant de l'hostilité envers les homosexuels à un vague malaise engendré par la présence de collègues homosexuels. Dans la mesure où ces attitudes négatives correspondent aux préjugés d'une majorité hétérosexuelle envers une minorité homosexuelle, la Cour ne saurait les considérer comme étant en soi une justification suffisante aux ingérences dans l'exercice des droits susmentionnés des requérants, pas plus qu'elle ne le ferait pour des attitudes négatives analogues envers les personnes de race, origine ou couleur différentes »[38]. Ainsi, ce n'est que lorsque l'homosexualité fut acceptée en tant qu'identité sexuelle que la Cour put passer d'une réflexion basée sur la cohabitation à une réflexion basée sur le couple.

1.2.2 De la cohabitation homosexuelle au couple homosexuel

Initialement, qu'il s'agisse de rapprochement de conjoints[39] ou, plus souvent, des diverses conséquences administratives d'une cohabitation, Commission et Cour se limitaient à refuser à deux homosexuels qui cohabitaient la protection offerte par le droit à la « vie familiale »[40]. Dans sa décision S. c. Royaume-Uni[41], la Commission considéra ainsi que l'objectif de protection de la famille – qu'elle jugea « analogue à la protection du droit au respect de la vie familiale, garanti par l'article 8 » – était « manifestement légitime » dans la mesure où la famille, à laquelle pouvait « être assimilé » le concubinage hétérosexuel, « mérit[ait] une protection particulière dans la société ». Ceci l'amena à conclure que la différence de traitement subie par la requérante par rapport à une personne hétérosexuelle placée dans la même situation pouvait « avoir une justification objective et raisonnable » sans avoir à examiner la proportionnalité des moyens employés par rapport au but

l'impossibilité pour les femmes d'obtenir le rapprochement de leurs conjoints : « la progression vers l'égalité des sexes constitue aujourd'hui un objectif important des États membres du Conseil de l'Europe. Partant, seules des raisons très fortes pourraient amener à estimer compatible avec la Convention une distinction fondée sur le sexe » (n° 9214/80, 9473/81 et 9474/81, C. Plén., 28 mai 1985, § 78). La Commission avait, quant à elle, estimé « opportune to reconsider its earlier case-law in the light of these modern developments and, more especially, in the light of the weight of current medical opinion that to reduce the age of consent to 16 might have positively beneficial effects on the sexual health of young homosexual men without any corresponding harmful consequences » (Sutherland, rapp., n° 25186/94, 1er juil. 1997, § 60).

[38] Smith et Grady, § 97 ou L. et V. c. Autriche et S.L. c. Autriche, resp. n° 39392/98 et 39829/98 et n° 45330/99, 9 jan. 2003, § 52 et § 37.

[39] « En dépit de l'évolution contemporaine des mentalités vis-à-vis de l'homosexualité », la Commission rejeta comme manifestement mal fondée une requête relative à l'expulsion d'un membre d'un couple gay, au motif qu'« il n'a[vait] pas été établi que les requérants ne pouvaient pas vivre ensemble ailleurs qu'au Royaume-Uni ou que leurs liens avec le Royaume-Uni étaient un élément essentiel de leurs relations » (X et Y c. Royaume-Uni, n° 9369/81, dc, 3 mai 1983).

[40] C'était également la position adoptée par la CJCE dans son arrêt Grant du 17 février 1998.

[41] ComEDH, S. c. Royaume-Uni, n° 11716/85, dc, 14 mai 1986.

visé[42]. En 2001, dans une affaire de droit à pension[43], la Cour constata une évolution des mentalités « dans plusieurs États européens, tendant à la reconnaissance légale et juridique des unions de fait stables entre homosexuels », mais considéra toutefois que « l'absence d'un dénominateur commun amplement partagé » justifiait le maintien d'une large marge nationale d'appréciation[44].

L'arrêt Karner[45] constitua, en revanche, une évolution car, tout en admettant que c'était bien « la cellule familiale traditionnelle », évoquée par le gouvernement, qu'il s'agissait ici de protéger (§ 39), la Cour y souligna cependant l'imprécision de cette notion en vue de restreindre la marge d'appréciation de l'État[46], affirmant que, « [l]orsque la marge d'appréciation laissée aux États est étroite, dans le cas par exemple d'une différence de traitement fondée sur le sexe ou l'orientation sexuelle, non seulement le principe de proportionnalité exige que la mesure retenue soit normalement de nature à permettre la réalisation du but recherché mais il oblige aussi à démontrer qu'il était nécessaire, pour atteindre ce but, d'exclure certaines personnes – en l'espèce les individus vivant une relation homosexuelle – du champ d'application de la mesure dont il s'agit » (§ 41). Bien que validant toujours la protection du modèle familial traditionnel en tant que but légitime, elle assura ainsi son rôle d'harmonisation du droit en procédant à un contrôle de proportionnalité qui l'amena à conclure à la violation de l'article 14 combiné avec l'article 8[47]. Sans trancher la question de savoir si les faits concernaient ou non la « vie privée et familiale » du requérant, elle franchit donc un pas décisif dans sa manière d'envisager les relations homosexuelles en affirmant que les États européens ne pouvaient plus se contenter de les considérer différemment des relations hétérosexuelles sans avoir à s'en justifier. C'était là ouvrir la porte à l'acceptation progressive de différentes formes de cohabitation ou d'union jugées jusqu'alors illégitimes à l'aune du modèle familial traditionnel. Elle continua alors à reconnaître légitime toute tentative des États de protéger ce modèle mais en leur imposant désormais de tenir compte de l'évolution des mentalités. Ainsi, dans l'arrêt Kozak[48], elle conclut à l'unanimité que le refus de reconnaître le droit à transmission d'un bail à un homosexuel, après le décès de son concubin, avait constitué une violation de l'article 14, au motif que la reconnaissance juridique du concubinage et le fait que celui-ci puisse produire des effets même entre homosexuels n'avait pas à découler de l'ouverture ou non de l'institution du mariage à ces derniers. Elle explicita ici sa jurisprudence Karner fondée sur le

[42] Elle conclut de même en 1996, refusant toujours d'examiner une « relation durable entre deux hommes » sous l'angle du droit au respect de la « vie familiale » et voyant cette fois dans la protection de la famille un objectif « qui se rapproche de la protection du droit au respect de la vie familiale » (Marc Roosli c. Allemagne, n° 28318/95, dc, 15 mai 1996).

[43] CEDH, Mata Estevez c. Espagne, n° 56501/00, dc, 10 mai 2001.

[44] Notant que « la relation affective et sexuelle maintenue par le requérant rel[evait] de sa vie privée au sens de l'article 8 § 1 », elle se borna cependant à considérer que le droit espagnol pouvait légitimement favoriser « la protection de la famille fondée sur les liens du mariage » à travers le droit aux prestations de survivants, alors même que les homosexuels se voyaient exclus de l'institution du mariage.

[45] CEDH, Karner c. Autriche, n° 40016/98, 24 juil. 2003, § 33.

[46] « Le but consistant à protéger la famille au sens traditionnel du terme est assez abstrait et une grande variété de mesures concrètes peuvent être utilisées pour le réaliser » (§ 41). C'est par cette notion de « famille au sens traditionnel » qu'elle renverra, par la suite, au but légitime de protection de la famille fondée sur les liens du mariage.

[47] Le Gouvernement n'ayant pas « fait état de motifs convaincants et solides » (§ 42) justifiant une différence de traitement.

[48] CEDH, Kozak c. Pologne, n° 13102/02, 2 mars 2010.

resserrement notable de la marge d'appréciation en affirmant que, « [m]algré l'importance du but légitime poursuivi [la protection de la famille traditionnelle], l'État doit tenir compte, dans son choix de protéger ce but, de l'évolution de la société, notamment du fait qu'il n'existe pas simplement une façon pour un individu de mener sa vie privée et familiale. »

Ce fut toutefois l'arrêt Schalk et Kopf[49] qui marqua un véritable tournant. A travers ce que le juge Costa appela une « démarche réservée », on y voit très bien la progressivité du raisonnement de la Cour car, bien qu'aboutissant à un double constat de non-violation, cet arrêt n'en comprit pas moins deux avancées notables. D'une part, « prenant en compte » l'article 9 de la Charte des Droits fondamentaux de l'Union européenne, la Cour y affirma ne plus considérer « que le droit de se marier consacré par l'article 12 de la Convention doive en toutes circonstances se limiter au mariage entre deux personnes de sexe opposé » et accepta ainsi l'applicabilité de l'article 12 au grief des requérants[50]. Cette avancée demeura néanmoins prudente puisque la Cour ajouta immédiatement qu'« en l'état actuel des choses, l'autorisation ou l'interdiction du mariage homosexuel [restait] régie par les lois nationales des États contractants » (§ 61)[51]. D'autre part, dans le prolongement de ce raisonnement, la notion de « vie familiale » se trouva ici appliquée pour la première fois à la situation d'un couple homosexuel, la Cour s'engouffrant dans la brèche ouverte par l'arrêt Karner, en choisissant de faire produire des effets nouveaux à sa « jurisprudence constante relative aux couples hétérosexuels », selon laquelle « la notion de 'famille' au sens où l'entend cet article ne se borne pas aux seules relations fondées sur le mariage et peut englober d'autres liens 'familiaux' de fait lorsque les parties cohabitent en dehors du mariage » (§ 91). Soulignant que, « depuis 2001 [et l'affaire Mata Estevez] l'attitude de la société envers les couples homosexuels a[vait] connu une évolution rapide dans de nombreux États membres » et que beaucoup avaient accordé « une reconnaissance juridique aux couples homosexuels » (§ 93), elle affirma ainsi qu'il aurait été « artificiel de continuer à considérer que, au contraire d'un couple hétérosexuel, un couple

[49] CEDH, Schalk et Kopf c. Autriche, n° 30141/04, 24 juin 2010.

[50] Si, « pris isolément, le texte de l'article 12 p[ouvai]t s'interpréter comme n'excluant pas le mariage entre deux hommes ou deux femmes », en revanche la formulation des autres articles et la prise en compte du contexte amenait à conserver une conception traditionnelle du mariage, le fait que le droit de se marier était désormais déconnecté de la capacité à procréer « n'autoris[ant] pas à tirer une quelconque conclusion au sujet du mariage homosexuel » (§ 56). « Bien que […] l'institution du mariage ait été profondément bouleversée par l'évolution de la société depuis l'adoption de la Convention », la Cour nota ici l'absence de consensus, le mariage homosexuel n'étant autorisé que par six États membres alors qu'il existait au contraire « une convergence des normes s'agissant du mariage des transsexuels sous leur nouvelle identité sexuelle » (§ 58-59).

[51] Elle précisa que « le mariage possède des connotations sociales et culturelles profondément enracinées susceptibles de différer notablement d'une société à une autre » et rappela qu'« elle ne d[eva]it pas se hâter de substituer sa propre appréciation à celle des autorités nationales, qui sont les mieux placées pour apprécier les besoins de la société et y répondre », adaptant ainsi l'arrêt B. et L. c. Royaume-Uni, dans lequel l'impossibilité légale de se marier, pour un homme et l'ex-femme de son fils, avait emporté violation de l'article 12 (n° 36536/02, 13 sept. 2005, § 36 : « Article 12 expressly provides for regulation of marriage by national law and given the sensitive moral choices concerned and the importance to be attached to the protection of children and the fostering of secure family environments, this Court must not rush to substitute its own judgment in place of the authorities who are best placed to assess and respond to the needs of society »).

homosexuel ne saurait connaître une 'vie familiale' aux fins de l'article 8 »[52] (§ 94). Or, même sans avoir mené à un constat de violation, ce choix revêtit une importance fondamentale car, en autorisant à raisonner en termes de comparaison pour prendre en compte l'évolution des mentalités[53], il rendit applicable l'article 14 combiné avec l'article 8.

En « se fond[ant] sur la prémisse selon laquelle les couples homosexuels sont, tout comme les couples hétérosexuels, capables de s'engager dans des relations stables », la Cour pu donc affirmer que « les requérants se trouv[ai]ent dans une situation comparable à celle d'un couple hétérosexuel pour ce qui [était] de leur besoin de reconnaissance juridique et de protection de leur relation » (§ 99)[54]. Toutefois, la majorité des États membres n'accordant pas encore une pleine reconnaissance juridique aux couples homosexuels, elle estima en l'espèce que « [l]e domaine en cause d[eva]it donc toujours être considéré comme un secteur où les droits évoluent, sans consensus établi, et où les États d[evai]ent aussi bénéficier d'une marge d'appréciation pour choisir le rythme d'adoption des réformes législatives » (§ 105)[55]. Si les positions demeuraient alors extrêmement clivées au sein même de la Cour,[56], cette approche comparative n'en marqua moins une avancée décisive dans la reconnaissance progressive des droits des membres de la communauté LGBTI – et l'on peut mesurer le chemin parcouru en comparant par exemple l'interdiction faite aux homosexuels de donner leur sang en Italie jusqu'en 2001[57] et l'affirmation de la Cour selon laquelle « [i]l n'existe aucune ambiguïté quant au fait que les autres États membres reconnaissent le droit de chacun de revendiquer ouvertement son homosexualité ou son appartenance à toute autre minorité sexuelle et à défendre ses droits et libertés, notamment en exerçant sa liberté de réunion pacifique »[58].

[52] Car «la relation qu'entret[enai]ent les requérants, un couple homosexuel cohabitant de fait de manière stable, rel[evait] de la notion de 'vie familiale' au même titre que celle d'un couple hétérosexuel se trouvant dans la même situation».

[53] « Force est [...] de constater que se fait jour un consensus européen tendant à la reconnaissance juridique des couples homosexuels et que cette évolution s'est en outre produite avec rapidité au cours de la décennie écoulée. »

[54] Et ce, bien que l'article 12 n'impose pas la création d'un mariage homosexuel et que la nécessité de lire la Convention comme un tout porte à conclure que « l'article 14 combiné avec l'article 8, dont le but et la portée sont plus généraux, ne sauraient être compris comme imposant une telle obligation » (§ 101).

[55] Dès lors, « [m]ême s'il n'[était] pas à l'avant-garde, le législateur autrichien ne saurait se voir reprocher de ne pas avoir créé plus tôt la loi sur le partenariat enregistré » (§ 106).

[56] D'une manière qui n'était pas sans rappeler les opinions séparées qui accompagnèrent les affaires de transsexualisme, tel l'arrêt Cossey, comme en témoigne notamment l'opinion du juge Malinverni, à laquelle le juge Kovler s'était rallié, soutenant que seules des personnes de sexe opposé pouvaient se marier et que l'évolution résultant de l'arrêt Goodwin ne changeait rien à la question puisque « [c]ette affaire ne concernait […] pas un mariage entre personnes de même sexe ».

[57] Ce n'est que depuis un décret du 26 janvier 2001 que les homosexuels ont la possibilité de donner leur sang en Italie. Voir CEDH, Faranda, Crescimone ou Tosto (resp. n° 51467/99, 49824/99 et 49821/99, dc, 15 oct. 2002, rayées du rôle).

[58] CEDH, Alekseyev c. Russie, n° 4916/07, 21 oct. 2010, § 84. La Cour y conclut à l'unanimité que le refus d'autoriser les défilés de la Gay Pride avait entraîné une violation de l'article 11 et y tourna définitivement le dos aux arguments fondés sur la dangerosité potentielle des comportements homosexuels, en affirmant « ne dispose[r] d'aucunes preuves scientifiques ou données sociologiques qui suggéreraient que la simple mention de l'homosexualité ou un débat public ouvert sur le statut social des minorités sexuelles nuiraient aux enfants ou aux 'adultes vulnérables' ». Elle sembla plutôt vouloir jouer un rôle dans la meilleure acceptation sociale de l'homosexualité en soulignant que « la société ne p[ouvai]t se positionner sur des questions aussi complexes [...] que par un débat équitable et public », ajoutant qu'« un tel débat, appuyé sur la recherche universitaire, serait bénéfique pour la cohésion sociale, car il permettrait l'expression de tous les points de vue, y compris celui des premiers intéressés. Il permettrait également de

Or, en retour, le développement de cette protection a également contribué à la modification de la conception de la famille en droit européen. En effet, la légitimité du mariage en tant qu'institution s'est trouvée peu à peu questionnée non seulement par l'existence de couples issus de la communauté LGBTI mais aussi par la banalisation du concubinage. Ainsi, ce n'est pas seulement contre les « dérives » que les couples homosexuels auraient été susceptibles de lui faire subir qu'il s'agissait de protéger cette institution mais, plus largement, contre toute forme d'unions perçues comme moins légitimes, au premier rang desquelles le concubinage. Dès 1986, la Commission affirma ainsi que « [l]e mariage se caractérise toujours par un ensemble de droits et d'obligations qui le différencient nettement de la situation des concubins »[59]. En 2000, la Cour estima de même que « la promotion du mariage par l'octroi d'avantages limités au conjoint survivant ne pouvait être considérée comme excédant la marge d'appréciation accordée à l'État »[60]. Cependant, se penchant plus récemment sur la discrimination prétendument subie par deux sœurs vivant ensemble au regard de l'obligation future de payer des droits de succession[61], c'est entre couples mariés ou pacsés d'une part, qu'ils soient hétérosexuels ou homosexuels, et couples non-mariés, d'autre part, que la Cour établit une distinction, ce qui la conduisit à conclure à la non-violation de l'article 14 combiné avec l'article 1er du Protocole n° 1. La section estima pour cela que l'État pouvait choisir de mener « par le biais de son régime fiscal une politique visant à promouvoir le mariage [et] d'octroyer aux couples homosexuels solides les avantages fiscaux associés au mariage » (§ 59)[62]. La Grande chambre, en revanche, constatant que, « sur le plan qualitatif la relation entre frères et sœurs est différente par nature de celle qui lie deux conjoints ou deux partenaires civils homosexuels », choisit d'insister sur ce qui rapproche mariage et partenariat civil pour mieux distinguer ces couples, auxquels le droit accorde une forme particulière de légitimité, de ceux qui ne témoigneraient pas du même engagement public. Ce serait donc bien le lien juridique, par lequel ses membres choisissent de se lier devant la société tout entière, qui ferait la valeur de ces unions, le concubinage ne s'apparentant au contraire qu'à une sorte de cohabitation de fait[63]. Cette précision l'autorisa à rejeter la requête sans avoir à examiner le fait que deux sœurs se trouvaient, par nature, privées de la possibilité de choisir de se lier de la sorte. Il ne s'agissait donc ici que d'une manière différente de protéger l'institution contre des couples ne disposant pas de la même légitimité que les couples mariés mais cherchant à s'approprier cette institution[64]. Pourtant,

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dissiper certains malentendus courants, tels que celui qui concerne la question de savoir si l'hétérosexualité et l'homosexualité peuvent découler de l'éducation ou de l'incitation et si l'on peut choisir volontairement d'être ou de ne pas être homosexuel » (§ 86).

[59] ComEDH, Lindsay c. Royaume-Uni, dc, n° 11089/84, 11 nov. 1986.

[60] ComEDH, Joanna Shackell c. Royaume-Uni, dc, n° 45851/99, 27 avr. 2000.

[61] CEDH, Burden et Burden c. Royaume-*Uni*, n° 13378/05, 12 déc. 2006 et GC, 29 avr. 2008.

[62] Ici, l'exonération de droits de succession consentie aux époux et aux partenaires civils visait le but légitime « qui consiste à favoriser les unions hétérosexuelles ou homosexuelles stables et solides en offrant au survivant une certaine sécurité financière après le décès de son conjoint ou partenaire », même si le législateur aurait pu abandonner ces notions.

[63] «Plutôt que la durée ou le caractère solidaire de la relation, l'élément déterminant est l'existence d'un engagement public, qui va de pair avec un ensemble de droits et d'obligations d'ordre contractuel».

[64] Les juges avaient d'ailleurs pleinement conscience de ces enjeux, soit qu'ils notent l'importance des politiques fiscales, lesquelles «comportent des incitations financières en faveur de certains choix que les particuliers sont

paradoxalement, déplaçant le curseur de la légitimité, l'une des conséquences de cet arrêt est aussi que les couples gays se trouvent désormais essentiellement « assimilés » aux couples hétérosexuels[65].

Certes, la Cour ne considère pas pour autant qu'il existerait aujourd'hui une forme d'obligation pour les États européens de reconnaître aux homosexuels le droit de se marier. Elle se base sur les dispositions du droit interne pour examiner si le traitement différencié qui peut parfois leur être réservé n'excède pas la marge d'appréciation dont les États disposent. Ce choix l'amène à continuer à considérer comme légitimes les distinctions – notamment fiscales – établies par certains droits internes en vue de la préservation d'une conception traditionnelle de la famille mais, par le jeu de l'entrecroisement des jurisprudences, les principes posés dans le cadre d'affaires relatives à des revendications portées par des homosexuels se trouvent peu à peu appliqués à tous. Ce fut le cas dans l'affaire Korosidou[66], relative à la « promotion du mariage » (§ 70) à travers le refus de versement d'une pension de réversion à la concubine d'un homme décédé. Appliquant sa jurisprudence Burden, centrée sur la légitimité particulière du mariage en tant que cellule familiale de base[67], la Cour conclut à la non-violation de l'article 14, combiné avec l'article 8 et l'article 1er du Protocole n° 1 en soutenant que les États disposent « d'une certaine marge d'appréciation quand ils prévoient un traitement différent selon qu'un couple est marié ou non, notamment dans des domaines qui relèvent de la politique sociale et fiscale, par exemple en matière d'imposition, de pension et de sécurité sociale » (§ 64). Dans l'affaire Vallianatos[68], en revanche, elle conclut, par seize voix contre une, à la violation de l'article 14 combiné avec l'article 8 quant à l'impossibilité,

susceptibles de faire» (op. diss. Zupancic), soit qu'ils insistent sur l'attitude nécessairement modérée de la Cour (pour D.T. Björgvinsson, si «le législateur a ainsi répondu aux nouvelles réalités sociales et à l'évolution des valeurs morales et sociales [i]l importe toutefois de garder à l'esprit que chaque pas dans cette direction, aussi positif qu'il puisse paraître du point de vue de l'égalité des droits, peut avoir des conséquences notables et profondes sur la structure sociale de la société, ainsi que des conséquences juridiques, en l'occurrence sur la sécurité sociale et le système fiscal des pays concernés »).

[65] Par exemple, la Cour jugea recevable, sous l'angle de l'article 14 combiné avec l'article 8 et avec l'article 1er du Protocole n° 1, un recours concernant le refus d'accorder au partenaire homosexuel d'un fonctionnaire une couverture d'assurance en qualité de personne à charge (P.B. et J.S. c. Autriche, n° 18984/02, dc, 20 mars 2008). Elle considéra qu'un homme qui cohabitait avec le titulaire d'un bail d'habitation, auquel il assurait des soins quotidiens, mais n'avait pu se voir transmettre ce bail au décès de celui-ci n'avait pas fait l'objet d'une différence de traitement fondée sur l'orientation sexuelle ou sur le sexe, mais sur « la nature de la relation ». Et conclut à l'irrecevabilité au motif qu'« un rapport de dépendance économique ne peut être assimilé à une relation durable », indépendamment du sexe des individus concernés, tous deux ne se trouvant pas dans une « situation analogue » à un couple (marié ou non), à des partenaires civils, ni à des parents proches, auxquels le droit interne reconnaîtrait le droit à la transmission du bail (Korelc c. Slovénie, n° 28456/03, dc, 12 mai 2009). De même, elle écarta la requête d'un homme relative à l'engagement d'une action indemnitaire contre un tiers suite au décès de sa fiancée en soulignant que, si la vie familiale « ne comprend pas uniquement des relations de caractère social, morale ou culturel, [mais] englobe aussi des intérêts matériels », l'action ne soulevait en revanche aucune question de « vie familiale » ni même de « vie privée » (Hofmann c. Allemagne, n° 1289/09, dc, 23 fév. 2010).

[66] CEDH, Korosidou c. Grèce, n° 9957/08, 10 fév. 2011.

[67] Elle rappela ici que la protection de cette institution « constitue en principe une raison importante et légitime pouvant justifier une différence de traitement entre couples mariés et couples non mariés » (Quintana Zapata c. Espagne, n° 34615/97, dc, 4 mars 1998) puisque l'institution « se caractérise par un ensemble de droits et d'obligations qui le différencient nettement de la situation d'un homme et d'une femme vivant ensemble » (Nylund c. Finlande, n° 27110/95, dc, 29 juin 1999 et Lindsay, *précitée*).

[68] CEDH, Vallianatos et a. c. Grèce, n° 29381/09 et 32684/09, GC, 7 nov. 2013.

pour les couples homosexuels, de contracter un « pacte de vie commune », ouvert exclusivement aux couples hétérosexuels, en affirmant que « la vie en commun des couples de même sexe implique les mêmes besoins de soutien et d'aide mutuels que ceux des couples de sexe opposé », même en l'absence de cohabitation[69]. Ce faisant, elle élargit donc son interprétation de la notion de « couple » au-delà de la seule cohabitation et put étendre le champ d'application de sa jurisprudence antérieure pour conclure que la Grèce avait l'obligation d'ouvrir ce pacte aux homosexuels. Ce ne fut cependant qu'au terme d'un raisonnement dénoncé par le juge Pinto de Albuquerque comme constitutif d'une « violation du principe de subsidiarité »… En effet, la Cour précisa ici que « l'État doit choisir les mesures à prendre [...] pour protéger la famille et garantir le respect de la vie familiale en tenant compte de l'évolution de la société ainsi que des changements qui se font jour […] notamment de l'idée selon laquelle il y a plus d'une voie ou d'un choix possibles en ce qui concerne la façon de mener une vie privée et familiale » (§ 84). En l'absence de consensus, c'est toutefois d'une façon un peu particulière qu'elle fit produire des effets à cette exigence, évoquant, « une tendance [à la] reconnaissance juridique des relations entre personne de même sexe » et soulignant qu'à l'exception de la Grèce et de la Lituanie, « lorsqu'un État membre du Conseil de l'Europe décide d'édicter une loi instituant un nouveau système de partenariat enregistré qui constitue une alternative au mariage pour les couples non mariés, les couples de même sexe y sont inclus » (§ 91). Elle parvint ainsi tout à la fois à affirmer que la Grèce pouvait légitimement chercher à « renforcer indirectement l'institution du mariage au sein de la société » et à lui imposer de prendre en considération les couples homosexuels[70].

Prolongeant l'arrêt Schalk et Kopf, qui avait ouvert aux couples homosexuels la protection offerte sous l'angle de la « vie familiale », une telle complexification du raisonnement permet de mieux saisir l'imbrication entre différentes questions. En effet, appliquant au cadre de la vie commune un principe élaboré en matière familiale[71], la Grande chambre opéra ici une jonction constructive entre deux jurisprudences, envisageant en même temps deux types de couples « en concurrence » avec l'institution légitime du mariage : le couple d'homosexuels et le couple d'hétérosexuels non mariés. Or, cette évolution dans l'interprétation de la notion de « couple » s'accompagne d'une évolution dans la manière d'envisager la parenté, la Cour distinguant pour cela entre situations de fait et désirs.

[69] Cette dernière « ne priv[ant] pas les couples concernés de la stabilité qui les fai[sai]t relever de la vie familiale au sens de l'article 8 », il n'existait donc aucun « élément permettant de distinguer […] entre les requérants qui vivent ensemble et ceux qui – pour des raisons professionnelles et sociales – ne cohabitent pas ».

[70] Considérant que leur relation relevait à la fois de la « vie privée » et de la « vie familiale », la Cour jugea la situation des requérants « comparable » à celle des couples hétérosexuels et nota que la reconnaissance juridique offerte par le pacte, « seule occasion [...] d'officialiser leur relation », leur aurait permis d'agir en tant que couple en matière de patrimoine, de pension alimentaire et de succession (§ 81 et 90).

[71] Voir l'affaire X. et autres c. Autriche, § 139, analysé dans la deuxième partie.

2 Parenté et filiation : le poids de l'institution familiale et la prise en compte progressive des membres de la communauté LGBTI en tant que parents

Dès son arrêt *Marckx c. Belgique*, la Cour établit que « [l]e droit au respect d'une 'vie familiale' ne protège pas le simple désir de fonder une famille ; il présuppose l'existence d'une famille » (§ 31)[72]. Dès lors, bien qu'elle ait considéré que la notion de vie privée « englobe le droit au respect de la décision d'avoir un enfant ou de ne pas en avoir »[73], s'agissant des membres de la communauté LGBTI, elle fait plus facilement droit aux demandes qui concernent la protection ou l'aménagement des relations que des requérants homosexuels ou transsexuels sont susceptibles d'entretenir *de facto* avec des enfants nés ou à naître (A) qu'à celles visant à leur permettre de fonder une famille en concrétisant un projet parental (B).

2.1 La réglementation de situations de fait : les membres de la communauté LGBTI comme parents d'enfants nés ou à naître

C'est à travers la vie de couple que la Cour se penche sur la possible légitimation juridique des relations existant entre un membre de la communauté LBGTI et l'enfant de sa/son partenaire (1). Elle ne peut bien sûr procéder de même pour considérer les relations qu'un parent homosexuel ou transsexuel entretient avec son propre enfant naturel (2). Dans le premier cas, le poids de l'institution familiale la conduit au refus d'établir une filiation biologiquement « impossible », dans le second, elle fait prévaloir plus directement les intérêts de l'enfant sur les droits parentaux.

2.1.1 Les relations entre un membre de la communauté LGBTI et l'enfant de sa/son partenaire : le refus d'établir une filiation « impossible »

S'agissant de préciser des liens existants entre un individu et l'enfant naturel de sa/son partenaire, la Cour a à connaître de diverses manières d'établir une filiation. Dans l'affaire X., Y. et Z. c. Royaume-Uni[74], la Grande chambre conclut que le refus d'enregistrer comme père d'un enfant (né suite à une insémination artificielle avec donneur) le transsexuel avec lequel vivait sa mère ne constituait pas une violation de l'article 8, alors même que le traitement médical avait bien été sollicité par le couple. Cet arrêt se révéla néanmoins fondateur, la Cour y appliquant pour la première fois la notion de « vie familiale » aux transsexuels[75], au motif que « les requérants viv[ai]ent d'une manière qui ne se distingu[ait] en rien de la "vie familiale" dans son acception

[72] Elle a précisé depuis lors que devait au moins exister une « relation potentielle qui aurait pu se développer » (Nylund, *précitée*), une relation née d'un mariage non fictif, même en l'absence de vie familiale déjà effective (Abdulaziz et a., *précité*, § 62), ou née d'une adoption légale non fictive (Pini et a. c. Roumanie, n° 78028/01 et 78030/01, 22 juin 2004, § 148). Pour une synthèse, voir E.B. c. France, n° 43546/02, GC, 22 janv. 2008, § 41.

[73] CEDH, Evans c.Royaume-Uni, n° 6339/05, GC, 10 avr. 2007, § 71.

[74] CEDH, X., Y. et Z. c. Royaume-Uni, *précité*.

[75] Distinguer les liens unissant X. et Y. de ceux existant au sein d'un couple de lesbiennes lui permit de se détacher d'une décision dans laquelle la Commission avait considéré que les relations entre une femme et l'enfant de sa partenaire de longue date ne concernaient pas le droit à la vie familiale (Kerkhoven et a. c. Pays-Bas, n° 15666/89, 19 mai 1992).

traditionnelle » (§ 35) et qu'ils entretenaient des « liens familiaux de facto »[76]. En l'absence de consensus en matière d'attribution de droits parentaux aux transsexuels, elle reconnut à l'État une large marge d'appréciation comme elle l'avait fait dans les affaires concernant la rectification des documents d'état-civil et le droit au mariage. Dès lors, confrontant l'intérêt des requérants à « l'intérêt de la société dans son ensemble de préserver la cohérence d'un ensemble de règles de droit de la famille plaçant au premier plan le bien de l'enfant », elle choisit de se placer sous l'angle de l'impact potentiel d'une telle reconnaissance sur l'enfant et non sous celui des droits potentiels du « parent transsexuel ». En ce sens, plutôt que d'appliquer sa jurisprudence selon laquelle « là où l'existence d'un lien familial avec un enfant se trouve établie, l'État doit agir de manière à permettre à ce lien de se développer et […] accorder une protection juridique rendant possible, dès la naissance ou aussitôt que possible après, l'intégration de l'enfant dans sa famille », elle préféra s'attacher aux « incertitudes » existant quant à la « meilleure manière » de protéger les enfants dans ce type de situation. Elle conclut donc à l'absence de violation, non sans avoir souligné que « le transsexualisme soulève des questions complexes de nature scientifique, juridique, morale et sociale » (§ 52). Or, cette solution, fondée sur l'évolution libérale de la société britannique et non sur d'éventuelles résistances morales ou religieuses[77], présente la particularité d'avoir fait jouer, paradoxalement, l'évolution des mentalités *contre* les requérants. Elle met ainsi en évidence la manière dont les requêtes individuelles s'insèrent dans des problématiques beaucoup plus larges à travers l'importance des questions qu'elles posent à la société.

Dans son opinion concordante, le juge Pettiti remarquait que « [l]a multiplication des situations familiales précaires, instables, soulève de nouvelles difficultés [...] et appellera dans l'avenir une réflexion en profondeur sur l'identité de la famille, le sens de la vie familiale à protéger au sens de l'article 8 en prenant en compte l'intérêt majeur de l'enfant et de son avenir »[78]. Depuis cet arrêt de principe, la Cour semble effectivement avoir entrepris une réflexion de ce type. Toutefois, la conception traditionnelle de la filiation reste vivace, reprise notamment dans une

[76] Elle adapta pour cela le principe posé dans l'arrêt Kroon c. Pays-Bas (n° 18535/91, 27 oct. 1994, § 30) en soutenant qu'il pouvait « se révéler utile de tenir compte d'un certain nombre d'éléments, comme le fait de savoir si les membres du couple vivent ensemble et depuis combien de temps, et s'ils ont eu des enfants ensemble, de manière naturelle ou autre, preuve de leur engagement l'un envers l'autre ». Elle jugea plusieurs éléments déterminants :« Le couple a demandé, et obtenu, un traitement IAD devant permettre à Y de concevoir un enfant. X a soutenu Y pendant cette période et se comporte à tous égards comme "le père" de Z depuis la naissance de celle-ci » (§ 37). Le juge De Meyer s'opposa vivement à cette solution en affirmant qu'il n'existait en l'espèce « qu'une 'apparence' de 'liens familiaux' » et qu'il aurait suffi à la Cour d'affirmer qu'« il va de soi qu'une personne qui n'est manifestement pas le père d'un enfant n'a aucunement le droit d'en être reconnue comme le père ».

[77] La Cour considéra en effet que « le fait que le droit britannique ne permette pas une reconnaissance juridique spéciale de la relation unissant X et Z ne constituait pas un manque respect de la vie familiale au sens de cette disposition » (§ 52), et ce pour deux raisons. D'une part, l'absence de mention du « père » sur l'acte de naissance n'était pas publique (et aucune « opprobre particulière [ne] frapp[ait] encore les enfants ou les familles se trouvant dans ce cas »), les actes de naissance n'étant que rarement utilisés pour des démarches administratives au Royaume-Uni. D'autre part, « rien n'empêch[ait] X de se comporter comme le père de Z en société », il pouvait « se présenter » comme tel et même demander une ordonnance de garde conjointe, qui lui [aurait] conf[éré] l'autorité parentale (§ 49-51).

[78] Soulignant que « [l]a dimension éthique et sociale constitutive d'une famille ne peut être occultée ni sous-évaluée », il plaidait alors pour « une prise en considération juridique, sociologique et éthique de l'ensemble du problème et de la diversité des droits et des valeurs à attribuer à chacune des personnes appelées à constituer une famille ».

décision d'irrecevabilité récente, relative au refus des autorités d'inscrire comme deuxième mère sur l'acte de naissance d'un enfant la partenaire civile de la mère biologique, avec laquelle celle-ci vivait au moment de l'accouchement[79]. De plus, à cette conception traditionnelle de la filiation répond une conception également traditionnelle de « l'intérêt de l'enfant » dès lors que sont en jeu les relations qui unissent un parent homosexuel ou transsexuel et son enfant naturel[80].

2.1.2 Les relations entre un membre de la communauté LGBTI et son propre enfant : reconnaissance, protection et aménagement des droits parentaux dans l'intérêt de l'enfant

Qu'il s'agisse de droit de garde ou du droit de visite accordé à un parent divorcé ou séparé, lorsqu'elle examine les relations entre un membre de la communauté LBGTI et son propre enfant, la Cour fait prévaloir les intérêts de l'enfant sur ceux du parent, et ce n'est que dans un second temps qu'elle examine la justification apportée par l'État à la différence de traitement dont le parent homosexuel ou transsexuel a pu faire l'objet. La situation de celui-ci se trouve alors examinée à l'aune de celle de parents hétérosexuels, puisque la vie familiale existe déjà et qu'il s'agit seulement de la réglementer. Toutefois, en la matière, il importe de distinguer entre requérants homosexuels et transsexuels. Quant au droit de garde d'un père divorcé homosexuel[81], rappelant que l'article 8 « s'applique aux décisions d'attribution de la garde d'un enfant à un des parents après divorce ou séparation »[82], la Cour conclut à l'unanimité à la violation de l'article 8 combiné avec l'article 14 au motif que la différence de traitement dont le requérant avait fait l'objet était manifestement liée à son orientation sexuelle, laquelle avait été soulignée par le juge interne, de même que le fait qu'il vivait avec un homme. En effet, bien qu'elle ait cherché à protéger « la santé et les droits de l'enfant » (§ 30), but légitime s'il en est puisqu'il autorise les plus importantes limitations à certains droits protégés, la Cour d'appel avait cependant évoqué une « anormalité » et affirmé qu'« un enfant ne doit pas grandir à l'ombre de situations anormales » (§ 34)[83]. Considérant que, « loin de constituer de simples formules maladroites ou malheureuses [...] ou de simples *obiter dicta* », ces passages de l'arrêt avaient au contraire « pesé de manière déterminante dans la décision finale », la Cour constata donc l'existence d'une « distinction qu'on ne saurait tolérer d'après la Convention » (§ 35), en raison du lien de causalité manifeste entre l'orientation sexuelle du père et la décision défavorable à son égard. Elle a, en revanche, récemment rejeté comme manifestement mal fondé un recours formé par un homosexuel concernant une garde d'enfant lors d'une procédure de

[79] CEDH, Boeckel et Gessner-Boeckel c. Allemagne, n° 8017/11, dc, 7 mai 2013. Constatant l'existence d'une « vie familiale », la Cour estima que la situation des requérantes n'était pourtant pas comparable à celle d'un couple hétérosexuel marié puisqu'il était ici biologiquement impossible que l'enfant descende de l'autre partenaire et qu'il n'existait donc pas de « fondement factuel à la présomption légale [réfragable] selon laquelle l'enfant descendrait de l'autre partenaire ».

[80] S'inscrivant dans le même type de configuration relationnelle, la question de l'adoption par un homosexuel ou un transsexuel de l'enfant de sa/son partenaire doit toutefois s'envisager sous l'angle de la prise en compte du projet parental.

[81] CEDH, Salgueiro Da Silva Mouta c. Portugal, n° 33290/96, 21 déc. 1999.

[82] CEDH, Hoffmann c. Autriche, n° 12875/87, 23 juin 1993, § 29.

[83] La juridiction a d'ailleurs « dissuadé [le requérant] d'avoir un comportement permettant à l'enfant, lors des périodes de visite, de comprendre que son père vit avec un autre homme 'dans des conditions similaires à celles des conjoints' » (§ 35).

divorce, au motif que les juridictions internes avaient apparemment écarté systématiquement les éléments ayant trait à son orientation sexuelle[84].

Sa prudence est plus grande encore dans le cas de parents transsexuels, en raison des conséquences possibles du changement de sexe de l'un de leurs parents sur les enfants[85]. Ainsi, trois mois à peine après l'arrêt X., Y. et Z., la Commission conclut à l'irrecevabilité d'une requête concernant l'obligation imposée à une transsexuelle, dans le cadre d'une procédure de séparation judiciaire, d'« agir, se comporter et s'habiller comme un homme » en présence de ses enfants[86]. Estimant que les juridictions internes avaient cherché à protéger la santé et les droits des enfants, elle procéda à un contrôle de proportionnalité très classique en se contentant d'affirmer qu'il ne lui appartenait pas de se livrer à un nouvel examen des faits et éléments de preuve. Depuis lors, la jurisprudence a certes évolué. Cependant, toujours concentrée sur l'intérêt supérieur de l'enfant, la Cour ne va pas jusqu'à placer son examen sous l'angle des droits parentaux. Ainsi, dans une affaire concernant la restriction du régime de visites d'une transexuelle à son enfant[87], elle conclut à la non-violation de l'article 8 combiné avec l'article 14 faute de lien de causalité suffisant entre la transsexualité de la requérante et la décision qui lui avait été défavorable. Selon elle, en effet, c'était « l'intérêt supérieur de l'enfant qui a[vait] primé dans la prise de décision » (§ 36) et le fait que la requérante ait été en « situation d'instabilité émotionnelle », eu égard à « l'existence d'un risque certain de porter préjudice à l'intégrité psychique et au développement de la personnalité du mineur, compte tenu de son âge et de l'étape évolutive dans laquelle il se trouvait » (§ 33). Faisant application de sa jurisprudence Salgueiro da Silva Mouta, elle parvint donc néanmoins à une solution moins libérale. Et l'extension à la dysphorie de genre du champ d'application du principe dégagé dans l'arrêt Smith et Grady (la Cour exigeant ici des « raisons particulièrement graves et convaincantes pour justifier une différence de traitement ») ne doit pas dissimuler les résistances existant. En effet, le choix se placer sous l'angle de la protection de l'intérêt supérieur de l'enfant amène la Cour à faire systématiquement prévaloir une forme d'intérêt social sur celui des parents, et c'est bien une certaine conception traditionnelle de la famille qui se trouve préservée, autour de l'idée implicite que l'enfant aurait en réalité intérêt à naître et à grandir au sein d'une famille « traditionnelle », composée d'un homme et d'une femme. Or, cet enjeu, sous-jacent à la jurisprudence, apparaît particulièrement dans la manière dont la Cour statue lorsque c'est le projet parental lui-même qui est en jeu et non la réglementation d'une situation déjà existante.

[84] CEDH, R.R. c. Roumanie, n° 18074/09, dc, 15 mars 2011.

[85] En 1992, le juge Walsh écrivait dans son opinion concordante sous l'arrêt B. c. France : « À supposer qu'un parent de l'un ou de l'autre sexe subisse une opération de conversion sexuelle afin d'acquérir l'apparence, anatomique ou autre, d'une personne du sexe biologique opposé, ce serait le comble de l'absurdité de considérer qu'un père est devenu la mère ou la tante, ou qu'une mère est devenue le père ou l'oncle de son propre enfant » (pt. 4).

[86] Ayant tenté de leur rendre visite sous son apparence féminine alors qu'ils étaient âgés de quatorze et douze ans au moment où elle avait acquis cette nouvelle apparence, elle s'était vu interdire de les approcher en raison de leur réaction négative (ComEDH, L.F. c. Irlande, n° 28154/95, dc, 2 juil. 1997).

[87] CEDH, P.V. c. Espagne, n° 35159/09, 30 nov. 2011.

2.2 Le refus de laisser le droit créer des situations nouvelles : une jurisprudence moins favorable à la légitimation d'un projet parental

Depuis l'arrêt X., Y. et Z., les transsexuels font figure de parents « potentiels » dans la jurisprudence strasbourgeoise. Parallèlement, depuis son arrêt Salgueiro Da Silva Mouta, la Cour a affirmé à plusieurs reprises que « les différences motivées uniquement par des considérations tenant à l'orientation sexuelle sont inacceptables au regard de la Convention »[88]. Force est néanmoins de constater que les parents issus de la communauté LGBTI sont encore loin d'être considérés de manière totalement similaire aux parents hétérosexuels. C'est tout spécialement le cas lorsqu'ils ne sont encore que des parents « en puissance » et présentent une requête tendant à permettre la concrétisation de leur projet parental. Ainsi, le poids de l'institution familiale traditionnelle demeure tel qu'il implique une différence notable entre la prise en considération des demandes d'agrément pour une adoption présentées par des homosexuels (1) et celle des difficultés existantes en matière d'adoption simple, par le second membre d'un couple homosexuel, de l'enfant naturel de son/sa partenaire né suite à une procréation médicalement assistée avec donneur anonyme (2).

2.2.1 En matière de demande d'agrément pour une adoption

Bien qu'elle ait affirmé en 2007, dans son arrêt *Evans*, que la notion de « vie privée » englobe le droit au respect de la décision d'avoir des enfants ou de ne pas en avoir, la Cour ne va pas jusqu'à inclure le désir de fonder une famille parmi les droits protégés par l'article 8 de la Convention, notamment lorsqu'elle se penche sur des décisions nationales de refus d'agrément en vue d'une adoption. Examinant la requête d'un homosexuel célibataire[89], elle jugea l'article 14 applicable, combiné avec l'article 8, au motif qu'en évoquant le « choix de vie du requérant », les autorités françaises avaient « implicitement mais certainement [...] renvoy[é] de manière déterminante à son homosexualité » (§ 32). Rappelant que la raison d'être de l'adoption est de « donner une famille à un enfant et non un enfant à une famille »[90] (§ 42), elle accorda toutefois à l'État une importante marge d'appréciation[91]. Et, au lieu de rechercher si une différence de traitement fondée sur l'orientation sexuelle du requérant pouvait être valablement justifiée par les autorités nationales, elle préféra souligner les incertitudes liées aux « conséquences éventuelles de l'accueil d'un enfant par un ou des parents homosexuels » et les « profondes divergences des opinions publiques nationales et internationales, sans compter le constat de l'insuffisance du nombre d'enfants adoptables par rapport aux demandes » (§ 42). Rendue par quatre voix contre trois, cette solution

[88] Voir Salgueiro da Silva Mouta, *précité*, § 36, E.B., *précité*, § 93 et 96 et X. et a, *précité*, § 99, Vallianatos, *précité*, § 77.

[89] CEDH, Fretté c. France, n° 36515/97, 26 fév. 2002.

[90] Affirmer que la Convention ne garantit pas un droit d'adopter correspond au principe posé par l'arrêt Marckx selon lequel « le droit au respect d'une vie familiale […] ne protège pas le simple désir de fonder une famille » (§ 32). Voir X. c. Belgique et Pays-Bas, n° 6482/74, dc, 10 juil. 1975 et Di Lazzaro c. Italie, n° 31924/96, dc, 10 juil. 1997.

[91] Car, « [m]ême si la majorité des États contractants ne prévo[ya]ient pas explicitement l'exclusion des homosexuels de l'adoption lorsque celle-ci est ouverte aux célibataires, on chercherait en vain dans [leur] ordre juridique et social [...] des principes uniformes ». Cette marge « ne saurait cependant se transformer en reconnaissance d'un pouvoir arbitraire à l'État » (§ 41).

– traduisant ce que le juge Costa appela, dans son opinion partiellement concordante, « la primauté des droits de l'enfant sur le droit à l'enfant » – protégeait implicitement un modèle familial traditionnel. Ce choix fut d'ailleurs fermement dénoncé dans l'opinion partiellement dissidente des juges Bratza, Fuhrmann et Tulkens, pour lesquels cette argumentation fondée sur l'absence de « dénominateur commun » entre États parties s'avérait « hors de propos, contraire à la jurisprudence de la Cour dans le domaine de l'article 14 [...] et, sous cette forme générale, de nature à provoquer une régression dans la protection des droits fondamentaux ».

Soucieuse peut-être de tenir compte de cette critique, la Grande Chambre (au profit de laquelle la deuxième section s'était dessaisie) opta pour une approche plus détaillée dans une affaire ultérieure présentant deux différences notables puisque la demande d'agrément avait été déposée par une femme vivant en couple, éléments susceptibles de s'interpréter comme la rendant plus « apte » à accueillir un enfant[92]. La Cour conclut à la violation de l'article 14 combiné avec l'article 8, par dix voix contre sept, au motif que les autorités avaient reproché à la requérante l'absence de « référent paternel » alors que le droit interne autorisait l'adoption par des célibataires. Reprenant un argument formulé par les juges dissidents dans l'arrêt Fretté, elle estima l'article 8 applicable en considérant que l'État, étant « allé au-delà de ses obligations découlant de l'article 8 en créant pareil droit, […] ne p[ouvai]t dans [s]a mise en application [...] prendre des mesures discriminatoires » (§ 49). Cependant, c'est surtout dans l'examen des motifs – l'absence de référent paternel et l'attitude de la concubine – que se lit la volonté de parvenir à un constat de violation. Questionnant le bien-fondé du premier[93], la Cour y appliqua sa jurisprudence Karner au-delà du cadre du couple pour faire peser sur l'État l'obligation de « produire des informations statistiques sur le recours à un tel motif selon l'orientation sexuelle – déclarée ou connue – des demandeurs, seules à même de fournir une image fidèle de la pratique administrative et d'établir l'absence de discriminations » (§ 74). Quant au second, elle estima « légitime que les autorités s'entourent de toutes les garanties en vue de l'accueil éventuel d'un enfant dans une famille » (§ 76)[94], ce qui semblait devoir mener au rejet de la requête. Pourtant, choisissant d'opter pour la théorie de la contamination par osmose, elle jugea que ces motifs, qui « s'inscriv[ai]ent dans le cadre d'une appréciation globale de la situation de la requérante [...] ne sauraient être considérés alternativement, mais d[e]v[ai]ent au contraire être appréciés cumulativement », ce qui impliquait que le « caractère illégitime » de l'un d'entre eux avait eu « pour effet de contaminer l'ensemble de la décision » (§ 80). L'utilisation « excessive » de l'exigence pourtant légitime d'un référent paternel et « [l]'influence de l'homosexualité déclarée de la requérante sur l'appréciation de sa demande » (§ 89) l'amenèrent donc, en application du principe posé dans l'arrêt Salgueiro da Silva Mouta mais contrairement à la solution de l'arrêt Fretté, à constater une différence de traitement injustifiée, faute de raisons

[92] CEDH, E.B. c. France, *précité*. En effet, la Cour nota que les autorités n'avaient « pas fait référence […] aux 'choix de vie' d'E.B. », mais souligné ses « qualités » ainsi que ses « capacités éducatives et affectives » et pris en compte « l'attitude de [s]a compagne », avec laquelle elle vivait une « relation stable et durable ».

[93] Qui risquait de « vider de sa substance le droit qu'ont les célibataires de demander l'agrément » (§ 73).

[94] « Partant, dès lors que le demandeur ou la demanderesse, bien que célibataire, a déjà constitué un foyer avec un ou une partenaire, la position de ce dernier et la place qu'il occupera nécessairement au quotidien auprès de l'enfant qui viendra vivre dans le foyer déjà formé commandent un examen spécifique, dans l'intérêt supérieur de l'enfant »

suffisamment « graves et convaincantes » avancées par l'État et dans la mesure où les qualités de la requérante servaient manifestement l'intérêt supérieur de l'enfant.

Nettement plus libérale que les précédentes, cette solution fut vivement critiquée par plusieurs juges, qui soulignèrent qu'adopter un enfant était « un privilège » et non un droit[95] et dénoncèrent la « discrimination *a contrario* » qui, depuis l'arrêt Fretté, aurait permis à des homosexuels de bénéficier de la protection de l'article 8 en faisant jouer sa combinaison avec l'article 14, alors que cela demeurait impossible pour des hétérosexuels[96]. Les mêmes résistances existent également concernant l'adoption, au sein d'un couple marié ou non, de l'enfant de l'un des membres par le second.

2.2.2 En matière d'adoption simple (ou coparentale)

S'agissant d'adoption simple, les recours tendent essentiellement l'obtention d'un statut juridique pour une situation de fait préexistante, puisqu'il s'agit de voir créer un lien de filiation entre l'un des requérants et l'enfant de l'autre, sans pour autant altérer la filiation d'origine. Ils concernent donc la légalisation d'une relation de fait assimilable à celles qui existent au sein d'une famille « légitime ». La variabilité des raisonnements adoptés à Strasbourg met toutefois en évidence les enjeux sociaux liés à la notion traditionnelle de famille d'une manière qui justifie de traiter cette question parmi les cas relevant de la difficile légitimation d'un « projet parental ». En effet, ici encore, l'évolution de la jurisprudence paraît plus aisée dès lors qu'elle concerne des parents hétérosexuels.

Ainsi, dans une affaire relative à l'adoption par un homme de la fille de sa concubine, déjà adulte et ayant des problèmes de santé[97], la Cour admit assez rapidement l'applicabilité de l'article 8[98] et reconnut aux concubins la même légitimité qu'aux époux pour adopter[99] en affirmant qu'« il n'appartient pas aux autorités nationales de se substituer aux personnes intéressées dans leur prise de décision sur la forme de vie commune qu'elles souhaitent adopter » (§ 82). Optant pour une approche résolument évolutive afin d'éviter que son interprétation de la Convention

[95] Pour B. Zupancic, « la discrimination née d'une inégalité de traitement s'applique aux situations mettant en jeu des droits » et non au « privilège d'adopter un enfant », car « [d]evant le droit absolu de cet enfant, tous les autres droits et privilèges s'effacent ». Il était donc incohérent de faire prévaloir les intérêts de l'enfant sur les droits des parents biologiques en matière de droit de garde sans faire de même vis-à-vis des privilèges d'un parent adoptif « potentiel ».

[96] A. Mularoni soutenait en ce sens que « le moment [était] venu pour la Cour d'affirmer que la possibilité de demander à adopter un enfant […] rentre dans le champ d'application de l'article 8 » afin d'assurer une protection identique de tous les requérants se trouvant « dans la même situation personnelle d'impossibilité ou de grande difficulté à concevoir un enfant » dans « leur désir légitime de devenir parents, qu'ils choisissent d'avoir recours à des techniques d'insémination artificielle ou de demander à adopter un enfant conformément aux dispositions de la législation nationale ».

[97] CEDH, Emonet et a. c. Suisse, n° 39051/03, 13 déc. 2007.

[98] Elle rappela néanmoins que « les rapports entre parents et enfants adultes ne bénéficient pas de [cette] protection [...] sans que soit démontrée 'l'existence d'éléments supplémentaires de dépendance, autres que les liens affectifs normaux' » (§ 35, *mutatis mutandis*, Kwakye-Nti et Dufie c. Pays-Bas, n° 31519/96, dc, 7 nov. 2000, sur le regroupement familial) et qu'il pouvait « se révéler utile de tenir compte d'un certain nombre d'éléments » (§ 36).

[99] Selon la Cour, « l'argument du Gouvernement selon lequel l'institution du mariage garantit à la personne adoptée une stabilité accrue par rapport à l'adoption par un couple de concubins n'est plus forcément pertinent de nos jours » (§ 81).

n'aboutisse à une solution contraire à l'esprit de celle-ci[100], elle affirma que « le 'respect' de la vie familiale des requérants aurait exigé la prise en compte des réalités, tant biologiques que sociales, pour éviter une application mécanique et aveugle des dispositions de la loi à cette situation très particulière, pour laquelle elles n'étaient manifestement pas prévues » et que l'« absence de cette prise en compte a[vait] heurté de front les vœux des personnes concernées, sans réellement profiter à personne » (§ 86). Par ce raisonnement, elle fit ainsi du concubinage l'une des variantes du modèle de couple constituant la base de la cellule familiale traditionnelle[101], l'importance d'une forme de volonté politique dans la stratégie jurisprudentielle adoptée à Strasbourg apparaissant ici avec d'autant plus d'évidence qu'elle invite à de ne pas oublier qu'à travers leurs propres jugements de valeurs, les juges sont à la fois les jouets et les agents d'une évolution des mentalités européennes qui s'impose à eux tout autant qu'ils contribuent eux-mêmes à la reconnaître et à la façonner –de façon parfois décisive.

La portée de cette solution pourra manifestement être étendue au-delà des seules questions d'adoption. Cependant, rapportée au cadre des relations homosexuelles, la jurisprudence se trouve plus contrainte car le juge européen y recherche si le couple concerné se trouvait ou non dans une « situation comparable » à celle des couples hétérosexuels. La Cour se pencha ainsi sur le refus de l'adoption simple d'un enfant – conçu grâce à une procréation médicalement assistée avec donneur anonyme – par la femme vivant en couple avec la mère biologique, au motif que l'autorité parentale serait alors transférée d'une requérante, pourtant mère biologique, à l'autre[102]. Constatant l'existence d'une « vie familiale »[103] et rappelant que « l'orientation sexuelle relève de la sphère personnelle protégée par l'article 8 », elle accepta l'application de l'article 14 combiné avec l'article 8. Elle conclut toutefois à l'absence de toute violation en constatant d'une part, que les requérantes n'étaient pas dans une « situation comparable » à celle des couples hétérosexuels infertiles (auxquels seuls l'insémination artificielle avec donneur était autorisée en France) et, d'autre part, qu'elles n'avaient pas fait l'objet d'une différence de traitement fondée sur l'orientation sexuelle entre les couples hétérosexuels non mariés et les couples homosexuels puisque l'interdiction de l'adoption coparentale frappait tant les premiers que les seconds, leur situation s'avérant, en fait, similaire à celle des couples pacsés[104], lesquels se voyaient également

[100] Cette volonté apparaît clairement dans l'interprétation que la Cour adopte de la Convention européenne en matière d'adoption des enfants, et particulièrement de son article 10 § 2, ainsi que du projet de convention révisée (§ 84).

[101] Elle s'appuya sur le principe selon lequel des circonstances peuvent imposer à l'État « l'obligation positive de permettre la formation et le développement de liens familiaux légaux » (Kroon et a., *précité*, § 32 et Pini et a., *précité*, § 149 et s.)

[102] CEDH, Gas et Dubois c. France, n° 25951/07, dc, 31 août 2010 et A, 15 mars 2012.

[103] « [I]l s'agit de deux personnes vivant ensemble depuis 1989 et unies, depuis 2002, par un pacte civil de solidarité [qui] a créé des liens contractuels entre elles, concernant l'organisation de leur vie commune. L'une des partenaires est la mère biologique de A., enfant qu'elles ont désirée [,] qui a été conçue par procréation médicalement assistée avec donneur anonyme [, qu'elles] élèvent […] depuis sa naissance, et [dont elles] occupent conjointement et activement, comme l'ont reconnu les juridictions nationales. »

[104] En revanche, elle n'était pas comparable à celle des couples mariés, auxquels le Code civil réservait le partage de l'autorité parentale dans les cas où l'adoptant « se trouve être le conjoint du parent biologique de l'adopté », alors que le mariage n'était pas encore ouvert aux couples homosexuels.

refuser l'adoption simple. Différente, cette solution ne fut pourtant guère plus cohérente que celle qui avait été rendue en matière de demande d'agrément puisque, entièrement focalisée sur le couple formé par la mère biologique et sa partenaire, c'est ici la question de l'intérêt supérieur de l'enfant – dont la naissance constituait pourtant l'aboutissement du projet parental commun – que la Cour laissa totalement de côté[105]. Cette conclusion sembla toutefois découler essentiellement de l'incompatibilité d'un projet homoparental concrétisé à l'étranger avec le droit national, car la Grande chambre conclut en revanche à la violation de l'article 14 combiné avec l'article 8 dès lors que la légitimité du projet homoparental n'était plus aussi directement en jeu, l'enfant ayant été conçu par l'une des deux requérantes sans assistance médicale.

Les États disposent d'une marge d'appréciation lorsqu'ils décident d'ouvrir un mode de reconnaissance juridique aux couples gays. C'est ce principe qui la conduisit à constater qu'un couple de lesbiennes avait fait l'objet d'une différence de traitement discriminatoire[106] dans la mesure où le droit interne offrait aux membres des couples hétérosexuels non mariés la possibilité d'adopter l'enfant de leur partenaire[107]. Selon cette approche fondée sur la comparaison, la solution dépendait en réalité des solutions offertes aux autres types de couples : c'est parce que l'État avait d'ores et déjà fait preuve de libéralisme à l'égard de certains couples anciennement perçus comme non-légitimes (les couples hétérosexuels non mariés) qu'il devait à nouveau faire preuve de libéralisme à l'égard d'autres types de couples (les couples homosexuels). Raisonner en termes de « situation comparable » et se placer sous l'angle de la non-discrimination plutôt que plus directement sous celui des droits parentaux permit ainsi à la Grande Chambre d'étendre la protection offerte par l'article 8. En effet, la situation des requérantes n'était pas « comparable à celle d'un couple marié dont l'un des membres aurait souhaité adopter l'enfant de l'autre », mais à celle d'un couple hétérosexuel non marié placé dans la même situation, auquel la loi autrichienne permettait l'adoption coparentale en prévoyant « que l'adoptant se substitue au parent biologique du même sexe que lui », ce qui n'était pas possible pour les couples homosexuels. Ainsi, si « l'article 8 n'impos[ait] pas aux États membres d'étendre le droit à l'adoption coparentale aux couples non mariés », il imposait cependant de faire reposer toute différence de traitement sur des « raisons convaincantes propres à établir que l'exclusion des couples homosexuels du champ de l'adoption coparentale ouverte aux couples hétérosexuels non mariés était nécessaire à la préservation de la famille traditionnelle ou à la protection de l'intérêt de l'enfant »[108]. Pour conclure que tel n'avait pas été le cas en l'espèce, la Cour souligna que l'adoption était possible en Autriche pour un(e)

[105] Or, de toute évidence, tenir compte de cet intérêt aurait pu mener à considérer, comme l'a souligné le juge Villiger dans son opinion dissidente, qu'il impliquait que « [l]'intéressé doit recevoir le meilleur des traitements offerts aux enfants nés dans le cadre d'une relation hétérosexuelle, à savoir l'autorité parentale partagée »...

[106] Contrairement à ce qu'elle allait décider trois mois plus tard dans sa décision d'irrecevabilité Boeckel et Gessner-Boeckel (qui concernait l'inscription d'une « deuxième mère » sur un acte de naissance).

[107] X. et a. c. Autriche, n° 19010/07, GC, 19 fév. 2013.

[108] Jugeant impossible de « tirer aucune conclusion sur un éventuel consensus entre les États européens » du faible nombre d'États « ouvrant l'adoption coparentale aux couples non mariés » (10), elle estima que seul lui importait de « savoir si les intéressés [avaie]nt été victimes d'une discrimination du fait que, l'adoption envisagée se heurtant à un obstacle juridique absolu, les tribunaux internes n'[avaie]nt pas eu la possibilité de rechercher concrètement si elle servait ou non l'intérêt [de l'enfant] ».

célibataire, même homosexuel(le) et que, lorsque l'adoptant avait conclu un partenariat civil, l'accord de son partenaire était requis. Elle en déduisit que « le législateur admet[tait] qu'un enfant peut grandir au sein d'une famille fondée sur un couple homosexuel, reconnaissant ainsi que cette situation n'est pas préjudiciable à l'enfant » et estima qu'il lui revenait donc de la protéger.

La diversité des solutions rendues, dont la clarté est loin de constituer la principale caractéristique, amène à constater le malaise qui entoure la réglementation de la filiation « non naturelle ». C'est qu'en réalité, tout comme cela a été longtemps le cas des couples perçus comme « non-légitimes » car hors de l'institution du mariage, celle-ci heurte de front l'évolution de la conception traditionnelle de la « famille ». Le confirment aussi bien les récents arrêts rendus en matière de gestation pour autrui[109] qu'une tendance récurrente des Gouvernements à mettre en avant les convictions religieuses, éthiques ou morales de leur population pour tenter de préserver cette conception, à travers une argumentation souvent complexe et parfois surprenante[110]. En tant que « norme de conduite établie et reconnue comme telle par un groupe social distinct »[111], toute institution s'inscrit dans la durée. Une forme de stabilité est donc inhérente aussi bien au mariage qu'à la famille, ce qui implique que leur interprétation en tant que notions juridiques ne saurait être que progressive et explique l'évolution lente du droit européen. Néanmoins, si elle suppose une forme de permanence, l'idée même d'institution requiert également une nécessaire adaptation au social. Dès lors, œuvrer pour l'égalité des droits nécessite, certes, de se pencher sur ce que le droit peut apporter à la communauté LGBTI, mais aussi – et peut-être surtout – de prendre conscience de ce que cette communauté peut apporter au droit.

[109] CEDH, Mennesson c. France et Labassée c. France, resp. n° 65192/11 et 65941/11, 26 juin 2014.

[110] Ainsi, dans l'arrêt A., B. et C. c. Irlande (n° 25579/05, GC, 16 déc. 2010) : « Selon le Gouvernement, les questions éthiques et morales soulevées par l'avortement sont à distinguer des questions scientifiques qui auraient été au cœur de l'affaire Christine Goodwin. […] Conclure en l'espèce que le refus d'autoriser l'avortement pour des raisons sociales emporte violation de l'article 8 entraînerait un préjudice important pour les citoyens irlandais ayant manifesté le souci de protéger l'enfant à naître. »

[111] A.R. Radcliffe-Brown, *Structure et fonction dans la société primitive*, Paris, Éd. de Minuit, 1972, p. 313.

The Role of Dynamic Interpretation in Advancing the Rights of Same-Sex Couples under Article 8 of the European Convention on Human Rights

Eszter Polgári

Abstract

The paper seeks to explore the development of the rights of same-sex couples, in particular their legal recognition, under the European Convention on Human Rights. It focuses on the role of the dynamic interpretation of Article 8 of the Convention that is usually closely linked to a consensus analysis. The author argues that reliance predominantly on the restrictive notion of consensus that requires widely shared common approach from the member states hindered the development and strengthened Article 8's heteronormative interpretation. The selected examples taken from the Article 8 jurisprudence illustrate the dynamics and the different phases of the development: until 2010 the European Court of Human Rights (and the former Commission) considered the claims under the private life limb of Article 8 and acknowledging their status as family has not fully eliminate the inequality as compared with different-sex partners.

Keywords

European Convention on Human Rights, European Commission and Court of Human Rights, Article 8, right to respect for private life, right to respect for family life, dynamic (evolutive) interpretation, European consensus, judicial activism.

* * * * *

1 The dynamic interpretation of the Convention

The dynamic approach[1] to the rights guaranteed in the European Convention on Human Rights (hereinafter: Convention) and the related doctrine of 'living instrument' has been instrumental for the European Court of Human Rights (hereinafter: Court) in expanding the scope of a right or raising the standard of protection. It allows the Court to reflect on legal, social, cultural or even economic changes in contemporary societies and give an interpretation that conforms the present-day conditions.[2] The need to approach the text of the Convention in an evolutive manner follows from

[1] The paper uses evolutive interpretation of the Convention interchangeably with the dynamic approach.

[2] *Tyrer v. the United Kingdom* (1978), Series A no. 26, par. 31.

the Vienna Convention on the Laws of Treaties: according the general rule of interpretation a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[3] It is commonly accepted that the purpose of human rights treaties is to provide safeguards for individuals against the tyranny of majority and ultimately guard individual autonomy.[4] In the context of the ECHR the dynamic interpretation is also supported by the reference in the Council of Europe Statute to the "the spiritual and moral values which are the common heritage" shared by the members.[5] The Preamble of the Convention reinforces the commitment emphasizing "that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms."[6] The evolutive interpretation is – in principle – capable to remedy the shortcomings of the Convention's original text and provide an up-to-date understanding to it.[7]

Determining the meaning of a Convention term with reference to the dynamic approach is closely linked to assessing whether a new standard is sufficiently widespread among the member states in order to warrant change in the interpretation. Perceiving the Convention as a 'living instrument' and the reasoning applied in *Tyrer*[8] already indicated that Court might use the commonly accepted standards of the member states as "a source of inspiration".[9] Reliance on inter-state comparison and the European consensus analysis increasingly accompanies the dynamic interpretation and reinforces the Court in its venture of constantly developing the protection of rights under the Convention.

References to some form of consensus – even if it is named differently – can be divided into two groups. On the one hand, the restrictive notion, such as reliance on strictly understood consensus, common ground or European standards, require that the standard incorporated in the interpretation of the Convention be widely shared, which generally presupposes more than the simple majority of member states sharing the same position.[10] On the other hand, under the dynamic notion of consensus the Court often relies on trends or tendencies, or growing and

[3] Article 31 of the Vienna Convention on the Laws of Treaties.

[4] See for example: George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP, 2007) 74.

[5] Statute of the Council of Europe, Preamble. See also: Franz Matscher, 'Methods of Interpretation of the Convention' in Ronald St. J. Macdonald, et. al. (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers, 1993) 69.

[6] ECHR, Preamble.

[7] Judge Soerensen cited by François Ost, 'The Original Canons of Interpretation of the European Court of Human Rights' in Mireille Delmas-Marty (ed), *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions* (Martinus Nijhoff Publishers, 1992) 302.

[8] *Tyrer v. the United Kingdom* (1978), Series A no. 26, par. 31.

[9] Christos L. Rozakis , 'The European Judge as Comparatist' (2005) 80 Tulane Law Review 257, 269.

[10] See for example the Court's approach in *X., Y. and Z. v. the United Kingdom* (1997) ECHR 1997-II, par. 44: "there is no common European standard with regard to the granting of parental rights to transsexuals. In addition, it has not been established before the Court that there exists any generally shared approach amongst the High Contracting Parties with regard to the manner in which the social relationship between a child conceived by AID and the person who performs the role of father should be reflected in law." Similarly the lack of "common ground" among the member states prevented the Court to find a violation in the first individual adoption case: *Fretté v. France* (2002) ECHR 2002-I., par. 40-41.

emerging consensus.[11] As the terms suggest, dynamic notions are not widely supported by state practice or legislation. The evolutive interpretation mostly – though not exclusively – relies on the latter type of consensus, which generally raises concerns about arbitrary and unpredictable interpretation of rights, while the restrictive notion of consensus often supports the Court's decision to grant a wide margin of appreciation to the state and remain more deferential to domestic solutions.

The cases on the recognition of same-sex couples perfectly illustrate the Court's hesitation between the conservative attitude resting on the restrictive notion of consensus and the corresponding wide margin of appreciation, and the dynamic approach assuming a more activist stand on the interpretation of rights, in particular Article 8 of the Convention.

2 Article 8 and same-sex families: general remarks

Article 8 of the Convention guarantees the right to respect for private and family life, home and correspondence. It is one of the areas in the jurisprudence where dynamic interpretation contributed significantly to the increased protection. In defining family the Court has constantly reflected on social and legal changes, and rejected to apply a formalistic approach. As early as in 1979 relying on "the domestic law of the great majority of the member States of the Council of Europe" the Court broke with the 'traditional' understanding that only married couples ought to be considered families, and acknowledged that illegitimate children and their parents enjoy protection under the Convention.[12] By today it is well-established in the case-law that "the notion of the »family« (…) is not confined solely to marriage-based relationships and may encompass other de facto »family« ties."[13] While focus on the substance of the relationship led to accepting a great variety of family settings,[14] the recognition of same-sex couples and their family rights was the result of a rather slow process.

Until recently the Court have seemed to be extraordinarily cautious when it came to broadening the protection offered to families – in its broadest sense of the notion, with or without children – formed by same-sex couples. In this context reliance on the restrictive notion of consensus has been a tool at the hands of the Court in support of its deferential, conservative attitude, in particular through accepting the states' wide margin of appreciation with reference to the lack or insufficiency of consensus, over a technically unlimited activism, which may be the natural consequence of using dynamic interpretation. The Court had very little problem in extending the scope of Article 8 on the different variations of 'traditional' families even at the price of often

[11] For the dynamic notion of consensus ("continuing international trend") please see: *Christine Goodwin v. the United Kingdom* (2002) ECHR 2002-VI., par. 85.

[12] *Marckx v. Belgium* (1979), Series A no. 31, par. 41.

[13] *Keegan v. Ireland* (1994) Series A no. 290, par. 44.

[14] There are claims that despite the evolution in this regard, "there remains a hierarchy in terms of the protection to be offered to formal as opposed to less formal relationships." See: Bernadette Rainey, Elizabeth Wicks, Claire Ovey, *Jacobs, White & Ovey. The European Convention on Human Rights* (6th ed., OUP, 2014) 338.

far-reaching activism.[15] However, the dynamics of reasoning change when the issue before the Court relates to the recognition of same-sex partnerships and more broadly of rainbow families. Although notions such as family are given an autonomous meaning in the jurisprudence, the Court constantly faces the fundamental question: should it put emphasis on the dynamic interpretation and thus bring the Convention in line with the present-day conditions even if the widespread acceptance of the standard in the domestic legal systems is missing, or should it cherish diversity and rely on the margin of appreciation instead? The choice has proved to be crucial to the rights of rainbow families, and the Court has benefitted both from the conservative and the activist use of the 'living instrument' doctrine.[16]

Unlike in cases touching upon family settings fitting into the heteronormative framework, recognition of same-sex couples and their rights were conditioned on some preliminary findings, thus developments need to be examined in the wider framework of LGBT rights litigation. First, accepting homosexuality[17] and gay persons as rights-holders emerged in the cases concerning the criminalization of sexual acts between consenting adult males. In *Dudgeon v. the United Kingdom* the Court established that these activities constitute "an essentially private manifestation of the human personality"[18] and "the most intimate aspect of private life",[19] which forms the basis of a more stringent review, *i.e.* states need to advance "particularly serious reasons" in order justify an interference.[20] Relying on arguments based on the restrictive notion of consensus the Court found:

> there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied.[21]

Considering the small number of member states maintaining similar laws,[22] the consensus analysis was rather conservative here and for this reason the judgment is distinct from the decisions which are exemplary of dynamic approach.

The second important step in deconstructing the strict heteronormative understanding of the Convention was the recognition of sexual orientation as a protected ground for the purposes of the prohibition of discrimination contained Article 14. The text of Article 14 does not explicitly mention sexual orientation, but the European Commission on Human Rights – in the context of the age of

[15] See for example: *Marckx v. Belgium* (1979) Series A no. 31.

[16] Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2013) 84-88.

[17] Although the general acceptance was far from being explicit – see for example the Court's remark in *Dudgeon*: "The Court is not concerned with making any value-judgment as to the morality of homosexual relations between adult males." *Dudgeon v. the United Kingdom* (1981) Series A no. 45, par. 54.

[18] *Ibid,* par. 60.

[19] *Ibid,* par. 52.

[20] *Ibid,* par. 52.

[21] *Ibid*, par. 60.

[22] See the two later cases on the same issue: *Norris v. Ireland* (1988) Series A no. 142 and *Modinos v. Cyprus* (1993) Series A no. 259.

consent cases – made it clear:

> (t)he Commission (…) is not required to determine whether a difference in treatment treatment on sexual orientation is matter which is properly to be considered as a difference on grounds of 'sex' or 'other status'. In either event it is a difference in respect respect of which the Commission is entitled to seek justification.[23]

Ever since the Court has consistently held that sexual orientation is a concept "which is undoubtedly covered by Article 14 of the Convention",[24] and distinctions exclusively based on sexual orientation are "not acceptable under the Convention,"[25] or as formulated more recently: "differences based on sexual orientation require particularly serious reasons by way of justification."[26]

The private/public binary accepted and reinforced in *Dudgeon* pervaded the ECHR jurisprudence for decades, and with this approach the Court effectively reproduced the closet in its own case-law.[27] It is without doubt that the Court maintained "an obvious split between a legitimate 'private' decriminalized homosexual subject and his/her unacceptable 'public' demands to establish relationships and families."[28] The development of the right to respect for family life was dominated by the Court's heavy emphasis on the private life limb in Article 8, and even when it implicitly accepted the right to family life of same-sex partners, it attempted to avoid taking a clear stand. As Johnson rightly notes: by restricting the protection to the private sphere, there is "limited consideration of the social, structural and institutional processes through which social exclusion and discrimination are maintained on the grounds of sexual orientation."[29]

The private aspect of Article 8 – similarly to family life – is a broad concept: "(t)he right to respect for private life is not only the right to privacy, but also, to a certain extent, the right to establish and develop relationships with other human beings,"[30] which – taking it textually – includes the possibility to accept the individual's ability to form a family with the partner of their choice. The Court's conscious move of regularly sidestepping the decision on defining the right at issue under Article 8 in cases concerning the recognition of same-sex couples under the Convention is not only an aesthetic problem: it conveys a clear message about the form of 'ideal' families and its own view about same-sex partners. However, the fact that the Court before 2010 failed to treat same-sex relationships as falling within the notion of family life under Article 8 of the Convention,

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[23] *Sutherland v. the United Kingdom* (1997) ECHR 3, par. 50-51. (Commission Report).

[24] *Salgueiro da Silva Mouta v. Portugal* (1999) ECHR 1999-IX, par. 28.

[25] *Ibid*, par. 36.

[26] *Karner v. Austria* (2003) ECHR 2003-IX, par. 37. The paper does not seek to explore the problem posed by the correct identification of the comparable group for the purposes of Article 14, on which many of the recent same-sex family cases turned.

[27] Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2013) 103-110.

[28] Michele Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) 14 European Journal of International Law 1023, 1038.

[29] Paul Johnson, 'An Essentially Private Manifestation of Human Personality: Constructions of Homosexuality in the European Court of Human Rights' (2010) 10 Human Rights Law Review 67, 78.

[30] *X. v. Iceland* (1976) DR 5, 86.

does not mean that they were completely left without protection; gradually certain partnership rights received the Court's endorsement.

3 Dynamic interpretation and the rights of same-sex partners under Article 8: The three phases

3.1 Missed opportunities

Until the early 2000's same-sex relationships were considered to be primarily covered by the first limb of Article 8, *i.e.* right to respect for private life. Two years after *Dudgeon* was decided the Commission declared that "the relationship of a homosexual couple falls within the scope of the right to respect for private life, but not that of family life."[31] In the case of *X. and Y. v. the United Kingdom* it took note of the growing acceptance homosexuality – which was explicitly acknowledged in *Dudgeon* as a factor contributing to establishing non-compliance with the Convention –, but did not find it sufficient to apply a dynamic interpretation on the basis of the "modern evolution of attitudes"[32] and summarily rejected the application.

For a decade the Commission's conclusion in *X. and Y. v. the United Kingdom* dominated the jurisprudence on same-sex couples: the Strasbourg organs excluded the possibility that same-sex partnerships benefit from the right to family life, regardless of the growing number of member states providing recognition. In *Mata Estevez v. Spain* the applicant – who lived in a stable *de facto* relationship with his same-sex partner before his passing away – claimed that the refusal of survivor's pension amounted to an unjustified differential treatment in conjunction with his right to private and family life.[33] The Court upheld the Commission's approach to the recognition of same-sex couples when emphasized:

> despite the growing tendency in a number of European States towards the legal and judicial recognition of stable *de facto* partnerships between homosexuals, this is, given the existence of little common ground between the Contracting States, an area in which they still enjoy a wide margin of appreciation.[34]

Although the applicant's relationship with his former partner did not fall within the notion of family life, the Court acknowledged that it may raise issues under private life. As to the differences in treatment the Court found: "the Spanish legislation relating to eligibility for survivors' allowances does have a legitimate aim, which is the protection of the family based on marriage bonds (…)," and the denial of benefits fell "within the State's margin of appreciation."[35]

The Court in *Mata Estevez* relied on the restrictive notion of consensus when looked for a

[31] *X. and Y. v. the United Kingdom* (1983) DR 32, 220.
[32] *Ibid*, p. 221.
[33] *Mata Estevez v. Spain* (2001) ECHR 2001-VI.
[34] *Ibid*.
[35] *Ibid.*

common ground among the member states, and the lack of that clearly justified a wide margin of appreciation for the government. It is interesting to compare the decision with the judgment delivered a year later in the *Christine Goodwin v. the United Kingdom* case,[36] where despite of the lack of common approach among the member states, the Court found "the continuing international trend" satisfactory for departing from its earlier case-law on the legal recognition of post-operative transsexuals.[37] The decision in *Mata Estevez* indicates a further problem that influences the case-law on the recognition of same-sex couples and their rights: the traditional understanding of marriage placed the Court in a difficult situation when it came to identifying the comparable group for the purposes of the Article 14 assessment.

3.2 Limited activism

The liberal shift in the interpretation of Article 8 came about in *Karner v. Austria* in 2003: it was the first case where the Court found a violation for treating same-sex couples living in stable *de facto* relationship differently from different-sex couples living outside marriage.[38] The Court when deciding on the right of continuing the deceased partner's tenancy rights focused its examination on the right to respect for home also covered by Article 8 and is indisputably closer to family life than to private life. However, the case is remarkable as the Court failed to accept automatically the states justification based on the protection of traditional families. The judgment is unequivocally a major step in broadening the notion of family as to include same-sex couples, even though the Court failed to grant an explicit acknowledgment. It, however, emphasized:

> (t)he aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people.[39]

In *Karner* the Court while accepting that states had an interest in protecting traditional families gave more weight to the Article 14 considerations and the fact that the difference in treatment was based on sexual orientation. The approach had its foundation in the case-law, but it was undoubtedly a major development. The states' limited margin of appreciation in areas where different-sex couples in a comparable situation (not in marriage though) are treated favorably than same-sex couples was also accepted in *Kozak v. Poland*.[40] The case – similarly to *Karner* – also concerned the right to succeed in tenancy that was granted to different-sex couples living in a stable

[36] *Christine Goodwin v. the United Kingdom* (2002) ECHR 2002-VI.
[37] *Ibid*, par. 85.
[38] *Karner v. Austria* (2003) ECHR2003-IX.
[39] *Ibid,* par. 41.
[40] *Kozak v. Poland* App. No. 13102/02 (ECtHR 2 March 2010).

relationship outside marriage. The Court did not significantly depart from the discrimination test applied in *Karner,* but the reasoning indicated change in the jurisprudence. Although the Court accepted that the protection of families based on marriage or the stable relationship of a man and a woman may constitute a legitimate reason under Article 14, it qualified *Karner* on this point:

> (h)owever, in pursuance of that aim a broad variety of measures might be implemented by the State (…). Also, given that the Convention is a living instrument, to be interpreted in the light of present-day conditions (…), the State, in its choice of means designed to protect the family and secure, as required by Article 8, respect for family life must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life.[41]

The judgment in *Kozak* may be viewed as mandating a dynamic approach when deciding on partnership rights of same-sex couples. The Court – despite elaborating at length about the need to reflect on social changes – failed to specify what developments need to be taken into consideration: it is questionable whether the judgment would require the Court to undertake a comparative study whenever the recognition of same-sex couples is at stake. The reasoning further fails to provide guidance on how much weight domestic social opposition or European legal consensus (which was clearly lacking at the time) should be attributed to. In line with the prior jurisprudence, the Court in *Kozak* left the issue of protection under the family life limb of Article 8 undecided, thus only unlocked the closet without properly opening its door to the public. Later cases resolved some of these reservations, but the general and vague reference to the dynamic interpretation and conditioning the scope of recognition on "developments in society" may lead to undesired outcomes.

3.3 Real activism: dynamic approach prevailing

Undeniably, the landmark judgment in the struggle of same-sex couples for recognition as families is *Schalk and Kopf v. Austria*.[42] The primary claim of the case related to the inability of same-sex partners to conclude marriage under the Austrian law. Despite the fact that the Court dismissed their claim under Article 12,[43] the judgment contains remarkable developments. The Court seemed to abandon the very textual reading of the right:

> (r)egard being had to Article 9 of the Charter, therefore, the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex.

[41] *Ibid*, par. 98.

[42] *Schalk and Kopf v. Austria* App. No. 30141/04 (ECtHR 24 June 2010).

[43] For a detailed overview of the case, including its Article 12 aspect please see: Nicholas Bamforth, 'Families but not (yet) marriages? Same-sex partners and the developing European Convention 'margin of appreciation'' (2011) 23 Child and Family Law Quarterly 128.

> Consequently, it cannot be said that Article 12 is inapplicable to the applicants' complaint. However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State.[44]

The significance of the judgment is, however, in the recognition of same-sex partners as families. The Court for the first time made concessions that people of the same gender living together in a stable relationship may be considered as family:

> the Court notes that since 2001, when the decision in Mata Estevez was given, a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then, a considerable number of member States have afforded legal recognition to same-sex couples (…). Certain provisions of European Union law also reflect a growing tendency to include same-sex couples in the notion of "family" (…). (T)he Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8.[45]

The terms of granting family recognition for same-sex couples, however, remained ambiguous; the recognition is dependent on some conditions. The judgment was "a simultaneous flirting (…) with both heteronormative and homonormative narratives."[46] It remained for future applicants to demonstrate the stability and strength of their – preferably monogamous – commitment towards each other, and in *Schalk and Kopf* the Court failed to unequivocally impose a positive obligation to provide legal recognition for same-sex couples.[47]

It is noteworthy, that the Court – in support of its dynamic interpretation – relied on "tendency" instead of a consensus. The formal is a looser standard and reflects an activist judicial approach unlike "common ground" that was the basis of the conclusion in *Mata Estevez.* Although the explicit recognition given in *Schalk and Kopf* was a much-awaited move from the Court, the judgment lacks any kind of methodological discipline. The reasoning seems to base the evolutive interpretation on tendencies reflected in EU law, which ultimately can be perceived as the materialization of the common approach by the EU member states. This type of reference to European tendencies works similarly to the restrictive notions of consensus: developments within the EU can be taken as to mirror the national changes in attitude. However, as the EU has no competence in the question of the family recognition of same-sex couples, member states may consent to documents and decisions without necessarily sharing the same view. Furthermore, preferences to EU-level measures might create tension between member states within the European Union and those outside.

Schalk and Kopf left open the question whether the lack of any formal recognition of same-

[44] *Schalk and Kopf v. Austria* App. No. 30141/04 (ECtHR 24 June 2010), par. 61.

[45] *Ibid*, par. 92-93.

[46] Francesca Romana Ammaturo, 'The Right to Privilege? Homonormativity and the Recognition of Same-Sex Couples in Europe' (2014) 23 Social & Legal Studies 175, 178.

[47] For an opposite conclusion see: Emmanuelle Bribosia, Isabelle Rorive, Laura Van den Eynde, 'Same-Sex Marriage: Building an Argument before the European Court of Human Rights in Light of the US Experience' (2014) 32 Berkeley Journal of International Law 1, 12.

sex couples would constitute the violation of the Convention, and the Grand Chamber judgment in *Vallianatos v. Greece*[48] from 2013 has not settled that fully either. The Greek legislator intended to introduce an institution for different-sex couples living outside marriage, but same-sex partners were denied access to that. The Court applied the *Karner* principle to the case and condemned Greece for the exclusion of same-sex couples. The dynamic approach was decisive for the decision: the Grand Chamber emphasized that

> although there is no consensus among the legal systems of the Council of Europe member States, a trend is currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships. Nine member States provide for same-sex marriage. In addition, seventeen member States authorise some form of civil partnership for same-sex couples. As to the specific issue raised by the present case (…), the Court considers that the trend emerging in the legal systems of the Council of Europe member States is clear: of the nineteen States which authorise some form of registered partnership other than marriage, Lithuania and Greece are the only ones to reserve it exclusively to different-sex couples (…). In other words, with two exceptions, Council of Europe member States, when they opt to enact legislation introducing a new system of registered partnership as an alternative to marriage for unmarried couples, include same-sex couples in its scope. Moreover, this trend is reflected in the relevant Council of Europe materials.[49]

A closer reading of the judgment does not eliminate all the prior reservations about the use of dynamic interpretation in cases where the broad consensus among the member states is missing. Clearly, when it comes to legal recognition, the mathematical majority of the member states still fails to put same-sex couples on equal ground with different-sex couples. For this reason the Court relied on the dynamic notion of consensus and focused on tendencies and a twisted consensus analysis covering only those countries where out-of-marriage relationships are recognized. Instead of establishing a clear positive obligation, *Vallianatos* indicates: it is unacceptable to treat same-sex couples differently from other couples in a comparable situation. But if the comparator is missing, the state has no obligation to create a legal institution for them. The limited consensus analysis also suggests this conclusions: the Court focused on those countries where unmarried couples may benefit from some kind of legal protection, while those states that offer no such institution are left out from the assessment.[50] The judgment built on what had been already achieved before the Court: the strong consensus that under the Convention it is extremely difficult – practically impossible – to justify difference in treatment based on sexual orientation.

[48] *Vallianatos and Others v. Greece* (2013) ECHR 2013.

[49] *Ibid,* par. 91.

[50] For a detailed analysis of the case see: Ilias Trispiotis, 'Discrimination and Civil Partnerships: Taking 'Legal' out of Legal Recognition' (2014) 14 Human Rights Law Review 343.

4 Conclusion

The legal recognition of same-sex couples under the Convention has been dominated by the use or the limited use of the dynamic interpretation. The Court in its jurisprudence heavily relies on the consensus analysis in this question: there is a traceable shift in the case-law from the restrictive notion of consensus requiring a widely shared legal practice among the member states to the more permissive and flexible dynamic concept of common practice, *i.e.* the reliance on trends and tendencies. The paper aimed at providing a brief overview of the jurisprudence and illustrating the dynamics of the development. Although the evolutive interpretation carries the potential of updating the original understanding of Convention rights, and in this case Article 8 in particular, according to the changed legal approaches and social attitudes, the Court failed to fully exploit this possibility. Until 2010 same-sex couples were not treated as families and their rights were primarily based on the private life limb of Article 8. The *Schalk and Kopf* judgment marked an important changed and affording family rights protection to those families that are based on a stable relationship of persons of the same sex, the Court has not given up completely its cautious approach to rainbow families.

The reliance of consensus may give rise to further critique: the jurisprudence fails to offer sufficient guidance on when and how the Court engages into a consensus analysis. In comparison with cases touching upon less controversial issues, the consensus arguments in cases concerning the rights of same-sex couples caused several backlashes and slowed down the development. As Wintemute put it, "'European consensus' serves to anchor the Court in legal, political and social reality on the ground".[51]

[51] Cited in: Emmanuelle Bribosia, Isabelle Rorive, Laura Van den Eynde, 'Same-Sex Marriage: Building an Argument before the European Court of Human Rights in Light of the US Experience' (2014) 32 Berkeley Journal of International Law 1, 19.

Legal family formats for (same-sex) couples[1]

Kees Waaldijk[2]

Abstract

This paper describes in a comprehensive but compact manner the legal recognition that same-sex couples have been gaining in Europe. In 40 years a growing number of European countries has started to make marriage and/or other 'legal family formats' available to same-sex couples. Simultaneously the number of pieces of European Union legislation that acknowledge non-marital partners (of any gender-combination) has been growing as well. The terminology used for the various new legal family formats is very diverse, and authors of comparative family law have proposed various classifications of these family formats - so far without convincing each other. This paper argues in favour of using 'registered partnership' and 'informal cohabitation' as the most appropriate terms to characterise the new range of non-marital family formats. All this has been accompanied and encouraged by a stream of case law in which the European Court of Human Rights and the Court of Justice of the European Union have been requiring some degree of equal treatment between unmarried different-sex and same-sex couples, and sometimes also between registered same-sex couples and married different-sex couples. This case law is still limited, but it does contain many statements that explicitly validate same-sex and non-marital family life and that recognize the need for legal recognition of such partnerships. Eventually, this affirmative eloquence of the highest European courts could become relevant to same-sex partners in jurisdictions and situations where many rights and benefits are still the exclusive privilege of married different-sex partners.

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[2] Leiden Law School, www.law.leidenuniv.nl/waaldijk. Acknowledgment: The research leading to these results has received funding from the European Union's Seventh Framework Programme (FP7/2007-2013) under grant agreement no. 320116 for the research project FamiliesAndSocieties.

1 National legislation extending the range of available formats

For a long time, across Europe, the only available legal family format for a couple was marriage, different-sex marriage. By marrying each other, the partners triggered a range of legal rights and responsibilities, between themselves and in relation to any children and others. However, over the last 40 years, in response to what the European Court of Human Rights now calls the need of same-sex and different-sex couples 'for legal recognition and protection of their relationship',[3] new legal family formats have been created and have been made available to same-sex and/or different-sex couples. Examples are registered partnership, civil partnership, legal cohabitation, de facto union, etc. This has been happening in a growing number of countries, and recently some of these countries have also opened up marriage to same-sex couples. In most member states of the European Union, and in a handful of other European countries, now at least one legal family format is available to same-sex couples (see *Table 1*).[4]

In spite of the lack of uniformity between the legislation of different European countries, it seems that the picture of Europe's map is becoming less diverse than a few years ago. With the opening up of marriage in France and soon in Great Britain and Luxembourg, the situation will be as follows (see also *Tables 1 and 2*): All countries in the North-Western part of Europe (from Spain to Finland), plus some countries in central Europe (Austria, Hungary, Slovenia) are allowing same-sex couples to enter into a legal format that is either called marriage or that entails almost all of the legal consequences of marriage. In the countries in the South-Eastern part of Europe (from Italy to Russia) this is not yet the case, although some of the rights of marriage are available in Croatia and the Czech Republic, while it seems that at least one of those many rights has been extended to same-sex partners in Poland, Italy and Serbia.[5]

In both halves of the continent further developments are under way. Plans for (more) recognition of same-sex partners are being discussed in Slovenia, Malta, and other countries.6 The opening up of marriage is being expected soon in England and Wales, Scotland and Luxembourg, and within a few years in Greenland, Finland and Ireland, while in Portugal, Austria, the Netherlands and Denmark legislation is underway to increase the possibilities for same-sex partners to jointly become legal parents of the children in their family, something that has also been effected by recent case law in Germany.[7] It is not quite clear whether the trend of growing legal recognition is equally strong with respect to different-sex couples that do not (want to) marry.

[3] ECtHR 24 June 2010, Schalk *& Kopf v Austria*, App. 30141/04, par. 99 (for case law of the ECtHR, see echr.coe.int/hudoc).

[4] For sources of most data in *Table 1*, see Waaldijk, 2009; Paoli Itaborahy & Zhu, 2013.

[5] For the applicability to same-sex couples of the legal protection against domestic violence in Serbia, see Cvejić Jančić, 2010, p. 81.

[6] On 7 November 2013 the ECtHR decided that it is not acceptable that registered partnership in Greece is only available to different-sex couples (case of *Valianatos v Greece*, App. 29381/09 and 32684/09, par. 92).

[7] Bundesverfassungsgericht (Constitutional Court, Germany)19 February 2013, 1 BvL 1/11, www.bverfg.de/entscheidungen/ls20130219_1bvl000111.html.

Table 1. Chronology of the 25 European countries that legally recognize same-sex couples

	Is there any legal recognition of *informal cohabitation* of same-sex couples? If so, since when?	**Can same-sex couples enter into a *registered partnership*? If so, since when?**	**Do same-sex couples have access to *civil marriage*? If so, since when?**
Netherlands	1979	1998	2001
Belgium	1996	2000	2003
Spain	1994	regionally since 1998	2005
Norway	1991	no longer (1993-2009)	2009
Sweden	1988	no longer (1995-2009)	2009
Iceland	1994?	no longer (1996-2010)	2010
Portugal	2001	no	2010
Denmark	1986	no longer (1989-2012)	2012
France	1993	1999	2013
Greenland (DK)	?	1996	in preparation?
Germany	2001	2001	no
Finland	2001?	2002	in preparation?
Luxembourg	?	2004	in preparation
England & Wales (UK)	1999	2005	2014?
Scotland (UK)	2000	2005	in preparation
Northern Ireland (UK)	?	2005	no
Czech Republic	?	2006	no
Slovenia	?	2006	no
Andorra	?	2006	no
Switzerland	2000?	2007	no
Hungary	1996	2009	no
Austria	1998	2010	no
Ireland	1995	2011	in preparation?
Liechtenstein	?	2011	no
Jersey (UK)	?	2011	no
Isle of Man (UK)	?	2012	no
Croatia	2003	no	no
Serbia	2005?	no	no
Italy	2011?	no	no
Poland	2012	no	no
Malta	in preparation	in preparation	no
Estonia	?	in preparation?	no
Greece	?	in preparation?	no

2 Academic literature trying to classify the new formats

Authors of comparative law and other disciplines have been struggling to find suitable classifications for the new legal family formats. Several authors speak about registered partnership

as a form of (unmarried, non-marital) 'cohabitation'.[8] Others see cohabitation and registered partnership as two distinct alternatives to marriage.[9] The main problem in the many classifications that have so far been proposed (see *Table 2*), is that different criteria are being used – often simultaneously. These criteria include: the legal name used for a format ('marriage'), the procedure that is required to use the format ('registration'), the place in legal doctrine that the format has been given ('contract', 'civil status'), the level of legal consequences that is attached to a format ('strong' or 'weak' registration, 'some' or 'most' rights of marriage), and the general similarity to marriage ('non-marital', 'quasi-marriage', 'semi-marriage').

The 'life partnership' in Germany is a good example of the difficulties of classification. Introduced in 2001, it was at first mostly classified as 'registered cohabitation', 'semi-marriage' or 'weak registration'. However, after more legal consequences had been attached to it, by legislation and by case law,[10] it is now mostly seen as a 'strong' form of registered partnership entailing most rights of marriage. The same could be said about registered partnership in Slovenia.

The challenge of classification is also highlighted by Scherpe, who points out that in some jurisdictions a mix of 'simple' and 'formalized' partnership has been created.[11] Gonzalez Beilfuss describes a few examples of this 'double-track model': In some regions of Spain the legal recognition applies automatically after living together for two or three years or having a child together, but it is also possible for the couple to 'enter the institution through a private contract recorded in a public deed'.[12]

It is clear from *Table 2* that no consensus on classification has been reached in (legal) literature. (In fact, some authors may not agree with how I have used their classification to group the countries at the top of *Table 2*.) Nevertheless, it seems that for formats not involving registration the words used most frequently are 'cohabitation' and 'unregistered'. Because the word 'cohabitation' is easy to understand, and because 'unregistered' is somewhat confusing in its suggestion of a previous registration that has been un-done, I will stick to my preference for the phrase 'informal cohabitation',[13] as in *Table 1*.

[8] Bradley, 2001; Barlow, 2004; Perelli-Harris & Sánchez Gassen, 2012.
[9] Wintemute, 2001, p. 764; Waaldijk, 2005.
[10] See Scherpe, 2013, p. 92.
[11] Scherpe, 2005, p. 582.
[12] González Beilfuss, 2012, p. 47.
[13] Waaldijk, 2005. Within this category it will only rarely be necessary to distinguish between piecemeal recognition, and situations where there is one general law on informal cohabitation.

Table 2. Classifications of legal family formats for non-marital couples

Authors using or proposing a classification	Countries with one or more new legal family formats for same-sex (and different-sex) couples *italics = for same-sex only* Netherlands Denmark Norway Spain Iceland Hungary etc.	Sweden parts Spain Portugal Croatia, etc. [Slovenia for different-sex only]	Belgium parts Spain Iceland	France parts Spain [Greece for different-sex only]	Czech Republic [at first Germany and Slovenia]	Netherlands Finland UK Switzerland Hungary Ire-land Austria Germany Slovenia
Barlow, 2004	cohabitation					
Bradley, 2001	unmarried cohabitation					
Perelli-Harris & Sánchez Gassen, 2012	cohabitation (unregistered)		cohabitation (registered)			
Forder, 2000	cohabitation protection by operation of law		optional co-habitation protection	enrolled contract	partnership registration	
Fulchiron, 2000	'unions libres'		'partenariats-cadres'		'partenariats-statuts'	
Kessler, 2004		'partenariats contrats'			'partenariats institutions'	
Coester, 2002	piecemeal regulation	domestic partnership (cohabitants) legislation	registered partnership			
Scherpe, 2005	simple partnership (for specific purpose(s))	simple partnership (for 'bundle' of purposes)	formalized partnership ('formalisierte Lebensgemeinschaft')			
Waaldijk, 2005	informal cohabitation		registered partnership			
Kollman, 2007	unregistered partnership		registered partnership			
Wintemute, 2001	unregistered cohabitation		registered cohabitation			registered partnership
Bell, 2004	cohabitation		legally recognized partnership			registered partnership
Waaldijk, 2004	para-marriage		semi-marriage			quasi-marriage
Curry-Sumner, 2005	unregistered forms of cohabitation		non-marital registered relationships (weak registration)			non-marital registered relationships (strong regist.)
Curry-Sumner, 2012	unregistered relationship forms		registered partnership (weak registration)			registered partnership (strong regist.)
Paoli Itaborahy & Zhu, 2013	some rights of marriage					most or all rights of marriage

For formats that do involve registration, the phrase 'registered partnership' is used most frequently, and I will continue to do so. However, it should be borne in mind that the use of this phrase covers a very wide range of legal formats across Europe. Therefore it will often be useful (for example, when conducting demographic or sociological research) to distinguish between strong and weak forms of registered partnership. Curry-Sumner has proposed to call registration 'strong' when there is a 'near assimilation of the legal effects attributed to registered partners and spouses'.[14] In other words, a 'strong' registration can be characterized as a 'quasi-marriage'.[15] Typically, such a registration would also be very much like marriage in two other dimensions: the conditions and procedures to enter into it and the procedures to get out of it. A weak form of registered partnership, on the other hand, would entail only a limited selection of the legal consequences attached to marriage.[16] Typically the conditions and procedures for entering into such a weak registration (a 'semi-marriage') would be different from those for marriage, and it would also be easier to get out of it. Occasionally (as the examples of Germany and Slovenia have shown) it may be difficult to decide whether the form of registered partnership enacted by a particular jurisdiction should be classified as strong or as weak.[17] When the level of legal consequences attached to it is somewhere between 'a limited selection' and 'near assimilation', then regard can be had to how closely the formalities resemble those of marriage. All this will require a more systematic study (and indeed monitoring) of the rights, responsibilities and formalities attached to the various legal family formats that have been enacted or are being considered in many European countries.

3 European Union legislation hesitantly following some national trends

Just like national lawmakers and legal scholars, the institutions of the European Union have not found it easy to deal with new forms and formats of family life. Family law as such is not a field in which the EU plays an important role. However, in quite a number of its fields of operation (ranging from free movement to accounting standards) family relationships do play a small or bigger part. At EUR-lex.europa.eu, a search for the words 'marriage', 'spouse' and/or 'child' generates a list of more than 500 EU regulations and directives in force today. Only some of these also make reference to non-marital partnerships. *Table 3* gives an overview of the main examples.

The overview makes it very clear that the EU has not yet found one consistent approach to the topic; it uses at least ten different phrases. The overview also shows that – unlike national legislation in some countries – EU legislation does not distinguish between same-sex and different-sex non-marital relationships.[18] This is not surprising, because such a distinction would have been contrary to well-established case law of the European Court of Human Rights (see *Table 4*).

[14] Curry-Sumner, 2012, p. 82.
[15] Waaldijk, 2004, p. 570.
[16] Waaldijk, 2004, p. 571.
[17] See the critical remarks of Curry-Sumner, 2005, p. 308-309.
[18] Whether it is still permissible in EU law to distinguish between same-sex and different-sex marriages that have lawfully been entered into, is a question that has not yet been decided by the Court of Justice of the EU.

Interestingly, none of the examples in *Table 3* is limited to registered partnership; forms of informal cohabitation are normally also covered, provided all substantive and formal conditions are met.

Table 3. Main examples of EU legislation on non-marital partners (MS = member state(s))

Area & legislative text	Article	Terms used	Restrictions
Free movement – Directive 2004/38/EC	art. 2(2)	'*registered* partnership on the basis of the legislation of a MS'	'if … host MS treats registered partnerships as *equivalent* to marriage'
	art. 3(2)(a)	'any other family members … who … are dependants or members of the household'	MS only have a duty to '*facilitate* entry and residence'
	art. 3(2)(b)	'*durable* relationship, duly attested'	
Family reunification for third country nationals – Directive 2003/86/EC	art. 4(3)	'duly attested *stable long-term* relationship' or '*registered* partnership'	'MS *may* … authorize entry and residence'
Asylum seekers – Dir. 2011/95/EU	art. 2(j)	'unmarried partner in a *stable* relationship'	'where … MS concerned treats unmarried couples in a way *comparable* to married couples under its law relating to third country nationals'
Jurisdiction etc. in matters relating to maintenance obligations – Regulation 4/2009	Annex VII, 4	'Certificate of marriage or *similar* relationship'	
	Annex VII, 9.3.1.7	'*Analogous* relationship to marriage'	
Staff Regulations of Officials of the EU, as amended by Regulation 723/2004	art. 72(1) & Annex V, art. 6	'unmarried partner'	'legal document … of a MS, acknowledging their status as non-marital partners'
	art. 1d	'non-marital partnerships'	'legal document … of a MS, acknowledging their status as non-marital partners' & 'no access to legal marriage in a MS'
	Annex VII, art. 1(2)(c)	'registered as a *stable* non-marital partner'	
Statute for Members of the European Parliament – Decision 2005/684/EC	art. 17(9)	'partners from relationships recognized in the MS'	
Implementing measures for Statute Members European Parliament – Decision of 19 May & 9 July 2008	art. 3(1)(a) & 58(2)	'*stable* non-marital partners'	'official document … of a MS acknowledging their status as non-marital partners'
Equal treatment of men and women in self-employment – Directive 2010/41/EU	art. 2	'life partners'	'when and in so far as recognized by national law'
Accounting standards – Regulation 632/2010	art. 9	'*domestic partner*' and 'dependants'	
Victims of crime – Directive 2012/29/EU	art. 2	'the person who is living with the victim in a *committed intimate* relationship … and the dependants of the victim'	'in a joint household and on a *stable and continuous* basis'

Finally it is important to point out that the listed directives and regulations hardly oblige unwilling member states to start to recognize unmarried partners: The obligation typically only applies when the member state concerned is already recognizing such partners. The only example where all member states are being forced to provide some substantial recognition is the recent Directive 2012/29/EU, establishing minimum standards on the rights, support and protection of victims of crime. The unease surrounding this novelty becomes apparent in the fact that the relationship not only needs to have a 'stable and continuous basis', but that it also must be both 'committed' and 'intimate'.

4 European courts gradually giving more guidance

The European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU, previously CJEC) have been asked several times to rule on (denied) access to certain legal family formats, or to rule on controversial differentiations that have been made between different legal family formats.

As regards access for same-sex couples to civil marriage, the ECtHR has ruled that it is up to the individual countries to decide whether or not to give such access.[19] Even when married partners have become 'same-sex' through a sex change of one of them, the ECtHR does not (yet) consider it a human rights violation if national law forces them out of their marriage (and into registered partnership).[20] However, the court has ruled that transsexuals should not be excluded from the right to enter into a different-gender marriage.[21] As regards access to a form of registered partnership or other form of legal recognition of same-sex couples, the ECtHR has ruled that each country enjoys a margin of appreciation 'in the timing of the introduction of legislative changes', and that Britain could not be criticized for not doing so until 2005, nor Austria for not doing so until 2010.[22]

There have been many court challenges claiming that it is discriminatory to distinguish in law between same-sex and different-sex unmarried cohabitants. The only challenge so far at the Court of Justice of the EU (CJEU) was unsuccessful, but that outcome is no longer valid since the Employment Equality Directive (2000/78/EC) came into force in 2003. Also since 2003, the other European court, ECtHR, has consistently held that to distinguish between same-sex and different-sex cohabitants is incompatible with the right to non-discrimination (see *Table 4*).

[19] ECtHR 24 June 2010, *Schalk & Kopf v Austria*, App. 30141/04.

[20] ECtHR 28 November 2006, *Parry v United Kingdom*, App. 42971/05; ECtHR 13 November 2012, *H v Finland*, App. 37359/09 (now being reconsidered in the Grand Chamber of the ECtHR).

[21] ECtHR 11 July 2002, *Goodwin v United Kingdom*, App. 28957/95.

[22] ECtHR 4 November 2009, *Courten v United Kingdom*, no. 4479/06; ECtHR 24 June 2010, *Schalk & Kopf v Austria*, App. 30141/04, par. 105-106.

Table 4. Challenges of differentiations between same-sex and different-sex cohabitants

Court	Case	Area	Did court find discrimination?
CJEU 17.2.1998	Grant v SW Trains C-249/96	partner benefits in employment	no, sexual orientation is not covered by prohibition of sex discrimination
ECtHR 24.7.2003	Karner v Austria 40016/98	succession to tenancy after death partner	yes, with respect to home
ECtHR 2.3.2010	Kozak v Poland 13102/02	succession to tenancy after death partner	yes, with respect to home
ECtHR 22.7.2010	PB & JS v Austria 18984/02	sickness insurance	yes, with respect to family life
ECtHR 28.9.2010	JM v United Kingdom 37060/06	calculation of level of child maintenance	yes, with respect to property
ECtHR 19.2.2013	X v Austria 19010/07	second-parent adoption	yes, with respect to family life

Until now, the European courts have not been willing to declare differentiations between marriage and cohabitation to be discriminatory, except in very specific circumstances (see *Table 5* and *Table 6*). However, the ruling of the ECtHR on phone calls from prison suggests that this court may be willing to entertain further challenges to rules that exclude unmarried partners, provided there are no strong counter arguments of the type acknowledged in the case on giving evidence.

Table 5. Challenges of differentiations between different-sex cohabitation and marriage

Court	Case	Area	Did court find discrimination?
CJEC 17.4.1986	Netherlands v Reed C-59/85	right to residence for partner of EC worker	no, in comparison with spouses; yes, in comparison with unmarried partners of Dutch workers
ECtHR 22.5.2008	Petrov v Bulgaria 15197/02	right to use prison phone to call partner	yes, with respect to family life
ECtHR 3.4.2012	Van der Heijden v Netherlands 42857/05	right not to give evidence in criminal proceedings against partner	no, differentiation is justified for the prevention of crime

The only case where one of the two main European courts has honoured the challenge of an unmarried same-sex couple (*Table 6)* must be read in the context of the fairly generous recognition provided in the EU Staff Rules (see *Table 3*). In this case the EU Civil Service Tribunal has given a wide (non-legalistic) interpretation of the condition that non-marital couples will only be given a household allowance if the couple has 'no access to legal marriage in a member state'.

In the case law of the ECtHR there is no full recognition yet for the fact that in many countries same-sex couples cannot marry (or even register as partners) and that therefore the exclusion of unmarried partners from certain rights and benefits has a disparate impact on same-sex partners (i.e. is indirectly discriminatory on grounds of sexual orientation).[23] The latter argument has been tried several times. In one older case, the Court responded by saying that the differentiation in question was justified by the legitimate aim of protecting the family based on marriage (see *Table*

[23] Johnson, 2013, p. 139; Waaldijk, 2012, par. 10, 22, 31.

6). In more recent cases, the typical response of the Court is that in law cohabitation is not similar to marriage (and that therefore the right to non-discrimination is not affected).

Table 6. Challenges of differentiations between same-sex cohabitation and marriage

Court	Case	Area	Did court find discrimination?
ECtHR 10.5.2001	Estevez v Spain 56501/00	survivor's pension	no, differentiation is justified for protection of family based on marriage
ECtHR 29.4.2008	Burden v United Kingdom 13378/05	inheritance tax	no, situation of cohabiting sisters is not analogous with marriage
ECtHR 4.11.2008	Courten v United Kingdom 4479/06	inheritance tax	no, situation of gay cohabitants is not analogous with marriage
ECtHR 23.6.2009	MW v United Kingdom 11313/02	bereavement payment	no, situation of gay cohabitants is not analogous with marriage
EU Civil Service Tribunal 14.10.2010	W v Commission F−86/09	household allowance for EU official	yes, the fact that W and his Moroccan partner are not married should not be used against them, because the situation regarding homosexuality in Morocco makes it not realistic for them to marry in Belgium
ECtHR 19.2.2013	X v Austria 19010/07	second-parent adoption	no, lesbian couple is not in relevantly similar situation as married couple

Finally, there is a growing number of cases in which registered partners demanded to be treated in the same way as married spouses (see *Table 7*). In the first of these cases the EU Court of Justice still emphasized the incomparability of marriage and registered partnership (even in Sweden, where registered partnership was rather strong and quasi-marital). In more recent cases, however, the CJEU has emphasized that it depends on whether the actual legal situation of registered partners and married spouses is comparable, and it suggested that – in the context of pension law – the situation of German registered life partners should indeed be considered as comparable to that of spouses. It seems that this is also the approach of the ECtHR, but the two cases this Court has had to decide so far both concerned France, and the conclusion was that – as regards pensions and as regards adoption – the legal situation of people in a PaCS (*pacte civil de solidarité*) is not similar to marriage.[24]

All in all, the main European courts have only provided little concrete recognition of same-sex and non-marital relationships. And the recognition they have so far offered is mostly depending on whether the national legislation in question already provides some legal recognition. It is a similar phenomenon as what we have seen in EU legislation (see *Table 3*).

[24] See Johnson, 2013, p. 138.

Table 7. Challenges of differentiations between registered partnership and marriage

Court	Case	Area	Did court find discrimination?
CJEC 31.5.2001	*D & Sweden v Council* C-122/99 & C-125/99	household allowance for EU official	no, (Swedish) registered partnership is distinct from marriage
CJEU 1.4.2008	Maruko v Versorgungsanstalt der deutschen Bühnen C-267/06	survivor's pension	yes, assuming that in Germany the situation of registered partners is comparable to marriage, their exclusion from a pension amounts to direct sexual orientation discrimination
ECtHR 21.9.2010	Manenc v France 66686/09	survivor's pension	no, PaCS in France is not analogous with marriage
CJEU 10.5.2011	Römer v Hamburg C-147/08	retirement pension	yes, situation of registered partners in Germany is comparable to marriage
ECtHR 15.3.2012	Gas & Dubois v France 25951/07	second-parent adoption	no, legal situation of lesbian couple in PaCS is not comparable to marriage

This somewhat limited judicial harvest (which echoes the often slow, hesitant or limited developments in national and EU legislation, see *Table 1*, *Table 2* and *Table 3*) seems to contrast with the more general and quite inclusive language that is often used by the ECtHR in the very same judgments. The Court has repeatedly recognized, for example, that the right to respect for private life encompasses the 'right to establish and develop relationships with other human beings'.[25] It has ruled that non-marital partnerships are covered also by the right to respect for family life,[26] and that this includes same-sex partnerships.[27] It has mentioned 'the fact that there is not just one way or one choice when it comes to leading one's family or private life',[28] and it is aware of the 'rapid evolution of social attitudes towards same-sex couples'.[29] It has acknowledged that 'the consensus among European States in favour of assimilating same-sex relationships to heterosexual relationships has undoubtedly strengthened' (since 2001),[30] and that a 'growing tendency to include same-sex couples in the notion of "family"' is also reflected in EU legislation.[31] The Court has stressed the 'importance of granting legal recognition to *de facto* family life',[32] and it has held that 'same-sex couples are just as capable as different-sex couples of entering into stable committed relationships' and that consequently they are 'in a relevantly similar situation to a different-sex

[25] See for example ECtHR 22 January 2008, *EB v France*, App. 43546/02, par. 43 and 49; on this 'right to relate' in general, see Waaldijk, 2013.

[26] ECtHR 18 December 1986, *Johnston v Ireland*, App. 9697/82, par. 55-56.

[27] ECtHR 24 June 2010, *Schalk & Kopf v. Austria*, App. 30141/04, par. 94.

[28] ECtHR 19 February 2013, *X v Austria*, App. 19010/07, par. 139; see also ECtHR 2 Maart 2010, *Kozak v Poland* , App. 13102/02, par. 98; and ECtHR 7 November 2013, *Vallianatos v Greece*, App. 29381/09 and 32684/09, par. 84.

[29] ECtHR 22 July 2010, *PB & JS v Austria*, App. 18984/02, par 29.

[30] ECtHR 28 September 2010, *JM v United Kingdom*, App. 37060/06, par. 50.

[31] ECtHR 24 June 2010, *Schalk & Kopf v Austria*, App. 30141/04, par 93.

[32] ECtHR 19 February 2013, *X v Austria*, App. 19010/07, par. 145.

couple as regards their need for legal recognition and protection of their relationship'.[33] The Court acknowledged that for a same-sex couple 'an officially recognised alternative to marriage (would) have an intrinsic value', irrespective of its legal effects, and that '(s)ame-sex couples sharing their lives have the same needs in terms of mutual support and assistance as different-sex couples'.[34] Furthermore, it has consistently held that 'differences based on sexual orientation require particularly serious reasons by way of justification',[35] and that the exclusion must be shown to be 'necessary' in order to achieve the legitimate aim.[36] And it ruled that 'a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy cannot be accepted (…) as necessary for the protection of the family viewed in its traditional sense'.[37]

All this may be seen as an indication that the European Court of Human Rights is contemplating to take more steps towards full legal recognition of same-sex and non-marital families than it has taken so far. The Court also seems to be encouraging lawmakers to extend greater legal protection and recognition to new forms of family life, and to provide access to legal family formats that meet the needs of the couples and children concerned. This makes it all the more probable that – for researchers and practitioners – this area of law will remain a moving target, both at national and at European level.

5 References

Barlow, A. (2004). Regulation of cohabitation, changing family policies and social attitudes: A discussion of Britain within Europe. *Law & Policy*, 26, 57-86.

Bradley, D. (2001). Regulation of unmarried cohabitation: Determinants of legal policy. *International Journal of Law, Policy & the Family*, 15, 22-50.

Bell, M. (2004). Holding back the tide? Cross-border recognition of same-sex partnerships within the European Union, *European Review of Private Law,* 5, 613-632.

Cvejić Jančić, O. (2010). The definition of family in modern law and its legal protection. *International Journal of the Jurisprudence of the Family*, 1, 77-100.

Coester, M. (2002). Same-sex relationships: A comparative assessment of legal developments across Europe, *European Journal of Law Reform*, 4, 585-601.

Curry-Sumner, I. (2005). All's Well That Ends Registered? The Substantive and Private International Law Aspects of Non-Marital Registered Relationships in Europe, Antwerp: Intersentia.

Curry-Sumner, I. (2012). A patchwork of partnerships: Comparative overview of registration schemes in Europe. In K. Boeli-Woelki & A. Fuchs (Eds.), Legal recognition of same-sex couples in Europe (pp. 71-87). Antwerp: Intersentia.

[33] ECtHR 24 June 2010, *Schalk & Kopf v Austria*, App. 30141/04, par. 99; see also ECtHR 15 January 2013, *Eweida v United Kingdom*, App. 48420/10, 59842/10, 51671/10 and 36516/10, par 105.; and ECtHR 7 November 2013, *Vallianatos v Greece*, App. 29381/09 and 32684/09, par. 78.

[34] ECtHR 7 November 2013, *Vallianatos v Greece*, App. 29381/09 and 32684/09, par. 81.

[35] ECtHR 24 July 2003, *Karner v Austria*, App. 40016/98, par. 37.

[36] ECtHR 24 July 2003, *Karner v Austria*, App. 40016/98, par. 41.

[37] ECtHR 2 March 2010, *Kozak v Poland* , App. 13102/02, par. 99.

Forder, C. (2000). European models of domestic partnership laws: The field of choice, Canadian Journal of Family Law, 17, 371-454.

Fulchiron, H. (2000). Réflexions sur les unions hors marriage en droit international privé. Journal du Droit International, 127, 889-914.

González Beilfuss, C. (2012). All or nothing: The dilemma of southern jurisdictions. In K. Boeli-Woelki & A. Fuchs (Eds.), Legal recognition of same-sex couples in Europe (pp. 41-53). Antwerp: Intersentia.

Johnson, P. (2013). Homosexuality and the European Court of Human Rights. Abingdon: Routledge.

Kessler, G. (2004). Les partenariats enregistrés en droit international privé. Paris: L.G.D.J.

Kollman, K. (2007). Same-sex unions: The globalization of an idea, International Studies Quarterly, 51, 329-357.

Paoli Itaborahy, L., & Zhu, J. (2013). State-sponsored homophobia: A world survey of laws: Criminalisation, protection and recognition of same-sex love. Brussels: International Lesbian, Gay, Bisexual, Trans and Intersex Association, www.ilga.org.

Perelli-Harris, B., & Sánchez Gassen, N. (2012). How similar are cohabitation and marriage? Legal approaches to cohabitation across Western Europe. Population and Development Review, 38, 435-467.

Scherpe, J.M. (2005). Rechtsvergleichende Gesamtwürdigung und Empfehlungen zur Rechtsstellung nichtehelicher Lebensgemeinschaften. In J.M. Scherpe & N. Yassari (Ed.), Die Rechtsstellung nichtehelicher Lebensgemeinschaften: The Legal Status of Cohabitants, (pp. 571-605). Tübingen: Mohr Siebeck.

Scherpe, J.M. (2013). The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights. The Equal Rights Review, 10, 83-96.

Waaldijk, K. (2004). Others may follow: The introduction of marriage, quasi-marriage, and semi-marriage for same-sex couples in European Countries. New England Law Review, 38, 569-589.

Waaldijk, K. (2005). More or less together: Levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners – A comparative study of nine European countries. Paris: Institut national d'études démographiques, https://openaccess.leidenuniv.nl/handle/1887/12585.

Waaldijk, K. (2009). Legal recognition of homosexual orientation in the countries of the world: A chronological overview with footnotes (paper for the conference The Global Arc of Justice – Sexual Orientation Law Around the World, Los Angeles, 11-14 March 2009), https://openaccess.leidenuniv.nl/handle/1887/14543.

Waaldijk, K. (2012). Same-sex partnership, international protection. In R. Wolfrum (Ed.), Max Planck encyclopedia of public international law. (Vol. VIII, pp. 1125-1134). Oxford: Oxford University Press, www.mpepil.com.

Waaldijk, K. (2013). The right to relate: A lecture on the importance of "orientation" in comparative sexual orientation law. *Duke Journal of Comparative and International Law* (accepted for publication; see also https://openaccess.leidenuniv.nl/handle/1887/19612).

Wintemute, R. (2001). Conclusion. In R. Wintemute & M. Andenaes (Eds.), *Legal recognition of same-sex partnerships* (pp. 759-773). Oxford: Hart Publishing.

PART THREE

Freedom of Movement and International Private Law

EU Free Movement Law and the Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition

Alina Tryfonidou

Abstract

The focus of this paper is the legal recognition of same-sex relationships and, in particular, the treatment of such relationships in situations which involve the free movement of Union citizens between Member States. The main argument of the paper will be that the increased societal acceptance of same-sex relationships, coupled with the constant growth of the group of countries - both worldwide and in Europe - which provide some form of legal recognition for such relationships, points to the need for the EU to adopt a more hands-on approach towards this issue, in situations which fall within the scope of application of EU law. Member States still have the competence to regulate family law and, therefore, it is still up to them to determine whether they will legally recognise same-sex relationships *within their territory*. What happens, however, when Union citizens who are in a relationship with a person of the same sex, or who have entered into a same-sex marriage or registered partnership, move to another Member State in exercise of their EU free movement rights? In case the host Member State does not legally recognise such relationships within its territory, can it refuse to recognise them and, where applicable, the legal status attached to them, also when they involve (at least one) Union citizen who has moved there in exercise of his/her EU free movement rights? Or *can* and, perhaps, *should* the EU in such situations require the host State to provide legal recognition? It will be explained that the host State's refusal to recognise the same-sex relationships of incoming Union citizens can negatively affect same-sex couples in two ways: a) when they seek to *be admitted into* the host State *as a couple*, this being, in essence, an immigration issue and b) once *within the territory of the host State*, when they seek to claim benefits or tax advantages which are confined to couples (or, in some cases, 'married couples'). This paper will be devoted to a discussion of these issues, starting with an explanation of the *status quo* – i.e. that EU law, as currently interpreted, appears to permit the host State to refuse to recognise same-sex relationships (and, where applicable, the status attached to them) even in situations which involve migrant Union citizens – and moving on to argue that this is problematic because in certain circumstances it amounts to a violation of EU law. In particular, it will be explained that it can amount to a violation of a) the EU free movement provisions; b) of certain provisions of the EU Charter of Fundamental Rights, and c) of the EU prohibitions of discrimination on the grounds of sex and sexual orientation . The analysis will then proceed to illustrate that the EU *can* and *should* require the host Member State to fully recognise the same-sex relationships (and the status attached to them) of incoming Union citizens.

Keywords
EU law, free movement of persons, migrant same-sex couples.

* * * * *

1 Introduction

The European Court of Justice (hereinafter 'ECJ', 'Court of Justice' or 'the Court') has often been called to depart from its traditional readings of EU law provisions, when they seem no longer to reflect social reality. Early in the new millennium, in his thorough and enlightening Opinion in *Baumbast and R*,[1] Advocate General Geelhoed pointed out that the EU rules governing the family reunification rights of migrant Union citizens should be redefined in the light of the social and legal developments which had occurred since the adoption of Regulation 1612/68[2] – the piece of secondary legislation which, at the time, governed these rights.[3] Similarly, in his Opinion in *P. v. S and Cornwall County Council*, Advocate General Tesauro stressed that 'the law cannot cut itself off from society as it actually is, and must not fail to adjust to it as quickly as possible. Otherwise, it risks imposing outdated views and taking a static role.'[4] Hence, just like the Council of Europe's European Convention of Human Rights and Fundamental Freedoms ('ECHR'), which is a 'living instrument' and, as such, 'must be interpreted in the light of present-day conditions',[5] the meaning attributed to EU law provisions must be constantly reassessed in order to come to grips with modern times and to be brought into line with the changing European social landscape.

This paper will be another call addressed to the Court of Justice to interpret EU law in a way which reflects the modern social and legal reality in the EU. It will, however, also, and mainly, be a call to the EU legislature to amend certain provisions of EU secondary legislation, with the same aim in mind. The focus of this piece is the cross-border legal recognition of same-sex relationships, and, in particular, the treatment of such relationships in situations which involve the free movement of Union citizens between Member States.[6] A cursory reading of the daily press immediately reveals

[1] Case C-413/99, *Baumbast and R*, [2002] ECR I-7091.

[2] Regulation 1612/68 on freedom of movement for workers within the Community, [1968] OJ L257/2.

[3] Paragraphs 22-36 of the Opinion of Advocate General Geelhoed in *Baumbast*, *supra* note 1. See, also, more recently, paragraphs 62 and 63 of the Opinion of Advocate General Szpunar in Case C-202/13, *McCarthy* (pending); and paragraph 52 of the Opinion of Advocate General Wahl in Case C-270/13, *Haralambidis*, Judgment of 10 September 2014, not yet reported.

[4] Paragraph 9 of the Opinion of Advocate General Tesauro in Case C-13/94, *P. v. S and Cornwall County Council*, [1996] ECR I-2143.

[5] *Tyrer v. United Kingdom*, Application No. 5856/72, Judgment of 25 April 1978, para. 31. For comments on the living instrument doctrine see P. Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2014), at pp. 84-88.

[6] The paper will, therefore, not examine the treatment of same-sex couples entirely comprised of third-country nationals (this is covered by the Family Reunification Directive (Directive 2003/86 on the right to family reunification, [2003] OJ L251/12)). For more details on this see J. Rijpma and N. Koffeman, 'Free Movement Rights for Same-Sex Couples Under EU Law: What Role to Play for the CJEU?' in D. Gallo, L. Paladini, and P. Pustorino (eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer, 2014), at pp. 484-487.

that the question of the legal recognition of same-sex relationships tops the list of socio-political issues that are now most widely discussed on a global scale. It is beyond the remit of this piece to analyse the emerging trends with regards to this issue, however, it would not be an oversimplification to take it as a given that, despite a number of recent backward steps,[7] there is, especially in (northern and western[8]) Europe, an increasing move towards the legal recognition of same-sex relationships.

The main argument of the paper will, therefore, be that the increased societal acceptance of same-sex relationships, coupled with the constant growth of the group of countries - both worldwide and in Europe - which provide some form of legal recognition for such relationships, points to the need for the EU to adopt a more hands-on approach towards this issue, in situations which fall within the scope of application of EU law. As will be explained in more detail below, Member States still have the competence to regulate family law and, therefore, it is still up to them to determine whether their national laws will make provision for the legal recognition of same-sex relationships *within their territory* and whether they will open marriage or registered partnerships to same-sex couples. What happens, however, when Union citizens who are in a relationship with a person of the same sex, or who have entered into a same-sex marriage or registered partnership, move to another Member State in exercise of their EU free movement rights? In case the host Member State does not legally recognise such relationships within its territory, can it refuse to recognise them and, where applicable, the legal status attached to them, also when they involve (at least one) Union citizen who has moved there in exercise of his/her EU free movement rights? Or *can* and, perhaps, *should* the EU in such situations require the host State to recognise them?

This paper will be devoted to a discussion of these issues, starting with an explanation of the *status quo* – i.e. that EU law, as currently interpreted, appears to permit the host State to refuse to recognise the same-sex relationships of incoming Union citizens – and moving on to argue that this is problematic because it can amount to a violation of EU law. The analysis will then proceed to illustrate that the EU *can* and *should* interfere in this area, by requiring the host Member State to fully recognise the same-sex relationships of incoming Union citizens and the legal status attached

[7] See, for instance, the promulgation in September 2014 of a draft law in Chad (awaiting ratification by the country's president) which makes same-sex relations punishable by 20-year sentence; the amendment of the Slovak onstitution in June 2014, to (re-)define marriage as 'the unique bond between a man and a woman', in this way 'banning' same-sex marriage; the decision of the Supreme Court of India in December 2013 (available at http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070) to overturn the Delhi High Court's 2009 decision in *Naz Foundation v. Government of NCT of Delhi* which had held to be unconstitutional – when applicable to sex between *consenting adults* - the provision of the Indian Penal Code 1860 which criminalised, *inter alia*, sex between persons of the same sex.

[8] As noted by Scherpe, in Europe it is particularly in Eastern European countries and in Greece and Italy that there is strong opposition to the legal recognition of same-sex relationships – J. M. Scherpe, 'The legal recognition of same-sex couples in Europe and the role of the European Court of Human Rights', (2013) 10 The Equal Rights Review 83, p. 84. This is, also, evident from the results in a recent Eurobarometer survey (Special Eurobarometer 393: Discrimination in the EU in 2012, available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_393_en.pdf). On page 41 of the Report, it is concluded that 'acceptance of gay, lesbian and bisexual people is greatest in Northern and Western EU Member States, and least common in a number of Eastern European countries'.

to them. The exact way that this can best be done will be analysed in the penultimate section of the paper.

2 Competence Issues: Who's Got the Power

Are same-sex relationships legally recognised in the EU? The answer is 'it depends', this being due to the fact that each Member State is free to regulate this matter in accordance with its own laws and traditions.[9] Moreover, even among the States that do provide legal recognition to same-sex relationships, 'there is considerable diversity between the types of legal status being afforded'.[10] At the moment of writing, out of the 28 Member States, only 8 offer to same-sex couples the option of marriage;[11] 12 offer some form of registered partnership;[12] whereas 12 Member States do not provide any legal status to same-sex couples.[13]

One thing should be made clear from the outset. In this paper, it is not proposed that the EU can – or, even, must – require the Member States to legally recognise same-sex relationships and to make available any particular legal status to same-sex couples that seek to formalise their relationship *within their own territory*. As the Court of Justice has recently confirmed, 'as European Union law stands at present, legislation on the marital status of persons falls within the competence

[9] Paragraph 76 of the Opinion of Advocate General Jääskinen in Case C-147/08, *Römer*, [2011] ECR I-3591. This is, also, reflected in Recital 22 in the preamble to Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16, which states that the Directive 'is without prejudice to national laws on marital status and the benefits dependent thereon'. See, also, the 'Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50', CHARTE 4473/00 CONVENT 49, Brussels, 11 October 2000, p. 12, where, referring to Article 9 of the EU Charter of Fundamental Rights (the right to marry and the right to found a family), the Praesidium noted that 'this Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex'. See, also, K. Lenaerts, 'Federalism and the Rule of Law: Perspectives from the European Court of Justice' (2011) 33 Fordham Int LJ 1338, at p. 1355.

[10] M. Bell, 'Holding back the tide? Cross-border recognition of same-sex partnerships within the European Union', (2004) 12 ERPL 613.

[11] In chronological order, starting from the Member State which first introduced same-sex marriage, these are: the Netherlands, Belgium, Spain, Sweden, Portugal, Denmark, France, United Kingdom (England and Wales only). At the time of writing, Luxembourg is in the process of opening marriage to same-sex couples as, by an overwhelming majority, it has recently adopted a Bill providing for this. It is expected that the law will come into force in 2015, this making Luxembourg the ninth EU Member State to offer marriage to same-sex couples.

[12] In chronological order, starting from the Member State which first introduced this, these are: the Netherlands, France, Belgium, Germany, Finland, Luxembourg, United Kingdom, Czech Republic, Slovenia, Hungary, Austria, Ireland. At the time of writing, Malta and Croatia are in the process of making available registered partnerships to same-sex couples. It is expected that the said laws will come into force in 2015, this making Malta and Croatia the thirteenth and fourteenth EU Member State to offer a form of registered partnership to same-sex couples. Moreover, Cyprus is in the early stages of drafting a Bill on a Cohabitation Pact which will be available to same-sex and opposite-sex couples (the first draft of the Bill was published in September 2014). As can be seen, there is some overlap between this list and the list in the previous footnote: 5 Member States (France, United Kingdom, the Netherlands, Belgium, Luxembourg) offer to same sex-couples the option of both a marriage and a registered partnership. Note that some Member States which initially offered registered partnerships specifically to same-sex couples have abolished this status and have opened marriage to all couples (e.g. Denmark).

[13] These are Bulgaria, Croatia (until 2015), Cyprus (until the proposed draft law on the Cohabitation Pact will become law and come into force), Estonia, Greece, Italy, Latvia, Lithuania, Malta (until 2015), Poland, Romania, Slovakia.

of the Member States'.[14] Accordingly, family law issues such as who can marry whom, formalities of marriage, adoption, divorce, and, naturally, whether same-sex couples can marry or enter into a registered partnership, are matters that fall within national competence and hence the EU does not – and cannot – require the Member States to adopt any particular stance on them.[15] These are all sensitive issues deeply influenced by local public sentiment and, for which, unavoidably, there is a lack of consensus among the Member States. Therefore, each Member State should remain free to regulate them as it considers best, provided that when it does so it complies with EU law.[16]

Member States are, thus, free to regulate family law issues in purely internal situations, i.e. situations which involve their own nationals who have never made use of EU free movement rights. Hence, whether a British national will be able to marry her female partner in the UK is a question that falls entirely within the competence of the UK and the EU cannot question that State's choices in this field. Conversely, when a Member State seeks to apply its family law provisions in situations that involve migrant Union citizens who fall within the scope of EU law, it is necessary to ensure that the application of national family law does not breach any EU law provisions. The main argument of the paper will, therefore, be that although Member States are free to refuse to provide any legal recognition to same-sex relationships in purely internal situations, they are not free to do so, also, with regards to the same-sex relationships of migrant Union citizens – especially when the latter have formalised their relationship in another State – because, as will be illustrated, this can amount to a violation of a number of EU law provisions and principles.

In this paper I shall focus on the position of same-sex couples comprised of at least one Union citizen, when they wish to leave their State of origin and settle in the territory of another Member State. As in all situations involving EU free movement law, the State of origin must not act in a way which impedes the freedom of Union citizens to leave its territory.[17] This, nonetheless, does not particularly affect same-sex couples[18] – i.e. there is no evidence that Member States wish to prevent same-sex couples, in particular, from leaving their territory – and, hence, will not be discussed here any further. Conversely, the treatment afforded by the host Member State to the incoming same-sex couple is much more important for our purposes, since some receiving States that do not recognise same-sex relationships within their territory, may refuse to do so also when it comes to same-sex couples who, having made use of EU free movement rights, enter their territory.[19] And

[14] *Römer*, *supra* note 9, para. 38.

[15] For an examination of the law applicable to the *formation* of same-sex partnerships and marriages in situations which involve a foreign element (e.g. where one of the partners is neither a national nor a resident of the State where the marriage or partnership will be contracted) see R. Virzo, 'The Law Applicable to the Formation of Same-Sex Partnerships and Marriages' in D. Gallo, L. Paladini, and P. Pustorino (eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer, 2014).

[16] Case C-267/06, *Maruko*, [2008] ECR I-1757, para. 59. See K. Lenaerts, *supra* note 9, at p. 1355.

[17] See Article 4 of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L158/77. See, *inter alia*, Case C-33/07, *Jipa*, [2008] ECR I-5157, para. 18; Case C-430/10, *Gaydarov*, [2011] ECR I-11637, para. 25.

[18] D. Kochenov, 'On options of citizens and moral choices of states: gays and European federalism', (2009) 33 Fordham Int'l LJ 156, at p, 189.

[19] Note that a problem does not arise in situations when same-sex couples move to a Member State which recognises same-sex relationships since the application of the principle of non-discrimination on the grounds of

this can happen even if the couple has entered into a marriage or a registered partnership in its home State, though, in certain cases, the host Member State may recognise the couple as a 'couple', but it may 'downgrade' its legal status (e.g. a same-sex marriage may be converted into a registered partnership or, even, be simply considered a *de facto* partnership).

As will be explained in more detail below, the host State's refusal to recognise the same-sex relationships (and the legal status attached to them) of incoming Union citizens, can negatively affect same-sex couples in two ways: a) when they seek to *be admitted into* the host State *as a couple*, this being, in essence, an immigration issue and b) once *within the territory of the host State*, when they seek to claim benefits or tax advantages or, simply, a certain kind of beneficial treatment, available only to couples (or, in some cases, 'married couples').

It should be noted that when it comes to the difficulties that the same-sex couple may face under the immigration laws of the host State, the arguments made in this paper will, mostly, be relevant to couples that are comprised of a migrant Union citizen (i.e. the person making use of EU free movement rights) and a third-country national who will seek to claim the right to move and reside in the host State via the former. This is because, if the second member of the couple is, also, a Union citizen, (s)he will be entitled on his or her own right under EU law to move to the host State (provided that the limitations and conditions imposed by secondary legislation are complied with[20]) and, hence, in order to gain access to, and reside, in the host State, there will be no need to claim such (derivative) rights under EU law, *as a family member of their partner*. Accordingly, the host State's refusal to recognise the same-sex relationship in this instance, will not have any bearing on its decision to admit both members of the couple into its territory, though they will be admitted as single persons. Conversely, the difficulties that may be faced by same-sex couples after they have gained access to the host State and when they seek to claim various benefits or tax advantages *as a couple*, can affect all (migrating) same-sex couples – whether they are comprised of two Union citizens or a Union citizen and a third-country national – in the same way.

3 EU Law and Same-Sex Relationships: The Current Legal Regime

In this section, I shall analyse the EU legal regime which currently governs the position of migrant same-sex couples, which are comprised of at least one Union citizen. The section shall be divided into two subsections: subsection 3.1 will explain how EU secondary legislation treats such couples for the purposes of family reunification, whilst subsection 3.2 will examine EU anti-discrimination legislation and its interpretation by the ECJ in situations which involve treatment which is discriminatory against same-sex couples.

To date, the ECJ has never been directly confronted with the question of the legal recognition

nationality will require the host State to treat them in the same way as its own nationals and, hence, it will recognise their relationships - E. Guild, 'Free Movement and Same-Sex Relationships: Existing EC Law and Article 13 EC' in R. Wintemute and M. Andenas (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart, 2001), p. 688.

[20] In essence, he/she must be economically active or, if not, economically self-sufficient and be covered by medical insurance in the host State. See Article 7 of Directive 2004/38, *supra* note 17.

of a *migrant* same-sex couple in the territory of the host State. Accordingly, the Court has never had to clarify its stance on the question of whether EU law requires the host Member State to recognise the same-sex marriage/registered partnership/durable relationship of migrant Union citizens, for family reunification purposes, and, hence, the explanation of the current legal regime governing this matter will solely rely on an analysis of the provisions of secondary legislation and, where appropriate, on the reports of, or discussions before, EU institutions. In its anti-discrimination case-law, however, the Court 'came close to confronting the recognition of same-sex relationships',[21] albeit not in a cross-border context, given that the EU anti-discrimination regime – unlike EU free movement law – does not merely apply to cross-border situations. As will be seen, none of the cases that reached the ECJ involved the question of the legal recognition by the receiving Member State of a same-sex couple that arrived in its territory after making use of EU free movement rights: the cases involved either a couple that was 'stagnant' and, hence, was subjected to discriminatory treatment *in its home State* (*Grant*, *Maruko*, *Römer*, and *Hay*[22]), or the application of the EU's Staff Regulations to the EU's employees (*D. and Sweden v. Council* and *W v. Commission*[23]).[24] Hence, in order to determine how EU anti-discrimination law can help *migrant* same-sex couples, this paper will consider how this case-law can be transposed to a cross-border context.

This paper will be focusing on the negative impact that the exercise of free movement rights under EU law can have on a same-sex couple, examining the situation when such a couple moves from a State which recognises same-sex relationships to one that does not or does not offer an equivalent legal status. However, it should by no means be thought that the exercise of free movement rights will, always, disadvantage same-sex couples. As Weiss has explained, 'federalism can be the source of greater rights, in that "state-by-state" variation leaves open the possibility to each individual of choosing to avoid repression by leaving the repressive jurisdiction'.[25] Hence, as the same commentator has noted, '[i]n the EU, there has already been significant migration of LGBT people from East to West. Anecdotal evidence suggests an exodus of gay people from Poland, where homophobia remains common, to the United Kingdom, where gay people enjoy substantive equality in terms of discrimination, partnerships, and adoption'.[26]

Moreover, given that it has recently been clarified by the Court that the right to family reunification under EU law entails a right to be joined by existing family members *and* the right to

[21] A. R. O'Neill, 'Recognition of Same-Sex Marriage in the European Community: The European Court of Justice's Ability to Dictate Social Policy', (2004) 37 Cornell Int'l L. J. 199, at p. 203.

[22] Case C-249/96, *Grant v. South West Trains*, [1998] ECR I-621; *Maruko*, *supra* note 16; *Römer*, *supra* note 9; Case C-267/12, *Hay*, Judgment of 12 December 2013, not yet reported .

[23] Joined Cases C-122/99 P and C-125/99 P, *D and Sweden v. Council*, [2001] ECR I-4319; Case C-86/09, *W v. Commission*, Judgment of 14 October 2010 (unpublished).

[24] For an analysis of this case-law see M. F. Orzan, 'Employment Benefits for Same-Sex Couples: The Case-Law of the CJEU' in D. Gallo, L. Paladini and P. Pustorino (eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer, 2014).

[25] A. Weiss, 'Federalism and the Gay Family: Free Movement of Same-Sex Couples in the United States and the European Union', (2007-2008) 41 Colum. J. L. & Soc. Probs. 81, at p. 89. See, also, D. Kochenov, *supra* note 18, pp. 165-172.

[26] A. Weiss, *supra* note 25, p. 89.

family formation in the host State,[27] same-sex couples who migrate to a Member State which legally recognises same-sex relationships from a Member State which does not (and, hence, do not have a legal status as a couple under the laws of any Member State), will clearly be able to rely on the family reunification rights granted by the 2004 Directive if they can prove that they have 'formed a family' with their same-sex partner in that State. Also, should they decide to subsequently return to their home State (which does not legally recognise same-sex relationships), they will clearly be able to rely on EU law to claim family reunification rights, although whether they will be able – *under the current regime* – to require that State to recognise their same-sex relationship and the legal status attached to it (in case they have formalised their relationship in the host State) remains unclear, as will be seen below.[28]

3.1 The EU Legal Regime Governing the Family Reunification Rights of Same-Sex Couples

3.1.1 The old (pre-2004) regime[29]

Neither the current EU and FEU Treaties, nor their predecessors, make provision for the grant of family reunification rights to migrant Union citizens. Nonetheless, even when the freedom of movement of persons was merely linked to the pursuit of an economic activity in a cross-border context, it was recognised that, in order for Member State nationals to be able to move between Member States in furtherance of this economic aim, they should be given the right to be accompanied in the host State by their family members: it was thought that Member State nationals confronted with the dilemma of a better job in another Member State or a less satisfactory working life in their State of nationality where they would, however, be surrounded by their loved ones, would probably choose the latter. Accordingly, under Regulation 1612/68[30] and Directive 73/148,[31] migrant workers and the self-employed, respectively, were given the *automatic* right to be accompanied in the host State by close family members, which meant, in practice, that the host State would not be able in such situations to apply its immigration laws, even if the accompanying family members were third-country nationals.[32]

Since the original pieces of legislation that granted family reunification rights to migrant economic actors were promulgated back in the late 1960s and early 1970s, it is not surprising that

[27] Case C-127/08, *Metock*, [2008] ECR I-6241, paras. 87-90. See, also, Case C-456/12, *O & B*, Judgment of 12 March 2014, not yet reported.

[28] The Court has established that although returnees are not covered by secondary legislation, they can rely directly on the EU free movement provisions to claim family reunification rights on their return to their home State – Case C-370/90, *Singh*, [1992] ECR I-4265; Case C-60/00, *Carpenter*, [2002] ECR I-6279; Case C-291/05, *Eind*, [2007] ECR I-10791.

[29] 2004 is considered to be the 'reference year' since it is the year that Directive 2004/38 (*supra* note 17), which provides the current legal regime governing the family reunification rights of migrant Union citizens, came into force.

[30] *Supra* note 2.

[31] Directive 73/148 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, [1973] OJ L172/14.

[32] For a more detailed explanation of this see A. Tryfonidou, 'The impact of EU Law on Nationality Laws and Migration Control in the EU's Member States', (2011) 25 JIANL 358, pp. 366-378. See, also, C. McGlynn, 'The Europeanisation of family law', (2001) 13 CFLQ 35, at p. 37.

they made no provision for same-sex relationships. The persons who were recognised as 'family members' of the migrant and who could, therefore, *automatically* accompany him/her in the host State were: a) the spouse;[33] b) the descendants (under 21 or dependents) of the migrant and the spouse,[34] and c) dependent relatives in the ascending line of the migrant and the spouse.[35] Apart from these three categories of 'family members', it was provided that Member States should 'facilitate' or 'favour' the admission of any other member of the family, who was dependent on the migrant (or his spouse) or living under his roof in the Member State of origin.[36] Similar, albeit somewhat more restrictive, family reunification rights were subsequently granted to economically inactive Member States nationals who, since the early 1990s, have been given the right to move and reside in another Member State, first via secondary legislation,[37] and subsequently by what is now Article 21 TFEU.

Since same-sex marriage was only instituted for the first time in 2001 (in the Netherlands), and given that all of the above instruments were repealed and replaced in 2004 by Directive 2004/38, it is not surprising that the question of whether the term 'spouse' included the same-sex spouse of the migrant, had not emerged. Of course, the fact that there was and there is no provision of EU law which defines the term 'spouse' for the purposes of free movement law,[38] means that this possibility has never been entirely excluded legislatively, although the Court in its judgment in the staff case of *D and Sweden v. Council*,[39] which was delivered in 2001, pointed out that 'the term "marriage" means a union between two persons of the opposite sex'.[40] Moreover, the lack of a reference to registered partnerships under the old regime, meant that the question of whether *same-sex* registered partners could *automatically* join the migrant Union citizen in the host State, did not come up, despite the fact that registered partnerships were opened to same-sex couples in some Member States as early as 1989.[41] Some commentators, however, had argued that given that same-sex registered partnerships had important similarities with marriage, and given that the old regime did not make provision for registered partners, (same-sex) registered partners should be brought within the concept of 'spouse' under the above regime[42] - an argument which was rejected by the Court in *D and Sweden v. Council*.[43]

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[33] Article 10(1)(a) of Regulation 1612/68, *supra* note 2 (for workers); Article 1(1)(c) of Directive 73/148, *supra* note 31 (for the self-employed).

[34] Article 10(1)(a) of Regulation 1612/68, *supra* note 2 (for workers); Articles 1(1)(c) and 1(1)(d) of Directive 73/148, *supra* note 31 (for the self-employed).

[35] Article 10(1)(b) of Regulation 1612/68, *supra* note 2 (for workers); Article 1(1)(d) of Directive 73/148, *supra* note 31 (for the self-employed).

[36] Article 10(2) of Regulation 1612/68, *supra* note 2 (for workers); Article 1(2) of Directive 73/148, *supra* note 31 (for the self-employed).

[37] Directive 90/364 on the right of residence, [1990] OJ L180/26; Directive 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L180/28; Directive 93/96 on the right of residence for students [1993] OJ L317/59.

[38] Case 59/85, *Reed*, [1986] ECR 1283, paras. 11-12.

[39] *Supra* note 23.

[40] *Ibid*, para. 34.

[41] The first Member State that made registered partnerships available to same-sex couples was Denmark in 1989.

[42] See, for instance, K. Waaldijk, 'Free Movement of Same-Sex Partners', (1996) 3 MJ 271, at pp. 278-280.

[43] *Supra* note 23.

As regards (non-registered) *de facto* partners – who were equally absent from the old regime – the ECJ ruled in *Reed*,[44] which involved non-registered *opposite-sex* partners, that the latter could not be equated to 'spouses' and, hence, could not automatically join the migrant in the host State; however, the Court went on to note that 'the possibility for a migrant worker of obtaining permission for his unmarried companion to reside with him […] can assist his integration in the host State and thus contribute to the achievement of freedom of movement for workers', and, therefore, amounts to a social advantage within the meaning of Article 7(2) of Regulation 1612/68.[45] This meant that a migrant worker could rely on this provision in order to require the host Member State to admit within its territory and grant a residence permit to his unmarried (opposite-sex) partner, *if this right was granted to its own nationals*. However, the Court was never faced with the question of whether the same principle would apply to the *same-sex* partner of a migrant Member State national and, hence, the question remained unanswered, though, agreeing with Guild, it is clear that it should.[46]

Writing in 2001 and, thus, commenting on the pre-2004 regime, McGlynn very rightly noted that 'rights are only granted to the families of migrant workers where they conform to a dominant norm of "the family", that is, a heterosexual married partnership, based on a "male breadwinner" model'.[47] A similar argument was soon after made by Caracciolo di Torella and Masselot, who stressed that the 'model family' traditionally conceived in EU law is based on (heterosexual) marriage and, hence, excludes cohabitees, and same-sex couples.[48] Yet, since it is only recently that there has been an avalanche of national laws offering a legal status to same-sex couples which has, correspondingly, given rise to the question of what happens when same-sex couples migrate, the rather narrow-minded definition of 'the family' under the old regime and the sexual orientation blindness of the EU institutions had gone, mostly, unchallenged. As will be seen in the next subsection, however, despite the fact that the majority of Member States now offer some form of legal status to same-sex couples, and despite the increased societal acceptance of same-sex relationships, migrant same-sex couples continue to be ignored under the current EU regime.

3.1.2 The current legal regime

Early in the new millennium, the Commission realised that the sector-by-sector, piecemeal, approach to the development of secondary legislation governing the free movement of persons had resulted in an unsatisfactory situation. Moreover, given that the majority of the legal instruments

[44] *Supra* note 38.

[45] *Ibid*, para. 28. Article 7(2) of Regulation 1612/68 (*supra* note 2) provided that the migrant worker 'shall enjoy the same social and tax advantages as national workers'. Regulation 1612/68 has now been repealed and replaced by Regulation 492/2011 (on the free movement of workers within the Community, [2011] OJ L141/1) and the text of the above provision has now been copied and pasted into Article 7(2) of the latter.

[46] E. Guild, *supra* note 19, p. 684. See, also, H. U. Jessurun d'Oliveira, 'Lesbians and Gays and the Freedom of Movement of Persons' in K. Waaldijk and A. Clapham (eds), *Homosexuality: A European Community Issue – Essays on Lesbian and Gay Rights in European Law and Policy* (Martinus Nijhoff, 1993), p. 314.

[47] C. McGlynn, *supra* note 32, at p. 36. See, also, pp. 46-48 of the same article. On the 'male breadwinner' model see B. Moebious and E. Szyszczak, 'Of raising pigs and children', (1998) 18 YEL 126.

[48] E. Caracciolo di Torella and A. Masselot, 'Under construction: EU family law', (2004) 29 ELRev. 32, at p. 39.

were promulgated back in the 1960s and 1970s, they appeared outdated. Accordingly, it was decided that it was necessary to codify and review the existing legislation.[49] For this purpose, the Commission drafted a proposal for a new Directive which would cover the rights to free movement and residence of *all* Union citizens *and* their family members.[50]

Although it was admitted in the proposal that '[t]he definition of family member must be widened and standardised for all persons entitled to the right of residence',[51] same-sex couples continued to be invisible under the proposed regime. Despite the suggestions for amendment of the proposal that were put forward by the EU Parliament (the most LGB-friendly institution), and which would have the effect that the terms of the proposed Directive would state explicitly that members of same-sex couples *are* included in the terms 'spouse' 'registered partner' and 'partner', the final text was disappointing, given that it perpetuated the uncertainty created by the previous legal regime: the terms used for defining the family members that could accompany or join the migrant remained both gender- and sexual orientation-neutral, in this way allowing some leeway to the Member States to interpret them as covering only opposite-sex couples. It is obvious that the Commission was wary of the danger of being accused of an unwarranted intrusion into the powers of the Member States in the family law field,[52] and, hence, preferred to maintain the EU's hands-off approach towards the question of whether the host Member State is obliged by EU law to recognise the same-sex relationship (and the legal status attached to it) of a national of another Member State entering its territory.

The Directive that ensued – Directive 2004/38[53] – came into force in its final form in April 2004 and Member States had to implement it by the end of April 2006. The Directive is, still, the instrument that governs the family reunification rights of migrant Union citizens.

Article 2(2) provides the following definition for 'family member': '(a) the spouse; (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State; (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b); (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)'. These family members – irrespective of whether they are Member State nationals or third-country nationals – have the *automatic* right to accompany or join the Union citizen in the host State. In addition, like under the previous regime, the 2004 Directive contains a provision – Article 3(2) –

[49] This is reflected in Recitals 3 and 4 of Directive 2004/38, *supra* note 17, which is the instrument that resulted from this review process.

[50] Commission, 'Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', COM (2001) 257 final [2001] OJ C270 E/151.

[51] *Ibid*, Recital 6.

[52] Commission, 'Amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', COM (2003) 199.

[53] *Supra* note 17.

which provides that the host Member State shall facilitate entry and residence for any other family members, and these, now, include 'the partner with whom the Union citizen has a durable relationship, duly attested'. Accordingly, unmarried partners are now expressly recognised as having the right to require the host State to 'facilitate' their entry and residence into the host State – but nothing more than that.

I would now like to summarise the position with regards to each of the three categories in which same-sex couples can fall under the current regime.

3.1.2.1 Married same-sex couples

Just like the pre-2004 regime, Directive 2004/38 considers the 'spouse' of the migrant to be a close family member and, hence, (s)he can rely on EU law to require the host State to automatically admit him or her within its territory. Since marriage is in some of the Member States available to same-sex couples, the word 'spouse' is, at least, open to an interpretation which includes same-sex spouses. Costello has actually pointed out that 'a literal interpretation would suggest that a marriage is a marriage, and legally married migrant EU citizens should be recognized as "spouses' under the meaning of Article 2(2)(a)' of the Directive.[54]

The practical reality, however, is not as clear. The 2004 Directive does not define the term 'spouse' and, despite its efforts, the European Parliament was unable to mobilise the Council to make it clear in the text of the Directive that this term also covers persons who are in a same-sex marriage.[55] Moreover, contrary to well-established practice with respect to key concepts in EU legislation such as the term 'worker',[56] where the ECJ has insisted that a uniform EU meaning should be attributed to them,[57] there is a clear 'jurisprudential reticence to interpret autonomously concepts of [EU] law which lie in the sphere of family law',[58] and, hence, it is not surprising that the Court has been reluctant to provide its own independent definition of this term.[59] This is, nonetheless, problematic, given that differences in the meaning attributed to the term 'spouse' through national laws will clearly undermine the uniform and effective protection of rights granted by the Treaty and secondary legislation.[60] Furthermore, if the Court refuses to consider – or, even, does not require to be considered – as 'spouses' for the purposes of EU free movement law, a same-sex couple that has married in accordance with the law of one Member State, it is 'showing little

[54] C. Costello, 'Metock: free movement and "normal family life" in the Union', (2009) 46 CMLRev. 587, pp. 615-616.

[55] K. Lenaerts, supra note 9, p. 1355.

[56] Case 75/63, Hoekstra, [1964] ECR 177.

[57] Case 327/82, *Ekro*, [1984] ECR 107, para. 11; Case C-201/13, *Deckmyn*, Judgment of 3 September 2014, not yet reported, para. 14.

[58] C. Denys, 'Homosexuality: a non-issue in Community law?', (1999) 24 ELRev. 419, at p. 420.

[59] Though, as explained by Orzan, when applying the Staff Regulations the Civil Service Tribunal and the ECG did adopt an autonomous interpretation of terms that lie in the field of family law and did not for this purpose make reference to national law – M. F. Orzan, *supra* note 24, at pp. 499-500. See Case F-122/06, *Roodhuijzen*, Judgment of 27 November 2007, para. 35 (confirmed by the EGC in T-58/08 P, *Roodhuijzen,* [2009] ECR II-3797, para.).

[60] For a similar argument see K. Armstrong, 'Tales of the Community: sexual orientation discrimination and EC law', (1998) 20 JSWFL 455, at p. 463.

respect for the national family law of that Member State',[61] and 'this would create two statuses: marriages valid throughout EU and national law; and marriages only valid within the national sphere'.[62]

Accordingly, although same-sex spouses have not been explicitly excluded from the term 'spouse' for the purposes of Directive 2004/38, it has not been made clear either that they should be covered by this term and, hence, it is still not certain that EU law *requires* the host State to automatically admit within its territory the same-sex spouse of the nationals of other Member States who move to its territory.[63] This means that (some) Member States consider that they are free to refuse to recognise the same-sex spouse of a migrant Union citizen as a 'spouse', and, hence that they can either downgrade them to the status of 'registered partner' or 'partner', with the difficulties that this entails and which we shall see below, or simply not recognise the couple as a 'couple' for the purposes of the 2004 Directive and national law. Hence, the EU legislator's failure to clarify that same-sex spouses should be recognised as such by the host State amounts to a tacit adoption of the host State principle in this context.

3.1.2.2 Registered same-sex partners

Same-sex registered partners are in an even more disadvantageous position. Apart from the fact that, like with 'spouses', it has not made it clear that the term covers, also, *same-sex* registered partners, the Directive provides that registered partners are considered to be 'family members' and, hence, entitled to automatically accompany or join the migrant Union citizen in the host State, *only* if the latter treats registered partnerships as equivalent to marriage. In other words, the EU legislator *explicitly* rejected the application of the mutual recognition principle, preferring, instead, to adopt the host State principle and to leave it entirely up to the host State to decide whether it will consider registered partners (including, same-sex registered partners) 'family members' of the migrant Union citizen and, as such, as automatically entitled to accompany the latter in its territory. After *Maruko*[64] and *Römer*[65] (to be seen below), one would conclude that 'it is unlikely that the Court will impose its own views as to when a Member State is treating registered partnerships "as equivalent to marriage"',[66] though this may no longer be the case following *Hay*[67] (again, to be seen below).

The current legal regime therefore creates a situation whereby same-sex couples who have entered into a registered partnership in one Member State (e.g. a civil partnership in the UK), will not be recognised as 'registered partners' in a Member State which does not make provision for same-sex registered partnerships or which it does but does not treat them as equivalent to

[61] K. Waaldijk, *supra* note 42, p. 280.

[62] M. Bell, *supra* note 10, p. 621.

[63] P. J. Slot and M. Bulterman, 'Harmonization of Legislation on Migrating EU Citizens and Third Country Nationals: Towards a Uniform Evaluation Framework?', (2006) 29 Fordham Int'l LJ 747, pp. 776-777.

[64] *Supra* note 16.

[65] *Supra* note 9.

[66] M. Bell and M. Bonini Baraldi, 'Lesbian, gay, bisexual and transgender families and the Free Movement Directive: Implementation Guidelines' (2008) ILGA Europe, at p. 15.

[67] Supra note 22.

marriage. According to Bell, as a result of the current regime, 'registered partners moving in the Union will find themselves in the strange situation of passing between states of recognition and states where they are rendered unmarried'.[68]

This means that the same-sex registered partner of the migrant Union citizen will not be *automatically* admitted into the territory of the host Member State, since (s)he will not be considered a 'family member' within the meaning of Directive 2004/38. The couple will, then, be downgraded to the Article 3(2) 'status', and hence the host Member State will merely have to *facilitate entry and residence* of 'the partner with whom the Union citizen has a durable relationship'. Unlike persons who fall within the term 'family member', persons who only qualify for the protection offered by this provision are not guaranteed admission into the host State. As Waaldijk explained, this 'does not produce a genuine right. It only triggers an obligation of the Member State to "facilitate" admission'.[69] In particular, Article 3(2) merely requires the host Member State to undertake an extensive examination of the personal circumstances and to justify any denial of entry or residence to the partner of the migrant Union citizen. Recital 6 of the Directive further elaborates on this requirement, noting that the situation of those persons 'should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen'. This is, however, by no means a sufficient guarantee for same-sex couples who may be in danger of being prejudiced when the above assessment is undertaken, especially since they will need to be assessed only by Member States which do not recognise same-sex registered partnerships as equivalent to marriage or which do not offer the option to same-sex couples of forming a registered partnership.

3.1.2.3 De facto same-sex partners

Unregistered partners – whether opposite-sex or same-sex – are governed by Article 3(2) of the Directive and can, therefore, merely expect the host State to 'facilitate' their entry and residence in its territory; the – rather 'soft' – requirements imposed by EU law on the host State when assessing the position of the couple referred to above will, therefore, apply.

One hurdle that only unregistered partners will have to overcome is the need to prove that they are in a durable relationship with the migrant Union citizen – same-sex spouses and registered same-sex partners will, at least, probably be considered as satisfying this requirement, using their marriage or registered partnership, respectively, as evidence of that.[70] The only real protection that unregistered same-sex partners can, therefore, derive from the Directive is that, given that the host State has to assess the position of the migrant couple and examine it as an individual case, it cannot adopt a block refusal to admit the same-sex partners of migrant Union citizens who enter their territory. Moreover, given that – as will be seen in the next section – the Directive requires that

[68] M. Bell, supra note 10, p. 624.

[69] K. Waaldijk, *supra* note 42, p. 280. See, also, M. Bell, *supra* note 10, p. 625.

[70] For a similar argument see A. Weiss, *supra* note 25, p. 104; J. Rijpma and N. Koffeman, *supra* note 6, p. 475. For a different view see D. Kochenov, *supra* note 18, p. 200.

Member States must not discriminate on the ground of *inter alia* sexual orientation, this means that when the host State conducts its assessment of individual cases to determine whether there is, indeed, a durable relationship which should be recognised for the purposes of EU free movement law, it needs to make sure that this assessment is free from any bias against same-sex couples.[71]

3.2 The EU Legal Regime Prohibiting Discrimination on the Ground of Sexual Orientation

Until the late 1990s, a prohibition of discrimination on the ground of sexual orientation was conspicuous by its absence in EU law. In fact, apart from discrimination on the ground of nationality which has always been a central aspect of EU free movement law, the only other form of discrimination that was prohibited under EU law since the birth of (what is now) the EU, was discrimination on the ground of sex, and this had begun as a mere requirement that women and men should be paid equally for work of equal value.[72] The long list of secondary legislation measures regulating different aspects of sex equality that followed,[73] and the introduction of a sex equality mainstreaming provision in the Treaty,[74] meant that the protection of equality between the sexes is one of the success stories of the EU: the prohibition of discrimination on the ground of sex now applies in a long list of areas – not just work-related ones – and is interpreted broadly.

In view of the fact that until the late 1990s, the Treaties did not include a provision prohibiting discrimination against LGBT individuals, there was an effort to bring such instances of discrimination within the ambit of discrimination on the ground of sex. A clear example of this is the case of *P. v. S. and Cornwall County Council*,[75] where a transsexual who was dismissed by her employer because of her decision to transition from male to female, was found to have been discriminated against on the ground of sex: '[w]here a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment'.[76] The Court held that this amounted to a violation of EU law and, in particular, of the Equal Treatment Directive.[77]

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[71] M. Bell, *supra* note 10, p. 625; A. Weiss, *supra* note 25, at p. 105.

[72] This is currently found in Article 157 TFEU.

[73] The ones currently in force are Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, [1979] OJ L6/24; Directive 92/85 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. [1992] OJ L348/1; Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, [2004] OJ 373/37; Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), [2006] OJ L204/23; Directive 2010/18 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance), [2010] L68/13; Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, [2010] OJ L180/1.

[74] This can now be found in Article 8 TFEU.

[75] *Supra* note 4.

[76] *Ibid*, para. 21.

[77] Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, [1976] OJ L39/40 (now repealed).

However, soon after, in the case of *Grant*,[78] the Court of Justice refused to consider discrimination on the ground of sexual orientation as a form of discrimination on the ground of sex. There, the Court noted that the refusal of Ms Grant's employer (South West Trains) to provide travel concessions for her same-sex partner, whereas such an advantage would be granted had Ms Grant been a man,[79] did not amount to discrimination on the ground of sex, given that a gay male employee who wished to claim the travel advantage for his same-sex partner would be treated in exactly the same way.[80] The Court found that this amounted to discrimination on the ground of sexual orientation which, at the time, was not prohibited by EU law.[81]

Soon after *Grant*, however, a new provision was inserted into, what is now, the FEU Treaty – Article 19 TFEU – which gave the EU the competence to make legislation to prohibit, *inter alia*, discrimination on the ground of sexual orientation.[82] Using this as a legal basis, the EU legislature promulgated Directive 2000/78,[83] which prohibits discrimination on a number of grounds, including sexual orientation, but only in employment, occupation and vocational training.

It was only in 2008 that the Court for the first time had to interpret this Directive in a case where it was relied upon to challenge an instance of alleged discrimination on the ground of sexual orientation. This was the case of *Maruko*,[84] where the reference emerged from proceedings between Mr Maruko and the German Theatre Pension Institution (VddB), relating to the refusal by the latter to recognise the former's entitlement to a widower's pension as part of the survivor's benefits provided for under the compulsory occupational pension scheme of which his deceased registered life partner had been a member. The VddB's refusal was based on the ground that its regulations only provided for such an entitlement for spouses, excluding surviving registered life partners. When considering whether the contested refusal amounted to discrimination on the ground of sexual orientation contrary to Directive 2000/78, the Court pointed out that 'from 2001 […] the Federal Republic of Germany altered its legal system to allow persons of the same sex to live in a union of mutual support and assistance which is formally constituted for life. Having chosen not to permit those persons to enter into marriage, which remains reserved solely to persons of

[78] *Supra* note 22.

[79] On the facts it was stated that Ms Grant's predecessor in post, Mr Potter, had in his time obtained travel concessions for his female partner with whom he was not married.

[80] A number of commentators have convincingly argued that discrimination on the grounds of sexual orientation is (also) a form of discrimination on the grounds of sex. See A. Koppelman, 'Why discrimination against lesbians and gay men is sex discrimination', (1994) 69 N.Y.U.L.Rev. 197; K. Waaldijk, *supra* note 42, p. 281; R. Wintemute, 'Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes', (1997) 60 MLR 334, pp. 344-353; J. McInnes, 'Annotation of *Grant*', (1999) 36 CMLRev. 1043, at pp. 1050-1053; D. Kochenov, *supra* note 18, pp. 172-180. This view was, also, shared by the Advocate General in *Grant*, *supra* note 22; and was the view adopted by the Human Rights Committee when interpreting the International Covenant on Civil and Political Rights in *Toonen v. Australia*, 31 March 1994, CCPR/C/50/D/488/1992, para. 8.7.

[81] For an analysis of early (soft) measures relating to discrimination on the grounds of sexual orientation see F. Russell, 'Sexual orientation discrimination and Europe', (1995) 145 NLJ 374; L. Flynn, 'The implications of Article 13 EC – After Amsterdam, will some forms of discrimination be more equal than others?', (1999) 36 CMLRev. 1127, pp. 1147-1148.

[82] For an early article assessing the implications of this new provision see L. Flynn, *supra* note 81.

[83] *Supra* note 9.

[84] *Supra* note 16.

different sex, that Member State created for persons of the same sex a separate regime, the life partnership, the conditions of which have been gradually made equivalent to those applicable to marriage'.[85] The Court, then, summarised the views of the referring court and, without providing its own conclusion as to whether registered partnerships are treated as equivalent to marriage under German law, it pointed out that '[i]f the referring court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor's benefit, legislation such as that at issue in the main proceedings must, as a consequence, be considered to constitute direct discrimination on grounds of sexual orientation, within the meaning of Articles 1 and 2(2)(a) of Directive 2000/78'.[86] In other words, the Court left it to the referring court to determine whether, for the purposes of the claimed benefit, life partnerships and marriages were in a comparable situation.

Accordingly, what the Court stated in *Maruko* is that if a Member State considers – for a certain purpose (e.g. the grant of a survivor's pension) – same-sex registered partnerships as equivalent to marriage, it must treat them in the same way. However, it left it to the national court to determine whether a German life partnership is considered equivalent to a marriage for the purposes of the widower's pension claimed by Mr Maruko. The same approach was followed three years later in the *Römer* case,[87] which involved a refusal of a German municipality to grant Mr Römer, who was in a life partnership with another man, a supplementary retirement pension of an amount as high as he requested, since the method of calculation of the pension used was more favourable to married pensioners than to pensioners who had contracted a registered life partnership.

As Toggenburg rightly pointed out commenting on *Maruko* (but, clearly, the same criticism can be made for *Römer*), '[t]he Court's approach in *Maruko* has two major weaknesses. Firstly, it provides no protection against discrimination where it is most needed, namely in national systems where homosexual relationships find no legal recognition. Secondly, the definition and identification of the point at which EU law steps in is entirely left to the Member States'.[88] More important for our purposes, however, is the point made by Möschel who, when commenting on this case, noted that the Court's approach 'may entail some negative consequences for the freedom of movement of life partners: Life partners moving from Member State X, where marriage and life partnerships are deemed to be similar situations by national courts and therefore must be treated equally, to Member State Y where courts have, on the contrary, held that this is not the case, might find themselves deprived of certain rights'.[89]

Despite the Court's rather disappointing approach in the cases of *Maruko* and *Römer*, the drafters of the Lisbon Treaty – which came into force in 2009 – gave an important boost to the prohibition of discrimination on the grounds of sexual orientation, by including a new

[85] *Ibid*, para. 67.

[86] *Ibid*, para. 72.

[87] *Supra* note 9.

[88] G. N. Toggenburg, '"LGBT" go Luxembourg: on the stance of Lesbian Gay Bisexual and Transgender Rights before the European Court of Justice', (2008) 5 *European law Reporter* 174.

[89] M. Möschel, 'Germany's life partnerships: separate and unequal?', (2009-2010) 16 CJEL 37, at p. 44.

mainstreaming provision in the FEU Treaty: Article 10 TFEU provides that '[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on […] sexual orientation'. According to ILGA Europe, '[e]quality mainstreaming opens the promise of greater consideration of LGBT issues by decision-makers. It presumes that in all decisions the impact these will have on LGBT people is assessed'.[90] Moreover, the coming into force of the Lisbon Treaty also gave binding force to the EU Charter of Fundamental Rights ('EUCFR' or 'the Charter'), Article 21(1) of which provides that '[a]ny discrimination based on any ground such as […] sexual orientation shall be prohibited'.

Accordingly, despite the rather restrictive approach in *Maruko* in 2008 (which was confirmed in 2011 in *Römer*), it is not surprising that a more LGB-friendly approach has been demonstrated by the Court in a number of other recent cases. Starting with the 2008 staff case of *W*,[91] the EU Civil Service Tribunal took a broad and pragmatic approach when interpreting the Staff Regulations, holding that the requirement that an official who is in a registered partnership can only claim a household allowance if the couple has no access to legal marriage in a Member State, was satisfied in the case of a dual Belgian and Moroccan national who – although legally had access to same-sex marriage in Belgium – argued that 'because homosexual acts are a criminal offence under Moroccan legislation, his Moroccan nationality and the legal and emotional ties he had with Morocco "make it impossible [for him] to marry" a person of the same sex'.[92]

More recently, the Court extended this LGB-friendly approach to situations where it was the compatibility of Member State laws with Directive 2000/78, that was – again – at issue. *Hay*,[93] emerged from proceedings between Mr Hay and his employer – a French bank – concerning the latter's refusal to award him days of special leave and a bonus granted to staff who marry, following the conclusion by Mr Hay of a civil solidarity pact (PACS). At the time, in France only opposite-sex couples could marry, whereas both same-sex and opposite-sex couples could enter into a PACS. In its judgment, after comparing PACS with marriage, the Court concluded that 'as regards benefits in terms of pay or working conditions, such as days of special leave and a bonus like those at issue in the main proceedings, granted at the time of an employee's marriage – which is a form of civil union – persons of the same sex who cannot enter into marriage and therefore conclude a PACS are in a situation which is comparable to that of couples who marry'.[94] It then held that 'a Member State's rules which restrict benefits in terms of conditions of pay or working conditions to married employees, whereas marriage is legally possible in that Member State only between persons of different sexes, give rise to direct discrimination based on sexual orientation against homosexual permanent employees in a PACS arrangement who are in a comparable situation'.[95] The Court pointed out that '[t]he difference in treatment based on the employees' marital status and not

[90] ILGA Europe, 'Equality Mainstreaming' (2007) available at http://www.ilga-europe.org/content/download/9365/55889/version/2/file/fact_sheet_sept-07.pdf.
[91] *Supra* note 23.
[92] *Ibid*, para. 15.
[93] *Supra* note 22.
[94] *Ibid*, paras. 36-37.
[95] *Ibid*, para. 41.

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 condition required for obtaining the benefit claimed'.[96]

Although a detailed analysis of this case is not necessary for the purposes of this paper, two points should be highlighted. The first is that the Court (correctly) followed *Maruko* and *Römer* when holding that a difference in treatment which disadvantages registered partners in a Member State where marriage is not open to same-sex couples, amounts to direct discrimination on the grounds of sexual orientation, if the situation of registered partners is for a particular purpose comparable with that of married couples. Therefore, this, now, appears to be a well-established principle. The second point is that the Court has, nonetheless, departed from its *Maruko* and *Römer* reticence when it comes to the equivalence assessment, and instead of leaving the determination of comparability of the situations between married couples and couples who had concluded a PACS to the national court, it decided to conduct the comparability assessment itself. This means that Member States are no longer given a carte blanche to discriminate against same-sex couples who have decided to formalise their relationship, simply by pointing out that *according to their own assessment* the situation of married couples and registered partners is not the same under national law, for a particular purpose. If the ECJ finds that (opposite-sex) married couples are in a comparable situation with (same-sex) registered partners for a certain purpose, this means that the latter cannot be treated worse than the former, simply because they have a different legal status, *if* under national law marriage is only available to opposite-sex couples.

Moreover, *Hay* comes to illustrate the Court's changed attitude towards same-sex relationships, given that the result reached in this judgment appears to reverse the Court's judgment in *D. and Sweden v. Council*, where it was held that the interpretation of the version of the Staff Regulations that was applicable at the time and which only granted the claimed household allowance to married couples, to the effect that (same-sex) registered partners were excluded from that benefit, did not amount to either discrimination on the grounds of sex or sexual orientation.[97] Adopting a limited view of the coverage of the prohibition of sex discrimination – in line with its judgment in *Grant*, seen above – the Court had pointed out that 'it is irrelevant for the purposes of granting the household allowance whether the official is a man or a woman'.[98] Moreover, as regards sexual orientation discrimination, the Court had noted that 'it is not the sex of the partner which determines whether the household allowance is granted, but the legal nature of the ties between the official and the partner'[99] – a statement which is, clearly, the opposite to the Court's approach in *Hay*, where it was pointed out that a difference in treatment based on the employee's marital status and not, on its face, on his or her sexual orientation amounts to direct discrimination on the latter ground.

Accordingly, *Hay* appears to illustrate that in recent years, there has been some progress in

[96] *Ibid*, para. 44.
[97] *Ibid*, paras. 46-47.
[98] *Ibid*, para. 46.
[99] *Ibid*, para. 47.

the Court's approach towards sexual orientation issues. The fact that an equally LGB-friendly approach has been followed in cases involving LGB individuals (as opposed to couples) in *Asociaţia Accept*[100] and *the X, Y and Z* judgment,[101] both of which were delivered shortly before *Hay*,[102] illustrates that through its recent case-law in the area of anti-discrimination law, the Court may now be in the process of eluding its characterisation of a 'homophobic bench'.[103]

4 Is the Current Legal Regime Compliant with EU Law?

As we saw in the previous section, EU law currently offers no protection to same-sex couples that migrate to another Member State - it 'fails to provide same-sex couples legal certainty as regards their right of free movement under the EU Treaties'.[104] More specifically, the EU legislature either explicitly (for registered and unmarried partners) or implicitly (for spouses) has adopted the host State principle, in this way leaving it entirely up to the host Member State to decide whether and, if yes, to what extent, it will recognise the same-sex relationships of migrant Union citizens. Accordingly, the host State is free to determine whether a) it will recognise the exact legal status attributed to the couple in another Member State (whether this is as a married couple or as registered partners); b) it will recognise the same-sex couple as a couple but will attribute to them a legal status different from that bestowed on them in their home State (e.g. if they were married in their home State but the host State only offers registered partnership to same-sex couples, they will be considered as registered partners); c) it will recognise the same-sex couple as a couple (as 'unmarried partners in a durable relationship') without, however, a formal legal status (and this may be so even if they married or entered into a registered partnership in their home State); d) it will refuse to recognise the same-sex couple as a couple (and this may be so even if they married or entered into a registered partnership in their home State).

This section aims to show that the EU's current hands-off approach *allows* Member States to breach a) the free movement rights that Union citizens derive from the Treaties, b) the prohibition of discrimination on the grounds of sexual orientation, provided in the Charter and in secondary legislation (Directive 2000/78), c) fundamental (human) rights protected under the Charter, namely, the right to human dignity.

[100] Case C-81/12, *Asociaţia Accept*, Judgment of 25 April 2013, not yet reported. For an excellent analysis of this case see U. Belavusau, 'A penalty card for homophobia from EU Non-Discrimination Law: Comment on *Asociaţia Accept* (C-81/12)', presented at the 44th UACES Annual Conference, Cork, Ireland (1-3 September 2014).

[101] Joined Cases C-199/12 to C-201/12, *Minister voor Immigratie en Asiel v. X* and *Y and Z v. Minister voor Immigratie en Asiel*, Judgment of 7 November 2013, not yet reported.

[102] At the moment of writing, two more cases involving the rights of LGB individuals are currently pending before the ECJ: Case C-528/13, *Léger* (pending) – Advocate General Mengozzi delivered his Opinion on 17 July 2014; and Joined Cases C-148-150/13, *A. B and C* (pending) – Advocate General Sharpston delivered her Opinion on 17 July 2014.

[103] D. Kochenov, supra note 18, at p. 175.

[104] J. Rijpma and N. Koffeman, *supra* note 6, p. 455.

4.1 Restrictions on Free Movement

The first problem with the current regime is that it permits the host State to create restrictions on the free movement of Union citizens, which are in contravention of the free movement provisions of the Treaty.

Before analysing this argument, I will provide a practical example in order to enable the reader to comprehend the position better. Let's assume that a Spanish man and a Moroccan man were married in Spain and are contemplating moving to Slovakia where the Spanish spouse has been offered a very well-paid job. If they are informed that in Slovakia they will not be considered a couple (and, clearly, not a married couple) and, hence, they will be treated as single persons (and, thus, less beneficially) for purposes of taxation and social benefits and so on, they may have second thoughts regarding the contemplated move. This will, probably, be even more so when they will find out that, given that Slovakia does not consider the same-sex spouse of a Union citizen as a 'spouse', within the meaning of the 2004 Directive, it does not consider that it is obliged by EU law to admit him within its territory. In such a scenario, the Spanish spouse will have to choose between moving to Slovakia alone or staying in Spain together with his spouse. Although the example refers to same-sex spouses, the same scenario can be transposed into a situation involving same-sex registered partners,[105] and same-sex *de facto* partners.[106]

The right to free movement of Union citizens who are in a same-sex relationship can be restricted in three different ways – and a single case may involve one or more of these three scenarios.

The first scenario involves the application of the conflict-of-law rules of the host State and, in particular, the question whether the host State shall recognise the specific legal status attached to the same-sex couple by another State. As noted by Lenaerts, 'a change in the civil status of incoming same-sex couples may be seen as an obstacle to free movement'.[107] Hence, the conversion of a certain legal status into another – often 'lesser' – status (e.g. from married couple to registered partners) may, *in itself*, be considered to amount to a restriction on free movement. *A fortiori* the denial to recognise at all the legal status that was attached to a same-sex relationship by another Member State can constitute an obstacle to free movement.

Biagioni drew a parallelism between situations where the host State does not recognise the marital/partnership status of migrant Union citizens (there has been no ECJ case-law to date on this) with the situations in the citizenship cases of *Garcia Avello*[108] and *Grunkin-Paul*,[109] which involved the denial of the host State to recognise the surnames registered in another Member State of Union citizens whose situation involved a cross-border element. In the above cases, the Court held that the contested denial would create an obstacle to free movement since the discrepancy in surnames

[105] For the position of registered same-sex partners where the host State principle is applied see M. Bell, 'We are Family? Same-sex Partners and EU Migration Law', (2004) 9 MJ 335, at pp. 345-346.

[106] L. Papadopoulou, 'In(di)visible Citizens(hip): Same-sex Partners in European Union Immigration Law', (2002) YEL 229, at p. 247.

[107] K. Lenaerts, supra note 9, pp. 1359-1360.

[108] Case C-148/02, *Garcia Avello*, [2003] ECR I-11613.

[109] Case C-353/06, *Grunkin-Paul*, [2008] ECR I-7639.

that would be created as a result could cause serious inconvenience to the persons concerned. On the basis of this, Biagioni pointed out that 'there is no doubt that a limping *status* as to marriage is likely to cause even greater inconveniences to the parties and to deter them from exercising the freedom of circulation' and, also, noted that it is unlikely that the host State will be able to justify such an obstacle.[110] Given that the EU seems to permit under the current regime each State to determine whether or not it will recognise a same-sex marriage or a registered partnership contracted in another Member State, this means that a married couple will be considered as married in some Member States, as registered or *de facto* partners in others, while in some Member States it will not be considered a couple at all; and, similarly, registered partners will be considered as registered partners in some Member States, as *de facto* partners in others, while in some Member States they will not be considered a couple at all. This will, no doubt, cause a serious inconvenience to the couple whenever it shall wish to exercise its free movement rights between States of recognition and non-recognition. In addition, not only is the change or complete non-recognition of the legal status attached to a same-sex relationship inconvenient in itself, but it, also, has negative practical consequences in a host of issues which will, in their turn, constitute obstacles to free movement, as we shall see when analysing the second and third scenarios below.

The second scenario involves same-sex couples which, after having been admitted into the host State, realise that they are unable to claim tax benefits, social security benefits, or social advantages that are granted to couples (or which are granted, only, to married couples). Two different possible situations may be envisaged here.

The first one is where the same-sex couple is not entitled to certain social or tax benefits, social security advantages and so on, *because of the refusal of the host State to recognise the legal status attached to it by another Member State* – the issue noted in the previous paragraph. An example of this could be a same-sex married couple which – because it is not recognised as a married couple by the host State – cannot claim social and tax advantages that are only available to married couples. Using Biagioni's argument above, there is no doubt that the discrepancy in statuses that will be created as a result of the host State's denial to recognise the legal status attached to a same-sex relationship, will create a significant inconvenience to the couple if – despite the fact that the parties to it have formalised their relationship and have made the commitment which normally leads to beneficial treatment under social security, tax, property and social assistance legislation in all Member States – it will be deemed not entitled to any of the benefits and allowances granted to other – opposite-sex – couples that have made the same commitment by formalising their relationship in the same manner. This will, clearly, amount to an obstacle to the free movement rights of the couple – given that the change in legal status and the consequent refusal of the benefits were caused by the exercise of those rights – and thus, unless justified, will be contrary to the free movement provisions of the Treaty.[111]

[110] G. Biagioni, 'On Recognition of Foreign Same-Sex Marriages and Partnerships' in D. Gallo, L. Paladini, and P. Pustorino (eds), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer, 2014), pp. 376-377.

[111] For a similar view see M. Bell, *supra* note 105, pp. 339 and 350.

The second possible situation is where the refusal of the said advantages, benefits etc, is not due to the non-recognition of a legal status bestowed by another Member State, but is simply a result of the tax and social assistance benefits legislation of the host State and the choices that the host State has made in that field. If, for instance, a same-sex couple that has entered into a registered partnership has moved from Member State A (which grants to registered partners the same rights it grants to married couples when it comes to tax advantages) to Member State B (which does not grant to registered partners the same rights it grants to married couples), the 'loss' of certain benefits that would be enjoyed in Member State A is not due to the exercise of free movement rights and/or to the fact that the host State refuses to recognise the legal status attached to the couple, but is, simply, a result of the application of the legislation of the host State. As has been made clear by the Court of Justice, freedom of movement does not require that a Union citizen be entitled in the host State to benefits identical to those to which he was entitled in his home State. The Court has held that 'adverse consequences' with regards to taxation assessment which are suffered by a Union citizen who has moved to another Member State, do not amount to a violation of EU free movement law if they 'result from the exercise in parallel by two Member States of their fiscal sovereignty'.[112] Similarly, the host State is only required to grant social assistance benefits to migrant Union citizens, under the same conditions as these are granted to its own nationals; it is not required to provide to nationals of other Member States social advantages which they enjoyed in their home State, if it does not grant such advantages to its own nationals.[113] Accordingly, if the host Member State treats its own nationals who are in a same-sex relationship as badly as same-sex couples who come from another Member State, and if the loss of the claimed benefits/advantages is not due to the denial to recognise a certain legal status and the same-sex couple is treated less beneficially than it would be treated in its State of origin simply because of the application of a different taxation and social assistance system in the host State, there will be no restriction which amounts to a violation of the free movement provisions of the Treaty. However, as will be seen in the next subsection, a refusal by the host State to legally recognise a migrant same-sex couple for the purposes of taxation assessment or the grant of social assistance benefits, may amount to a violation of EU anti-discrimination law in certain cases.

The third scenario concerns the admission into the territory of the host State of the family members of the migrant. As noted in the previous section, it has always been considered that Member State nationals would only be willing to move to another Member State if they were guaranteed that they would be able to be accompanied or joined there by their close family members. Accordingly, the EU legislature has always 'recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the EC Treaty'.[114] Similarly, the Court has held in a long line of case-law that the unjustified refusal of the host State to admit within its territory

[112] Case C-513/04, Kerckhaert *and Morres*, [2006] ECR I-10967, para. 20.

[113] See Article 24(1) of Directive 2004/38, *supra* note 17; Article 7(2) of Regulation 492/2011, *supra* note 45; Case 197/84, Steinhauser, [1985] ECR 1819.

[114] *Metock*, *supra* note 27, para. 56.

the close family members of the migrant, amounts to a restriction on free movement which is contrary to the free movement provisions of the Treaty.[115] Hence, the complete refusal of the host State to admit within its territory the same-sex spouse/registered partner/partner of the migrant Union citizen amounts to a clear obstacle to free movement. If a migrant Union citizen cannot be accompanied in the host State by his or her spouse or registered/*de facto* same-sex partner, this can clearly dissuade him or her from actually moving to the host State and will, thus, amount to a restriction on free movement.[116] Accordingly, it can amount to a, *prima facie*, violation of the free movement of persons provisions.[117] As the Court noted, '[e]stablishing an internal market implies that the conditions of entry and residence of a Union citizen in a Member State whose nationality he does not possess are the same in all the Member States.'[118] Consequently, and paraphrasing the Court, the freedom of movement of Union citizens in a Member State whose nationality they do not possess should not vary from one Member State to another, according to the provisions of national law concerning immigration and family law, with some Member States permitting entry and residence of same-sex spouses/registered partners/*de facto* partners of a Union citizen and other Member States refusing them.[119]

However, as is well known, measures which lead to a restriction on free movement rights are not, always, prohibited by EU law: the recalcitrant Member State can continue applying the offending measures if it can prove that it is justified in doing so by a Treaty derogation and, in case the measure is not discriminatory on the grounds of nationality and does not have to do with the entry or expulsion of Union citizens and/or their family members, it can be justified by an objective justification.

In the context of the above three scenarios, it is most likely that Member States would try to rely on the ground of public policy, arguing that their actions are justified by the need to protect public morality and 'the family' or – in cases involving same-sex marriages – the need to protect the traditional notion of marriage in their territory. Yet, the fact that in all three scenarios the Member State is engaging in discrimination on the ground of sexual orientation – as will be seen in the next subsection – will prove problematic. As Advocate General Jääskinen has rightly pointed out, 'the aim of protecting marriage or the family cannot legitimise discrimination on grounds of sexual orientation. It is difficult to imagine what causal relationship could unite that type of discrimination,

[115] See, for instance, *Singh*, *supra* note 28, paras. 18-20; *Carpenter*, *supra* note 28, para. 39; *Eind*, *supra* note 28, paras. 35-37; *Metock*, *ibid*, paras. 56-57.

[116] A. Clapham and J. H. H. Weiler, 'Lesbians and Gay Men in the European Community Legal order' in K. Waaldijk and A. Clapham (eds), *Homosexuality: A European Community Issue – Essays on Lesbian and Gay Rights in European Law and Policy* (Martinus Nijhoff, 1993), p. 41; K. Waaldijk, *supra* note 42, p. 279; E. Deards, 'Discrimination on grounds of sexual orientation: the role of Community law', (1999) 10 KCLJ 12, at p. 19; E. Guild, *supra* note 19, pp. 685-686; J. Rijpma and N. Koffeman, *supra* note 6, pp. 476-477.

[117] Article 21 TFEU (for economically inactive Union citizens), Article 45 TFEU (for workers), Article 49 TFEU (for the self-employed who exercise their freedom of establishment), Article 56 TFEU (for service-providers). Which provision will be applicable will depend on the 'status' of the migrant Union citizen. For instance, if he is a 'worker', Article 45 TFEU will apply whereas if he is economically inactive, the applicable provisions will be Article 21 TFEU.

[118] *Metock*, *supra* note 27, para. 68.

[119] *Ibid*, para. 67.

as grounds, and the protection of marriage, as a positive effect that could derive from it'.[120] Similarly, Kochenov has stressed that 'public policy cannot possibly consist in discriminating on the basis of sex',[121] or, I would add, on the basis of sexual orientation.

In any event, and leaving aside the question of whether such arguments do have any substance and are capable of justifying a restriction on free movement rights, Member States will still face an – insurmountable – obstacle when trying to justify their measures. This is that Article 27(2) of Directive 2004/38 requires that measures taken by the host State relying on public policy 'shall be based exclusively on the personal conduct of the individual concerned'.[122] This will, clearly, not be satisfied where Member States engage in a blanket refusal to recognise and/or admit within their territory the same-sex spouse/registered partner/unmarried partner of a migrant Union citizen, since they exclude a *whole category* of persons (i.e. LGB individuals who are in a same-sex relationship) *simply* because those individuals fall within that category, and, hence, their exclusion is not based on their personal conduct.[123]

Accordingly, it appears highly unlikely that Member States will be able to their measures which are in breach of the EU free movement provisions in the above scenarios. Agreeing with Kochenov, '[t]he main right of EU citizenship, which is free movement, cannot be made dependent on the sex or, for that matter, the sexual preferences of citizens',[124] and, therefore, Member States will be found to be in violation of the free movement of persons provisions of the FEU Treaty when engaging in the above conduct. Accordingly, EU free movement law (i.e. the free movement of persons provisions) requires Member States to (mutually) recognise the legal status attached to the same-sex relationships of migrant Union citizens. This will not only enable same-sex couples to be recognised as such once they are admitted into the territory of the host State (for the purposes of taxation, social benefits etc) but it will, also, enable LGB Union citizens to rely on Article 2 of Directive 2004/38 in order to claim *automatic* family reunification rights with their same-sex spouse or – if the condition laid down in that provision is satisfied – registered partner in the host State, just as heterosexual Union citizens are under all circumstances entitled to do. Moreover, when the host State conducts its assessment under Article 3(2) of the Directive as to whether it should facilitate the entry into its territory of the (same-sex unmarried) partner of the migrant Union citizen, this should be free from any discrimination on the ground of sexual orientation. After all, the impediment to free movement is exactly the same, whether an LGB Union citizen cannot be

[120] Paragraph 175 of the Opinion of Advocate General Jääskinen in *Römer*, *supra* note 9. See, also, the Judgment of the ECtHR in *Karner* v. Austria, Application No. 40016/98, 27 July 2003.

[121] D. Kochenov, *supra* note 18, p. 203.

[122] For a similar view see L. Papadopoulou, *supra* note 106, pp. 235-236.

[123] For an analysis of the Court's approach to the interpretation of the Treaty derogations, including the requirements that must be satisfied for the public policy derogation see T. Kostakopoulou and N. Ferreira, 'Testing Liberal Norms: The Public Policy and Public Security Derogations and the Cracks in European Union Citizenship', University of Warwick Law School Legal Studies Research Paper No. 2013-18, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271722 (last accessed on 8 September 2014) (see, especially, p. 6).

[124] D. Kochenov, supra note 18, p. 184.

accompanied in the host State by his same-sex partner or whether a heterosexual Union citizen cannot be accompanied by his opposite-sex partner.

4.2 Violation of the Principle of Non-Discrimination on the Ground of Sexual Orientation

Having analysed the functional, free movement, argument in building a case against the current failure of the EU to protect migrant same-sex couples when they seek to be admitted into, and reside in, the territory of another Member State, we move, now, to an equality-based argument.

As Bell has stressed, 'it is difficult to see how any exclusion of same-sex married couples […] from free movement rights could be reconciled with' the principle of equal treatment irrespective of sexual orientation.[125] If any of the EU institutions – including the Court of Justice – expressly interprets the terms 'spouse', 'registered partner' or 'partner' in Directive 2004/38 as excluding same-sex spouses/partners, this will clearly amount to direct discrimination on the ground of sexual orientation,[126] and will, thus, amount to a violation of Article 21 EUCFR.

Similarly, if any Member States decide to explicitly exclude same-sex spouses/registered partners/*de facto* partners from the terms 'spouse', 'registered partner', and 'partner', in their legislation implementing Directive 2004/38, they will be in violation of Article 21 of the Charter: this will amount to direct discrimination on the ground of sexual orientation;[127] and the case against them will be further bolstered by the fact that Recital 31 of the 2004 Directive provides that Member States should implement the Directive without discrimination between its beneficiaries on the ground of, *inter alia*, sexual orientation. Of course, even if national implementing legislation appears entirely neutral – using the gender-neutral terms employed by the EU legislature – there will, obviously, be a violation of the above provisions if in practice the host State excludes the same-sex spouse/partner of the migrant from the scope of these terms.[128] [129]

[125] M. Bell, *supra* note 105, p. 349.

[126] M. Bell, 'EU Directive on Free Movement and Same-Sex Families: Guidelines on the Implementation Process', ILGA Europe, October 2005, p. 5.

[127] Fundamental Rights Agency Report 'Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis' (2009), pp. 16, 66, 69 and 70.

[128] For a table describing the approach towards the legal recognition of migrant same-sex couples by each Member State (albeit somewhat outdated given that the Report was compiled back in 2010) see Fundamental Rights Agency Report 'Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity' 2010 Update' (2010).

[129] In the European Parliament's Report on the application of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2008/2184(INI)), p. 7, it was stated that one of the problematic issues with Member State implementation of Directive 2004/38 (*supra* note 17) is the 'restrictive interpretation by Member States of the notion of "family member" (Article 2), of "any other family member" and of "partner" (Article 3), particularly in relation to same sex partners, and their right to free movement under Directive 2004/38/EC'. The Parliament has, therefore, called 'on Member States to fully implement the rights granted under Article 2 and Article 3 of Directive 2004/38/EC not only to different sex spouses, but also to the registered partner, member of the household and the partner, including same-sex couples recognized by a Member State, irrespective of nationality and without prejudice to their non-recognition in civil law by another Member State, on the basis of the principle of mutual recognition, equality, non-discrimination, dignity, private and family life; calls on member States to bear in mind that the Directive imposes an obligation to recognize freedom of movement to all Union citizens (including same-sex partners) without imposing the recognition of same-sex marriages; in this regards, calls on

If a Member State, in violation of Article 21 of the Charter, is found to be discriminating on the grounds of sexual orientation when implementing and applying Directive 2004/38 with regards to the admission of the third-country family members of incoming Union citizens, it will only be able to continue doing so if it can justify the contested differential treatment. Yet, given that, as the Strasbourg Court has held,[130] only 'particularly serious reasons' can justify differential treatment based on sexual orientation,[131] the Member State responsible for such discriminatory practices will be faced with an uphill struggle. As that court pointed out in its judgment in *Vallianatos*, '[i]n cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of the provisions at issue. […] the burden of proof in this regard is on the respondent Government'.[132] It, therefore, appears that it will be very difficult, if not impossible, for a Member State to justify measures or practices which discriminate against (migrant) same-sex couples when it comes to the grant of family reunification rights.

We should now turn to the position of same-sex couples *once* they are within the territory of the host Member State. As Bell has pointed out, '[h]aving admitted a couple in a same-sex marriage or registered partnership, questions would undoubtedly arise concerning the extent to which that marriage or registered partnership has effects within the host state. For example, if the host state provides special tax advantages to married couples, would these be extended to same-sex married or registered partners from other EU states?'.[133]

Article 24 of Directive 2004/38 requires that EU citizens (and their family members) are treated equally with the nationals of the host State. From this it follows that if there is any discrimination on the ground of nationality against a (same-sex) couple in the host State, this will, obviously, be contrary to the Directive.

Moreover, if the host State refuses to recognise the legal status attached to a migrant same-sex couple for the purposes of e.g. taxation assessment, social benefits etc, this will clearly amount to discrimination on the ground of sexual orientation in breach of Article 21 EUCFR, if a migrant

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the Commission to issue strict guidelines, drawing on the analysis and conclusions contained in the Fundamental Rights agency report and to monitor these issues' – pp. 8-9 of the Report.

[130] It should be noted that Article 52(3) of the EU Charter of Fundamental Rights provides that '[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'. Accordingly, the ECJ must adopt the interpretation and principles laid down by the Strasbourg Court unless it wishes to offer higher protection. In this context, this means that Member States will have to *at least* rely on particularly serious reasons to justify discrimination on the grounds of sexual orientation.

[131] Application No. 7525/76, *Dudgeon v. United Kingdom*, 22 October 1981, (1982) 4 EHRR, para. 52; *Smith and Grady v. United Kingdom*, Applications Nos. 33985/96 and 33986/96, 27 September 1999, (1999) 29 EHRR 493; *Karner*, *supra* note 120, para. 37.

[132] Application Nos. 29381/09 and 32684/09, *Vallianatos and Others v. Greece*, Judgment of 7 November 2013.

[133] M. Bell, supra note 10, p. 623.

opposite-sex couple in a comparable position would have its legal status recognised.

The next question is whether EU anti-discrimination law can be of help to *migrant* same-sex couples in situations where the host State refuses to recognise their relationship and/or the legal status attached to it. For instance, if the host State refuses to treat a married same-sex couple from another Member State as married and treats the parties to the marriage as registered or unmarried partners or even does not treat them as a couple at all, and this has as a result that they are not entitled to receive preferential tax treatment that is afforded to (opposite-sex) married couples, is this contrary to EU anti-discrimination law (in addition to being contrary to EU free movement law as we saw in the previous subsection)?

Before attempting to provide an answer to this question, it should be explained that the problem here, from the point of EU law, is not that the couple loses benefits and entitlements to which it is entitled in its State of origin: as noted in the previous subsection, EU law does not require the host State to provide to migrant Union citizens the same social and tax benefits they enjoy in their home State. Rather, the problem is that the failure of the host State *to recognise the legal status* conferred on a couple in its State of origin, may put the couple in a position where it is discriminated against on the ground of its sexual orientation. Accordingly the main question here is whether the same-sex couple is treated worse than opposite-sex couples who are in a comparable situation, and hence whether this amounts to discrimination on the ground of sexual orientation.

Drawing on the Court's case-law to date (*Maruko*,[134] *Römer*,[135] and *Hay*[136]) it is clear that if a same-sex married couple moves to a Member State which has not opened marriage to same-sex couples and, hence, the marriage is converted into a registered partnership, which, in the host State, is a status that is *for the relevant purpose* (e.g. taxation, a specific pension benefit, and so on *which falls within the material scope of the Directive*) comparable to that of (opposite-sex) marriage, the host State is obliged under Directive 2000/78 to treat the couple in exactly the same way as a married couple *for that purpose*. Hence, if the host Member State complies with its obligations under the above Directive, same-sex married couples will not suffer any *practical* disadvantage when it comes to beneficial tax treatment etc, if they move to a Member State which does not recognise same-sex marriage, *but* treats registered partnerships (to which the marriage has been converted) as equivalent to marriage when it comes to that particular benefit/advantage etc. The same will, of course, be the case for registered partners who move to a Member State which treats registered partnerships as equivalent to marriage in a particular area – apart from not 'losing' their status or being 'downgraded', they will also be able to require the host State to treat them in the same manner as (opposite-sex) married couples, if the conditions noted above are satisfied.

Moreover, following *Hay*, the assessment of the comparability of married and registered partners will no longer be entirely left to the national courts, but the ECJ may decide to conduct the comparability assessment itself and this may yield a result which is different from what is argued by

[134] *Supra* note 16.
[135] *Supra* note 9.
[136] *Supra* note 22.

the national authorities.

Accordingly, in case it is found by the ECJ that there is, indeed, comparability (despite the opposite being argued by the national authorities), the host Member State will be obliged to treat the same-sex spouses or registered partners in the same way as (opposite-sex) married couples, otherwise there will be discrimination on the ground of sexual orientation which – if it is in the areas of employment, occupation and vocational training – will be contrary to Directive 2000/78. As regards any situations not falling within the scope of Directive 2000/78, Article 21 of the Charter may come to the rescue, but this will depend on whether the situation falls within the scope of the Charter. Further clarification from the Court is, clearly, required here.

As regards same-sex *de facto* partnerships, on the other hand, these must merely be treated in the same way as opposite-sex *de facto* partnerships with regards to taxation, social assistance benefits and so on; if they are not, this will amount to a breach of Directive 2000/78 if the discrimination is in the areas of employment, occupation or vocational training, and/or a breach of Article 21 of the Charter, in situations which fall within the scope of the Charter.

4.3 Violation of the Right to Human Dignity under Article 1 EUCFR

Apart from the functional and equality-based arguments made so far, a number of human rights arguments can be used to challenge the host State's denial to recognise the legal status attached by another State to a certain same-sex relationship, its refusal to admit within its territory same-sex couples, and its discriminatory treatment against them once they are within its territory.

The first such argument is that (all) the above practices may amount to a violation of the right to human dignity provided under Article 1 EUCFR, and which is, also, a general principle of EU law.[137]

Although neither the Court nor the 'Explanations Relating to the Charter of Fundamental Rights' have provided much by way of clarification of this right, and although 'there is hardly any legal principle more difficult to fathom in law than that of human dignity',[138] the words of Advocate General Poiares Maduro in his Opinion in *Coleman* shed some light on its meaning: '[a]t its bare minimum, human dignity entails the recognition of the equal worth of every individual. One's life is valuable by virtue of the mere fact that one is human, and no life is more or less valuable than another. As Ronald Dworkin has recently reminded us, even when we disagree deeply about issues of political morality, the structure of political institutions and the functioning of our democratic states we nevertheless continue to share a commitment to this fundamental principle. Therefore, individuals and political institutions must not act in a way that denies the intrinsic succession of choices among different valuable options. The exercise of autonomy presupposes that people are given a range of valuable options from which to choose'.[139]

The ability to form a stable intimate relationship with another individual is of fundamental importance for every human being, irrespective of his or her sexual orientation. As Baroness Hale very rightly put it in the English case of *Ghaidan v. Godin Mendoza*, '[s]ome people, whether

[137] Case C-36/02, *Omega*, [2004] ECR I-9609, para. 34.
[138] Paragraph 74 of the Opinion of Advocate General Stix-Hackl in *Omega*, *ibid*.
[139] Paragraph 9 of the Advocate General's Opinion in Case C-303/06, *Coleman*, [2008] ECR I-5603.

heterosexual or homosexual, may be satisfied with casual or transient relationships. But most human beings eventually want more than that. They want love. And with love they often want not only the warmth but also the sense of belonging to one another which is the essence of being a couple. And many couples also come to want the stability and permanence which go with sharing a home and a life together, with or without the children who for many people go to make a family. In this, people of homosexual orientation are no different from people of heterosexual orientation'.[140]

Accordingly, every human being should be free to form an intimate relationship with another human being, and should be able to (legally) formalise such a relationship and through this to require everyone else to recognise and respect it. As Poiares Maduro notes above, other individuals and political (or, I would add, judicial and legal) institutions should not act in a way that denies 'the intrinsic succession' of such choices. The fact that a person chooses to form such relationships with a person of the same- or the opposite-sex should not make any difference: these are different – albeit morally equal - choices.

Nicholas Bamforth has, also, viewed the need to protect human dignity as a deeper, underpinning, justification for protecting same-sex partnerships rights and for requiring equality of treatment between same-sex and opposite-sex relationships: '[a]utonomy or dignity arguments suggest that sexual and emotional desires […] feelings, aspirations, and behaviour, are of central importance for human beings. For most people, participation in a happy sexual and emotional relationship is a central aspect of their well-being, or something which they aspire to have as such an aspect. Provided that a relationship is based on consent, it is – from this perspective – highly unjust for the law to penalise it or to refuse to provide it with an adequate level of support. It is at this stage in the dignity argument that equality becomes relevant. For we can clearly say that, in circumstances of existing inequality, one sensible way to measure the level of protection that should be offered is by comparison with already protected heterosexual relationships'.[141]

From the above, the following argument can be constructed. Forming intimate relationships with other individuals and choosing to formalise these relationships and, consequently, attaching to them a legal status, is an exercise of personal autonomy, which is an aspect of the dignity of every human being. All human beings are equal in dignity.[142] The EU, by prohibiting discrimination on the grounds of sexual orientation in situations that fall within the scope of EU law,[143] (tacitly) admits the equal worth of all individuals *irrespective of their sexual orientation*, and, with it, the equal moral worth of opposite-sex and same-sex relationships. When the EU institutions and/or the Member States refuse to give effect to the choices of individuals as regards their same-sex relationships and (where applicable) to the legal status attached to them, by either not recognising them or downgrading them in some way,[144] they treat such relationships differently from opposite-sex

[140] *Ghaidan v. Godin Mendoza*, [2004] UKHL 30; [2004] 2 A.C. 557, para. 142.

[141] N. Bamforth, 'Same-sex Partnerships: Some Comparative Constitutional Lessons', (2007) EHRLR 47, p. 55.

[142] Paragraph 31 of the Opinion of Advocate General Cruz Villalón in Case C-447/09, *Prigge*, [2011] ECR I-8003.

[143] Despite the suggestions of two Advocates General, the ECJ has yet to recognise the prohibition of discrimination on the ground of sexual orientation as a general principle of EU law. See the Opinion of Advocate General Jääskinen in *Römer*, *supra* note 9, paras. 126-131 and the Opinion of Advocate General Mengozzi in *Léger*, *supra* note 102, footnote 53.

[144] For a similar view see J. Rijpma and N. Koffeman, *supra* note 6, p. 465.

relationships and they seem to be considering the relationship choices of LGB individuals who are in a same-sex relationship as inferior to opposite-sex relationships and, hence, as not having the same moral worth as the latter. Treating LGB Union citizens as second-class citizens in the above manner by failing to recognise and respect their choices in forming intimate relationships and formalising them can, clearly, amount to a violation of the their right to human dignity and, as such, of Article 1 of the Charter; given that the right to human dignity is a general principle of EU law, it can also simultaneously be found to amount to a breach of that principle. Since situations involving migrant same-sex couples do clearly fall within the scope of EU law and since what is mainly contested is the way in which Member States have implemented Directive 2004/38 (and the EU's (tacit) acceptance of this), there is no doubt that such situations fall within the scope of the Charter and, more broadly, within the ambit of EU law, for the purposes of application of the general principle of human dignity.

Accordingly, the right to human dignity is, clearly, an important weapon in the arsenal of migrant same-sex couples.

4.4 Violation of the Right to Private and Family Life Under Article 7 EUCFR?

The final basis on which someone might try to challenge the current legal regime and, in particular, its application by the Member States, is, again, human rights law and, in particular, Article 7 of the Charter which protects the right to private and family life. Here, two separate 'claims' can be made.

Firstly, relying on ECHR case-law,[145] since, to date, there is no ECJ case-law on this,[146] it could be argued that the refusal of the host State to recognise a family status – which could clearly be interpreted to include a same-sex *marriage* or *registered partnership* – amounts to a violation of the right to private and family life protected under Article 7 of the Charter, unless the host State will be able to justify this.[147]

Secondly, same-sex couples that encounter difficulties in their effort to be admitted into the host State may try to rely on Article 7 ECHR to require that State to admit both of the partners/spouses within its territory. Since there is no ECJ case-law to date – interpreting Article 7 of the Charter – which deals with same-sex couples, I will rely on case-law of the European Court of Human Rights where Article 8 ECHR was interpreted. However, it should be noted that Article 52(3) of the Charter provides that although when the Charter contains rights which correspond to rights guaranteed by the ECHR the meaning and scope of these rights shall be the same, it also notes that this shall not prevent EU law providing more extensive protection, which means that the ECJ may read additional obligations into certain rights, including into the right to private and family life examined here.

Until relatively recently, 'homosexual relationships' did not fall within the ambit of 'family life'

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[145] *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, judgment of 28 June 2007; *Negrepontis-Giannisis v. Greece*, no. 56759/08, judgment of 3 May 2011.

[146] This is in line with Article 52(3) of the Charter, *supra* note 129.

[147] See G. Biagioni, *supra* note 110, p. 361.

for the purposes of Article 8 ECHR,[148] though they did fall within the scope of 'private life' under the same provision.[149] According to Johnson, 'by siphoning issues relating to homosexuality into the "private life" limb of Article 8, the Court can be seen to have maintained a strongly heteronormative conception of family life'.[150] However, in 2010 the Strasbourg Court, in the 'historic'[151] decision in *Schalk*,[152] decided to depart from this deeply heterosexist and homophobic approach, by holding that a same-sex couple can enjoy 'family life' together, within the meaning of Article 8 ECHR. In line with this, the right to family life under Article 7 of the latter can, therefore, also, be interpreted as protecting the family life of a same-sex couple.

The important question for our purposes is whether the refusal of the host State to admit within its territory the same-sex spouse/registered partner/*de facto* partner of the migrant Union citizen, can amount to a violation of their right to private life and/or their right to family life and can, thus, be found to be in violation of Article 7 of the Charter. The Strasbourg court's case-law points to a negative reply to this question. This is because it is well-established that Article 8 ECHR does not imply a general obligation on the Contracting States 'to accept the non-national spouses for settlement'.[153]

Nonetheless, as the Court established in *Carpenter*, drawing on the case-law of the Strasbourg court interpreting Article 8 ECHR, '[e]ven though no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the Convention. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of that article'.[154] This means that the exclusion or deportation of a same-sex spouse/registered partner/*de facto* partner who (already) enjoys 'family life' with the migrant Union citizen in the host State may amount to a violation of Article 7 of the Charter unless it can be justified.[155] Similarly, it will be able to amount to a violation of the 'private life' bit of that provision, however, it should be noted that the European Commission on Human Rights in *W. J. and D. P. v. UK*[156] and *C. and L. M. v. UK*,[157] held that the disruption of private life by deportation only amounts to an 'interference' when there are 'exceptional circumstances'.

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[148] Application No. 14753/89, *C. and L.M. v. UK*, Commission decision, 9 October 1989; Application No. 56501/00, *Mata Estevez v. Spain*, 10 May 2001, (2001) ECHR-VI. This was noted, also, by the ECJ in *Grant*, *supra* note 22, para. 33.

[149] K. Waaldijk, *supra* note 42, pp. 282-284.

[150] P. Johnson, *supra* note 5, p. 113.

[151] J. M. Scherpe, *supra* note 8, p. 92.

[152] Application No. 30141/04, *Schalk and Kopf v. Austria*, 24 June 2010, (2011) 53 EHRR 20. See, also, Application No. 18984/02, *P. B. and J. S. v. Austria*, Judgment of 22 July 2010.

[153] *Abdulaziz*, 28 May 1985, Series A, Volume 94, para. 68.

[154] *Carpenter*, *supra* note 28, para. 42; confirmed in, *inter alia*, Case C-540/03, *Parliament v. Council*, [2006] ECR I-5769, para. 53. For the same principles established in an ECtHR case see Application No. 50963/99, *Al-Nashif v. Bulgaria*, 20 June 2002, (2003) 36 EHRR 655, para. 114.

[155] See, for instance, Application 54273/00, *Boultif v. Switzerland*, 2 August 2001, (2001) 33 EHRR 1179; Application No. 1365/07, *CG and Others v. Bulgaria*, 24 April 2008. For an explanation of the principles see R. C. A. White and C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (OUP, 2010), at pp. 344-351.

[156] No. 12513/86, 13 July 1987, not reported.

[157] No. 14753/89, 9 October 1989, not reported.

Accordingly, based on the Strasbourg Court's case-law interpreting Article 8 ECHR, it seems that Article 7 of the Charter will only be capable of helping same-sex couples who are *already settled* in the host State (after being admitted there) and are recognised as enjoying family (or private) life within the meaning of Article 7 ECHR. Only in case the host State (unjustifiably) deports one of the same-sex spouses/registered partners/*de facto* partners may there be a violation of Article 7. Conversely, same-sex couples that wish to be admitted for the first time to the territory of the host State are likely to be found to be unable to rely on this provision, unless, of course, the ECJ decides to interpret Article 7 of the EU Charter more broadly than the ECtHR has interpreted Article 8 ECHR.

5 Solutions

In this final main section of the paper, I shall seek to summarise my suggestions as to how EU law – or the interpretation of EU law – should be amended or clarified, in order to ensure that the (actual or potential) violations of EU law identified in the previous section are prevented or remedied.

It is clearly no longer acceptable, or legally permissible, for the EU to permit 'ambiguities in the law governing'[158] the status of migrant same-sex couples to persist, since the EU in this manner gives leeway to the Member States to violate the free movement and fundamental rights that a certain group of Union citizens – migrant LGB Union citizens who are in a same-sex relationship – enjoy.

Unlike most commentators,[159] I believe that the best solution will require action, primarily, on the part of the EU legislature.

Since it is most likely that the Court will only be given the opportunity to make it clear that the terms used in the 2004 Directive are inclusive of same-sex couples, via a reference for a preliminary ruling, and given that, as is well-known, there is always an element of randomness involved in this procedure, due to the fact that the questions that are referred to the ECJ depend on the cases that come before national courts and on whether the national court will eventually decide to make a reference to the ECJ, there is no guarantee that the Court will, any time soon, be called to provide an interpretation of these terms. Accordingly, in order to provide an immediate and wholesome solution to the problems identified in this paper, it will be necessary for the EU legislature to amend Directive 2004/38 to make explicit reference to same-sex couples and to incorporate the principle of mutual recognition when it comes to the legal status afforded to same-sex couples in their State of origin. Given that in the last few years more than half of the Member States (at the moment of writing 16, the number rising to 18 in 2015) have amended their laws to provide legal recognition to same-sex relationships, it is not too optimistic to suppose that a qualified majority approving such amendments – as is required under the ordinary legislative procedure –will now be able to be achieved; something which was, clearly, not feasible back in the early 2000s, when the proposal for

[158] The phrase has been taken from A. Weiss, supra note 25, p. 83.

[159] For a view that the problems faced by migrant same-sex couples require action by the Court of Justice, instead of action by the EU legislature, see J. Rijpma and N. Koffeman, *supra* note 6.

the 2004 Directive was negotiated and when only a handful of Member States legally recognised same-sex relationships.

5.1 Proposed Legislative Amendments

In order to ensure that the Member States do not violate the rights to free movement of Unions citizens and/or that they do not discriminate against them on the grounds of sexual orientation or violate their right to human dignity, Directive 2004/38 should be amended as follows:

a) Article 2(2)(a) should be amended to make it clear that same-sex spouses are also covered by the term 'spouses' and that a couple that has married in accordance with the laws of its home State should be recognised as such everywhere in the EU. Accordingly, Article 2(2)(a) should be amended to read: 'the spouse, irrespective of sex, according to the relevant legislation of the home State'.

b) Article 2(2)(b) should be amended to make it clear that same-sex registered partners are also covered by the term 'the partner' and that a couple that has formed a registered partnership in accordance with the laws of its home State should be recognised as such everywhere in the EU, in this way abolishing the host State principle and replacing it with the home State and mutual recognition principles. Accordingly, Article 2(2)(b) should be amended to read: 'the partner, irrespective of sex, with whom the Union citizen has contracted a registered partnership, according to the relevant legislation of the home State'.

c) A new paragraph should be added to Article 2 of the Directive (Article 2(4)) which will provide: '"Home Member State" means the Member State from which a Union citizen moves in order to exercise his/her right of free movement and residence'.

d) A new paragraph should be added to Article 3(1) of the Directive which shall provide: 'The right of Union citizens and their family members to move to or reside in a Member State other than that of which they are a national, shall be exercised without any discrimination on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation'. In this way, there will be a binding provision in the main text of the Directive reflecting what is stated in Recital 31.

e) Article 3(2)(b) should be amended to provide as follows: 'the partner, irrespective of sex, with whom the Union citizen has a durable relationship, duly attested. The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people. When conducting this examination, the host Member State shall ensure that its assessment is free from discrimination on any of the grounds referred to in paragraph 1'.

Apart from the fact that the current lack of clarity in the law permits Member States to violate EU law, as seen above, the above changes appear, also, to be required by the mainstreaming requirement inserted into the FEU Treaty by the Treaty of Lisbon, and which is now found in Article 10 TFEU. As noted by ILGA-Europe, writing before the introduction of this provision, equality mainstreaming requires, *inter alia*, that '[p]olicy in relation to partnerships and family should be

adapted to include same-sex couples and rainbow families'.[160]

The main changes proposed above consist, in essence, of a) a clarification that any terms used referring to family members should in all circumstances be interpreted to include the same-sex spouse/registered partner/*de facto* partner of the migrant Union citizen; b) a clarification that when – like, for instance, in Article 2(2)(a) – it is not clear whether it is the home or the host State principle that applies when it comes to the legal status attached to same-sex relationships (which, of course, applies equally to opposite-sex relationships), the home State principle applies, whilst where – like, for instance, in Article 2(2)(b) – the host State principle has been adopted, this should now be abolished and replaced by the home State principle; in this way it is ensured that the legal status attached to a same-sex relationship is valid everywhere in the EU and is not downgraded or, simply, lost, when a same-sex couple moves. In other words, the principle of mutual recognition is transplanted into this context.

Mutual recognition is a principle which has been applied in a number of different EU policies, including, of course, the internal market. The principle provides that in areas where the Member States maintain legislative competence and, hence, there is regulatory diversity which will unavoidably lead to obstacles to free movement, products and economic actors that have complied with the rules of their home State should be admitted into the host State, without having, in addition, to comply with the requirements of the latter. Mark Bell has spoken of an 'increasing acceptance in the EU institutions of the applicability of this approach to managing obstacles to free movement arising from differences in national family laws', and suggested that 'it seems logical that this approach could also be applied as a first step to dealing with the variety of national laws on partnerships'.[161] The application of mutual recognition in the context of same-sex relationships would, in particular, mean that same-sex couples would have to be recognised as such and as having the legal status acquired in their home State, regardless of the position of same-sex couples in the domestic law of the host State. The legal status granted to same-sex couples in their home State would have to be recognised for the purposes of *both* the right to enter and reside in another Member State as well as their treatment under national law, once they have been admitted into the host State (e.g. for purposes of taxation assessment or the grant of benefits).

The question, however, is whether the EU does have the competence to impose the principle of mutual recognition in this context, given that, as noted at the beginning of this paper, the Member States still have exclusive competence in the area of family law. The answer, however, is clear, if we consider the Court's approach in other areas where Member States maintain exclusive competence. In particular, as explained by Kochenov, just as the question of the nationality of a Member State is a matter exclusively for national law and, yet, the EU can require the host State to recognise for all purposes the decision of the home State to grant its nationality to a Union citizen,[162] in the same way, the legal status granted to certain relationships – including same-sex relationships

[160] http://www.ilga-europe.org/content/download/9365/55889/version/2/file/fact_sheet_sept-07.pdf.
[161] M. Bell, *supra* note 105, p. 352.
[162] See, for instance, Case C-369/90, *Micheletti*, [1992] ECR I- 4239; Case C-200/02, *Chen*, [2004] ECR I-9925.

– by a Member State should be mutually recognised by other Member States.[163] Accordingly, the fact that Member States still have the exclusive competence to regulate family law and to determine which couples can be granted a legal status *within their territory*, does not mean that the home State principle and the principle of mutual recognition cannot be applied in this context. In fact, as explained in this paper, this is required if Member States shall exercise their competence in this field *in accordance with EU law*, which is always a necessary requirement in areas that fall within the exclusive competence of the Member States.[164]

Accordingly, it is my contention that irrespective of how difficult and sensitive the issue of the legal recognition of same-sex couples in cross-border situations is, it should clearly be placed firmly on the EU's legislative agenda. As was explained in the previous section, the current regime and the uncertainty that ensues from it permits Member States to act in ways which violate a number of important principles of EU law and infringe some of the fundamental rights enjoyed by Union citizens. Therefore, making the suggested amendments is not simply a matter of improving the rights of a group of Union citizens who are currently disadvantaged, but is required in order for the 2004 Directive to be compatible with higher – i.e. primary – EU law.[165]

5.2 Suggested Clarifications to be Provided by the ECJ

If the EU legislature does not take action in the manner suggested above, the full burden will fall on the Court of Justice to ensure that – as far as this is possible – it ensures that the host State respects the free movement rights of migrant Union citizens who are in a same-sex relationship and does not violate their rights under the Charter and EU anti-discrimination law. In fact, given that more and more same-sex couples can now formalise their relationship in view of the fact that the number of Member States offering a legal status to same-sex couples continuously increases, it appears to actually be a matter of time before a same-sex couple brings a case before a national court arguing that the contested refusal of the host State to recognise their relationship amounts to a violation of their rights under EU law.[166] In such a case, and given the lack of clarity that persists in this area, the national court will have to make a reference for a preliminary ruling requesting the ECJ to clarify matters.

The ECJ will, therefore, have to a) clarify that the terms 'spouse' and 'partner' for the purposes of Articles 2 and 3 of the 2004 Directive, include same-sex spouses and partners; that when the Member States implement the Directive – and when they apply the implementing legislation – they have to ensure that they do not directly or indirectly discriminate on the grounds of sexual orientation; and that a same-sex marriage lawfully contracted in accordance with the law of the host State should be mutually recognised in any other Member State (i.e. introduction of the home

[163] D. Kochenov, *supra* note 18, p. 192.

[164] See, for instance, Case C-279/93 *Schumacker* [1995] ECR I-225, para 21 (taxation); Case C-348/96, *Calfa*, [1999] ECR I-11, para. 17 (criminal law); *Garcia Avello*, *supra* note 108, para. 25 (surnames).

[165] In my view, although legally possible, it is unlikely, in practice, that a judicial review action would be brought challenging the validity of the Directive on the ground that it violates EU free movement law and/or the Charter.

[166] A. R. O'Neill, *supra* note 21, p. 200.

State/mutual recognition principle with regards to married couples).[167]

However, as regards registered partners, given that the Directive expressly provides for the application of the host State principle, and this is not capable of being interpreted in any other manner, the Court will not be able to remedy this and, hence, whether same-sex registered partners will be recognised in the host State as such, will depend on the law of that State.

Practically speaking, however, when and how much of these issues will, in the end, be clarified by the Court, is entirely unpredictable given that this will depend entirely on the cases that reach the ECJ and the particular questions referred to it.

6 Conclusion

In this paper we saw that there is, in essence, a triple argument on which to base a claim that the current reticence of the EU to intervene and require the host State to recognise the same-sex relationships – either *de facto* or *de jure* – of migrant Union citizens, is entirely unsatisfactory, and permits the violation of a number of Treaty provisions by the Member States. The first is a functional, free movement, argument that should such relationships (and, where applicable, the status attached to them) not be recognised by the host State, this will impede the free movement of Union citizens who are in such relationships and will, therefore, restrict their fundamental right to move and reside in the territory of another Member State. The second is an equality argument, according to which the failure by the host State to recognise the same-sex relationships of migrant Union citizens may amount to a breach of the prohibition of discrimination on the ground of sexual orientation, contrary to Article 21 EUCFR. Moreover, if, once such couples are admitted into the host State's territory, they are treated worse than opposite-sex couples, with regards to matters in the sphere of employment, occupation, and vocational training, this may amount to a violation of Directive 2000/78 as well as (and in areas outside employment, occupation, and vocational training) a breach of Article 21 of the Charter. And the third is a human rights argument, claiming that the refusal of the host State to recognise the same-sex relationships of Union citizens and the legal status attached to them, amounts to a violation of their right to human dignity protected under the Charter (which is, also, a general principle of EU law). Moreover, although the refusal to recognise the legal status attached to a same-sex relationship may be capable of amounting to a violation of the right to private and family life provided by Article 7 of the Charter, the refusal of the host State to admit within its territory the same-sex spouse/registered partner/partner is unlikely to be found to amount to a breach of that provision.

Although the Member States maintain an exclusive competence in the field of family law and, thus, it is up to them to determine whether they will provide a legal status to same-sex couples within their territory, they need to exercise their powers in that field in a way which does not violate EU law. And, this, as has been suggested, requires that Member States mutually recognise the legal

[167] A call for such clarification has already been made by the Fundamental Rights Agency – see Fundamental Rights Agency Report 'Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis' (2009), *supra* note 126, p. 16.

status of same-sex couples (i.e. they recognise same-sex spouses as 'spouses' and same-sex registered partners as 'registered partners') and do not treat same-sex couples worse than opposite-sex couples, if the basis of the differentiation is, merely, the (homosexual) sexual orientation of the two spouses/partners. Accordingly, this paper has suggested that the EU legislature must make a number of amendments to Directive 2004/38, which will, in essence, make it clear that Member States must treat same-sex migrant couples in the same way as opposite-sex migrant couples. Moreover, the Court should make it clear – if and when it is given the opportunity – that the principle of mutual recognition is applicable in this context as well, and it should ensure that it interprets Directive 2004/38 in a way which does not lead to discrimination on the ground of sexual orientation.

As a final point which, due to lack of space was not developed in the main text and which can form the basis of another article, it should be noted that should the EU legislature and/or the Court act in the way suggested in this paper, this will most likely have as a side-effect the improvement of the position of 'stagnant' same-sex couples i.e. same-sex couples who are in a purely internal situation for the purposes of EU free movement law. This is because, the application of the mutual recognition and home State principles will mean that the host State will need to grant rights to same-sex couples that come from other Member States which are not, under national law, granted to its own nationals – a form of reverse discrimination.[168] Since Member States do not, usually, wish to discriminate against their own nationals, it is likely that States will decide – as a matter of national law – to extend the rights they afford to same-sex couples that arrive from other Member States to their national same-sex couples.[169] Hence, if, for instance, a Member State admits within its territory – because it is obliged by EU law – the same-sex spouses of nationals of other Member States who have moved to its territory in exercise of their free movement rights, it is very likely that it will decide to do the same – even though it is not required by EU law – with respect to the same-sex spouses of its own nationals in situations where there is no EU cross-border element.[170] In this way, same-sex couples will, eventually, be treated equally with opposite-sex ones, not only in situations where they decide to migrate but even in purely internal situations and, hence, the problems currently created by the legal patchwork that exists in the EU with regard to the legal recognition of same-sex relationships, will be solved through a process of voluntary harmonisation, which will absolve the EU from any criticism that it wished to impose its own views on the matter on the Member States.

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[168] L. Papadopoulou, *supra* note 106, p. 258; D. Kochenov, *supra* note 18, pp. 196-197. For a detailed study of reverse discrimination in EU free movement law see A. Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer, 2009).

[169] A. Weiss, *supra* note 25, p. 105. For a similar argument see D. Kochenov, *supra* note 18, p. 197.

[170] This is now possible since in *Metock*, *supra* note 27, para. 99, the Court held that (opposite-sex) spouses qualify as family members under the 2004 Directive, irrespective of when and where the marriage took place, which means that same-sex marriages formed outside the EU would qualify for mutual recognition, *should the EU legislature or the Court decide to employ this principle for same-sex marriages or registered partnerships*. This would mean that a Member State national who was born and has always lived only in his State of nationality and was married to, say, a Canadian national in Canada where they lived for some time, will be able to return to his State of nationality and require the latter to recognise his Canadian marriage for the purposes of family reunification, *if his State of nationality decides to extend – on its own volition – the family reunification rights granted by EU law to its own nationals in purely internal situations*. Yet, the situation will be more difficult for registered partnerships since the wording of the Directive appears to be requiring that these are formed in an EU Member State, in order to be covered by it.

Rainbow Families e diritto internazionale privato: conflitti di norme e conflitto di valori nella circolazione degli status personali

Eva de Götzen

Abstract

Il presente studio intende esaminare l'atteggiamento assunto dall'ordinamento italiano nei confronti della libera circolazione delle c.d. *Rainbow Families*. In particolare, attraverso un'analisi della recente evoluzione giurisprudenziale sovranazionale e nazionale, si approfondirà il tema del riconoscimento in Italia degli effetti civili di matrimoni omogenetici celebrati all'estero e delle criticità legate alla trascrizione nei registri dello stato civile italiani del relativo atto di matrimonio, al fine di stabilire se l'approccio adottato dall'ordinamento italiano sia nel suo complesso idoneo a garantire la continuità dello status giuridico acquisito da una coppia non tradizionale e dal nucleo familiare da essa formato all'estero oppure se esso violi il più generale divieto di discriminazione in base all'orientamento sessuale e all'identità di genere.

Keywords

Rainbow Families – matrimonio omogenetico – trascrizione - atti stato civile – status – omogenitorialità

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1 Introduzione

Si ponga il caso di un matrimonio contratto tra persone del medesimo sesso - di cui almeno una cittadina italiana - in uno Stato in cui sia consentita la celebrazione dei c.d. *gender neutral marriages*. Si ipotizzi che in tale Stato la coppia non tradizionale adotti, poi, un figlio oppure che i partners ne diventino genitori per ricorso alla pratica della procreazione assistita o alla maternità surrogata. A completamento del quadro, si consideri l'esigenza di detta coppia di spostare la residenza familiare dallo Stato di celebrazione del matrimonio omogenetico in Italia. Un nucleo familiare così composto continuerà a essere ritenuto tale anche una volta varcati i confini del nostro Paese?

La realtà europea ed extraeuropea ha da tempo registrato la progressiva diffusione del

fenomeno delle convivenze stabili tra partners del medesimo sesso.[1] Alcuni Paesi europei, per dare rilievo giuridico a tali formazioni sociali, hanno provveduto a riconoscere alle coppie non tradizionali il diritto al matrimonio o un più limitato diritto alla formalizzazione delle relazioni stabili accompagnate da coabitazione di fatto (es. le c.d. *registered partership*). In questo modo le coppie omogenetiche possono conseguire uno status giuridico che implica diritti e obblighi - tanto fra i conviventi quanto nei confronti dei terzi - identici o, comunque, molto simili a quelli che scaturiscono dall'istituto del matrimonio tradizionale. Tuttavia, nel quadro normativo europeo la materia del diritto di famiglia è assegnata alla competenza residua nazionale (salvo i limitati profili di cui all'art. 81 TFUE)[2] e non sussiste alcun obbligo per gli Stati membri, né alla luce dell'art. 9 della Carta Nizza né dell'art. 12 CEDU, di concedere l'accesso al matrimonio alle coppie di identico genere, ragion per cui i diversi Stati membri sono a tuttora liberi di riconoscere, al proprio interno, effetti giuridici (coniugali e/o paraconiugali) alle unioni non eterosessuali secondo la sensibilità dei vari legislatori nazionali.

L'Italia è uno tra i Paesi europei a non aver ancora predisposto alcuna normativa per la disciplina delle unioni di coppie non tradizionali. Sebbene siano stati presentati alcuni progetti di legge in merito - volti, se non a estendere *tout court* l'istituto del matrimonio alle copie omogenetiche, quantomeno a elaborare una regolamentazione di riferimento per le convivenze stabili tra persone del medesimo sesso - il loro iter di adozione risulta congelato, mentre l'ordinamento giuridico italiano – rimasto nel suo complesso profondamente ancorato al paradigma tradizionale del nucleo familiare fondato sulla diversità di genere dei nubendi, per quanto mai normativamente individuato - ha sempre mantenuto un atteggiamento ondivago, quando non ostile, a riguardo.

In tale contesto, nel momento in cui esercitino il diritto alla libera circolazione all'interno dell'Unione, i nuclei familiari originati dalle mutate abitudini sociali pongono più di un interrogativo sul piano del diritto internazionale privato. Infatti, qualora una coppia non tradizionale unita in rapporto di coniugio decida di spostarsi dallo Stato membro di celebrazione del matrimonio in un altro Stato membro, in assenza di un consenso tra i vari Stati nazionali sul tema della disciplina sostanziale delle unioni omosessuali, potrebbero sorgere ostacoli in ordine alla continuità della situazione giuridica legittimamente acquisita nello Stato d'origine, con conseguente vuoto di tutela nello Stato di destinazione.[3]

Alla luce di quanto premesso, senza ambire a fornire soluzioni alle problematiche testé

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[1] Cfr. J. Borg-Barthet, The principled imperative to recognize same-sex unions in the EU, in Jour. Priv. int. law, 2012, p. 359 ss.; K. Boele-Woelki, The legal recognition of same-sex relationship within the European Union, in Tulane Law Rev., 2008, p. 1949 ss.

[2] A livello europeo, sono state unificate le norme di conflitto in materia di famiglia (cfr. regolamento CE 2201/2003, relativo alla competenza, al riconoscimento e all'esecuzione delle decisioni in materia matrimoniale e in materia di responsabilità genitoriale; regolamento CE 4/2009, in tema di obbligazioni alimentari; regolamento UE 1259/2010, relativo alla legge applicabile al divorzio e alla separazione personale; regolamento UE 650/2012, in materia successoria), ma non il diritto sostanziale afferente al medesimo settore. Pertanto, l'applicabilità dei predetti strumenti uniformi alla fattispecie del matrimonio omogenetico dipende dall'equiparazione di quest'ultimo al matrimonio eterosessuale nell'ordinamento di ciascuno Stato membro.

[3] Potrebbe essere, infatti, dubbia l'estendibilità della disciplina dell'acquisto della nazionalità, dello scioglimento del vincolo, del regime alimentare dei coniugi, dei rapporti di filiazione e della successione *mortis causa*.

richiamate, il presente studio intende esaminare l'atteggiamento assunto dall'ordinamento italiano nei confronti della libera circolazione delle coppie omogenetiche e del nucleo familiare da esse composto. In particolare, attraverso un'analisi della recente evoluzione giurisprudenziale sovranazionale e nazionale - nel nome del riconoscimento automatico degli *status* e dell'interesse superiore del minore -, verrà approfondito il tema del riconoscimento in Italia degli effetti civili di matrimoni omogenetici celebrati all'estero e delle criticità legate alla trascrizione nei registri dello stato civile italiani del relativo atto di matrimonio, da analizzarsi sotto gli ulteriori profili del riconoscimento della validità tout court del rapporto coniugale instaurato all'estero e/o della produzione di determinati effetti del rapporto di coniugio, anche in termini di sopravvivenza del rapporto parentale nei casi di omogenitorialità.

Sulla base dei risultati raggiunti si valuterà, infine, se l'approccio adottato dall'ordinamento italiano sia nel suo complesso idoneo a garantire la continuità dello status giuridico acquisito da una coppia non tradizionale all'estero, anche nei confronti dei minori legati da vincolo parentale con uno o entrambi i partners della coppia, oppure se esso risulti in contrasto con il più generale divieto di discriminazione in base all'orientamento sessuale e all'identità di genere.

2 Il matrimonio omogenetico e l'ordinamento italiano: profili di diritto sostanziale

Da un punto di vista sostanziale, l'ordinamento italiano detta un'apposita disciplina per contrarre matrimonio (cfr. artt. da 84 a 88 c.c., relativi alla capacità di sposarsi e agli impedimenti alla celebrazione del matrimonio). Le condizioni ivi previste devono sussistere sia quando un cittadino italiano contragga matrimonio in un Paese straniero, secondo le forme ivi stabilite, sia quando uno straniero contragga matrimonio in Italia (cfr. artt. 115 e 116 c.c., su cui v. *infra*).

Sebbene il requisito della differenza di sesso tra i nubendi non sia previsto da nessuna delle norme richiamate, esso è considerato implicito nel nostro sistema ed è tradizionalmente ritenuto essenziale ai fini della celebrazione di un matrimonio in Italia. Individuata, dunque, l'eterosessualità tra i requisiti primari per contrarre matrimonio, l'ordinamento italiano non conosce altri modi per costituire una famiglia diversi dal matrimonio tra persone di sesso diverso. Di conseguenza, il matrimonio omogenetico rimane un istituto sconosciuto al nostro ordinamento e affatto assimilabile al matrimonio così come configurato dal legislatore italiano.

Tale conclusione trova conferma in una recente pronuncia della Corte Costituzionale.[4] Chiamati a pronunciarsi in merito al rifiuto dell'ufficiale dello stato civile di celebrare un matrimonio tra persone dello stesso sesso, i giudici di legittimità hanno chiarito che, siccome in Italia l'istituto del matrimonio è (implicitamente) incentrato sul fondamentale requisito della diversità di sesso tra i nubendi, la mancata previsione dell'istituto del matrimonio omogenetico nell'ordinamento italiano non è discriminatoria ex artt. 2, 3, 29 e 39 Cost. Peraltro, tale lacuna non viola nemmeno gli artt. 12 CEDU e 9 Carta dei Diritti Fondamentali UE posto che, sebbene i menzionati strumenti sovranazionali riconoscano il diritto di sposarsi anche a persone di diverso sesso, essi rinviano alle

[4] Corte costituzionale, sentenza 15 aprile 2010, n. 138, in Fam. e dir., 2010, p. 653 ss.

leggi nazionali per la determinazione delle condizioni di esercizio del relativo diritto, ragion per cui non vi è nessun obbligo per il legislatore italiano di concedere l'accesso al matrimonio a una coppia omosessuale (v. *infra*). In conclusione, le unioni omosessuali devono essere ritenute una delle "formazioni sociali" tutelate e riconosciute attraverso l'art. 2 Cost. ma, in quanto tali, esse «*non possono essere ritenute omogenee al matrimonio*».

A completamento del quadro, si aggiunge che, nell'ordinamento italiano, non esiste alcuna disciplina legislativa delle convivenze. Nel 2002 era stata presentata una proposta di legge sui patti civili di solidarietà e sulle unioni di fatto, che distingueva tra PACS - accordi di tipo contrattuale volti a disciplinare i rapporti patrimoniali e personali tra persone dello stesso e di diverso sesso - e unioni di fatto – ossia rapporti di convivenza stabile e continuativa tra due persone dello stesso o di diverso sesso conducenti una vita di coppia. Nel 2007 era stato presentato un nuovo disegno di legge – relativo ai c.d. DICO – in tema di riconoscimento di alcuni diritti (alimentari, successori e di assistenza) alle persone stabilmente conviventi, senza alcuna distinzione in base all'orientamento sessuale. Nel 2008 è stato, poi, elaborato un progetto di legge c.d. DIDORE (diritti e doveri di reciprocità dei conviventi), volto a disciplinare tutti i rapporti affettivi non formalizzati in matrimonio, da ritenersi meritevoli di tutela indipendentemente dall'orientamento sessuale. Nessuna delle proposte qui richiamate, nemmeno quella relativa alle unioni civili e al patto di convivenza, di recente elaborazione,[5] ha, tuttavia, ultimato l'iter legislativo di adozione, ragion per cui non esiste una disciplina dei diritti e dei doveri di una coppia non tradizionale.

Senonchè, almeno per via giurisprudenziale è stata riconosciuta ai conviventi del medesimo sesso la facoltà di succedere nel contratto di locazione stipulato da uno dei conviventi, di chiedere il risarcimento del danno morale e patrimoniale nei confronti del terzo che abbia cagionato la morte del partner o, in caso di incidente, quando questi abbia riportato lesioni tali da compromettere l'esercizio normale delle funzioni vitali.[6]

Nonostante i reiterati tentativi di introdurre nuovi istituti giuridici, che fungano da veste a modelli familiari diversi da quello tradizionale, allo stato non è possibile comprendere il matrimonio fra persone dello stesso sesso entro la nozione dell'istituto fatta propria dal nostro sistema giuridico. Di conseguenza, alla luce delle norme sugli impedimenti matrimoniali si deve, per il momento, escludere che possa essere celebrato in Italia un matrimonio tra persone dello stesso sesso.

[5] Le unioni civili tra persone dello stesso sesso dovrebbero godere dell'estensione di tutti i diritti previsti dal matrimonio, eccezion fatta per l'adozione. Sul modello dell'istituto della stepchild adoption inglese, infatti, è escluso il diritto di adottare, ma i membri della coppia omosessuale possono ottenere la custodia di eventuali figli del partner, continuando ad assisterli nel caso in cui il genitore naturale venga a mancare. Sul lato patrimoniale e previdenziale è stata proposta l'introduzione della reversibilità della pensione, i diritti successori per il partner e la possibilità di succedere nel contratto d'affitto. Inoltre, dovrebbe essere prevista l'iscrizione delle coppie omosessuali all'ufficio dello stato civile in un registro apposito delle unioni civili.

[6] Si segnala che anche in ambito ONU è intervenuta una simile equiparazione, essendo stato previsto che i partner di coppie dello stesso sesso, che abbiano contratto matrimonio in uno Stato in cui ciò sia ammesso, possono accedere ai benefici stabiliti per i dipendenti dell'Organizzazione, a prescindere dalla trascrizione del relativo atto di matrimonio nel Paese d'origine dei coniugi.

3 Il matrimonio omogenetico nella giurisprudenza sovranazionale

Contrariamente all'esperienza nazionale, a livello sovranazionale è intervenuta una significativa apertura verso le coppie omosessuali, attraverso un'interpretazione evolutiva in senso omnicomprensivo degli artt. 8 (Diritto alla vita privata e familiare) e 12 (Diritto al matrimonio) della Convenzione europea dei diritti dell'uomo ("CEDU").

In principio, la Corte europea dei diritto dell'uomo ("Corte EDU") considerava tutelato dall'art. 12 CEDU soltanto il matrimonio celebrato tra un uomo e una donna, rivelando un atteggiamento di difesa del matrimonio tradizionale fra due persone di sesso biologico diverso.[7] Le unioni diverse dal matrimonio, fondate sull'impegno reciproco dei due soggetti, erano ricondotte nell'ambito di applicazione del diverso art. 8 CEDU.[8]

Nel 2002 è stato fatto il primo passo in avanti. Abbandonato il riferimento al diritto al rispetto della vita privata e familiare (art. 8 CEDU) in favore del vero e proprio diritto di sposarsi (art. 12), è stato riconosciuto il diritto del transessuale, dopo il mutamento di sesso, di contrarre matrimonio con persone del proprio sesso originario, stante la necessità di intendere le nozioni di "uomo" e "donna" in un'accezione evolutiva, non più ancorata esclusivamente a caratteri biologici.[9]

Successivamente, nel 2010 l'art. 12 CEDU è stato letto alla luce dell'art. 9 (Diritto al matrimonio) della Carta di Nizza che, a differenza dello strumento internazionale, non contiene più il riferimento alla differenza di sesso tra gli sposi. Attraverso un processo di c.d. *cross-fertilisation* tra diritto europeo e diritto internazionale, la Corte europea ha interpretato evolutivamente il secondo, arrivando, attraverso un vero e proprio *overruling*, a riconoscere il diritto al matrimonio *tout court* anche alle coppie non tradizionali, ritenendo che il diritto di sposarsi sancito dall'art. 12 CEDU non possa più essere limitato al matrimonio tra persone di sesso opposto.[10] La diversità di sesso dei nubendi perde, dunque, rilevanza giuridica, ma pur sempre in un quadro di rinvio ai legislatori nazionali per la determinazione delle modalità di esercizio del diritto di sposarsi, posto che la CEDU non fissa un obbligo per gli Stati contraenti di prevedere, nel proprio ordinamento, l'accesso al matrimonio anche per le coppie omogenetiche.

Di recente, è stato affermato che, sebbene l'art. 8 CEDU imponga l'obbligo di rendere accessibili le procedure per il riconoscimento del nuovo genere acquisito da una persona nel corso della sua esistenza, gli Stati parte non sono tenuti a riconoscere i matrimoni tra coppie dello stesso sesso nemmeno nel caso in cui uno dei partner abbia cambiato sesso in costanza di matrimonio e la coppia desideri mantenere il vincolo coniugale, ben potendo, invece, prevedere la trasformazione del matrimonio in un'unione registrata.[11] Inoltre, qualora una legge introduca nell'ordinamento

[7] Corte EDU, sentenza 17 ottobre 1986, Rees c. Regno Unito.

[8] Cfr. ad es. Corte EDU, sentenza 22 aprile 1997, X, Y, Z c. Regno Unito.

[9] Corte EDU, sentenza 11 luglio 2002, Goodwin c. Regno Unito.

[10] Corte EDU, sentenza 24 giugno 2010, Schalk e Kopf c. Austria.

[11] Corte EDU, sentenza 16 luglio 2014, H. c. Finlandia. Quanto all'ordinamento interno, è già stata dichiarata l'illegittimità costituzionale degli artt. 2 e 4, l. 14 aprile 1982 n. 164, con riferimento all'art. 2 Cost., "nella parte in cui non prevedono che la sentenza di rettificazione dell'attribuzione di sesso di uno dei coniugi, che comporta lo scioglimento del matrimonio, consenta, comunque, ove entrambi lo richiedano, di mantenere in vita un rapporto di coppia giuridicamente regolato con altra forma di convivenza registrata, che tuteli adeguatamente i diritti ed obblighi

nazionale una disciplina per le unioni civili formate da sole coppie eterosessuali, la coppia non tradizionale deve essere equiparata a quella eterosessuale, ragion per cui devono essere riconosciuti gli effetti civili anche delle unioni tra persone dello stesso sesso, pena la violazione degli artt. 14 (Divieto di discriminazione) e 8 CEDU.[12]

Del medesimo tenore anche una pronuncia della Corte di giustizia dell'Unione europea. Sebbene rimanga insuperato l'orientamento secondo cui "*è pacifico che il termine «matrimonio», secondo la definizione comunemente accolta dagli Stati membri, designa una unione tra due persone di sesso diverso*",[13] la Corte ha affermato che, laddove un Paese membro introduca nel proprio ordinamento i patti civili di solidarietà (Pacs) tra partner dello stesso sesso, non può negare a coloro che stipulano questi accordi l'attribuzione degli stessi diritti e benefici concessi a coloro che contraggono matrimonio, in particolare quando il diritto interno non prevede per le coppie dello stesso sesso la possibilità di sposarsi.[14] Coloro che concludono i Pacs scelgono, infatti, di organizzare una vita in comune in modo analogo a coloro che contraggono matrimonio, ragion per cui i due tipi di unioni devono ricevere il medesimo trattamento, trovandosi in una situazione analoga.

Allo stato, pendono avanti la Corte EDU alcuni procedimenti proposti contro l'Italia aventi ad oggetto proprio il mancato riconoscimento di matrimoni tra partner dello stesso sesso avvenuti all'estero per impossibilità di trascriverlo e il perdurante divieto di matrimonio per coppie dello stesso sesso.[15] Si dovrà, dunque, attendere l'esito di tali procedimenti per valutarne l'impatto sull'ordinamento interno.

4 Profili di diritto internazionale privato del matrimonio omogenetico

Nonostante le aperture intervenute a livello sovranazionale, il matrimonio omosessuale rimane istituto estraneo al nostro ordinamento e non esiste un diritto a celebrarne uno in Italia. Tale conclusione vale per tutte le coppie omosessuali formate da cittadini italiani e residenti in Italia.

E se la legge nazionale di uno dei partners ammettesse, invece, la celebrazione di un matrimonio omogenetico, tale circostanza potrebbe avere un diverso rilievo per il nostro ordinamento?

Quanto alla disciplina di conflitto del matrimonio come atto, ai fini della validità del medesimo occorre distinguere tra i requisiti formali e sostanziali. In punto, la l. 31 maggio 1995 n. 218 di riforma del sistema italiano di diritto internazionale privato dispone – quanto ai requisiti sostanziali (art. 27, primo periodo) – che la capacità matrimoniale e le altre condizioni per contrarre matrimonio sono

della coppia medesima, la cui disciplina rimane demandata alla discrezionalità di scelta del legislatore" (Corte costituzionale, sentenza 11 giugno 2014, n. 170, in Diritto & Giustizia 2014)

[12] Corte EDU, sentenza 7 novembre 2013, Vallianatos e altri c. Grecia

[13] Corte di giustizia, sentenza 31 maggio 2001, procedimenti riuniti C-122/99 P e C-125/99 P, D e Regno di Svezia c. Consiglio dell'Unione europea, in Raccolta, 2001, p. I-04319; 17 febbraio 1998, in causa C-249/96, Grant c. South-West Trains Ltd., in Raccolta, 1998, p. I-00621.

[14] Corte di giustizia, sentenza del 12 dicembre 2013, in causa C-267/12, Hay c. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres, in corso di pubblicazione.

[15] Corte EDU, rispettivamente ricorso n. 26413/12 del 20 aprile 2012, Orlandi e altri c. Italia e ricorsi n. 18766/11 del 21 marzo 2011, Oliari e Longhi c. Italia e n. 36030/11 del 10 giugno 2011, Felicetti e altri c. Italia.

regolate dalla legge nazionale di ciascun nubendo al momento del matrimonio. Quanto ai requisiti formali (art. 28), il matrimonio è valido se è considerato tale dalla *lex loci celebrationis* o dalla legge nazionale di almeno uno dei coniugi al momento della celebrazione o dalla legge dello Stato di comune residenza in tale momento. Tali norme devono essere integrate dalle norme di diritto internazionale privato materiale di cui agli artt. 115 e 116 c.c. In particolare, ai sensi dell'art. 115 c.c. la validità del matrimonio del cittadino italiano celebrato all'estero, nel rispetto della *lex loci celebrationis*, resta comunque subordinata alla sussistenza delle condizioni relative allo stato e alla capacità delle persone previste dal nostro ordinamento (art. 84 c.c. e segg.). Quanto al matrimonio dello straniero in Italia, le disposizioni richiamate dal secondo comma dell'art. 116 c.c., che impongono il rispetto di alcuni degli impedimenti c.d. dirimenti al matrimonio previsti dalla legge italiana, sono ritenute norme di applicazione necessaria, ragion per cui devono trovare applicazione indipendentemente dalla legge regolatrice del rapporto.

Per quel che qui interessa, la diversità di sesso dei nubendi rientra tra le condizioni necessarie per contrarre matrimonio di natura sostanziale. Se si considera una coppia omosessuale, di cui uno dei partners sia cittadino italiano, ai sensi dell'art. 27, l. 218/95 la capacità matrimoniale del partner italiano e le altre condizioni per contrarre matrimonio saranno disciplinate dalla legge italiana, in quanto legge nazionale del nubendo al momento della celebrazione. Ancorché, come detto, la diversità di sesso non sia espressamente contemplata dal nostro ordinamento, essa rimane comunque uno dei caratteri essenziali del medesimo, ragion per cui, ragionando in termini di validità tout court del rapporto di coniugio, si deve escludere la possibilità di celebrare in Italia un matrimonio omosessuale tra un cittadino italiano e un partner straniero, stante il difetto, nel primo, di uno dei requisiti sostanziali ex art. 27, l. 218/95. [16]

5 La trascrizione in Italia del matrimonio omogenetico celebrato all'estero

Diverso è il tema della trascrizione, nei registri dello stato civile italiani, dell'atto di matrimonio validamente celebrato tra due persone dello stesso sesso all'estero.[17]

Gli ordinamenti degli Stati membri, che riconoscono la validità di matrimoni celebrati anche in difetto del requisito della diversità di sesso dei nubendi, in genere prevedono relative forme di pubblicità, solitamente riconducibili alla formazione dell'atto di matrimonio. Tale documento

[16] Cfr. N. Boschiero, Les unions homosexuelles à l'épreuve du droit international privé italien, in Riv. Dir. Int., 2007, p. 50 ss.; G. Rossolillo, Registered partnership e matrimoni tra persone dello stesso sesso: problemi di qualificazione ed effetti nell'ordinamento italiano, in Riv. Dir. Int. priv e proc., 2003, p. 363 ss.; B. Barel, S. Armellini, Manuale breve di diritto internazionale privato, Milano, 2014, p. 129 ss.

[17] G. Biagioni, On recognition of foreign same-sex marriages and partnerships, in Gallo, Paladini, Pustorino (eds.), Same-sex couples before national, supranational and international jurisdictions, Berlino, 2014, p. 359 ss.; F. Mosconi, C. Campiglio, Il riconoscimento del matrimonio omosessuale alla luce di recenti pronunce, in Diritto, Immigrazione, Cittadinanza, 2012, p. 73 ss.; A. Schuster, Il matrimonio e la famiglia omosessuale in due recenti sentenze. Prime note in forma di soliloquio, in Forum di Quaderni Costituzionali, 2012; M. Meli, Il matrimonio tra persone dello stesso sesso: l'incidenza sul sistema interno delle fonti sovranazionali, in NLCC, 2012, p. 451 ss.; E. Bergamini, Riconoscimento ed effetti in Italia di un matrimonio tra persone dello stesso sesso contratto all'estero: la recente evoluzione della giurisprudenza italiana, in NLCC, 2012, p. 461 ss.

costituisce un atto dello stato civile e, come tale, può esserne richiesta la trascrizione in Paesi diversi da quello in cui è stato redatto. Senonché, mentre nel nostro ordinamento esistono svariate disposizioni sul riconoscimento e l'attuazione delle sentenze (art. 64, l. 218/95), degli altri provvedimenti giudiziali relativi alla capacità nonché all'esistenza di rapporti di famiglia o di diritti della personalità (artt. 65, l. 218/95) e degli atti pubblici (art. 68, l. 218/95), manca una disposizione dedicata al riconoscimento degli atti dello stato civile che, per lo più, vengono in considerazione nel loro valore probatorio, quale documento attestante lo status del soggetto cui si riferiscono (v. *infra*).[18] Si tratta, pertanto, di capire quale sia la reazione del nostro ordinamento di fronte alla richiesta di aggiornamento dei registri di stato civile in caso di matrimonio omogenetico contratto in uno Stato in cui sia ammesso.

Tale esigenza potrebbe trarre origine da due diversi scenari. In una prima ipotesi, una coppia omosessuale formata da cittadini italiani potrebbe decidere di recarsi all'estero per formalizzare la propria unione, contraendo matrimonio in uno degli Stati che lo consentono, per poi tornare in Italia e chiedere il riconoscimento del rapporto validamente costituito all'estero. In una seconda ipotesi, una coppia non tradizionale potrebbe celebrare il matrimonio omogenetico nello Stato di provenienza di uno dei nubendi, diverso dall'Italia, salvo poi traferirsi in Italia e qui chiedere la trascrizione dell'atto di matrimonio validamente formato all'estero. In entrambi i casi, una volta varcati i confini nazionali e formulata la richiesta di aggiornamento dei registri dello stato civile ai fini di pubblicità, l'autorità a ciò preposta è tenuta a verificare se sussistano i requisiti di legge per procedere al richiesto aggiornamento.

In punto, l'art. 18 d.p.r. 396/2000,[19] sancisce l'intrascrivibilità degli atti dello stato civile formati all'estero contrari all'ordine pubblico. Nello specifico, la circolare del Ministero degli interni 18 ottobre 2007 n. 55 ha previsto che non è trascrivibile, per contrarietà all'ordine pubblico, il matrimonio celebrato all'estero tra omosessuali, di cui uno italiano.[20]

Sulla base delle fonti normative sin qui richiamate, la questione del se due partner del medesimo sesso, i quali abbiano contratto matrimonio all'estero, siano o meno titolari del diritto alla trascrizione del relativo atto nel corrispondente registro dello stato civile italiano, parrebbe da risolversi in senso negativo.

In questi termini Tribunale di Latina che, affrontando per la prima volta il problema del riconoscimento della validità in Italia di un matrimonio omosessuale celebrato all'estero, stabilì che, poiché la diversità di sesso assurge ad elemento essenziale della fattispecie "matrimonio", è legittimo il rifiuto opposto dall'ufficiale di stato civile alla trascrizione "*per l'assenza dei requisiti minimi essenziali che consenta di inquadrare la fattispecie in esame nella stessa previsione legale*

[18] Gli atti dello stato civile sono atti emanati da pubblica amministrazione con funzione certificativa delle principali statuizioni relative allo stato civile delle persone e non sono considerati atti pubblici. Essi, pertanto, sono sottratti all'applicazione della disciplina dell'art. 68, l. 218/95.

[19] Il d.p.r. 3.11.2000, n. 396 recante il Regolamento per la revisione e la semplificazione dell'ordinamento dello stato civile, a norma dell'art. 2, comma 12, l. 15 maggio 1997, n. 127 (Gazz. Uff. n. 303 del 30 dicembre 2000, Suppl. Ordinario n. 223).

[20] Si ha contrarietà all'odine pubblico soltanto nel caso in cui uno dei due coniugi sia cittadino italiano. Paradossalmente, come rilevato da Boschiero, Les unions cit., p. 120, se entrambi i coniugi fossero stranieri, non parrebbe operare il predetto limite.

'matrimonio', presupposto questo indefettibile per la trascrizione".[21] In particolare, il difetto dell'elemento dell'eterosessualità era ritenuto in contrasto con l'ordine pubblico, determinando "*l'inesistenza … del negozio matrimoniale, con l'effetto che non può essere trascritta nei registri dello stato civile l'unione fra persone del medesimo sesso contratta all'estero"*. Del medesimo avviso il Tribunale di Treviso, secondo cui "*Non è trascrivibile in Italia un matrimonio validamente celebrato tra due persone dello stesso sesso in virtù delle leggi di uno Stato estero (California)"* in quanto totalmente estraneo al concetto giuridico italiano di "matrimonio".[22]

Tale orientamento divergeva da quello affermatosi, in generale, in tema di matrimoni eterosessuali contratti all'estero tra cittadini italiani e tra italiani e stranieri, in base al quale tali matrimoni hanno immediata validità e rilevanza nell'ordinamento italiano qualora risultino celebrati nel rispetto delle forme previste dalla *lex loci celebrationis* – trattandosi, quindi, di atti già di per sè validi sulla base del principio *locus regit actum* - e sempre che sussistano i requisiti sostanziali relativi allo stato e alla capacità delle persone previsti dalla legge italiana.[23] Difatti, "*nell'ipotesi in cui manchino i requisiti sostanziali relativi allo stato ed alla capacità delle persone previsti dalla legge italiana, l'atto di matrimonio non perde la sua validità fino a quando non sia impugnato per una delle ragioni previste dall'art. 117 c.c. e non sia intervenuta una pronuncia di nullità o di annullamento*"[24].

Un matrimonio fra persone dello stesso sesso contratto all'estero sembrerebbe, dunque, subire una sorte giuridica (l'inesistenza) peggiore di quella di un matrimonio eterosessuale carente dei requisiti di legge. Eppure, l'identità di sesso tra i nubendi non dovrebbe costituire un impedimento tale da impedire *tout court* la trascrizione dell'atto di matrimonio nel corrispondente registro dello stato civile italiano e da negare la produzione *pro tempore* di determinati effetti nell'ordinamento interno, quali quelli indirettamente connessi alla qualità di coniuge (acquisto della qualità di erede, subentro nel contratto di locazione, titolarità del permesso di soggiorno, ecc.), come accade in caso di difetto (anche solo ipotetico) degli altri requisiti di capacità (ad es., lo stato libero nel caso del matrimonio poligamico).

Di diverso avviso la Suprema Corte che, ribadita l'assenza di una norma che riconosca il diritto a contrarre matrimonio tra persone dello stesso sesso nel nostro ordinamento, ha confermato la legittimità del diniego opposto alla trascrizione di un matrimonio omosessuale validamente celebrato all'estero nei registri dello stato civile italiano in quanto lo stesso, sebbene non più qualificabile come "inesistente" o "invalido" alla luce delle recenti pronunce CEDU, deve comunque essere ritenuto "inidoneo" a produrre effetti giuridici nel nostro ordinamento.[25] Di conseguenza, un

[21] Tribunale di Latina, decreto 10 giugno 2005, in Riv. notariato 2006.

[22] Tribunale di Treviso**,** decreto 19 maggio 2010, in Dir. famiglia 2011.

[23] E ciò a prescindere dall'osservanza delle norme italiane relative alla pubblicazione - la cui violazione può dar luogo soltanto a irregolarità suscettibili di essere sanzionate amministrativamente - o alla trascrizione - che ha natura non costitutiva ma meramente dichiarativa e certificativa.

[24] Cass. civ., sez. I, sentenza 13 aprile 2001, n. 5537, in Giust. civ. Mass. 2001, aveva affermato che il matrimonio poligamico celebrato all'estero deve essere considerato valido ad interim, anche in difetto dello status libertatis, risultando trascrivibile e produttivo di effetti giuridici dal momento della celebrazione fino a quello della pronuncia di invalidità.

[25] Cass. civ., sez. I, sentenza 15 marzo 2012, n. 4184, in Riv. Dir. Int. Priv. e Proc., 2012, pp. 747–767.

matrimonio omosessuale validamente celebrato all'estero, benchè esistente e valido in alcuni ordinamenti (quello in cui è stato celebrato e negli altri ordinamenti in cui potrebbe essere ipoteticamente trascritto), rimane inefficace nel nostro ordinamento, nonostante non possa più essere ritenuto contrario all'ordine pubblico.

Sebbene non segni un punto di svolta in tema di aggiornamento dei registri dello stato civile, tale pronuncia appare, tuttavia, innovativa recependo, da un lato, l'interpretazione evolutiva dell'art. 12 CEDU – che ha privato di rilevanza giuridica la diversità di sesso dei nubendi, con la conseguenza che quest'ultima non può più considerarsi presupposto "naturalistico" per l'esistenza del matrimonio civile (cfr. sentenza *Schalk e Kopf c. Austria*) – dall'altro, inibendo l'incidenza del limite dell'ordine pubblico in sede di aggiornamento dei registri dello stato civile, avendolo assorbito nel concetto, per quanto discutibile,[26] di "inefficacia" del matrimonio omogenetico.

Le conclusioni sin qui raggiunge potrebbero, però, essere messe in forse da una recente pronuncia di merito. Forte delle statuizioni della Corte EDU, il Tribunale di Grosseto ha ammesso la trascrizione nei registri di stato civile dell'atto di matrimonio celebrato a New York da una coppia omosessuale di cittadini italiani, sostenendo, con approccio estremamente pragmatico, che la trascrizione non ha natura costitutiva ma meramente certificativa e scopo di pubblicità di un atto già di per sé valido (anche se, in realtà, incide sulla libertà di stato) e che non vi è contrarietà all'ordine pubblico - nonostante la circolare ministeriale sopra citata – posto che la differenza di sesso non rientra tra le condizioni previsti dagli artt. da 84 a 88 c.c. per contrarre matrimonio.[27]

Tale pronuncia, per quanto conforme alla recente posizione assunta in materia dalla Corte EDU, non pare del tutto condivisibile. Seppur con nobili intenti, infatti, l'organo giudicante pare aver trascurato il fatto che, a tuttora, la normativa italiana non prevede una simile forma di matrimonio (cfr. le citate sentenze della Corte costituzionale e della Corte di Cassazione). E anche l'apertura recentemente manifestata da alcune Autorità locali, nel senso di ammettere l'iscrizione all'anagrafe delle unioni di persone dello stesso celebrate all'estero come "coniuge e coniuge", parrebbe incoerente e foriera di non poche criticità dal punto di vista pratico/operativo, posto che, nel silenzio del legislatore, gli ufficiali di stato civile potrebbero ritenersi legittimati a dare pubblicità a un atto di matrimonio omogenetico validamente formato all'estero, il cui rapporto coniugale sotteso è, tuttavia, destinato a rimanere improduttivo di effetti giuridicamente rilevanti nel nostro ordinamento.[28]

[26] Su cui De Felice, Argomentazione della Cassazione sul diritto alla trascrizione di un atto di matrimonio celebrato all'estero fra cittadini italiani del medesimo sesso, in Rassegna avvocatura dello Stato, 2012, p. 168 ss.

[27] Tribunale Grosseto, ordinanza 9 aprile 2014, in Redazione Giuffrè 2014.

[28] Circostanza confermata dalla circolare n. 10863 del Ministero degli Interni del 7 ottobre 2014, recante un invito formale al ritiro e alla cancellazione delle trascrizioni delle unioni civili omosessuali contratte all'estero, in quanto disposte da provvedimenti sindacali non conformi al quadro normativo vigente. In caso di inerzia, è previsto l'annullamento d'ufficio degli atti illegittimamente adottati. Peraltro, con decreto del 19 settembre 2014, depositato il 24 settembre, la Corte di appello di Firenze ha annullato il provvedimento del Tribunale di Grosseto per un vizio formale, ma vi è l'importante affermazione di principio per cui l'attività di tenuta dei registri dello stato civile costituisce prerogativa statale, ed è pertanto sottratta alla disponibilità del sindaco.

6 Il riconoscimento delle certificazioni dello stato civile e la circolazione degli status

Sin qui si è trattato della possibilità di riconoscere, mediante trascrizione nei registri dello stato civile italiani, un matrimonio omosessuale validamente celebrato all'estero, peraltro negata dalla recente pronuncia della Suprema Corte.

Tuttavia, la celebrazione di un matrimonio omosessuale all'estero, in quanto valido ed efficace ai sensi della *lex loci celebrationis*, comporta l'acquisizione del c.d. *status maritalis*, che produce gli effetti giuridici che gli sono propri. Pertanto, rimane da chiedersi se almeno lo *status maritalis* come situazione giuridica a sé stante, derivante dal matrimonio omosessuale contratto all'estero e trascritto nei registri dello stato civile del luogo di celebrazione, status che esiste a priori e a prescindere dalla sua trascrizione nel nostro Paese, possa produrre determinati effetti giuridici in Italia.[29]

In punto si osserva che la Corte EDU ha gettato le basi della c.d. *cross-border continuity of personal and familial status* validamente costituiti all'estero, stabilendo che il mancato riconoscimento, nello Stato di destinazione, degli status acquisiti ai sensi della legislazione dello Stato d'origine, costituisce una violazione dell'art. 8 CEDU quando lo status corrisponde a un legame familiare effettivamente esistente nella realtà sociale.[30]

Allo stesso modo, la Corte di giustizia ha stabilito che gli Stati membri non possono negare il riconoscimento di uno status personale o familiare validamente acquisito in un altro Stato membro, in quanto l'eventuale rifiuto costituirebbe una potenziale limitazione della libertà di circolazione garantita dai Trattati ai cittadini europei, salvo il caso in cui esso debba essere opposto per motivi di ordine pubblico, in presenza di una minaccia reale e sufficientemente grave per un interesse fondamentale della società.[31]

Dal punto di vista internazionalprivatistico, al fine di preservare la stabilità dello status in tutti gli Stati membri, evitando situazioni claudicanti, si dovrebbe applicare sempre la legge dello Stato d'origine, in deroga alle norme di conflitto in materia vigenti nello Stato di destinazione, eliminando, così, possibili ostacoli alla libera circolazione. Se si applicasse detto principio anche al matrimonio omosessuale - rendendo il rispetto di un diritto fondamentale del cittadino europeo strumento per il riconoscimento dello *status maritalis* validamente acquisito all'estero - si dovrebbe concludere che uno Stato membro non può negare il riconoscimento dello *status maritalis* scaturente da detto rapporto salvo il caso in cui il matrimonio omogenetico leda un interesse fondamentale della

[29] Lo status maritalis è disciplinato dall'art. 27, l. 218/95. Pertanto, ci si deve domandare se la legge nazionale straniera individuata dall'art. 27, che crea o riconosce lo status derivante da un matrimonio omosessuale, possa trovare applicazione o se vi si opponga il limite dell'ordine pubblico o delle norme di applicazione necessaria di cui all'art. 116 c.c. Cfr. L. Tomasi, La tutela degli status familiari nel diritto dell'Unione europea, Padova, 2007, p. 217 ss.

[30] Corte EDU, sentenza 28 giugno 2007, Wagner c. Lussemburgo; sentenza 3 maggio 2011, Negrepontis-Giannisis c. Grecia.

[31] Corte di giustizia, sentenza 2 ottobre 2003, in causa C-148/02, Garcia Avello c. Stato belga, in Raccolta, 2003, p. I-11613; 14 ottobre 2008, in causa C-353/06, Grunkin e Paul, in Raccolta, 2008, p. I-07639; 22 dicembre 2010, in causa C-208/09, Sayn-Wittgenstein c. Landeshauptmann von Wien, in Raccolta, 2010, p. I-13693, tutte relative al diritto di conservare un determinato nome identificativo della persona.

società, lesione che, alla luce delle recenti evoluzioni giurisprudenziali, parrebbe da escludersi.

Ad adiuvandum, si richiama altro orientamento della Corte di giustizia, secondo cui le autorità amministrative di uno Stato membro devono attenersi, senza poterle sindacare, alle certificazioni dello stato civile provenienti da un altro Stato membro, salvo che non vi siano concreti indizi di non veridicità delle stesse, premessa la non contrarietà all'ordine pubblico[32]. Ciò dovrebbe valere nei casi in cui lo status personale e/o familiare venga attestato da un atto o da un certificato dello stato civile, onde non pregiudicare la libera circolazione delle persone all'interno dell'Unione.

In tale contesto, è stata presentata il 24 aprile 2013 una proposta di regolamento volto a promuovere la libera circolazione di cittadini e imprese semplificando l'accettazione di alcuni atti pubblici nell'Unione europea (COM/2013/228 def.).[33] Sulla scorta del Programma di Stoccolma del 2009 (*Un'Europa aperta e sicura al servizio e a tutela dei cittadini*), la Proposta si prefigge di sopprimere gli ostacoli amministrativi all'accettazione transfrontaliera dei certificati dello stato civile (relativi a nascita, decesso, matrimonio, unione registrata e status giuridico, rappresentanza di una società o altra impresa), che incidono negativamente sulla libera circolazione dei cittadini europei. Tuttavia, a differenza di quanto previsto nel Libro verde, il futuro regolamento si limita a garantire l'accettazione transnazionale dei documenti formati da pubbliche autorità a ciò deputate, facendo sì che, attraverso una cooperazione amministrativa tra autorità competenti, detto documento abbia lo stesso valore probatorio che esplica nello Stato di emissione, in base al principio *locus regit actum*. Per contro, la Proposta non si cura del riconoscimento reciproco del contenuto di tali certificati, con ciò escludendo che essi possano produrre automaticamente effetti giuridici in uno Stato membro diverso da quello d'origine. Il nuovo regolamento parrebbe, quindi, limitarsi a promuovere la libera circolazione dello *status* già acquisito dal soggetto nell'ordinamento di un altro Stato membro - e comprovato dalle certificazioni dello stato civile - attraverso il riconoscimento reciproco del valore probatorio degli atti amministrativi stranieri, senza limiti e senza controlli, ma senza avere ulteriori risvolti internazionalprivatistici.

L'atteggiamento del nostro ordinamento, anche in questo caso, non pare univoco. Secondo la citata Cassazione n. 4184/12, un atto straniero di stato civile può essere trascritto solo se lo status da esso certificato è idoneo a produrre effetti giuridici anche nel nostro ordinamento, limitandosi la trascrizione dell'atto di matrimonio a dare pubblicità dell'esistenza di tale status e degli effetti ad esso connessi. Diversamente, il tribunale di Grosseto ha ammesso la trascrizione dell'atto di matrimonio tra persone dello stesso sesso a prescindere dal fatto che il rapporto di coniugio sottostante, secondo la predetta Cassazione, sia improduttivo di effetti nel nostro ordinamento. Sebbene la posizione della Suprema Corte paia alquanto anacronistica, è pur tuttavia vero che non esiste un obbligo di riconoscimento delle situazioni giuridiche costituite all'estero e, quindi, della validità degli *status* che derivano dalle certificazioni dello stato civile. Pertanto, l'ordinamento

[32] Corte di giustizia, 2 dicembre 1997, in causa C-336/94, Dafeki c. Landesversicherungsanstalt Württemberg, in Raccolta, 1997, p. I-06761; 30 marzo 1993, in causa C-168/91, Konstantinidis c. Stadt Altensteig, Standesamt e Landratsamt Calw, Ordnungsamt, in Raccolta, 1993, p. I-01191.

[33] Su cui cfr. P. Lagarde, The movement of civil-status records in Europe and the European Commission's Proposal of 24 April 2013, in YPIL, 2013/2014, p. 1 ss.; C. Kohler, Towards recognition of civil status in the European Union, in YPIL, 2013/2014, p. 13 ss.

italiano rimane libero di attribuire o meno agli *status* soggettivi costituiti all'estero effetti giuridici, indipendentemente dall'attitudine di quegli stessi *status* a produrre effetti nell'ordinamento di origine, mentre la certificazione dello stato civile rimane, anche nell'ottica del legislatore europeo, un mero strumento di circolazione degli *status,* dotato soltanto di efficacia probatoria del proprio contenuto.

7 Omogenitorialità e continuità del rapporto parentale

L'estraneità del matrimonio omosessuale rispetto al nostro ordinamento si ripercuote sulla sorte *cross-border* del rapporto parentale nei casi di omogenitorialità, essendo foriera di probabili difficoltà in sede di trascrizione nei registri dello stato civile italiano dell'atto di nascita di un bambino nato o adottato all'estero da una coppia non tradizionale, con conseguente incerta accessibilità, per le coppie non tradizionali, agli istituti legati alla filiazione.[34]

In tema di adozione, sebbene Tribunale dei Minori di Brescia (provvedimento del 26 settembre 2006, n. 2) avesse negato il riconoscimento di una sentenza straniera che dichiarava l'adozione di un minore in favore di una coppia omosessuale - poiché la creazione di un rapporto genitoriale tra due persone del medesimo sesso e un minore urtava con i principi fondamentali ed etici dell'ordinamento italiano -, la Corte EDU – pur avendo affermato che gli Stati sono liberi di vietare l'adozione al partner di una coppia dello stesso sesso[35] - ha stabilito che il partner di una coppia dello stesso sesso ha diritto (ex artt. 8 e 14 CEDU) ad adottare il figlio del proprio compagno se questa possibilità è concessa, dall'ordinamento interno, alle coppie eterosessuali non sposate, a meno che il *discrimen* persegua un fine legittimo e sia proporzionato al raggiungimento di quest'obiettivo.[36] Più di recente, Tribunale dei minorenni di Roma (ordinanza n. 299 del 30 luglio 2014) ha ammesso l'adozione di una bambina, nata attraverso il procedimento della procreazione assistita all'estero, da parte della convivente della madre biologica, questa volta sulla base dell'art. 44, lett. d), l. n. 184/1983, che prevede l'adozione in casi particolari senza richiedere che i genitori siano legati da un valido rapporto di coniugio.

Quanto alla pratica della maternità surrogata, seppur vietata in Italia dalla legge n. 40/2004, Corte d'Appello di Bari[37] ha ammesso la registrazione, nei registri dello stato civile, del rapporto di parentela tra minore e madre "legale", costituito all'estero tramite un provvedimento inglese, segnando il superamento del limite dell'ordine pubblico nel nome dell'interesse superiore del minore e della garanzia della unicità, all'interno dell'Unione, dello status acquisito all'estero. Allo stesso modo, Tribunale di Napoli ha ammesso la trascrizione di un certificato di nascita di un minore nato in America mediante ricorso alla pratica della procreazione assistita, escludendo il contrasto con l'ordine pubblico.[38] Anche la Corte di Strasburgo ha sancito l'obbligo, per le autorità nazionali,

[34] Cfr. Wrinkler, Same-Sex Families Across Borders, in Gallo, Paladini, Pustorino (eds.), Same-sex couples cit., p. 381 ss.

[35] Corte EDU, 15 marzo 2012, Gas e Dubois c. Francia.

[36] Corte EDU, sentenza 19 febbraio 2013, X e altri c. Austria.

[37] Corte appello di Bari, 13 febbraio 2009, in Famiglia e minori, 2009.

[38] Tribunale di Napoli, 14 luglio 2011, in Foro it. 2012.

di procedere alla trascrizione di atti stranieri che riconoscono il legame con i genitori legali che ricorrono all'estero alla maternità surrogata, malgrado il divieto legislativo in patria,[39] salva la possibilità di impedire l'accesso, nel Paese dei genitori legali, di un minore nato da madre surrogata all'estero qualora sia necessario effettuare opportuni accertamenti in ordine alla genuinità del legame instaurato con questi ultimi.[40]

8 Conclusioni

A differenza di quanto previsto in alcuni Stati europei, nell'ordinamento italiano non esiste un diritto a contrarre matrimonio omogenetico. E, in difetto di uno sviluppo legislativo che sia frutto di una "felice contaminazione" tra fonti europee, convenzionali e interne, non risulta allo stato possibile celebrare in Italia un *gender neutral marriage* né tra cittadini italiani né tra italiani e stranieri.

Il dumping legislativo così creato costituisce un ostacolo al godimento della libera circolazione da parte di una coppia omosessuale che abbia contratto matrimonio all'estero, posto che un vincolo coniugale tra persone del medesimo sesso, perfettamente valido ed efficace oltre i confini nazionali, risulta improduttivo di effetti giuridici nel nostro ordinamento. Non solo. Non esistendo un obbligo di riconoscimento automatico dello *status maritalis* derivante da un matrimonio omogenetico celebrato all'estero, è altresì dubbia la possibilità che coniugi siffatti possano fruire, nel nostro ordinamento, di determinati effetti giuridici correlati direttamente a detto status.

Allo stesso tempo, il mancato riconoscimento in Italia del vincolo di parentela instaurato all'estero all'interno di una *Rainbow Family*, in quanto estraneo e/o incompatibile con il nostro ordinamento, potrebbe indebolire i rapporti tra genitori omosessuali e minore, quando non cancellare del tutto lo *status filiationis*. Tuttavia, la giurisprudenza nazionale ha accolto il principio per cui la tutela del diritto allo *status* e all'identità personale del minore, quand'anche acquisito all'estero, non può dipendere dalla sussistenza di un legame genetico con i genitori, di tal che, a differenza degli orientamenti assunti in tema di matrimonio omogenetico, si è preferito assicurare continuità giuridica a vincoli parentali omogenitoriali già esistenti all'estero, anteponendo al silenzio del legislatore il rispetto del preminente interesse del minore.

[39] Corte EDU, sentenze 26 giugno 2014, Mennesson c. Francia e Labassee c. Francia.
[40] Corte EDU, sentenza 9 settembre 2014, D. e altri contro Belgio.

A Transatlantic Rainbow Comparison: "Federalism" and Family-Based Immigration for Rainbow Families in the U.S. and the E.U.

Scott Titshaw

Abstract

When the U.S. Supreme Court struck down the federal definition of marriage in the Defense of Marriage Act (DOMA) in *United States v. Windsor*, it eliminated a categorical barrier to immigration for thousands of lesbian, gay, bisexual and transgender (LGBT) families. Yet *Windsor* was not an immigration case, and the Court[1]s opinion did not address at least three resulting immigration questions: What if a same-sex couple legally marries in one jurisdiction but resides in a state that does not recognize the marriage? What if the couple is in a legally recognized "civil union" or "registered partnership"? Would children born to spouses or registered partners in same-sex couples be recognized as "born in wedlock" for immigration and/or citizenship purposes? The Obama administration has rightly adopted a uniform place-of-celebration rule in response to the first question. But the treatment of legal marriage alternatives and of parent-child relationships are less clear.

After describing the recent experience with layered state and federal regulation of migration issues in the U.S., I will draw analogies and contrasts to parallel issues in European migration for non-E.U. nationals.

Keywords

Marriage, assisted reproductive technology (A.R.T.), medically assisted reproduction (M.A.R.), parent, immigration, citizenship, United States, same-sex, Windsor, European Union.

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1 Introduction – Diverging Paths for Same-Sex Couples and Their Children in the U.S. and the E.U.

Parallel developments in the European Union and the United States have brought progressive recognition of same-sex marriages and alternative forms of legal relationship recognition. There have also been substantive developments in the legal treatment of lesbian, gay, and bisexual parents, including the areas of adoption, assisted reproductive technology (A.R.T.), and presumed parenthood upon birth to a same-sex spouse or registered partner. Many of these developments have been reflected in changing immigration and citizenship laws on both sides of the Atlantic.

This paper examines the recent shift in U.S. immigration and citizenship laws as they apply to same-sex couples and their children. That comprehensive shift has been sudden and dramatic. Briefly stated, engaged or married same-sex couples and their children now have exactly the same formal legal rights under U.S. immigration law as different-sex couples. Civil unions and registered partners are generally not recognized for federal purposes, but there could arguably be an exception in states that define such partners as "spouses." Finally, there has been some increased recognition of same-sex marriages and resulting parental relationships for purposes of *ius sanguinis* citizenship transmission; however, serious obstacles remain for many same- and different-sex U.S. citizen spouses whose children are born abroad after conception through A.R.T.

After discussing the dramatic recent changes in the United States, this paper shifts to give a brief overview of some European developments in these areas. It concludes that the U.S. has more than overcome Europe's early lead in advancing immigration options for married same-sex couples and their children and suggests possible reasons for differences in the current pace of progress on both sides of the Atlantic.

2 The Dramatic Recent Shift in U.S. Immigration Laws

United States law long posed harsh obstacles to lesbian, gay, bisexual and transgender (L.G.B.T.) immigrants. Throughout most of the twentieth century, lesbians, gay men and bisexuals were officially barred from admission into the U.S.[1] This meant that non-citizens identified as homosexual or bisexual were legally barred from entering the country and that they could be deported later if they were found out.[2] Even after this bar to admissibility was dropped in 1990, a similar bar on HIV-positive immigrants remained in effect until 2010.[3]

As of June 2013, same-sex couples were not recognized for most immigration and citizenship purposes even if they were legally married in a U.S. state or foreign nation. The Defense of Marriage Act (D.O.M.A.) of 1996 clearly defined "marriage" and "spouse" to exclude same-sex couples for all federal purposes, including immigration and citizenship.[4] Many L.G.B.T. U.S. citizens were therefore forced to choose between life alone in the U.S. and life in *de facto* exile with their spouses or partners. In cases where no other country would allow the couple to immigrate together, separation was the only legal choice.

[1] Scott Titshaw, 'The Meaning of Marriage: Immigration Rules and their Implications for Same-Sex Spouses in a World Without DOMA' (2010) 16 Wm. & Mary J. Women & L. 537, 586-88

[2] In *Boutilier v. I.N.S.*, 387 U.S. 118 (1967), for example, the U.S. Supreme Court upheld the deportation of a Canadian man, who had spent most of his adult life as a U.S. lawful permanent resident, because his bisexuality proved he was "afflicted with psychopathic personality" at the time of his earlier entry.

[3] Lori Scialabba, et. al, USCIS Memorandum regarding Public Law 110-293, 42 C.F.R. §34.2(b), and Inadmissibility Due to Human Immunodeficiency Virus (HIV) Infection (2009)

[4] Defense of Marriage Act, Pub. L. No. 104-99, §§ 1-3, 110 Stat. 2419 (1996)

2.1 United States v. Windsor and Its Implementation by the Obama Administration: A Place of Celebration Rule for Federal Marriage Validity

In the summer of 2013, the judicial and executive branches of the U.S. government changed immigration law dramatically for same-sex couples. First, the U.S. Supreme Court struck down D.O.M.A.'s anti-gay federal definitions of "spouse" and "marriage" as a violation of the equality guarantee of the United States Constitution in *United States v. Windsor*.[5] Then, the Obama administration interpreted existing immigration and citizenship law to incorporate all same-sex spouses and marriages wherever the terms "spouse" and "marriage" occurred in the statutes and regulations so long as a marriage was legal in the U.S. state or foreign country where it was celebrated.[6]

All of the numerous formal immigration advantages of marriage now attach equally to legally married same- and different-sex married couples. If a same-sex couple marries in South Africa or Iowa, where the marriage is valid, they will be recognized as "spouses" under the Immigration and Nationality Act (I.N.A.), even if they live, or plan to live, in Mississippi or Alabama, where same-sex marriages are invalid under the state constitutions.[7] Thus, a U.S. citizen will be able to sponsor his foreign national husband immediately for an immigrant visa or for adjustment to lawful permanent resident status.[8] If the foreign national is in removal proceedings because of immigration violations or even criminal convictions, he may be eligible for relief based on his U.S. citizen husband.[9] If a Kazakh lesbian is engaged to marry a U.S. citizen from Texas, the U.S. Consulate in Kazakhstan will issue her a fiancée visa to do so, so long as they declare their intent to marry in a U.S. state where their marriage will be valid.[10] A legally married Spanish worker in temporary employee visa status will also be eligible to bring along her wife as a dependant.[11]

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[5] 113 S.Ct. 2675 (2013).

[6] This was clarified within days of the *Windsor* decision, first by President Obama, then by the State Department, the Department of Homeland Security and the Board of Immigration Appeals. Scott Titshaw, 'Revisiting the Meaning of Marriage: Immigration for Same-Sex Spouses in a Post-*Windsor* World' (2013) 66 Vand. L. Rev. en banc 167, 169

[7] Miss. Const. art. XIV, § 263A; Ala. Const. amend. 774

[8] The U.S. immigration system relies on an extensive system of country- and category-based annual quotas for new lawful permanent residents in both employment and family-based categories, 8 U.S.C. § 1153(a). The wait for a quota number can last years. U.S. Department of State Visa Bulletin <http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2014/visa-bulletin-for-september-2014.html> But spouses and dependent, minor children are exempt from these restrictions as "immediate relatives." 8 U.S.C. § 1151(b)(2)(A)(i)

[9] 8 U.S.C. §1182(h)(1)(B). In addition to criminal inadmissibility, spouse-based waivers are available in the cases of inadmissibility or removability based on everything from membership in a totalitarian party, 8 U.S.C. §1182(a)(3)(D)(iv), to public charge issues, 8 U.S.C. §1182(a)(4)(C)(i)(I), "alien smuggling," 8 U.S.C. §1182(a)(6)(E)(ii), unlawful presence, 8 U.S.C. §1182(a)(9)(B)(v), health-based grounds, 8 U.S.C. §1182(g)(1)(A), and even misrepresentation and fraud, 8 U.S.C. §1182(i)(1) & 8 U.S.C. §1227(a)(1)(H)(i).

[10] This example raises the question of what might happen to immigrants while they are awaiting a visa after revealing a same-sex relationship in particularly homophobic countries. The State Department has recognized this possible danger and established procedures for third-country processing in some cases. Minutes of AILA/Department of State Liaison Meeting on October 9, 2014, American Immigration Lawyers Association (AILA) InfoNet Doc. No. 14101042 (posted 10 Oct. 2014), available at <http://www.aila.org/content/default.aspx?docid=50361>

[11] For example, spouses may obtain H-4 visas to accompany temporary H-1B workers in speciality occupations. 8 U.S.C. § 1101(a)(15)(H)

2.2 Justification for the Place of Celebration Rule

The Obama administration's post-*Windsor* reading of existing immigration law to include most same-sex spouses was both good policy and consistent with precedent, but it was not inevitable. *Windsor* was a federal estate tax case, not an immigration case. Perhaps immigration should be different? Former U.S. Attorney General Alberto Gonzales joined another author to make that argument in a *New York Times* op-ed soon after *Windsor* was decided.[12] They cited a thirty-year-old precedent from one of America's twelve federal courts of appeals and argued that the terms "spouse" and "marriage" were not intended to include same-sex couples at the time when the Immigration and Nationality Act (I.N.A.) was enacted in 1952.[13]

Of course, it is unlikely that President Eisenhower or the United States Congress had same-sex marriages in mind as they enacted the I.N.A. during an era when no jurisdiction in the world recognized marriage equality. However, even if one focuses solely on legislative intent rather than a modern understanding of the English language,[14] the very specific Gonzales approach is not the only way to view legislative intent. With the exception of unconsummated proxy marriages,[15] Congress defined neither "marriage" nor "spouse" in the I.N.A. Given this Congressional silence, lawmakers likely assumed the federal government would continue to recognize marriages as defined by the laws of relevant U.S. states and foreign jurisdictions. With the statutorily defined exceptions of proxy-marriage, polygamy (inferred from the express bar to admissibility of "practicing polygamists" in the I.N.A.)[16], and same-sex spouses (under D.O.M.A.), that is what U.S. immigration authorities and courts have done for a century.[17] The U.S. Supreme Court has expressly recognized the legitimacy of this approach in other federal contexts, explaining:

> The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.[18]

Of course, reliance on relevant state and foreign marriage law begs the question: *Which* jurisdiction is "relevant" in a given case?

United States immigration law has generally employed a place-of-celebration rule to

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[12] Alberto R. Gonzales & David N. Strange, 'What the Court Didn't Say' *New York Times* (18 July 2013) 3

[13] ibid

[14] Dictionaries now commonly include same-sex marriages within their definitions of the term. See <http://www.merriam-webster.com/dictionary/marriage>

[15] 8 U.S.C. § 1101(a)(35)

[16] 8 U.S.C. §1182(a)(10)(A)

[17] Scott Titshaw, 'The Meaning of Marriage: Immigration Rules and their Implications for Same-Sex Spouses in a World Without DOMA' (2010) 16 Wm. & Mary J. Women & L. 537, 559-64

[18] *De Sylva v. Ballentine* (1956) 351 U.S. 570, 580

determine whether to recognize a non-fraudulent marriage as legal.[19] The Board of Immigration Appeals (B.I.A.), the highest U.S. administrative immigration court, however, has historically recognized some exceptions when a couple was domiciled in a state with a strongly held public policy objection to the category of marriage in question.[20] These cases were generally old ones dealing with subjects like interracial marriages and marriages among close relatives, but the handbook used by immigration authorities still includes references to that concept.[21] However, these exceptions to the place-of-celebration rule were rare and the level of "public policy objection" required was extremely high, usually based on state laws criminalizing the marriages in question.[22] Such exceptions now are unlikely in the context of consenting, non-commercial adult same-sex relationships because the U.S. Supreme Court has made it clear that their criminalization is unconstitutional.[23]

2.3 Registered, But Unmarried Couples – Civil Unions, Domestic Partnerships, Registered Partnerships, etc.

The State Department clarified early on that "at this time" it would only recognize a relationship "legally considered to be a marriage in the jurisdiction where it took place."[24] This seemingly temporary language remains on its website, and that is likely to continue in light of the particular terms "marriage" and "spouse" used throughout the I.N.A. However, the State Department has recognized unmarried cohabitation as "the functional equivalent of marriage" for some discrete purposes, where "[l]ocal laws recognize such cohabitation as being fully equivalent in every respect to a traditional legal marriage."[25] Perhaps, immigration officials will eventually give broader recognition to such legally registered couples, at least those in jurisdictions defining partners in civil unions as "spouses."[26]

As described below, even if their parents' partnerships are not generally recognized as marriages by immigration authorities, the children of same-sex couples in registered civil partnerships have a strong claim to recognition as "born in wedlock" under the I.N.A. Yet that claim has not yet been recognized in all contexts.

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[19] Titshaw, note 17 above, at 559-64. Like most European countries, the U.S. has long refused to recognize "fraudulent" marriages undertaken solely for the purpose of obtaining immigration benefits, but that focus on specific marriages does not generally extend to the validity of whole categories of marriage. Ibid at 580-82

[20] ibid at 564-75

[21] 12 Adjudicator's Field Manual ch. 2(a)(1). However, the same section now also specifies regarding same-sex marriages in particular, that "if the state of residence has a public policy refusing to recognize same-sex marriage, this will not result in a same-sex marriage being considered invalid for immigration purposes if it is valid in the place of celebration." Ibid

[22] Titshaw, note 17 above, at 569

[23] *Lawrence v. Texas* (2003) 539 U.S. 558

[24] 'U.S. Visas for Same-Sex Spouses: FAQs for Post-Defense of Marriage Act' <http://travel.state.gov/content/dam/visas/DOMA/DOMA%20FAQs.pdf> accessed 27 Sept. 2014

[25] 9 Foreign Affairs Manual § 40.1 N 1.2

[26] The U.S. state of New Jersey expressly defined the partners in a Civil Union as "spouses" under its state law. N.J. Stat. Ann. § 37: 1-33 (2013). However, a New Jersey challenge is less likely after that state recognized full marriage equality for same-sex couples in September 2013. <http://www.freedomtomarry.org/states/entry/c/new-jersey>

2.4 Immigration and the Children of Same-Sex Couples

Stemming from the invisibility of their parents' marriages under federal law, the children of married same-sex couples sometimes lost out under D.O.M.A. as well. The I.N.A. defines "child" in terms of birth in or out of wedlock. Under the Obama administration's implementation of *Windsor*, it appears that children now qualify as "born in wedlock" if their parents are in a same-sex marriage at the time of their birth without having to demonstrate a "natural" and "bona-fide" parent-child relationship as do children born "out of wedlock."[27] Further, since the I.N.A. does not define "born in wedlock," a functional definition that includes the children of civil unions and of other marriage-like registered partnerships could be a valid interpretation of the term.[28] This interpretation would coincide with the overriding I.N.A. policy of family reunification. In the context of citizenship transmission, it would also coincide with the international law imperative against stateless children.[29]

For immigration purposes, the I.N.A. also provides benefits to stepchildren, defined in terms of "the marriage creating the status of stepchild."[30] D.O.M.A. presumably prevented benefits for "stepchildren" created by same-sex marriages. Fortunately, following the changes described in Section 2.1 above, a child can now qualify for immigration benefits as a stepchild, even if her parents are a same-sex couple. So a newlywed gay U.S. citizen may now petition for an immigrant visa on behalf of his stepchild as well as his new husband.

On the other hand, the I.N.A. does not recognize birthright citizenship for stepchildren. In fact, it employs a completely different definition of parentage for citizenship purposes, and the treatment of children conceived through assisted reproductive technology (A.R.T.) has been much less favorable in that context.

2.5 Birthright Citizenship for Children Conceived through Assisted Reproductive Technology

The Fourteenth Amendment of the United States Constitution guarantees *ius soli* citizenship, stating that "[a]ll persons born . . . in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[31] The Constitution additionally provides Congress with the power to "establish an uniform Rule of Naturalization,"[32] and Congress has provided in the I.N.A. for *ius sanguinis* based citizenship acquisition as well, including automatic citizenship upon birth abroad to U.S. citizen parents.[33] In this context, the U.S. State Department has moved very slowly in recognizing citizenship transmission to children conceived through assisted reproductive technology (A.R.T.). While a larger number of different-sex couples are

[27] 8 U.S.C. § 1101(b)(1)(D)

[28] For a fuller exposition of this argument, see Scott Titshaw, 'A Modest Proposal: To Deport the Children of Gay Citizens, & Etc.: Immigration Law, the Defense of Marriage Act and the Children of Same Sex Couples' (2011) 25 Geo. Immigr. L.J. 407, 483-84

[29] Convention on the Rights of the Child, Art. 7; The Universal Declaration of Human Rights, Art. 15

[30] 8 U.S.C. § 1101(b)(1)(B)

[31] U.S. Constitution, Amendment XIV, Section 1.

[32] U.S. Constitution, Art. I, Section 8.

[33] 8 U.S.C. § 1401, 8 U.S.C. § 1409

affected by this rule, it affects a higher percentage of lesbians and gay men, who have more limited options for procreation.

For years, the State Department seemed to take the concept of "blood" transmission literally, defining the requirement for parent-child recognition in this context in genetic terms. The donors of the sperm and egg that created a child were her parents, regardless of whose womb was used or who were the intended and legal parents of the child.[34] The State Department even extended this genetic essentialism to its conception of whether a child was "born in wedlock," focusing on whether the sperm and egg that created the child came from a married couple. If not, the child was considered "born out of wedlock" and subject to the more difficult criteria in that category.[35]

Of course, this lead to absurd results in many situations. The most compelling were probably those of women, who gave birth to children they intended to mother and who were viewed as mothers at birth under relevant family law. For example, a U.S. citizen woman with fertility problems, might use a donated egg and her non-citizen husband's sperm to conceive a child *in vitro*, which she later carries to term. In analyzing the child's citizenship upon birth abroad, the State Department views the child as "born out of wedlock" and, because it is not genetically related to the U.S. citizen mother, citizenship would not have been transmitted.[36]

Fortunately, in early 2014, the State Department adjusted its analysis slightly in order to remedy the specific situation described above. Now it focuses on "biological" parentage, which comprises genetic parents and intended and legal mothers who actually gives birth to the children.[37] This means that the mother in the prior example would now transmit her U.S. citizenship to her child. Under its new interpretation, the State Departent also views a child as born in wedlock if born to two women, a genetic and a birth mother, both of whom would be considered to have the requisite "biological relationship" to the child.[38] However, parents using a surrogate to carry a child to term will continue to be relevant for citizenship purposes only to the extent a U.S. citizen provides his or her genetic material. Relevant family law related to the parents' marriage and presumed legal parentage do not control. This could result in stateless children in many diverse circumstances.[39]

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[34] Scott Titshaw, 'Sorry Ma'am Your Baby is an Alien: Outdated Immigration Rules and Assisted Reproductive Technology' (2010) 12 Fla. Coastal L. Rev. 47

[35] 7 Foreign Affairs Manual 1131.4-2

[36] Titshaw, note 34 above, at 105

[37] Important Information for U.S. Citizens Considering the Use of ART Abroad <http://travel.state.gov/content/travel/english/legal-considerations/us-citizenship-laws-policies/assisted-reproductive-technology.html> The Department of Homeland Security's U.S.C.I.S. has recently confirmed this approach as well. USCIS Policy Alert (28 Oct. 2014) on Effect of Assisted Reproductive Technology (ART) on Immigration and Acquisition of Citizenship under the Immigration and Nationality Act (INA), available at <http://www.uscis.gov/policymanual/Updates/20141028-ART.pdf>

[38] ibid

[39] For example, if a child is born in a *ius sanguinis* jurisdiction that recognizes the child's genetic non-U.S.-citizen-father and his U.S. citizen wife as the chlid's legal parents, the child would be stateless unless it happened to be covered by the citizenship transmission requirements of the father's country of nationality.

3 A Brief Overview of European Immigrant Same-Sex Spouses or Partners and their Children

Unlike the United States, many European countries have long provided immigration benefits to the foreign national same-sex partners of their citizens.[40] Yet, a number of European countries still do not generally recognize same-sex partnerships for immigration purposes today.[41] The European Union, however, has set some relevant minimum requirements for its Member States.

3.1 Families of Third-Country Residents of the European Union

E.U. Council Directive 2003/86/EC on the right to family reunification sets a floor for immigration by spouses and dependant children of third-country nationals with residence permits in E.U. Member States (except Denmark, Ireland and the United Kingdom.)[42] While the Directive still allows individual States a lot of leeway regarding waiting periods,[43] integration requirements,[44] and other restrictions, it has generally had a liberalizing and harmonizing effect.[45]

However, the Directive expressly leaves each Member State to decide whether to "authorize family reunification . . . of unmarried or registered partners" with regard to its own residents and those of other Member States migrating within the E.U.[46] It also has no application to immigration cases when only one E.U. Member State is involved, leading to occasional discrimination against the spouses of a country's own citizens in contrast to the spouses of migrating citizens from other Member States.[47]

The Directive clearly covers minor adopted children of E.U. residents, but it is silent with regard to presumed parent-child relationships of children conceived through A.R.T.[48] The qualification of these dependants apparently hinges instead on each country's national laws.

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[40] Scott Long, Jessica Stern and Adam Francoeur, *Families, Unvalued: Discrimination, Denial, and the Fate of Binational Same-Sex Couples under U.S. Law* (2006) 152-72

[41] One recent article references a not-yet-published survey of legal experts including representatives from most European countries to note that a foreign same-sex marriage or registered partnership would probably still not be recognized for residence permit purposes in a quarter of the countries surveyed. Kees Waaldijk, 'The Right to Relate: A Lecture on the Importance of "Orientation" in Comparative Sexual Orientation Law' (2013) 24 Duke J. of Comp. & Int'l L. 161, 198

[42] Helena Wray, Agnes Agoston & Jocelyn Hutton, 'A Family Resemblance?: The regulation of Marriage Migration in Europe' (2014) 15 European J. of Migration & L. 209, 216

[43] The Directive only requires a Member State to allow family reunification of residents who have stayed in their territory for more than two years. Article 8

[44] Article 7(2)

[45] "The Directive had a varied impact although it led overall to greater harmonization. Of the 13 countries that had transposed by the end of 2006, the outcome was more liberalization in 8 states, more restrictions in 3 and a mixed effect in the remainder." Wray, et. al , note 42 above, at 218

[46] Article 4(3)

[47] Peter Van Elsuwege and Dimitry Kochenov, 'On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights' (2011) 13 European J. of Migration & L. 443

[48] Article 3(5)

3.2 Families of E.U. Citizens

The spouses and children of E.U. citizens have more protections under E.U. law than those of third country residents. Directive 2004/38/EC of the European Parliament and the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states ("The Citizens' Directive") incorporates, revises and supplements a number of prior directives and judicial decisions into a more comprehensive instrument. It generally gives third-country family members of E.U. Citizens rights mirroring their own.[49] This is understandable since obstacles to families' migrating together seriously discourage the exercise of freedom of movement, which is a cornerstone of the European Union and a fundamental component of E.U. Citizenship.[50] Yet, the Citizens' Directive allows Member States some discretion in deciding who is a "family member."

Along with parents and dependant and minor children, the Citizens' Directive expressly defines "family member" to include the E.U. citizen's "spouse."[51] On its face, this appears to clearly include same-sex spouses. However, the European Court of Justice has not directly addressed this point in spite of slow implementation in some E.U. Member States.

The directive proceeds to also include "the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of the Member State," but only "if the host Member State treats registered partnerships as equivalent to marriage . . ."[52] This leads to a complex matrix of recognition questions in light of the many divergent forms of same-and different-sex marriage and registered and unregistered partnerships in Europe, not all of which are readily answered.[53]

The preamble of the Citizens' Directive charges Member States with "examining" the "persons who are not included in the definition of family members under this Directive . . . on the basis of its own national legislation, in order to decide whether entry and residence could be granted."[54] Perhaps, this might lead some States to read their national laws more liberally on this issue than they otherwise would, but it is not clear this is happening yet. While twenty states within the European Economic Area (E.E.A.) recognize same-sex marriages or registered partnerships domestically, only eight states provide equal rights of family reunification to same- and different-sex partners.[55] Several countries allow admission of same-sex partners, but on a narrower basis.[56]

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[49] Wray, et. al, note 42 above, at 220

[50] Kees Waaldijk, 'The Right to Relate: A Lecture on the Importance of "Orientation" in Comparative Sexual Orientation Law' (2013) 24 Duke J. of Comp. & Int'l L. 161, 197 (citing numerous scholars, who have made this point.)

[51] Citizens' Directive, Article 2(2)

[52] ibid

[53] The vast number of possible permutations and uncertainties becomes clear upon merely looking at a group of 3 E.U. states such as the U.K., Belgium, and The Netherlands. Ian Curry-Sumner, 'Interstate Recognition of Same-Sex Relationships in Europe' (2009) 13 J of Gender, Race & Justice 59

[54] Whereas clause 6

[55] Wray, et. al, note 42 above, at 238 (adding the caveat that other states may provide additional protections under the category of unregistered cohabiting partners)

[56] ibid. (citing Italy, which only permits the immigration of same-sex legal spouses with marriages in an E.U. member state, and France, which provides only a second-class status.)

The Citizens' Directive is also silent regarding what constitutes a parent-child relationship in the A.R.T. context. Filling this gap, the Council of Europe officially recommended *ius sangunis* citizenship transmission to the states of the intended parent(s), which recognize an underlying parent-child relationship.[57] However, laws still vary from state to state, leaving children at risk of being stateless.[58]

4 Conclusion: Comparison and Conjecture

Just over five years ago, the United States seemed to lag far behind Europe when it came to the families of lesbians and gay men. By 2008, Massachusetts was the only U.S. state that recognized marriage equality, and it was forced to do so by a court. Most states had adopted anti-gay state constitutional amendments that barred same-sex marriages and, in some cases, any recognition of same-sex relationships.[59] Meanwhile, the popularly elected legislatures of three European countries had recognized same-sex marriage, Norway and Sweden were on the verge of joining them, and a dozen European countries recognized various types of registered partnership.[60] Even more European nations provided immigration benefits for the foreign same-sex partners of their citizens.[61] Yet D.O.M.A. prevented almost any recognition of same-sex couples for U.S. immigration purposes.

4.1 Comparing Recent Changes on Both Sides of the Atlantic

Over the past four years, the marriage equality tide appears to have developed into a tsunami in the United States, which now appears to be outpacing movement in Europe. While European progress has continued apace with six more countries recognizing marriage equality, the United States has seen a tremendous escalation in rights recognition. Now thirty-two states and the District of Columbia recognize same-sex marriage, and many have done so through legislation or plebiscites.[62] Unlike European same-sex marriage recognition, American marriage equality also tends to be truly equal, with no carve-outs regarding parenting, adoption or the use of assisted reproductive technology. And most importantly for immigration purposes, the federal government now uniformly recognizes same-sex marriages that are valid in the jurisdiction where they were celebrated.

The U.S. Supreme Court is likely to decide whether there is a right to marriage equality for

[57] Maarten P. Vink and Gerard-René, *Birthright Citizenship: Trends and Regulations in Europe* (2010) 8.

[58] ibid

[59] Scott Titshaw, 'The Reactionary Road to Free Love: How DOMA, State Marriage Amendments, and Social Conservatives Undermine Traditional Marriage' (2012) 115 W. Va. L. Rev. 205, 255-63.

[60] By 2009, The Netherlands, Belgium, Spain, Norway and Sweden recognized marriage equality, and over a dozen other European countries provided some lesser form of relationship recognition to same-sex couples. Kees Waaldijk, 'Legal Family Formats for (Same-Sex) Couples' in these *Proceedings*, 121.

[61] James D. Wilets, 'A Comparative Perspective on Immigration Law for Same-Sex Couples: How the United States Compares to Other Industrialized Democracies' (2008) 32 Nova L. Rev. 327, 329.

[62] < http://www.freedomtomarry.org/states/>

same-sex couples within the next year or two. With growing public support and state recognition in the U.S. as well as near unanimity among courts that have considered this question after *Windsor*, it seems likely the Court will find such a right.[63] If so, the discussion will be over in the United States. Same-sex couples will be able to wed (and divorce) equally with different-sex couples. While it may take longer to resolve, U.S. constitutional protections would arguably also extend to the use of A.R.T. and presumed parenthood. (Adoption may be a special case, since it often involves difficult choices in the best interests of children, choices that would be unacceptable in other contexts.[64])

In Europe, on the other hand, it appears highly unlikely that either the European Union or the European Court of Human Rights will soon require universal recognition of equality for same-sex couples or their children. More relevant for purposes of this paper, there does not seem to be a push for imminent harmonization around the equal recognition of same-sex couples and their children under immigration and citizenship laws in Europe.

4.2 Conjecture regarding Possible Reasons for Divergence

There are several possible explanations for the divergent present outlook regarding the speed of change in recognition of immigration and other benefits for L.G.B.T. families in the U.S. and Europe. First, U.S. cultural trends and public opinion may be somewhat more uniform in light of shared language, media and history. Yet citizens of Alabama and Mississippi are arguably at least as intolerant of LGBT families as Poles and Italians.[65] Thus, this explanation seems incomplete.

A second possibility is the difference in government structure and its public acceptance. The widely recognized supremacy of America's federal Constitution has been clear since the end of the Civil War in 1865. (Alabama has recognized bi-racial marriages since the Supreme Court held they were constitutionally protected in 1967, even though they were disfavored by a sizeable number of that state's voters.) Europe remains a hybrid, supranational system with institutions still developing and subject to some doubt as it negotiates its geographical, political and sociological boundaries. This difference in federal/supranational government structure and development is particularly important in the area of immigration, which is primarily a federal responsibility in the U.S., but still an evolving hybrid in Europe, governed by Member State law under the direction of an E.U. work in progress.

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[63] The U.S. Supreme Court offered further support for this assumption when it recently refused to review three federal appellate decisions striking down state marriage discrimination against same-sex couples. Although refusals to hear discretionary appeals have no formal precedential value, it is hard to imagine that the Court did not consider the practical implications of its recent decision. A later Supreme Court decision upholding anti-gay marriage laws would likely lead to great uncertainty in the sixteen states where same-sex marriage will soon be recognized based on the federal appellate decisions the Court has refused to review.

[64] It is unlikely that any categorical prohibition on adoption by married same-sex couples could withstand constitutional scrutiny after *Windsor* and any case finding a broad right to marry for same-sex couples, but that may not necessarily mean same-sex couples will always be treated equally as prospective adoptive parents. Courts have long tolerated considerations in adoptions that would never be allowed in other legal contexts, such as race and sex, if there is a nexus to the child's best interests.

[65] Well over eighty percent of the populace of each state voted to amend their state constitutions to disapprove of same-sex marriage.

Finally, Europe's early legislative victories in the recognition of same-sex relationships may have now become an obstacle to equality for migrating couples. As countries like The Netherlands and Belgium pioneered the legal recognition of such relationships, their success was partly due to pragmatism and willingness to compromise, first on non-marital alternatives, then on marriage with carve-outs (like adoption and presumed parentage).[66] As other European states followed this model, the laudable democratic manner in which each came to recognize same-sex relationships created a different compromise, resulting in tremendous complexity in the end. This plethora of experimental alternatives to marriage is an exciting positive development for those who support greater freedom in relationship recognition.[67] Yet, in the context of questions about the cross-border treatment of these relationships, complexity can lead to confusion, at least in the short term.

The European model was influential in the United States as well. Yet, there, the first major successes were judicial in nature. Courts in Hawaii, Vermont, and Massachusetts, framed the question in terms of marriage equality and pushed legislatures to recognize reciprocal beneficiaries, civil unions and eventually marriage. They simultaneously inspired D.O.M.A. and the mass adoption of state constitutional amendments, often prohibiting registered partnerships and other forms of compromise. The state constitutions stopped movement towards partial recognition in much of the country while D.O.M.A. froze non-recognition of federal benefits in place for seventeen years. By the time the Supreme Court decided *Windsor*, no one wanted to compromise, and the question that remained was often a binary yes-no on full formal marriage equality. That binary may not be optimal, but it certainly simplifies some of the cross-border issues. And the difference may lie in the distinction between progress instigated through legislative or through judicial and executive means.

[66] Kees Waaldijk, 'Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries' (2004) 38 New England Law Review 569

[67] Jessica Feinberg, 'The Survival of Non-Marital Relationship Statuses in the Same-Sex Marriage Era: A Proposal' (2014)(forthcoming) 87 Temple L. Rev. ___

Standard internazionali e tutela delle *rainbow families* nell'UE: le nozioni di "famiglia" e di "*best interest* del minore" nel sistema ONU di protezione dei diritti umani

Luca Paladini∗

Abstract

Il *paper* prende in esame le nozioni "famiglia" e di "*best interest* del minore" maturate nel sistema ONU di protezione dei diritti umani, al fine di comprendere se offrano indicazioni a tutela dell'unità familiare delle *rainbow families*, il cui ricongiungimento nell'UE, alla luce delle direttive 2003/86/CE e 2004/38/CE, non è sempre garantito. L'esame della pertinente prassi evidenzia che la nozione di "famiglia" è ampia, ma dev'essere contestualizzata nell'ambito di riferimento; nell'UE, essa sembra includervi le famiglie omogenitoriali stabili attraverso il richiamo alla giurisprudenza sull'art. 8 CEDU. Quanto ai figli, il principio del *best interest* del minore previsto dalla Convenzione di New York del 1989 richiede, *inter alia*, che la tutela dell'unità familiare sia da considerare in termini di ricongiungimento qualora il fanciullo sia separato dai genitori in seguito a movimenti migratori. A nostro avviso, gli *standard* internazionali considerati depongono, in coordinamento interpretativo con le fonti UE sui diritti fondamentali, a favore di un'interpretazione evolutiva delle due direttive che garantisca alle famiglie omogenitoriali stabili il ricongiungimento familiare all'interno dell'UE.

Keywords

UE, ONU, diritti fondamentali, famiglia, interesse del minore, interpretazione del diritto UE.

* * * * *

1 L'incerto ricongiungimento familiare delle famiglie omogenitoriali nell'UE

Sebbene nelle direttive 2003/86/CE e 2004/38/CE il ricongiungimento familiare a beneficio dei cittadini UE che esercitano il diritto alla libera circolazione e dei cittadini degli Stati terzi legalmente soggiornanti sia stato agganciato al diritto alla vita familiare,[1] ci sono famiglie la cui unità non è sempre garantita.

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[1] Considerando 2 ss. della direttiva 2003/86/CE e considerando 6 e 31 della direttiva 2004/38/CE.

È il caso delle *rainbow families*, nelle quali il ruolo genitoriale è esercitato da due persone dello stesso sesso legate da una relazione affettiva, il cui incerto ricongiungimento dipende da fattori quali la formalizzazione della coppia davanti alla legge (se è stato possibile e nelle forme ammesse) e l'apertura dell'ordinamento di destinazione verso queste unioni. Non è chiaro, ad esempio, se il termine "coniuge" contenuto nelle direttive includa il *same-sex spouse*, quindi il suo ricongiungimento non è certo come quello dell'*opposite-sex spouse*. Ancora, in base alla direttiva 2004/38/CE il ricongiungimento del *partner* registrato è garantito se l'ordinamento di destinazione riconosce le *partnership*, ma in difetto di tale apertura la coppia dovrà tentare di ottenere (con ragionevole certezza) il ricongiungimento come unioni stabili.[2] Per le unioni di fatto il ricongiungimento è ancora più incerto, poiché gli Stati membri hanno un obbligo di carattere "meramente promozionale"[3] di agevolare l'ingresso del *partner* del cittadino UE, mentre nel caso dei cittadini degli Stati terzi il ricongiungimento è rimesso alla loro discrezionalità.[4]

La stessa incertezza investe la prole. Mentre è garantito il ricongiungimento del figlio biologico dell'individuo che circola nell'UE o vi entra per soggiornarvi legalmente, la riunione con il figlio del *same-sex spouse* o del *partner*, anche *de facto*, dipende dai fattori sopraindicati, quindi non è detto che il minore possa proseguire la convivenza con entrambe le figure genitoriali, biologiche e di fatto, che hanno provveduto alla sua crescita e al suo sviluppo.

Tale scenario variabile permane nonostante le direttive siano state oggetto di interventi interpretativi atti a rendere il diritto al ricongiungimento il più effettivo possibile. La Corte UE ha più volte ribadito che l'autorizzazione al ricongiungimento familiare è la regola generale della direttiva 2003/86/CE e che le relative limitazioni devono essere interpretate restrittivamente, così come la discrezionalità riconosciuta agli Stati membri nell'attuazione della direttiva non deve pregiudicarne l'obiettivo e l'effetto utile.[5] Inoltre, ai fini del ricongiungimento del *partner* di fatto ai sensi dell'art. 3 della direttiva 2004/38/UE, la Commissione ha sottolineato che "(i)l requisito della stabilità della relazione va valutato alla luce dell'obiettivo della direttiva di preservare l'unità della famiglia in senso ampio" e che il rifiuto dell'ingresso o del soggiorno deve essere motivato e poter formare oggetto di ricorso.[6]

Colpisce, pertanto, che mentre nel caso *Chakroun* la Corte UE afferma che le misure

[2] Cfr. Jorrit Rijpma and Nelleke Koffeman, "Free Movement Rights for Same-Sex Couples under EU law: What Role to Play for the European Court of Justice?" in D Gallo et al. (eds) *Same Sex Couples Before National, Supranational and International Jurisdictions* (Springer 2014) 472 ss.

[3] Cfr. Adelina Adinolfi, "Il ricongiungimento familiare nel diritto dell'Unione europea" in R Pisillo Mazzeschi et al. (eds), *Diritti umani degli immigrati. Tutela della famiglia e dei minori* (Editoriale scientifica 2010) 122.

[4] Tale situazione riguarda anche i *partner* registrati. Quindi, di fatto è più certo il ricongiungimento della coppia *same-sex* con figli minori qualora uno dei *partner* sia cittadino di uno Stato terzo nel quale l'omosessualità è perseguita penalmente, poiché sarebbe un avente diritto all'asilo in uno Stato membro (cfr. cause riunite C-199/12 *X*, C-200/12 *Y* e C-201/12 *Z* [2012] nyp).

[5] C-578/08 *Chakroun* [2010] ECR I-1839, para 41 ss. e, con riguardo ai minori, cause riunite C-356/11 *O. e S.* e C-357/11 *L.* [2012] nyp, para 69. Per un'applicazione analogica del principio espresso in *Chakroun*, C-571/10 *Kamberaj* [2012] nyp, para 86.

[6] Cfr. Commissione, "Orientamenti per un migliore recepimento e una migliore applicazione della direttiva 2004/38/CE relativa al diritto dei cittadini dell'Unione e dei loro familiari di circolare e di soggiornare liberamente sul territorio degli Stati membri" (Comunicazione) COM (2009) 313 def.

riguardanti il ricongiungimento familiare debbano essere adottate in conformità con l'obbligo di protezione della famiglia e di rispetto della vita familiare consacrato dalla Carta UE, dalla CEDU e "in numerosi atti di diritto internazionale",[7] le due direttive soffrano ancora di chiari limiti in tema di rispetto dei diritti fondamentali (e anche di cittadinanza UE).[8]

2 Interpretazione del diritto UE e *standard* internazionali

Trattasi di criticità così evidenti che, com'è stato affermato, è solo questione di tempo prima che la Corte UE si esprima sul rifiuto di uno Stato membro di concedere il ricongiungimento al *same-sex partner* di un cittadino dell'UE ivi trasferitosi.[9]

In proposito, a nostro avviso le opzioni possono essere diverse. Ad esempio, i giudici del Lussemburgo potrebbero doversi esprimere sulla nozione di "coniuge" ai sensi della direttiva 2004/38/CE, concentrandosi quindi su questioni di mutuo riconoscimento dei matrimoni tra gli Stati membri, oppure potrebbero dover chiarire in presenza di quali elementi una coppia di fatto, anche composta da cittadini di Stati terzi, si può considerare "stabile" e pertanto meritevole di ricongiungimento, tenendo conto sia dell'obiettivo comune alle direttive di preservare l'unità familiare, sia dei chiarimenti interpretativi già offerti. Inoltre, in presenza di figli minori, gli stessi giudici ne dovrebbero considerare i diritti in relazione al caso concreto.

In ogni caso, la Corte UE esaminerebbe la questione posta alla sua attenzione tenendo conto *in primis* delle fonti privilegiate di tutela dei diritti fondamentali nell'UE, quindi dell'art. 6 TUE e dei principi generali, della Carta UE e della CEDU. Non si può però escludere un richiamo anche ai pertinenti *standard* di tutela maturati in ambito ONU quali parametri interpretativi sussidiari,[10] nell'ipotesi in cui fissassero livelli di protezione dei diritti fondamentali maggiori di quelli garantiti nell'UE oppure qualora corroborassero un'interpretazione del diritto UE tesa a innalzare la tutela degli stessi diritti.

Tale *modus interpretandi* sarebbe in linea con la giurisprudenza della Corte UE, dalla quale emerge la tendenza a interpretare il diritto UE soprattutto secondo i metodi teleologico e sistematico.[11] Infatti, atteso che il rispetto dei diritti umani e il divieto di discriminazione sono valori fondanti e obiettivi dell'UE,[12] un innalzamento di tutela dei diritti fondamentali nell'ambito delle competenze attribuite costituirebbe uno sviluppo possibile alla luce sia dell'oggetto e dello scopo dei trattati sull'UE, sia del suo contesto normativo, da realizzare anche attraverso un coordinamento

[7] C-578/08 (n 5) para 44.

[8] Su tale specifico aspetto, cfr. Helen Stalford, *Children and the European Union* (Hart Publishing 2012) e Ellen Nissen, *The Rights of Minor EU Member State Nationals Wishing to Enjoy Family Life with a Non-EU Parent in their Country of Nationality* (WLP 2013).

[9] Da ultimo, Nelleke Koffeman, '*EU Free movement law and rainbow families – waiting for the leading case*', ROTM Rainbow families in Europe Project, Ljubljana, 8 March 2014.

[10] Si tratterebbe del richiamo a "qualsiasi regola pertinente di diritto internazionale applicabile nei rapporti fra le parti" (cioè, gli Stati membri dell'UE) *ex* art. 31 della Convenzione di Vienna del 1969 sul diritto dei trattati.

[11] Cfr. Federico Casolari, *L'incorporazione del diritto internazionale nell'ordinamento dell'Unione europea* (Giuffré 2008) 131 ss.

[12] Artt. 2 e 3 TUE. Sul divieto di discriminazione cfr. anche l'art. 10 TFUE.

interpretativo tra le fonti UE sui diritti fondamentali e gli *standard* internazionali. È forse meno chiara l'operatività di tale coordinamento interpretativo rispetto alle direttive di nostro interesse, ma sul punto si intende tornare nel prosieguo.

Inoltre, un innalzamento di tutela dei diritti fondamentali sarebbe possibile in base all'art. 52 della Carta UE, che ammette una protezione più elevata rispetto allo *standard* di Strasburgo nei casi di corrispondenza tra le norme della Carta UE e quelle CEDU, tenuto conto che, ai sensi del successivo art. 53, il livello minimo di garanzia è costituito dallo stesso diritto UE, dal diritto internazionale, dai trattati di cui sono parti l'UE o tutti gli Stati membri e dalle costituzioni nazionali. Poiché lo *standard* CEDU in materia di ricongiungimento familiare è meno permissivo di quello garantito nell'UE[13] e che nella stessa UE il diritto in questione non è sempre garantito alle *rainbow families*, sussistono dei margini di miglioramento del livello di tutela di tali famiglie.

Infine, il richiamo agli *standard* a vocazione universale confermerebbe la rilevanza assunta nell'ordinamento UE dai trattati sui diritti umani conclusi in ambito ONU. Infatti, oltre a essere stati richiamati al fine di interpretare il diritto UE e di individuarne i principi generali,[14] alcuni *standard* sono oggi riflessi nelle norme della Carta UE che ne sono direttamente o indirettamente tributarie. Ad esempio, secondo quanto affermano le Spiegazioni[15] l'art. 49 è fondato anche sul Patto dei diritti civili e politici del 1966, mentre l'art. 24 è basato su diverse disposizioni della Convenzione sui diritti del fanciullo del 1989. Inoltre, altre norme della Carta UE si basano su disposizioni CEDU la cui interpretazione, alla luce della giurisprudenza della Corte europea dei diritti dell'uomo, è avvenuta tenendo conto della prassi del Comitato dei diritti umani.[16] A nostro avviso, tale "innesto giuridico" implica che nell'interpretare le norme della Carta UE si dovrebbe tener conto dell'esegesi delle disposizioni internazionali poste a loro (più o meno diretto) fondamento. Giova peraltro aggiungere che la rilevanza degli *standard* in questione opera anche a livello normativo, come testimoniano i richiami ai trattati di ambito ONU contenuti nel diritto primario dell'UE,[17] nella normativa derivata[18] e anche negli accordi con gli Stati terzi.[19]

[13] Cfr. Adinolfi (n 3) 113 e 123.

[14] Ad es., C-540/03 *Parlamento c Consiglio* [2005] ECR I-5769, para 35 ss e C-244/06 *Dynamic Medien Vertriebs GmbH* [2008] ECR I-505, para 39. Le decisioni dei comitati ONU sono spesso richiamate dagli Avvocati Generali: ad es., cause riunite C-356/11 *O. e S.* e C-357/11 *L.* [2012] nyp, Opinion of AG Bot, para 83 oppure C-267/06 *Maruko* [2007] ECR I-1757, Opinion of AG Ruiz-Jarabo Colomer, para 86.

[15] Spiegazioni relative alla Carta dei diritti fondamentali [2007] GU L303/17.

[16] Ad es., *Burghartz v Switzerland*, App no 16213/90 (ECtHR, 22 February 1994), para 24.

[17] Ad es., art. 3 TUE con riguardo ai principi della Carta ONU e Protocollo (n. 24) sull'asilo per i cittadini degli Stati membri dell'Unione europea rispetto alla Convenzione di Ginevra del 1951 sullo *status* dei rifugiati.

[18] Ad es., regolamento del Parlamento europeo e del Consiglio (UE) n. 235/2014 che istituisce uno strumento finanziario per la promozione della democrazia e i diritti umani nel mondo [2014] GU L77/85, art. 2.

[19] Accordo concluso con la Repubblica di Mauritius "sulle condizioni del trasferimento delle persone sospettate di atti di pirateria e dei relativi beni sequestrati dalla forza navale diretta dall'Unione europea alla Repubblica di Mauritius e sulle condizioni delle persone sospettate di atti di pirateria dopo il trasferimento" [2011] GU L 254/3.

3 La nozione di "famiglia" maturata in ambito ONU

In tema di *rainbow families*, il primo *standard* internazionale pertinente è costituito dalla nozione di "famiglia".

Il diritto internazionale non ne dà una definizione, come anche i trattati del sistema ONU di protezione dei diritti umani, salvo affermare che essa è il "nucleo naturale e fondamentale della società".[20] In alcuni trattati è intesa in senso ampio e comprende coloro che possono prendersi cura dei minori,[21] anche disabili,[22] o le persone ''having with [migrants] a relationship that, according to applicable law, produces effects equivalent to marriage",[23] ma trattasi di indicazioni che, pur interessanti per il richiamo a forme familiari non tradizionali, non definiscono la "famiglia".

Maggiori indicazioni sono contenute nella prassi dei comitati che monitorano l'attuazione dei trattati sui diritti umani di ambito ONU, i quali, nell'interpretare o decidere i reclami relativi alla loro violazione, si sono occupati del diritto alla vita familiare. Tra questi, il Comitato dei diritti umani è quello che si è espresso per primo e più di frequente sul tema, tanto che la nozione di "famiglia" contenuta nel *General Comment No. 16* del 1988 è stata ripresa da altri comitati, divenendo una sorta di "nozione di riferimento" in ambito ONU.[24]

Come ha affermato detto Comitato, la "famiglia" non è definibile in modo assoluto, poiché

> the concept (…) may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. However (…) when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23.[25]

La nozione è quindi ampia e comprende varie formazioni, a seconda di come la "famiglia" è intesa "in the society of the State party concerned",[26] cioè nel contesto giuridico e socio-culturale di riferimento. Il richiamo al diritto e alla prassi degli Stati non è quindi da intendere come

[20] Cfr. la Dichiarazione universale dei diritti dell'uomo del 1948 (art. 16), il Patto sui diritti civili e politici del 1966 (art. 23), il Patto sui diritti economici, sociali e culturali del 1966 (art. 10) e il preambolo della Convenzione sulla protezione delle persone con disabilità del 2006.

[21] Convenzione sui diritti del fanciullo del 1989, art. 5.

[22] Convenzione sulla protezione delle persone con disabilità del 2006, art. 23.

[23] Convenzione sulla protezione dei diritti dei lavoratori migranti e dei membri delle loro famiglie del 1990, art. 4.

[24] Tale "cross-fertilization interna" al sistema ONU di protezione dei diritti umani è fondata sulla comunanza di principi e sull'interdipendenza tra i relativi trattati. Cfr. UN OHCHR, "The United Nations Human Rights Treaty System" No. 30/Rev. 1 (2012) 18 e, in dottrina, Theo Van Boren, "Categories of Rights" in D Moekli et al. (eds), *International Human Rights* (OUP 2013) 143 ss.

[25] *General Comment No 19* (Comitato dei diritti umani [di seguito HRC], 27 July 1990) para 2. Cfr. anche *General Recommendation No. 21* (Comitato sull'eliminazione delle discriminazioni contro le donne [di seguito, CEDAW Committee], 13th session, 1994) para 13 e *General Comment No. 28* (HRC, 29 March 2000) para 27.

[26] *General Comment No. 16* (HRC, 8 April 1988) para 5. In senso conforme, *General Comment No. 4* (Comitato sui diritti economici, sociali e culturali [di seguito, CESCR Committee], 13 December 1991) para 6.; *General Comment No. 7* (Comitato dei diritti del fanciullo [di seguito, CRC Committee], 12-30 September 2005) para 15; *General recommendation No. 29* (CEDAW Committee, 30 October 2013) paras 16 ss.

discrezionalità a delimitare la nozione, poiché non sarebbe ammissibile una definizione che fosse in contrasto con gli *standard* internazionali o più ristretta rispetto a quella percepita a livello sociale.[27] Il profilo socio-culturale della nozione di "famiglia" è importante quanto quello giuridico e un esempio di tale rilevanza è dato dal caso *Hopu and Bessert v France*, emblematico per quanto isolato, nel quale il Comitato dei diritti umani ha considerato gli antenati quali familiari dei ricorrenti e accertato la violazione del diritto alla vita familiare di questi ultimi, poiché lo Stato convenuto aveva autorizzato la costruzione di un complesso alberghiero su un sito funerario polinesiano.[28]

A parte il modello tradizionale fondato sul matrimonio,[29] nella prassi in esame la "famiglia" comprende anche il nucleo familiare d'origine (genitori, fratelli e sorelle),[30] il rapporto tra genitori e figli,[31] e può includervi il rapporto tra nonni e nipoti e le relazioni *de facto*.[32] Va però sottolineato che tali "famiglie" sussistono in presenza di elementi di effettività, come la convivenza stabile, i legami economici e le relazioni regolari e intense, mentre in loro difetto non si può parlare di vita familiare. Ne dà conto, ad esempio, il caso *A.S. v Canada* del 1980, nel quale il Comitato dei diritti umani ha negato l'applicabilità degli artt. 17 e 23 del Patto sui diritti civili e politici (in tema di vita familiare), invocati da madre e figlia cui era stato rifiutato il ricongiungimento familiare, poiché le ricorrenti, pur consanguinee in linea diretta, per un lungo tempo "have not lived together as a family".[33]

A nostro avviso, l'ampia nozione consente di includervi le *rainbow families* se il contesto di riferimento le riconosce come "famiglie" e se si tratta di "relazioni comprovatamente stabili". La prassi del Comitato sui diritti umani sembra fornire alcune conferme in tale direzione. Ad esempio, nel caso *Joslin v New Zealand* del 2002 non viene messo in discussione, anche da parte dello Stato convenuto, che le due donne da tempo conviventi e i loro figli, nati dai precedenti matrimoni, costituissero una famiglia.[34] Inoltre, nei casi sulla pensione di reversibilità,[35] sebbene il Comitato non debba soffermarsi sulla natura del legame tra i *partner* omosessuali per sanzionare, in base al divieto di discriminazione, le leggi interne che attribuivano il diritto alla pensione alle coppie eterosessuali *more uxorio* ma non a quelle *same-sex*, le vicende occorse riguardavano delle relazioni stabili e l'aspetto discriminatorio è stato rilevato rispetto a convivenze considerate "famiglie".[36]

[27] Cfr. Sarah Joseph et al., *The International Covenant on Civil and Political Rights* (OUP 2005) 587.

[28] *Hopu and Bessert v France*, No. 549/1993 (HRC, 29 July 1997) para 10.3. Cfr. anche *General Comment No. 5* (CESCR Committee, 9 December 1994) para 30 e *General Comment No. 6* (Id., 8 December 1995) para 31.

[29] *Shirin Aumeeruddy-Cziffra et al. v Mauritius*, No. 35/1978 (HRC, 9 April 1981) para 9.2 (b).

[30] *Dauphin v Canada*, No. 1792/2008 (HRC, 28 July 2009) para 8.3.

[31] *Balaguer Santacana v Spagna*, No. 417/1990 (HRC, 15 July 1994) para 10.2.

[32] Cfr. Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N. P. Engel Publisher 2005) 394 e 517-8, oltre al caso richiamato in (n 34).

[33] *A.S. v Canada*, No. 68/1980 (HRC, 31 March 1981) para 5.1.

[34] *Joslin v New Zealand*, No. 902/1999 (HRC, 30 July 2002) 4.8. Cfr. anche Nowak (n 32) 394.

[35] *Young v Australia*, No. 941/2000 (HRC, 18 September 2003) e *X. v Colombia*, No. 1361/2005 (Id., 14 May 2007).

[36] Cfr. anche *General Comment No. 20* (CESCR Committee, 1 June 2009) para 31.

3.1 La contestualizzazione della nozione nell'UE

L'applicabilità della nozione *de qua* alle *rainbow families* ai fini del ricongiungimento di cui alle direttive 2003/86/CE e 2004/38/CE richiede dunque che sia individuato il relativo contesto di riferimento.

In proposito, sebbene lo Stato costituisca, come prima evidenziato, l'ambito di riferimento principale della nozione, diversi elementi depongono a favore della contestualizzazione del concetto di "famiglia" nell'UE in relazione alle sue competenze attribuite, senza che ciò comporti particolari problemi di ordine giuridico.

Infatti, la circostanza che l'UE non è parte dei trattati sui diritti umani di ambito ONU, né della maggior parte degli altri trattati sui diritti umani, non rappresenta un limite invalicabile, dato che tutti gli Stati membri ne sono parti. Peraltro, sebbene tali trattati non generino alcun obbligo giuridico per l'UE, la stessa organizzazione può comunque decidere di adeguarsi alle loro disposizioni o di tenerne conto in sede interpretativa, come è già avvenuto nella giurisprudenza della Corte UE.[37]

Inoltre, l'UE è già ambito di riferimento, in relazione alle competenze attribuite, per l'applicazione della Convenzione sui diritti delle persone con disabilità del 2006, trattato sui diritti umani di ambito ONU aperto alle organizzazioni internazionali, cui è giuridicamente vincolata dal 2010.[38] Si noti che l'appartenenza alla Convenzione del 2006 ha portato la Corte da una parte ad affermare che il primato degli accordi internazionali conclusi dall'UE sulle norme di diritto derivato impone di interpretare queste ultime in modo "per quanto possibile" conforme agli obblighi internazionali pattizi e dall'altra, mancando una definizione UE di *handicap*, a utilizzare la nozione contenuta nella stessa Convenzione per interpretare la direttiva 2000/78/CE sulla parità di trattamento nel lavoro.[39]

Mentre è chiaro che l'UE può costituire il contesto di riferimento della nozione *de qua*, non è invece immediato comprendere cosa si intenda per "famiglia" nel diritto UE, poiché, come per il concetto di *handicap*, non ne esiste una "nozione comunitaria".

A nostro avviso, però, la posizione privilegiata della CEDU nell'ordinamento dell'UE, la corrispondenza tra l'art. 8 CEDU e l'art. 7 della Carta UE e la circostanza che gli Stati membri sono parti della Convenzione europea consentono di assumere la nozione di "famiglia" *ex* art. 8 CEDU come riferimento per l'UE. Si può quindi affermare che le *rainbow families* rientrino nella nozione di "famiglia" maturata in ambito ONU e contestualizzata nell'UE attraverso la giurisprudenza di Strasburgo, poiché, come noto, dal caso *Schalk and Kopf v Austria* le coppie *same-sex* stabili rientrano nella nozione di "vita familiare"[40] e, con riguardo alle *rainbow families*, nei casi *Gas and*

[37] Cfr. la giurisprudenza in (n 14).

[38] Attualmente, l'UE è l'unica organizzazione a essere parte della Convenzione del 2006. Cfr. Decisione del Consiglio (CE) 2010/48 relativa alla conclusione, da parte della Comunità europea, della convenzione delle Nazioni Unite sui diritti delle persone con disabilità [2010] GU L23/35.

[39] Cause riunite C- 335/11 e C- 337/11, *HK Danmark* [2013] paras 37 ss e C- 363/12 (Grande Sezione), *Z.* [2014] paras 70 ss.

[40] *Schalk and Kopf v Austria*, App no 30141/04 (ECtHR, 24 June 2010) 93-4.

Dubois v France[41] e *X and others v Austria*[42] la Corte europea dei diritti dell'uomo ha riconosciuto che la coppia stabile convivente con la prole di una delle *partner* rientra nell'ambito di applicazione dell'art. 8 CEDU.

4 Il "*best interest* del minore"

Il secondo *standard* pertinente in tema di omogenitorialità riguarda i figli e la preminenza che dev'essere accordata al loro interesse nell'adozione delle decisioni che li riguardano (principio del *best interest* del minore).

Il *best interest* riveste una certa rilevanza nell'UE. È un principio generale di diritto, che la Corte UE ha applicato in relazione alle libertà fondamentali, come nel caso *Dynamic Medien*, nel quale ha affermato che la tutela del minore giustifica una limitazione idonea e proporzionata alla libera circolazione delle merci.[43] Inoltre, esso riveste rango primario, sia perché la tutela dei diritti del minore è uno degli obiettivi dell'UE,[44] sia perché è stato incorporato nell'art. 24 della Carta UE.

Tuttavia, pur rilevando ai fini dell'attuazione e interpretazione delle direttive 2003/86/CE e 2004/38/CE, il *best interest* non garantisce ancora completamente il ricongiungimento dei minori appartenenti alle *rainbow families*, soprattutto se le figure genitoriali sono unite in via di fatto. In tale ipotesi, infatti, uno dei due *partner* non avrà legami biologici o formali col minore (ad esempio, in termini di adozione) e in caso di circolazione o soggiorno nell'UE non sarà certa la riunione del nucleo familiare *de facto*.

Diviene quindi interessante verificare se il principio del *best interest* espresso dall'art. 3, par. 1, della Convenzione sui diritti del fanciullo del 1989,[45] nell'interpretazione datane dal recente *General Comment No. 14 (2013)* del Comitato dei diritti del fanciullo,[46] corrobori un'esegesi delle due direttive che garantisca l'unità familiare delle *rainbow families*, atteso che è nell'interesse del minore crescere nel contesto familiare di appartenenza. Dei numerosi aspetti considerati nel documento del Comitato dei diritti del fanciullo, si intende di seguito dare conto di due indicazioni particolarmente rilevanti.

4.1 Migrazioni, best interest e tutela dell'unità familiare

La prima riguarda la tutela dell'unità familiare in caso di separazione dei minori dalla famiglia o da un genitore a seguito di migrazioni.

[41] *Gas and Dubois v France*, App no 25951/07 (ECtHR, 31 August 2010) 12.
[42] *X and others v Austria*, App no 19010/07 (ECtHR, 19 February 2013) 96.
[43] C- 244/06 (n 14) para 42 ss.
[44] Art. 3, para 3, TUE.
[45] Il principio è contenuto anche nella Dichiarazione dei Diritti del Fanciullo del 1959, nel Patto sui diritti civili e politici del 1966 (art. 24), nel Patto sui diritti economici, sociali e culturali del 1966 (art. 10), nella Convenzione sull'eliminazione di ogni forma di discriminazione contro le donne del 1979 (art. 5) e nella Convenzione sui diritti delle persone con disabilità del 2006 (art. 7).
[46] *General comment No. 14* (CRC Committee, 29 May 2013).

Va detto che l'importanza della salvaguardia dell'unità familiare è evidenziata anche agli artt. 9 e 10 della Convenzione del 1989, secondo cui gli Stati parti vigilano affinché il minore non sia separato dai genitori contro la sua volontà ed esaminino con spirito positivo, umanità e diligenza le domande di ricongiungimento familiare presentate da un fanciullo o dai suoi genitori. Come ha osservato il Comitato dei diritti del fanciullo, le due disposizioni "come into effect and should govern host country's decisions on family reunification therein" qualora non sia possibile il ritorno nel Paese d'origine dei minori non accompagnati, evidenziando, pur con riguardo all'ipotesi specifica, la rilevanza dell'unità familiare.[47] Inoltre, va ricordato che la tutela dell'unità familiare ha connotato alcune decisioni del Comitato dei diritti umani sull'espulsione degli stranieri, nelle quali lo Stato convenuto, sul cui territorio i soggetti irregolari convivevano coi figli, è stato censurato per "failure to provide them with the necessary measures of protection as minors".[48]

Nel *General Comment No. 14* il Comitato dei diritti del fanciullo torna sull'importanza del mantenimento dell'unità familiare, ma in relazione all'ipotesi della separazione del minore dal contesto familiare in seguito a movimenti migratori. In tal caso, l'interesse del minore richiede di considerare la tutela della vita familiare in termini di riunificazione, poiché, come afferma lo stesso Comitato,

> it is indispensable to carry out the assessment and determination of the child's best interests in the context of potential separation of a child from his or her parents (arts. 9, 18 and 20). (…) The family is the fundamental unit of society and the natural environment for the growth and well-being of its members, particularly children (…). The right of the child to family life is protected under the Convention (art. 16). The term "family" must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom (art. 5). Preventing family separation and preserving family unity are important components of the child protection system, and are based on the right provided for in article 9, paragraph 1, which requires "that a child shall not be separated from his or her parents against their will, except when […] such separation is necessary for the best interests of the child". (…) When the child's relations with his or her parents are interrupted by migration (of the parents without the child, or of the child without his or her parents), preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification.[49]

L'ampio passaggio riferisce della nozione estesa di "famiglia" e della necessità di far sopravvivere la vita familiare agli eventi migratori quali presupposti per un'attenta considerazione del ricongiungimento familiare a beneficio del minore, elementi che si ripropongono, in termini pressoché identici, nel caso delle *rainbow families* che circolano o soggiornano nell'UE.

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[47] *General Comment No. 6* (n 28) para 83.

[48] *Winata and Li v Australia*, No. 93/2000 (HRC, 11 May 2000) para 7.3 e *Madafferi v Australia*, No. 1011/2001 (Id., 26 July 2004) para 9.8. In dottrina, Ludovic Hennebel, *La jurisprudence du Comité des droits de l'homme des Nations Unies: Le Pacte international relatif aux droits civils et politiques et son mécanisme de protection individuelle* (Bruylant 2007) 54-5.

[49] *General comment No. 14* (n 46) paras 58 ss

Emerge inoltre con chiarezza che l'unità familiare costituisce un elemento fondamentale per l'accertamento del *best interest* del minore, al quale va accordata la considerazione preminente "and not just one of several considerations"[50] nell'adozione delle decisioni che lo riguardano. Ci si domanda quindi, anche rammentando il bilanciamento effettuato nel caso *Dynamic Medien*, se il principio del *best interest* non rappresenti uno *standard* da bilanciare *in melius* con la disciplina del ricongiungimento contenuta nelle direttive 2003/86/CE e 2004/38/CE, al fine di tutelare la prole di una *rainbow families* stabile.

4.2 Best interest e discriminazioni tra minori

La seconda indicazione rilevante riguarda il divieto di discriminazione *ex* art. 2 della Convenzione del 1989, che è anche uno dei principi generali del trattato (come, peraltro, lo stesso *best interest*) e rileva quindi ai fini dell'interpretazione e attuazione di tutti i diritti del minore.[51]

Sul divieto il Comitato dei diritti del fanciullo si era già soffermato, osservando che i minori possono subire gli effetti dell'impari trattamento riservato ai genitori e che gli Stati parti hanno la responsabilità "to monitor and combat discrimination in whatever forms it takes and wherever it occurs".[52] Nel *General comment No. 14*, il Comitato chiarisce meglio la natura dell'obbligo in carico agli Stati parti:

> The right to non-discrimination is not a passive obligation, prohibiting all forms of discrimination in the enjoyment of rights under the Convention, but also requires appropriate proactive measures taken by the State to ensure effective equal opportunities for all children to enjoy the rights under the Convention. This may require positive measures aimed at redressing a situation of real inequality.[53]

In proposito, venendo alle *rainbow families*, è stato osservato che "(i)t is imperative that children who live in a same-sex family receive just as much legal protection as other children", obiettivo da realizzare attraverso il riconoscimento giuridico dell'omogenitorialità.[54] Il tema è delicato, perché risente della tensione tra il sistema di valori che informa il diritto di famiglia degli Stati e la necessità di rimuovere ogni forma (anche potenziale) di discriminazione tra minori, e l'auspicio è senz'altro condivisibile.

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[50] ibid., paras 38 ss.

[51] A livello internazionale, il divieto è previsto in tutti i trattati sui diritti umani, è uno dei fondamenti del sistema ONU di protezione dei diritti umani e, come ha osservato la Corte interamericana dei diritti dell'uomo nel caso *Atala Riffo y niñas vs. Chile* (IAtHR, 24 de Febrero de 2012), "en la actual etapa de la evolución del derecho internacional, el principio fundamental de igualdad y no discriminación ha ingresado en el dominio del *jus cogens*" (para 79). Sui principi generali della Convenzione sui diritti del fanciullo del 1989, che comprendono anche il diritto alla vita *ex* art. 6 e il diritto all'ascolto *ex* art. 12, cfr. *General comment No. 12* (CRC Committee, 20 July 2009) para 2 e, in dottrina, Trevor Buck et al., *International Child Law* (Routledge 2011) 130 ss.

[52] *General comment No. 7* (n 26) para 12.

[53] *General comment No. 14* (n 46) para 41.

[54] Cfr. Nina Dethloff, 'Same-Sex Parents in a Comparative Perspective' [2005] Forum du droit international 204-5.

D'altra parte, indipendentemente dalle questioni di riconoscimento giuridico, ci si permette anche di osservare che la discriminazione che un minore appartenente a una *rainbow family* può subire a causa dell'incertezza del ricongiungimento familiare incide sulla stessa possibilità di condurre una vita quotidiana, quale proseguimento in un nuovo Stato di quella già avviata nel Paese d'origine. È quindi lecito domandarsi se tra le *positive measures* cui fa riferimento il *General comment No. 14* non debbano annoverarsi anche i provvedimenti che, in attuazione delle direttive 2003/86/CE e 2004/38/CE, gli Stati membri adottano in materia di ricongiungimento familiare delle *rainbow families* stabili.

5 Operatività e limiti del coordinamento interpretativo tra s*tandard* internazionali e fonti UE sui diritti fondamentali

Considerati gli *standard* a vocazione universale pertinenti in materia di *rainbow families*, restano da comprendere l'operatività e i limiti dell'ipotizzato coordinamento interpretativo con le fonti UE di tutela dei diritti fondamentali.

Quanto al primo aspetto, a nostro avviso i due *standard* possono corroborare un'interpretazione delle rilevanti norme primarie di diritto UE che innalzi il livello di protezione del diritto al ricongiungimento delle *rainbow families* stabili. Ci si riferisce soprattutto all'art. 24 della Carta UE, la cui interpretazione, come si è sostenuto, dovrebbe fondarsi anche sull'esegesi delle norme della Convenzione sui diritti del fanciullo del 1989 che sono poste a suo fondamento, in particolare l'art. 3 sul *best interest* e l'art. 9 sul diritto del minore a intrattenere regolari relazioni con i genitori.

Pertanto, un'interpretazione dell'art. 24 della Carta UE tesa a innalzare il livello di tutela del diritto al ricongiungimento familiare delle *rainbow families* stabili potrebbe fondarsi (anche) sulla considerazione che il minore appartiene a una "famiglia" secondo la nozione maturata in ambito ONU (e contestualizzata nell'UE attraverso la giurisprudenza di Strasburgo), quale formazione sociale cui va accordata protezione giuridica, e che le pertinenti norme della Convenzione del 1989, tra cui il principio del *best interest* del minore, impongono di tutelarne l'unità anche nell'ipotesi specifica della separazione dovuta a movimenti migratori, con conseguente riverbero sull'interpretazione – che dev'essere conforme – delle direttive 2003/86/CE e 2004/38/CE.

Altra questione riguarda, invece, i limiti di tale coordinamento interpretativo, poiché mentre l'attività ermeneutica non può sovvertire il dato normativo (ad esempio, imporre agli Stati membri il riconoscimento delle *partnership* registrate e, quindi, determinare il ricongiungimento automatico del *partner*), è invece ammissibile un'esegesi delle direttive che, facendo leva sui diritti fondamentali, riduca il margine di discrezionalità di cui dispongono gli Stati membri nell'accordare il ricongiungimento familiare alle *rainbow families* stabili.

In sostanza, si tratterebbe di precisare – ulteriormente e con riguardo a tali famiglie – quanto la Corte ha già affermato nel caso *Chakroun*, cioè che le misure in materia di ricongiungimento

familiare siano adottate in conformità con l'obbligo di protezione della famiglia e di rispetto della vita familiare consacrato dalla Carta UE, dalla CEDU e a livello internazionale.[55]

Infatti, nonostante i chiarimenti interpretativi intervenuti per rendere il ricongiungimento più effettivo possibile, gli Stati membri godono comunque di discrezionalità, pur non illimitata, nel decidere i criteri in base ai quali accordare il ricongiungimento dei *partner* di fatto, con conseguente possibile penalizzazione delle *rainbow families*. L'auspicato coordinamento interpretativo potrebbe invece indicare che le famiglie omogenitoriali stabili, che possano dimostrare l'effettività della vita familiare – i cui criteri potrebbero essere quelli individuati dalla prassi dei comitati ONU o, meglio, dalla giurisprudenza sull'art. 8 CEDU – rientrino nelle ipotesi nelle quali il margine di discrezionalità degli Stati si riduce al punto da configurare un diritto al ricongiungimento per i richiedenti.

Si noti che siffatta interpretazione consentirebbe la riunione familiare di tutte le *rainbow families*, anche quelle fondate sul matrimonio o sulla *partnership* registrata qualora il ricongiungimento dovesse avvenire in uno Stato il cui ordinamento non fosse aperto a tali unioni, poiché la prova dell'effettività della vita familiare sarebbe costituita dall'avvenuta formalizzazione, davanti alla legge dello Stato d'origine, della relazione di coppia e dell'eventuale legame coi figli (ad esempio, in termini di adozione coparentale, laddove possibile).

6 Conclusioni

Naturalmente, l'operatività di tale coordinamento interpretativo dipenderebbe dalla scelta della Corte UE di avvalersi degli *standard* considerati quali pertinenti parametri interpretativi del diritto UE. Sebbene controversa e poco gradita agli Stati membri, tale interpretazione *rainbow families-oriented* sarebbe in armonia con i valori e gli obiettivi dell'UE *ex* artt. 2 e 3 TUE e potrebbe gettare le basi per una revisione delle due direttive, al fine di porre rimedio agli evidenziati problemi di rispetto dei diritti individuali.

Considerate le basi giuridiche,[56] si tratterebbe di atti modificabili con la procedura legislativa ordinaria, quindi su iniziativa della Commissione e, acquisiti i dovuti pareri, con l'approvazione del Consiglio e del Parlamento.

In proposito, con riguardo alla direttiva 2003/86/CE, nel 2011 la Commissione ha avviato un dibattito pubblico sul ricongiungimento familiare, con l'obiettivo di darvi un seguito politico e tenendo conto che

> Qualsiasi strumento dell'Unione dovrà essere conforme alla Carta dei diritti fondamentali dell'Unione europea, soprattutto per quanto riguarda il rispetto della vita privata e della vita familiare, il diritto di sposarsi, i diritti del minore, il principio della non discriminazione, e dovrà tener conto di altri obblighi internazionali.[57]

[55] C-578/08 (n 5) para 44.

[56] Artt. 46 e 79 TFUE.

[57] Cfr. Commissione, "Libro verde sul diritto al ricongiungimento familiare per i cittadini di paesi terzi che vivono nell'Unione europea (direttiva 2003/86/CE)" COM (2011) 735 def., p. 2.

Dalla consultazione è emersa la necessità che il ricongiungimento familiare sia considerato nell'ottica del rispetto degli obblighi internazionali sui diritti umani, compresi la giurisprudenza internazionale e gli *standard* accettati dall'UE e dagli Stati membri, con specifico riguardo al Patto dei diritti civili e politici del 1966 e alla Convezione sui diritti del fanciullo del 1989.[58] Nella stessa direzione si sono espressi il Comitato delle regioni,[59] il Comitato economico e sociale[60] e l'Agenzia UE sui diritti fondamentali[61].

Una revisione delle direttive vedrebbe favorevole anche il Parlamento, che nella recente risoluzione sulla *road map* per i diritti LGBT ha sollecitato la Commissione a

> elaborare orientamenti per garantire l'attuazione della direttiva 2004/38/CE relativa al diritto dei cittadini dell'Unione e dei loro familiari di circolare e soggiornare liberamente nel territorio degli Stati membri e della direttiva 2003/86/CE relativa al diritto al ricongiungimento familiare, nell'ottica di assicurare il rispetto di tutte le forme di famiglia riconosciute a livello giuridico dalle leggi nazionali degli Stati membri; … presentare proposte finalizzate al riconoscimento reciproco degli effetti di tutti gli atti di stato civile nell'Unione europea al fine di ridurre gli ostacoli discriminatori di natura giuridica e amministrativa per i cittadini e le relative famiglie che esercitano il proprio diritto di libera circolazione.[62]

Tale sviluppo sarebbe in linea anche con la consolidata vocazione di *human rights promoter* dell'UE,[63] rispetto alla quale ci permettiamo di osservare che al forte coinvolgimento nella promozione dei diritti umani nel mondo dovrebbe corrispondere un pari impegno dell'UE a favore dei diritti fondamentali anche nelle "situazioni interne".

Chiaramente, l'attuale transizione istituzionale nell'UE non consente di aprire il cantiere della revisione delle direttive 2003/86/CE e 2004/38/CE, ma in prospettiva è possibile che ciò avvenga, visto che tra le 10 priorità indicate dal nuovo Presidente della Commissione c'è il rispetto dei diritti fondamentali e di cittadinanza, materie affidate a un Commissario *ad hoc*, e l'adozione di una nuova politica migratoria, che renda "Europe to become at least as attractive as the favourite migration destinations such as Australia, Canada and the USA".[64] Rispetto alla quale, ad esempio, ci si domanda come sia possibile rendere l'UE una "destinazione attraente" per il migrante parte di una

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[58] Ad es., *Response by the International Commission of Jurists*, February 2012, e *ILGA-Europe's Contribution to the Green Paper*, February 2012. La *webpage* della consultazione è *on line*: http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2012/consulting0023en.htm

[59] CIVEX-V-028, 3 e 4 maggio 2012.

[60] SOC/436, 23 maggio 2012.

[61] EU Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I – Legal Analysis*, 2009.

[62] Risoluzione del 4 febbraio 2014 sulla tabella di marcia dell'UE contro l'omofobia e la discriminazione legata all'orientamento sessuale e all'identità di genere (P7TA-PROV(2014)0062), punto H.

[63] Cfr. Marise Cremona, 'The Union as a Global Actor: Roles, Models and Identity' [2004] CML Rev. 553-73 e Sybilla Fries and Allan Rosas, "The EU as an External Human Rights Actor" in G Alfredsson et al. (eds), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller* (Martinus Nijhoff Publishers 2009) 591 ss.

[64] Priority 8, *Towards a New Policy on Migration*. Il programma del nuovo Presidente della Commissione è on line: http://ec.europa.eu/about/juncker-commission/priorities/08/indexen.htm

rainbow family stabile qualora, una volta assunta la residenza, non possa contare sul ricongiungimento con la propria famiglia.

PART FOUR

Medically Assisted Procreation

Could a common EU standard of access to MAR techniques be possible also for LGBT couples?

Lucia Busatta[*]

Abstract

The field of medical assisted reproduction (MAR) represents one of the most challenging examples of the impact of new technologies on legal systems and fundamental rights' guarantee. From the ethical and legal viewpoint, MAR techniques raise several and controversial issues concerning reproductive rights: for example, who should be granted access to MAR (singles, heterosexual or LGBTI families, etc.)? Which could be a reasonable age limit? How to regulate access to MAR and gametes donation?

With particular reference to rainbow families, legal and ethical issues concerning MAR demonstrate the difficulties that many States are facing. This phenomenon may have a considerable impact on fundamental rights of individuals involved, because a mere prohibition might entail also some relevant legal consequences, such as the need for a fair access to information on services available abroad and, above all, or the legal status and citizenship of the new born and on parenthood once the family comes back to the State of origin.

EU fundamental freedoms and EU law, across the years, played an important role on the definition and extension of reproductive rights (i.e. with reference to the right to information and to the right to movement for reproductive services). The growing phenomenon of reproductive tourism in Europe is particularly relevant for LGBT families, because they are those who suffer at most because of national prohibitions.

Keywords

Cross-border healthcare, cross-border reproductive care, medically assisted reproduction, same-sex couples, fundamental rights, right to information, EU law.

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1 Introduction

In the last decades, the developments of medical technologies have widely affected not only human lives but also individual rights. The field of medical assisted reproduction (MAR) represents

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one of the most challenging examples of the impact of new technologies on legal systems and fundamental rights' guarantee. From the ethical and legal viewpoint, MAR techniques raise several and controversial issues concerning reproductive rights: for example, who should be granted access to MAR (singles, heterosexual or LGBTI families, etc.)? Which could be a reasonable age limit? How to regulate access to MAR and gametes' donation?

With particular reference to rainbow families, legal and ethical issues concerning MAR demonstrate the difficulties that many States are facing. This phenomenon may have a considerable impact on the fundamental rights of individuals involved, because a mere prohibition might entail also some relevant legal consequences, such as the need for a fair access to information on services available abroad and, above all, or the legal status and citizenship of the new born and on parenthood, once the family comes back to the State of origin.

Access to MAR techniques is raising several ethical, medical, social and legal issues around Europe and worldwide. In particular[1], national prohibitions or restrictive regulations have sensibly contributed to the increase of a phenomenon, known as cross-border reproductive care (CBRC)[2], that involves biologically or socially infertile patients, gametes donors and potential surrogates, who «cross international borders in order to obtain or provide reproductive treatment outside their home country»[3].

Among the reasons for CBRC, law evasion is surely the most relevant: it has been estimated that, at the European level, around 55 % of patients seeking reproductive assistance abroad are escaping national prohibitions[4]. Other motivations could be identified in the length of waiting lists for access to reproductive techniques; the shortage of gametes, due to a lack of donors or to the insufficient number of centres performing it; the sought for a better quality of care or of less costly treatments[5].

People that cross national borders for the purpose of accessing reproductive care elsewhere might considerably differ with regards to personal characteristics, especially on the grounds of age, marital status and sexual orientation. Even though it is not possible to completely describe numbers, individual situations and reasons for CBRC, some studies have been conducted in Europe and

[1] And this will be the main focus of this paper.

[2] G. Pennings, G. de Wert, F. Shenfield, J. Cohen, B. Tarlatzis and P. Devroey, 'ESHRE Task Force on Ethics and Law 15: Cross-border reproductive care' (2008) 23(10) HUMAN REPRODUCTION 2182–2184. Even if the phenomenon is known also as "reproductive tourism", the term cross-border reproductive care has to be preferred: «We will avoid the terms 'reproductive' or 'procreative tourism' because of their negative connotations and will use instead the neutral term 'cross-border reproductive care'».

[3] A.P. Ferraretti, G. Pennings, L. Gianaroli, F. Natali, M. Cristina Magli, 'Cross-border reproductive care: a phenomenon expressing the controversial aspects of reproductive technologies' (2010), 20(2) REPRODUCTIVE BIOMEDICINE ONLINE 261–266; Virginie Rozée Gomez, Elise de La Rochebrochard, 'Cross-border reproductive care among French patients eligible for ART funding in France' (2013) 28(11) HUMAN REPRODUCTION 3103, 3104.

[4] V. Rozée Gomez, E. de La Rochebrochard, 'Cross-border reproductive care among French patients eligible for ART funding in France' (2013) 28(11) HUMAN REPRODUCTION 3103, 3104; F. Shenfield *et al*., 'Cross border reproductive care in six European countries' (2010) 25(6) HUMAN REPRODUCTION 1361.

[5] V. Rozée Gomez, E. de La Rochebrochard, 'Cross-border reproductive care among French patients eligible for ART funding in France', cit., 3104; G. Pennings, G. de Wert, F. Shenfield, J. Cohen, B. Tarlatzis and P. Devroey, 'ESHRE Task Force on Ethics and Law 15: Cross-border reproductive care', cit., 2182–2184.

elsewhere, with the purpose of discussing issues and data concerning this highly problematic phenomenon[6].

From the legal viewpoint, access to MAR techniques could sensibly vary from a State to the other. Notwithstanding national prohibitions, individuals and couples do cross state borders to become parents and, after one or several reproductive treatments they usually come back to their place of residence to continue their normal lives. Are legal orders able to properly deal with the issue of CBRC? Are there any general principles that could find application in order to grant the fundamental rights of perspective parents moving for ART and, at a second stage, of minors?

Taking into account just the European framework, it seems that European Union law could provide for some legal instruments that might be useful in order to grant – at least – a minimum level of safety for individuals going abroad for reproductive care.

2 LGBT couples and CBRC

Even if in the last few years the number of same-sex couples seeking assisted reproduction abroad has become more evident, from a scientific viewpoint this issue has remained (by the moment) less investigated[7]. The reasons for that could be located in the difficulty to collect homogeneous data, on the one side, and on the heterogeneity of techniques and practices sought, on the other side[8].

Generally speaking, same-sex couples, once undertaken the decision to become parents, demonstrate to be strongly willing and highly determined to realise their desire and, to do so, they often decide to use medically assisted reproduction techniques[9]. National restrictions concerning subjective characteristics to have access to ART determine the flow of these patients to other countries where these techniques are accessible also for singles of same-sex partners[10].

With regards to male couples or single men, for example, it should be pinpointed that there is a very limited number of published data and researches that address the issue of access to MAR for these subjects, under the medical perspective or from the viewpoint of social sciences. There are several aspects that might deserve due consideration and that might serve as a basis for legal

[6] F. Shenfield *et al*., 'Cross border reproductive care in six European countries' (2010) 25(6) HUMAN REPRODUCTION 1361.

[7] See G.N. Allahbadia *et al*., 'Surrogacy for same-sex couples: a 3-year experience' (2008) 17(2) REPRODUCTIVE BIOMEDICINE ONLINE S-23; S.A. Grover *et al.*, 'Assisted reproduction in a cohort of same-sex male couples and single men' (2013) 27(2) REPRODUCTIVE BIOMEDICINE ONLINE 217–221; W. Norton, N. Hudson, L. Culley, 'Gay men seeking surrogacy to achieve parenthood' (2013) 27(3) REPRODUCTIVE BIOMEDICINE ONLINE 271-279.

[8] See W. Norton, N. Hudson, L. Culley, 'Gay men seeking surrogacy to achieve parenthood', cit.

[9] G. Pennings, 'Evaluating the welfare of the child in same-sex families' (2011) 26 (7) HUMAN REPRODUCTION 1609-1615. With reference to the US scenario, see D.A. Greefeld, 'Gay men choosing parenthood through assisted reproduction: medical and psychological considerations' (2011) 95(1) FERTILITY AND STERILITY 225-229.

[10] For example, in the study carried on by F. Shenfield *et al*., 'Cross border reproductive care in six European countries', cit., 1367, it is reported that, within the sample they used, «39.2 % of the French women [seeking IVF abroad] were lesbians and 16.4 % were single». The reason for that is identified in the legislative prohibition provided by law no. 94-654, 1994; law no. 2004-800, 2004. Conversely, within the sample, none travelled from the UK to another member State for the same purpose, as access to IVF for single or homosexual women has never been forbidden.

consideration: for example, the choice to use one partner's or both partners' gametes to inseminate the oocyte; the choice of an anonymous or a known oocyte donor; the possibility of oocyte donor's identity disclosure once the child conceived reaches the age of eighteen, and so on[11].

Moreover, taking into account the desire for men to become parents, it has to be highlighted that "male biological limits", especially in the past, have considerably characterised the possibility for gay couples or single men to have access to parenthood. Available options included adoption, post-divorce custody arrangements, or co-parenting arrangements with lesbian couples, while in the last few years the number of male couples experiencing parenthood through surrogacy is increasing[12].

It was just with the development of medical techniques concerning reproduction that surrogacy became a concrete option, even if just from the practical viewpoint. From the ethical and legal perspective, on the contrary, surrogacy is still raising several issues, that – far from being easily resolved – determined the choice of national law-makers to hardly restrict (or even criminalise[13]) them. The increasing social impact of surrogacy and the willingness to ensure legal certainty for parental relationships for children born *via* use of a surrogate represent the reasons that determined, for example, the recent legislative amendments in the UK[14], which stands as one of the very few cases of legislative acknowledgement of surrogacy and related parental rights for same-sex parents in the European panorama.

Furthermore, the issue of surrogacy raises several legal and ethical concerns when intended as "commercial surrogacy". In this case, almost every European country stigmatise the commercialisation of pregnancies and also provide for criminal sanctions for advertising surrogacy agreements[15]. Surrogacy contracts, moreover, have widely been addressed as problematic from a legal point of view, because their content, object and scope do not encounter the rationale of rights and limits connected to the human body and often demonstrate to be against the "public order clause" which, at a constitutional level, serves as a boundary – general in nature – for the acknowledgement and enjoyment of individual rights[16].

[11] Of particular interest, in this field, is one of the results of a study published in 2013, concerning access to IVF procedures for gay men in Canada. S.A. Grover *et al.*, 'Assisted reproduction in a cohort of same-sex male couples and single men' (2013) 27(2) REPRODUCTIVE BIOMEDICINE ONLINE 217–221, 221: «Twenty-eight couples (76 %) chose to use spermatozoa from both partners […] to inseminate the eggs and transferred one embryo from each to the surrogate. As a result, all twins from this group were half genetic siblings».

[12] W. Norton, N. Hudson, L. Culley, 'Gay men seeking surrogacy to achieve parenthood', cit., 272; S. Golombok, 'Families Created by Reproductive Donation: Issues and Research' (2013) 7(1) CHILD DEVELOPMENT PERSPECTIVES 61–65.

[13] This is the case of the Italian law n. 40/2004, article 12.

[14] See Human Fertilisation and Embryology Act 2008, an Act to amend the Human Fertilisation and Embryology Act 1990 and the Surrogacy Arrangements Act 1985, which permits to people in same-sex relationships to be registered as parents of children born *via* surrogacy. See W. Norton, N. Hudson, L. Culley, 'Gay men seeking surrogacy to achieve parenthood', cit., 272.

[15] For example, see article 12 of the Italian law on assisted reproduction, n. 40/2004; or, with regards to the UK, section 2 of the Surrogacy Arrangements Act 1985, as amended in 2008.

[16] Even though in the U.S. the regulation of surrogacy follows patterns which are different from European ones, conferring centrality to the right to privacy rather that to other sets of rights, the prohibition of commercial surrogacy entered some States' legislation and was also upheld in Courts. For a general overview of the US debate on surrogacy and other arrangements concerning the human body, see R. Rao, 'Property, Privacy, And The Human Body' (2000) 80

The peculiar status of surrogacy under national legislations determines several difficulties for prospective parents moving to another country (either in Europe or not), which might involve the relationship between the two legal systems involved, as well as problems of immigration or citizenship[17] for minors and criminal consequences for perspective parents, once back in their home country[18].

Therefore, for male same-sex couples, access to MAR techniques is quite difficult, highly demanding from a social, legal and – unfortunately – economic viewpoint and often legally stigmatised. Even though at first glance it might seem that access to ART could be easier for lesbian couples, national prohibitions[19] are still preventing two women bound by a relationship, either registered or not, or even single women, from having access to artificial reproduction. These restrictions and prohibitions have thus contributed to increase the phenomenon of cross-border reproductive care, not only within Europe, but also towards other countries.

Moreover, the fact that just a few countries in the EU have adopted an open approach, recognising access to ART also to singles or LGBT couples, permitting surrogacy as well as gametes' donation, shoves people who are seeking reproduction abroad to go to poor countries where these techniques are available, unregulated and generally accessible on payment: «Such conditions lead unerringly to financial exploitation, lack of informed consent and even criminal activity»[20].

For the purposes of the present analysis, however, while acknowledging the widespread nature of the phenomenon, we will take into consideration just the intra-European dimension of it,

BOSTON UNIVERSITY LAW REVIEW 359, 400. Conversely, more recently, though, the need for legal certainty boosted some other US States to regulate surrogacy, giving prevalence to «the pragmatic objective of providing certainty about parental status and protecting all participants, especially children». See E.S. Scott, 'Surrogacy and the politics of commodification', (2009) 72 LAW AND CONTEMPORARY PROBLEMS 109, 121.

[17] For example, children born *via* surrogacy abroad might result stateless or even parentless as a result of the combined application of national legislations concerning surrogacy and immigration. For a glance on these issues, see N. Gamble, 'Why UK surrogacy law needs an urgent review' (2008) BIONEWS 445, available at http://www.bionews.org.uk/page_37990.asp (last access 06.10.2014). See also D and L (Surrogacy) [2012] EWHC 2631 (Fam) - Family Division High Court of Justice UK, 28 September 20012, concerning a same-sex couple; High Court, Family division X & Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam), 9 December 2008, concerning a heterosexual couple. With specific reference to LGBT couples, see E. Falletti, 'Lgbti Discrimination and Parent–Child Relationships: Cross-Border Mobility of Rainbow Families in the European Union' (2014) 52(1) Family Court Review 28–45, 35.

[18] An example of this could be a recent series of Italian criminal courts' decisions concerning false declarations made before state authorities by parents of children born abroad (in India or in Ukraine) via surrogacy: Tribunale di Milano, decision of 27.4.2014; Tribunale di Brescia, II sez. Pen, 26.11.2013; Tribunale di Milano, Sez. V pen., 15.10.2013; Tribunale di Trieste, GUP, 4.10.2013. All of these decisions are available, in Italian, at www.biodiritto.org (last accessed 06.10.2014).

[19] A seminal example is the Italian Law on medically assisted reproduction, nr. 40/2004, article 5, which provides that only heterosexual (married or cohabiting) couples could be granted access to MAR: «possono accedere alle tecniche di procreazione medicalmente assistita coppie di maggiorenni di sesso diverso, coniugate o conviventi, in età potenzialmente fertile, entrambi viventi». A similar provision is provided also by the French *Code de la santé publique*, at article L2141-2: «L'homme et la femme formant le couple doivent être vivants, en âge de procréer et consentir préalablement au transfert des embryons ou à l'insémination».

[20] R.F. Storrow, 'The pluralism problem in cross-border reproductive care' (2010) 25(12) HUMAN REPRODUCTION 2939-2943, 2941. For a wider perspective on the phenomenon of commercial surrogacy see the report *Birthing a market. A study on commercial surrogacy*, Sama – Resource Group for women and health, New Delhi, 2012; S. Mohapatra, 'Achieving reproductive justice in the international surrogacy market' (2012) 21(1) ANNALS OF HEALTH LAW 191.

trying to understand if EU law could help member States in developing at least a common standard to grant access to ART to same-sex couples, in the light of the process of European integration and to raise the benefits of European citizenship.

3 National prohibitions as a factor for CBRC

Within the EU, States are facing in different ways ethical and legal problems arising from the development of reproductive technologies, that are considerably widening the possibilities connected to parenthood and procreation. Some States adopted quite restrictive legislations, whereas others opted for a *laissez-faire* regime or adopted a quite permissive legislation, giving priority to procedural instruments to ensure the respect of fundamental rights of individuals concerned, rather than focusing on prohibitions and severe bans. If we consider the issue of medically assisted reproduction under the perspective of medical care, there is a very important aspect that deserve due consideration. National prohibitions, notwithstanding their proportionality or reasonableness, may not restrain those who profoundly desire it to seek reproductive services abroad. This affects crosswise any kind of couple, either heterosexual or same-sex.

Therefore, as mentioned above (para 1), one of the main reasons that boost people to seek medical services abroad is to circumvent national prohibitions or restrictions. This phenomenon is particularly evident in the field of reproductive rights (abortion, ART)[21], because in this particularly sensitive matter, law-makers reveal their difficulties in finding a political (rather than ethical) consensus on the issue to be regulated and this often leads to the adoption of a restrictive approach that, far from encountering a larger political sharing, demonstrates how risky legislative restriction might be for fundamental rights.

As we have seen, national prohibitions or restrictions on reproductive rights are a factor for CBRC. As a consequence, in States that have chosen to adopt a more permissive regulation of MAR techniques, resources are spent also for people coming from abroad, waiting lists are extended by foreigners, a considerable amount of labour resources (concerning in particular health professionals) move from the public sector to the private one in search of better profit, and, finally, the risk of exploitation of the poorer segments of the population dramatically increases[22].

On the other side, States that decided – for ethical or cultural reasons – to enact restrictive legislation should consider (and indeed have been forced to do it, especially by the recent case law of the European Court of Human Rights) that their decisions should respond to a standard of proportionality and should be framed coherently in consideration also of other regulations that

[21] The phenomenon of crossing national borders to get a medical treatment which is limited or forbidden in the home country has recently become significant also regarding end of life issues and individual choices concerning the ultimate stages of life. On this see C. Dyer, 'Swiss Parliament may ban suicide tourists' (2003) 326 BMJ 242; I.G. Cohen, *Patients with passports. Medical tourism, law and ethics*, OUP USA, 2014.

[22] On these issues, see R.F. Storrow, 'The pluralism problem in cross-border reproductive care' (2010) 25(12) HUMAN REPRODUCTION 2939-2943; A. McKelvey, A.L. David, F. Shenfield, E.R. Jauniaux, 'The impact of cross-border reproductive care or 'fertility tourism' on NHS maternity services' (2009) 116(11) BJOG 1520-1523; W. Van Hoof, G. Pennings, 'Extraterritoriality for cross-border reproductive care: should states act against citizens travelling abroad for illegal infertility treatment?' (2011) 23(5) REPRODUCTIVE BIOMEDICINE ONLINE 546-554.

might be relevant on the matter[23]. Furthermore, sometimes, it might even happen that the national prohibition is not enough to prevent the risk of illegitimate practices or to avoid that, on the national territory, the healthcare service is not called to give assistance to those who underwent medically assisted reproduction abroad: there could be the need (and indeed often occurs) for pre-natal or post-natal care, once the perspective parents come back from their "reproductive travel abroad"[24].

3.1 Cross-border abortion

Decisions regarding medical treatments, especially when a huge ethical and legal debate on their admissibility is going on, is a State competence. This principle, enrooted in States' constitutional frameworks, was also clearly stated by the ECJ[25] and the ECtHR[26]. Nevertheless, the European Union, as well as the European Court of Human Rights, had to deal with the compatibility either with the Treaties framework, or with the ECHR obligation, of a State's decision to prohibit a specific medical treatment or to impose severe restrictions on the availability of a given medical practice.

The seminal example, and indeed the very first time when both European Courts had to deal with these themes, regards access to abortion in Ireland. It is well known that the issue of abortion has been highly critical for the Irish Republic at least since a "right to abortion" started to be claimed

[23] The reference, in this case, is to the European Court of Human Rights decision in *Costa and Pavan v. Italy*, appl. n. 54270/10, 28 August 2012, paras. 53-63. See also *A, B and C v. Ireland*, appl. n. 25579/05, 15 December 2010, para 249: «in the negative obligation context, the State enjoys a certain margin of appreciation. While a broad margin of appreciation is accorded to the State as to the decision about the circumstances in which an abortion will be permitted in a State, once that decision is taken the legal framework devised for this purpose should be "shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention"». On the matter of ART, see *S.H and other v. Austria*, appl. n. 57813/00, 3 November 2011, para 100: «The Court considers that concerns based on moral considerations or on social acceptability must be taken seriously in a sensitive domain like artificial procreation. However, they are not in themselves sufficient reasons for a complete ban on a specific artificial procreation technique such as ovum donation. Notwithstanding the wide margin of appreciation afforded to the Contracting States, the legal framework devised for this purpose must be shaped in a coherent manner which allows the different legitimate interests involved to be adequately taken into account».

[24] R.F. Storrow, 'The pluralism problem in cross-border reproductive care', cit.

[25] As to the competence of member States in organising their healthcare services and in deciding the conditions under which medical treatments could be made available to individuals on their territory see C-173/09, *Elchinov*, 5 October 2013, 2010 I-08889, para. 40; C-372/04, *Watts*, 16 May 2006, 2006 I-04325, para. 92; C-444/05, *Stamatelaki*, 19 April 2007, 2007 I-03185, para. 23; C-211/08, Commission v Spain, 15 June 2010, 2010 I-05267, para. 53.

[26] When dealing with ethically sensitive issues, the ECtHR usually refers to the "consensus" among member States: «where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wide», see *Mennesson v. France*, appl. no. 65192/11, 26 June 2014, para. 77. On the state margin of appreciation when there is no consensus among member States, see also *A., B. and C. v. Ireland*, appl. no. 25579/05, 16 December 2010; *S.H. and Others v. Austria*, appl. no. 57813/00, 3 November 2011. K. Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12 GERMAN LAW JOURNAL 1730-1745, available at http://www.germanlawjournal.com/index.php?pageID=11&artID=1382 (last accessed 03 November 2014); D. Fenwick, 'Abortion jurisprudence' at Strasbourg: deferential, avoidant and normatively neutral?' (2013) 34(2) LEGAL STUDIES 214–241.

and acknowledged by constitutional and supreme Courts in Europe and around the world[27]. The fact that the country strongly claimed its decision to ban it, except in the case of a serious risk for the life of the mother, raised several constitutional law issues, especially with regards to EU law and with the freedom of movement principle[28].

Irish women, in fact, travelled to the UK to perform abortions to circumvent national prohibitions, in case of unintentional or unwanted pregnancies. This phenomenon brought to some legal issues, several breaches of women's fundamental rights, a number of very important judicial decisions and even to a constitutional amendment in 1993[29]. Finally, the decision by the ECtHR in the case of *A, B and C v. Ireland*, in which the state was partially condemned, conduced the Irish Parliament to adopt a legislation that clarifies the conditions under which women can lawfully have access to pregnancy interruptions and to information of services legally available abroad[30].

The evolution of the abortion ban in Ireland is interesting because it offered the chance, to the ECtHR, to express some principles which has become fundamental with regards also to cross-border reproductive care: to which extent information on services legally available elsewhere in Europe can be acceptable? In *Open Door And Dublin Well Woman V. Ireland*[31] the Court, after a deepened scrutiny of the Irish legislative and constitutional framework, underlined that the mere act of giving information on services legally available abroad (in this case, in the UK) did not constitute *per se* a violation of Irish law, because the ultimate decision on whether to terminate the pregnancy or not rests of the woman concerned. On the contrary, the total absence of such information did pose a serious risk on women's right to health, as they would have otherwise been forced to refer to unlawful abortion providers[32].

[27] It is not accidental that the most relevant decisions concerning de-criminalisation of abortion where issued by supreme and constitutional Courts in Europe and in the US during the Seventies. The principle that a woman can decide on her body and that, legally speaking, she has a right to self-determination over her body, contraception and sexual life is one of the most revolutionary products of the feminist and civil rights battles of the Sixties. As a consequence of a "social" aftermath of these principles, their legal recognition was sought and this brought to some of the most famous decisions regarding abortion. See, for example, Roe v. Wade 410 U.S. 113 (1973) or the Italian constitutional court decision n. 27 of 1975. For a general overview, see R. Sifris, 'Restrictive regulation of abortion and the right to health' (2010) 28 MEDICAL LAW REVIEW 185–212.

[28] For some recent contributions on the issue see: E. Wicks, 'A, B, C v Ireland: Abortion Law under the European Convention on Human Rights', (2011) 11 (3) *HUMAN RIGHTS LAW REVIEW* 556-566; G. Puppinck, 'Abortion and the European Convention on Human Rights' (2013) 3(2) IRISH JOURNAL OF LEGAL STUDIES 142-193; B.C. Mercurio, 'Abortion in Ireland: An Analysis of the Legal Transformation Resulting from Membership in the European Union' (2003) 11 Tulane Journal of International & Comparative Law 141-180; M.A. Rhinehart, 'Abortions in Ireland: Reconciling a History of Restrictive Abortion Practices with the European Court of Human Rights' Ruling in A., B. & C. v. Ireland' (2013) 117(3) PENN STATE LAW REVIEW 959-978.

[29] The complete reconstruction of the legal framework concerning abortion in Ireland, including case law and legislation is reported in the dossier issued by the Centre for Reproductive Rights, *Abandoned and Stigmatized. The impact of the Irish Abortion Law on women*, 2014, available at http://www.ccprcentre.org/doc/2014/06/INT_CCPR_CSS_IRL_17442_E.pdf (last accessed 06.10.2014).

[30] References to the Irish legal framework concerning abortion, especially after the ECtHR decision in A, B and C v. Ireland are almost endless. To have an overview on the European implications, see J. Westeson, 'Reproductive health information and abortion services: standards developed by the European Court of Human Rights' (2013)122 INTERNATIONAL JOURNAL OF GYNECOLOGY AND OBSTETRICS 173-176.

[31] Open Door And Dublin Well Woman V. Ireland, Appl. n. 14234/88; 14235/88, 29 October 1992.

[32] Open Door And Dublin Well Woman V. Ireland, paras 67-77.

It was in the same years that the European Court of Justice as well was called to give its opinion on an "abortion information case", contributing this way to the framing of a European standard for access to cross-border information and services. In *Grogan*[33], a student association in Ireland was distributing to female students information on abortion services available in the UK. The ECJ's decision concerned the applicability of EU law to the present case, considering the involvement of cross-border issues and information on services: the problem at stake was whether abortion was to be considered a services for the purposes of EU law; whether the student union had to be considered as a service provider; and, therefore whether the Treaties' fundamental freedoms of free movement and services had been violated by the Irish legal restriction. Even if the Court found that the students' association was not a service provider and, therefore, the Treaty provisions were not applicable in the specific case, the judges affirmed that abortion has indeed to be considered a service under EU law. Providing information on a service legally available abroad was not done with economic purposes by the student union, which, on the contrary, did not have any economic or actual relationship with the British clinics they were indicating.

At that time, the *Grogan* decision was both highly criticised and welcomed, for its cautious approach, for affirming that abortion is a service and for not having decided on the matter[34]. Beyond the positive or negative criticisms it raised, the decision marked a very important step in ECJ adjudication concerning medical treatments and, especially, highly controversial medical treatments, so that it still serves as a basis of any legal reasoning concerning CBRC.

3.2 A European right to correct and complete information

As the Irish experience teaches, EU fundamental freedoms and EU law, across the years, played an important role in the definition and extension of reproductive rights, especially with reference to the right to information and to the right to movement for reproductive services. The growing phenomenon of CBRC in Europe is particularly relevant for LGBT families, because – as mentioned above – these subjects are those who suffer at most because of national prohibitions.

The right to information on services legally available in Europe has to be distinguished from the dissemination of information on commercialisation of tissues, gametes or surrogacy services[35]. Even if European countries have very different and in some cases opposite legislative positions with regards to heterologous insemination, gametes or embryos donation and surrogacy, all of them ban commercial practises, authorising just a refund of medical expenses by commissioning parents to the surrogate mother or a reimbursement for gametes donors[36]. Moreover, the so-called tissue directive, regarding traceability requirements and technical procedures for the coding, processing,

[33] Case C-159/90, The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others, Court of Justice of the European Union, 4 October 1991, 1991 I-04685.

[34] R. Lawson, 'The Irish abortion cases: European limits to national sovereignty?' (1994) 1 EUROPEAN JOURNAL OF HEALTH LAW 167-186.

[35] See, for example, the prohibition provided by art. 12.6 of the Italian law on ART, n. 40/2004, that provides for a criminal offence with a punishment up to two years for the conduct of the subjects who realize, organize or advertise the commercialization of gametes, embryos and surrogacy.

[36] W. Norton, N. Hudson, L. Culley, 'Gay men seeking surrogacy to achieve parenthood', cit., 273.

preservation and storage of human tissues and cells finds application also in the field of reproduction, as gametes are considered human tissues and cells for the purposes of the directive. Among security and safety provisions, the directive forbids commercialisation of human tissues; therefore European legislation regarding ART should be enacted in compliance with these EU provisions[37]. Moreover, the directive also provides for a state obligation in taking «all necessary measures to ensure that any promotion and publicity activities in support of the donation of human tissues and cells comply with guidelines or legislative provisions laid down by the Member States». There should also be adequate provisions for prohibitions on advertising the «need for, or availability of, human tissues and cells with a view to offering or seeking financial gain or comparable advantage»[38].

For all of these reasons, a right to information concerning the availability of MAR techniques in other member States is taking shape at a European level and finds its roots in the case law of the ECJ and in European and state legislations. Taking into account the state perspective concerning the right to have access to complete and objective information on services lawfully available abroad, it should be pinpointed that, in the UK, for example, «the HFEA has decided to provide as much information as possible so that reproductive tourists can make well-informed decisions»[39].

Provision of information could be difficult, not just on medical or subjective (considering the situation of one specific patient, his needs and his views on his state of health) grounds, but also on linguistic grounds, when cross-border healthcare is at stake. Just a few patients do have sufficient knowledge, instruments and possibility to obtain complete information on medical services abroad. This aspect is strictly related to the patients' subjective situation or characteristics: for example, linguistic competences, but also personal contacts with friends or relatives living abroad, without mentioning financial resources[40].

Among the objectives of the directive on patients' rights in cross-border healthcare[41], the goal to grant a common basis of access to information on medical services (treatments, therapies and technologies) available abroad is foreseen, also in order to fill linguistic and cultural gaps. The directive provides for a state responsibility in organising information units on medical services

[37] EUTCD, Directive and its impletions directives: 2004/23/EC, 2006/17/EC and 2006/86/EC, as regards traceability requirements, notification of serious adverse reactions and events and certain technical requirements for the coding, processing, preservation, storage and distribution of human tissues and cells. See F. Shenfield *et al*., 'Cross border reproductive care in six European countries', cit., 1367; T. Davies, 'Cross-border reproductive care: quality and safety challenges for the regulator' (2010) 94(1) FERTILITY AND STERILITY e20-e22, e21.

[38] Directive and its impletions directives: 2004/23/EC, article 12, para 2.

[39] W. Van Hoof, G. Pennings, 'Extraterritoriality for cross-border reproductive care: should states act against citizens travelling abroad for illegal infertility treatment?' (2011) 23(5) REPROD BIOMED ONLINE 546-554, 552; T. Davies, 'Cross-border reproductive care: quality and safety challenges for the regulator', cit.

[40] Some European ART providers, used to deal with patients from other countries, started to provide services in other languages. In a study of CBRC in six European countries, published in 2010, among relevant results, it was underlined that «for 91.4 % of all patients, the information about the clinic they attended was obtained in their language, and considered satisfactory. See F. Shenfield *et al*., 'Cross border reproductive care in six European countries', cit., 1364.

[41] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, on which see the following paragraph.

abroad and, vice versa, for patients coming from another member State[42]. Moreover, member States shall designate one or more National Contact Points that shall facilitate the exchange of information «concerning healthcare providers, including, on request, information on a specific provider's right to provide services or any restrictions on its practice […], information on patients' rights, complaints procedures and mechanisms for seeking remedies, according to the legislation of that Member State, as well as the legal and administrative options available to settle disputes, including in the event of harm arising from cross-border healthcare»[43]. It is worth mentioning, though, that the directive provisions find application just for medical services that are foreseen, legitimate and available within the National healthcare system.

4 Patients' rights in cross-border healthcare

The EU has recently intervened in the field of health, with the directive on patients' rights in cross-border healthcare[44]. This act clarifies under which conditions a patient can get a medical treatment in a member State different from the one of residence and, once back, be refunded of medical expenses by the home healthcare institution. It is also aimed at guaranteeing the safety, quality and efficiency of care for cross-border patients and at promoting cooperation between member States on healthcare matters.

The drafting of the directive was particularly long, considering that the first draft was presented in 2008 and that its final approval arrived in March 2011. One of the reasons for this long legislative path has to be identified in the fear that some member States had regarding the emerging of an obligation to reimburse also treatments that were prohibited within the national territory. For this reason, during the drafting, an amendment was introduced to clarify that the state obligation to reimburse medical expenses for services undergone abroad was limited to those treatments which are already foreseen by the national health service and available on the national territory[45]. It is not just a matter of finance or sustainability of healthcare services: member States were (and still are) quite concerned about the EU intervention in the field of health and in the space of their legislative autonomy to decide on ethically sensitive issues, such as abortion or medically assisted reproduction[46].

[42] See Directive 2011/24/EU, articles 4, para 2, and 5.

[43] Directive 2011/24/EU, article 6.

[44] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare.

[45] «An amendment was introduced to make it clear that the directive does not imply that member states would have to reimburse "ethically controversial medical 'service' like euthanasia, DNA-testing or IVF" when the relevant service is not allowed , or at least not financed, in the relevant member state. In fact, this abuse would be prevented by the general rule that "the obligation to reimburse costs of cross-border healthcare should be limited to healthcare to which the insured person is entitled according to the legislation of the member state affiliation». W. Van Hoof, G. Pennings, 'Extraterritoriality for cross-border reproductive care: should states act against citizens travelling abroad for illegal infertility treatment?', cit., 552.

[46] This profile is indeed taken into consideration in the text of the directive. See, among introductive acknowledgements, n. 7: «This Directive respects and is without prejudice to the freedom of each Member State to

The directive aims at harmonising national legislation concerning access to healthcare in a member State different from the one of affiliation. This entails several interventions to be taken at a state level, that are intended to pursue the directive's obligation and grant legal certainty for European patients moving abroad in the EU for health reasons. Unfortunately, for reimbursement eligibility, it is necessary that the medical treatment undergone abroad is foreseen by the healthcare service of patient's affiliation[47]. Nevertheless, beyond reimbursability requirements, it should be pointed out that the directive poses some important targets on member States regarding the raising of healthcare standards also at a national level. To this end, for example, European reference networks are going to be created in order to strengthen connections between centres of excellence for the treatment of specific illnesses or of rare diseases[48].

For the purposes of the present analysis, it seems that some of the principles established in the directive might be of help also for the development of a European understanding of CBRC and of the sets of rights connected to it. More specifically, the directive boosts the creation of professional and medical networks concerning health treatments, which are aimed at increasing the standards of access to medical treatments around Europe and at improving conditions and practises for healthcare delivery in each member State. In this context, also MAR technologies are included within the number of treatments whose standards might be enhanced, even if conditions and requirements to have access to them sensibly differ among member States.

The achievement of high quality of treatment and safety for patients are of seminal importance for those individuals who go abroad to have access to medical treatments, regardless of their social and economic conditions or sexual orientation. Because they are far away from their place of living, main interlocutors and human connections and also because they might have some information or communication deficits in accessing treatments abroad, they deserve a system of guarantees of health and safety standards that should be put in place also to avoid health damages, undue exploitation or illegitimate practises.

For these reasons, it could be argued that the directive principles could find application even in the field of access to cross-border medical assisted reproduction, with specific regard to availability of information for patients and guarantee of quality standards, even if reimbursement procedures for CBRC might not be fully included, due to the profound differences that characterise national legislations in this field. As we have already mentioned, the spectrum of application of the directive does not completely concern ART, because the basic requirement for the application of its provisions concerns a "reciprocity standard" between the home state and the state in which the patient is undergoing the medical treatment in questions. Being EU law so heterogeneous with regards to ART regulation, it means that for EU citizens moving from one member state to another

decide what type of healthcare it considers appropriate. No provision of this Directive should be interpreted in such a way as to undermine the fundamental ethical choices of Member States».

[47] See acknowledgement nr. 33: «This Directive does not aim to create an entitlement to reimbursement of the costs of healthcare provided in another Member State, if such healthcare is not among the benefits provided for by the legislation of the Member State of affiliation of the insured person».

[48] See article 6 on national contact point and article 12 on European reference networks.

in order to get an IVF procedure requires deep scrutiny of both national legislation concerning ART and the requisites to access it.

Beyond the "reciprocity requirement", whereby a patient can obtain the reimbursement of medical expenses for treatments received abroad just in the case in which the same treatment is included among those provided by the home health provider, CBRC could hardly fall within the directive's provision for reasons of health coverage. In each country there are different provisions regarding the reimbursement or healthcare coverage of the costs of IVF practises[49]. Therefore, sometimes, going abroad at the individual's own expenses might be even cheaper for perspective parents. Once more, even this factor demonstrates how much the issue of CBRC for LGBT couples is composite and multifaceted and, once more, it clearly emerges that national decisions (either in a restrictive or permissive sense) could impact on individual fundamental rights and could lead also to economic exploitation of less developed countries or poorer segments of the society[50].

5 Conclusions: the grouchy path towards a European common standard for CBRC for LGBT couples

The analysis of the directive on patients' rights in cross-border healthcare together with the evaluation of legal restrictions that LGBT are facing to have access to ART in the European Union permits to develop some consideration about the need for the elaboration of a common European set of principles concerning access to reproductive care.

Beyond national prohibitions, there are several other factors that determine the flow of patients seeking reproductive care in another member State. Among these, the possibility to get a reimbursement of medical expenses has rarely been taken into account, due to a concrete difficulty for singles or same-sex couples to have an effective access to these mechanisms because of legislative barriers. National legislations are profoundly different with regards to MAR regulation; moreover, subjective requirements (possibility to have access to MAR for singles or same-sex couples) are making the matter even more prickly and, ultimately, determine the patient's sense of solitude. As a result of it, LGBT couples willing to procreate have no other chance to find by their selves relevant information on services available abroad or – in the best case – to find the support of an association who directly deals with these issues.

The analysis of the relationship between national prohibitions and the sought of ART in other countries demonstrates that the boundaries between legal and illegal, licit or illicit treatments, situations or agreements might be evanescent. Going abroad for the purposes of procreation might even put the perspective parent in risky situations: just to make an example, laboratories for

[49] See A.P. Ferraretti, G. Pennings, L. Gianaroli, F. Natali, M.C. Magli, 'Cross-border reproductive care: a phenomenon expressing the controversial aspects of reproductive technologies', cit., 263.

[50] On this matter see K. Schanbacher, 'India's Gestational Surrogacy Market: An Exploitation of Poor, Uneducated Women' (2014) 25(2) HASTINGS WOMEN'S LAW JOURNAL 201-220; R. Deonandan, A. Bente, 'Assisted reproduction and cross-border maternal surrogacy regulations in selected nations' (2014) 4(1) BRITISH JOURNAL OF MEDICINE & MEDICAL RESEARCH 225-236.

gametes collection might not be pursuant with the average safety standard; surrogate mothers might be the victims of economic or social exploitation, and so on.

For these reasons, it has to be remarked that, beyond state decisions to forbid a specific treatment on its territory (such as in the case of surrogacy) or to exclude some categories from access to MAR (such as singles or same-sex couples), member States should nevertheless respect their obligations under EU law. Among these, the task of ensuring safety of European citizens when going abroad for the purposes of reproductive care should assume a predominant role and should characterise, at least, national regulations concerning the dissemination of information on services legally available abroad.

In the few cases in which CBRC is not caused by national bans, it should be mentioned that moving patients should receive all relevant information on reimbursement opportunities and procedures, in compliance with the directive. Some researches show that, sometimes, patients move for MAR in order to skip waiting lists in their countries: this is the case of patients who can have access to MAR in their home country, but decide to go abroad because of the scarce availability of treatments in their country. In these situations, they theoretically have the right to receive the reimbursement of medical expenses occurred, but rarely this right is effective, due to the different national frameworks concerning the level of health insurance coverage and due to a lack of information on reimbursement procedures. For example, in a study published in 2013, concerning cross-border reproductive care for French patients who sought IVF in Greece, Spain and Belgium, results showed that, while «a vast majority of patients going to Belgium for sperm donation were not legally eligible for ART in France because they were same-sex couples or single women»[51], those going to Greece and Spain would have had access to IVF in France as well. With reference to this group of patients, CRBC has been determined by the length of waiting lists and the scarce availability of the reproductive technique that they sought[52]: in this case, the reason for travelling abroad could be detected in the very restricted access to oocyte donation caused by the shortage of donors and by the application, by IVF centres, of more restrictive rules than those provided by law[53].

This example demonstrates that reasons for CBRC could be manifold and, in some cases, different from the willingness to avoid legislative bans. On the one side, this difference is dependent upon the patients' characteristics (same-sex couples or single women, who are denied access to ART in France), age or treatment sought (in this case, oocyte donation demonstrated to be quite of difficult access in France). In this latter example, for heterosexual couples, access to ART through oocyte donation could be theoretically reimbursed by the French healthcare service and, for this reason, the directive might find application.

With reference to same-sex couples seeking CBRC, it has to be pinpointed that, within the European context, there is a scarce availability of studies and researches concerning single men or

[51] V. Rozée Gomez, E. de La Rochebrochard, 'Cross-border reproductive care among French patients eligible for ART funding in France', cit., 3108.

[52] They were heterosexual couples where the woman was younger than 43 years old.

[53] V. Rozée Gomez, E. de La Rochebrochard, 'Cross-border reproductive care among French patients eligible for ART funding in France', cit., 3108.

male couples who seek surrogacy[54]. The study concerning French patients, for example, could take into consideration also single women or female partners seeking sperm donation in Belgium, but it could not consider the above-mentioned part of the population.

A further profile that deserves due consideration when facing the issue of CBRC for same-sex couples concerns the hypothesis of people travelling from one member State to the other not to circumvent national prohibitions or to skip long waiting lists, but to have access to better treatment conditions. For example, it was already mentioned that the shortage of donors impacts upon the length of waiting lists, as gametes could be scarcely available. Another factor that is not often kept into consideration, but which seems to be of relevance for same-sex couples concerns donors' anonymity: «Another legal barrier, which increases the number of movements across border for donor insemination is the regulation regarding donor anonymity. Scandinavian patients often go to Denmark for donor insemination where anonymity is compulsory in the medical setting. In this study, 18.9 % of Swedish and 16.4 % of Norwegian patients stated they did not merely want donor insemination, but that they sought anonymous donation»[55].

The factors that determine CBRC for patients in general and for same-sex couples in particular are multi-layered. If the most relevant is, beyond doubt, legislative ban or restrictions, it has to be considered that around Europe people are incited to go abroad for MAR or surrogacy even for other reasons, such as the length of waiting lists or the sought for a higher quality treatment. With regards to this phenomenon, therefore, the EU has started to adopt both bounding regulations and recommendations aimed at ensuring that, even across borders, the safety and the rights of patients are respected and made effective.

To this end, the circulation of information is of fundamental importance and it has to be remarked that, especially in a field which is so delicate as the one of human reproduction, it is of unrenounceable importance that a complete, secure and independent information on services legally available abroad is equally ensured to all European citizens.

[54] W. Norton, N. Hudson, L. Culley, 'Gay men seeking surrogacy to achieve parenthood', cit.; S.A. Grover *et al*., 'Assisted reproduction in a cohort of same-sex male couples and single men', cit., 217–221.

[55] F. Shenfield *et al*., 'Cross border reproductive care in six European countries', cit., 1366.

Same-Sex Couples and Legislative Proposals for the Regulation of Assisted Human Reproduction in Ireland

Brian Tobin

Abstract

The General Scheme of the Children and Family Relationships Bill 2014 is the first piece of legislation proposed to regulate assisted human reproduction in Ireland. If enacted it will, inter alia, enable a child conceived in a clinic via sperm/ovum donation to have two female parents. However, the proposed legislation must be in compliance with the Constitution of Ireland, otherwise it will be susceptible to constitutional challenge and its provisions could be struck down by the courts. On 25th September 2014 the General Scheme was revised somewhat, in part due to constitutional concerns, and its assisted human reproduction provisions no longer propose to regulate parentage in surrogacy cases. The revised General Scheme will preclude a child from having two males recognised as its legal parents and this endorses inequality amongst Irish rainbow families.

This paper critiques the assisted human reproduction provisions of the revised General Scheme for their potential to frustrate, rather than facilitate, the formation of rainbow families in Ireland and I conclude by making proposals to amend the revised General Scheme. Such proposals are based on recommendations made by this author during pre-legislative scrutiny of the General Scheme with members of a specialist Irish parliamentary committee in April 2014 and they aim to achieve an equitable balance between the rights of the child and its same-sex parents in an assisted reproduction context.

Keywords

Surrogacy; assisted reproduction; home-insemination; known donor; child's right to identity; Article 42A, Irish Constitution.

* * * * *

1 Introduction

The General Scheme of the Children and Family Relationships Bill 2014 proposes to radically overhaul Irish family law and duly equip it for the twenty-first century. Among its many family law reform-oriented aims the General Scheme seeks to regulate parentage where a child is born via assisted reproduction for the first time under Irish law. This article will analyse whether the General

Scheme's assisted reproduction provisions have the potential to frustrate rather than facilitate the intentions of Irish rainbow families and it will make some recommendations for reform.

2 Part 3 of General Scheme

Part 3 of the General Scheme aims to regulate parentage in cases of assisted reproduction other than surrogacy due to its recent revision. Originally, Part 3 would have enabled the intended parents of a child born through surrogacy, whether same-sex or opposite-sex, to apply to the court for a declaration of parentage. Such an application could only be made 30 days after the child's birth in order to allow the surrogate "sufficient time to recover from the rigours of pregnancy and childbirth before participating in proceedings."[1] An application would have had to be accompanied by evidence of the genetic relationship of one or both of the intended parents to the child and evidence that the surrogate is not the genetic mother of the child (Part 3 proposed to regulate *gestational* surrogacy). Once satisfied that the surrogate consented and that at least one of the intending parents had a genetic link to the child, the court would have been permitted to make a declaration of parentage in favour of the child's intended parents. However, the consent of the gestational surrogate to the making of the application was essential; otherwise she would be the child's legal mother.

This author has pointed out elsewhere that allowing a gestational surrogate who has no genetic connection to the child to keep what is essentially (and genetically) someone else's child seemed rather inequitable and could have constituted a potential infringement of the child's constitutional rights if Article 42A (the 'Children's Amendment') is ultimately inserted into the Constitution following the outcome of a legal challenge.

3 The constitutional rights of the child in cases of dispute between the gestational surrogate and the intended parents

The result of the Children's Referendum is currently the subject of a legal challenge.[2] However, if inserted, Article 42A.1 will guarantee as follows:

The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

Indeed, the very use of the word "natural" in Article 42A.1 implies that the child's "natural and imprescriptible" rights include rights in relation to those persons from whom he *naturally* results; in other words, his genetic parents. Doyle and Feldman observe that Article 42A.1 places the "natural and imprescriptible" rights of the child "front and centre".[3] Further, Shannon suggests that a child

[1] General Scheme of the Children and Family Relationships Bill 2014, Head 13 (Notes).

[2] *Jordan v* Minister *for Children and Youth Affairs* [2013] IEHC 635. This case is currently under appeal to the Supreme Court.

[3] Oran Doyle and Estelle Feldman, "Constitutional Law" in Raymond Byrne and William Binchy (eds), *Annual Review of Irish Law* 2012 (Thomson Round Hall 2013) 130.

may enjoy a "natural constitutional right to family life pursuant to Article 42A.1".[4] Indeed, there is much to suggest that, where possible, a child has a natural constitutional right to family life with his biological parents. In *G v An Bord Uchtála*, Walsh J suggested that among the child's natural rights is an entitlement "to be supported and reared by its parent or parents, who are the ones responsible for its birth".[5] In addition, Article 7.1 of the United NationsConvention on the Rights of the Child (UNCRC) provides that a child has "from birth…as far as possible, the right to know and be cared for by his or her parents." The importance to a child's welfare of being nurtured by the "natural family" where possible was strongly emphasised by Hardiman J in *N v Health Service Executive*:

> "[T]he presumption mandated by our Constitution is a presumption that the welfare of the child is presumptively best secured in his or her natural family…*the child has a right to the nurture of his or her natural family where that is possible*."[6]

If, under the proposals in Part 3 of the General Scheme, the gestational surrogate refused to consent to a legal assignation of parentage in favour of the commissioning couple and sought to retain custody of the child, could it be argued that she would be breaching the child's natural constitutional right to family life under Article 42A (if inserted)? It is submitted that where the genetic parents are an opposite-sex married couple and both members of the couple have provided the genetic material, *ie* the female has provided the ovum and the male has provided the sperm, this argument could hold significant weight. This is because by refusing to consent a gestational surrogate would be denying the child *its right* to know and be reared by its genetic, married parents. This would appear contrary to Article 42A (if inserted), and the rights of the married family under Article 41 could also be invoked because there is a constitutional presumption that the welfare of a child is best secured with its natural, married parents.[7] Thus, one envisages that, if a dispute arose between a gestational surrogate and genetic married parents in the future, a provision such as Head 13 (of Part 3) would undoubtedly have been placed under a constitutional spotlight. As Mulligan emphasises, a proposed legislative framework for assisted reproduction in Ireland:

> "[M]ust be careful to respect constitutional rights, and ensure that they are adequately protected in the scheme of regulation. As well as failing to show sufficient regard for the Constitution, a framework that did not give enough weight to constitutional rights would be vulnerable to constitutional challenge."[8]

However, if a gestational surrogate refused to consent to the making of an order in favour of a male same-sex couple under Head 13, the argument that the child's natural constitutional right to family life is being breached may hold less weight in the courts. This is because only one member of

[4] Geoffrey Shannon, *Child Law* (2nd edn, Round Hall 2010) 36.

[5] [1980] IR 32, 67-68.

[6] [2006] 4 IR 374. Emphasis added.

[7] See *Re JH* [1985] IR 375, and *N v Health Service Executive* [2006] 4 IR 374. Article 41.3.1 of the Irish Constitution guards with special care "the institution of Marriage, on which the Family is founded".

[8] Andrea Mulligan, "From Murray v. Ireland to Roche v. Roche: Re-Evaluating the Constitutional Right to Procreate in the Context of Assisted Reproduction" (2012) *Dublin University Law Journal* 261, 261-262.

the same-sex couple will be the child's genetic parent, and even if the gestational surrogate sought to retain the child the natural father could seek to establish family life with the child by applying for guardianship and/or access rights in the courts under the Guardianship of Infants Act 1964. This might satisfy the child's natural constitutional right to family life. Unlike their married opposite-sex counterparts, a male same-sex couple would be unable to rely on the protection afforded under Article 41.[9] Thus a male same-sex couple deprived of a child that they intended to raise together would be unlikely to establish any breach of constitutional rights caused by the surrogate's actions because they constitute a family unit that is presently devoid of any constitutional protection.

In any event, on 25th September 2014 the Revised General Scheme of the Children and Family Relationships Bill 2014 was published and, rather than refine the surrogacy provisions to dispel the abovementioned fears, the Oireachtas instead chose to delete them from Part 3 of the Revised General Scheme. Thus, if the Revised General Scheme is eventually passed into law it will create an inequality between rainbow families that choose to have a child via assisted human reproduction. Lesbian couples will be able to conceive a child via AHR in a clinic and provided that the non-biological co-mother consents, she will be the child's second legal parent under Irish law. However, male same-sex couples who engage a surrogate to bear a child for them will not be entitled to the same treatment under Irish law because the deletion of the surrogacy provisions means that the surrogate will be the child's legal mother and there will be no legal mechanism enabling her to transfer parentage to the male couple, the child's intended parents. Hence the eventual enactment of Part 3 of the Revised General Scheme will, in an AHR context, frustrate the intentions of prospective homosexual male parents and create a statutory inequality between children born into Irish rainbow families by means of assisted reproduction.

4 Lesbian couples and children conceived via home-insemination

The Revised General Scheme does not regulate parentage where a child is conceived by a lesbian couple outside of a clinical setting, *ie* through self-insemination in the home. This policy choice was necessary given the Irish Supreme Court's decision in *McD v L*. In that case it was established that where a child is conceived via home-insemination with sperm from a known donor then the known donor has the same rights of guardianship and access as any other natural father under Irish law. The member of the lesbian couple that is the child's biological mother will be its parent and legal guardian upon birth and the known donor will be its other parent entitled to apply for guardianship and access under the provisions of the Guardianship of Infants act 1964. The member of the lesbian couple that is intended as the child's co-mother cannot be deemed a parent but if she and the child's mother are civil partners then, if enacted, the Revised General Scheme will enable her to apply for guardianship once she has shared with the child's mother responsibility for the child's day-to-day care for a period of more than two years. Similarly, where the child's birth mother and its intended co-mother have been cohabiting for over three years in an intimate and

[9] Although there is a referendum on same-sex marriage proposed for 2015 which, if successful, should result in *married* same-sex couples being entitled to the protection of Article 41.

committed relationship and the latter has shared with the former responsibility for the child's day-to-day care for a period of more than two years, she will be eligible to apply for guardianship.

Since many lesbian couples may continue to conceive a child through home-insemination with sperm from a known donor because it is far less expensive than going down the clinical route, the Revised General Scheme's provisions are far from ideal. Since the non-biological co-mother cannot be deemed a parent of the child where her lesbian partner conceives a child in this manner, and because she can only acquire guardianship once certain statutory time periods are satisfied, this author would propose a mechanism that would allow the known donor to transfer his parental status and rights to the non-biological co-mother after a statutory cooling-off period. It is opined that such a legislative provision would equitably balance the rights of the child, the known donor and the lesbian partners, and in the vast majority of instances it would facilitate the intentions of rainbow families where a child is conceived via home-insemination. This author proposes that, identical to what was originally proposed for the gestational surrogate, the known donor should be able to choose to transfer his parental rights to the child's co-mother after a 30-day cooling off period. In most cases this would enable the child to have its intended same-sex family structure of two lesbian legal parents recognised in law. Following the transfer of parental rights, legislation could permit the co-mother to apply to the court for guardianship or to be made a guardian by agreement with the child's mother. This is currently the situation for unmarried fathers and known sperm donors also.

5 The child's right to know the identity of its parents

Rainbow families who choose to have children via recourse to methods of assisted human reproduction should not underestimate how important it can be for a donor-conceived child to have knowledge of genetic parentage. Kilkelly believes that all donor-conceived children should be able to choose whether or not to access identifying and non- identifying information about their donors because:

> Supported by considerable research and the development of best practice across the world, the strong consensus emerging is that it is without a doubt not only in children's interests to know the full details of their history (and indeed that of their family) but that an overwhelming number of them request, want and need that information.[10]

Similarly, Cowden recognises the importance that a child can attach to its biological family and that "the evidence is growing that access to identifying information regarding one's genetic parents is essential to a child's mental health."[11] In *McD v L*, the Supreme Court recognised that "[t]here is

[10] Ursula Kilkelly, "Complicated Childhood: the Rights of Children in Committed Relationships" in Oran Doyle and William Binchy (eds), *Committed Relationships and the Law* (Four Courts Press 2007) 215, 234.

[11] Mhairi Cowden, "'No Harm, No Foul': A Child's Right to Know their Genetic Parents" (2012) 26 (1) *International Journal of Law, Policy and the Family* 102, 110-111. As authority for this statement, the author cites J.E. Scheib, M. Riordan and S. Rubiri, "Choosing Identity – Release Sperm Donors: The Parents' Perspective 13-18 Years Later" (2003) 18 *Human Reproduction* 1115.

natural human curiosity about parentage."[12] Further, the ECtHR has recognised "the importance to children of accessing information about their identity"[13] and it appears to require some State intervention to facilitate this.[14] In light of all this, it was worrying that the General Scheme originally lacked any provision enabling a donor-conceived child to acquire identifying or non-identifying information about its biological progenitor(s), upon maturity, especially since the Commission on Assisted Human Reproduction recommended in its 2005 report that donor-conceived children "should, on maturity be able to identify the donors involved."[15] Blyth and Frith have observed that "[w]orldwide, jurisdictions that are passing laws on the issue of assisted human reproduction tend to recognise the right of donor-conceived people to learn the identity of their donor."[16]

In each of these jurisdictions a prospective donor must explicitly agree to the release of his identity to a donor-conceived child who requests this information, prior to donating his sperm for use in assisted reproduction procedures. Further, the licensed fertility clinics in each of these jurisdictions are required "to keep records of their procedures and to forward these to a body charged with maintaining a donor register."[17] In the UK the Human Fertilisation and Embryology Authority is the body responsible for maintaining the donor-conceived register. Donor-conceived children there have the right to obtain non-identifying information at the age of sixteen and, for those children born after 1st April 2005 identifying information such as the donor's name and address can be obtained once they reach the age of eighteen.[18] Identifying information will first be released to donor-conceived children in the UK in 2023.

Part 4 of the Revised General Scheme contains similar provisions prohibiting the use of anonymous sperm/eggs by fertility clinics and it provides for the establishment by ministerial order of a body tasked with maintaining the national donor-conceived person register. Fertility clinics must keep a record of donor information and within 3 months of the birth of a donor-conceived child such clinics must send the donor information to the body tasked with maintaining the national donor-conceived person register. A donor-conceived child aged 18 or over will have the right to request identifying or non-identifying information about their donor. Hence the Revised General

[12] McD *v L* [2010] 1 ILRM 461, 524.

[13] Ursula Kilkelly, "Complicated Childhood: the Rights of Children in Committed Relationships" in Oran Doyle and William Binchy (eds), *Committed Relationships and the Law* (Four Courts Press 2007) 215, 237.

[14] *Gaskin v United Kingdom* (1989) 12 EHRR 36; *Mikulic v Croatia* App No 53176/99 (ECHR, 7th February 2002); *SH v Austria* App No 57813/00 (ECHR, 1st April 2010). Indeed, Kilkelly believes that the ECtHR could interpret Article 8 so as to prohibit anonymous gamete donation: see Ursula Kilkelly, 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child" (2001) 23 (2) *Human Rights Quarterly* 308.

[15] *Report of the Commission on Assisted Human Reproduction* (Department of Health 2005) 46. Available at: http://www.dohc.ie/publications/pdf/cahr.pdf

[16] Blyth and Frith, "Donor-Conceived People's Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity" (2009) 23 (1) *International Journal of Law,* Policy *and the Family* 174, 188.

[17] Blyth and Frith, "Donor-Conceived People's Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity" (2009) 23 (1) *International Journal of Law, Policy and* the *Family* 174, 178.

[18] Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004, SI 2004/1511. Available at www.opsi.gov.uk/SI/si2004/20041511.htm

Scheme attempts to vindicate the right of the donor-conceived child to knowledge of its genetic parentage. This right is possibly a constitutional right of the child, a corollary of the right to know the identity of one's natural mother that was identified by the Supreme Court in *I'OT v B* as a personal right of the child under Article 40.3.[19]

Part 4 of the Revised General Scheme will have a significant impact on the prevailing practice of fertility clinics in Ireland because "there is no sperm bank in Ireland" and to date all of the sperm used in Irish fertility clinics has been "donated anonymously",[20] having been imported from countries such as Spain where donor anonymity is guaranteed. However, even if this proposed legislative prohibition on anonymity makes it difficult for Irish fertility clinics to source sperm/eggs, one is inclined to agree with Cowden that:

> Even if there was a shortage in gamete donations, there is a strong argument that that this outcome is more acceptable than knowingly creating individuals who will never never be able to know their genetic parents.[21]

6 Conclusion

The Revised General Scheme of the Children and Family Relationships Bill 2014 is a progressive step in a jurisdiction that has hitherto never legislated for assisted reproduction. If the General Scheme is enacted, the undesirable effect of the deletion of the surrogacy provisions from Part 3 will be the creation of a statutory inequality between male and female rainbow families that conceive children via methods of assisted human reproduction. Further, while the General Scheme will enable a lesbian couple to be deemed the legal parents of a child conceived via donor sperm in a clinical setting, this paper has highlighted that home-insemination is a far less expensive process which many lesbian couples are likely to continue to have recourse to. Therefore it would be wise to introduce legislation facilitating the transfer of parental rights from a known donor to a non-biological co-mother in this type of scenario as this would give effect to the true intentions of the parties in the vast majority of home-insemination cases. Part 4 of the General Scheme is a welcome revision for donor-conceived children born into Irish rainbow families as it endeavours to vindicate their (arguably constitutional) right to knowledge of their genetic identity. However, this policy objective will have a significant impact on current clinical practice in the area of assisted human reproduction in Ireland.

[19] [1998] 2 IR 321, 348 (Hamilton CJ).

[20] Joint Committee on Justice, Defence and Equality Deb 9th April 2014, 11.

[21] Mhairi Cowden, "'No Harm, No Foul': A Child's Right to Know their Genetic Parents" (2012) 26 (1) *International Journal of Law, Policy and the Family* 102, 121.

La surrogazione di maternità all'estero tra riconoscimento dello *status filiationis* e profili di responsabilità penale

Tommaso Trinchera e Giulia Vallar[1]

Abstract

Il presente contributo intende affrontare due problemi, rispettivamente di diritto internazionale privato e processuale e di diritto penale, che possono venire in rilievo quando una coppia italiana si reca all'estero per ricorrere alla maternità surrogata. Sotto il primo profilo, la trascrizione dell'atto di nascita validamente formato all'estero potrebbe essere rifiutata dall'ufficiale di stato civile per presunta contrarietà all'ordine pubblico. La nozione di ordine pubblico è presa in considerazione alla luce della rilevante giurisprudenza nazionale. Inoltre, si considera il possibile rilievo che due recenti sentenze della Corte europea dei diritti dell'uomo potrebbero avere sulla nozione stessa e, di conseguenza, sull'effettiva possibilità di ottenere la trascrizione degli atti di nascita di cui si è detto. Sotto il secondo profilo, si potrebbe configurare il reato di alterazione di stato. Anche in questo caso sono analizzati i contrastanti orientamenti della giurisprudenza nazionale sul punto e sono svolte alcune considerazioni circa la legittimità o meno del ricorso alla sanzione penale in casi siffatti.

Keywords

Turismo procreativo, fecondazione eterologa, surrogazione di maternità, trascrizione dell'atto di nascita, ordine pubblico, superiore interesse del minore, alterazione di stato.

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1 Premessa

Il ricorso alle tecniche di maternità surrogata dà origine a complessi problemi, anche di natura giuridica, che hanno stimolato il fiorire di iniziative, a livello internazionale, per lo studio e la ricerca di una soluzione agli stessi.[2]

[1] Sebbene il presente lavoro sia frutto di una riflessione congiunta degli autori, la premessa (par. 1) è da attribuire congiuntamente ai due autori; il par. 2 (e i relativi sottoparagrafi) è da attribuire a Giulia Vallar e il par. 3 (e i relativi sottoparagrafi) a Tommaso Trinchera.

[2] Senza pretesa di esaustività, possono ricordarsi gli studi condotti nell'ambito della Conferenza dell'Aia di diritto internazionale privato e processuale, dell'Unione europea e dell'*International Commission on Civil Status*.

Il presente contributo intende porre l'attenzione su due dei maggiori ostacoli, rispettivamente di diritto internazionale privato e processuale e di diritto penale, con cui potrebbe andare incontro una coppia, nella quale almeno uno dei due partner è cittadino italiano, che fa ricorso alla surrogazione di maternità all'estero. Un primo problema è rappresentato, infatti, dalla possibilità di ottenere in Italia la trascrizione dell'atto di nascita validamente formato nel Paese straniero. Un secondo problema concerne, invece, gli eventuali profili di responsabilità penale che possono venire in rilievo in caso di surrogazione di maternità all'estero.

2 La trascrizione in Italia dell'atto di nascita validamente formato all'estero

Il tema della trascrizione in Italia dell'atto di nascita validamente formato all'estero dev'essere trattato avendo riguardo alle pertinenti norme italiane in materia, nonché alla luce di una recente giurisprudenza della Corte europea dei diritti dell'uomo.

2.1 La clausola di ordine pubblico quale possibile ostacolo alla trascrizione dell'atto di nascita

Come noto, la trascrizione in Italia di atti dello stato civile stranieri è regolata dal d.P.R. 3 novembre 2000, n. 396, il quale, all'art. 18, vieta tale trascrizione nel caso in cui le disposizioni contenute nell'atto producano effetti contrari all'ordine pubblico .[3]

Il fine primario perseguito, in generale, dal legislatore attraverso il limite dell'ordine pubblico è quello di preservare l'armonia e la coerenza interna dell'ordinamento di appartenenza. La clausola in esame entra in funzione nel momento in cui è riempita di uno specifico contenuto dal giudice chiamato a risolvere un determinato caso concreto. Il margine di discrezionalità lasciato a quest'ultimo nell'individuare quali siano i valori tutelati attraverso l'eccezione di ordine pubblico e nell'accertare se, ad esempio – nel caso che ci riguarda –, la trascrizione di un atto di nascita formato all'estero possa alterare la coerenza interna dell'ordinamento è chiaramente assai ampio ed è nell'uso di tale discrezionalità che il giudice deve mostrare grande saggezza ed equilibrio. Quale parametro di riferimento, egli dovrà assumere non una singola norma isolatamente presa ma i

[3] Da segnalare la Circolare MIACEL del 26 marzo 2011, in RDIPP, 2002, p. 283 ss., secondo cui il limite dell'ordine pubblico di cui all'art. 18 del citato d.P.R. non si applica alle trascrizioni di atti formati all'estero relativi a cittadini stranieri residenti in Italia e regolate dall'art. del 19 d.P.R. citato. Infatti «tali trascrizioni sono meramente riproduttive di atti riguardanti i predetti cittadini stranieri formati secondo la loro legge nazionale da autorità straniere. Esse hanno il solo scopo di offrire agli interessati la possibilità di ottenere dagli uffici dello stato civile italiani la copia integrale degli atti che li riguardano così come formati all'estero. Dette trascrizioni, attesa la loro estraneità all'ordinamento giuridico italiano non possono, comunque, porsi in contrasto con quest'ultimo per ragioni di ordine pubblico». Tale previsione desta senz'altro qualche perplessità e dunque pare da accogliere con favore la segnalazione contenuta nel parere del Consiglio di Stato del 12 luglio 2011, n. 2/52 (in RDIPP, 2012, p. 447 ss.) di un possibile futuro intervento di riforma dell'ordinamento dello stato civile nel senso di «introdurre un controllo di ordine pubblico sugli atti riguardanti gli stranieri residenti in Italia, come quello previsto dall'art. 18 … per gli atti formati all'estero riguardanti cittadini italiani» e ciò al fine di «giungere … ad una piena equiparazione fra la trascrizione ex art. 19 … e la trascrizione ordinaria prevista per i cittadini». Sul punto si veda anche Sara Tonolo, 'La trascrizione degli atti di nascita derivanti da maternità surrogata: ordine pubblico e interessi del minore' [2014] RDIPP 81, 83 ss.

principi che per il proprio ordinamento complessivamente considerato – in generale o in un particolare settore – sono di fondamentale importanza.[4]

Al fine di intendere come sia stata interpretata la clausola di ordine pubblico di cui all'art. 18 del d.P.R. 396/2000 nei casi di richiesta di trascrizione di un atto di nascita validamente formato all'estero a seguito di maternità surrogata, è bene ricordare quelle decisioni di merito che, a partire dal 2009, hanno argomentato in relazione, appunto, alla contrarietà o alla non contrarietà all'ordine pubblico del riconoscimento in Italia di situazioni familiari create all'estero attraverso il ricorso alle tecniche suddette.

La prima pronuncia sul punto proviene dalla Corte di Appello di Bari, in un caso relativo al riconoscimento in Italia, *ex* artt. 64 lett. g), 65 e 67 della l. n. 218/1995, degli effetti di due c.d. *parental order* inglesi che attribuivano alla madre committente la maternità su due bambini nati da altra donna, cioè dalla madre surrogata. La Corte ritiene tale riconoscimento non contrario all'ordine pubblico internazionale,[5] sulla base di molteplici considerazioni. Per quanto interessa in questa sede, la Corte innanzi tutto indica che la nozione di o. p. internazionale «deve essere rinvenuta in esigenze (comuni ai diversi ordinamenti statali) di garanzia di tutela dei diritti fondamentali dell'uomo, o in valori fondanti dell'intero assetto ordinamentale … valori condivisi dalla comunità internazionale»; inoltre «la maternità surrogata è ammessa da alcuni Stati dell'Unione Europea, sì che non è contraria all'ordine pubblico internazionale, essendo evidente che essa non collide con le esigenze (comuni ai diversi ordinamenti statali) di garanzia di tutela dei diritti fondamentali dell'uomo, o in valori fondanti dell'intero assetto ordinamentale». In ogni caso, «nella valutazione degli effetti, nel nostro ordinamento, del riconoscimento, o del mancato riconoscimento, dei provvedimenti giurisdizionali stranieri … deve aversi prioritario riguardo all'interesse superiore dei minori … costituente anch'esso parametro di valutazione della contrarietà o meno all'ordine pubblico internazionale; tale interesse, nel caso di specie, era senz'altro quello di vedere riconosciuti in Italia i *parental order*». Infine, la Corte d'Appello richiama il principio affermato dalla Corte di Cassazione, secondo cui, in taluni casi, «il *favor veritatis* è recessivo rispetto al *favor filiationis*».[6]

Il Tribunale di Napoli poi, nel 2011, ha ritenuto non contrari all'ordine pubblico gli effetti che sarebbero derivati dalla trascrizione in Italia, richiesta da un cittadino italiano, di un atto di nascita di due bambini nati in Colorado a seguito di maternità surrogata. Secondo il Tribunale, infatti, nell'ordinamento italiano, «il principio guida è quello della responsabilità procreativa finalizzato a proteggere il valore della tutela della prole, principio che è assicurato sia dalla procreazione naturale che da quella medicalmente assistita ove sorretta dal consenso del padre sociale. Pertanto, l'ingresso della norma straniera, ovvero dei suoi effetti, non mette in crisi uno dei principi cardine dell'ordinamento ben potendo coesistere ed armonizzarsi il divieto di ricorrere a tecniche di fecondazione eterologa in Italia con il riconoscimento del rapporto di filiazione tra il padre sociale ed il nato a seguito di fecondazione eterologa negli Stati Uniti».[7]

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[4] Franco Mosconi e Cristina Campiglio, *Diritto Internazionale privato e processuale*, Vol. I (6ª ed., Wolters Kluwer, 2013) 260, 265.

[5] In questo caso l'ordine pubblico è inteso come internazionale, stante la cittadinanza inglese dei due bambini.

[6] Corte di Appello di Bari, 13 febbraio 2009, in DeJure.

[7] Tribunale di Napoli, 1 luglio 2011, in DeJure.

Interessante quanto disposto dal Tribunale di Forlì in un caso di bambini nati in India a seguito di maternità surrogata con apporto genetico del solo padre, cittadino italiano. Il giudice, da un lato, ha ritenuto non contrari all'ordine pubblico gli effetti della trascrizione in Italia del corrispondente atto di nascita in relazione al padre. Dall'altro lato, invece, si è pronunciato nel senso che, nei confronti della madre committente, tale riconoscimento avrebbe prodotto effetti contrari all'ordine pubblico, non essendo essa «né la madre gestante e partoriente i minori», né avendo comunque «arrecato alcun apporto al processo di fecondazione».[8]

Da ultimo, il Tribunale di Milano, nell'ambito di un giudizio penale relativo – ancora una volta – ad una vicenda in cui una coppia, che aveva tentato di fare trascrivere in Italia l'atto di nascita di un bambino nato in Ucraina a seguito di un contratto di maternità surrogata, era stata imputata del reato di alterazione di stato.[9] Gli effetti della trascrizione non sono ritenuti contrari all'ordine pubblico né internazionale – «a tacer d'altro, per la circostanza che questa forma di procreazione assistita è praticata e consentita dalla maggior parte dei Paesi che aderiscono all'Unione europea … e di quelli che hanno sottoscritto la Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali firmata a Roma il 4 novembre 1950, di cui l'Italia è uno dei promotori» –, né interno[10] – «infatti … il concetto di genitorialità incentrato sull'assunzione di responsabilità, su cui la determinazione dello *status filiationis* da parte dell'autorità ucraina si fonda, è patrimonio anche del nostro ordinamento».[11]

2.2 L'apporto della giurisprudenza della Corte europea dei diritti dell'uomo in materia di trascrivibilità degli atti di nascita

Ai fini dell'interpretazione della clausola di ordine pubblico in oggetto, risulta peraltro fondamentale anche l'apporto delle recenti sentenze della Corte europea dei diritti dell'uomo nei casi *Mennesson* e *Labassee* del 26 giugno 2014.[12] I ricorsi, trattati simultaneamente dalla quinta sezione della Corte, riguardano due fattispecie in cui la Francia aveva rifiutato di trascrivere nei propri registri dello stato civile gli atti di nascita di minori nati negli Stati Uniti, nell'un caso in California e nell'altro in Minnesota, grazie a tecniche di maternità surrogata, perché contrastanti con l'ordine pubblico.

Preliminarmente i giudici affermano che, da un lato, poiché non vi è consenso tra gli Stati membri del Consiglio d'Europa sulla questione della maternità surrogata e soprattutto poiché essa comporta delicate considerazioni morali o etiche, il margine di apprezzamento lasciato agli Stati deve essere ampio ma, dall'altro lato, essendo in gioco un aspetto particolarmente importante

[8] Tribunale di Forlì, 25 ottobre 2011, in DeJure.

[9] V. amplius infra.

[10] Sebbene i giudici ritengano che il riferimento debba essere all'ordine pubblico internazionale.

[11] Tribunale di Milano (5 pen.), 13 gennaio 2014, in Dejure e in Dir. pen. cont., 21.2.2014, con nota di Tommaso Trinchera, 'Alterazione di stato e maternità surrogata all'estero: una pronuncia assolutoria del Tribunale di Milano'. Si veda anche Tribunale dei minori di Milano, 3 agosto 2012, disponibile a: <http://www.tribunaleminorimilano.it>.

[12] Mennesson *v Francia* App no 65192/11 (ECtHR, 26 giugno 2014) e *Labassee v Francia* App no 65941/11 (ECtHR, 26 giugno 2014). Le due sentenze sono divenute definitive il 26 settembre 2014, ai sensi dell'art. 44 § 2 della Convenzione europea dei diritti dell'uomo.

dell'esistenza o dell'identità di un individuo, tale margine di apprezzamento deve essere ridotto. Inoltre, è sottolineato che, nell'esaminare i fatti di causa e nel decidere il ricorso, essi dovranno tenere in considerazione il fatto che, ogniqualvolta il caso riguardi un minore, è l'interesse di quest'ultimo a dover prevalere.

Secondo i giudici di Strasburgo, lo Stato avrebbe violato l'art. 8 CEDU in relazione al diritto dei minori al rispetto della loro vita privata ma non, invece, in relazione al diritto dei genitori committenti al rispetto della propria vita familiare. In particolare, per quanto riguarda i minori, i giudici ricordano che il diritto al rispetto della vita privata esige che ciascuno possa definire i dettagli della propria identità come essere umano. Proprio in relazione a questo punto, la Corte identifica tre ipotetiche situazioni svantaggiose con cui i minori avrebbero potuto scontrarsi. Innanzi tutto il fatto che lo Stato francese, pur riconoscendo che essi sono considerati in altri Stati come figli dei «genitori committenti», nega che tale qualifica possa essere loro attribuita nel proprio ordinamento. Inoltre, le difficoltà e le incertezze relative alla possibilità di ottenere la nazionalità francese. Infine, il fatto che, in una vicenda successoria, tali minori non sarebbero stati considerati dallo Stato francese come eredi dei genitori committenti bensì come semplici terzi.

La Corte, pur ritenendo ammissibile il tentativo della Francia di disincentivare i propri cittadini dal ricorrere all'estero a tecniche di procreazione che essa vieta sul proprio territorio, non ammette che gli effetti di tale politica possano riverberarsi anche sui minori così concepiti, i quali, a differenza dei genitori committenti, non hanno fatto alcuna scelta che l'ordinamento francese deplori. Pertanto, la politica dello Stato *de quo* pare in contrasto con il principio di necessaria tutela dell'interesse superiore del minore.

Da segnalare che un'ulteriore vicenda di rifiuto di trascrizione di un atto di nascita di un bambino nato attraverso la tecnica della maternità surrogata, questa volta concernente proprio lo Stato italiano, è stata portata all'attenzione della Corte europea dei diritti dell'uomo ed è tuttora pendente davanti ad essa.[13]

2.3 Alcune considerazioni conclusive sulla trascrizione dell'atto di nascita straniero

Le sentenze della Corte europea dei diritti dell'uomo di cui sopra confermano l'importanza e il rilievo che le questioni concernenti i diritti umani presentano anche nel campo del diritto internazionale privato e processuale. Per quanto rileva in questa sede, pare interessante osservare quale sia, in particolare, il rapporto tra i diritti umani da un lato e la clausola di ordine pubblico dall'altro. Nell'ordinamento italiano, la clausola in oggetto è stata spesso utilizzata per impedire l'ingresso nel nostro Paese di leggi, decisioni e/o atti stranieri che comportano una violazione dei diritti umani, come, ad esempio, nei noti casi del ripudio o delle leggi che limitano la capacità matrimoniale della donna. In tali circostanze, i diritti umani sostanzialmente vanno ad integrare la clausola di ordine pubblico, conferendole una portata concreta e contribuendo a forgiare quello che in dottrina è stato chiamato «ordine pubblico (*lato sensu*) europeo».[14] Diversamente, nel caso che

[13] *Paradiso e Campanelli v Italia* App no 25358/12, introdotta il 27 aprile 2012.
[14] Ornella Feraci, *L'Ordine pubblico nel diritto dell'Unione europea* (Giuffrè, 2012) 328.

qui interessa, l'impiego del limite dell'ordine pubblico al fine di impedire l'ingresso in un dato ordinamento di uno *status* legittimamente creato all'estero ha comportato una violazione dei diritti umani. In questo caso, pertanto, i diritti umani non hanno la funzione di conferire un significato concreto all'eccezione di ordine pubblico ma piuttosto quella di operare come contro-limiti allo stesso.[15]

La posizione della Corte EDU pare condivisibile sotto più aspetti. Da un lato, infatti, essa riconosce la particolare delicatezza della materia *de qua*, garantendo di conseguenza agli Stati interessati, in via generale, un ampio margine di discrezionalità nel bilanciare gli interessi del singolo e quelli della collettività.[16] Dall'altro lato, però, essa afferma che, nel momento particolare in cui entra in gioco l'interesse superiore del minore, tale margine si restringe. E in effetti, pare indiscutibile la necessità di evitare che un minore, considerato figlio di Tizia e Caio, per esempio, in Ucraina, sia considerato in Italia figlio di nessuno. Inoltre, sempre la Corte, in un *obiter*, parrebbe riconoscere la potenziale liceità dell'adozione di misure che, nel rispetto dei diritti dell'uomo, abbiano il fine di scoraggiare il ricorso a tali tecniche.

Pare dunque ora pacifico che la nozione di ordine pubblico di cui all'art. 18 del d.P.R. 396/2000 non può essere utilizzata, nemmeno nel nostro ordinamento, al fine di impedire la trascrizione di un atto di nascita validamente formato all'estero a seguito di maternità surrogata.[17]

3 Profili di responsabilità penale in caso di surrogazione di maternità all'estero

Un secondo problema che può venire in rilevo in caso di surrogazione di maternità all'estero concerne, invece, gli eventuali profili di responsabilità penale cui può andare incontro la coppia italiana che decida di ricorrere a tale trattamento.

Come abbiamo anticipato, la legge n. 40/2004 vieta qualsiasi forma di surrogazione di maternità e sanziona penalmente – con la reclusione da tre mesi a due anni e con la multa da 600.000 a un milione di euro – chi realizza, organizza o pubblicizza tale tecnica di procreazione medicalmente assistita (art. 12 co. 6). L'ambito di applicazione della norma in esame è circoscritto alle sole condotte commesse in Italia.[18] *Quid iuris* se una coppia si reca all'estero per concepire un

[15] Su queste due possibilità cfr. Franco Mosconi e Cristina Campiglio, *Diritto Internazionale privato*, (n. 4), 256, 264. Si veda anche Pasquale Pirrone, 'Diritti umani e diritto internazionale privato e processuale tra scontro e armonizzazione', in Pasquale Pirrone (a cura di), *Circolazione dei valori giuridici e tutela dei diritti e delle libertà fondamentali* (Giappichelli, 2011) 3 ss.

[16] Nel senso che il margine di discrezionalità dovrebbe allargarsi «qualora la questione interessi aspetti etico-sociali particolarmente sensibili» cfr. Sara Tonolo, 'La trascrizione degli atti di nascita' (n. 3) 99.

[17] Lo spazio limitato concesso in questa sede non permette di esaminare approfonditamente tutti i profili rilevanti della questione in esame. Sul punto si rimanda ai numerosi contributi della dottrina tra cui, oltre a quelli citati in altre note del presente contributo, da ultimo e senza pretesa di esaustività, Cristina Campiglio, 'Norme italiane sulla procreazione assistita e parametri internazionali: il ruolo creativo della giurisprudenza' [2014] RDIPP 481 ss., in corso di pubblicazione e Katarina Trimmings e Paul Beaumont, *International Surrogacy Arrangements. Legal Regulation at the International Level* (Hart Publishing, 2013) ed i riferimenti ivi contenuti.

[18] Le sanzioni previste dall'art. 12 co. 6 legge n. 40/2004 non possono trovare applicazione nel caso in cui la surrogazione di maternità avvenga in uno Stato che non pone alcun divieto al ricorso a tale tecnica di procreazione medicalmente assistita, perché manca il requisito – implicito nella disciplina di cui all'art. 9 c.p. – della doppia

figlio ricorrendo alla surrogazione di maternità e poi chieda il riconoscimento in Italia del rapporto di filiazione formatosi nel Paese straniero?

In particolare, la giurisprudenza penale si è interrogata sulla possibilità di configurare il reato di alterazione di stato *ex* art. 567 co. 2 c.p., in caso di surrogazione di maternità all'estero, qualora il neonato sia dichiarato figlio della donna per conto della quale è stata portata avanti la gravidanza, invece che come figlio della donna che lo ha partorito.

3.1 I casi oggetto delle sentenze

I casi che sono emersi di recente – e che hanno dato origine ad altrettante pronunce giurisprudenziali – sono in larga misura analoghi.

Una coppia di cittadini italiani, trovandosi nell'impossibilità di portare a termine una gravidanza tradizionale, decide di recarsi all'estero (precisamente, in Ucraina e in India) per ricorrere a una tecnica di procreazione medicalmente assistita che non può essere praticata in Italia. La tecnica cui ricorre la coppia prevede la formazione di un embrione *in vitro* con metà del patrimonio genetico del padre e l'altra metà proveniente da una donna ovo-donatrice (fecondazione eterologa mediante donazione di ovocita). L'embrione così generato viene poi impiantato nell'utero di una terza donna che porta a termine la gravidanza per conto della coppia (surrogazione di maternità).

Dopo la nascita del bambino, le autorità dello Stato estero formano il relativo certificato di nascita attribuendo ai cittadini italiani che hanno fatto ricorso al trattamento di procreazione assistita, lo *status* di padre e madre del neonato. Al fine di sollecitarne la trascrizione nel nostro Paese, la coppia compila e presenta all'ambasciata e all'ufficio dell'anagrafe del comune di residenza, i documenti necessari ai sensi di legge, indicando le qualità di padre e madre attestate nel certificato formato all'estero. Una volta giunta in Italia, la coppia ottiene la trascrizione dell'atto di nascita nei registri dello stato civile, con la conseguenza che il bambino – anche in Italia – risulta figlio della donna che non lo ha portato in grembo e che non ha con esso alcun legame genetico.

In relazione a tali fatti, alcuni pubblici ministeri chiedono e ottengono il rinvio a giudizio dell'uomo e della donna che sono ricorsi alla surrogazione di maternità, ipotizzando a loro carico il reato di alterazione di stato previsto dall'art. 567 co. 2 c.p. Tale reato – che è punito con una pena straordinariamente severa (reclusione da cinque a quindici anni), superiore a quella prevista, ad esempio, per la corruzione per un atto contrario ai doveri d'ufficio (reclusione da quattro a otto anni) o per il delitto di incendio doloso (reclusione da tre a sette anni) – si verifica allorché, nella formazione dell'atto di nascita, si «altera lo stato civile di un neonato, mediante false certificazioni, false attestazioni o altre falsità».

L'argomento sul quale si fonda l'ipotesi accusatoria è molto semplice. Se l'art. 567 c.p. ha lo scopo di assicurare al neonato uno stato di famiglia corrispondente alla sua effettiva discendenza,[19] il reato sussiste ogni qual volta la falsità commessa nella formazione dell'atto di nascita abbia come

incriminazione. Cfr., *amplius*, proprio con riferimento esemplificativo alla surrogazione di maternità, Giorgio Marinucci e Emilio Dolcini, *Manuale di diritto penale. Parte generale* (4ª ed., Giuffrè, 2012) 129.

[19] Così, ad esempio, Cass. pen. (6), 8 febbraio 1994 (dep. 21 aprile 1994), 4633, *Pijano*, Mass. CED Cass.

conseguenza l'attribuzione di un titolo di stato diverso da quello che spetterebbe al neonato sulla base dell'effettivo rapporto di procreazione.

Ciò posto, quindi, commetterebbe il reato di alterazione di stato *ex* art. 567 co. 2 c.p. chi denuncia come proprio il figlio nato da fecondazione eterologa, perché in tal modo il neonato non consegue uno stato di famiglia conforme alla sua effettiva discendenza. Si realizzerebbe il delitto di alterazione di stato anche quando la falsità riguarda la procreazione, come nel caso di maternità surrogata, perché il neonato risulta figlio di una donna che non lo ha realmente partorito.

3.2 L'orientamento seguito dal Tribunale di Milano e dal Tribunale di Trieste

Il problema sul quale è stato chiamato a pronunciarsi il giudice penale è dunque il seguente: commette il reato di alterazione di stato *ex* art. 567 co. 2 c.p. chi ricorre alla surrogazione di maternità in un Paese straniero e, successivamente, ottiene la trascrizione nei registri dello stato civile italiano del certificato di nascita formato all'estero nel quale è attribuito lo *status* di madre alla donna per conto della quale la gravidanza è stata portata avanti (invece che alla donna che lo ha realmente partorito)?

A questo interrogativo hanno dato risposta negativa i giudici del Tribunale di Milano[20] e del Tribunale di Trieste.[21]

Se l'atto di nascita è stato formato validamente nel rispetto della legge del Paese ove il bambino è nato, non può configurarsi il reato di alterazione di stato, perché «solo la falsità espressa al momento della prima obbligatoria dichiarazione di nascita è in grado di determinare la perdita del vero stato civile del neonato, mentre le dichiarazioni mendaci rese in epoca successiva possono eventualmente integrare il meno grave reato di falsa attestazione o dichiarazione su qualità personali ex art. 495 co. 2 n. 1 c.p.».[22]

Nel caso per cui è giudizio – osservano i giudici milanesi e il giudice triestino – l'atto di nascita è stato formato nel rispetto della legge del luogo dove il bambino è nato, all'esito di una procreazione medicalmente assistita conforme alla *lex loci* (o da questa, per lo meno, non espressamente proibita). L'alterazione di stato, pertanto, non può dirsi consumata perché lo stato civile che il neonato ha conseguito corrisponde a quello cui ha diritto secondo la legislazione del Paese in cui lo stesso è nato.

Però, una volta formato all'estero il certificato di nascita, la coppia italiana ne ha richiesto la trascrizione nei registri dello stato civile del nostro Paese. Per ottenere la trascrizione, gli imputati hanno – in un caso – nascosto all'autorità consolare la natura surrogata della maternità e hanno – in un altro caso – dichiarato davanti all'ufficiale dell'anagrafe del comune di residenza di essere i genitori del bambino. Tali condotte – osservano, in particolare, i giudici del Tribunale di Milano –

[20] In questo senso: Tribunale di Milano, 15 ottobre 2013 (n. 11); Tribunale di Milano (GUP), 8 aprile 2014, Giud. Mastrangelo, Dir. pen. cont., 27.4.2014, con nota di Matteo Winkler, 'Una nuova pronuncia su surrogazione di maternità all'estero e falsa dichiarazione in atti dello stato civile in una sentenza del Tribunale di Milano'; Tribunale di Milano (5 pen.), 14 aprile 2014, Est. Secchi, inedita.

[21] Tribunale di Trieste (GUP), 6 giugno 2013 (dep. 4 ottobre 2013), Giud. Patriarchi, in DeJure.

[22] Così, in particolare, Tribunale di Milano, 15 ottobre 2013 (n. 11).

conservano rilevanza penale sotto il profilo dell'immutazione del vero in ordine a qualità personali effettuata davanti a un pubblico ufficiale (l'autorità consolare, in un caso, il funzionario dell'anagrafe, nell'altro). Le false dichiarazioni rese dagli imputati hanno sottratto al patrimonio conoscitivo dell'ufficiale di stato civile italiano un elemento – il carattere surrogato della maternità – «potenzialmente valutabile ai fini del rifiuto della trascrizione, ai sensi dell'art. 18 d.P.R. 396/2000, per contrarietà all'ordine pubblico».[23]

Pertanto – concludono sul punto i giudici del Tribunale di Milano – la condotta di chi rende dichiarazioni mendaci sullo stato del minore al momento della richiesta di trascrizione dell'atto di nascita, presenta tutti gli elementi costitutivi del delitto di false dichiarazioni ad un pubblico ufficiale su qualità personali destinate ad essere recepite in atti dello stato civile (art. 495 co. 2 n. 1 c.p.). Questo delitto – posto a tutela della fede pubblica – punisce la condotta di chi «dichiara o attesta falsamente al pubblico ufficiale l'identità, lo stato o altre qualità della propria o dell'altrui persona». Quando le dichiarazioni sono rese in atti dello stato civile la pena è aggravata (reclusione da due a sei anni).

In un caso, poiché la condotta è stata posta in essere davanti alle autorità consolari italiane nel Paese dove il bambino era nato – trattandosi di un reato comune, punito con la pena minima inferiore a tre anni, la cui procedibilità in Italia è subordinata alla richiesta del Ministro della giustizia ai sensi dell'art. 9 c.p. – il Tribunale di Milano ha concluso dichiarando il non doversi procedere nei confronti degli imputati.[24] Nell'altro caso, invece, essendo state rese le false dichiarazioni davanti all'ufficiale dell'anagrafe in Italia, il Tribunale di Milano ha concluso affermando la responsabilità degli imputati per il reato di cui all'art. 495 co. 2 c.p. e li ha condannati alla pena di un anno e quattro mesi di reclusione.[25]

3.3 L'orientamento seguito dal Tribunale di Brescia

In un caso analogo ai precedenti, il Tribunale di Brescia è invece giunto a una conclusione opposta: ha affermato la responsabilità degli imputati per il reato di alterazione di stato *ex* art. 567 co. 2 c.p. e ha condannato i cittadini italiani che sono ricorsi all'estero alla surrogazione di maternità alla pena di cinque anni e un mese di reclusione.[26]

Ad avviso dei giudici del Tribunale di Brescia, in caso di fecondazione assistita di tipo eterologo e contestuale maternità surrogata, si configura il delitto di alterazione di stato mediante falsa attestazione se il neonato è dichiarato figlio della donna che non ha partorito il bambino e che non ha con esso alcun legame genetico. Il reato sussisterebbe anche se l'atto di nascita è stato formato all'estero (nel caso di specie Ucraina) e successivamente trascritto nei registri dello stato civile italiano qualora la legge del Paese dove il bambino è nato non consenta il ricorso alle tecniche di

[23] Tribunale di Milano, 8 aprile 2014, (n. 19).

[24] Tribunale di Milano, 15 ottobre 2013, (n. 11).

[25] Tribunale di Milano, 8 aprile 2014, (n. 20).

[26] Tribunale di Brescia (2 pen.), 26 novembre 2013, Est. Di Martino, in Dir. pen. cont., 17.3.2014, con nota di Tommaso Trinchera, 'Ancora in tema di alterazione di stato e procreazione medicalmente assistita all'estero: una sentenza di condanna del Tribunale di Brescia'.

procreazione medicalmente assistita in concreto praticate (ricorso sia alla donazione di ovociti sia alla surrogazione di maternità).

Sul piano oggettivo – si legge nella sentenza resa dal Tribunale di Brescia – è certamente integrata la figura di reato prevista dall'art. 567 co. 2 c.p., perché nell'atto di nascita è stato attribuito al bambino lo *status* di figlio di una donna che, in realtà, non lo ha né generato né partorito. Anche in relazione all'elemento soggettivo – cioè il dolo – non si può dubitare che gli imputati fossero consapevoli della falsità della dichiarazione relativa alla *status* di discendenza del bambino e che entrambi vollero effettuare tale falsa dichiarazione essendo in grado di prevedere quale sarebbe stata la conseguenza della loro azione, cioè attribuire al neonato uno stato civile diverso da quello che sarebbe loro spettato «secondo natura».

A nulla varrebbe – secondo il Tribunale di Brescia – la considerazione che il certificato di nascita sia stato formato all'estero davanti all'ufficiale di stato civile straniero. Infatti, la legge del Paese dove il bambino è nato (che, come si è detto, era l'Ucraina) consentirebbe – ad avviso dei giudici – la donazione di ovociti attraverso cui generare *in vitro* l'embrione da impiantare nell'utero della donna infertile moglie del padre genetico (fecondazione eterologa); oppure l'impianto dell'embrione concepito con il patrimonio genetico di una coppia legalmente sposata nell'utero di una donna diversa dalla madre biologica (surrogazione di maternità); ma non consentirebbe di ricorrere contestualmente – come invece è stato fatto nel caso di specie – sia alla donazione di ovocita sia alla maternità surrogata.

Non si può pertanto sostenere – conclude il Tribunale di Brescia – «che i certificati di nascita ucraini andavano trascritti in Italia siccome redatti secondo le regole dello Stato estero, posto che … si tratta di certificati intesi a coprire una pratica di fecondazione ai fini del riconoscimento della genitorialità non ammessa nella stessa Ucraina e come tali falsi ideologicamente (anche) secondo la normativa stessa del detto Paese».

Benché giungano a soluzioni opposte – in un caso condannando e nell'altro assolvendo gli imputati dal reato di alterazione di stato – i giudici del Tribunale di Milano e quelli del Tribunale di Brescia, a ben vedere, non affermano principi di diritto di per sé contrastanti. Nei "casi milanesi", infatti, i giudici escludono la configurabilità del reato previsto dall'art. 567 co. 2 c.p. perché l'atto di nascita era stato formato nel rispetto della legge del luogo dove il bambino è nato e all'esito di una procreazione medicalmente assistita conforme alla *lex loci*. Nel "caso di Brescia", invece, i giudici ritengono integrato il reato di alterazione di stato perché l'atto di nascita non è stato formato validamente all'estero, non consentendo la legge del Paese dove il bambino è nato il ricorso alle tecniche di procreazione medicalmente assistita in concreto praticate.

Tuttavia, non si può non rilevare che la fattispecie concreta che ha dato origine alle diverse vicende giudiziarie, come già abbiamo detto, sembrerebbe identica. Gli imputati si sono rivolti, sia nei casi decisi dal Tribunale di Milano sia in quello deciso dal Tribunale di Brescia, ad una struttura specializzata di Kiev in Ucraina per ricorrere a una tecnica di procreazione medicalmente assistita che prevedeva la formazione di un embrione in vitro con metà del patrimonio genetico del padre e l'altra metà proveniente da una donna ovo-donatrice (fecondazione di tipo eterologo mediante donazione di ovocita) e il successivo impianto dell'embrione così generato nell'utero di un'altra

donna che ha portato a termine la gravidanza (surrogazione di maternità). L'atto di nascita, sia in un caso che negli altri, è stato formato in Ucraina dall'ufficiale di stato civile di Kiev e successivamente trascritto nei registri dello stato civile italiano.

Pertanto, il punto sul quale i due orientamenti davvero divergono sembra essere esclusivamente quello relativo all'interpretazione delle norme della legislazione ucraina, in particolare nella parte in cui consentono o vietano di ricorrere alla tecnica di procreazione medicalmente assistita (donazione di ovocita e maternità surrogata) cui hanno fatto ricorso gli imputati nel caso concreto.

3.4 Conclusioni: è legittimo il ricorso alla sanzione penale in casi siffatti?

Le pronunce rese dai Tribunali di Milano e di Trieste – nella parte in cui escludono la configurabilità del reato di alterazione di stato quando l'atto di nascita è formato validamente all'estero – affermano un principio sicuramente condivisibile.

Gli elementi che compongono una fattispecie di reato possono essere individuati dal legislatore ricorrendo a concetti descrittivi – cioè termini che fanno riferimento a oggetti della realtà fisica o psichica, che sono suscettibili di essere accertati attraverso i sensi – oppure a concetti normativi – cioè termini che fanno riferimento a un'altra norma, giuridica o extragiuridica, che possono essere compresi soltanto attraverso l'interpretazione della norma richiamata.

Nel delitto previsto dall'art. 567 co. 2 c.p., il concetto di "stato civile" la cui alterazione mediante false certificazioni, false attestazioni o altre falsità, è punita dalla norma in commento, è senza dubbio un concetto normativo che può essere compreso soltanto guardando alle norme del diritto civile che regolano il rapporto di filiazione. Perché si abbia alterazione dello stato civile di un neonato, è necessario innanzitutto stabilire quale sia lo stato civile che al neonato spetta sulla base della legislazione vigente.

Secondo quanto previsto dell'art. 15 del d.P.R. n. 396/2000, le dichiarazioni di nascita effettuate da cittadini italiani all'estero «devono farsi secondo le norme stabilite dalla legge del luogo alle autorità competenti». Il rinvio alla *lex loci* operato dall'ordinamento interno impone ai cittadini italiani all'estero di effettuare le dichiarazioni di nascita all'ufficiale di stato civile straniero secondo la legge del luogo.

Pertanto, in caso di formazione dell'atto di nascita all'estero, il reato di alterazione di stato – che sicuramente è punibile, anche se commesso dal cittadino all'estero, ai sensi dell'art. 9 c.p., perché si tratta di delitto per il quale la legge italiana prevede la reclusione non inferiore nel minimo a tre anni – si configura quando al neonato viene attribuito uno stato civile difforme da quello che gli spetterebbe sulla base dalla legge del luogo.

È bene precisare che il limite dell'ordine pubblico fissato dall'art. 18 del d.P.R. n. 396/2000, non attiene al momento di formazione dell'atto di nascita – unico rilevante ai fini della consumazione del delitto di cui all'art. 567 co. 2 c.p. – ma riguarda il momento successivo del recepimento degli effetti dell'atto formato all'estero nel nostro ordinamento a seguito di trascrizione. L'eventuale contrarietà all'ordine pubblico non inciderebbe, dunque, sulla

consumazione del reato di alterazione di stato, ma si limiterebbe eventualmente a inibire la trascrizione in Italia dell'atto validamente formato all'estero.

Una volta chiarito che non può configurarsi il reato di alterazione di stato se l'atto di nascita è formato validamente nel rispetto della legge del Paese dove il bambino è nato, resta da verificare se le false dichiarazioni rese dagli imputati in un momento successivo alla formazione dell'atto di nascita possano integrare il meno grave reato di falsa attestazione o dichiarazione su qualità personali *ex* art. 495 co. 2 n. 1 c.p. Diversamente da quanto hanno affermato i giudici del Tribunale di Milano, riteniamo che a questo interrogativo si debba dare una risposta negativa. Per diverse ragioni che qui brevemente illustreremo.

La condotta che si rimprovera agli imputati è di aver chiesto e ottenuto la trascrizione del certificato di nascita nei registri dello stato civile italiano, mediante false dichiarazioni e false attestazioni, rese prima al funzionario dell'ambasciata e poi all'ufficiale dell'anagrafe. L'*immutatio veri* sarebbe in particolare consistita nell'aver attribuito la qualità di "madre" alla donna che non ha portato in grembo e partorito il bambino.

L'attestazione o la dichiarazione falsa – cioè difforme dal vero – per essere punibile ai sensi dell'art. 495 c.p. deve cadere sull'identità, sullo stato o su altre qualità della persona.[27] Se lo *status* di figlio della coppia che ha fatto ricorso alla surrogazione di maternità si è formato validamene all'estero, sulla base della legislazione del Paese nel quale il bambino è nato, la donna per conto della quale la gravidanza è stata portata a termine non attesta né dichiara il falso se afferma di essere la "madre" del bambino al momento della richiesta di trascrizione del certificato di nascita.

Ma a prescindere da questo rilievo – che pure non ci sembra di poco conto – il problema principale, a nostro avviso, risiede nella ragionevolezza del ricorso alla sanzione penale in casi siffatti e, soprattutto, nella compatibilità con i diritti fondamentali riconosciuti dalla CEDU.

Innanzitutto – come giustamente ha fatto notare un'autorevole dottrina – se le false attestazioni venissero punite *ex* art. 495 co. 2 n. 1 c.p., i genitori che sono ricorsi all'estero alla surrogazione di maternità incorrerebbero in una pena nettamente superiore a quella prevista dalla legge n. 40/2004 per chi organizza, realizza o pubblicizza in Italia tale tecnica di procreazione medicalmente assistita.[28] Il che pare, francamente, irragionevole.

In secondo luogo, il principio affermato dalla Corte europea nelle sentenze *Mennesson c. Francia* e *Labassee c. Francia* – secondo cui contrasterebbe con l'art. 8 della Convenzione il rifiuto da parte di uno Stato membro di riconoscere valore giuridico al rapporto di parentela, validamente formatosi in un Paese estero, tra l'uomo e la donna che hanno fatto ricorso alla maternità surrogata

[27] Secondo un orientamento – a dire il vero minoritario – seguito dalla S.C., il reato previsto dall'art. 495 c.p. non si configura quando «la dichiarazione non rispondente a verità riguarda solo il fatto materiale della procreazione e non l'identità o lo stato o altre qualità della propria o dell'altrui persona» così Cass. pen. (5), 23 gennaio 1970 (dep. 28 marzo 1970), 101, *Barni*, Mass. CED Cass.; nonché Cass. pen. (5), 2 aprile 1971 (dep. 9 giugno 1971), 571, *Albertazzi*, Mass. CED Cass. Il principio è stato affermato in relazione al falso riconoscimento di figlio naturale, ma crediamo possa essere esteso anche all'ipotesi di false dichiarazioni rese al momento della richiesta di trascrizione di atto di nascita formato all'estero. *Contra*, però, la giurisprudenza prevalente: cfr., *ex plurimis*, Cass. pen. (6), 5 maggio 2008 (dep. 18 settembre 2008), 35806, Mass. CED Cass.

[28] Così Emilio Dolcini, 'Surrogazione di maternità all'estero: alterazione di stato ex art. 567 comma 2 c.p.?' [2014] 115 Politeia 88.

e il bambino nato dalla donna che ha messo a disposizione il proprio utero per portare a termine la gravidanza – ha importanti risvolti, oltreché sulla disciplina di diritto internazionale privato, anche sugli eventuali profili di responsabilità penale che possono venire in rilievo in caso di surrogazione di maternità all'estero.

Se lo Stato italiano, per non violare precisi obblighi convenzionali, è tenuto a riconoscere il rapporto di filiazione validamente formatosi all'estero tra la coppia di genitori che ha fatto ricorso alla surrogazione di maternità e il bambino nato dalla madre surrogata, non si vede come possa poi lo Stato infliggere una pena ai genitori che abbiano richiesto, e abbiano anche ottenuto, il riconoscimento di tale rapporto con la trascrizione dell'atto di nascita del minore nei registri dello stato civile.

Vero è che la sanzione penale consegue alle false dichiarazioni in ordine al carattere surrogato della maternità, e quindi non al semplice fatto di aver richiesto e ottenuto il riconoscimento del rapporto di filiazione validamente formatosi all'estero. Ma è altrettanto vero – a nostro avviso – che la minaccia della pena costituisce in realtà un grave ostacolo per la coppia di cittadini italiani che ha fatto ricorso alla surrogazione di maternità all'estero e che voglia ottenere il riconoscimento del proprio *status* di genitori del bambino nato dalla madre surrogata.

Infine, se la condotta decettiva posta in essere dagli imputati viene punita – come afferma il Tribunale di Milano – perché ha precluso all'ufficiale di stato civile italiano di decidere se trascrivere o meno l'atto di nascita con cognizione del carattere surrogato della maternità, la rilevanza giuridica del falso – e dunque la punibilità della condotta – viene meno a seguito del principio affermato a Strasburgo. L'ufficiale di stato civile, infatti, non può rifiutarsi di trascrivere l'atto di nascita, perché incombe sullo Stato – pena la violazione dell'art. 8 CEDU – l'obbligo di riconoscere il rapporto di filiazione costituito all'estero ricorrendo alla surrogazione di maternità.

PART FIVE

Parenthood

Parent-Child Relationships beyond Blood Ties: Current Debates to Grant Full Equality Between Children

Denise Amram

Abstract

Each society is based on family life, which nowadays develops within a huge variety of models. This paper focuses on the analysis of family dynamics, exploring how to ensure children's personal and material welfare in relation to the model of family in which they are born or brought up.

In fact, according to the UN Convention on the Rights of the Child, children should not be discriminated against due to the status of their parents' relationship.

Considering that the rights of parents and children are inevitably linked, does the lack of protection for non-traditional families affect children's rights in Europe?

In those countries where non-traditional families do not find legal recognition, like Italy, this may cause a lack of protection of parent-children relationships, which are central to a child's life. In this regard, the recent Italian Acts n. 219/2012 and 154/2013 are not sufficient to cover the lack of protection for those children who are not biologically linked to the family they are growing up (e.g. LGBTI families). Case-law often covers this legislative gap, regulating issues arising within non-protected family relationships through the application of the internationally recognised principle of the best interest of the child.

Other European systems, instead, are improving their legislations introducing legal protection to social parenthood on the basis of the principle of the best interest of the child. In fact, parenting desire could be reached also through adoption, artificial insemination, and surrogacy. However, the access to these legal tools swings between permissions and prohibitions even in those systems, like France and Spain, where several non-traditional families have been recently legally recognised.

The paper will focus on the recognition of parenting rights to rainbow families comparing different countries.

For instance, the Irish parliament is currently discussing the Children and Family Relationships Bill 2014, aiming at recognizing and protecting children living in all non-traditional families. Moreover, France introduced the debate on the *Loi sur l'autorité parentale et l'intérêt de l'enfant* aiming at recognizing the legal role of step-parents in the best interest of the child perspective also in LGBTI families.

In light of these new bills and case-law interpretations, we will propose a new model of child's protection within rainbow families in Europe, aimed at granting full equality between children regardless of the legal recognition of the adults' relationship as a family model.

Keywords

Best Interest of the Child, Equality, Rainbow Children, New Bills, Assessment.

* * * * *

1 Introduction. Can general principles build a legal status for rainbow children?

According to the international legal framework the best interest of the child is the principle that should have a paramount consideration in any decisions affecting children[1].

The formula "best interest of the child" is an abstract concept, which assumes different meanings in each context. Being linked to the evolution of the common sense, it is subject to different interpretations.[2]

As far as the rainbow families' rights are concerned, the application of the principle of the best interest of the child is often applied in order to give a legal relevance to concrete circumstances that develop in the shape of law. The aim to extend fundamental rights to members of non-traditional families is often achieved through the application of the principle of non-discrimination under Article 14 of the European Convention on Human Rights.[3]

Moreover, according to the Convention on the Rights of the Child, the combination of the two principles forges a new one, by which the child should not be discriminated against because of their parents' characteristics.[4] From this perspective living in a homosexual family should not be different than living in a heterosexual one. However, this is not true even if the parent's relationship is regulated as a civil partnership or a marriage.

For example, Spain approved same-sex marriage in 2005, opening the access to adoptions as well.[5] However, after almost 10 years, many issues regarding parent-child relationships are still controversial and many rainbow children are still living in a legislative *limbo* determined by the institutional refusal to recognise their filiation status beyond the blood ties.

In this regard, last January, the Tribunal Supremo denied the application concerning the registration in the Spanish registry of a Californian Birth Certificate of twins born through a surrogacy agreement, because it was considered in contrast to the international public order.[6] According to the decision, the necessity to preserve the internal prohibition to sign surrogacy agreements prevailed on the need to formally recognise the parental status between the fathers and the child.[7]

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[1] Article 3 of the Convention on the Rights of the Child, Rome - 20 November 1989; Article 24 EU Charter of Fundamental Rights, Nice - 7 December 2000.

[2] See K. Boele-Woelki *et al.* (eds)*, Principles of European Family Law regarding Parental Responsibilities* (Intersentia, 2007).

[3] See, *ex multis*, G. Ifezue, M. Rajabli, "Protecting the Interests of the Child" (2013) Cambridge Journal of International Comparative Law, 77; U. Kilkelly, "Children Rights: a European Perspective" (2004) Judicial Studies Institute Journal, 68.

[4] Article 2 of the Convention on the Rights of the Child, Rome - 20 November 1989.

[5] Ley 13/2005, "Ley Modificación del Código Civil en materia de derecho a contraer matrimonio", 1 July 2005.

[6] Tribunal Supremo, case 853/2013, 6 February 2014 (2014) www.articolo29.it, comments by G. Palmieri, "Il Tribunal Supremo a proposito di status familiari e maternità di sostituzione".

[7] In the next paragraphs, we will illustrate how a similar approach, adopted also in France, violates the European Convention on Human Rights.

In another case, in application of the principle of non-discrimination, the Tribunal Supremo extended the filiation status to the social parent who was not married to (but in a relationship with) the biological one at the child's birth.[8] In fact, despite the fact that according to the Spanish act on medical assisted reproduction[9] the recognition of the filiation status for the non-biological parent is possible only if the couple is married at the moment of the child's birth, the court stated that this system should be analysed in light of the *possessio status* rule, which allows the establishment of the filiation link for unmarried couples. According to the decision, the refusal to find a common interpretation between the two legal tools on filiation would have created discrimination between rainbow children born during the marriage and out of the wedlock.

These examples help to identify the main questions of this scientific contribution: is the recognition of the adult's relationship a necessary and sufficient condition to grant full equality to the rainbow families? Are the application of the principles of the best interest of the child and non-discrimination sufficient to adapt the traditional and existing legal tools on filiation in order to build a legal status for rainbow children?

In order to try to give an answer to the above questions, in the next paragraphs, we will examine new bills and legislative initiatives by Italy, Ireland, and France with the lenses of the mentioned principles.

2 The Italian Reform on Filiation

In the last two years the Italian legislator enacted an important reform on child law, introducing the principle of equality in the rules concerning the filiation included in the civil code.

The reform,[10] introduced by Act n. 219/2012 and Act n. 154/2013, established that all children are equal before the law, removing all the differences between the former called "natural children" and "legitimate children".[11] In the previous system, in fact, different procedures, different rules were applied to establish parental authority (today parental responsibility) and even different courts were asked to establish guardianship, child custody and visiting rights.

The reform has been called the "filiation without adjectives", since children should have the same rights regardless of their parents' relationship.

However, despite the intent was to grant equal treatment in parent-child relationships between all children, the ones growing in a rainbow family could benefit of the reform only in their relationship with the biological parent because the social parent continues to be excluded from their sphere of interests and relations.

[8] Tribunal Supremo, case 758/2012, 15 January 2014 (2014) www.articolo29.it.

[9] Ley 14/2006, "Ley de Técnicas de Reproducción Humana Asistida", 26 May 2006.

[10] Act 10 December 2012, n. 219 "Disposizioni in materia di riconoscimento dei figli naturali" and Act 28 December 2013, n. 154 "Revisione delle disposizioni vigenti in materia di filiazione, a norma dell' articolo 2 della legge 10 dicembre 2012, n. 219".

[11] *Ex multis*, P. Schlesinger "Il D.lgs 154 del 2013 completa la riforma della filiazione" (2014) Famiglia e diritto, 443.

In fact, in Italy same-sex couples do not find any recognition by the legislator yet. And the filiation reform pursued in the blind perspective to not consider rainbow families as a reality to be regulated by the law.

The principles of non-discrimination and best interest of the child find a general and undisputed application within the heterosexual families, while it is up to the case-law to apply them in those cases involving members of rainbow families.

For example, since 2006, the Italian system identified the share custody as the best solution in case of separation and divorce disputes as a general rule. Lower case-law had the opportunity to state that the sexual orientation of the parent should not affect child custody provisions. In other words, sexual orientation is not relevant in the determination of the parent suitability to take care and educate his/her child. From this perspective, case-law considered more than once[12] unsuitable the homophobic behaviour of the parent against the other who started a homosexual relationship after the marriage. This approach has been recently confirmed by the Italian Supreme Court,[13] which stated "the mere prejudice that to live together with a same-sex couple is harmful for the correct development of the child" reverses the burden of the proof. In fact, it is up to the claimant to prove that the other parent family environment is in contrast with the best interest of the child.

Again, in 2013, three different courts[14] considered stable same-sex couples suitable for third party temporary custody in cases where there was a temporary abandonment of a child.

In particular,

> "Family is not a crystalized concept, but it should be adapted to society and habits and, from a legal perspective, it should be considered following different parameters, such as the constitutional and supranational frameworks, beyond the national one".[15]

Recalling the ECtHR *Schalk e Kopf v. Austria*[16] case and the European Charter on Fundamental Rights, the Tribunale per i Minorenni di Palermo stated that third party custody could not be denied to a same-sex couple because of two main reasons: firstly, there is not a specific prohibition stated by the Italian law; secondly, the concept of "legame familiare" (*i.e.* family relationship) include same-sex couples.

Moreover, the Tribunale per i Minorenni di Roma[17] has recently opened a step-parent adoption for the partner of the biological parent of a child, giving a new interpretation of the Italian law. The court observed that in particular circumstances, even if the requirements stated by article

[12] *Ex multis,* Tribunale of Genoa, 30 October 2013, in www.articolo29.it; Tribunale of Bologna, 7 July 2008, *Giurisprudenza Italiana*, 2009, 1164.

[13] Cass. 11 January 2013, n. 601, *Famiglia e diritto*, 2013, 570.

[14] Tribunale per i Minorenni of Palermo, 4 December 2013, Tribunale per i Minorenni of Bologna 31 October 2013, Tribunale of Parma, 3 July 2013, www.articolo29.it.

[15] Tribunale per i Minorenni of Palermo, *cit.* "quello di "famiglia" non è un concetto cristallizzato, ma va adeguato all'evoluzione della società e dei costumi, e che, sul piano strettamente normativo, esso va rapportato a diversi parametri, quali quello costituzionale e quello sovranazionale, oltre che alle leggi nazionali".

[16] *Schalk e Kopf v. Austria*, App. n. 30141/04 (ECHR, 22 November 2010).

[17] Tribunale per i Minorenni di Roma, 30 July 2014, www.articolo29.it.

1 of the Italian Adoptions Act[18] (e.g. abandonment) are not integrated, the article 44 of the same act allows single persons to adopt a minor. The *ratio* resides in the need to consolidate relationships between the child and his/her parent relatives or his/her caregivers. This is possible only if the adoption by a relative, spouse (or partner) of the child responds to the child best interest, as both article 44 and 57 expressly state. In the concrete case, the step-parent adoption would just give legal relevance to an existing *de facto* relationship, since the child is already growing up and living with her mother's same-sex partner, that she calls "mum".

Unfortunately, the fact that the case-law fills the legislative gap determining which is the best interest of a particular child in a given context considering the supranational and international legal framework is not sufficient to grant full equality to all rainbow children residing in Italy. Many aspects of the daily routine still need to be regulated in a general way, to not be applied only case by case.

The Italian Government is working on a bill, which will introduce same-sex partnerships and open to the step-parent adoption, without designing a proper legal status for rainbow children. At this stage, the content of the proposal does not seem to design a legal status for rainbow children nor to enrich their protection, hopefully it will be another wasted opportunity towards children equality.

3 The Irish General Scheme of a Children and Family Relationship Bill

Despite the Italian legislative *inertia*, in the last years Ireland is providing important reforms to modernise family law, recognising in different steps rights and duties to non-traditional family models. For example, in 2010, the parliament enacted the Civil Partnership Certain Rights and Obligations of Cohabitants Act 2010, which did not grant homosexual couple any parenting rights. In 2012, a referendum validated the new Article 42A of the Constitution which removed the discrimination between children born inside or out of the wedlock for adoption purposes.[19] In January 2014, a General Scheme of a Children and Family Relationships Bill 2014 has been introduced by the Minister of Justice and it is currently under assessment by the Irish Parliament and, last but not least, in 2015 the referendum on same-sex marriage will take place.

Analysing the *de iure condendo* tool (*i.e.* the General Scheme of a Children and Family Relationships Bill), we could observe that the Irish system is taking the opportunity to apply the principle of the best interest of the child in non-traditional families. Its main goal is to determine for each family model who should exercise parental responsibilities and what it means in contemporaneous Irish society. According to the Special rapporteur on Child Protection:

> "The Children and Family Relationships Bill represents the most significant change in family law in a generation and attempts to reflect the social reality of contemporary family

[18] Italian Adoptions Act, 4 May 1983, n. 184, "Diritto del minore ad una famiglia".

[19] A. Parkes, S. McCaughren "Viewing Adoption through a Children's Rights Lens: Looking to the Future of Adoption Law and Practice in Ireland" (2013) Irish Journal of Family Law, 99.

> life in Ireland (…) The new framework that will be implemented following the passage of this Bill will not only radically overhaul many existing rules, it will create new rights for parents, both biological and social, and, most critically, for children. As a result, it represents an important milestone on the road to recognition of children as rights holders".[20]

In fact, recalling the above mentioned UN Convention on the Rights of the Child by which children should not be discriminated against due to the status of their parents' relationship, the Bill sets out how parentage is to be assigned in cases of assisted reproduction, renders civil partners eligible to jointly adopt a child, and allows step-parents, civil partners, those cohabiting with the biological parent and acting in loco parentis for a specified period to obtain guardianship and/or custody. In particular, the Head 35 (4) provides factors that courts may consider in the evaluation of the best interest of the child including

> "the history of the child's upbringing and care, including the nature of the relationship between the child and each of his parents and with other relatives and the desirability of preserving and strengthening such relationships "

This provision is really interesting if we consider that according to Head 33 "relative of the child" includes the spouse, civil partner or cohabitant of the child's parent and step-brother, step-sister or child of the child's parent's civil partner or cohabitant.

Moreover, Head 10 regulates the parentage in cases of child born through assisted reproduction using donor gametes, establishing for example that if a child is born as a result of assisted reproduction with the use of eggs provided by a woman and sperm provided by a donor, the parents of the child are the birth mother and the person who was married to (or in a civil partnership with, or cohabiting in an intimate and committed relationship with) the birth mother at the time of the child's conception, and consented to be a parent of a child born as a result of assisted reproduction. Likewise, if a child is born as a result of assisted reproduction with the use of eggs, sperm or an in vitro embryo provided by donors only, the parents of the child are the birth mother and a person who was married to (or in a civil partnership with or cohabiting in an intimate and committed relationship with) the birth mother at the time of the child's conception, and consented to be a parent of a child born as a result of assisted reproduction.

In accordance with this system, Head 41 establishes that where a child is born through assisted reproduction using donor gametes and the other parent of the child is the civil partner of the mother, she shall be a guardian of the child jointly with the child's mother. In case of cohabitants, the provision is applied if the cohabitation lasts at least 12 consecutive months including at least 3 months after the child's birth.

[20] G. Shannon, "The Children and Family Relationships Bill 2014 – a Children's Rights Perspective" Children's Rights Alliance Seminar, 10 April 2014, www.childrensrights.ie, 1.

In addition, in the part concerning child maintenance, Head 67 gives different definitions of "dependent child of the family" for each of the main family models. In particular, in case of civil partnership and cohabitation the dependent child is the one of

> "both civil partners (cohabitants) or adopted by both civil partners (cohabitants) or in relation to whom both civil partners (cohabitants) are in loco parentis, or of either civil partner (cohabitant) in relation to whom either civil partner (cohabitant) is in loco parentis where the other partner (cohabitant being aware that he or she is not the parent of the child) has treated the child as a member of the family [brackets added]".

The first draft of the Bill included also the regulation of the non-commercial surrogacy,[21] which has been removed in the latest. This –as remarked by Brian Tobin[22] in his paper – precludes from the legal recognition (and so from the equal treatment) those rainbow children born from two males. However, the latest version enables cohabitants living together for 3 years to jointly adopt.

The main achievement of this Irish reform seems to grant equality and give a legal recognition to *de facto* parent-child relationships even beyond the blood ties. This means to identify a legal status for the child regardless of his/her parents' relationship. Such effort should be appreciated, especially in light of other European experiences which focus the debate on the recognition of same-sex marriages without providing a specific reform of child law, or – as observed for Italy – which provided a child law reform without considering the variety of non-traditional families.

4 The French *Proposition de Loi sur l'Autorité parentale et intérêt de l'enfant*

In France, as known, since 2013 same-sex couples can get married and adopt[23]. However, rainbow families are still facing some difficulties regarding the recognition of parental rights, coming from the fact that surrogacy is prohibited and the access to medical assisted reproduction is limited to couples with medical impediments.

The contradiction emerging from the current French legal framework is well represented by the title of Professor Fulchiron's paper "Le mariage pour tous. Un enfant pour qui ?"[24] in which he illustrates, on one side, the effects of the Act 2013-404, that introduced the gender neutral marriage model, replacing the words "husband" and "wife" with "spouse" in the civil code and amending the article 143 with the formula "*Le mariage est contracté par deux personnes de sexe différent ou de même sexe*". On the other side, he shows how the recognition of the adults' relationship did not solve the need to give full protection to rainbow families without a more complex reform of filiation law. This is confirmed by the Conseil Constitutionnel, which stated that to allow same-sex couple adoption does not mean to proclaim a "right to a child".

[21] D. Madden, "Bill marks first step in grapping with surrogacy" (2014) Irish Times, February 17.

[22] B. Tobin, "Same-Sex Couples and Legislative Proposals for the Regulation of Assisted Human Reproduction in Ireland", *supra*.

[23] Loi n. 2013-404, *Loi ouvrant le mariage aux couples de personnes de même sexe*, 17 May 2013.

[24] H. Fulchiron, "Le mariage pour tous. Un enfant pour qui ? Loi n. 2013-404 du 17 mai 2013" (2013) La Semaine Juridique Edition Générale n° 23, 3 Juin 2013, doctr. 658 .

From this perspective, the new bill on the *Autorité parentale et intérêt de l'enfant* - currently under assessment by the Sénat – reflects and endorses this approach. According to the bill, the step-parent legal relevance will be subject to the biological one's consent. In fact, the proposed bill recognises social parenthood through the introduction of a new tool, called *mandat d'éducation quotidienne*, by which the biological parent agrees to authorise a third person to take daily decisions for his/her child and in the latter's best interest, without providing any changes to the medical assisted reproduction act.

The lack of dispositions on the role of biological parent's partner/spouse respect to a child born through medical assisted reproduction abroad shows several limits in the full recognition of equal rights to rainbow families.

In particular, in case of separation/divorce of the couple, social parent's rights and responsibilities will be always under judgment of courts, since the article 371-4 endorses their discretional power in the evaluation of third party roles in the child's life. Issues arise because all third parties are even, including the "other parent" respect to the biological one in a rainbow family.

> "Le recours à l'article 371-4 du Code civil pour les parents sociaux pose une double difficulté. D'une part, l'intérêt de l'enfant élevé par un couple homosexuel n'est pas apprécié selon les mêmes critères que celui élevé par un couple hétérosexuel, ce qui constitue une véritable discrimination entre eux. D'autre part, une part très importante est laissée, sous couvert de l'appréciation souveraine des juges, à l'idée que chacun se fait de l'intérêt d'un enfant conçu – souvent de manière illégale au regard du droit français – et élevé par deux parents du même sexe".[25]

The refusal to recognise the filiation link between the rainbow child and the non-biological parent brings to reverse the burden of the proof: the social parent, like the other third parties, but differently from the biological one, should prove that to maintain relationships and contacts with the child corresponds to the latter best interest, while in case of recognition of his/her role of parent this would be presumed, as it is presumed for the biological parent.

The described approach might change after the ECHR judgements *Mennesson v. France*[26] and *Labassee v. France*[27] concerning the refusal to grant the filiation link between children born in the U.S. through surrogacy and the intended parents (husband and wife). In both cases, the Court stated the violation to children's right to respect for private life (but not the violation of their intended parents and children's right to respect for family life) under Article 8 of the Convention. In fact, according to the decision, the balance between the public interest of France in prohibiting surrogacy agreements and the private one of the claimants to have children should be considered in light of the best interest of the child, which corresponds to give legal relevance to the *de facto* circumstances.

[25] E. Mulon, "L'article 371-4 du Code civil : un dispositif utile, mais insuffisant en cas de séparation d'une couple homosexuel" (2014) Gazette du Palais, 16 September 2014, n. 259, 10.

[26] *Mennesson v. France* App. no. 65192/11 (ECHR, 26 June 2014).

[27] *Labassee v. France* App. no. 65192/11 (ECtHR, 26 June 2014).

The French *empasse* shows the need to provide new solutions focused on the new concept of family which has been legally introduced in 2013, that brings to a new concept of parent.

5 Comparative remarks: Towards a legal status for rainbow children?

The illustrated debates show how the need to ensure the best interest of the child in all family models and in particular for LGBTI ones is common to all the given systems, beyond the fact they have (have not) already recognised same-sex marriage or civil partnerships (yet) and beyond the fact that rainbow children might be conceived abroad, breaching national prohibitions to access to medical assisted reproduction and surrogacy agreements.

This is due to the necessity to deal with duties and rights that adults have towards children, which emerges from the praxis in the national courts.

From this perspective, it is every day more common for courts to face concrete circumstances in light of the internationally recognised best interest of the child principle. On one side, this is forcing current legislation to give proper answers for claimed rights. On the other side, the need to find abstract solutions to be applied to every rainbow children and not only to those who are involved in a dispute becomes more urgent.

As seen, the necessity to identify the same responsibilities and rights of the biological parent to the social one is really difficult without new rules.

In particular, the attempt to identify in traditional legal tools like the *possessio status* could be helpful to solve some disputes, where the requirements of *nomen, tractatus* and *fama* are fulfilled. However, such instrument will not be suitable to create a legal status for all rainbow children.

Again, the simple application of the principles of non-discrimination and best interest of the child are not sufficient to design a legal status for rainbow children, especially in a Civil Law tradition system, where precedent is not binding. As shown, the Italian case-law efforts to fill the legislative gap can provide a legal status to a given family, the one who applied for their rights, but not to all children. This means to pursue the best interest of “a” and not “the” child.

In this regard, it would be more convenient to reform filiation law considering the social changes that brought the necessity to give new definition to the concepts of “family”, “parent” and “procreation”. From this perspective, the Irish General Scheme could be considered the approach to follow, in fact it implements a new system of legal definitions based on the necessity to regulate child’s sphere of interest within his/her family relationships.

Orientamento sessuale e status di genitore tra prospettiva nazionale e prospettiva europea

Daniele Ferrari

Abstract

Obiettivo del presente contributo è ricostruire il rapporto tra orientamento sessuale e *status* di genitore. Quest'analisi verrà condotta indagando se e in quale misura l'eterosessualità o l'omosessualità incidano sulla capacità giuridica di essere genitore e di agire come tale. In questi termini, si premetterà un'introduzione strumentale all'individuazione di alcuni modelli di genitorialità, che verranno poi utilizzati come criteri di ricostruzione delle diverse fonti del diritto che, nell'ordinamento italiano e nel diritto europeo, riguardano lo *status* in questione. In questo senso, la condizione di genitore verrà studiata con riguardo alla procreazione (modello procreativo), alla volontà di avere un figlio (modello procreativo artificiale o surrogato) e all'interesse del minore (adozione).

Keywords

Status genitoriale; orientamento sessuale; omogenitorialità; interesse del minore; matrimonio; diritto alla vita familiare; adozione; procreazione; maternità surrogata; affidamento.

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1 Premessa

Il rapporto tra condizione genitoriale e orientamento sessuale può essere ricostruito con riguardo all'impatto che l'omosessualità o l'eterosessualità hanno sulla capacità della persona di essere titolare delle situazioni giuridiche attive e passive, corrispondenti al legame parentale[1]. L'orientamento sessuale, come criterio di imputazione dello *status* in esame[2], sembra emergere in

[1] Sula nozione di *status*, v. P. Barile, Le libertà nella Costituzione. Lezioni (Cedam, Padova 1966) 25; Idem, Il soggetto privato nella Costituzione italiana (Cedam, Padova 1953) 8 ss.; G. Alpa, Status e capacità. La costruzione giuridica delle differenze individuali (Laterza, Roma-Bari 1993) 56 ss.

[2] In senso, qui condiviso, la dottrina costituzionalistica ha cercato di distinguere tra capacità di diritto pubblico e capacità di diritto privato, non escludendo, in entrambi gli ambiti, ipotesi di titolarità di diritti sganciate dalla capacità di esercitarli. Questo, ad esempio, può avvenire per la condizione genitoriale, quando questa non si costruisce su qualità comuni a tutti i soggetti, ma su caratteristiche che, come l'orientamento sessuale, non equiparano ma differenziano le persone; v., sul punto, S. Silverio, 'Titolarità ed esercizio dei diritti fondamentali: prime riflessioni sulla capacità di diritto pubblico' (2007) 3 Diritto pubblico, 927. *Contra*, v. P. Perlingieri, La personalità umana nell'ordinamento giuridico,

misura principale da quel complesso di norme che hanno ad oggetto la famiglia, quale formazione sociale in cui si realizza la condizione in esame[3]. Lo *status* di genitore esprime, inoltre, un ambito di svolgimento della più generale condizione attribuita alla persona umana nelle costituzioni e dettagliata nelle norme di diritto civile[4]. In questi termini, dall'esame delle diverse fonti, possono emergere modelli diversi di parentela, fondati su qualità variabili della persona, tra le quali, ad esempio, la capacità di procreare, la volontà di diventare genitore, l'idoneità del soggetto di realizzare l'interesse del minore[5].

Le qualità soggettive premesse possono essere sistematizzate in tre modelli di filiazione, alternativamente, incentrati sulla procreazione naturale, sulla procreazione artificiale o surrogata oppure sul diverso principio non procreativo, che fonda il legame genitoriale sull'interesse del minore[6]. La definizione normativa di questi tre modelli può configurare un diverso rapporto tra genitorialità e orientamento sessuale, a seconda che il diritto prescriva l'idoneità del soggetto di essere genitore in funzione di qualità neutre o non neutre rispetto all'orientamento sessuale.

1.1 Modello procreativo.

Con riguardo alla filiazione naturale, si può, alternativamente, sostenere, che, in un ordinamento incentrato solo sul modello procreativo, l'orientamento sessuale non abbia alcun impatto in ordine alla posizione di genitore naturale, restando esclusi solo i soggetti sterili o, diversamente, limiti la capacità giuridica parentale delle coppie omosessuali, definendo i ruoli genitoriali in paternità e maternità, a partire da un paradigma eteronormativo[7] di famiglia[8].

La prima tesi muove dall'evidenza che ciascun soggetto fertile, a prescindere dal proprio orientamento sessuale, è capace di procreare. Tale capacità coincide con uno *status*, quando dal legame di sangue tra chi genera e chi è generato l'ordinamento giuridico fa discendere la titolarità

(Edizioni Scientifiche Italiana, Napoli 1972) 140 ss.; P. Stanzione, Capacità e minore età nella problematica della persona umana (Jovene, Camerino-Napoli 1975) 59 ss.

[3] V. G. Bach Ignasse, Familles et homosexualités, in D. Borrillo (a cura di), Homosexualités et droit (PUF, Paris 1998) 122.

[4] Sull'opportunità di impostare lo studio del diritto civile, mettendo al centro la nozione di personalità umana in una prospettiva costituzionalmente orientata, v., per tutti, Pietro Perlingieri, Il diritto civile nella legalità costituzionale (I ed. Edizioni Scientifiche Italiane, Napoli 1984).

[5] Sull'origine del rapporto di filiazione in termini di teoria generale v., tra gli altri, L. Bregante, Doveri e diritti dei genitori. Profili istituzionali (Cedam, Padova 2005) 3 ss.

[6] Sull'evoluzione storica della nozione di filiazione v. M. Mantovani, 'I fondamenti della filiazione', in P. Zatti (diretto da), Trattato di diritto di famiglia (Giuffrè, Milano II 2011) 3 ss.

[7] In questi termini, la dottrina ha osservato che l'istituzionalizzazione delle figure genitoriali in maternità e paternità si fonda su un "dualismo eteronormativo", che "indica l'esistenza di un paradigma a fondamento di norme morali, sociali e giuridiche basato sul presupposto che vi sia un orientamento sessuale corretto, quello eterosessuale, che vi sia una coincidenza fra il sesso biologico e il genere e che sussista una naturale e necessaria complementarietà fra uomo e donna, sia con riferimento ai ruoli sessuali che sociali e culturali"; così A. Schuster, L'abbandono del dualismo eteronormativo della famiglia, in A. Schuster (a cura di), Omogenitorialità. Filiazione, orientamento sessuale e diritto, (Mimesis, Milano-Udine 2011) 35.

[8] Sul punto, v. E. Falletti, Genitorialità e identità di genere, in A. Schuster (a cura di), Omogenitorialità *(…)*, cit., 93 ss.

di diritti e doveri, che qualificano la posizione del genitore rispetto al figlio[9]. In questa accezione, quindi, ciascun soggetto fertile, eterosessuale o omosessuale, può diventare genitore.

Nel senso della seconda tesi, invece, il modello procreativo definisce la condizione parentale in funzione di un principio eteronormativo, quando positivizza l'eterosessualità, distinguendo i ruoli in paternità e maternità. In questa prospettiva, lo *status* di genitore può non dipendere dal semplice legame biologico, ma costituirsi sul piano presuntivo in forza del vincolo coniugale tra soggetti di genere opposto[10]. Questo modello sembra escludere, perlomeno dalla condizione di genitore legittimo, i soggetti omosessuali, quando l'insorgere del legame parentale è il riflesso di un vincolo giuridico riservato a soggetti di sesso diverso[11].

1.2 Modello procreativo artificiale o surrogato.

Il modello procreativo artificiale o surrogato supera il tradizionale principio bigenitoriale, scomponendolo in diverse figure legate al ruolo, che ciascun soggetto svolge nel processo di procreazione[12]. In questi termini, si può determinare un'evoluzione, rispetto alla tradizionale nozione giuridica di genitore, nella misura in cui il legame parentale conseguente alle pratiche in discorso viene ricondotto sul piano positivo non solo all'apporto di materiale genetico, ma alla volontà dell'individuo di diventare genitore. In questo caso, lo *status* in questione diviene una condizione sociale, discendente dalla scelta consapevole del singolo o della coppia di accedere alla

[9] In questa prospettiva, lo *status* di genitore rappresenta "la sintesi ideale di particolari atteggiamenti che assumono talvolta intere categorie di rapporti sociali, giuridicamente rilevanti, fra un soggetto e tutti gli altri, in base a determinati presupposti di fatto". In questo senso, il fatto della procreazione fa assumere a due soggetti l'uno rispetto all'altro la condizione di genitori. Cfr., su tale nozione, A. Cicu, Il concetto di "*status*", in Studi in onore di V. Simoncelli (Jovene, Napoli 1917) 7 ss.

[10] In questo senso, in Italia, anche dopo la riforma intervenuta con l'entrata in vigore del d. lgs., 28.12.2013, n. 154 *Revisione delle disposizioni vigenti in materia di filiazione, a norma dell'art. 2 della legge 10 dicembre 2012, n. 219*, in G.U., 5, 08.01.2014, che ha realizzato la piena equiparazione tra figli legittimi e figli naturali, alcune disposizioni hanno mantenuto il riferimento alla presunzione di *status* con riguardo ai minori nati in costanza di coniugio. V., ad esempio, artt. 231 e 232 c.c.

[11] Al di là dell'evoluzione che la nozione costituzionale di matrimonio ha avuto nella legislazione e nella giurisprudenza di alcuni Stati europei, prendendo in considerazione le Costituzioni dei 28 Stati membri dell'Unione europea, fra le libertà costituzionalmente garantite, quella di sposarsi viene testualmente attribuita solo ad uomini e donne dalla: Costituzione spagnola del 1978, in cui si afferma che "l'uomo e la donna hanno diritto a contrarre matrimonio (…)" (art. 32, c. 1, Cost.); dalla Costituzione polacca del 1997, che qualifica il matrimonio "come unione dell'uomo e della donna" (art. 18); dalla Legge fondamentale dell'Ungheria del 2011 all'art. L, c. 1: "L'Ungheria tutela l'istituto del matrimonio quale unione volontaria di vita tra l'uomo e la donna, nonché la famiglia come base della sopravvivenza della Nazione"; dalla Costituzione bulgara del 1991, che all'art. 46 definisce il matrimonio come "l'unione tra un uomo e una donna".

[12] In questa prospettiva, quando una coppia omosessuale accede a questa pratica, si può avere la compresenza di tre paradigmi genitoriali, se un membro della coppia fornisce i gameti (genitore genetico), il *partner* vuole un figlio (genitore sociale) e la gravidanza avviene nell'utero di un soggetto terzo (genitore gestazionale). Su queste nozioni anche in prospettiva comparata v. A. Lorenzetti, Bilanciamento di interessi e garanzie per i minori nella filiazione de fecondazione eterologa e da maternità surrogata, in G. O. Cesaro, P. Lovati, G. Mastrangelo (a cura di*),* La famiglia si trasforma. *Status* familiari costituiti all'estero e loro riconoscimento in Italia, tra ordine pubblico e interesse del minore, (FrancoAngeli, Milano 2014) 80 ss.

pratiche procreative artificiali o surrogate per avere un figlio, che *in rerum natura* non potrebbero generare[13].

La figura del genitore sociale realizza la libertà di accedere alla filiazione per le coppie *same sex*, solo a condizione che l'orientamento sessuale non limiti l'accesso dei soggetti a queste pratiche, in base alle caratteristiche della persona identificate a livello positivo.

1.3 Modello non procreativo.

Il modello non procreativo può essere affrontato con riguardo all'istituto dell'adozione che configura un legame di filiazione non fondato sul dato biologico, ma sull'interesse del minore di avere una famiglia[14]. Anche in questo caso l'orientamento sessuale limita la capacità giuridica di adottare in quegli ordinamenti che, da un lato inibiscono ai *single* la possibilità di divenire genitori, dall'altro riconoscono unicamente alle coppie sposate eterosessuali l'accesso. In tali casi, la normativa sull'adozione ricrea, nel regolamentare l'insorgere del rapporto tra adottante e adottato, le figure genitoriali esistenti *in rerum natura* e corrispondenti al già descritto modello procreativo.

In una diversa prospettiva, gli omosessuali, sia come singoli sia in coppia, possono adottare quando, come avviene in numerosi ordinamenti europei[15], l'interesse dell'adottando coincide con una normativa neutra rispetto all'orientamento sessuale, che misura l'idoneità degli adottanti in funzione della loro concreta capacità di provvedere al mantenimento e all'educazione del minore[16].

2 Lo *status* di genitore omosessuale nell'ordinamento italiano.

Nella Costituzione italiana, il legame tra *status* di genitore e orientamento sessuale emerge da un complesso di disposizioni, che, da un lato, qualificano in senso specifico la condizione in esame (artt. 29, 30, 31 Cost.), dall'altro rinviano alle fonti di livello internazionale ed europeo alle quali l'Italia ha aderito (artt. 11 e 117, co. 1, Cost.). All'interno della Carta lo studio sulla condizione genitoriale verrà, quindi, distinto in rapporto ai contenuti di garanzia previsti a livello nazionale ed europeo[17].

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[13] In ambito comparato, le Corti di molti Stati americani e province canadesi hanno declinato la nozione di genitore sociale in funzione dell'interesse del minore a mantenere i propri legami familiari, riconoscendo al *partner* omosessuale del genitore biologico di procedere alla *stepparent adoption*; per un'analisi puntuale di questa giurisprudenza, v. F. Caggia, Convivenze omosessuali e genitorialità: tendenze, conflitti e soluzioni nell'esperienza statunitense, in E. Moscati-A. Zoppini (a cura di), I contratti di convivenza (Giappichelli, Torino 2011), 243-266.

[14] In questo senso, la Corte costituzionale italiana, distinguendo tra lo *status* di genitore biologico e lo *status* di genitore adottivo, ha chiarito che l'adozione deve realizzare il primario interesse del minore, cfr. Corte cost., sent., 24 gennaio 1991, n. 27, (1991) Giur. cost. I, 175.

[15] Per una panoramica sull'omogenitorialità negli Stati europei, v. Commissario per i diritti umani del Consiglio d'Europa, 'La discriminazione fondata sull'orientamento sessuale e l'identità di genere in Europa' (edizioni del Consiglio d'Europa, 2011).

[16] In questa seconda prospettiva, la Corte Suprema del Messico ha stabilito, con sentenza del 16 agosto 2010, che sarebbe incostituzionale non consentire ad una coppia omosessuale di adottare.

[17] Su tali nozioni in rapporto ai diversi livelli di tutela dei diritti della persona, Cfr. P. Häberle, Cultura dei diritti e diritti della cultura nello spazio costituzionale europeo (Giuffrè, Milano 2003) 103.

2.1 Il livello nazionale

La Costituzione agli artt. 29, 30 e 31 definisce la condizione genitoriale sulla base di quattro principali criteri: esistenza della famiglia, quale formazione sociale in cui sorge il legame parentale (art. 29, c. 1, Cost.); diritto e dovere dei genitori di provvedere al mantenimento e alla formazione dei figli (art. 30, c. 1, Cost.); tutela dell'interesse del minore (art. 30, Cost.); promozione da parte dello Stato della filiazione attraverso specifiche misure (art. 31 Cost.).

I principi premessi possono essere, preliminarmente, messi in relazione con l'orientamento sessuale, muovendo dalla lettura dell'art. 29 Cost., in quanto la condizione di genitore identifica parte dei diritti riconosciuti alla famiglia, quale formazione sociale in cui si iscrive il legame filiale[18]. In questi termini, le situazioni giuridiche attive e passive, che identificano lo *status* in questione, dipendono dal modello di famiglia costituzionalmente prescritto[19].

Con riguardo ai legami genitoriali, la Carta del 1948, nel fissare all'art. 30 i due modelli di famiglia legittima e naturale, identifica, in senso implicito, nella procreazione il primo presupposto all'origine dello *status* parentale[20]. Infatti, il riferimento al matrimonio, quale condizione di legittimitazione della filiazione, evoca un istituto che, anche alla luce della più recente giurisprudenza costituzionale, è riservato ad un uomo e ad una donna[21]. In questi termini,

[18] Sul legame tra famiglia e filiazione cfr. C. Esposito, Famiglia e figli nella Costituzione italiana, ora in La Costituzione italiana. Saggi (Cedam, Padova 1954) 135 ss.

[19] Sulla nozione di famiglia delineata nel disegno costituzionale, si sono confrontati due principali orientamenti in dottrina, che hanno, alternativamente, sostenuto l'immutabilità del modello familiare, esaurendo i ruoli genitoriali in paternità e maternità oppure la necessità di definire la nozione in esame alla luce dei principi fondamentali posti dalla Costituzione a fondamento della condizione giuridica dell'uomo. Nel senso della seconda tesi, è possibile superare la definizione dei ruoli parentali fondata sulla diversità di genere, ritenendo che l'unico criterio ragionevole di determinazione della capacità genitoriale sia dato dall'interesse del minore. Sulla prima tesi, cfr., tra gli altri, D. Barbero, 'I diritti della famiglia nel matrimonio', (1955) Iustitia, 451 ss.; V. Del Giudice, 'Sulla riforma degli istituti familiari', (1950) Jus, 293 ss.; G. Lombardi, 'La famiglia nell'ordinamento italiano', (1965) Iustitia, 3 ss. Sulla seconda, v., per tutti, M. Bessone, Art. 29, in G. Branca (a cura di), Commentario della Costituzione, Rapporti etico-sociali (art. 29-34), (Zanichelli, Bologna-Roma 1976), 17 ss.; P. Barile, L'uguaglianza morale e giuridica dei coniugi nella giurisprudenza della Corte costituzionale, in Eguaglianza morale e giuridica dei coniugi. Atti del Convegno di studi, (Jovene, Napoli 1975) 37 ss.; G. Brunelli, Famiglia e Costituzione: un rapporto in continuo divenire, in C. Mancina-M. Ricciardi (a cura di), Famiglia italiana. Vecchi miti e nuove realtà (Donzelli, Roma 2012) 69-74.

[20] In senso conforme la dottrina ha osservato che l'art. 30 Cost. "connette le aspettative della prole quanto a mantenimento, istruzione ed educazione ad un puro e semplice principio di responsabilità dei genitori per il solo fatto della procreazione (…)", così M. BESSONE, *Art. 29*, in G. BRANCA (a cura di), *Commentario della Costituzione,* cit., 30.

[21] Cfr., Corte cost., sentt., 15 aprile 2010, n. 138, in (2010) 2 Giur. Cost., 1064, in particolare punto 9 del *Considerato in diritto* e, 11 giugno 2014, n. 170, in <http://www.giurcost.org/decisioni\>, accesso 12 agosto 2014. Le due decisioni, una di rigetto e l'altra di accoglimento, pur avendo ad oggetto questioni di legittimità attinenti a norme diverse, hanno segnato il formarsi di un orientamento consolidato della giurisprudenza costituzionale che ha identificato nella diversità di genere tra i *nubendi* uno dei requisiti ineludibili dell'istituto matrimoniale, rendendolo un contenuto costituzionalmente imposto. A commento della prima decisione v., tra gli altri, R. Romboli, 'Il diritto "consentito" al matrimonio ed il diritto "garantito" alla vita familiare per le coppie omosessuali in una pronuncia in cui la Corte dice "troppo" e "troppo poco" ', in (2010) Giur. cost., 1634; A. D'Aloia, Le coppie omosessuali e lo "schema" costituzionale della famiglia e del matrimonio. Note sulla sentenza della Corte Costituzionale n. 138 del 2010, in S. Prisco (a cura di), Amore che vieni, amore che vai …, Unioni omosessuali e giurisprudenza costituzionale, (Jovene, Napoli 2012) 3 ss.; a commento della seconda, cfr. 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)', in Consulta online <http://www.giurcost.org/studi\>, consultato il 20 agosto 2014.

l'eterosessualità rappresenta una qualità personale connessa alla condizione genitoriale[22], che deriva dall'unione tra due soggetti di genere opposto. Di conseguenza, il principio personalista espresso all'art. 2 Cost. [23] può essere riferito non al singolo, ma solo a quelle formazioni sociali formate da un uomo e da una donna, dal momento che la condizione di genitore può essere realizzata solo attraverso un altro soggetto, definendosi in funzione della diversità di sesso in maternità e paternità. In senso ulteriore, il descritto statuto costituzionale di genitore, distinto in maternità e paternità[24], trova conferma in quel complesso di previsioni costituzionali che, nell'ambito dei rapporti familiari, promuovono la condizione femminile, garantendo ai coniugi la stessa capacità giuridica in ordine allo *status* genitoriale.

Il principio procreativo può essere, alternativamente, identificato o distinto dall'ulteriore qualità della persona che la Costituzione riconduce alla condizione in esame e cioè la capacità del genitore di provvedere sia in senso materiale sia in senso spirituale alla prole (art. 30, c. 1, Cost.)[25].

Nella prima ipotesi (coincidenza tra procreazione e interesse del minore), il riservare il ruolo di genitori solo a coppie formate da un uomo e una donna, pur rappresentando una distinzione fondata sul sesso e quindi vietata dall'art. 3 Cost., è ragionevole nella misura in cui l'interesse psico-fisico del minore può essere realizzato solo da questo tipo di coppia[26]. In definitiva, la nozione costituzionale di genitore incentrata sul fatto della procreazione sembra definire non solo un prevalente modello biparentale caratterizzato dalla diversità di genere tra i soggetti coinvolti[27], ma

[22] Come osservato dalla dottrina, infatti, la Costituzione repubblicana, già nei suoi principi fondamentali, fa della differenza di genere uno degli elementi centrali ai fini della definizione della condizione giuridica dell'uomo. In questo senso, il riferimento al genere ha anche delle ricadute sulla definizione del modello costituzionale di famiglia. In questa prospettiva, l'imporsi di una nozione bigenitoriale fondata sulla procreazione conferma "(…) l'irriducibile differenza tra i sessi nella riproduzione introducendo una regola unidirezionale, applicabile al solo femminile". Così B. Pezzini, Costruzione del genere e Costituzione, in Idem (a cura di), La costruzione del genere. Norme e regole (Sestante Edizioni, Bergamo 2012) 31 ss.; Idem, Uguaglianza e matrimonio. Considerazioni sui rapporti di genere e sul paradigma eterosessuale nel matrimonio secondo la Costituzione italiana, in Tra famiglie, matrimoni e unioni di fatto (Jovene, Napoli 2008) 102.

[23] Sull'omogenitorialità, come condizione esistenziale meritevole di tutela ai sensi dell'art. 2 Cost., v. A. Lorenzetti, La tutela della genitorialità omosessuale fra dignità e uguaglianza, in A. Schuster (a cura di), Omogenitorialità. Filiazione, orientamento sessuale e diritto, cit., 81 ss. M. Bonini Baraldi, Le famiglie omosessuali nel prisma della realizzazione personale, (2009) 4 Quad. cost., 885.

[24] In questo senso la dottrina ha evidenziato come la distinzione delle figure genitoriali in maternità e paternità dipenda da un "un dualismo eteronormativo", rispetto al quale il legislatore italiano ha mostrato un certo conservatorismo, v., A. Schuster, L'abbandono del dualismo eteronormativo della famiglia, in A. Schuster (a cura di), Omogenitorialità. Filiazione, orientamento sessuale e diritto, cit., 35. Sui riflessi che questo modello ha sui contenuti della fonte costituzionale e sulla sua interpretazione cfr., tra gli altri, G. Brunelli, Famiglia e Costituzione: un rapporto in continuo divenire, in C. Mancina – M. Ricciardi (a cura di), Famiglia italiana. Vecchi miti e nuove realtà (Donzelli, Roma 2012) 69 ss.

[25] Sul punto v., per tutti, M. BESSONE, Art. 30-31, in G. BRANCA (a cura di), Commentario della Costituzione, Rapporti etico-sociali (art. 29-34), 86.

[26] Alcuni autori hanno individuato un nesso ineludibile tra eterosessualità, diversità di sesso della coppia e filiazione; tra questi v. A. Singara, 'Matrimonio omosessuale validamente celebrato all'estero ed ordine pubblico italiano', (2006) 2 Giur. merito, 624.; M. Casini e M. L. Di Pietro, 'Il matrimonio tra omosessuali non è un vero matrimonio', (2006) 2 Giur. merito, 616.; F. D'angeli, Il fenomeno delle convivenze omosessuali: quale tutela giuridica? (Cedam, Padova 2003) 12 ss.

[27] Sulle ricadute che la nozione eterosessuale di matrimonio ha sulla condizione genitoriale v. M. R. Marella-G. Marini, Di cosa parliamo quando parliamo di famiglia (Laterza, Roma-Bari, 2014) 96 ss.

anche qualificare l'interesse del minore[28] e quindi la capacità genitoriale[29]. In questi termini, guardando all'art. 30, c. 1, Cost., la prima condizione di capacità giuridica dei diritti e dei doveri genitoriali (e quindi il presupposto di accesso allo *status* in questione) sarebbe identificata dall'appartenenza del soggetto ad una formazione sociale costituita da due individui di genere opposto e non sterili[30].

Sulla base della seconda ipotesi (non coincidenza tra procreazione e interesse del minore), diversamente, la Costituzione, non esaurendo la nozione di genitorialità al legame di sangue, ma prospettandone ulteriori declinazioni in rapporto all'interesse del minore[31] e alla promozione dello *status* di genitore[32], non escluderebbe anche altri modelli di filiazione, a condizione che questi non ledano lo sviluppo psico-fisico del bambino.

Le due ipotesi ricostruttive proposte possono essere esaminate nella normativa di dettaglio, ambito nel quale si prenderanno in esame tre principali modelli parentali (procreativo, non procreativo, procreativo artificiale).

Nel modello procreativo legittimo, il rapporto tra orientamento sessuale e condizione di genitore è stato oggetto di valutazione, quando l'emersione dell'omosessualità di uno dei coniugi ha determinato la fine del rapporto e la necessità, in sede di separazione o di divorzio, di definire il regime di affidamento della prole. In particolare, la giurisprudenza di merito[33] e quella di

[28] Sulla nozione di interesse del minore, v. per tutti, M. Dogliotti, 'Che cos'è l'interesse del minore?', (1992) Dir. fam. pers., 1086.

[29] Sul rapporto di identità tra interesse del minore e presenza di due figure genitoriali v., per tutti, P. Zatti, 'Interesse del minore e doppia figura genitoriale', (1997) NGCC, 84.

[30] Il principio in parola, come osservato dalla dottrina, "viene indicato nelle convenzioni internazionali e nella riforma sull'affidamento non più come qualcosa semplicemente corrispondente all'interesse del minore, ma come un vero e proprio diritto del minore in sintonia con quanto già da tempo aveva anche previsto la normativa in materia di adozione (…)", così G. Dosi, 'Le nuove norme sull'affidamento e sul mantenimento dei figli e il nuovo processo di separazione e di divorzio', (2006) 6 Dir. e Giu., 100.

[31] La capacità giuridica di essere genitore è subordinata dall'art. 30, c. 2, all'idoneità dei soggetti di provvedere in senso materiale e spirituale alla prole. Nel caso di incapacità dei genitori in ordine all'adempimento di tali doveri, infatti, si impone un intervento del legislatore, che realizza l'interesse pubblico di garanzia dei diritti del minore. In questa prospettiva, la l., 04.05.1983, n. 184, Diritto del minore ad una famiglia, in attuazione degli artt. 30, co. 2, e 31 Cost. ha introdotto gli istituti dell'affidamento e dell'adozione del minore. Tale legge è stata modificata nel 2001 dall'entrata in vigore della l., 28.03.2001, n. 149, "Modifiche alla legge 4 maggio 1983, n. 184, recante «Disciplina dell'adozione e dell'affidamento dei minori», nonché al titolo VIII del libro primo del codice civile".

[32] Gli interventi tesi a favorire la formazione della famiglia e la condizione genitoriale, enunciate all'art. 31 Cost., possono costituire ulteriori legami parentali, con riguardo alle coppie, se affette da problemi legati alla procreazione. V., in questo senso, M. BESSONE, *Art. 30-31*, in G. BRANCA (a cura di), *Commentario della Costituzione, Rapporti etico-sociali (art. 29-34)*, cit., 135 ss. In questo senso, v. Corte cost., sent., 10.06.2014, n. 162, punto 6 del *Considerato in diritto*, in <http://www.giurcost.org/decisioni\>, consultato il 18 agosto 2014.

[33] Cfr. in tema di affidamento esclusivo al genitore omosessuale, Trib. di Ravenna, ord., 13 aprile 2006; in tema di affidamento condiviso e omosessualità del genitore, Trib. Napoli, sent., 28 giugno 2006, in (2007) *Giur. Merito*, 178, poi confermata da Corte d'Appello Napoli, sent., 11 aprile 2007, in (2008) 3 Fam. pers. succ., 2008, 234; *semel*, v., *ex multis*, Trib. di Bologna, decr., 15 luglio 2008, in (2009) 2 Dir. fam. pers., 689; Trib. di Genova, 0rd., 30 ottobre 2013, in http://www.articolo29.it/genitori-2/affidamento-e-diritto-di-visitamerito/, consultato il 22 agosto 2014; Trib. di Nicosia, ord., 14 dicembre 2010, in http://www.minoriefamiglia.it/, consultato il 22 agosto 2014. A commento v., tra gli altri, D. Bianchini, 'Omosessualità ed affidamento condiviso: nulla quaestio se non vi è contrasto con l'interesse del minore', (2009) 2 Dir. Famiglia, 690; G. Oberto, 'Problemi di coppia, omosessualità e filiazione', (2010) 2 Dir. Famiglia, 802. G. Fava, 'La (presunta) omosessualità del genitore non è di ostacolo all'affido esclusivo del figlio', (2007) 6 Giur. Merito, 1581. Contra, a sostegno della diversità di genere tra i genitori quale requisito essenziale ai fini del corretto

legittimità[34] hanno concorso a stabilire il principio in base al quale l'orientamento sessuale, astratto da specifiche e provate circostanze di fatto[35], è del tutto neutro e irrilevante rispetto alla valutazione dell'idoneità genitoriale[36]. Infatti:

> "L'omosessualità del genitore si pone (…) in termini non diversi dalle opzioni politiche, culturali e religiose, che pure sono di per sé irrilevanti ai fini dell'affidamento"[37].

L'omosessualità, come ribadito dalla Cassazione nel 2013, deve essere, al pari di qualsiasi altra qualità della persona, valutata solo con riferimento all'interesse della prole[38].

Con riguardo all'adozione, l'interesse del minore è stato definito da quelle normative che, introducendo questo istituto, quale modello non procreativo di genitorialità, hanno riservato l'adozione ordinaria solo a coppie sposate[39]. In questo senso, il modello costituzionale procreativo legittimo ha qualificato il contenuto di tutela corrispondente al diritto del bambino di avere una famiglia, divenendo il criterio di determinazione della capacità giuridica dei soggetti di adottare. Gli adottanti devono, infatti, rispecchiare una doppia genitorialità differenziata in maternità e paternità e essere uniti in matrimonio[40].

Tali criteri hanno un effetto negativo nei confronti delle coppie omosessuali, in quanto le stesse da un lato esprimono una bigenitorialità non differenziata in ragione del genere, dall'altro il matrimonio è nell'ordinamento italiano riservato solo ad uomini e donne[41].

L'incapacità delle coppie dello stesso sesso di adottare minorenni è stata, peraltro, confermata da quelle pronunce della Corte costituzionale che, tra il 2010 e il 2014, definendo la nozione costituzionale di matrimonio come l'unione tra un uomo e una donna, hanno determinato, stabilendo l'esclusione delle coppie *same sex* dallo *status* coniugale, anche l'impossibilità per queste

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sviluppo del rapporto filiale, v. G. Manera, 'Se un'elevata conflittualità tra i genitori (uno dei quali tacciato di omosessualità) esclude l'applicazione in concreto dell'affidamento condiviso', (2007) 4 Dir. famiglia, 1692.

[34] Cfr., Corte Cass.: sent., 17 ottobre 1995, n. 10833, in (1996) 1 Fam. dir., 25 ss. - sent., 18 giugno 2008, n. 16593, in (2008) Fam. dir., 1106 ss. – sent., 11.01.2013, n. 601, in (2013) II NGC, II, 601 ss., con nota di M. Winkler, 'La Cassazione e le famiglie ricomposte: il caso del genitore convivente con persona dello stesso sesso'; A. Figone, 'Inserimento del minore in famiglia omosessuale. Nota a sentenza della Cassazione 11 gennaio 2013 n. 601', in (2013) 1 Rivista AIAF, 84.

[35] In questa prospettiva, il Tribunale di Napoli nel 2006 ha sostenuto che: "(…) La relazione omosessuale del genitore potrà in concreto, vale a dire in casi specifici, fondare un giudizio negativo sull'affidamento o sull'idoneità genitoriale, solo allorquando (ma si tratta di ipotesi residuali, e non a caso la giurisprudenza rinvenuta non è recente) sia posta in essere con modalità pericolose per l'equilibrato sviluppo psico-fisico del minore. Tanto può affermarsi anche per una relazione eterosessuale"; v. Trib. Napoli, sent. cit., punto 3 *e)* dei *Motivi della decisione*.

[36] In senso conforme, v. A. FIGONE, *Nota a sentenza Cass. n. 10833 del 1995*, in (1996) 1 Fam. dir., 25 ss.

[37] V. ult. dec. cit., punto 3 *e)* dei *Motivi della decisione*.

[38] In questi termini, anche una relazione eterosessuale è stata valutata negativamente in giurisprudenza ai fini dell'affidamento; v. Trib. Velletri, 25 settembre 1977, in (1978) *Dir. fam*., 886; Cass, 12 febbraio 1971, n. 364, in (1973) *Rep. Foro it.*, 150; Cass., 22 dicembre 1976, n. 4706, in (1977) *Dir. fam.*, 113.

[39] V. art. 6, c. 1, l. n. 149/2001.

[40] In questa prospettiva, la famiglia adottiva deve corrispondere ad un modello di *imitatio naturae* al quale corrisponde una coppia sposata formata da un uomo e una donna. Cfr. Corte cost., sent., 16 maggio 1994, n. 183, in (1994) II *Giur. cost.*, 1642 ss.

[41] In senso ulteriore, v. F. Bilotta, 'Omogenitorialità, adozione e affidamento famigliare', in (2011) 3 Dir. fam., 1376.

formazioni sociali di essere titolari di tutte quelle situazioni giuridiche condizionate al possesso della condizione matrimoniale.

Diverse considerazioni possono essere svolte con riguardo all'adozione in casi particolari. Infatti, l'art. 44 della l. n. 184/1983, derogando alle condizioni di adottabilità del minore previste in via ordinaria, individua requisiti di capacità giuridica alternativi rispetto allo *status* coniugale e, in parte, del tutto neutri rispetto all'orientamento sessuale dell'adottante[42]. In questi termini, le persone omosessuali possono adottare in casi particolari dei minori, non rilevando a nessun titolo l'appartenenza ad un gruppo sociale istituzionalizzato, ma solo in concreto l'idoneità del soggetto di realizzare l'interesse dell'adottando.

In questo senso, il Tribunale per i minorenni di Roma ha riconosciuto l'adozione ad una donna nei confronti del figlio naturale della compagna, sul presupposto dell'impossibilità dell'affidamento preadottivo, stante la condizione di non abbandono del minore giuridicamente figlio della madre biologica[43]. In particolare, il giudice, osservando come nel nostro ordinamento il divieto di adozione per il *single* sia da riferire solo all'istituto dell'adozione legittimante, ha chiarito che

> "nessuna limitazione è prevista espressamente, o può derivarsi in via interpretativa, con riferimento all'orientamento sessuale dell'adottante o del genitore dell'adottando, qualora tra di essi vi sia un rapporto di convivenza".

In particolare, "non può presumersi che l'interesse del minore non possa realizzarsi nell'ambito di un nucleo familiare costituito da una coppia di soggetti del medesimo sesso" [44]. In questa prospettiva, il rapporto genitoriale formatosi tra il minore e la madre sociale, accertato dal Tribunale, necessita di tutela anche sul piano giuridico, attraverso il riconoscimento dello *status* di genitore adottivo.

La legge in materia di procreazione medicalmente assistita appare incentrata sul modello procreativo, nella misura in cui riserva l'accesso a queste pratiche solo a coppie formate da soggetti di sesso diverso[45] e pone un esplicito di divieto sia di procreare artificialmente per le coppie *same sex*[46] sia di realizzare la surrogazione di maternità[47]. La normativa descritta, declinando l'insorgere del rapporto genitoriale in maternità e paternità in funzione dell'esistenza di una coppia formata da

[42] Cfr. art. 44, ll. *a)* e *c)*, l. n. 184/1983.

[43] V. Trib. minori Roma, sent., 30 luglio 2014, n. 299, in <http://www.giurcost.org/decisioni\>, consultato il 24 agosto 2014. Nella stessa prospettiva di tutela del minore, ma con effetti legittimanti, è stata riconosciuta l'adozione di una single avvenuta negli Stati Uniti; cfr. Trib. Bologna, dec., 21 marzo 2013, n. 1948, in <http://www.articolo29.it/wp-content/uploads/2014/09/Decreto-trib-min-bo.pdf>, consultato il 20 settembre 2014.

[44] V. Trib. minori Roma, sent. n. 299/2014, cit., *Motivi della decisione*.

[45] V., art. 5, l., 19.02.2004, n. 40, "Norme in materia di procreazione medicalmente assistita", in *G.U.*, 24.02.2004, n. 45.

[46] Cfr., l. n. 40/2004, artt. 12, c. 2.

[47] Cfr., l. n. 40/2004, art. 12, c. 6.

soggetti di genere diverso[48], determina l'incapacità per le persone omosessuali, singole o in coppia, di procreare artificialmente[49].

Rispetto a questa rigidità, la giurisprudenza di merito ne ha in parte attenuato gli effetti, riconoscendo *status filiatonis* formatisi all'estero per surrogazione di maternità[50]. Anche se i casi in questione non hanno riguardato coppie omosessuali, costituiscono comunque importanti precedenti nella misura in cui hanno affermato l'esistenza sul piano giuridico della nuova figura del genitore sociale, riconducendo il legame parentale alla qualità del rapporto formatosi tra l'adulto e il minore. Questa interpretazioni permetterebbe, quindi, anche a singoli o coppie dello stesso sesso di ottenere in Italia il riconoscimento del proprio *status* di genitori di fatto, in virtù dell'interesse del bambino di vedere riconosciuto questo legame.

2.2 Il livello sovranazionale

A livello europeo il rapporto tra orientamento sessuale e condizione di genitore si è determinato in rapporto a due principali fattori: evoluzione della giurisprudenza delle corti europee nell'interpretare i contenuti di garanzia riconducibili allo *status* in esame; circolazione dei modelli familiari quale conseguenza dell'avanzamento del processo di integrazione europeo, oggi riconducibile ad un vero e proprio *status* di cittadinanza[51].

La Corte di Strasburgo si è occupata in alcune principali decisioni del rapporto tra omofilia e condizione genitoriale, con riguardo agli istituti dell'affidamento della prole e dell'adozione.

Nel caso *Salgueiro Da Silva Mouta c. Portogallo*[52], la Corte ha valutato sussistente la lesione dei diritti del ricorrente di non discriminazione e alla vita familiare, sostenendo che il giudice lusitano avesse incentrato tutta la decisione di affidamento della prole sull'omofilia del genitore, senza però motivare in modo adeguato sull'incidenza negativa che l'omosessualità avrebbe avuto sull'interesse del minore.

In materia di adozione, si è registrata un'evoluzione nella giurisprudenza di Strasburgo, che, da un'iniziale posizione che rimetteva al margine di apprezzamento degli Stati la scelta di valutare la compatibilità tra omosessualità e interesse del minore[53], ha poi stabilito il principio secondo il

[48] Peraltro, l'impianto di questa legge è stato in parte smantellato da una serie di pronunce della Corte costituzionale. Tra queste, V. Corte cost., sent. n. 162/2014, cit.

[49] A questo proposito, la dottrina ha osservato che questa scelta del legislatore corrisponderebbe alla volontà di condizionare lo *status* genitoriale alla necessaria unione tra due soggetti di genere diverso, v. E. Dolcini, 'Il divieto di fecondazione assistita "eterologa" … in attesa di giudizio', in (2011) Diritto penale e processo, 353 ss.

[50] In questo senso, Cfr., Corte d'Appello di Bari, 23 febbraio 2009, in (2009) 5 Famiglia e minori, 50. *Semel*, v. Trib. min. Milano, decr., 6 settembre 2012, in (2013) I *NGCC*, 715, ove si riconosce, non autorizzando lo stato di adottabilità di un minore nato a seguito di maternità surrogata in India, lo *status* genitoriale della madre sociale, fondandolo sulla capacità genitoriale che la madre ha dimostrato nei confronti del minore, pur non avendolo generato. A commento v. F. Turlon, Nuovi scenari procreativi: rilevanza della maternità "sociale", interesse del minore e *favor veritatis*, (2013) I *NGCC*, 719. In senso contrario a questo orientamento, v. Trib. di Forlì, 25 ottobre 2011, in banca dati DeJure, consultata il 22 agosto 2014.

[51] Cfr. Trattato sull'Unione Europea, art. 9, c. 2, e a commento F. X. Priollaud, D. Siritzky, Le traité de Lisbonne. Texte et commentaire article par article des nouveaux tratés européens (TUE-TFUE) (La Documentation Française, Paris 2008) 52 ss.

[52] Cfr. Salgueiro Da Silva Mouta c. Portogallo (ric. n. 33290/96) C.edu 21 marzo 2000,.

[53] V. Fretté c. France (ric. n. 36515/97) C.edu 26 maggio 2002.

quale le legislazioni nazionali, al fine di non violare il diritto alla vita familiare, letto anche in combinato disposto con il divieto di discriminazione sulla base del sesso, devono motivare l'esclusione delle coppie *same sex* da questo istituto[54].

Gli ordinamenti particolari devono, inoltre, con riguardo alla circolazione degli *status* familiari, favorire la garanzia del superiore interesse del minore, riconoscendo i suoi legami familiari, anche quando questi si siano formati sulla base di istituti non previsti nello Stato di ingresso[55].

La giurisprudenza richiamata, peraltro, si iscrive nella tutela della famiglia omosessuale stabilita dalla Corte con la nota sentenza *Schalk e Kopf c. Austria*[56] , in quanto tra i contenuti di garanzia del diritto alla vita familiare rientrano anche i legami genitoriali, la cui protezione, sganciata dalla circostanza che i soggetti componenti la coppia siano o meno coniugati, configura un obbligo di tutela anche negli ordinamenti nazionali, a prescindere che questi abbiano o meno previsto analoghi modelli giuridici di genitorialità[57].

La tutela dei legami omoparentali emerge nello spazio U.E. con particolare riguardo al diritto di circolazione dei cittadini e dei loro familiari[58]. In questi termini, lo *status* di cittadinanza dell'Unione, rappresenta la condizione di capacità giuridica, in ogni Stato membro ospitante e anche in assenza di specifici istituti, per il riconoscimento dei rapporti genitoriali sorti in un altro ordinamento. In difetto, infatti, come più volte sostenuto dalle istituzioni europee, si verrebbe a determinare una doppia discriminazione fondata sulla nazionalità e sull'orientamento sessuale[59].

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[54] V. E.B. c. Francia (ric. n. 43546/02) C.edu G.C. 22 novembre 2008, in particolare § 97 e X e Altri c. Austria C.edu (ric. n. 19010/07) C.edu 19 dicembre 2013, in particolare § 131. V., in senso contrario, Gas et Dubois c. Fran (ric. n. 25951/07) C.edu 15 giugno 2012. Cfr. E. Falletti, 'La Corte europea dei diritti dell'uomo e l'adozione da parte del single omosessuale', in (2008) Fam. dir., 221; F. Donati, 'Omosessualità e procedimento di adozione in una recente sentenza della Corte di Strasburgo', (2008) 3 Dir. fam. e persone, 1090.

[55] V. Wagner J.M.W.L. c. Lussemburgo (ric. n. 76240/01) C.edu 28 giugno 2007 e, in una diversa prospettiva, Negrepontis-Giannisis c. Grecia (ric. n. 56759/08) Cedu 3 maggio 2011; sulla protezione del genitore sociale in caso di surrogazione di maternità, v. Labasse c. Francia e Mennesson c. Francia (ricc. nn. 65941-65192/11) C.edu 26 giugno 2014.

[56] Schalk e Kopf c. Austria (ric. n. 30141/04) C.edu 24 giugno 2010. In particolare, il nuovo orientamento della Corte richiama gli indirizzi di tutela delle coppie omosessuali già affermati dalla Corte di Giustizia. Per ricostruire queste decisioni, mi sia permesso rinviare a D. Ferrari, Lo *status* giuridico delle coppie *same sex* in Europa, in D. ferrari (a cura di), Lo *status* giuridico delle coppie *same sex*: una prospettiva multilivello (Primiceri Editore, Pavia 2014), 91-132.

[57] Comitato dei Ministri del Consiglio d'Europa, 'Raccomandazione CM/Rec (2010)5 del Comitato dei ministri agli Stati membri sulle misure volte a combattere la discriminazione fondata sull'orientamento sessuale o sull'identità di genere, 31 marzo 2010.

[58] V. Parlamento Europeo e Consiglio Direttiva (CE) 2004/38 relativa al diritto dei cittadini dell'Unione e dei loro familiari di soggiornare liberamente nel territorio degli Stati membri [2004] GUE L 158/2004 art. 2 n. 2. Sul punto cfr. G. Rossillo, 'Rapporti di famiglia e diritto dell'Unione europea: profili problematici del rapporto tra dimensione nazionale e dimensione transnazionale della famiglia', in (2010) 7 Fam. dir., 733.; P. Morozzo della Rocca, 'Cittadinanza europea, libertà di circolazione e famiglie senza matrimonio' (2010) 8-9 Fam. dir., 849.

[59] Sulla circolazione degli *status* giuridici personali, v. Commissione (CE), 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (Green Paper) COM (2010) 747 final, 14 dicembre 2010 e Parlamento Europeo (PE), Commissione per le petizioni, 'Petizione 724/2005 presentata da James Walsh, cittadino britannico, sui diritti di lesbiche, omosessuali, bisessuali e transessuali nell'Unione europea', 3 luglio 2006. In dottrina, cfr. P. Marozzo della Rocca, Diritti del minore e circolazione all'estero del suo *status* familiare: nuove frontiere, in G. O. Cesaro, P. Lovati, G. Mastrangelo (a cura di), La famiglia si trasforma, cit., 44 ss.

3 Conclusioni

In conclusione, l'interesse del minore quale requisito essenziale di capacità dello *status* di genitore permette di superare il monopolio normativo del modello procreativo, dal momento che non è scontato che chi genera sia anche un buon genitore e, in senso contrario, chi non genera non possa esserlo. La condizione in esame è sempre condizionata al benessere del bambino, la cui sola garanzia può configurare ragionevoli differenziazioni motivate dall'orientamento sessuale. Al di fuori di questi casi, a livello nazionale, si realizza una violazione del principio di eguaglianza, nella parte in cui vieta distinzioni normative fondate sul sesso[60] (art. 3, c. 1, Cost.).

In questi termini, anche se la legislazione italiana sull'adozione e sulla procreazione artificiale riconduce in via principale questo interesse alla compresenza di due figure genitoriali di diverso genere, la giurisprudenza nazionale ed europea non ha ritenuto, né ai fini dell'affidamento né ai fini dell'adozione, di poter affermare un'aprioristica incompatibilità tra omofilia e interessi del bambino, valutando, al pari di altre qualità personali, se l'orientamento sessuale nel caso concreto fosse causa di un nocumento alla crescita del minore. Tale principio, applicato alla circolazione delle famiglie omoparentali, ha determinato il riconoscimento in Italia di nuove figure genitoriali, espressione, in taluni casi, di istituti non solo non previsti, ma addirittura vietati, dalla normativa nazionale.

[60] Sull'interpretazione della qualità personale del sesso come comprensiva anche dell'orientamento sessuale v. O. Pollicino, Discriminazioni sulla base del sesso e trattamento preferenziale nel diritto comunitario (Giuffrè, Milano 2005) 236.

L'adozione omoparentale nella giurisprudenza della Corte di Strasburgo tra divieto di discriminazione sulla base dell'orientamento sessuale e interesse superiore del minore

Adele Del Guercio

Abstract

L'indagine si sofferma sulla giurisprudenza resa dalla Corte europea dei diritti umani con riguardo all'adozione del minore da parte di un single o di una coppia omosessuale. Nelle sentenze *E.B. c. Francia* del 22 gennaio 2008 (concernente un'adozione monoparentale) e *X. e altri c. Austria* del 19 febbraio 2013 (concernente un'adozione coparentale), il suddetto organo, in composizione di Grande Camera, ha ritenuto che la differenza di trattamento riservata alle ricorrenti, basata sull'orientamento sessuale delle stesse, si ponesse in violazione dell'art. 14 CEDU letto in combinato disposto con l'art. 8. La Corte ha rigettato la presunta inidoneità delle persone non eterosessuali ad occuparsi di un minore. Piuttosto le autorità statali dovrebbero adottare un approccio *case by case*, volto a verificare se gli aspiranti genitori abbiano la capacità di prendersi cura del minore, indipendentemente da considerazioni legate all'orientamento sessuale. Al centro di qualsiasi procedimento concernente i minori, infatti, la massima considerazione dovrebbe essere attribuita al loro superiore interesse.

Keywords

Omogenitorialità, adozione, interesse superiore del minore, orientamento sessuale, divieto di discriminazione, margine di apprezzamento statale, consenso europeo.

* * * * *

1 Introduzione

L'adozione di un minore da parte di una persona o di una coppia LGBT[1] sta ricevendo sempre maggiore attenzione nell'ambito del Consiglio d'Europa. A partire dagli anni 2000, sia l'Assemblea parlamentare, sia il Comitato dei ministri, si sono impegnati nella predisposizione di documenti[2] che, sebbene privi di portata giuridica obbligatoria, offrono delle linee di indirizzo alle autorità statali, le

[1] La sigla "LGBT" sta per lesbiche, gay, bisessuali e transessuali. Cfr. Gay & Lesbian Alliance Against Defamation, *Media Reference Guide*, 8° ed., maggio 2010.

[2] Detti documenti sono stati raccolti nel report a cura del COE, Combating discrimination on grounds of sexual orientation or gender identity. Council of Europe standards, 2011.

quali sono chiamate ad agire con uno spirito di leale cooperazione in virtù della loro appartenenza al COE. In particolare, in una raccomandazione del 2010[3], il Comitato dei ministri ha ribadito che

> the child's best interests should be the primary consideration in decisions the parental responsibility for, or guardianship of a child, member states should that such decisions are taken without discrimination based on sexual orientation or gender identity (par 26).[4]

Nello stesso documento viene inoltre auspicato che, laddove l'ordinamento statale ammetta l'adozione da parte del single, tale possibilità debba essere accessibile a tutte le persone, indipendentemente dall'orientamento sessuale (par. 27).

Peraltro, uno studio condotto per conto del Consiglio d'Europa ha evidenziato che

> Children do not live in a vacuum, but within a family, and *an important part of their protection is that the family unit, no matter what form it takes*, *enjoys adequate and equal legal recognition and protection*. In other words, it is as discriminating to the child to limit legal parenthood, or to deny significant careers legal rights and responsibilities, as it is to accord the child a different status and legal rights according to the circumstances of their birth or upbringing.[5]

In linea generale, l'adozione di un minore da parte di persone omosessuali può avvenire in tre modi: adozione del single (anche detta "monoparentale"), adozione del figlio biologico del partner (cd. coparentale o *step-parent adoption*) e adozione congiunta[6]. Invero, sono ancora poco numerosi gli Stati che consentono alle persone e alle coppie omosessuali di adottare un minore. Nell'ambito del COE solo undici Stati (Belgio, Danimarca, Finlandia, Francia, Germania, Islanda, Danimarca, Norvegia, Spagna, Svezia e Regno Unito) hanno introdotto nel proprio ordinamento la cd. *second-parent adoption*; otto di questi (Belgio, Danimarca, Islanda, Danimarca, Norvegia, Spagna, Svezia e Regno Unito) hanno previsto altresì l'adozione congiunta da parte di coppie formate da persone dello stesso sesso. In 35 dei 47 Stati del COE non è ammessa alcuna forma di adozione da parte di persone LGBT, che si tratti di single o di membri di una coppia,[7] e tale circostanza è indicativa delle resistenze che ancora si registrano con riguardo alla questione che ci accingiamo a trattare.

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[3] Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, del 31 marzo 2010.

[4] Si vuole qui ricordare che nel 2012 il Consiglio d'Europa si è dotato di una *Strategy for the Rights of the Child (2012-2015)*, nella quale vengono indicate le linee d'azione per il periodo di riferimento, da realizzarsi secondo un approccio olistico e *child-friendly*. Il documento è reperibile al link http://www.coe.int/t/dg3/children/StrategySept2012_en.pdf. Tra l'altro i documenti adottati dal COE fanno costantemente riferimento a quelli elaborati nell'ambito delle Nazioni Unite, ed in particolare alla Convenzione sui diritti del fanciullo del 1989 e al Commento generale n. 14 del 29 maggio 2013 sul principio del superiore interesse del minore.

[5] Lowe N., A study into the Rights and Legal Status of Children Being Brought Up in Various Forms of Marital or Non-Marital Partnerships and Cohabitation, Directorate General of Human Rights and Legal Affairs, Council of Europe secretariat, 2010, p. 3, corsivo aggiunto.

[6] I dati sono tratti dal rapporto del COE, *Discrimination on grounds of sexual orientation and gender identity in Europe*, 2° edizione, 2011, p. 97, e non tengono conto degli sviluppi più recenti.

[7] Ivi, pp. 97-98.

Il presente scritto si soffermerà sulla giurisprudenza resa dalla Corte europea dei diritti dell'uomo, organo di controllo dell'omonima Convenzione, relativamente all'adozione di un minore da parte di persone o coppie omosessuali. Prima di addentrarci in tale analisi si vuole verificare quali sono le indicazioni al riguardo ricavabili da un altro strumento adottato nell'ambito del Consiglio d'Europa, ovvero la Convenzione europea sull'adozione dei minori.

2 La Convenzione europea sull'adozione dei minori

La Convenzione europea sull'adozione dei minori è stata adottata, in una prima versione, il 24 aprile 1967, per essere poi riveduta negli anni Duemila, con l'obiettivo dichiarato di prendere atto dei cambiamenti che sono intervenuti nel frattempo in Europa, anche in materia di adozione, e di ridurre le diversità che si registrano tra i vari ordinamenti nazionali. In effetti non può negarsi che al modello tradizionale di famiglia se ne siano affiancati di nuovi, in un processo di scomposizione e di ricomposizione del nucleo familiare al quale partecipa altresì l'istituto dell'adozione.[8] La nuova Convenzione è stata aperta alla firma il novembre 2008 ed è entrata in vigore il 1° settembre 2011, al deposito del terzo strumento di ratifica, come previsto dal dettato pattizio. Al momento in cui si scrive conta solamente sette Stati Contraenti.[9]

Va da subito evidenziato che, mentre la Convenzione del 1967 riconosce l'accesso alle procedure di adozione alle sole coppie coniugate e ai single – quest'ultima ipotesi esclusivamente nel caso in cui sia ammessa dall'ordinamento interno –, l'art. 7, par. 1, della Convenzione del 2008 estende tale possibilità a tutte le coppie eterosessuali, sposate o unite in una partnership registrata.[10] La nuova Convenzione consente inoltre di riconoscere l'accesso alle procedure di adozione anche alle coppie formate da persone dello stesso sesso, che siano coniugate, unite in una partnership registrata o quanto meno legate da una relazione stabile (par. 2).[11] Trattasi, ad ogni modo, di una mera facoltà per gli Stati membri, e non di un obbligo cui conformarsi. Va tuttavia precisato che, qualora l'accesso alle procedure di adozione da parte delle coppie omosessuali venga prevista, non sono ammesse discriminazioni rispetto alle coppie eterosessuali[12]. Sebbene l'art. 7 sia quello che più di altri riflette i cambiamenti che sono intervenuti nelle società europee, la

[8] Per un approfondimento si rinvia ai saggi raccolti nel volume a cura di A. Schuster, *Omogenitorialità. Filiazione, orientamento sessuale e diritto*, Mimesis, 2011.

[9] Danimarca, Finlandia, Norvegia, Paesi Bassi, Romania, Spagna, Ucraina. Sono dieci gli Stati che l'hanno firmata ma non ratificata; tra questi non si annovera l'Italia. La Convenzione è aperta alla ratifica anche da parte di Stati non membri del COE. Sono sedici, invece, gli Stati Parti della Convenzione del 1967: Austria, Danimarca, Ex-Repubblica Jugoslava di Macedonia, Germania, Gran Bretagna, Grecia, Irlanda, Italia, Lettonia, Liechtenstein, Malta, Polonia, Portogallo, Repubblica Ceca, Romania, Svizzera. La Norvegia e la Svezia hanno denunciato la Convenzione del 1967 ed hanno aderito a quella del 2008. Sull'attuazione della Convenzione del 1967 nell'ordinamento italiano si rinvia a Vitucci C., "Orientamento sessuale e adozione nella giurisprudenza della Corte europea dei diritti umani", in *Diritti umani e diritto internazionale*, 2/2013, p. 481 ss., in par. p. 484-485.

[10] Va evidenziato che il par. 1 dell'art. 7 può essere sottoposto a riserve.

[11] La definizione dei criteri per valutare la stabilità di una relazione viene demandata alla legislazione nazionale, come si ricava dall'*Explanatory Report*, par. 47.

[12] Shannon G., Horgan R., Keehan G., Daly C., *Adoption. Law and practice under the Revised European Convention on the Adoption of Children*, Council of Europe Publishing, 2013, p. 37.

formulazione scelta, come si è visto, è invero improntata ad un certo *self-restraint*, ritenuto necessario in un settore sensibile quale quello oggetto di approfondimento.

Entrambe le Convenzioni si richiamano espressamente al principio del superiore interesse del minore, al quale deve essere attribuita una considerazione preminente.

3 La Convenzione europea dei diritti umani

La Convenzione europea dei diritti umani non contempla nessuna disposizione dalla quale sia ricavabile un diritto di adozione. A venire in rilievo nella giurisprudenza che prenderemo in esame sono l'art. 8, che sancisce il diritto al rispetto della vita privata e familiare, e l'art. 14, che vieta qualsiasi discriminazione nel godimento delle situazioni giuridiche soggettive garantite dal dettato pattizio.

L'art. 8 è una delle disposizioni che più di altre sono andate incontro ad un'evoluzione interpretativa da parte del giudice della CEDU, in linea con i cambiamenti maturati dalle società europee, e tale evoluzione ha riguardato tra l'altro anche le prerogative delle persone omosessuali. Innanzitutto va evidenziato come la relazione tra persone dello stesso sesso, a lungo qualificata come "vita privata", solo di recente, con la sentenza *Schalk e Kopf c. Austria* del 24 giugno 2010, sia stata riconosciuta alla stregua di "vita familiare".[13] Peraltro tale sviluppo, che pure ha tardato ad affermarsi, trova una base giuridica nella stessa definizione di "vita familiare" abbracciata sin dal 1979 dalla Corte di Strasburgo[14], definizione nella quale sono state ricomprese non solo le relazioni giuridicamente istituzionalizzate, bensì anche le situazioni di fatto. Rientra nell'ambito soggettivo di tale nozione anche la relazione tra genitori e figli, sia qualora si tratti di filiazione legittima, sia nel caso della filiazione naturale, anche in assenza di convivenza tra i genitori. Il suddetto organo ha altresì riconosciuto la cd. famiglia in senso sociale, ossia quella nella quale il legame "sociale" di genitorialità sia costitutivo dell' "apparenza", nei confronti di terzi, di una famiglia.[15] La CEDU non garantisce il diritto di adottare; nondimeno la filiazione adottiva, una volta costituita, viene riconosciuta come "vita familiare"[16], in quanto tale meritevole di tutela nell'ambito dell'art. 8. Com'è noto, detta disposizione ammette un bilanciamento tra gli interessi concorrenti dell'individuo (la vita privata e familiare) e della comunità (la sicurezza, l'ordine pubblico, il benessere economico, la salute, la morale). Nell'effettuare tale bilanciamento agli Stati è riconosciuto un margine di apprezzamento[17], la cui ampiezza varia a seconda della natura del diritto, dell'obiettivo

[13] Corte europea dei diritti umani, *Schalk e Kopf c. Austria*, ricorso n. 30141/04, sentenza del 24 giugno 2010, sulla quale si rinvia a Schuster A., *Il matrimonio e la famiglia omosessuale in due recenti sentenze. Prime note in forma di soliloquio*, 2012, in part. p. 6, reperibile al sito www.forumcostituzionale.

[14] Corte europea dei diritti umani, *Marckx c. Belgio*, ricorso n. 6833/74, sentenza del 13 giugno 1979. Al riguardo si rinvia a Tomasi L., "Articolo 8", in *Commentario breve alla convenzione europea dei diritti dell'uomo*, Bartole S., De Sena P., Zagrebelsky V. (a cura di), 2012.

[15] Tomasi L., "Articolo 8", cit., p. 300.

[16] Corte europea dei diritti umani, *Pini e altri c. Romania*, ricorsi n. 78028/01 e 78030/01, sentenza del 22 giugno 2004.

[17] Sulla teoria del margine di apprezzamento si rinvia a van Hoof F., "The Stubbornness of the European Court of Human Rights' Margin of Appreciation Doctrine", in *The Realisation of Human Rights: when Theory meets Practice*,

dell'interferenza ed anche del cd. *consensus* europeo, ovvero della sussistenza di un denominatore comune, negli ordinamenti degli Stati membri, con riguardo alla regolamentazione della materia trattata[18]. Va evidenziato che laddove si venga a verificare una situazione di conflitto tra diritti fondamentali, soprattutto qualora il caso sollevi delicate questioni etiche o morali, il margine di apprezzamento accordato alle autorità statali è più ampio. È quanto emerge, ad esempio, dalle sentenze relative alla tutela dell'infanzia[19]. Sulla base dell'art. 8 CEDU la Corte, anche richiamandosi agli obblighi positivi posti in capo alle Parti contraenti, ha sviluppato una giurisprudenza molto ricca ispirata al superiore interesse del minore[20], principio non espressamente sancito dal dettato convenzionale ma al quale il suddetto organo dichiara di ispirarsi.

In quanto all'art. 14, esso ha natura accessoria e bandisce qualsiasi discriminazione, nel beneficio delle situazioni giuridiche protette dalla CEDU, che siano basate su sesso, razza, colore, lingua, religione, opinioni politiche, origine nazionale o sociale, appartenenza a una minoranza nazionale, ricchezza, nascita o "ogni altra condizione"[21]. Trattasi di un elenco non esaustivo e la stessa Corte di Strasburgo ha fatto ricadere nell'ambito di applicazione della suddetta norma disparità di trattamento basate su *rationes distinguendi* non contemplate espressamente, come nel caso, che qui interessa, della discriminazione sulla base dell'orientamento sessuale[22]. Invero l'art. 14 ammette le discriminazioni, purché le stesse siano giustificabili sulla base di motivazioni oggettive e ragionevoli. L'onere della prova spetta alle autorità statali, le quali devono dimostrare che la differenza di trattamento sia legittima e che rispetti il principio di proporzionalità tra i mezzi impiegati e il fine conseguito. Il suddetto organo ha anche specificato che, quando a rilevare è una discriminazione basata sull'orientamento sessuale, il margine di apprezzamento statale si riduce[23].

La Corte fino a questo momento ha avuto modo di pronunciarsi su due tipi di adozione, quella da parte del single omosessuale e quella coparentale, e peraltro va evidenziato come la giurisprudenza di riferimento sia alquanto scarna: in entrambi i casi, infatti, sono due le sentenze che vengono in rilievo, peraltro di segno opposto.

3.1 L'adozione del single nella giurisprudenza della Corte europea dei diritti umani

Con riguardo all'adozione monoparentale, a venire in rilievo sono le sentenze *Fretté*[24] e *E.B.*[25], entrambe concernenti la Francia, la cui normativa in vigore all'epoca dei fatti consentiva ai single

Haeck Y. (ed.), Cambridge-Antwerp-Portland, 2014, p. 125-149; Spielmann D., "Allowing the Right Margin : the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?", in *The Cambridge Yearbook of European Legal Studies*, vol. 13, 2012, p. 381-418.

[18] Sulla questione Tomasi L., "Articolo 8", cit., p. 307 ss., e dottrina ivi indicata.

[19] Corte europea dei diritti umani, *Scozzari e Giunta c. Italia*, ricorsi n. n° 39221/98 e 41963/98, sentenza del 13 luglio 2000.

[20] Kilkelly U., "Protecting children's rights under the ECHR: the role of positive obligations", in *NILQ*, 3/2011, p. 245 ss.

[21] Spitaleri F., Dolso G.B., "Articolo 14", in *Commentario breve alla convenzione europea dei diritti dell'uomo*, cit., p. 518 ss.

[22] Corte europea dei diritti umani, *Salgueiro da Silva Mouta c. Portogallo*, n. 33290/96, del 26 febbraio 2002.

[23] Ibidem.

[24] Corte europea dei diritti umani, *Fretté c. Francia*, ric. n. 36515/97, sentenza del 26 febbraio 2002.

[25] Corte europea dei diritti umani, *E.B. c. Francia*, ric. n. 43546/02, sentenza del 22 gennaio 2008.

che avessero compiuto 28 anni di adottare un minore (art. 343-1 del Codice civile)[26]. La prima sentenza riguarda un uomo la cui domanda di adozione era stata rigettata malgrado "his undoubted personal qualities and aptitude for bringing up children" (par. 16). Nondimeno, ad avviso dei servizi sociali e dei giudici nazionali dinanzi a quali il ricorrente aveva impugnato la decisione, egli "did not provide the requisite safeguards – from a child-rearing, psycological and family perspective – for adopting a child" (par. 16). Ciò alla luce dell'assenza, nella sua cerchia più stretta di relazioni, di un riferimento femminile che potesse incarnare la figura materna, ed anche delle difficoltà pratiche che avrebbe incontrato nel riorganizzare la propria vita intorno alla presenza di un bambino. Il sig. Fretté si era pertanto rivolto alla Corte di Strasburgo, contestando la violazione degli artt. 8 e 14. Il suddetto organo, nel pronunciarsi sul caso, ha innanzitutto ribadito che la Convenzione non contempla un "diritto all'adozione" e che lo stesso obbligo di rispettare la vita familiare, di cui all'art. 8, presuppone l'esistenza di una famiglia già formata e non garantisce il diritto di crearne una (par. 32). Nel caso di specie è indubitabile che il rifiuto delle autorità francesi di autorizzare il ricorrente ad adottare un minore – malgrado la normativa nazionale garantisca tale possibilità ai single – sia collegato alla sua "choice of lifestyle", ovvero al suo orientamento sessuale, e che, pertanto, si venga a configurare una disparità di trattamento rispetto alle persone eterosessuali (par. 32). Tuttavia, la discriminazione subita dal sig. Fretté è giustificata sulla base di un obiettivo legittimo, "namely to protect the health and the rights of children who could be involved in an adoption procedure" (par. 38). Il giudice della CEDU afferma di non condividere "The irrebuttable presumption that no homosexual provided sufficient guarantees to offer a suitable home to an adopted child" e nemmeno "[the] social prejudice and the irrational fear that children brought up by homosexuals would be 'at greater risk of becoming homosexuals themselves or developing psychological problems'" (par. 35). Nondimeno, qualche passaggio oltre, osserva, contraddicendo le proprie stesse affermazioni, che

> the scientific community – particularly experts on childhood, psychiatrists and psychologists – is divided over the possible consequences of a child being adopted by one or more homosexual parents, especially bearing in mind the limited number of scientific studies conducted on the subject to date (par. 42).

Peraltro, sostiene il giudice della CEDU, intorno alla questione dell'adozione del minore da parte di una persona omosessuale non si è ancora formato un *terreno comune* a livello europeo e, pertanto, alle autorità statali va riconosciuto un ampio margine di apprezzamento (par. 36). Tale elemento ha avuto un peso considerevole nella valutazione svolta dall'organo di Strasburgo, il quale ha escluso, con una maggioranza di quattro voti su sette, che vi sia stata violazione del combinato disposto degli artt. 8 e 14. Di opinione diversa i giudici che hanno votato a favore del ricorrente, i quali hanno evidenziato, nella loro *Dissenting opinion*, che "Wherever a legal system grants a right, in this case the right for everyone to apply for authorization to adopt, it cannot grant it in a discriminatory manner without violating Article 14 of the Convention"; nel caso di specie, ad avviso

[26] Il 17 maggio 2013 è stata adottata la *Loi n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe*, che modifica diversi articoli del codice civile, tra cui quelli in materia di adozione.

degli stessi, si è venuta a realizzare una discriminazione basata esclusivamente sull'orientamento sessuale e dunque contraria alla CEDU[27].

Un esito differente si è avuto con la sentenza resa, sei anni dopo, dalla Corte, in composizione di Grande Camera, sul caso *E.B. c. Francia*. Alla ricorrente, come al sig. Fretté, era stata negata l'adozione di un minore malgrado avesse insegnato per tredici anni in una scuola per l'infanzia e avesse dimostrato ottime capacità relazionali con i bambini. La sua richiesta non era stata accolta innanzitutto per l'assenza di una figura maschile che potesse assolvere la funzione paterna, ed anche perché, a detta delle autorità statali, non era chiaro quale ruolo avrebbe avuto la partner della ricorrente in seguito all'adozione.

La Corte europea è andata a verificare innanzitutto che la questione posta dalla ricorrente ricadesse nell'ambito di applicazione di uno dei diritti sanciti dalla CEDU. Infatti, come già si è detto, l'art. 8 non contempla il diritto di fondare una famiglia e non garantisce il diritto all'adozione; il rispetto della vita familiare "does not safeguard the mere desire to found a family" (par. 41). Nondimeno, nel momento in cui uno Stato contraente decide di riconoscere nel proprio ordinamento dei diritti *addizionali* (come consentito dall'art. 53 CEDU) che, pur non contemplati espressamente dalla Convenzione, ricadono nell'ambito di applicazione della stessa, "cannot, in the application of that rights, take discriminatory measures within the meaning of article 14" (par. 49). In effetti la Francia ha previsto la possibilità per i *single* di accedere alle procedure di adozione, che sono tuttavia state precluse alla ricorrente, a suo dire sulla base dell'orientamento sessuale (concetto che rientra tra le cause di discriminazione di cui all'art. 14 CEDU[28]).

La Corte di Strasburgo non prende le distanze dal caso *Fretté*, bensì ne conferma l'iter argomentativo[29], richiamando i principi generali espressi in tale decisione, in particolare il principio del superiore interesse del minore e il riconoscimento di un ampio margine di apprezzamento alle autorità statali in un settore che vede la comunità internazionale e scientifica divisa (par. 70). Afferma, tuttavia, che nel caso *E.B*. si registrano significative differenze rispetto al caso *Fretté*. Almeno apparentemente, infatti, l'autorizzazione alla ricorrente non è stata negata sulla base della sua "choice of life". Anzi, le autorità statali hanno riconosciuto "the applicant's qualities and her child-raising and emotional capacities" (par. 71). Tuttavia, l'assenza di un riferimento maschile e, soprattutto, l'atteggiamento – ritenuto ambiguo – della partner hanno spinto le autorità statali a negare l'autorizzazione. Le giustificazioni avanzate dal governo a sostegno del diniego opposto alla sig.ra E.B. sono apparse poco convincenti all'organo di Strasburgo. In quanto all'assenza di una figura maschile che possa svolgere il ruolo paterno, la questione è stata definita "germane here because the case do not concern an application for authorization to adopt by a – married or unmarried – couple, but by a single person" (par. 73). Ad avviso della Corte si tratta indubbiamente di un "pretext for rejecting the applicant's application on grounds of her homosexuality" (par. 73). In quanto alla seconda argomentazione, è legittimo che la valutazione coinvolga la partner

[27] D*issenting opinion* dei giudici Bratza, Fuhrmann e Tulkens, p. 33.

[28] Come espressamente affermato nella sentenza, *Salgueiro da Silva Mouta c. Portogallo*, cit.

[29] Cfr. altresì Crisafulli F., "Same-sex Couples' Rights (Other than the Right to Marry) Before the ECtHR", in *Same-Sex Couples before National, Supranational and International Jurisdictions*, Gallo D., Paladini L., Pustorino P. (a cura di), Springer, 2014, p. 409 ss.

dell'adottante, tenuto conto del ruolo significativo che avrà nella vita quotidiana del minore adottato (par. 76). Malgrado tali rilievi, il giudice della CEDU è dell'avviso che le motivazioni invocate dal governo francese per giustificare il trattamento discriminatorio nei confronti della ricorrente non possano essere considerate alternativamente, ma come elementi di una valutazione complessiva, e pertanto l'illegittimità dell'una (nel caso di specie l'irrilevanza dell'assenza di una figura paterna) ha l'effetto di contaminare l'intera decisione (par. 80). Peraltro viene osservato che, alla luce di un'attenta analisi della documentazione prodotta dalle autorità statali, l'orientamento sessuale della sig.ra E.B. "was consistently at the centre of deliberations in her regard and omnipresent at every stage of the administrative and judicial proceedings" (par. 88) e rappresenta indubbiamente "a decisive factor" nella decisione delle autorità statali di autorizzare l'adozione (par. 89). La Corte ribadisce un importante principio di diritto, ovvero che "where sexual orientation is in issue there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within article 8" (par. 91). Non manca, inoltre, un riferimento en passant alla natura vivente della CEDU, da interpretarsi "in the light of present-day conditions" (par. 92). Nel caso di specie, malgrado l'adozione sia nell'interesse del minore, tenuto conto delle "undoubted personal qualities and aptitude for bringing up children" della ricorrente, l'esito della procedura è stato negativo, e ciò proprio sulla base dell'orientamento sessuale. Tale discriminazione, non essendo conforme ai principi di legittimità, necessità e proporzionalità, si pone in violazione dell'art. 14 letto in combinato disposto con l'art. 8 CEDU. Va evidenziato come nella sentenza *E.B.* non sia fatto alcun riferimento né all'assenza di un terreno comune europeo, né al margine di apprezzamento.

Detta sentenza riveste grande importanza con riguardo alla tematica di cui andiamo discutendo, giacché nell'adottarla la Corte europea dei diritti umani ha affermato un principio avente una notevole portata, ovvero che la valutazione della domanda di adozione non può essere determinata sulla base dell'orientamento sessuale della persona[30]. Tuttavia non può trascurarsi la circostanza che la decisione è stata adottata con una maggioranza di soli 10 voti su diciassette, e che si sono registrate anche delle opinioni dissenzienti. È stato ad esempio sostenuto che sia le attitudini della partner, sia il riferimento all'assenza di un riferimento maschile, possano ben legittimare il rifiuto dell'autorizzazione ad adottare. Ad avviso di chi scrive, le divisioni interne alla Corte sono emblematiche delle resistenze che ancora si registrano nelle società europee con riguardo all'adozione da parte delle persone LGBT.

[30] Sulla sentenza cfr. Falletti E., "Homosexual single individuals' rights to adopt before the European Court of Human Rights and in the French Legal Context", in *Human rights brief*, 2011, p. 26 ss.; Wintemute R., "Who can adopt? Taking into account societal changes", Joint Council of Europe and European Commission Conference, *Challenges in adoption procedures in Europe: Ensuring the best interests of the child*, 30 November-1 December 2009, p. 20 ss.

3.2 L'adozione del figlio biologico del partner nella giurisprudenza della Corte europea dei diritti umani

Anche con riguardo all'adozione coparentale, sono solo due le sentenze che vengono in rilievo. La prima è stata resa nel 2012 sul caso *Gas e Dubois c. Francia*[31], che ha avuto origine dal diniego della richiesta di adozione della figlia biologica della partner presentata da una donna francese. La normativa interna dello Stato in questione consentiva l'adozione coparentale nell'ambito della coppia sposata, ma non nell'ambito delle relazioni di fatto[32]. Nel caso di specie, il giudice della CEDU ha escluso che vi sia stata violazione degli artt. 14 e 8, come sostenuto dalle ricorrenti. La situazione giuridica in cui si trovano le stesse, infatti, non è assimilabile a quella delle coppie sposate in cui uno dei coniugi intenda adottare il figlio dell'altro. La Corte non ha ravvisato alcuna disparità di trattamento in ragione dell'orientamento sessuale, dal momento che anche alle coppie eterosessuali che contraggono un'unione civile di solidarietà è negata l'autorizzazione all'adozione. Al di là del modo, alquanto superficiale, in cui la questione è stata liquidata, è degno di nota che la relazione tra le ricorrenti e la figlia biologica di una delle due venga inquadrata come "vita familiare" ai sensi dell'art. 8 CEDU[33].

Ad altra conclusione è giunta la Corte, in composizione di Grande Camera, il 19 febbraio 2013, con la sentenza *X e altri c. Austria*[34]. Il ricorso era stato presentato da una donna in seguito al rifiuto da parte delle autorità austriache di autorizzare l'adozione del figlio della partner alla quale era unita da una relazione stabile. Anche nell'esame del caso di specie la Corte ha escluso che la situazione di una coppia di fatto sia assimilabile a quella di una coppia sposata. È stato anche ribadito che sugli Stati Contraenti non grava l'obbligo di consentire alle persone non eterosessuali di contrarre matrimonio o di riconoscere loro i diritti garantiti alle coppie sposate. In tale settore le autorità statali conservano un significativo margine di apprezzamento. Tuttavia il giudice della CEDU prende atto delle differenze rispetto al caso *Gas e Dubois*: la normativa austriaca applicabile al caso di specie, infatti, garantiva anche alle coppie eterosessuali non sposate l'accesso alle procedure per l'adozione coparentale, ma tale possibilità era tassativamente esclusa per le coppie non sposate formate da persone dello stesso sesso[35]. Ciò perché quando la coppia fosse formata da due uomini o da due donne – come nel caso sottoposto alla Corte – l'applicazione della normativa avrebbe avuto l'effetto di spezzare il legame tra il minore e il genitore naturale, al quale sarebbe subentrato il genitore adottivo dello stesso sesso. Pertanto, alla base del ricorso vi è il trattamento discriminatorio, basato sull'orientamento sessuale, tra coppie eterosessuali e coppie omosessuali non coniugate derivante dalla normativa austriaca in materia di adozione. Seppure l'adozione vada

[31] Corte europea dei diritti umani, *Gas e Dubois c. Francia*, ric. n. 25951/07, sentenza del 15 marzo 2012, sulla quale si rinvia al commento di Johnson P., "Adoption, Homosexuality and the European Convention on Human Rights: *Gas and Dubois v France*", in *The Modern Law Review*, 2012, pp. 1123–1149.

[32] Si rinvia alla nota 26.

[33] Cfr. al riguardo anche Schuster A., *Il matrimonio e la famiglia omosessuale*, cit.

[34] Corte europea dei diritti umani, *X e altri c. Austria*, ric. n. 19010/07, sentenza del 19 febbraio 2013. Per un esame di quest'ultima si rinvia a Vitucci C., *op. cit.*

[35] Il 1° gennaio 2010 è entrato in vigore in Austria il *Registered Partnership Act*, che modifica tra l'altro la disciplina in materia di adozione. La legge non era in vigore al momento dei fatti oggetto del giudizio della Corte di Strasburgo.

annoverata tra i cd. diritti aggiuntivi, una volta che tale possibilità sia stata introdotta nell'ordinamento interno, deve essere esercitabile in modo non discriminatorio, nel rispetto dell'art. 14 CEDU. Accertato che la discriminazione sussiste, e ribadito il principio affermato in *E.B*. secondo cui "L'orientation sexuelle relève du champ d'application de l'article 14" (par. 99), la Corte va dunque a valutare se la stessa risponda ai requisiti di legittimità, necessità e proporzionalità. Dalle sentenze dei tribunali interni si ricava che gli obiettivi, peraltro ritenuti legittimi, che le autorità statali hanno voluto conseguire rifiutando l'autorizzazione ad adottare alla sig.ra X sono di preservare la famiglia tradizionale e di tutelare il superiore interesse del minore ad avere due genitori di sesso opposto (par. 137). Trattasi indubitabilmente di obiettivi legittimi ma va verificato se nel caso di specie non potessero essere impiegate altre misure per il conseguimento degli stessi (apr. 139). L'esame sotto il profilo della proporzionalità del trattamento discriminatorio deve tener conto, tra l'altro, della *natura vivente* della CEDU e dell'evoluzione della società, ed in particolare "de l'idée l'idée selon laquelle il y a plus d'une voie ou d'un choix possibles en ce qui concerne la façon de mener une vie privée et familiale" (par. 139). Sebbene gli Stati conservino un margine di apprezzamento nel settore considerato, quando a venire in rilievo è l'orientamento sessuale le autorità devono dimostrare che il mezzo impiegato – il trattamento discriminatorio – sia *necessario* al raggiungimento dell'obiettivo perseguito: non bisogna infatti sottostimare la portata delle conseguenze che ne derivano, nel caso di specie l'esclusione di *tutte* le persone omosessuali dalle procedure di adozione (par. 140, corsivo aggiunto). Ancora, la Corte rileva che le autorità statali non hanno presentato argomenti convincenti atti a giustificare la disparità di trattamento. Il governo austriaco ha bensì sostenuto che le coppie omosessuali possono essere idonee o meno a prendersi cura di un minore allo stesso modo delle coppie eterosessuali (par. 142), senza tuttavia impegnarsi nel riconoscimento giuridico delle stesse, come invece imporrebbe una consolidata giurisprudenza ai sensi della quale anche la famiglia di fatto è meritevole di protezione[36]. Come si è detto, sebbene il governo conservi un margine di apprezzamento, trattandosi "des questiones morales ou étiques delicate", nondimeno grava sullo stesso la dimostrazione che sia stato operato un giusto bilanciamento tra gli interessi in gioco. Il margine di apprezzamento, nel caso di specie, è comunque ridotto, dal momento che a venire in rilievo è una discriminazione basata sull'orientamento sessuale. Nell'esame del ricorso sottopostole, la Corte ha evidenziato numerosi elementi che portano a dubitare della proporzionalità del trattamento discriminatorio subito dalle ricorrenti; tra gli altri, vengono richiamati

> l'existence de la famille de fait formée par les intéressés, l'importance qu'il y a pour eux à en obtenir la reconnaissance juridique, l'incapacité du Gouvernement à établir qu'il serait préjudiciable pour un enfant d'être élevé par un couple homosexuel ou d'avoir légalement deux mères ou deux pères, et surtout le fait que le Gouvernement reconnaît que les couples homosexuels sont tout aussi aptes que les couples hétérosexuels à l'adoption coparentale (par. 146).

[36] Come affermato altresì nella sentenza *Schalk e Kopf c. Austria*, cit.

Alla luce di tali considerazioni è stata constatata la violazione dell'art. 14 in combinato disposto con l'art. 8. Malgrado, infatti, la ricerca di un bilanciamento tra la tutela della famiglia tradizionale, da una parte, e quella delle minoranze sessuali, dall'altra, sia un'operazione difficile e delicata, nel caso di specie le autorità statali non hanno avanzato argomenti convincenti a dimostrare che la discriminazione subita dalle coppie formate da persone dello stesso sesso risponda ad un obiettivo legittimo e proporzionale. È interessante notare come nel caso di specie la Corte abbia utilizzato l'argomento dell'assenza di un *consensus* europeo a sostegno della propria posizione: ha infatti affermato che la ristrettezza del campione a disposizione (solo dieci Stati membri del COE riconoscono alle coppie non sposate l'accesso alle procedure di adozione, e sei di questi ammettono tale possibilità anche per le coppie formate da persone dello stesso sesso) "ne permet de tirer aucune conclusion sur un éventuel consensus entre les Etats membres du Conseil de l'Europe" (par. 149).

Anche la sentenza *X. e altri c. Francia*, così come quella resa nel caso *E.B. c. Francia*, è stata rimessa alla Grande Camera, a riprova della delicatezza della questione oggetto della presente indagine. E, come in *E.B. c. Francia*, i giudici non sono riusciti a trovare una posizione unanimemente condivisa: la pronuncia è stata adottata, infatti, con dieci voti favorevoli su diciassette ed è stata accompagnata da un'opinione comune parzialmente dissenziente[37].

4 Osservazioni conclusive

Alla luce dell'indagine condotta, a noi sembra che le sentenze *E.B. c. Francia* e *X e altri c. Austria* si inscrivano nel solco già tracciato dalla sentenza *Schalk e Kopf c. Austria,* e rappresentino un ulteriore passaggio di quel processo, attualmente in corso, di riconoscimento e di tutela della famiglia omosessuale. Peraltro è degno di nota che sia in *Gas e Dubois*, sia in *X. e altri*, la Corte europea abbia riconosciuto nel nucleo formato dalle due donne e dalla minore una famiglia *de facto* e che ne abbia auspicato un riconoscimento sul piano giuridico. Tale approccio sembra aprire la strada ad ulteriori sviluppi verso la definizione di un vero e proprio obbligo in tal senso per le Parti Contraenti, in particolar modo quando siano coinvolti dei minori[38].

È apprezzabile che il giudice della CEDU abbia posto fortemente l'accento sulla necessità che le autorità statali svolgano un esame *case by case* delle richieste di adozione che vengono loro sottoposte: "Cette façon de procéder paraît aussi plus conforme à l'intérêt supérieur de l'enfant,

[37] *Opinion partiellement dissidente commune aux juges Casadevall, Ziemele, Kovler, Jociene, Sikuta, De Gaetano et Sicilianos*.

[38] Secondo una parte della dottrina, alle sentenze della Corte europea deve essere attribuito, oltre che un valore di *res judicata*, altresì quello di *res interpretata*. Pertanto, non solo lo Stato chiamato in giudizio, ma tutte le Parti Contraenti sono tenute a conformare il proprio ordinamento alla giurisprudenza complessiva del suddetto organo e ad astenersi dal mettere in atto condotte che si pongano in palese violazione con l'orientamento dello stesso su di una specifica questione già sottopostagli. In argomento si rinvia a Cataldi G., "La natura self-executing delle norme della CEDU e l'applicazione delle sentenze della Corte europea negli ordinamenti nazionali", in La *tutela dei diritti umani in Europa. Tra sovranità statale e ordinamenti sovranazionali*, Caligiuri A., Cataldi G., Napoletano N. (a cura di), Padova, 2010, p. 565 e ss., in part. pp. 578-579.

notion clé des instruments internationaux pertinents"[39]. Va tuttavia rilevato che nessuna delle sentenza prese in esame si sofferma sulla definizione e sul contenuto di detto principio, pure costantemente richiamato. In *X. e altri* la Corte di Strasburgo si limita a far riferimento alla Convenzione delle Nazioni Unite sui diritti del fanciullo e alla Convenzione europea sull'adozione dei minori[40]. Sarebbe stato forse opportuno dedicare maggiore spazio alla definizione del principio del preminente interesse del minore e alle conseguenze che ne derivano.

Peraltro si dubita della compatibilità con tale principio di una normativa che di fatto consente l'adozione coparentale alle sole coppie eterosessuali, in tal modo mettendo in atto una disparità di trattamento nei confronti dei bambini inseriti nell'ambito di una famiglia omosessuale, sui quali si ripercuote la discriminazione subita dai genitori in ragione dell'orientamento sessuale. Sembra riproporsi quella distinzione irragionevole fra *status filiationis* che fin dalla sentenza *Marcks* del 1979 è stata ritenuta illegittima dalla stessa Corte di Strasburgo[41]. A tal riguardo si condivide l'opinione dissenziente del giudice Villiger allegata alla sentenza *Gas e Dubois*:

> Je ne vois pas de justification à cette différence de traitement. A mes yeux, tous les enfants doivent recevoir le même traitement. Je ne vois pas pourquoi certains enfants, et d'autres non, devraient être privés de ce qui est dans leur intérêt supérieur, à savoir l'autorité parentale partagée[42].

Preme sottolineare un altro elemento della giurisprudenza esaminata. Ad avviso di chi scrive, nel caso della *second parent adoption* a venire in rilievo non è esclusivamente un trattamento discriminatorio delle coppie omosessuali rispetto a quelle eterosessuali, bensì anche un'interferenza nella vita familiare delle persone coinvolte, ed in particolare dei minori. La Corte, infatti, già in *Gas e Dubois* – posizione confermata in *X. e altri* – ha ritenuto che la relazione tra persone dello stesso sesso e il figlio biologico di una delle due possa essere considerata "vita familiare" ai sensi dell'art. 8 CEDU. Dunque, se il nucleo familiare è già costituito, come nei casi summenzionati, negare alla partner della madre biologica, con la quale il minore già convive, l'autorizzazione ad adottare costituisce un'ingerenza nell'esercizio del diritto alla vita familiare, tutelato dalla suddetta disposizione[43]. Una volta accertata l'ingerenza, bisognerebbe verificare se la stessa risponda o meno ai requisiti di legalità, necessità e proporzionalità previsti dal par. 2 dell'art. 8. Tale approccio appare più rispondente all'obiettivo – che anche la Corte di Strasburgo sembra condividere – di salvaguardare le situazioni giuridiche dei minori superando tuttavia i pregiudizi, e le disparità di trattamento che ne derivano, nei confronti delle persone LGBT. A venire in gioco, nei casi di adozioni coparentali nell'ambito delle coppie formate da persone dello stesso sesso, sono

[39] Corte europea dei diritti umani, *X. e altri c. Austria*, cit., par. 146.

[40] Oltre che alcuni documenti di *soft-law* adottati nell'ambito del COE.

[41] Corte europea dei diritti umani, *Marcks c. Belgio*, ricorso n. 6833/74, sentenza del 13 giugno 1979.

[42] Al riguardo si veda anche Repetto G., "Figli irriconoscibili. Le adozioni omoparentali davanti alla Corte europea dei diritti dell'uomo", in *Omosessualità, eguaglianza, diritti*, Schillaci A. (a cura di), Carocci editore, 2014, p. 150 ss., in part. p. 162.

[43] Tali osservazioni sono valide altresì con riguardo al ricorso *X. e altri c. Austria*, rispetto al quale, tuttavia, viene in rilievo un ulteriore elemento che non abbiamo preso in considerazione in questa sede, ovvero la presenza di un padre biologico che non ha fornito l'autorizzazione all'adozione.

due valori fondamentali, quello del superiore interesse del minore e il divieto di discriminazioni basate sull'orientamento sessuale. Nel caso *Fretté* – che invero concerne l'adozione da parte del single e le cui conclusioni sono state superate in *E.B.* – la Corte ha definito gli stessi come "competing interests" e li ha posti in relazione in un giudizio di bilanciamento, giungendo a ritenere legittimo un trattamento discriminatorio basato sull'orientamento sessuale in ragione del superiore interesse del minore. Tuttavia, se è vero, come ha affermato la stessa Corte in una giurisprudenza ormai consolidata, che l'orientamento sessuale costituisce un elemento "innate or inherent" dell'essere umano[44], nessuna discriminazione dovrebbe essere ammessa sotto tale profilo. Tale posizione è stata peraltro espressamente sostenuta nella sentenza *Salgueiro de Mouta c. Portogallo*[45], nella quale si legge che qualsiasi disparità di trattamento basata sull'orientamento sessuale "is not acceptable under the Convention" (par. 36). Alla luce di tali considerazioni, la salvaguardia del superiore interesse del minore dovrebbe essere perseguita attraverso altre modalità, che nulla hanno a che vedere con l'orientamento sessuale dell'aspirante genitore. Il bilanciamento degli interessi in gioco dovrebbe infatti avvenire sulla base degli elementi fattuali che emergono dal caso concreto, solo in tal modo potendo essere conseguito il migliore interesse per il minore. L'elemento discriminante nella decisione di autorizzare o meno l'adozione non dovrebbe essere, pertanto, l'orientamento sessuale dell'adottante, bensì la sua effettiva idoneità a prendersi cura del minore. Di tale avviso è anche la Corte interamericana dei diritti dell'uomo, che in una decisione del 2012, avente ad oggetto l'affidamento di minori alla madre lesbica, afferma risoluta che

> la determinación del interés superior del niño, en casos de cuidado y custodia de menores de edad, se debe hacer a partir de la evaluación de los comportamientos parentales específicos y su impacto negativo en el bienestar y desarrollo del niño según el caso, los daños o riesgos reales y probados, y no especulativos o imaginarios. Por tanto, no pueden ser admisibles las especulaciones, presunciones, estereotipos o consideraciones generalizadas sobre características personales de los padres o preferencias culturales respecto a ciertos conceptos tradicionales de la familia[46].

Peraltro, anche la Corte europea dei diritti umani, nel pronunciarsi su di un caso avente ad oggetto il diritto di accesso al bambino da parte del genitore transessuale, ha asserito che non può dedursi dalla transessualità un danno per il minore, ma che la valutazione deve tener conto della situazione specifica del genitore e del minore[47]. Tali principi possono estendersi indubbiamente ai casi in cui l'elemento discriminante sia l'omosessualità.

Negare al minore, in ragione dell'orientamento sessuale degli aspiranti genitori, la possibilità di avere una famiglia capace di garantirgli affetto e cura, non appare in effetti rispondente all'obiettivo di garantire il suo superiore interesse. Com'è stato evidenziato,

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[44] Corte europea dei diritti umani, *Clift c. Regno Unito*, ricorso n. 7205/07, sentenza del 13 luglio 2007, par. 57. Sull'argomento cfr. Reeves A., "Sexual Identity As A Fundamental Human Right", in *Buffalo Human Rights Law Review*, 2009, p. 215 ss.

[45] Corte europea dei diritti umani, *Salgueiro de Mouta c. Portogallo*, cit.

[46] Corte interamericana dei diritti umani, *Atala Riffo e figlie c. Cile*, decisione del 24 febbraio 2012, par. 109.

[47] Corte europea dei diritti umani, *P.V. c. Spagna*, ricorso n. 35159/09, sentenza del 30 novembre 2010.

> Adoption was in the past considered a way of handing down a name or bequeathing a fortune, but this was progressively turned towards the exclusive interests of children without families and now it corresponds to the need to give to the child a replacement family when the original family is missing or not able to look after it, to take charge of bringing it up. So adoption makes it possible to give a family to a child, not a child to a family as the Court has often recalled in its judgments[48].

Lungi dal voler ricavare un "diritto" all'adozione dalla CEDU, con il presente scritto si è provato ad evidenziare come il principio del superiore interesse del minore non si ponga in conflitto con il divieto di discriminazione basato sull'orientamento sessuale. La centralità di tale principio nelle procedure che vedono coinvolti i bambini e gli adolescenti richiede una valutazione basata sugli elementi fattuali ricavabili dal caso concreto e non comporta un'esclusione *tout court* di un'intera categoria di persone e di coppie in ragione dell'orientamento sessuale. Peraltro si è visto come da tale esclusione derivino disparità di trattamento nei confronti degli stessi minori, sui quali viene fatto ricadere il peso e le conseguenze di una condizione giuridica collegata all'orientamento sessuale dei genitori e al mancato riconoscimento delle coppie di fatto da parte del legislatore statale[49].

[48] Berro-Lefevre I., "The case law of the European Court of Human Rights concerning adoption", Joint Council of Europe and European Commission Conference, *Challenges in adoption procedures in Europe: Ensuring the best interests of the child*, 30 November - 1 December 2009, p. 13 ss.

[49] Sul punto anche Repetto G., *op. cit*., p. 169.

PART SIX

Gender Identity

"*Recognizing Identities, Denying Families*": Conditions for the Legal Recognition of Gender Identity in Europe

Peter Dunne

Abstract

This paper considers how the conditions for the legal recognition of gender identity limit both the formation and maintenance of Rainbow Families in Europe. The paper concentrates on two specific pre-conditions for recognition - sterilisation and the "divorce requirement" - which have assumed especial importance and prevalence in European states. At present, 21 countries across the Council of Europe require individuals to prove infertility before extending recognition of preferred gender. In at least 19 states, a person may not access recognition if he or she is in an existing marriage. Adopting a human rights-centred approach, this paper explores the rationale and application of sterilisation as a pre-condition for recognition in Europe. It discusses the practical impact of both pre-conditions on transgender persons and their ability to form loving, secure family relationships. The paper considers recent statutory, judicial and policy-based movements away from these requirements. The paper concludes by highlighting a number of alternative, rights-focused, models for legal gender recognition and suggest how these alternative schemes may better protect and promote Rainbow Families in Europe.

Key Words

Gender Identity - Legal Gender Recognition - Conditions for Recognition - Sterilisation - Divorce - Human Rights - Comparative Law

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1 Introduction

In the landmark 2002 decision, *Goodwin v United Kingdom*[1], the European Court of Human Rights (ECtHR), citing an "unmistakable trend" among Council of Europe member states, established a general right for post-operative transgender persons to access legal gender recognition. In the absence of "concrete or substantial hardship or detriment to the public interest"[2], the United Kingdom (UK) failure to provide Ms. Goodwin with an amended birth certificate was held to violate art. 8 of the European Convention on Human Rights (ECHR or "the

[1] [2002] 35 E.H.R.R. 18.

[2] ibid [91].

Convention"). While *Goodwin* is frequently celebrated for this recognition of a Convention right to gender identity, the ECtHR also found that the UK's refusal to permit Ms Goodwin to enter a heterosexual marriage, in her preferred female legal gender, was a violation of art. 12 ECHR[3]. Indeed, *Goodwin* is a prime example of how the historic failure to recognise preferred gender has denied transgender persons throughout Europe the opportunity to establish a stable and secure family environment.

Although *Goodwin* acknowledges a general right to recognition, the European judges were careful not to set down any particular procedures or rules which Contracting states must follow in granting such recognition. The result has been significant variation in gender recognition regimes across Europe, ranging from Denmark's recent move towards a self-identification model to the requirement for invasive and irreversible surgical intervention, still enforced in European countries, such as France. This paper looks at two specific conditions of recognition - sterilisation and the "divorce requirement" - and considers their effect on the formation and maintenance of Rainbow Families throughout Europe.

At the outset, it is important to acknowledge that these two conditions are, without doubt, not the only pre-requisites for legal recognition which touch upon family life. Indeed, in a conference entitled "Rights on the Move", it would be remiss not to mention the significant impact which nationality and age limit requirements can have upon the mobility of transgender persons and their families. Where national laws deny gender recognition to non-citizens or do not cover young persons under the age of 18 years, those laws may hamper the ability and willingness of Rainbow Families to move and settle around Europe. Within the specific context of the European Union, these restrictions may even constitute a barrier to the free movement of persons, and some commentators suggest that the situation now requires further investigation, particularly in the light of new protections introduced by the Charter of Fundamental Rights.[4]

However, as noted, this paper will focus on only two conditions of recognition: sterilisation and divorce. It does so not simply for reasons of time and space, but also because of the prevalence and importance that these requirements have assumed in Europe. The paper seeks both to illustrate the significant negative consequences which sterilisation and forced divorce create for Rainbow Families and to suggest alternative, rights-orientated mechanisms for legal gender recognition in Europe.

2 Sterilisation

In 1972, Sweden became the first county in the world to permit the legal recognition of preferred gender.[5] A central feature of the 1972 Act was a requirement, under s. 1, that the

[3] ibid [97] - [104].

[4] Transgender Europe, 'Transgender Europe - Submission to the DG Home Affairs consultation on the "post-Stockholm Programme"', (Berlin, 21 January 2014) http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2013/pdf/0027/organisations/transgender-europe_en.pdf accessed 22 August 2014.

[5] SFS 1972:119: Lag (1972:119) om fastställande om könstillhorighet i vissa fall.

applicant submit to medical sterilisation. As of 2014, the pan-European transgender rights group, Transgender Europe (TGEU), reports that, across the Council of Europe, at least 21 countries continue to impose sterilisation as a pre-condition for gender recognition.[6] In Belgium, art. 62bis, ss. 2, of the Civil Code requires that applicants provide a "statement from a psychiatrist or surgeon" confirming that they are "no longer capable of producing children in a manner which is consistent with [their] former sex."[7] In the Czech Republic, the national Register Office may only amend the gender marker in a person's birth records where there is evidence of a surgical "sex change", which must involve the "disabling of reproductive functions."[8]

2.1 Justifications for Imposing Sterilisation as a Pre-Condition for Gender Recognition

A number of arguments have historically been offered to justify the imposition of a "sterilisation requirement." For many policy makers, there is a need to restrict the reproductive capacity of transgender persons in order to uphold traditional reproductive binaries. Since 1972, there has been significant unease among European legislators that the legal recognition of preferred gender might result in men giving birth to children or women biologically fathering offspring. The highly publicised case of Thomas Beattie in the American state of Arizona[9], and similar stories, are scenarios which European politicians clearly feel a need to avoid. Sterilisation has been deemed to be the most appropriate avenue to achieve this goal. There has also been evidence of an attitude, most clearly articulated by Ormerod J in the now infamous case of *Corbett v Corbett*[10], that an individual's legal gender should wholly, or at least to a large extent, reflect that person's biological and sex characteristics at birth. While legislation, such as Sweden's 1972 law, obviously reject Ormerod J's ultimate conclusion - that the recognition of preferred gender is a legal fiction - they do show an unmistakable fidelity to the dual ideas that (a) gender is a product of physiology and (b) the physiological characteristics to be associated with each gender are rigid or fixed (i.e. the capacity to bear children is de facto incompatible with a male legal gender). Finally, sterilisation requirements are often based upon ill-informed or generalised assumptions about the intention of transgender persons themselves. It is frequently assumed - without evidence obtained through further investigation - that an individual who seeks legal recognition of preferred gender must also wish to remove his or her capacity to reproduce in accordance with his or her birth-assigned sex.

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[6] Transgender Europe, 'Trans Rights Europe Map, 2014' (5 February, 2014) < http://www.tgeu.org/Trans_Rights_Europe_Map> accessed 22 August, 2014

[7] In French, art. 62bis, ss 2, states: "que l'intéressé n'est plus en mesure de concevoir des enfants conformément à son sexe precedent."

[8] Act on Specific Health Services, No 373/2011 Coll; Section 29(1) of the new Czech Civil Code, Act No 89/2012 Coll, Civil Cod.

[9] see British Broadcasting Company (BBC), 'US "Pregnant Man" has Baby Girl', (3 July 2008) http://news.bbc.co.uk/2/hi/americas/7488894.stm> accessed 22 August 2014

[10] [1970] 2 All ER 33

2.2 Objections to Sterilisation

The sterilisation requirement is perhaps the most obvious and harmful restriction on Rainbow Families in Europe. Depriving persons of their capacity to reproduce, sterilisation denies transgender individuals and their partners the fundamental right to found a family. Since 1972, a number of cogent objections have been raised against the sterilisation requirement. First, rendering an individual infertile - a process which, in many European countries, is linked to wider surgical obligations - is an invasive, irreversible procedure which violates the physical integrity of transgender persons. Second, mandatory sterilisation is a significant breach of an individual's personal autonomy. As the Stockholm Administrative Court of Appeal has recently noted, transgender persons cannot be considered to voluntarily submit to a sterilisation process if that process is a pre-condition for gender recognition.[11] While many transgender persons may, in fact, wish to access a specific sterilisation procedure, or other forms of medical intervention which have the effect of producing infertility, the fact that all applicants *must* prove infertility before obtaining recognition significantly undermines the consensual nature of sterilisation. Third, sterilisation medicalises healthy bodies. In the vast majority, if not all, gender recognition scenarios, there is no medical justification for requiring an individual to submit either to sterilisation or to wider gender confirmation surgery. It is difficult to conceive of any other situation where a person would be required to undergo unnecessary and invasive healthcare treatments simply to vindicate, what the ECtHR confirmed in *Goodwin*, is a fundamental Convention right. Finally, the sterilisation requirement stigmatises the role of transgender persons as parents. It suggests that there is an overwhelming social imperative to prevent transgender individuals from founding a family. The requirement implies that transgender persons are incapable of rearing children in a satisfactory manner and, therefore, that children may be harmed by growing up in a family where one, or both parents, are transgender.[12] This state-sponsored stigmatisation not only affects transgender persons and their partners who seek to create new family units. It also harms existing family structures where transgender persons are already parents or guardians to children. Rules which prevent transgender persons from founding new families cast aspersions on these existing structures and encourage both legal and social discrimination.

2.3 Legal and Policy Movements away from Sterilisation

In recent years, there have movements - at the judicial, legislative and international policy-making levels - towards removing sterilisation as a pre-requisite for legal gender recognition in Europe. These movements draw upon a broad spectrum of sources, including research data, international human rights norms and existing constitutional protections, to illustrate that conditioning recognition on the compromise of reproductive capacity is inconsistent with the notion of a society underpinned by the rule of law.

[11] *Socialstyrelsen v. NN*, Mål nr 1968-12 (2012), 5-6

[12] For further discussion of this point, see Human Rights Watch, 'Controlling Bodies, Denying Identities', (September 2011), p. 26 < http://www.hrw.org/sites/default/files/reports/netherlands0911webwcover.pdf> accessed 22 August 2014.

In February 2013, the UN Special Rapporteur on Torture, Juan Méndez, called upon states to "repeal any law allowing intrusive and irreversible treatments, including…involuntary sterilization...when enforced or administered without...free and informed consent."[13] By its Resolution 1728 of 2010, the Parliamentary Assembly of the Council of Europe affirmed that Member States should not make access to identity documentation conditional upon "any prior obligation to undergo sterilisation."[14] The World Professional Association of Transgender Health (WPATH) has stated that "no person should have to…accept sterilization as a condition of identity recognition."[15]

Since 2004, the legislatures in Spain[16], Portugal[17], the Netherlands[18] and the UK[19] have all expressly adopted legal recognition procedures which omit a sterilisation requirement. In 2011, the German Constitutional Court struck down the sterilisation provisions in s. 8 of the federal Transsexual Act 1980.[20] The Court ruled that a requirement of sterilisation was incompatible with the rights of sexual self-determination and physical integrity. The applicant, a transgender woman who identified as a lesbian, was refused access to a civil partnership with her female companion because she had not undergone surgical intervention and sterilisation and could not therefore register as female. As registered partnerships in Germany are solely open to persons of the same legal gender, the only alternative option for the applicant was to enter a marriage. However, as Germany does not recognise same-sex marriage, this would immediately have revealed the applicant's transgender identity. Thus, contrary to the German Basic Law, the person's intimate sphere would not be protected against unwanted disclosure. The importance of physical integrity has also been acknowledged by the Stockholm Administrative Court of Appeals. In December 2012, the Court ruled that Sweden's mandatory sterilization rules violated Chapter 6, s. 2 of the Swedish Instrument of Government and both arts. 8 and 14 ECHR.[21] As observed above, the Court considered that sterilisation was a forced physical procedure within the meaning of Chapter 6 because, where it is a condition of legal recognition, transgender persons cannot be said to submit voluntarily. Sterilization was not a legitimate inference with art. 8 or 14 ECHR because it was not the only way to create legal certainty in family relationships. The original sterilisation requirement, as set out in s. 1 of Sweden's 1972 Act, has now been removed as a pre-condition for legal gender recognition.

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[13] Juan Mendez, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (Geneva, 2013), para 88 <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf > accessed 22 August 2014.

[14] Parliamentary Assembly of the Council of Europe, Resolution 1728 (2010); Discrimination on the basis of sexual orientation and gender identity (2010), para 16.11.2 <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/ERES1728.htm> accessed 22 August 2014.

[15] World Professional Association of Transgender Health (WPATH), 'WPATH Identity Recognition Statement' (2010) <http://www.wpath.org/announcements_detail.cfm?pk_announcement=18> accessed 22 August 2014.

[16] Act 3/2007 of March 15, State Official Bulletin (BOE) No. 65, of March 16, 2007.

[17] Lei n° 7/2011 - Cria o procedimento de mudança de sexo e de nome próprio no registo civil e procede à décima sétima alteração ao Código do Registo Civil.

[18] See amended art. 28 of the Dutch Civil Code.

[19] Gender Recognition Act 2004.

[20] BVerfG 11 January 2011, BVerfGE 128, 109.

[21] *Socialstyrelsen v. NN*, Mål nr 1968-12 (2012), 5-6.

In respect of the 2011 judgment issued by Germany's Constitutional Court, two additional points are worthy of note. First, the Constitutional Court recognised that any sterilisation requirement could only have a limited effect in a legal environment where individuals can avail of sperm and oocyte cryo-preservation. Where policy makers justify enforced infertility on the ground that there is a supposed public good in preventing women from fathering children, this rationale is ultimately undermined by the fact that, post-recognition, "sperm freezing" allows individuals with a female legal gender to donate sperm using artificial reproductive technologies. In reality, therefore, sterilisation requirements force individuals to submit to invasive, unnecessary medical treatments in order to achieve a result which the individuals can circumvent by other means. This argument, raised by the Court in relation to German law, is applicable to a number of European jurisdictions which currently mandate sterilisation. The question thus becomes: what actual purpose does enforced infertility serve in Europe's recognition regimes? It might, of course, be argued that sterilisation requirements are only arbitrary in countries which permit a transgender person to donate frozen ova or sperm post-recognition. Where such donations are de jure, or de facto, prohibited, there is no opportunity for the person to reproduce and, therefore, the alleged public good is achieved. However, in European countries where, either because of legal prohibitions or prejudicial practices in the medical sector, transgender persons cannot freeze their ova or sperm – so that the violation of their right to found a family is compounded – the discrimination faced by transgender families is magnified rather than decreased, so that this situations should not be interpreted as either socially or legally desirable.

The second notable aspect of the 2011 judgment is the Court's acceptance that it was constitutionally valid for the German state to seek to prevent men giving birth and women fathering children. As already observed, this fear of disturbing the traditional reproductive binary has been a motivating factor behind many of the sterilisation requirements introduced across Europe. However, perhaps surprisingly, it is frequently presented, and accepted, without any further explanation or investigation. In particular, both policy makers and judges have traditionally seen little need to provide concrete justification or evidence as to (a) why pregnancy and the act of giving birth must be linked to the female legal gender and, more importantly, (b) what negative societal consequences might follow if men were to become pregnant or women were to donate sperm for the production of a child.[22] Without doubt, it is the responsibility of legislators and other state actors to enact policies which either tangibly promote the welfare of society or positively avoid situations which would compromise that welfare. This responsibility cannot, and should not, be abdicated merely because a policy, while necessary, is unpopular or subject to critique by human rights advocates. However, when determining the necessity of a particular measure, legislators and other state actors must have regard to empirical evidence and existing practices. They should not simply introduce policies which they feel or intuitively believe will benefit the welfare of society. Requiring an individual to submit to sterilisation, and thus compromise his or her ability to found a family, as

[22] For an interesting discussion around the issues of gender and parenting, see materials from the 2012 Harvard Journal of Law and Gender Conference, 'Unsex Mothering', accessed at < http://harvardjlg.com/2012/02/unsex-mothering-online-colloquium/>.

a pre-condition for legal recognition, is a significant policy choice, with lifelong consequences for the individual involved. If legislators are going to require sterilisation, and national courts are going to uphold and enforce those requirements, surely there must be a strong, evidence-based justification of their necessity.

3 The Divorce Requirement

3.1 Divorce or Marriage Dissolution as a Pre-Condition for Legal Gender Recognition

For transgender individuals who have already founded a family, whether through an existing marriage or civil partnership, and irrespective of whether the couple have produced children, the conditions for legal gender recognition in a number of European countries place significant restrictions on the continued integrity of those family structures. Throughout the Council of Europe, at least 19 Contracting State Parties, including Hungary, Latvia and Poland, require that an individual be single or divorced in order to obtain recognition of preferred gender.[23] In Turkey, an applicant for recognition cannot access gender confirmation surgery – a pre-condition of legal gender recognition – without proof that he or she is unmarried.[24] In the Czech Republic, the Act on Specific Health Services expressly states that married individuals must divorce before seeking rectification of birth records.[25] In cases where legal recognition has been granted before dissolution or divorce, the Czech Civil Code automatically dissolves the marriage as a consequence of recognition.[26]

Since 1972, when Sweden became the first European country to require divorce as a pre-requisite for gender recognition, the "divorce requirement" (as it has come to be known) has been justified as a necessary legal protection against same-gender marriage. In its 2011 report to the Irish Government, the Gender Recognition Advisory Group explained that, in countries, such as Ireland, where there is a legal or constitutional prohibition on same-gender marriages, the divorce requirement ensures that gender identity recognition does not introduce marriage equality by the back door.[27]

The validity of divorce requirements under the ECHR has recently been considered by Strasbourg Court in *Hämäläinen v Finland*[28]. In its judgment, the Grand Chamber held that Contracting States of the Council of Europe can legitimately require the dissolution of an existing marriage before extending the right to legal gender recognition. *Hämäläinen* concerned a married transgender woman in Finland who was unable to obtain recognition of her preferred female gender because she and her wife refused, for religious reasons, to convert their marriage into a registered

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[23] Transgender Europe, 'Trans Rights Europe Map, 2014' (5 February, 2014) < http://www.tgeu.org/Trans_Rights_Europe_Map> accessed 22 August, 2014.

[24] Article 40 of the Turkish Civil Code.

[25] Act No 373/2011 Coll on Specific Health Services, s. 21 (2) (b).

[26] Czech Civil Code, Act No 89/2012 Coll, Civil Cod, s. 29 (2).

[27] Gender Recognition Advisory Group (GRAG), Report to Joan Burton TD, Minister for Social Protection (Dublin, June 2011), p 30 < http://www.teni.ie/news-post.aspx?contentid=166> accessed 22 August 2014

[28] Application No 37359/09, 16 July 2014

partnership (as provided for under s.2 of Finland's Transsexuals (Confirmation of Gender) Act). A majority of the Grand Chamber, affirming the earlier Fourth Section decision in *H v Finland*[29], held that, while art. 8 ECHR did apply to a married post-operative transgender individual in the applicant's position, Finland's dissolution or conversion requirement could not constitute a disproportionate interference with private and family life. Ms Hämäläinen had not specifically advocated for a general right to same-gender marriage but a finding in her favour would have led "to a situation in which two persons of the same sex could be married to each other." The Court had previously ruled in *Schalk and Kopf v Austria*[30] that art. 12 ECHR does not protect the right of two same-gender persons to marry. Contracting States could not be forced to accept same-gender marriages under the cover of legal gender recognition. For a majority of the Grand Chamber, it sufficed that, through Finland's conversion mechanism, the applicant and her wife could obtain an alternative form of relationship recognition, and therefore retain the majority of their existing rights, including parental obligations and entitlements.

3.2 Objections to the Divorce Requirement

Like sterilisation, the divorce requirement has been subject to a number of objections - both legal and policy-based. First, from a purely human, lived-experience, perspective, forced divorce places an intolerable burden on existing European families. It requires loving couples to dissolve their legal bonds, irrespective of the length of time and personal difficulties through which those bonds have endured. The divorce requirement ignores the fact that, despite having had to face the emotional and physical strains which the transition process often places upon partners, the married couple have decided to continue their commitment and support each other.[31] Where two partners are able to maintain and develop their connection through such upheaval, surely no genuine social interest is served in requiring those partners to sever their legal ties? Second, as the German Constitutional Court has already noted, the divorce requirement ignores the fact that, pre-legal recognition, many transgender persons already live in a de facto same-gender marriages.[32] While the laws in European countries, such as Italy and Finland, do not grant marriage equality, they also do not prevent transgender persons from transitioning both socially and medically before legal recognition. In many jurisdictions, while unable to maintain their existing marriages post-recognition, transgender persons are nevertheless already entitled to change their legal name, access gender confirmation surgeries and live both socially, and professionally, in their true gender (albeit it with certain legal documents which retain their birth-assigned gender markers). This means that, even before obtaining gender recognition, many transgender persons, if they remain in a relationship with their existing spouse, are - in the eyes of family, friends, neighbours and the wider

[29] Application no 37359/09), 13 November 2012

[30] [2011] 53 E.H.R.R. 20

[31] see general discussion of consequences of divorce requirement in: Amnesty International, The State Decides Who I Am, (London, 2014), < http://www.amnesty.org/en/library/info/EUR01/001/2014/en> accessed 22 August 2014.

[32] BVerfG 27 May 2008, BVerfGE 121, 175; This point was also discussed by the dissenting minority in *Hämäläinen*, Application No 37359/09, 16 July 2014 [13].

community – a same-gender spouse. As the dissenting minority in *Hämäläinen* (Sajó, Keller and Lemmens JJ) suggest, if marriage equality does truly have a corrosive effect on the moral fabric of European societies, that effect is no less likely to arise from these de facto same-gender marriages simply because they do not yet have full legal status.[33] If European countries are genuinely committed to counteracting the alleged risks posed by same-gender marriage, including marriages where one of the spouses has obtained legal gender recognition, surely they must also prevent married transgender persons from initiating any process of transition before obtaining full legal recognition. The fact that a majority of European policy-makers are happy to permit transgender persons to maintain a de facto same-gender marriage undermines the state-sponsored arguments against wider marriage equality and exposes the logical flaws inherent in the divorce requirement. Finally, forced divorce may actually be incompatible with other existing laws within particular European states. In Ireland, for instance, which remains the last EU jurisdiction to provide no mechanism – statutory or administrative – for the legal recognition of preferred gender, the Department for Social Protection has proposed the inclusion of a divorce requirement in the forthcoming Gender Recognition Bill 2014. However, under art. 40. 3. 2 of the Irish Constitution, a couple may only seek a dissolution of their union if there is no reasonable prospect of reconciliation. Where a couple's relationship has survived the process of transition and they both wish to remain married, it is clear that those individuals cannot be said to have a reached a state of total irreconcilability. In such circumstances, it may be impossible for an Irish judge to grant a dissolution of marriage, even if this leaves a transgender person without any right to legal recognition.[34]

3.3 Movements away from the Divorce Requirement

There is a strong body of jurisprudence, both at the international and European levels, which affirms that divorce should not play a role in the legal recognition of gender identity. Yogyakarta Principle[35] No. 3 provides that "no status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity."[36] The former Council of Europe (COE) Commissioner for Human Rights, Thomas Hammarberg, has specifically recommended that Member States "remove any restrictions on the right of transgender persons to remain in an existing marriage following a recognised change of gender."[37] In its recent Concluding Observations

[33] Ibid.

[34] see Peter Dunne, 'Divorce in the Gender Recognition Bill', [2014] 32 ILT 70; Transgender Equality Network Ireland, 'Lobbying for Recognition' <http://www.teni.ie/page.aspx?contentid=590> accessed 22 August 2014; Fergus Ryan, 'Ryan on Gender Recognition and Marriage', Human Rights in Ireland Blog, 19 October 2012 < http://humanrights.ie/children-and-the-law/ryan-on-gender-recognition-and-marriage/> accessed 22 August 2014.

[35] The Yogyakarta Principles are a set of principles on the application of international human rights law in relation to sexual orientation and gender identity. Drafted, developed and discussed by a group of human rights experts, including Mary Robinson and Prof. Michael of Flaherty, the principles were adopted during a meeting at Yogyakarta, Indonesia from 6 to 9 November 2006.

[36] Yogyakarta Principle No. 3 < http://www.yogyakartaprinciples.org/principles_en.pdf> accessed 22 August 2014.

[37] Thomas Hammarberg, Human Rights and Gender Identity, (CommDH/IssuePaper(2009)2, 29 July 2009), p 45 https://wcd.coe.int/ViewDoc.jsp?id=1476365 accessed 22 August 2014.

for Ireland, the United Nations Human Rights Committee, called upon the Irish state "to ensure that [the rights of transgender persons] are fully guaranteed, including the right to legal recognition of gender without the requirement of dissolution of marriage or civil partnership."[38]

It is clear that, for European countries which have already embraced marriage equality, the fact that, post-recognition, there may be a situation where two individuals of the same legal gender inhabit a marriage, does not pose significant problems. Therefore, the recent gender recognition statutes in Spain, Portugal and the Netherlands do not require marriage dissolution as a pre-condition for gender recognition. However, even among European states which do not currently allow same-gender marriage, there is evidence that policy makers are increasingly attuned the negative consequences of forced divorce. Estonia, Georgia and Romania - all countries without marriage equality (indeed, without recognition rights for same-gender couples) - do not currently require individuals to dissolve an existing marriage before accessing recognition.[39] In Luxembourg, which introduced a same-gender marriage law in June, 2014, divorce was not a pre-condition for gender recognition before marriage equality.[40] These countries illustrate how European states can combine their continued opposition to same-gender marriages with a more humane and dignified mechanism for legal gender recognition.

In *Hämäläinen*, both the majority and dissent acknowledged that divorce requirements have been placed under increasing scrutiny by Europe's highest courts. In a highly publicised 2008 judgment, the German Constitutional Court struck down the divorce requirement in s. 8 of the Transsexual Act 1980.[41] Existing marriages were constitutionally protected through art. 6 of the German Basic Law. That protection would effectively be withheld, however, if individuals were required to forfeit their marital rights simply because they chose to obtain legal gender recognition. Forced divorce placed transgender persons in a situation of having to choose between two fundamental rights: marriage and sexual self-determination. The German court's ruling built upon an earlier decision of the Austrian Constitutional Court in 2006.[42] In that instance, the Austrian court had invalidated a regulation which was prohibiting a transgender woman from legally transitioning while she remained married to her wife. The Constitutional Court observed both that the divorce requirement lacked any basis in national law and that "changing a sex entry in a birth certificate cannot be hindered by marriage."[43] In June, 2014, the Italian Constitutional Court broadly upheld

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[38] United Nations Human Rights Committee, Concluding Observations for Ireland, Advanced Unedited Version, para 7 http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fIRL%2fCO%2f4&Lang=en accessed 22 August 2014.

[39] Transgender Europe, 'Trans Rights Europe Map, 2014' (5 February, 2014) < http://www.tgeu.org/Trans_Rights_Europe_Map> accessed 22 August, 2014.

[40] Ibid.

[41] BVerfG 27 May 2008, BVerfGE 121, 175.

[42] Vefassungerichtshof, V 4/06-7, 8 June 2006; see analysis of judgment in Agius, Kohler, Aujean and Ehrt, 'Human Rights and Gender Identity: Best Practices Catalogue' (December 2011) < http://www.tgeu.org/sites/default/files/best_practice_catalogue_human_rights_gender_identity.pdf> accessed 22 August 2014.

[43] Thomas Hammarberg, Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe (2nd Ed, Council of Europe Publishing, 2011), p 88.

the right of the Italian State to require marriage dissolution as a pre-condition for legal gender recognition.[44] Article 29 of the Italian Constitution, much like the Italian Civil Code, only protected the traditional marital family unit - a family consisting of one individual with a male legal gender and one individual with a female legal gender. Where a married transgender person accesses legal gender recognition, and thus creates a situation where there are two persons of the same legal gender in his or her marriage, the couple cannot rely upon art. 29 of the Constitution in order to challenge forced divorce. However, the Constitutional Court did state that, where a married couple is stripped of all their legal rights because one spouse obtains legal gender recognition, that couple is denied their "inviolable rights of man" as set out in art. 2 of the Italian Constitution.[45] There appears, therefore, to be a constitutional obligation on the Italian state, where it requires transgender individuals to dissolve their existing marriage, to provide some alternative form of relationship recognition which allows the former spouses to retain most, if not all, their previous marital entitlements.

3.4 Challenging the Grand Chamber's Reasoning in Hämäläinen

The ECtHR's judgment in *Hämäläinen* undoubtedly represents a setback for Rainbow Families in Europe, particularly those couples where one partner seeks recognition of his or her preferred gender. As the first substantive opportunity for the Strasbourg judges to consider what conditions a Contracting Party can impose for legal gender recognition, many advocates had hoped that the Court would adopt a strong, human rights-centred approach, rejecting the notion that recognition must involve the compromise of other fundamental Convention rights. Instead, the Grand Chamber relied upon a highly conservative interpretation of arts. 8, 12 and 14 ECHR, not only refusing the claims of transgender families but also quelling expectations, ever increasing since *Schalk and Kopf*, that art. 12 ECHR might soon evolve towards embracing marital protections for same-gender couples: "Article 12…enshrines the traditional concept of marriage as being between a man and a woman."[46]

There are, however, significant difficulties with the reasoning adopted by the Grand Chamber in *Hämäläinen*. It is hoped that, after an appropriate period of reflection, the Strasbourg judges may be presented with an opportunity to re-consider the divorce requirement and to establish a more nuanced, balanced jurisprudence which adequately respects the family life and dignity of transgender persons.

In *Hämäläinen*, the applicant had claimed that art. 12 ECHR should not be interpreted as simply protecting the right to enter a heterosexual marriage. In arguments adopted by the dissenting judges, Ms Hämäläinen suggested that art. 12 ECHR would be redundant if, having permitted herself and her wife to contract a valid marriage, the Finnish authorities could thereafter

[44] No 170 [2014], 11 June 2014.

[45] Peter Dunne, 'Marriage Dissolution as a Pre-Requisite for Legal Gender Recognition', Cambridge Law Journal (*forthcoming* November 2014).

[46] Application No 37359/09, 16 July 2014; see further analysis of this point in Peter Dunne, ''Marriage Dissolution as a Pre-Requisite for Legal Gender Recognition', Cambridge Law Journal (*forthcoming* November 2014).

require them to forfeit their marriage entitlements in order to vindicate another Convention right - legal gender recognition. This argument for protecting existing, valid marriages has found support from both judges and academics across the Council of Europe. In its recent report on Ireland's proposed gender recognition regime, the Equality Authority, wrote that - at least in common law jurisdictions such as England, Northern Ireland and Ireland - the appropriate time to consider the validity of a marriage is the point of entry.[47] Where two fully consensual individuals, of proper age and fulfilling all necessary legal requirements, enter a valid marriage, that marriage is protected in the eyes of the law and, with limited exceptions, is generally not affected by subsequent conduct, such as obtaining legal gender recognition, which, if carried out pre-marriage, might have impeded the marriage contact.[48] Similarly, in both France and Luxembourg, courts in Rennes[49] and Luxembourg City[50] have refused to enforce a divorce requirement on the basis that, at the time the marriage was initially entered, the parties to the union were legally of a different gender and, thus, the conditions for marriage were complied with. Like at common law, it was irrelevant to the validity of the marriage that, at some later stage, one of the spouses sought to have the gender marker on their birth certificate legally changed. While representing a compelling interpretation of art. 12 ECHR, the applicant's submissions were not explicitly considered by the majority in *Hämäläinen*. This is unfortunate because, as the author has noted elsewhere, the fact that Ms Hämäläinen and her wife were in a valid heterosexual marriage was also relevant to the question of discrimination under art. 14 ECHR. In their accompanying opinion the dissenting judges wrote that they could not identify 'any situation' where a comparable, happily married couple would be required "to choose between maintaining their civil status and obtaining identity cards reflecting the gender with which they identify."[51]

Another significant feature of the *Hämäläinen* decision is that, while the Grand Chamber used language of very general application, it actually only considered divorce requirements through the narrow lens of the Finnish recognition model. While no doubt understandable - it is generally preferable for a court to resolve actual, as opposed to hypothetical, legal issues - this approach may ultimately lead to difficulty when considered in the wider European context. In terms of legal gender recognition throughout Europe, and particularly forced divorce requirements, Finland is actually somewhat of an outlier. Under the Transsexuals (Confirmation of Gender) Act, married transgender individuals can automatically convert their existing marriage into a registered partnership. Unlike other European regimes, there is no need to obtain a full legal divorce and to subsequently contract a separate registered partnership agreement. The conversion model is relatively streamlined, and Finnish couples retain the vast majority of the rights they enjoyed during the marriage, including parental obligations and state pension entitlements. In its submissions to the Court, the Finnish

Equality Authority, Observations on the Gender Recognition Bill 2014, (7 August 2014), p. 29 http://www.equality.ie/Files/Observations-on-the-Gender-Recognition-Bill-2014.pdf accessed 22 August 2014

[47] No. 11/08743, 1453, 12/00535, Cour d'Appel de Rennes, France, 16 October 2012

[48] Ibid.

[49] No. 11/08743, 1453, 12/00535, Cour d'Appel de Rennes, France, 16 October 2012.

[50] Civil Judgment no no 184 / 2009, First Chamber of the arrondissement of Luxembourg, 30 September 30, 2009.

[51] Peter Dunne, ''Marriage Dissolution as a Pre-Requisite for Legal Gender Recognition', Cambridge Law Journal (*forthcoming* November 2014).

government placed significant emphasis upon the fact that conversion would have no effect on the applicant's legal relationship with her 12 year old daughter. Therefore, while all of the objections noted earlier in this section can equally apply to Finland's divorce requirement, the Finnish authorities have at least sought to achieve their policy aims through the least onerous procedures possible.[52]

In the wider European context, however, it is clear that there are numerous other countries which, like Finland, enforce a divorce requirement but which, in opposition to the Transsexuals (Confirmation of Gender) Act, have established recognition procedures which are streamlined neither in their application nor in their ultimate consequences. Although these Contracting states offer significantly reduced rights for transgender persons who re-enter registered partnerships, it must be presumed that, post-*Hämäläinen*, the regimes which they have adopted are also Convention-compatible. While noting the streamlined nature of Finland's law, the Grand Chamber certainly did not condition its ruling on the existence of total parity between registered partnership and marriage entitlements (no such exact parity exists in Finland).[53] The wide margin of appreciation afforded to Contracting states in the area of relationship recognition suggests that it will suffice that transgender persons, and their spouses, have additional options for legal status beyond marriage. This means, however, that across Europe, it will not violate the Convention that Contracting states to require individuals to accept a significant loss of their legal relationship rights, simply because those individuals wish to obtain recognition of their preferred gender.

3.5 The Subsequent Introduction of Marriage Equality

In many European jurisdictions, particularly those which are currently considering proposals for same-gender marriage, there is often an attitude that, while neither fair nor desirable, the divorce requirement is a dying legal condition. Once a state embraces marriage equality, transgender persons will automatically be entitled to maintain their existing marriage structures during the legal recognition process. However, two recent examples from Europe serve as cautionary tales in this regard. First, in Sweden, which legalised same-gender marriage in 2009, the requirement that an applicant for legal recognition be single or divorced was actually retained post-marriage equality. It was not until 2012 that policy makers amended the 1972 Act to formally remove the divorce pre-condition.[54] Similarly, in the United Kingdom, which began issuing marriage certificates to same-gender couples in March, 2014, the current Gender Recognition Act 2004, as amended by the Marriage (Same-Sex Couples) Act 2013, does not provide for the automatic retention of marital status. Instead, a married individual who seeks to obtain legal gender recognition, but who does not wish to dissolve his or her marriage, must produce a declaration from

[52] Ibid.

[53] Ibid.

[54] see; The Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights (RFSL), Belonging, pp. 20-21 <http://www.rfsl.se/public/rfsl_belonging_2.pdf> accessed 22 August 2014; ILGA-Europe, Sterilisation of Transgender People a "Dark Chapter": Reinfeldt, (31 July 2010) http://www.ilga-europe.org/home/guide_europe/country_by_country/sweden/sterilization_of_transgender_people_a_dark_chapter_reinfeldt accessed 22 August 2014.

his or her spouse consenting to continuation of the marriage.[55] In both of these jurisdictions, the recognition of same-gender marriage did not automatically vindicate the marital rights of transgender persons. Indeed, in England and Wales, the 2013 reforms still indirectly condition legal recognition on consent from a person other than the applicant him or herself.

4 A Human Rights-Centred Model for Legal Gender Recognition

Moving forward, the question arises as to how European states can establish regimes for legal gender recognition which protect and support, rather than undermine, Rainbow Families, particularly where one or both parents seek to vindicate their gender identity. An obvious starting point is to address the concerns raised in this paper. European states should ensure that (a) gender recognition laws do not deprive transgender persons of their capacity to found new families and (b) where transgender persons already enjoy existing family rights, they are not asked to forfeit those rights as a pre-condition of legal gender recognition.

However, as noted in the introduction to this paper, sterilisation and forced divorce are not the only aspects of Europe's gender recognition rules which impact upon transgender families. In many countries, the specific conditions of recognition - irrespective of whether they expressly touch upon an applicant's family life - create an environment where, as a matter of practice, the applicant is not able to obtain the full legal recognition of his or her preferred gender. This failure to recognise can, in turn, have significant consequence for the individual's social, economic and mental health well-being. The European Commission has written that "incongruence between one's gender presentation and gender marker" may result, inter alia, in restricted access to employment, marriage and basic transportation.[56] A transgender person whose gender expression does not match his or her identity documents runs a continuous risk of being publicly "outed", with the accompanying threat of transphobic ridicule, and in some cases, extreme violence. There is also evidence that transgender persons who cannot obtain legal recognition of their preferred gender are more likely to experience mental health concerns, no doubt related to the external difficulties which lack of recognition inevitably creates.[57] All of these difficulties - social, emotional, financial and physical - directly affect and limit the opportunities for transgender persons to form healthy, secure family relationships. Where transgender persons already enjoy existing family structures, the problems they experience through the absence of legal recognition also impact upon the family members with whom they share their lives.

[55] Section 4(2), 4(3) and 11A of the Gender Recognition Act 2004, as inserted by the Marriage (Same-Sex Couples) Act 2013.

[56] Agius and Tobler, Trans and Intersex People; Discrimination on the grounds of Sex, Gender Identity and Gender Expression (EU Commission, Luxembourg, 2012), p 17.

[57] Transgender Equality Network Ireland, "New Survey reveals nearly 80% of Trans people have considered Suicide" (2 December 2013) http://www.teni.ie/news-post.aspx?contentid=970 accessed 22 August 2014; For more detail, see The Task Force, Injustice at Every Turn, (3 February 2011) http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf accessed 22 August 2014.

In thinking about a fair, human rights-centred gender recognition process, it is important to adopt a holistic approach. Transgender persons, and their families, deserve a legal regime which (a) reflects the lived experiences of applicants, (b) establishes realistic and attainable pre-conditions and (c) does not require individuals to sacrifice one set of fundamental rights in order to vindicate another. In May, 2012, the Argentine Congress passed the Gender Identity and Health Comprehensive Care for Transgender People Act. The statute, which has been described as the "most progressive gender identity law in history"[58], permits individuals to amend the gender marker on all their official documents by simply submitting an affidavit which confirms their desire for the change.[59] The Argentine law does not mandate divorce, the intervention of a medical officer or a diagnosis of gender dysphoria. All that matters is the express self-identification of the transgender person involved.[60] In Europe, the Danish parliament has recently adopted an Argentine-inspired approach as part of its gender recognition regime. Individuals in Denmark may now apply to the relevant public authority, stating that they identify with a particular gender and that they want this identification to be reflected on their personal identification number.[61] Unlike in Argentina, Denmark does require that an individual observe a six-month waiting period after the initial application is made. However, at the end of that time period, the public authority will request the individual to confirm the desire for legal recognition and, where the individual does confirm the original application, recognition is extended without any further pre-conditions, including divorce and sterilisation.[62]

For transgender persons and their families in Europe, the Argentine and Danish models serve as an important illustration that countries can achieve legal gender recognition in a manner which protects fundamental rights without compromising the well-being of society. It is hoped that, in the years to come, both laws form a blueprint for wider gender recognition across Europe.

[58] Transitioning Africa, "Celebrating Argentina", (2012) http://www.transitioningafrica.org/ accessed 22 August 2014.

[59] Art. 4 of Gender Identity Law 2012.

[60] Ibid.

[61] ILGA-Europe, 'Denmark: Landmark Gender Recognition Act' (11 June 2014) http://www.ilga-europe.org/home/guide_europe/country_by_country/denmark/denmark_landmark_gender_recognition_act accessed 22 August 2014.

[62] Ibid.

Transgender Rights on the Move: Towards Recognition and Gender-Neutral Definition of Parenthood

Anna Śledzińska-Simon[1]

Abstract

The Article seeks to depart from the assumption that law often lacks adequate protection of transgender parents. Whereas transgender rights in the area of legal gender recognition and non-discrimination are steadily gaining international and domestic recognition, the rights of transgender persons as parents are often in the state of denial. Numerous instances have been examined of the discrimination, limitation and denial of rights of transgender parents who experience legal and practical barriers in the exercise of their parental rights with regard to children born both before and after their gender reassignment. As a result, the Article suggest that law-makers and courts recognize self-defined roles of transgender persons as parents and accept a gender-neutral conception of 'motherhood' and 'fatherhood'. It claims that the recognition of rights of transgender parents requires not only reconsideration of the heteronormativity of the existing legal norms and institutions, but also of the role of one's procreative capacity in determining one's legal gender and one's status as a parent.

Keywords

Transgender parenting, LGBT rights, gender

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1 Introductory remarks

The Article seeks to depart from the assumption that law often lacks adequate protection of transgender parents (further also referred to as trans parents). Whereas transgender rights in the area of legal gender recognition and non-discrimination are steadily gaining international and domestic recognition, the rights of transgender persons as parents are often in a state of denial. In

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some countries, trans persons may not be eligible for legal gender recognition because of the fact that they have children, particularly underage children. Trans parents may also face the risk of termination of their parental authority, or limitations of custody or contact rights solely because of their gender identity or gender transition. Trans parents who underwent gender reassignment therapy or changed their identity and image may be forced to disclose their past identity to public officials or third parties in order to prove kinship with a child. Some trans parents may also feel concerned about the recognition of their parental authority over children to which they are not biologically related. In countries where sterilization or other procedures that result in sterilization are not required for recognition of gender identity, new problems arise in cases when a transgender person becomes a parent or seeks access to assisted reproduction technologies.

The Article argues that current progress in the area of biotechnology necessitates new legal solutions that would better respond to the needs of trans parents. Since the world has seen the first baby born by a 'legal' man, the concept of parenthood determined by biology is no longer viable. Therefore, inspired by this change, the legal systems should translate the existing norms to fit the new reality, taking into account the experience of trans parenting. Bearing in mind the diverse and complex family constellations involving transgender persons, the Article argues in favour of a functional approach to notions such as 'family' or 'parenthood'. While the elimination of gender designation from a legal system seems to be neither a plausible nor even feasible endeavour, the Article suggest that law-makers and courts recognize self-defined roles of transgender persons as parents and accept a gender-neutral conception of 'motherhood' and 'fatherhood'. In this respect, the Article relates to the literature concerning assisted reproductive technology, which argues that parenthood shall not be aligned with biological criteria.[2] Rather one's status as a mother or a father shall be based on one's identification with a particular role.[3] Yet, the emphasis on gender identity of a parent may not solve all the problems, unless it is followed by the introduction of same-sex parenthood and the notion of multiple fatherhood or motherhood.

2 Trans Rights on the Move

This part of the Article aims to present the changing landscape of rights protection accorded to transgender persons. 'Transgender' is an umbrella term that encompasses various categories of gender variant persons, including persons who identify with local specific conceptions of gender and those who are assigned a different gender than male or female at birth.[4] Although the concept of

[2] S. McGuiness and A. Alghrani, 'Gender and Parenthood: the Case for Reallignment' (2008) 16 Medical Law Review 261.

[3] Darren Rosenblum, 'Unsex Motherhood: Toward a New Culture of Parenting', 35 Harvard Journal of Law and Gender (2010) 58 ("[Unsexed mothering] is relational, not biological, is an act, not a fixed identity. While biological elements may undoubtedly further the relationship, one need not engage in these functions in order to mother a child. A male parent could say to others, "I am the child's mother'"), 79.

[4] *See* working definitions of Transgender Europe: "In binary (male-female) gender systems, trans people include, those who have a gender identity that is different from the gender they were assigned at birth, and those who wish to portray their gender identity in a different way than the gender they were assigned at birth. It includes those people who feel they have to -- or who prefer or choose to -- present themselves in a way that conflicts with the social

transgenderism (gender dysphoria)[5] has recently gained more visibility and attention, trans rights remain at the margin of the LGBT rights movement. For the reason of their numerical weakness and limited resources to organize, transgender persons remain legally and socially marginalized within the society and within the LGBT community.[6] As Cai Wilkinson and Anthony J. Langlois rightly notice, 'both the B and the T are often neglected (while intersex remains entirely absent)' in the LGBT rights discourse.[7]

Clearly, the LGBT rights movement is usually envisaged as the same-sex rights project involving people who enjoy full sexual citizenship.[8] In contrast, transgender persons often lack such status, in particular when they are trapped between their gender identity and conditions of legal gender recognition that they are not able or willing to accept.[9] In this regard, experiences of transgender persons may vary from those of cisgender same-sex attracted individuals, although their claims may overlap as well. Yet, transgender persons do not necessarily follow the call for 'homonormativity' in the LGBT rights discourse.

In this context, the trans rights movement could be distinguished from the LGBT rights agenda as it has its own trajectory, aims and category of rights-holders (rights-seekers).[10] The trans rights movement is a relatively new phenomenon that has become noticeably stronger in the last two decades. The momentous point in this period was the recognition of the right to gender reassignment by the European Court of Human Rights in *Goodwin and I v. United Kingdom*;[11] the adoption of the Yogyakarta Principles as a universal guide to human rights with regard to sexual orientation and gender identity, which affirm binding international legal standards;[12] and the publication of the Issue Paper *Human Rights and Gender Identity* by the Council of Europe

expectations of the gender role assigned to them at birth, whether they express this difference through language, clothing, accessories, cosmetics or body modification. This definition includes, among many others, transsexual and transgender people, transvestites, cross dressers, no gender, liminal gender, multigender, and genderqueer people, as well as intersex and gender variant people who relate to or identify as any of the above." Available at: http://www.transrespect-transphobia.org/en_US/tvt-project/definitions.htm

[5] The term 'gender dysphoria' is used in Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) and is considered as less stigmatizing than 'gender identity disorder,' used in the International Classification of Diseases-10 (ICD-10).

[6] Justus Eisfeld, Sarah Gunther, and Davey Shlasko, The State of Trans* and Intersex Organizing: A case for increased support for growing but under-funded movements for human rights (New York: Global Action for Trans* Equality and American Jewish World Service 2014).

[7] Cai Wilkinson, Anthony J. Langlois, 'Special Issue: Not Such an International Human Rights Norm? Local Resistance to Lesbian, Gay, Bisexual, and Transgender Rights – Preliminary Comments' (2014) 13 Journal of Human Rights 249, 252.

[8] David Evans, Sexual Citizenship: The Material Construction of Sexualities (Routledge 1994).

[9] Sally Hines and Tam Sanger (eds.) Research in Gender and Society: Transgender Identities: Towards a Social Analysis of Gender Diversity (Routledge 2010).

[10] As trans rights I refer to all human rights as applied to a broadly defined group of transgender people.

[11] *Goodwin and I v. United Kingdom*, Application no. 28957/95, judgment of 11 July 2002. *See* also *B. v. France*, Application no. 13343/87, judgment of 25 March 1992.

[12] The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, adopted by international human rights experts at Gadjah Mada University on Java on 6-9 November 2006.

Commissioner for Human Rights, Thomas Hammarberg.[13] Following these developments, evident progress has been made in acknowledging the right to legal gender recognition[14] and non-discrimination with regard to gender identity[15] both on the international and domestic level. The advancement of the right to gender recognition and non-discrimination is undoubtedly fostered by the logic of visibility and inclusion, although little is known whether they really improve the quality of life of transgender persons.[16]

In contrast, the issue of transgender parenting seems to receive the least public attention. Even in social science, very little empirical work has explored transgender parent families because studying this phenomenon is particularly complex given the diversity of gender identities that fall under the category of 'trans'.[17] Yet, what is certain is that trans families and trans parenthood develop in a context of discrimination that has both structural (legal) and social character. Clearly, transgender parenting requires much more careful attention of law- and policy-makers because trans parents face not only various forms of transphobia and homophobia, but lack legal recognition in their self-defined and exercised parental roles. This fact inevitably also affects the spouses, partners and children of trans parents.[18]

3 Transgender challenge to biologically determined parental roles

The empirical observation that the existing models of gender recognition do not fully and fairly take into account the fact that transgender persons may be or wish to become parents has serious theoretical and practical implications. On the theoretical level, the recognition of rights of transgender persons as parents urges for a re-definition of the concept of gender that is currently entrenched in the Western social and legal culture and systems.

Undeniably, the study of transgenderism challenges the prevailing understanding of gender (sex) as biologically determined.19 As the molecular research and experiences of transgender persons show, human sex (gender) is a product of various factors, processes and their interactions

[13] Human Rights and Gender Identity, Issue Paper by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, Strasbourg, 29 July 2009, CommDH/IssuePaper(2009)2.

[14] ECtHR, *Van Kück v. Germany*, Application no. 35968/97, judgment of 12 June 2003; *L. v Lithuania*, Application No. 27527/03, judgment of 11 August 2007; *Schlumpf v. Switzerland*, Application No. 29002/06, judgment of 8 January 2009.

[15] ECJ, Case C-13/94, *P. v. S. and Cornwall City Council*, judgment of 30 April 1996, ECR [1996] I-2143, ECJ, Case C-117/01, *K.B. v. National Health Service Pensions Agency, Secretary of State for Health*, judgment of 7 January 2004, ECJ, Case C-423/04, *Sarah Margaret Richards v Secretary of State for Work and Pensions*, judgment of 27.4.2006.

[16] Dean Spade, 'What is Wrong with Trans Rights?' 184-194.

[17] Jordan B. Downing, 'Transgender-Parent Families' in Abbie E. Goldberg and Katherine R. Allen (eds.), *LGBT-Parent Families: Innovations in Research and Implications for Practice* (Springer 2013), 105-116.

[18] M. Ryan, 'Beyond Thomas Beatie: Trans Men and the New Parenthood' in R. Epstein (ed.), *Who is Your Daddy? And other writings on queer parenting* (Sumach Press 2009), 139-150.

[19] Notably, second-wave feminism has not changed the presumption that sex is left in the realm of biology. *See* Sharon Cowan, 'Gender is no substitute for sex': a comparative human rights analysis of the legal regulation of sexual identity' (2005) 13 Feminist Legal Studies 67, 71.

and may be flux, changing, or unstable.[20] Therefore, transgender persons contest the dominant perception that gender may be adequately determined at birth on the basis of genital organs.[21] For the same reason, the trans movement calls for adoption of laws that acknowledge that one's gender shall be subject to self-identification rather than contingent on certain biological characteristics ascertained on the basis of presence or absence of particular bodily organs or the capacity to beget children either as a female or a male. Yet, this challenge remains partly unnoticed in the transgender jurisprudence, which has not yet unchained gender from biology.

Although the judicial approach to transgenderism has changed over years and the most cited example of such transition was the move from *Corbett*[22] to *Goodwin*,[23] the conclusion of *Goodwin* was quite modest.[24] Rather than recognizing that gender is a question of self-identification, it reasoned that a post-operative trans woman should be treated as a woman by law. In this sense, *Goodwin* did not grant individuals the right to self-determination of one's gender identity, but mandated legal gender reassignment of a post-operative transsexual. In this case, the European Court of Human Rights was not requested to determine which factors – biological or psychical – are conclusive for determination of gender.[25] Yet, the Court would not be able to similarly escape such a decision in a case of a non-operative transgender person seeking legal gender recognition. However, it is quite likely that the Court would use its 'margin of appreciation' smokescreen, which permits it to avoid political controversy and judicial intervention in domestic regulation over matters that perhaps have not yet attained the level of European consensus.[26]

By the same token, transgender parenthood challenges the conceptions of parenthood as defined by biology. While trans persons transgress the normative notions of 'masculine' or

[20] Susan Styker and S. Whittle (eds.) *Transgener Studies Reader* (Routledge 2006); Lara Karaian, supra note, at 214, citing Vernon Rosatio, "Quantum Sex: Intersex and the Molecular Deconstruction of Sex, GLQ: A Journal of Lesbian and Gay Studies 12(2) (2009), 267-284.

[21] *See* the Maryland Court of Appeals in *Re Heilig*, 816 A.2d 68, 73 (Md. 2003), citing W. Reiner, "To Be Male or Female-That is the Question', Archives Pediatric and Adolescent Medicine 151 (1997), 224: "In the end it is only the children themselves who can and must identify who and what they are. It is for us as clinicians and researchers to listen and to learn. Clinical decisions must ultimately be based not on anatomical predictions, nor on the 'correctness' of sexual function, for this is neither a question of morality nor of social consequence, but on that path most appropriate to the likeliest psychosexual developmental pattern of the child. In other words, the organ that appears to be critical to psychosexual development and adaptation is not the external genitalia, but the brain."

[22] 2 All E.R. 33 (P. 1970), where the Court adopted a test based on congruent chromosomal, gonadal and genital characteristics. This standard was followed for years in Canada, Hong Kong, Ireland, New Zealand, Singapore, South Africa and the United States. However, some courts did not adhered to *Corbett* ruling and the doctrine of immutability of biological sex.

[23] Before *Goodwin*, the applications concerning the lack of legal gender recognition were considered as inadmissible. *See Van Oosterwijck v. Belgium*, Application No. 7654/76, inadmissibility decision of 6 November 1980; *Rees v. United Kingdom*, Application No. 9532/81, judgment of 19 October 1986; *Cossey v. United Kingdom*, Application No. 10843/84, judgment of 27 September 1990; *Sheffield and Horsham v. United Kingdom*, Application Nos. 22958/93 and 23390/94, judgment of 30 June 1998.

[24] In *Corbett*, the underlying assumption was that transgender people could never change their biological sex, even if they complete full gender reassignment.

[25] In *Goodwin*, the ECtHR observed that the chromosomal element, which remains unchangeable in the course of gender reassignment, should not preclude legal gender recognition of a post-operative transsexual, para. 82.

[26] *See Grant v. United* Kingdom, Application no. 32570/03, judgment of 26 March 2006. *See* also *Bioethics and the case-law of the Court*, Research Report, Council of Europe 2012.

'feminine', trans parents transgress the normative - engendered - notion of 'motherhood' or 'fatherhood'. In both cases, the natural/automatic linkage between the engendered parental role and biological sex is non-existent. In this context, it is important to notice that transgender parenthood has a much stronger - revolutionizing, or transformative - impact on the conception of gender roles than same-sex parenting, which usually requires a third party 'intervention' to conceive and/or bear a child.

Since 2008, it is a fact that men can give birth to children.[27] In result of this change, albeit still only an exception to the rule, pregnancy and child-bearing can no longer be considered an exclusively female project.[28] Thomas Beatie's case and other trans men's cases that followed have changed not only our social reality, but they have also challenged the binary gender model underlying our Western/European legal systems. Notwithstanding the growing tendency to recognize transgender persons in their preferred gender in courts and to adopt a liberal, identity-based gender recognition laws,[29] there is little development in the area of family law that would give account to transgender parenting. This lack of interest to regulate transgender parenting may be just an example of legislative inertia, or it may be a strategy to preserve the binary gender roles and the heterosexual type of intercourse within the adult population.[30]

Any progress in this area shall be seen as resultant of two opposite movements. On the one hand, the staggering institutionalization of same-sex relationships across Europe and various states in North America demonstrates a departure from heterosexuality as a norm. On the other hand, the preservation of binary gender models with parental roles defined on the basis of one's procreative capacity seems to be one of the last fortified areas of resistance to a more permanent change in the existing social norms and culture. Yet, the recognition of rights of transgender parents requires not only reconsideration of the heteronormativity of the existing legal norms and institutions, but also of the role of one's procreative capacity in determining one's legal gender and one's status as a parent.

Various jurisdictions developed different responses to the transgender challenge to heteronormativity and biologically determined parental roles. In some countries, including Austria, Belgium, Germany, Finland, France, Italy, Netherlands, Norway, Sweden and Switzerland, the fear of same-sex relationships motivated law-makers or courts to require sterilization as a condition for gender recognition for quite a long time.[31] Many such laws have been recently abolished either as

[27] In 2008 Thomas Beatie became the first male (trans man) who became pregnant and gave birth to his first daughter, followed by two other children in 2009 and 2010.

[28] Lara Karaian, 'Pregnant Men: Repronormativity, Critical Trans Theory and the Re(conceive)ing of Sex and Pregnancy in Law (2013) 22(2) Social and Legal Studies 211, 213 ("pregnant men engender a critical re(conceive)ing of the idea that sex is biologically determined, that pregnancy is necessarily sexed as female, and that one's sex, gender identity and identification as mother/father neatly align").

[29] In the recent years such laws were adopted in Argentina (2012) and Denmark (2014).

[30] As Melissa Murray notices, the state regulation of the area of sex and sexuality has historically intended to channel sex into marriage where it could be disciplined and rendered socially productive. Melissa Murray, 'Marriage as Punishment' (2012) 112 Columbia Law Review 1, 46.

[31] TGUE 2014 Map, available at: http://www.tgeu.org/Trans_Rights_Europe_Map

a result of court decisions or law reforms.[32] Yet, in countries where sterilization is still required, gender recognition is contingent on 'full' transition from one gender to another. This requirement exists even at the cost of a permanent deprivation of one's procreative capacity.[33]

The criterion of sterilization or, even more clearly, the criterion of full gender reassignment therapy, assumes that a transition to one's preferred gender requires attaining sexual functions of a person who was assigned with this gender at birth.[34] Such focus on sexual functions of a post-operative transsexual and the capacity to engage in the heterosexual intercourse seems to be contrary to the contemporary notion of (marital) privacy and unsupported by the requirement of ability to consummate, in addition to appearing to be an attempt to impose heterosexuality as a norm. Similarly, the criterion of bodily appearance as it is related to these parts of human body, which are usually not exposed to the public, seems to be unsubstantiated by any public interest consideration. The criterion of infertility is also invalid due to the development of methods of artificial insemination and surrogate parenthood.[35]

Thus, the recent development in the area of trans rights concerning the abandonment of sterilization as an eligibility condition for legal gender recognition demonstrates that the recognition of one's preferred gender challenges the 'homonormativity' of legal institutions, but not necessarily the 'repronormativity' of the existing conception of marriage.[36] Quite on the contrary, there are ample examples of transgender persons who accept the 'repronormativity' of marriage, but they do not align themselves with the engendered concept of motherhood or fatherhood.

Keeping in mind the evolutionary interpretation of the right to respect the private life made by the European Court of Human Rights in *Goodwin* and its contribution to a more common understanding that transsexual persons should have access both to medical procedures of gender reassignment and to legal gender recognition, the time is approaching for the next step in recognition of transgender persons as parents. For the ECtHR, it would be an important decision to acknowledge that involuntary sterilization of transsexual persons seeking gender recognition violates the prohibition of torture and other cruel, inhuman or degrading treatment, the right to

[32] Austria, Canada, Germany and Sweden have abolished forced sterilization based on court decisions. The Netherlands and Sweden adopted new laws.

[33] The sterilization requirement may be subject to various interpretations. For example, the Belgian law requires that "the person is no longer capable of producing children in accordance with his or her previous gender," while the condition of infertility is not mentioned anywhere. Furthermore, the law does not determine what kind of gender reassignment surgery is needed, nor it does regulate the situation of persons who have not undergone such surgery or a particular part thereof. It is therefore argued that the law allows transgender persons to maintain the external genital organs. *See* Act of 10.05.2007 on transsexualism, Belgian State Gazette of 11.07. 2007 and J. Motmans, 'Being Trangender in Belgium. Maping the Social and Legal Situation of Transgender People', (2010) Institute for the Equality of Women and Men, 59, available at: http://igvm-iefh.belgium.be/nl/binaries/34%20-%20Transgender_ENG_tcm336-99783.pdf

[34] In this light, queer persons appear as 'bad guys' because they do not fit in the binary of 'femaleness' or 'maleness.'

[35] H. J. Tobin, 'Against the Surgical Requirement for Change of Legal Sex' (2006-2007) 38 Case Western Reserve Journal of International Law 393, 425.

[36] J. Halberstam, *In a queer time and place: Transgender bodies, subcultural lives* (New York University Press 2005).

protection of private life and the right to non-discrimination.[37] Such a decision could rely on the existing case-law concerning Roma women.[38]

Among international human rights organizations and experts there is already a consensus in this regard. For example, the UN Special Rapporteur on Torture has referred to unwanted sterilization of transgender persons as contrary to Article 5 of the Universal Declaration of Human Rights and Article 7 of International Covenant for Civil and Political Rights.[39] The Council of Europe bodies, including the Commissioner for Human Rights,[40] and the World Professional Association for Transgender Health[41] expressed similar concerns. Yet, a judgment of the Strasbourg Court banning sterilization of transgender persons would admit that legal gender recognition may not be conditional on involuntarily deprivation of the reproductive capacity, and in consequence would 'authorize' trans men bearing children.[42]

Interestingly, in some countries, legal gender recognition is available to concerned individuals who meet eligibility criteria other than the criterion of sterilization.[43] For example, in Poland, mandatory sterilization was never an issue, perhaps because of the importance of the ability to procreate for conclusion of a religious marriage.[44] In contrast, the ability to procreate has never been a condition for contracting parties in a marriage, and non-consummation is not a ground to annul a legal marriage in common law jurisdictions.[45] The Polish example shows that sterilization could not be required by law in a country where the dominant religion or Church have influence on law-making, or at least on the understanding of family law matters. At the same time, trans men in Poland have to undergo a mandatory mastectomy in order to obtain a court judgement determining their 'acquired' gender. The lack of sterilization criterion could not be thus explained by the cruelty

[37] *See Y. Y. v. Turkey,* Application No. 14793/08, case communicated in March 2010 (concerning the courts' refusal to authorize the applicant to undergo gender reassignment surgery on the ground that she did not meet the statutory criterion of having had a diagnosis of permanent infertility).

[38] *See* i.e. *K.H. and Others v. Slovakia*, Application no. 32881/04, judgment of 28 April 2009.

[39] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 1 February 2013, A/HRC?22/53, para. 78.

[40] *See* i.e. Resolution 1728 (2010) of the Parliamentary Assembly – Discrimination on the basis of sexual orientation and gender identity; Recommendation 1915 (2010) of the Parliamentary Assembly – Discrimination on the basis of sexual orientation and gender identity. Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity.

[41] International WPATH Gender Recognition Statement 2010, 16 July 2010.

[42] In 1997 the European Commission of Human Rights rejected the claim that the gender reassignment surgery requirement violated Article 8 of the Convention - *Roetzheim v. Germany*, Application No. 31177/96, decision on inadmissibility of 23 October 1997.

[43] Similarly, Belarus, Croatia, Hungary, Portugal, Spain and United Kingdom do not have sterilization requirements. See TGUE 2014 Map http://www.tgeu.org/Trans_Rights_Europe_Map

[44] In Poland, a transsexual person can apply for a declaratory judgment determining her or his legal gender only after a partial gender reassignment (in the case of female to male transsexuals - hormonal therapy and mastectomy, and in the case of male to female transsexuals - only hormonal therapy). Otherwise, a surgeon who removes female or male genital organs can face criminal charges for depriving such a person of reproductive capacity, regardless of his or her informed consent. *See* Article 156 of the Polish Penal Code that prohibits causing serious damage to health that results in total infertility. Based on the current practice, the full gender reassignment surgery is available only after a declaratory judgment determines the change of one's gender and birth record.

[45] Lara Karaian, supra note at 218, citing Laura Grenfell, 'Making Sex: Law's Narratives of Sex, Gender and Identity' (2003) 23 Legal Studies, 66, 78-79.

or harm considerations. Ironically, in a country where chances for legalization of same-sex marriage or partnership are politically very little, a trans man who retained his female reproductive capacity may successfully request legal gender recognition and consecutively enter into a marriage with a woman.[46] Thus, even such LGBT-unfriendly regimes like Poland tacitly acknowledge that mother is not always a 'woman'. At least, not in legal terms.

4 Forms of transgender parenthood

The implication of applying human rights standards to persons with regard to their gender identity is that legal gender recognition shall not impose undue burdens or limitations on individuals' reproductive autonomy, especially where it would deprive individuals who seek gender recognition of their right to become a parent. To the extent that the right to become a parent may be for many people a constitutive element of the right to found a family, one should see it in light of a broader right to the protection of family life. In principle, both individual reproductive autonomy and family relationships belong to a sphere that requires the least state intervention. Yet, some sort of regulation could be required for the protection of the rights of others – spouses, parents and children.

According to Principle 24 of the Yogyakarta Principles, 'everyone has the right to found a family, regardless of sexual orientation or gender identity.' This Principle also acknowledges that families exist in diverse forms. Further, it prohibits the discrimination of families on the basis of the sexual orientation or gender identity of any of its members. It also affirms that the right to found a family imposes a number of obligations on the states, such as ensuring access to adoption or assisted procreation (including donor insemination) without discrimination on the basis of sexual orientation or gender identity and recognizing the diversity of family forms. While the underlying principle concerning the right to found a family and respect family life gives primary consideration to the best interest of the child, the Yogyakarta Principles clearly state that the sexual orientation or gender identity of the child or of any family member or other person may not be regarded as incompatible with such best interests.

In general, among various family constellations involving transgender persons, one could distinguish family relationships based on parenthood. Further, among transgender parenthood constellations, one could distinguish parent-children relationships that were established before and after legal gender recognition. With regard to the first category, the focus is on the rights of transgender parents whose children were born (or adopted) before their transition, while also taking into account the best interest of the child. As it has already been mentioned, the mere fact of being a parent may be reason to disqualify a transgender person from accessing legal gender recognition. For example, in Japan it is illegal to undergo gender transition once a person is already a parent of a child who is under 20 years of age. Only the law in Uruguay explicitly states that

[46] Adam Bodnar and Anna Śledzińska-Simon, 'Between Recognition and Homophobia: Same-Sex Couples in Eastern Europe' in D. Gallo, L. Paladini, P Pustorino (eds.) *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer 2014), 211-247.

childlessness is not a condition for making the application for recognition of one's gender identity. Other laws remain silent on this issue.[47]

Furthermore, gender identity, like sexual orientation, may sometimes become a reason for terminating or limiting parental authority. This area of family law often seems to be uncharted territory due to the lack of explicit laws or precedents prohibiting discrimination with regard to gender identity in determining termination of parental authority or child custody. The prevailing judicial approach in these types of decisions should be based on individualized assessment of the eligibility of a particular person in light of the best interest of the child, and without discrimination with regard to gender identity.[48] However, the existing transgender jurisprudence shows that judges make arbitrary decisions about the impact of gender identity on the best interest of the child. Thus, trans parents may rationally fear losing such cases.[49]

Although there is relatively little research on the impact of transgender parents on the development of their children, some surveys show that having a supportive family was more important for their well-being than the mere transition.[50] The survey also showed that remaining in contact with a transgender parent was less harmful for a child than limiting contact or custody, or requiring a parent to postpone transitioning.[51] Yet, it is generally unclear how transitioning during parenthood may affect minors.[52] Moreover, the experience may differ depending on one's race or social status. In most of the cases, the respondents agreed that it was unnecessary for a transgender parent to postpone the decision about transitioning until the child comes of age.[53]

In general, the effect of legal gender recognition on parental responsibility may depend on the character of relationship between parents of the child. For example, Section 12 of the United Kingdom's Gender Recognition Act stipulates that '[t]he fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child.'[54] Yet, consequences of gender recognition vary depending on the decision to obtain the Gender Recognition Certificate. If a trans person is married and upon the transition the spouses decide to remain in a legal same-sex marriage, the trans person may not obtain full gender recognition. In such a scenario, the person retains his or her birth certificate and identity according to the gender he or she was assigned at birth and the status of such person in relation to her or his

[47] Jack Byrne, *Licence to Be Yourself. Laws and Advocacy for Legal Gender Recognition of Trans People* (Open Society Institute 2014) 19.

[48] Carlos A. Ball, *The Right to Be Parents: LGBT families and the transformation of parenthood* (New York: New York University Press 2012); M. Ryan, 'Beyond Thomas Beatie: Trans Men and the New Parenthood' in R. Epstein (ed.), *Who is Your Daddy? And other writings on queer parenting* (Sumach Press 2009), 139-150.

[49] See *P.V. v. Spain*, Application no. 35159/09), judgment of 30 November 2010.

[50] R. Green, 'Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents' (1978) 135 American Journal of Psychiatry 692; T. While and R. Ettner, 'Children of a Parent Undergoing a Gender Transition: Disclosure, Risk and Protective Sources (paper presented at the XVI Symposium of the Harry Benjamin International Gender Dysphoria Association, London,17-19 August 1999).

[51] Ibidem.

[52] Jordan B. Downing, supra note, 109.

[53] Sean Cahill, Sarah Tobias, *Policy Issues Affecting Lesbian, Gay, Bisexual, and Transgender Families* (University of Michigan Press), 15.

[54] Act to make provision for and in connection with change of gender (Gender Recognition Act), adopted on 1 July 2004.

children does not change. Even if a trans person decides to obtain a Gender Recognition Certificate and a new birth certificate, the mandatory annulment of marriage does not affect parental responsibility of the spouses (who may transform their marriage into civil partnership). Moreover, if a trans person enters a civil partnership or marriage with a person who is not the child's parent, the civil partner or spouse may seek to obtain parental responsibility as a step-parent without relinquishing the authority of the trans parent. In this case, the scheme is quite progressive because it allows more than one father to have parental authority, which responds to the needs of parents who enter new relationships after the child's father obtained gender recognition.[55]

The second category of transgender family constellations concerns parent-child relationships that are established after legal gender recognition has taken place. As it was noted before, in the contemporary world 'parenthood' is not necessarily determined by full reproductive capacity. Moreover, not only the role of a mother as a child-carer, but also that of child-bearer may be successfully fulfilled by a 'legal' man. Thus, transgender persons may become parents because they retained their reproductive capacity according to the gender they were assigned at birth, or because they have taken advantage of assisted reproduction technology.

With regard to forms of transgender parenthood established after gender recognition, one could envisage a number of family constellations that vary depending on whether a trans man or a trans woman is one of the parents.

Forms of trans man parenthood include:

- a single trans man who gives birth to a child that is genetically related to him;
- a married trans man who gives birth to a child that is genetically related to him and his spouse[56];
- a married trans man who gives birth to a child that is not genetically related to him, but to his spouse;
- a married transman who gives birth to a child that is genetically related to him, but not to his spouse;
- a married trans man who gives birth to a child that is not genetically related either to him or his spouse;
- a trans man in a registered partnership who gives birth to a child that is genetically related to him and his female partner;
- a trans man in a registered partnership who gives birth to a child that is not genetically related to him, but to his partner;
- a trans man in a registered partnership who gives birth to a child that is genetically related to him, but not to his partner;

[55] The multiple-fathers authority does extinguish when a new partner of the child's mother adopts the child. T. Reed, *Court Information for Transsexual Parents* (Gender Identity Research and Education Society 2008), at 10.

[56] Notably, in Argentina the first trans man who gave birth to a child was married to a trans woman and the child is genetically related to both of them. Both spouses changed their gender in pursuance of the new law of 2012, but did not undergo gender reassignment surgery. *See* http://www.argentinaindependent.com/currentaffairs/first-baby-born-transgender-couple-argentina/

- a trans man in a registered partnership who gives birth to a child that is not genetically related either to him or his partner;
- a trans man in a *de facto* partnership who gives birth to a child that is genetically related to him and his female partner;
- a trans man in a *de facto* partnership who gives birth to a child that is not genetically related to him, but to his partner;
- a trans man in a *de facto* partnership who gives birth to a child that is genetically related to him, but not to his partner;
- a trans man in a *de facto* partnership who gives birth to a child that is not genetically related to him or to his partner.

Forms of trans woman parenthood include:

- a single trans woman who is a genetic parent of a child with a woman who is neither her spouse nor a partner;
- a trans woman in a registered partnership with a woman who gives birth to a child that is genetically related to her, irrespectively from a genetic relationship with a woman who gives birth;
- a trans woman in a registered partnership with a woman who gives birth to a child that is not genetically related to her, irrespectively from a genetic relationship with a woman who gives birth;
- a trans woman in a *de facto* partnership with a woman who gives birth to a child that is genetically related to her, irrespectively from a genetic relationship with a woman who gives birth.

The above scenarios inevitably show that the Roman principle *mater semper certa est* loses its relevance in the context of transgender parenthood. Moreover, the rule adopted to determine motherhood in cases of in vitro fertilization that states 'the mother of a child is the woman who gave birth to it' also seems to not take account of transgender parenting, because a mother who gave birth to a child does not have to be a woman in light of the law. Given the diversity and complexity of family forms and parent-children relationships involving transgender persons, family law needs to translate the notion of 'motherhood' and 'fatherhood' to more encompassing concepts that give an account of parenthood of persons whose functions and roles may not 'naturally' correspond with their legal gender. The difficulty of regulating this area is related to the fact that the best interest of a child must be often ascertained vis-à-vis the interests of multiple parents.

In addition to the scenarios sketched above, one should also bear in mind problems of transgender persons who have been deprived of their reproductive capacity, but nevertheless founded a family after their gender recognition. In 1997, the European Court of Human Rights decided a case concerning a post-operative trans man who at the material time did not have the right to legal gender recognition, and additionally could not be registered as a legal parent of a child born to his female partner.[57] He alleged that the lack of possibility to record his name on the birth

[57] *X, Y and Z v. United Kingdom*, Application no. 21830/93, judgment of 22 April 1997.

certificate of a child born to his partner through artificial insemination by donor violates his right to protect his private and family life. According to the Registrar-General, only a biological man could be registered as the father.

Interestingly, the government's response was that Article 8 of the European Convention on Human Rights was not applicable since family life protection does not extend to apparent same-sex couples. The Court accepted this view in light of the lack of European consensus with regard to parental rights of transsexual persons. More importantly, the Court acknowledged that the applicants – X, Y and Z – are a family in the light of the Convention, notwithstanding the lack of marital or biological ties between X and Y and X and Z. By now, the situation has changed on the domestic level. Under the Human Fertilisation and Embryology Act 2008, the mother of a child and her partner who was not a sperm donor could be registered as mother and father, provided that the transgender person holds a gender recognition certificate. Consequently, the UK law does not fix the right to be a parent to one's gender assigned at birth, but it requires full gender recognition in one's preferred gender in order to be permitted to register as a parent of a child to whom one is not genetically related. Where full gender recognition has not yet been obtained, that person continues to be a parent only in the social sense.

The process of translating the existing notions of 'motherhood' and 'fatherhood' to transgender parents may take shape as legal reform. Yet, the legislator may choose not to regulate exceptions from the rule that a mother is a woman who gives birth to a child, which is the case in Germany and most other European countries. However, this choice necessitates adoption of *ad hoc* solutions by authorities 'forced' to deal with such untypical situations as the registration of birth of a child born by a trans man. Secondly, the legislator may establish presumptions of motherhood or parenthood by giving priority to certain type of relationships – for example in favour of the 'sanctity' or 'stability' of marital relationship over the genetic or biologic link. Thirdly, it may leave the choice to those who are concerned, while defining the category of persons who are concerned, as well as their rights and obligations towards the child. Finally, the law should prevent involuntary disclosure of one's gender transition and identity. Involuntary disclosure is a frequent experience of transgender persons who live in their preferred gender, but legally remain parents - mothers or fathers - in the gender assigned at their birth. These individuals may find it necessary to prove the relationship with their children to public authorities or third parties.

One could imagine following legal solutions to the question of post-recognition trans parenting. A single trans man who gives birth to a child is registered as a father, while the entry for the mother in the birth registry remains vacant (as if the mother is unknown). In this case, paternity and maternity determined according to such rule should not be subject to disavowal, or changed upon a court order determining paternity of the sperm donor. A trans man in a marital relationship who gives birth to a child is registered as a father, while his wife is registered in the child's birth certificate as a mother. The registration of the mother is based on a legal presumption of motherhood, and is done irrespective of the genetic link between the woman and the child. In this case, the abolition of fatherhood and motherhood and of the determination of parental rights of the sperm donor should be excluded in order to protect the stability of a family life. The same rule

could apply to children born to a trans man, where the man remains in a registered partnership. Yet, if a trans man who gives birth to a child lives in a *de facto* partnership with a woman, he should be registered as a father of the child and the woman he lives with should be entered as a mother only after the genetic ties between her and the child are affirmed by a court order. Similarly, both abolishing fatherhood and motherhood, and determination of parental rights of the sperm donor should be excluded in this case in order to protect the stability of a family life. However, a trans man who gives birth to a child while remaining in a same-sex marriage or registered partnership could be registered as a mother, and his spouse or partner as a father. Yet, one could consider whether a trans man in a *de facto* partnership should be legally recognized as a mother, while his same-sex partner is recognized as a father provided that he is a sperm donor.

The solutions regarding trans women as parents could be following. A trans woman who is a genetic parent of a child is registered as a father, irrespective of being in a relationship with the child's mother. It is quite crucial that the legislator considers whether a trans man who gives birth to a child and is registered as a mother and a trans woman who is a genetic parent of a child and is registered as a father should provide the birth registry with personal data and identity used before their gender recognition took place. Alternatively, all above scenarios should leave the decision to the persons concerned about their registration as parents.

5 Transgender parenthood in Poland

Formally speaking, the situation of transgender parents in Poland complies with international standards of protecting the right to privacy and non-discrimination.[58] As a result of a court procedure determining the legal gender of a transsexual person, her or his parental rights would remain intact. The act of changing the first and the last name (specifically, the ending of the last name), as well as the gender marker in all vital documents, does not have *ex lege* effect on the rights and duties of a parent. Notably, legal gender reassignment does not affect the status of adoptive or natural children, nor does it impact the execution of one's parental authority or contact rights.

Yet, in practice, many transsexual persons who are parents of minor children postpone their legal transition in fear of losing their status as parents. In the divorce procedure, which is a necessary condition of requesting the determination of a transsexual person's legal gender, the courts tend to grant custody rights to the non-transsexual parent or establish the place of residence of a minor with the non-transsexual parent. In consequence, the judicial practice requires that a transsexual person seeking legal gender recognition undergo an involuntary divorce, notwithstanding the actual lack of a dissolution of a marital relationship. Furthermore, the judicial practice also seems to follow the view that minors shall not remain in custody of a transsexual parent because it is contrary to the best interest of the child.

The second practical problem experienced by transgender parents in Poland is the burden of proving that they are parents and custodians of their children, and that their children were born

[58] Anna Śledzińska-Simon (ed.), *Prawa osób transseksualnych. Rozwiązania modelowe a sytuacja w Polsce*, (Warszawa 2010).

before legal gender recognition took place. In the Polish law, the fact of a parent's changing identity is not reflected in the child's vital documents, nor is it entered into the birth certificate. Therefore, a transgender parent is not in a position to prove the parenthood of a child without disclosing the fact of his or her gender reassignment. In fact, a parent of a child has to present not only the child's birth certificate, but also the full copy of one's own birth certificate including personal data from before the transition. Such evidence may be necessary not only in a situation where the parent exercise his or her parental authority before public authority, but also in relation to all public institutions like public schools, hospitals or private educational institutions. In this situation, transgender persons continuously reveal their transition to third parties, notwithstanding the standard protection of personal data and privacy.

The law could prevent this form of human rights violation by mandating the court to issue a certificate of parental authority to all transgender persons in the same procedure that determines their legal gender. Such a certificate could include the new identity of the person concerned. Furthermore, the same form of certificate could be used by courts for any other judicial procedures that concern a determination of the scope of parental authority and family ties between parents and children (for example, if a parent changes his or her last name while a minor retains it) in order to avoid further stigmatization. Paradoxically, such certificates could facilitate the exercise of parental authority by single parents who continuously need to prove under the current law that the other parent is deprived or limited in his or her rights.

Yet, some countries have adopted a different response to this problem. In the model described above, the birth certificate of a child whose parent underwent gender reassignment would be changed to include the new personal data of that parent. However, this solution is quite controversial for countries with the dominant view that a child cannot or shall not have two mothers or two fathers. In countries that have legalized same-sex unions, such regulation has been put in place to accommodate the needs of modern families. So far, Argentina, the United Kingdom and some states in the USA have introduced the possibility to designate same-sex parents in response to the same-sex rights claims, and these rules have turned out to be similarly favorable to transgender parents and their children. In some other jurisdictions, the legal parenthood status of a co-mother was established for a female spouse or partner of the biological mother, without the need to initiate an adoption procedure.[59] Paradoxically, the same-sex parenthood regulations authorizing determination of multiple parents may be the only way to solve the dilemma of how to register children born after the formal gender recognition of their parent(s).

Currently, Polish law does not provide a clear answer as to how to register the parents of a child born after gender recognition. According to the Family and Guardianship Code, the mother is a woman who gave birth to a child and the father is her husband by way of the presumption of paternity. In the absence of such a presumption or after such a presumption has been rebutted, the man who is a genetic father of a child and who acknowledged his paternity for this child. Therefore, a 'legal' man who gave birth to a child may not be registered as a mother of a child, while a 'legal'

[59] Australia, Belgium, some provinces in Canada, Denmark, Iceland, Netherlands, Norway and Sweden.

woman who was the sperm donor may not be registered as a father.[60] At the same time, a woman who was the sperm donor may not be regarded as a legal mother of a child because she did not give birth to it. Therefore, under Polish law, trans men may not be registered as mothers of their genetic children except in the case of adoption. Under the current law, it is only possible to acknowledge paternity of a child or to determine paternity by a court order if the child is genetically related to such person. Yet, a trans man who gave birth to a child is not able to prove to be genetically related to a child, if the child was conceived from a donated ova. Therefore, a man who gave birth to a child may not be registered as a parent (neither as a mother or a father) except in the case of adoption. In this context, it is quite clear that the recognition of rights of transgender parents necessitates a legal reform that would allow for the registration of two fathers or two mothers in the birth certificate of a child born after the gender recognition of her or his parent(s).[61]

6 Conclusions

The practical problems experienced by transgender persons concern not only the lack of legal gender recognition procedure nor its oppressive character, including the sterilization requirement, but also the lack of recognition of transgender persons as parents. Practice shows that legal gender recognition has a negative impact on the status of transgender persons as parents or potential parents, as well as on the status of their children. Due to the fact that the existing concepts of motherhood and fatherhood and rules for the establishment of family ties do not adequately respond to the needs of transgender persons, and given the complex forms of transgender parenthood, the law shall translate the existing concepts and rules in a way that ensures the effective protection of fundamental rights of transgender persons as parents and their children.

Although this Article does not pertain to contribute to queer theory, it accepts its underlying notion that the resistance against the normative framework of gender and sexuality has a transformative power.[62] It has been rightly noticed that the greater the progress made in recognizing LGBT rights, the more resistance to their claims on the domestic fora. The debate over LGBT rights as human rights, particularly in the context of transgender parenting and trans rights, is a process that inevitably brings about change.[63] Yet, as change may occur throughout legal reforms and social attitudes, it is expected that it is not a linear or even gradual process. Rather, it is a type of change that is contingent on many local factors.

[60] Paradoxically, the lack of regulation in the area of assisted reproduction results in the lack of discrimination against transgender persons seeking access to assisted reproduction technology.

[61] Małgorzata Szeroczyńska, 'Rodzicielstwo prawne w wypadkach medycznie wspomaganej prokreacji – między genetyką, fizjologią a wolą posiadania dziecka' (2009) 3 Przegląd filozoficzny 240.

[62] Karen Zivi, 'Performing the nation: Contesting same-sex marriage rights in the United States', Journal of Human Rights 13(3) (2014), 290-306.

[63] Anthony Langlois, 'Human Rights, "Orientation," and ASEAN' (2014) 13 Journal of Human Rights 249.

PART SEVEN

Country-Specific Analyses

L'uso distorto della Full faith and Credit clause federale nell'adozione del Defence of Marriage Act del 1996: da clausola unificante a strumento di ghettizzazione

Laura Fabiano

Abstract

Con la pronuncia *United States v. Windsor*[1] del 2013 la Corte suprema federale statunitense ha proclamato l'illegittimità costituzionale della sezione terza del *Defence of Marriage Act* del 1996 (DOMA) ove il Congresso aveva posto una definizione, per il diritto federale, dell'istituto del matrimonio quale unione esclusivamente eterosessuale; ciò al fine di escludere le coppie eventualmente unite in un matrimonio omosessuale dai possibili vantaggi (fiscali, di assistenza sanitaria ecc.), discendenti dalla normativa federale. Nella medesima decisione la Corte ha altresì sancito che il discrimine sulla base delle tendenze sessuali da parte di una normativa di rango ordinario è idoneo ad innescare l'utilizzo da parte del giudice del c.d. *strict scrutiny*.

La suprema Corte non si è invece pronunciata apertamente sulla sezione seconda dello stesso DOMA *Act* nella quale è stabilito che gli Stati della Federazione non sono tenuti a riconoscere le unioni matrimoniali omosessuali celebrate in altri Stati; tale disposto normativo tuttavia, a seguito della decisione *Windsor*, presenta anch'esso importanti profili di illegittimità costituzionale.

La sezione seconda del DOMA è stata adottata sulla base di una clausola costituzionale prevista nell'articolo IV sezione I della Costituzione federale statunitense nota come *Full Faith and Credit Clause* in base alla quale: «In ogni Stato saranno attribuiti piena fiducia e pieno credito agli atti, ai documenti pubblici ed ai procedimenti giudiziari degli altri Stati; e il Congresso potrà mediante atti generali prescrivere il modo in cui la validità di tali atti, documenti e procedimenti debba essere determinata nonché gli effetti della validità stessa»[2].

Nella decisione *Milwaukee County v. M.E. White Co.* [3], del 1935, la Corte suprema ne pose in evidenza la finalità "unificante" e tuttavia il Congresso, nell'adozione del DOMA *Act*, ne ha snaturato il senso alterandone del tutto gli obiettivi.

[1] United States v. Windsor, 570 US_(2013).

[2] Letteralmente: «Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof» (trad. it. A cura di P.Biscaretti di Ruffia, *Costituzioni straniere contemporanee* – Volume I, Milano, Giuffrè, 1994; da ultimo si veda inoltre G. Cerrina Feroni, T.E. Frosini, A. Torre, *Codice delle* Costituzioni – Volume I, Torino, Giappichelli, 2009).

[3] 296 US 268 (1935).

Il *paper* intende ricostruire l'uso distorto che il Congresso federale statunitense ha fatto di tale clausola la quale, nata per garantire la validità di atti e sentenze statali su tutto il territorio federale è stata utilizzata invece dal legislatore della Federazione come legittimazione costituzionale per l'adozione di una normativa volta a garantire gli Stati dall'obbligo di riconoscere le unioni matrimoniali omosessuali celebrate in altri Stati.

Keywords
Full Faith and Credit Clause , *Defence of Marriage Act* , same sex marriage, famiglia, federalismo, costituzionalità,.

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1 La *Full faith and credit clause* della Costituzione federale statunitense

1.1 La clausola costituzionale fra dottrina e giurisprudenza

L'articolo IV sezione I della Costituzione federale degli Stati Uniti d'America prevede la clausola del *Full faith and credit* sancendo che «In ogni Stato saranno attribuiti piena fiducia e pieno credito agli atti, ai documenti pubblici ed ai procedimenti giudiziari degli altri Stati; e il Congresso potrà mediante atti generali prescrivere il modo in cui la validità di tali atti, documenti e procedimenti debba essere determinata nonché gli effetti della validità stessa».

Si tratta di una clausola costituzionale la quale, a fronte di una frequente sottovalutazione da parte della dottrina circa le sue reali potenzialità e finanche definita «relatively a neglected one in legal literature»[4], ha ricevuto invece una discreta considerazione in giurisprudenza a partire dalla decisione *Milwaukee County v. M.E. White Co.*[5], del 1935, ove la Corte suprema ne pose in evidenza la forza oltre che la finalità "unificante" sottolineando come «The very purpose of the full-faith and credit clause was to alter the status of the several States as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin. That purpose ought not lightly to be set aside out of deference to a local policy which, if it exists, would seem to be too trivial to merit serious consideration when weighed against the policy of the constitutional provision and the interest of the state whose judgment is challenged»[6]. Una più attenta analisi della detta clausola costituzionale e delle sue applicazioni pone in effetti in rilievo il fatto che in differenti occasioni essa abbia dimostrato di essere caratterizzata da tratti più che controversi, oltre che di essere dotata di fortissime potenzialità.

[4] R.H. Jackson, Full Faith and Credit – The Lawyer's Clause of the Constitution, in Colum. L. Rev., 1945, 1 ss.
[5] 296 US 268 (1935).
[6] 296 U.S. 268, 277. Nella decisione *Estin v. Estin,* 334 U.S. 541 (1948) la Corte suprema afferma ancora che «[the Full Faith and Credit Clause] substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns» 334 U.S. 541, 546.

1.2 L'evidentiary command e l'effect clause

La clausola costituzionale che sancisce il principio di *Full faith and credit* si presenta suddivisa in due parti: la prima, l'"*evidentiary command*", impone un impegno immediato in capo ad ogni Stato nei confronti degli altri Stati membri della Federazione mentre la seconda parte, l'"*effect clause*", attribuisce al Congresso la competenza a legiferare sui modi attraverso cui questo impegno deve essere mantenuto[7].

Quanto sancito nell'*evidentiary command* affonda le proprie radici nella tradizione inglese con riguardo, in primo luogo, alle regole ed alle prassi utilizzate per l'ammissione delle prove e delle testimonianze nei procedimenti giurisdizionali e, successivamente, alle regole concernenti l'ammissione, come prova, delle decisioni precedentemente emanate da Corti straniere[8].

L'espressione è utilizzata in questo senso da sir Geoffrey (o Jeffray) Gilbert nel suo *Law of Evidence*, opera scritta nella prima metà del diciottesimo secolo (ma pubblicata non prima del 1974), che ha rappresentato per lungo tempo un punto di riferimento fondamentale per magistrati ed avvocati nord americani in tema di diritto processuale[9]. Suddiviso in cinque capitoli[10], il trattato bipartisce le prove processuali fra *written* ed *unwritten evidence*, dedicando tuttavia alle prime maggiore attenzione, e fra queste, concentrando la parte più rilevante dell'opera agli Atti del Parlamento ed ai registri delle Corti di *common law*, seguiti da tutti gli atti connotati dall'apposizione di un sigillo. In relazione a questi ultimi Gilbert chiarisce come vi sia una differenza fra i vari sigilli apponibili ad un documento e come da tale differenza consegua una diversa fede da accordare ai contenuti dell'atto stesso; in particolare Gilbert distingue, fra tutti, il c.d. *Great Seal* che, in quanto posto dalla Corte di Cancelleria, è il sigillo a cui massimamente bisognava prestare fede[11].

Nell'esperienza americana la necessità di una regola condivisa sul riconoscimento degli Atti e delle sentenze straniere si pose sin dall'inizio come fondamentale soprattutto in relazione ai rapporti fra gli Stati membri della Federazione e, del resto, il mancato riconoscimento dei decreti di

[7] Sulla distinzione fra l'evidentiary clause e l'effect clause si rimanda a R.U. Whitten, The original Understanding of the Full Faith and Credit Clause and the Defence of Marriage act, in Creighton Law Review, 1998, 255 ss.

[8] Cfr. R.U. Whitten, The Original Understanding, cit., 255 ss.; S.E. Sachs, Full Faith and Credit in the Early Congress, in Va. L. Rev., 2009, 1201 ss., D. E. Enghdal, The Classic Rule of Full Faith and Credit, in Yale L. J., 2009, 1584. In particolare nella tradizione inglese Whitten distingue l'ammissione come prova delle decisioni di Corti straniere la cui autorità promana da fonti diverse da quelle delle Corti inglesi, dalle decisioni emesse dalle Corti di Common law. L'espressione è in realtà utilizzata nell'esperienza inglese in modo poliedrico essendo utilizzata in relazione all'autenticazione dei documenti, ai rapporti diplomatici o all'attività notarile. Su tale ultimo punto S.E. Sachs, Full Faith and Credit, cit. spec. 1217-1220.

[9] Sul punto si rimanda a J.H. Langbein, Historical Foundations of the Law of Evidence: A View from the Ryder Source, in Colum. L. Rev., 1996, 1168 ss. ed a T.P. Gallains, The Rise of Modern Evidence Law, in Iowa L. Rev., 1999, 499 ss.

[10] Nelle cinque parti dell'opera l'Autore affronta: 1) la problematica del "grado di credibilità" delle prove stesse delineando la c.d. "*best evidence rule*"; 2) il tema delle prove scritte e del modo in cui possono o devono essere presentate dinanzi ad una Corte; 3) le questioni legate alle prove non scritte con particolare riguardo alle prove testimoniali; 4) il tema della valutazione delle prove e del rapporto di gerarchia fra loro; 5) il rapporto fra le prove e le dichiarazioni fatte in sede processuale. Per un approfondimento sulle cinque parti dette si rimanda a T.P. Gallains, *The Rise of Modern Evidence Law*, in *Iowa L. Rev.*, 1999, pp. 499 ss.

[11] Sul punto si rimanda a K.H. Nadelmann, Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal, in Mich. L. Rev., 1957, 33 ss., spec. 41-44.

ingiunzione al pagamento emessi dalle Corti statali fu, come è noto, fra i motivi alla base della crisi stessa degli *Articles of Confederation*[12]. Ciò avvenne nonostante la espressa previsione, nello stesso documento, di una clausola molto simile a quella che successivamente venne prevista nell'articolo IV della Costituzione federale: l'ultimo paragrafo dell'articolo IV degli *Articles of Confederation* stabiliva infatti che «Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State»[13]. La detta clausola, che non risultava prevista nell'originario progetto degli *Articles* adottato dal II Congresso federale nell'agosto del 1776, risultava invece aggiunta l'anno successivo su proposta di una commissione appositamente nominata[14].

In realtà, ancora prima della adozione degli *Articles of confederation* clausole similari erano state adottate tanto dai legislatori di singole colonie in atti normativi[15], tanto in esperienze confederative pregresse[16] e non è dunque una sorpresa l'inserimento della *Full faith and credit rule* nella stesura definitiva della Costituzione federale.

[12] Cfr. A. Jones Maldwyn, Storia *degli Stati Uniti d'America. Dalle prime colonie inglesi ai giorni nostri*, Bompiani, 2005; A Testi, *La formazione degli Stati Uniti*, Bologna, il Mulino, 2003; L. Stroppiana, *Stati Uniti*, Bologna, il Mulino, 2006.

[13] La clausola, nella dicitura adottata nella Costituzione federale, si distingue dalla precedente non solo per il fatto evidente che prevede la seconda parte concernente il ruolo del legislatore, ma anche in quanto comprende fra gli atti cui gli Stati si impegnano a conferire *faith and credit* non solo quelli emanati da una Corte o da una magistratura ma in generale tutti gli atti promananti dall'autorità statale e dunque anche gli atti normativi. Nel corso dei lavori a *Philadelphia* la dicitura utilizzata ha subito delle modifiche giacché la proposta originaria recitava «full faith and credit ought to be given in each State to the public acts, records and judicial proceedings of every other State, and the Legislature shall by general laws prescribe the manner in which such acts, records and proceedings shall be prove, and the effect which judgments obtained in one State, shall have in another» ed invece, all'adozione del testo, all'espressione «ought to» fu preferita l'uso di «shall», scelta che segna una volontà vincolante maggiore per gli Stati; inoltre, all'espressione finale «which judgments obtained in one State, shall have in another» venne sostituta la parola «thereof», scelta che la dottrina ha invece collegato alla volontà di conferire al futuro legislatore un'ampia discrezionalità in merito. Sul punto cfr. J.M.Patten, *The Defense of Marriage Act: How Congress said "No" to Full Faith and Credit and the Constitution*, in *Santa Clara Law Review*, 1998, 939 ss., spec, 946-947.

[14] La commissione, nominata il 10 Novembre del 1777, era composta da Richard Law (Connecticut), Richard Henry Lee (Virginia), James Duane (New York). La Commissione propose tanto la clausola del *Full Faith and Credit* (in un testo in realtà più complesso del quale fu approvata solo la prima parte), tanto altre clausole fra cui, non di poco conto, la *Privileges and Immunities Clause* (prevista anch'essa, negli *Article of Confederation* all'articolo IV, primo comma).

[15] All'inizio del 1774 il legislatore della provincia della Baia del Massachussets adottava infatti uno *Statute* in base al quale il merito di una decisione adottata in una "*sister colony*" non dovesse essere posto in discussione in una causa sollevata dinanzi ad una corte locale e ciò al fine di affrontare il difficile problema della fuga dei debitori da una colonia ad un'altra a seguito di una ingiunzione di pagamento. Sullo *Statute* del Massachussets si rimanda a W. L. M. Reese, V. A. Johnson, *The Scope of Full Faith and Credit to Judgments*, in *Colum. L. Rev.*, 1949, 153 ss. ed a K.H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, in *Mich. L. Rev.*, 1957, 33-88 oltre che a E.S. Corwin, *The Full Faith and Credit Clause*, in *U. Penn. L. Rev.*, 1933, 371 ss.

[16] Ci si riferisce all'esperienza degli articoli di confederazione delle Colonie del New England del 1643. In realtà negli *Articles* la clausola non era prevista ma il problema ad essa sotteso si pose certamente e portò i commissari delle colonie ad adottare una raccomandazione (del 9 settembre del 1644) per la quale «that every such verdict or sentence may have a due respect in any other Court through the Colonies where occasion may be to make use of it, and that it may be accounted good evidence for the plaintiff until either better evidence or some other just cause appear to alter or make the same void, and that in such case, the issuing or the cause be respited for some convenient time, that the court may be advised which were the verdict or sentence first passed»; il passo è citato da K.H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, in *Mich. L. Rev.*, 1957, 38.

Nella giurisprudenza della Corte suprema si riscontra una distinzione netta circa l'interpretazione dell'*evidentiary command* con riguardo, agli atti normativi e le decisioni giurisprudenziali.

Nel 1939, nella decisione *Pacific Employers Ins. Co. v. Industrial Accident Comm'N*[17], la Corte suprema affrontò ampiamente la questione dell'effetto di una eventuale interpretazione rigida della clausola dell'articolo IV della Costituzione federale in relazione alla disciplina normativa applicabile all'interno degli Stati. Il caso riguardava la disciplina applicabile alla vicenda di un operaio di una *Corporation* dello Stato del Massachussets il quale, durante un lavoro svolto temporaneamente in California, aveva avuto un incidente riportando dei danni fisici. La Corte Suprema, nelle parole del giudice Stone, svolse un ragionamento approfondito circa il senso da attribuire alla clausola della *Full faith and credit* in questo caso, giungendo ad affermare che «the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events». Il ragionamento svolto dal giudice Stone si appuntava in particolare sul bilanciamento che doveva necessariamente essere operato fra gli interessi statali in gioco osservando che, nel caso in questione, «although Massachusetts has an interest in safeguarding the compensation of Massachusetts employees while temporarily abroad in the course of their employment, and may adopt that policy for itself, that could hardly be thought to support an application of the full faith and credit clause which would override the constitutional authority of another state to legislate for the bodily safety and economic protection of employees injured within it». La Corte dunque concludeva per una interpretazione blanda della clausola, in questo caso, giacché gli interessi in gioco riguardavano la politica sociale di uno Stato (nel caso di specie la California), il cui controllo e la cui riconduzione nell'ambito della sovranità statale non poteva essere aggirato attraverso la detta regola federale. Ancora di più, pare, alla lettura della sentenza, che la Corte abbia dunque operato un bilanciamento fra l'interesse alla garanzia della sovranità degli Stati sulle politiche sociali da essi prescelte e la spinta all'uniformità che la clausola stessa della *Full faith and credit* imprime all'esperienza federale concludendo per una valorizzazione della garanzia della sovranità statale.

Tale impostazione sembra confermata nella decisione di molto successiva *Phillips Petroleum Co. v. Shutts*[18],. Il caso riguardava una *class action* nella quale gli interessati, 28.000 persone fra statunitensi cittadini di ogni Stato e stranieri, richiedevano ad una compagnia petrolifera dei pagamenti in sospeso in relazione a delle concessioni estrattive. La causa era stata presentata in Kansas e la Corte suprema federale era stata chiamata a decidere, in primo luogo, se effettivamente la Corte statale fosse il foro competente per ognuno dei *class members* (anche con riguardo ai cittadini di altri Stati o stranieri) ed in secondo luogo quale fosse la legge applicabile. Se con riguardo al primo punto la Corte suprema si richiamava alla teoria del c.d. "*minimum contacts*"[19], sancendo

[17] 306 US 493 (1939).

[18] Petroleum Co. v. Shutts, 472 US 797 (1985).

[19] La teoria del "*minimum contact*" viene in realtà elaborata dalla Corte suprema nella decisione *International Shoe Co. v. Washington,* 326 U. S. 310 (1945) con riguardo alla giurisdizione che una Corte statale può avere in una causa ove sia convenuta una *Corporation* di uno diverso Stato. Nella decisione *International Shoe* la Corte afferma che «Since

in tal modo la giurisdizione dello Stato del Kansas, con riguardo invece alla questione della normativa applicabile la Corte affermava che lo Stato ove si svolge la causa «must have a "significant contact or aggregation of contacts" to the claims asserted by each plaintiff class member in order to ensure that the choice of Kansas law was not arbitrary or unfair».

In considerazione della storia dell'espressione "*full faith and credit*" prima nella tradizione inglese, e poi nelle vicende oltreoceano, parte della dottrina statunitense ha sostenuto che sin dalla sua adozione costituzionale, il senso da attribuirle alla clausola fosse tale per cui essa imponesse agli Stati della Federazione non necessariamente l'obbligo di riconoscere l'autorità degli Atti emessi dagli altri Stati quanto piuttosto la loro esistenza, come dato di prova, e che solo attraverso la lettura in tal modo della prima parte della clausola, la seconda parte acquistava effettivamente senso[20].

Ciononostante nel corso degli anni si è tuttavia affermata una giurisprudenza volta ad interpretare il primo comma della clausola in senso forte[21] parallelamente alla considerazione del permanere della possibilità del Congresso di legiferare in merito[22].

In considerazione del fatto che la possibilità di adottare normative federali sulla base della seconda parte della clausola non è stata utilizzata frequentemente dal legislatore federale, è rilevante che la maggior parte di questa normativa attenga tuttavia a questioni che hanno a che fare con l'istituto familiare[23] e dunque proprio con una materia strettamente attinente alla politica sociale che dovrebbe essere di stretta competenza degli Stati. A parte infatti il *Full Faith and Credit Act* adottato nel 1790[24], che nei propri contenuti ricalca fedelmente quanto stabilito dalla medesima clausola costituzionale[25], sono da considerarsi rilevanti il *Parental Kidnapping Prevention Act* del

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the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, *Klein v. Board of Supervisors,* 282 U. S. 19, 282 U. S. 24, it is clear that, unlike an individual, its "presence" without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it». Nella decisione *Phillips Petroleum*, invece, la Corte si richiama alla particolare funzione dell'istituto stesso del ricorso attraverso *class action* affermando che «A class action plaintiff, however, is in quite a different posture … As the Court pointed out in *Hansberry,* the class action was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the litigation was too great to permit joinder».

[20] Cfr. Whitten, *The Original Understanding*, cit., 255 ss.

[21] La Corte suprema sottolinea ad esempio la volontà di "unificazione" dei *framers* quando nella decisione *Milwaukee County v. M. E. White Co.,* 296 U.S. 268 (1935) afferma: «The very purpose of the full-faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin».

[22] In relazione a questa tendenziale scelta interpretativa è stato fatto notare da ampia dottrina come la seconda parte della clausola abbia invece acquistato un senso nuovo con l'adozione da parte del Congresso del *Defense of Marriage Act* del 1996 (DOMA) con il quale piuttosto che, come normalmente nella legislazione adottata sulla base della clausola, definire i modi e le procedure di riconoscimento degli atti fra Stati, il Congresso ha consentito agli Stati di non riconoscere alcun atto pubblico di altro Stato che consideri una unione fra persone dello stesso sesso alla stregua di matrimonio. Sul DOMA si rimanda al proseguo del testo.

[23] Sulla disciplina di cui si riferisce si rimanda più approfonditamente a A.L. Estin, Sharing Governance, cit. ed a H. Hamilton, The Defense of Marriage Act: A Critical Analysis of its Constitutionality Under the Full Faith and Credit Clause, in DePaul Law Review, 1998, 943 ss.

[24] Trasfuso attualmente nel 28 USC sezz. 1738, 1739.

[25] L'Atto del 1990 stabiliva che «the records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every Court within the United States, as they have by law or usage in the Courts of the state from whence the said records are or shall be taken». Con una successive modifica il Congresso ha poi assicurato eguale riconoscimento anche agli atti normativi.

1980, che si prefiggeva di affrontare lo spinoso problema del *forum shopping* nelle cause di affidamento dei figli e finanche del rapimento dei minori da parte dei genitori[26], il *Full Faith and Credit for Child Support Act* del 1994[27] sul riconoscimento degli obblighi di mantenimento dei minori nei rapporti interstatali ed infine il *Safe Homes for Woman Act* del 1994 in tema di violenza domestica sulle donne. Atti normativi come quelli appena citati hanno tutti in comune la caratteristica di descrivere, in termini procedurali, il modo in cui, da uno Stato ad un altro, documenti amministrativi normativi e giurisdizionali necessitano di essere riconosciuti, e pertanto, di assicurare, in specifiche aree, l'operatività della prima parte della clausola.

2 L'interpretazione "a rovescio" della clausola

2.1 Il Defense of Marriage Act del 1996

In aperto contrasto con tale lettura sulla legittimazione del Congresso ad adottare normative federali in base alla *Full faith and credit clause* si è posto invece, nel 1996, il *Defense of Marriage Act* (DOMA), adottato sulla base della medesima clausola costituzionale ma in netta controtendenza con le finalità finora descritte[28]. Il DOMA è stato difatti adottato dal Congresso statunitense in reazione ad una vicenda giudiziaria che, a partire dal 1993, aveva suscitato gran clamore in tutti gli Stati Uniti: in quell'anno infatti era accaduto che tre coppie omosessuali avevano contestato la legislazione hawaiana sulle licenze matrimoniali in quanto essa prevedeva che le licenze stesse non fossero attribuibili che a coppie eterosessuali; la Corte suprema dello Stato, nella decisione *Baehr v. Lewin*[29], aveva stabilito che lo scrutinio da utilizzare nel caso di specie fosse lo "*strict*" in quanto la normativa operava una discriminazione utilizzando il "sesso" come parametro e ciò risultava in contrasto con la Costituzione statale[30]. A seguito di tale decisione la Corte di circuito del medesimo Stato, nella sentenza *Baehr v. Miike*[31], aveva affermato che effettivamente non sembrava esservi un "*compelling interest*" statale sufficientemente convincente e perciò tale da legittimare costituzionalmente la normativa oggetto di controllo, elemento che invece è necessario per superare lo scrutino di costituzionalità in casi come questi[32]. Una vicenda simile era accaduta nel

[26] Il PKPA trasfuso nel 28 USCA § 1738A segue l'adozione nel 1968 dello *Uniform Child Custody Jurisdiction Act*, adottato dalla *National Conference of Commissioners on Uniform State Laws*, alla quale, in effetti, già molti Stati si erano nel tempo adeguati.

[27] 28 USCA § 1738B.

[28] Cfr. a proposito le riflessioni di M.M. Winkler, Same sex marriage *negli Stati Uniti: Le nuove frontiere del principio di eguaglianza*, in *Pol. Dir.*, n. 1, 2011, 93 ss.

[29] *Baehr v. Lewin,* 852 P.2d 44 (Haw. 1993).

[30] La Corte suprema statale si riferiva all'art. 1 *section* 5 della Costituzione delle Hawaii.

[31] *Baehr v. Miike*, Civ. No. 91-1394 (Haw. Cir. Ct. Dec. 3, 1996).

[32] Nella decisione la Corte statale afferma: «In this case, the evidence presented by Defendant does not establish or prove that same-sex marriage will result in prejudice or harm to an important public or governmental interest. 18. Defendant has not demonstrated a basis for his claim of the existence of compelling state interests sufficient to justify withholding the legal status of marriage from Plaintiffs. As discussed hereinabove, Defendant has failed to present sufficient credible evidence which demonstrates that the public interest in the well-being of children and families, or the optimal development of children would be adversely affected by same-sex marriage. Nor has Defendant demonstrated how same-sex marriage would adversely affect the public fisc, the state interest in assuring recognition

medesimo periodo nello Stato dell'Alaska, nella decisione *Brause v. Bureau of Vital Statistics*[33]*,* pur se con le dovute differenze dato che nonostante in entrambi questi casi le Corti statali avevano stabilito di utilizzare lo scrutinio rigido di costituzionalità ("lo *strict scrutiny*") tale decisione risultava legata a parametri costituzionali differenti giacché la Corte hawaiana riteneva che si fosse in presenza di una discriminazione sulla base di un parametro sensibile, e la Corte dell'Alaska che si trattasse di un caso di deprivazione di un diritto fondamentale[34].

Le decisioni, in entrambi i casi, a favore della legittimità dei matrimoni omosessuali, non condussero tuttavia all'ammissione nei medesimi Stati di tali unioni per via della adozione, nel torno di pochissimo tempo, di emendamenti costituzionali statali che definivano il matrimonio come l'unione fra l'uomo e la donna nel caso dell'Alaska e che attribuivano al legislatore la possibilità di porre tale definizione per le Hawaii[35].

Nel 1999 un caso ancora analogo era stato discusso in Vermont, nella decisione *Baker v. Vermont*[36], ove la Corte suprema statale, pur sanzionando il limite all'accesso per gli omosessuali ai vantaggi legati all'istituto del matrimonio[37], demandava al legislatore statale la predisposizione di eventuali istituti alternativi di attribuzione dei medesimi vantaggi a tali coppie, ed il risultato fu la predisposizione, nello Stato del Vermont, di una normativa sulle unioni civili[38].

Dinanzi al rischio che, sulla base del vincolo imposto dalla *Full faith and credit clause*, il matrimonio omosessuale, una volta ammesso in uno Stato, potesse "dilagare" in ogni altro Stato della federazione, il Congresso si era risolto, già nel 1996, ad adottare il *Defense of Marriage Act*.

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of Hawaii marriages in other states, the institution of traditional marriage, or any other important public or governmental interest». Sullo scrutinio in relazione alle c.d. "*suspect categories*" si consenta di rimandare a L. Fabiano, *Le categorie sensibili dell'eguaglianza negli Stati Uniti d'America*, Giappichelli, Torino, 2009.

[33] *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

[34] Nella decisione *Brause* la Corte statale afferma «the recognition of one choice of a life partner is a fundamental rights».

[35] Le Hawaii e l'Alaska non sono casi isolati. Un anno dopo la decisione *Goodbridge v. Department of Public Health*, 798 N.E. 2d 941 (Mass. 2003), – con la quale la Corte Suprema del Massachussets ha anch'essa sanzionato come illegittima, per violazione della *equal protection* e del *due process clause* statale, la normativa statale sulla concessione delle licenze matrimoniali (ove quest'ultima negava alle coppie, che non fossero eterosessuali, la possibilità di ottenere le medesime licenze) – in occasione delle elezioni di Novembre, 13 Stati hanno approvato degli emendamenti con i quali vietavano il matrimonio fra persone dello stesso sesso. Sul punto si rimanda a J.K. Baker, *Status, Substance, and Structure: An interpretative Framework for Understanding the State Marriage Amendments*, in *Regent University Law Review*, 2005, 221 ss.

[36] *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

[37] È importante tenere presente che nella decisione *Baker* la Corte del Vermont non sanziona la norma statale per violazione dell'*Equal protection* o della *Due process clause* statali, ma per la lesione di una diversa clausola costituzionale la quale è prevista esclusivamente nella Costituzione di quello Stato, all'art. 7, ovvero la *Common Benefits clause*; essa prevede che «The government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community, and not for the particular emolument or advantage of any single person, family, or set of person, who are part only of that community; and that the community hath an indubitable, inalienable and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judge most conducive to the public weal». Su tale particolare aspetto si rimanda a L. Friedman, C.H. Baron, *Baker v. State and the Promise of New Judicial Federalism*, in *Boston College Law Review*, 2001, 125 ss. ed a R. Blandin, *Baker v. Vermont: The Vermont State Supreme Court* Held *that Denying Same-Sex Couples the Benefit and Privilege of Marriage is Unconstitutional*, in *Law & Sexuality* Law, 2000, 349 ss.

[38] Vt. Stat. Ann. Tit. 15, 1201-1207 (2002); Vt. Stat. Ann. Tit. 18, 5160-5169 (2000).

Il *Defense of Marriage Act* del 1996 si presentava suddiviso in due parti. Nella prima parte (*Section 2*) il DOMA stabiliva che gli Stati della Federazione non fossero tenuti a riconoscere unioni matrimoniali omosessuali celebrate in altri Stati[39].

Nella seconda parte (*Section 3*) veniva invece posta la definizione, per il diritto federale, dell'istituto del matrimonio quale unione esclusivamente eterosessuale[40] al fine di escludere le coppie eventualmente unite in un matrimonio omosessuale dai possibili vantaggi (fiscali, di assistenza sanitaria ecc.), discendenti dalla normativa federale per le coppie coniugate[41].

L'adozione di tale Atto da parte del Congresso suscitò, ovviamente, sin da subito, un acceso dibattito fra sostenitori ed oppositori della medesima normativa e ciò anche in considerazione del particolare "momento storico" in atto, con riguardo al percorso compiuto dagli omosessuali nell'esperienza americana per il riconoscimento dei propri diritti, giacché si era all'indomani della adozione, da parte della Corte Suprema, della decisione *Romer v. Evans*[42], sentenza nella quale la Corte aveva sanzionato l'illegittimità costituzionale, per violazione dell'*Equal protection clause*, di un emendamento alla Costituzione del Colorado sulla base del quale era vietata l'adozione di ogni tipo di atto che considerasse con favore la categoria degli omosessuali[43]. Anche se nella propria decisione la Corte aveva ribadito che l'omosessualità non fosse da considerarsi come "*suspect class*" tuttavia, il giudice costituzionale, citando come autorevole precedente il caso *Department of Agricolture v. Moreno*[44], aveva sostenuto che un emendamento costituzionale, adottato al fine di impedire l'attività di *lobby* ad un qualsiasi gruppo sociale (in questo caso omosessuali e bisessuali)[45], fosse di per sé al di fuori di quanto legittimamente perseguibile dal legislatore (anche costituzionale) statale e che, in questo caso, il principio maggioritario trovava nel diritto all'esistenza delle minoranze sociali un limite assoluto[46]. È stato acutamente osservato come, paradossalmente,

[39] «No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public Act, record or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same-sex that is treated as a marriage under the laws of such other State, territory, possession or tribe, or a right or claim arising from such relationship» 28 USC 1738 C (DOMA c. 2).

[40] «In determining the meaning of any Act of Congress or any ruling, regulation or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the world "spouse" refers only to a person of the opposite sex who is a husband or a wife» 1 USCA 7 (DOMA c. 3).

[41] La illegittimità costituzionale della seconda parte del DOMA è stata sancita dalla Corte suprema federale nella decisione *United States v. Windsor*, 570 US_(2013).

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

[43] L'emendamento alla Costituzione dello Stato, denominato "*Amendment 2*" ed adottato a seguito di un *referendum*, recitava: «No protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of Constitution shall be in all respects self-executing».

[44] *Department of Agricolture v. Moreno*, 413 US 528 (1973); nel famoso precedente la Corte afferma che «a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest».

[45] La Corte espressamente afferma: «The Amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that other enjoy or may seek without constraint».

[46] La Suprema Corte federale, pur confermando nel deciso la sentenza della Corte suprema dello Stato del Colorado si premurava di sottolineare il fatto di essere mossa da motivazioni diverse affermando che «We granted

nell'adozione del DOMA, le correnti politiche coinvolte, tanto nel sostegno, quanto nell'opposizione all'atto federale, abbiano assunto prospettive politiche tendenzialmente opposte a quelle loro tradizionalmente proprie dato che la maggior parte dei sostenitori del DOMA, prevalentemente esponenti del partito repubblicano e tendenzialmente conservatori e dunque, normalmente, sostenitori dello Stato minimo e della minor interferenza possibile della federazione negli affari statali, hanno supportato fortemente, in relazione all'atto del 1996, l'intervento federale; diversamente l'area liberale del Paese ha assunto la posizione opposta, contestando l'invadenza della federazione in una materia di competenza eminentemente statale.[47]

Può dunque legittimamente ritenersi che il DOMA rappresentasse in parte una reazione alle tendenze antimaggioritarie segnate certamente dalla decisione *Romer*[48].

2.2 La sentenza United States v Windsor del 2013

Da più parti è stato osservato che l'adozione dell'atto normativo federale del 1996 sarebbe stato in realtà superfluo giacché ad impedire il riconoscimento del matrimonio omosessuale fra gli Stati sarebbe stato sufficiente l'innescarsi del meccanismo della *public policy exception*[49], e non sono inoltre mancati durissimi attacchi da parte della maggioranza della dottrina statunitense dubbiosa circa la costituzionalità del medesimo atto federale[50] che, difatti, è stato dichiarato in parte

certiorari and now affirm the judgment, but on rationale different from that adopted by the State Supreme Court». Mentre, infatti, la Corte suprema statale aveva ritenuto di dover utilizzare lo scrutinio rigido di analisi, la Corte federale utilizza lo scrutinio deferente ed allo stesso modo però, giunge alla dichiarazione di illegittimità dell'emendamento («If a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. Amendments 2 fails, indeed defies, even this conventional inquiry»). Sul punto si rimanda a A. Bhagwat, *Purpose scrutiny in Constitutional Analisys*, in *California Law Review*, 1997, 297 ss., spec. 314.

[47] Cfr. P.E. Chabora, *Congress' Power Under Full Faith and Credit Clause and the Defence of Marriage Act of 1996*, in *Nebraska Law Review*, 1997, 604 ss. Una similare inversione di tendenze politiche è avvenuta anche con riguardo alla proposta, ancora una volta di marca repubblicana, di emendare la Costituzione federale inserendo nel documento costituzionale la definizione del matrimonio come unione eterosessuale. È da dire, comunque, che in relazione ad una proposta emendativa di tal genere alcuni noti esponenti del mondo repubblicano (l'ex Vice Presidente Cheney ad esempio, in aperta opposizione con l'allora Presidente Bush, cfr. L. Stein, *Cheney's Chice*, in *U.S. News and World Report*, September 6, 2004, 14) hanno assunto posizioni critiche a difesa delle proprie posizioni sul federalismo. Cfr. ancora C. Cox, *The Marriage Amendment is a Terrible Idea*, in *Wall Street Journal*, September 28, 2004, e B. Fein, *Constitutional Rashness*, in *Washington Times*, September 2, 2003.

[48] Sul punto cfr. P.E. Chabora, *Congress' Power Under Full Faith and Credit Clause*, cit.

[49] In realtà, osserva ancora P.E. Chabora, *Congress' Power Under Full Faith and Credit Clause*, cit. che gli effetti del mancato riconoscimento discendenti dall'utilizzo di tale eccezione piuttosto che dalla regolamentazione federale non sono identici e probabilmente quelli legati a quest'ultimo sono di portata più ampia. Sul punto si rimanda anche a L. Kramer, *Same sex-Marriage, Conflicts of Laws and the Uncostitutional Public Policy exception*, in *Yale L. J.*, 1997, 1965 ss., ove viene affrontato anche il problema della legittimità dell'utilizzo in questo caso della *public policy exception*.

[50] Sulla supposta illegittimità costituzionale del DOMA si rimanda ad esempio oltre a P.E. Chabora, Congress' Power Under Full Faith and Credit Clause, cit. anche a P. Hay, Civil Law, Procedure, and Private International Law: Recognition of Same-Sex Legal Relationship in the United States, in Am. J. Comp. L., 2006, 257 ss.; H. Hamilton, The Defense of Marriage Act: A Critical analysis of its Constitutionality under the Full Faith and Credit Clause, in DePaul Law Review, 1998, 943 ss.; R.U. Whitten, Symposium on the implications of Lawrence and Goodridge for the Recognition of Same-Sex Marriages and the Validity of Doma: Full Faith and Credit for Dummies, in Creighton Law Review, 2005, 465 ss.; J.M. Patten, The Defense of Marriage Act: How Congress said "No" to Full Faith and Credit and the Constitution, in Santa Clara Law Review, 1998, 939 ss.; Si veda tuttavia a sostegno della legittimità costituzionale del Defense of Marriage

illegittimo costituzionalmente nella decisione *United States v. Windsor*[51], del 2013 la quale in effetti costituisce il passo successivo alla decisione Romer mosso dalla comunità LGBT nel proprio percorso di emancipazione di una condizione di, per lungo tempo, non apertamente riconosciuta, discriminazione giuridica e sociale.

La sentenza Windsor si pone quale momento di svolta fondamentale in tale cammino giacché è in tale decisione che, per la prima volta, la Corte suprema federale sancisce che il discrimine sulla base delle tendenze sessuali da parte di una normativa di rango ordinario è idoneo ad innescare l'utilizzo da parte del giudice dello *strict scrutiny*: si tratta di una novità importante perché sino al 2013 le garanzie di rango costituzionale federale offerte alla comunità omosessuale passavano esclusivamente dalla valorizzazione del concetto di *privacy* sotteso alla clausola del *due process* piuttosto che in relazione al principio di eguaglianza[52].

La decisione Windsor ha origine in una vicenda iniziata nel 2009. Lo Stato di New York aveva difatti riconosciuto il matrimonio avvenuto fra due donne nel 2007 in Canada e tuttavia quando due anni dopo, alla morte di una delle due, l'altra aveva fatto richiesta di essere esonerata dal pagare le tasse di successione, sfruttando una esenzione federale prevista per il coniuge superstite, ciò gli era stato negato in quanto in base al DOMA del 1996 la stessa donna non poteva essere qualificata come "consorte" per il diritto federale.

La questione ha assunto sin da subito una notevole importanza di tipo politico e ciò si è reso evidente quando, nel rispetto della normativa federale (28 USC § 530 D), il Dipartimento di Giustizia ha informato lo *Speaker* della Camera dei Rappresentanti di non avere intenzione di difendere il DOMA dinanzi alla suprema Corte giacché la presidenza considerava che il parametro dell'orientamento sessuale dovesse essere assoggettato ad uno scrutinio più rigido dello *standard*.

Nella decisione del 2013 la Corte suprema osserva come nonostante il diritto di famiglia sia tradizionalmente materia statale ciò non significa di per sé che non possano esservi casi in cui la normativa federale finisce per incidere su tale materia senza per questo essere costituzionalmente illegittima e ciò in quanto «Congress has the power both to ensure efficency in the administration of its programs and to choose what larger goals and policies to pursue»[53]: non è dunque di per sé l'incidenza del DOMA sulla materia statale a costituire motivo di illegittimità costituzionale.

Tuttavia, prosegue la Corte, il caso della normativa del 1996 è ulteriormente diverso in quanto esso incide su una categorie di persone che lo Stato di New York ed altri 11 Stati della Federazione hanno considerato "suspect" scegliendo di applicare lo scrutino rigido nella normativa che li

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Act, M.D. Rosen, Why the Defense of Marriage Act is not (Yet?) Unconstitutional: Lawrence, Full Fait and Credit, and the Many Societal Actors That Determine What Constitution Requires, in Minnesota L. Rev., 2006, 915 ss.

[51] United States v. Windsor, 570 US_(2013).

[52] Ciò era quanto stabilito con la decisione *Lawrence v. Texas*, 539 U.S. 558 (2003); su tale evoluzione si consenta di rinviare a L. Fabiano, *Le categorie sensibili dell'eguaglianza negli Stati Uniti d'America*, Giappichelli, Torino, 2009. Sulla decisione *United States v. Windsor* cfr. T. Giovannetti, *USA: La Corte suprema sul* same sex marriage. *Il caso* United States v. Windsor, in www.forumcostituzionale.it , A. Perelli, *Il matrimonio omosessuale dinanzi alla Corte suprema degli USA : brevi considerazioni in ottica comparata*, in *DPCE on line*, 2013/3; G. Aravantinou Leonidi, United States v. Windsor, in the name of same sex marriage. *Alcune brevi considerazioni a margine della storica sentenza della Corte suprema*, in *Nomos. Le attualità del diritto*, 2-2013.

[53] *United States v. Windsor*, 570 US_(2013), part III.

riguarda; a tale elemento viene inoltre aggiunto il richiamo a quanto stabilito nella già citata decisione *Department of Agricolture v. Moreno*[54] in base alla quale la garanzia della eguaglianza costituzionale «must at the very least mean that a bare congressional desire to harm a politically un popolar group cannot justify disparate tretment of that group»: la Corte osserva come, con il Doma del 1996, il Congresso deliberatamente pone in una condizione di svantaggio una categoria di persone individuata da numerose normative statali come meritevole di particolari garanzie e come in effetti sia lo stesso Atto federale a disegnare una categoria di persone all'interno della comunità alla quale, a causa di peculiari caratteristiche personali, è riservato un trattamento discriminatorio. Con la decisione *Windsor* dunque la Corte non solo considera e valorizza l'importanza del ruolo statale nella formazione e nella evoluzione dell'opinione dominante e del consenso popolare ma sottolinea, superando quanto stabilito nel 1996 con decisione *Romer*, come sia stato lo stesso Congresso, con le sue scelte normative "stigmatiche", ad aver condotto alla enucleazione di una nuova "suspect category" individuabile nel parametro dell'orientamento sessuale[55].

2.3 Vigenza della parte seconda del DOMA Act: dubbi di costituzionalità

La decisione del 2013 travolge così la sezione 3 del DOMA del 1996 mentre lo stesso Atto federale, nella parte in cui stabilisce che gli Stati non sono tenuti a riconoscere le unioni matrimoniali omosessuali celebrate in altri Stati non è stato (ancora) dichiarato costituzionalmente illegittimo da alcuna magistratura (né statale né federale) [56].

Al tempo dell'adozione del Doma federale, affiancato, fra l'altro anche da cd. mini-doma statali e da diversi emendamenti ad alcune Costituzioni statali sulla definizione eterosessuale del matrimonio[57], dinanzi a manifestazioni di sempre più marcate di "attivismo dei giudici"[58], gli oppositori del *same sex marriage* avevano temuto che la sussistenza di una normativa di rango

[54] Department of Agricolture v. Moreno, 413 US 528 (1973).

[55] La Corte afferma difatti che «the avowed purpose and the practical effect of the law herein question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into a same-sex marriages made lawful by the unquestioned authority of the States» *United States v. Windsor*, 570 US_(2013), part III. Sulla enucleazione delle suspect categories nel diritto statunitense si consenta di rinviare a L. Fabiano, Le categorie sensibili dell'eguaglianza negli Stati Uniti d'America, Giappichelli, Torino, 2009.

[56] Cfr. *Smelt v. County of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D.Fla.2005); *In re Kandu*, 2004 WL 1854112 (Bankr. W.D. Wash.).

[57] Sugli emendamenti alle Costituzioni degli Stati si rimanda a V.D. Ricks, State Marriage Amendments: Marriage and the Constitutional Right to Free Sex: The State Marriage Amendments as Response, in Florida Coastal law Review, 2005, 271 ss.

[58] Fra tutte le decisioni la più significativa in tale contesto è stata certamente la sentenza *Goodbridge v. Department of Public Health*, 798 N.E. 2d 941 (Mass. 2003), con la quale la Corte Suprema del Massachussets ha anch'essa sanzionato come illegittima, per violazione della *equal protection* e del *due process clause* statale, la normativa statale sulla concessione delle licenze matrimoniali ove quest'ultima negava alle coppie, che non fossero eterosessuali, la possibilità di ottenere le medesime licenze. Tuttavia, differenziandosi dalle altre Corti statali già intervenute sul tema, la Corte del Massachussets ha scelto di utilizzare nell'analisi della normativa sottoposta al proprio controllo lo scrutinio minimo, il *rational based*, e ciononostante è giunta a sanzionare l'illegittimità dello *Statute* statale, giacché nel corso della causa il *Department of Public Health* non è riuscito a dimostrare il senso logico della negazione delle licenze matrimoniali alle coppie omosessuali. Con ciò la Corte ha dunque aperto la strada, nello Stato del Massachussets, al *same sex-marriage*. Sull'attivismo dei giudici in particolare cfr. J.S. Schacter, *The Role of Courts in Social Change. Sexual Orientation, Social Change and the Courts*, in *Drake Law Review*, 2006, 861 e ss.

primario, il DOMA, come unico strumento a tutela del contenimento al dilagare del *same sex marriage* di Stato in Stato, non fosse in effetti strumento sufficiente tenendo conto, del resto, che il DOMA stesso rimetteva estrema discrezionalità nelle mani del giudiziario statale. Pertanto, sin da subito vennero pertanto avanzate diverse proposte di modifica della stessa Costituzione federale per l'adozione di un c.d. *Federal Marriage Amendment* il quale, tuttavia, non ha mai riscosso il consenso necessario perché tale proposta venisse presa serie mante in considerazione dal Congresso.

Ampia dottrina pose in evidenza all'epoca che all'adozione di un apposito emendamento alla Costituzione federale sul tema del matrimonio si mostravano in effetti contrari anche molti fra coloro i quali, in linea di principio, si opponevano al riconoscimento del *same sex marriage* ritenendo che la Costituzione federale non fosse la fonte idonea ove occuparsi di temi tradizionalmente di competenza degli Stati e riconoscendo dunque agli stessi, nonostante l'adozione del DOMA, il ruolo fondamentale di "laboratori sociali" che da sempre compete loro[59]; veniva inoltre avanzata anche la competente considerazione per la quale un'eventuale approvazione di un emendamento federale sull'argomento avrebbe potuto comportare, per analogia, un travolgimento non solo del matrimonio omosessuale ma anche delle normative sulle unioni civili[60] ingessando, in tal caso, forse anche oltre la volontà dei propri sostenitori[61], la discrezionalità dei legislatori statali.

La giurisprudenza del 2013 ha in effetti confermato in pieno tali riflessioni ponendo in evidenza come una scelta del Congresso distorsiva delle finalità costituzionali ha condotto ad una perturbazione degli equilibri federali sufficiente a rendere la normativa di rango primario così adottata incostituzionale[62]: Tale prospettiva getta certamente un'ombra scura sulla restante parte del DOMA Act.

[59] Su quest'ultima riflessione si rimanda in particolare a D. Carpenter, *The Federal Marriage Amendment, Unnecessary, Anti-Federalist, and Anti-Democratic*, in *Policy Analysis*, 2006 reperibile in www. cato. org .

[60] Il timore è espresso sia da D. Carpenter, The Federal Marriage Amendment, cit. sia da T.B. Colby, The Federal Marriage Amendment and the False Problem of Originalism, in Colum. L. Rev., 2008, 529 ss.

[61] Cfr. specificatamente T.B. Colby, *The Federal Marriage Amendment*, cit.

[62] Nella decisione Windsor la Corte afferma: «it is unnecessary to decide whether this federal intrusion on State power is a violation of the Constitution because it disrupts the federal balance» e, poco più avanti, aggiunge «The dynamics of State government in the federal system are to allow the formation of consensus respecting the way the members of discrete community treat each other in their daily contact and constant interaction with each other».

Corte Costituzionale italiana, Cedu e famiglie "*altre*"

Alessandra Nocco

Abstract

L'analisi delle recenti pronunce della C. Cost. italiana dimostra come il diritto europeo giochi un ruolo determinante, seppur non sempre esplicito, nella ridefinizione della nozione di "*famiglia*" emergente dal *corpus* tradizionale del diritto familiare, sì da rendere necessarie per gli Stati membri, nel prossimo futuro, forme di riconoscimento e tutela delle famiglie arcobaleno.

La riflessione su alcuni importanti arresti della Corte Edu conferma la tesi, offrendo l'occasione di meditare su principi (es. tutela vita privata e familiare) che, pur se enunciati nei confronti di altri Paesi, devono trovare ingresso anche in Italia, contribuendo a ridurre gli ostacoli giuridici frapposti alle famiglie "*altre*".

L'*"affaire Mennesson c. Francia*" dimostra, ad esempio, come uno stato di filiazione regolarmente costituito all'estero non possa essere ignorato da un Paese dell'UE, pur quando contrario alla legislazione interna, in quanto ciò significherebbe violare l'art. 8 Cedu ed esporsi alla possibilità di condanne.

I principi enunciati dalla Corte Edu, oltre che a fattispecie a carattere transnazionale, sono fruttuosamente applicabili anche a fattispecie domestiche.

Keywords

Famiglia, Corte Edu, «divorzio imposto», omogenitorialità, maternità surrogata, PMA eterologa, vita familiare e privata.

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1 Introduzione

Nel 2012, in Spagna, nasce uno di tanti "bambini arcobaleno": è figlio di due madri lesbiche, una torinese e l'altra spagnola, regolarmente coniugate in Spagna. A febbraio, le madri, divenute tali grazie all'inseminazione artificiale di un ovulo della prima impiantato nell'utero della seconda, fanno pervenire all'Ufficio di Stato Civile del Comune di Torino la richiesta di iscrizione del bambino all'Aire. I funzionari dell'Ufficio di Stato Civile, registrando la peculiarità dell'istanza, si rivolgono alla Procura della Repubblica per avere un parere giuridico, e la risposta dei magistrati torinesi non si fa attendere. I giudici ricordano che la Corte di Cassazione si è da poco pronunciata sull'inidoneità del matrimonio *same-sex* contratto all'estero a produrre effetti nell'ordinamento italiano e affermano

che, atteso il divieto di fecondazione eterologa (allora) vigente in Italia, il bambino può essere registrato come figlio della donna che lo ha partorito, ma non anche della sua seconda mamma, considerata dallo Stato quale terza estranea.

Il lavoro dimostra come casi analoghi a quello descritto, a soli due anni di distanza, debbano essere risolti in senso opposto grazie all'applicazione di principi di matrice sovranazionale, come interpretati dalla Corte Edu nei più recenti arresti.

Viene dimostrata, inoltre, la fruttuosa applicabilità di tali principi ai fini della tutela delle famiglie "*altre*" anche in fattispecie interne, come comprovato da parte dall'ultima giurisprudenza di merito[1].

Nei paragrafi che seguono si analizza anzitutto la pronuncia della C. Cost. n. 170 del 2014, ricostruendo le radici sovranazionali della declaratoria di incostituzionalità del «divorzio imposto» e mostrando come l'impiego delle coordinate ermeneutiche costruite delle Corti Superiori in casi recenti possa portare, pur nell'inerzia del legislatore italiano, a svolte significative.

L'approccio metodologico descritto, tuttavia, non conduce a misconoscere (ma anzi a rimarcare) il valore delle pronunce nelle quali, come in C. Cost. n. 162 del 2014, i giudici di legittimità riescono, più e meglio di quanto richiesto dalla Corte Edu, a garantire importanti diritti quale quello a diventare genitori, che potrebbero essere resi accessibili anche alle coppie LGBT.

Nondimeno, l'analisi è rivolta soprattutto a verificare come, in situazioni concrete, la giurisprudenza italiana riesca o possa tutelare i diritti delle famiglie LGBT facendo impiego dei preziosi strumenti offerti dal diritto sovranazionale, sia positivo che giurisprudenziale[2].

Particolarmente significativo, in quest'ottica, si mostra il *modus operandi* individuato dalla Corte Edu nel caso "*Mennesson c. Francia"*: in questa decisione, infatti, essa afferma il diritto di due gemelle, nate in California con maternità surrogata, a vedere riconosciuto anche in Francia il proprio *status* giuridico di figlie del padre biologico e della madre sociale, come certificato nello Stato di nascita, nel rispetto della loro vita privata.

L'iter argomentativo e i principi espressi dalla Corte nel caso francese si sarebbero potuti impiegare, *mutatis mutandis*, per costruire un diverso epilogo nel caso del "bambino arcobaleno" di cui sopra. Più in generale, essi possono essere determinanti per riconoscere, in futuro, almeno a livello giurisprudenziale, dignità giuridica a modelli familiari "*altri*" rispetto a quello della coppia eterosessuale coniugata[3], contribuendo alla rimodulazione del concetto giuridico di "*famiglia*" emergente dal diritto familiare classico.

[1] Da ultimo, v. Trib. min. Roma, n. 299/2014 che ha acconsentito a una donna omosessuale l'adozione ex art. 44, lett. d) l. n. 184/83 della figlia minore della sua compagna e convivente (c.d. *step-child adoption*).

[2] In generale sulla tutela dei diritti nel pluralismo degli ordinamenti giuridici e delle Corti, v. D'Aloia, *"Europa e diritti: luci e ombre dello schema di protezione multilevel*", in *Il diritto dell'Unione Europea*, n. 1/2014, 1 ss.

[3] Si pensi alla affermazione della necessità di trascrivere il matrimonio *same-sex* contratto all'estero, fino ad oggi negata in Italia.

2 Incostituzionalità del «*divorzio imposto*» al transessuale

2.1 C. Cost. n. 170/2014: il caso e i profili di rilevanza per l'indagine

Con la sent. n. 170/2014[4] la C. Cost. dichiara l'illegittimità costituzionale degli artt. 2 e 4 della l. 14 aprile 1982, n. 164, nella parte in cui non prevedono che la sentenza di rettificazione dell'attribuzione di sesso di uno dei coniugi, che provoca lo scioglimento del matrimonio o la cessazione degli effetti civili conseguenti alla trascrizione del matrimonio, consenta, comunque, ove entrambi lo richiedano, di mantenere in vita un rapporto di coppia giuridicamente regolato con altra forma di convivenza registrata che tuteli adeguatamente diritti ed obblighi della coppia stessa, con le modalità da statuirsi dal legislatore. La Corte dichiara inoltre, in via consequenziale, l'illegittimità costituzionale dell'art. 31, co. 6, del d.lgs. n. 150/2011.

L'importanza di tale arresto ai fini dell'indagine è rappresentata dai seguenti aspetti: 1) l'affermazione, in linea con il proprio precedente orientamento[5], che nella nozione di "*formazione sociale*" di cui all'art. 2 Cost. è da annoverare anche l'unione omosessuale, intesa come stabile convivenza tra due persone (anche divenute) dello stesso sesso, cui spetta il diritto fondamentale di "*vivere liberamente una condizione di coppia, ottenendone, nei tempi, nei modi e nei limiti stabiliti dalla legge, il riconoscimento giuridico con i connessi diritti e doveri*"; 2) la considerazione per cui, nonostante spetti al Parlamento, nell'esercizio della propria discrezionalità, individuare forme di riconoscimento e garanzia per tali unioni, resti riservata alla C. Cost. la possibilità di intervenire "*a tutela di specifiche situazioni*", quale viene considerata quella oggetto delle pronuncia stessa, nel quadro di un controllo di ragionevolezza della disciplina; 3) l'utilizzo del diritto sovranazionale per giungere alla declaratoria di incostituzionalità della normativa censurata e all'affermazione della necessità di tutela della vita familiare del transessuale e del suo ex coniuge, dovendo il legislatore evitare il passaggio della coppia, già coniugata, da uno stato di massima protezione giuridica ad una condizione di assoluta indeterminatezza ; 4) la possibilità che nel prossimo futuro, spingendo in avanti il ragionamento della Corte, si possa accordare tutela giuridica alle famiglie LGBT, se non tramite l'accesso al matrimonio, quantomeno mediante una forma di convivenza registrata, estendendo loro, *mutatis mutandis*, le coordinate ermeneutiche tracciate in questa pronuncia per tutelare una coppia prima eterosessuale e, dopo, LGBT.

2.2 Le radici europee delle ragioni dell'incostituzionalità del «divorzio imposto» come concepito in Italia: in particolare, i casi "H. c. Finlandia" e "Schalk and Kopf c. Austria"

Nella parte motivazionale della pronuncia in commento, la Corte afferma di ritenere non pertinente il riferimento dei ricorrenti alla violazione degli artt. 8 (sul diritto al rispetto della vita familiare) e 12 (sul diritto di sposarsi e formare una famiglia) Cedu, come interpretati dalla Corte Edu nei casi "Shalk and Kopf c. Austria" del 2010 e "H. contro Finlandia" del 2012, invocate quali

[4] V. Bozzi, "*Mutamento di sesso di uno dei coniugi e «divorzio imposto»: diritto all'identità di genere vs paradigma della eterosessualità del matrimonio",* in *La nuova giurisprudenza civile commentata*, n. 5/2014, 233 ss.

[5] C. Cost. n. 138/2010.

norme interposte ai sensi della violazione degli artt. 10, primo co., e 117, primo co., Cost. Questo giacchè, sostiene la Consulta, in assenza di consenso tra i vari Stati dell'UE sul tema delle unioni omosessuali, la Corte Edu, in virtù del margine di apprezzamento conseguentemente riconosciuto loro, afferma essere riservate alla discrezionalità dei legislatori nazionali le eventuali forme di tutela per le coppie same-sex.

La stessa sentenza della Corte Edu "Shalk and Kopf c. Austria", pur ritenendo possibile un'interpretazione estensiva dell'art. 12 Cedu nel senso della riferibilità del diritto di contrarre matrimonio anche alle coppie omosessuali, chiarisce come, e lo ricordano i giudici di legittimità, non derivi da siffatta interpretazione un'imposizione della stessa agli Stati membri.

Le considerazioni della C. Cost. appaiono corrette, ma tradiscono un'impostazione argomentativa che un po' sottace l'effettivo impatto del diritto sovranazionale sulla declaratoria di illegittimità in esame. Da un lato, infatti, risponde al vero che la Corte Edu non impone agli Stati membri di accordare alle coppie same-sex l'accesso all'istituto del matrimonio, riconducendo tale decisione alla discrezionalità dei loro legislatori, dall'altro è pur vero che un ruolo determinante essa abbia svolto e continui a svolgere nel sottolineare, come in "Shalk and Kopf c. Austria", la necessità di garantire alle coppie same-sex e alle coppie "altre", se caratterizzate dalla stabilità del vincolo, la tutela resa necessaria dall'essere, anche tale convivenza, "vita familiare" ex art. 8 Cedu.

Quanto al caso "H. c. Finlandia", significativamente, la Grande Camera ha affermato che non si pone in contrasto con la Convenzione la *conversione forzata del matrimonio in una* partnership *civile, a seguito del mutamento di identità di genere di uno dei due coniugi, a fronte di un regime di tutela dei diritti e doveri degli ex coniugi equiparabile al modello matrimoniale.*

La legge finlandese, come quella italiana, non prevede il matrimonio same-sex e pertanto, in base al Finnish Act on Confirmation of the Gender of a Transsexual Act, laddove la persona transessuale sia coniugata, ai fini del pieno riconoscimento giuridico della nuova identità si genere si configurano le seguenti possibilità: a) se il coniuge intende mantenere la relazione, il matrimonio viene convertito in unione civile registrata e il transessuale è confermato nella nuova identità; b) se il coniuge intende concludere la relazione, prende avvio la procedura di divorzio e il transessuale può comunque ottenere dallo Stato il riconoscimento.

Nel caso della Finlandia, dunque, diversamente dall'Italia, esiste per queste situazioni (divenute) arcobaleno un'alternativa giuridica (la partnership registrata) idonea a tutelare la sostanza del legame matrimoniale forzatamente sciolto, garantendo, anche dopo, un equilibrio dei diritti e dei doveri parificabile a quello coniugale. E questa è la ragione per la quale la Corte Edu ha ritenuto non in contrasto con la Convenzione Edu la disciplina del «divorzio imposto» finlandese.

Diversamente potrebbe opinarsi (e difatti si è opinato da parte della C. Cost.) in merito al «divorzio imposto» in Italia, che nessuna alternativa di tutela apre agli ex coniugi dopo lo scioglimento del vincolo coniugale.

Alla luce di "Shalk and Kopf c. Austria" e "H. contro Finlandia" evidenti appaiono, dunque, le radici sovranazionali delle ragioni della declaratoria di incostituzionalità pronunciata da C.Cost. n. 170/2014. L'influenza, anche implicita, della giurisprudenza delle Corti Superiori nel graduale

ripensamento della nozione di "famiglia" emergente dal corpus del diritto familiare classico, a favore delle famiglie "altre", va dunque riconosciuta e plaudita.

3 L'affermazione del diritto alla procreazione e le nuove frontiere della genitorialità

3.1 C. Cost. n. 162/2014: il caso e i profili di rilevanza per l'indagine

Con la sent. n. 162 del 2014[6] la C. Cost. dichiara l'illegittimità costituzionale dell'art. 4, co. 3, della l. n. 40/2004, nella parte in cui stabilisce, per la coppia avente i requisiti di cui all'art. 5, il divieto del ricorso a tecniche di PMA di tipo eterologo, qualora sia stata diagnosticata una patologia causa di sterilità o infertilità assolute ed irreversibili.

L'importanza dell'arresto, ai fini dell'indagine, è rappresentata da tre aspetti: 1) l'affermazione della portata costituzionale del diritto alla procreazione; 2) la realizzazione, in Italia, per merito di questa sentenza, di un livello di tutela del diritto di accesso alle tecniche di procreazione superiore rispetto a quello richiesto dalla Corte Edu agli Stati membri in ragione dell'adesione alla Convenzione; 3) il compimento di un piccolo passo in avanti (seppur sul fronte delle tecniche consentite e non sul quello dei requisiti soggettivi di accesso alle stesse) nel cammino che potrebbe portare all'apertura dell'accesso alla PMA alle coppie LGBT, partendo dal principio primario, posto appunto da questa pronuncia, secondo cui "*la scelta […] di formare una famiglia che abbia dei figli costituisce espressione della fondamentale e generale libertà di autodeterminarsi […] riconducibile agli artt. 2, 3 e 31 Cost., poiché concerne la sfera privata e familiare*".

Nell'ipotesi che in futuro si giunga ad affermare, dunque, che l'espressione della libertà di autodeterminarsi, rappresentata dall'accesso alle tecniche in parola, e avente copertura costituzionale, sia da riconoscere agli individui come singoli, ancor prima che alla coppia (e, in ogni caso, non solo alle coppie eterosessuali ma anche alle coppie omosessuali) sarebbe allora aperta anche alle famiglie "*altre*" la possibilità di avvicinarsi all'esperienza del "dare la vita". In questa prospettiva, allora, appare di particolare rilievo proprio l'apertura dell'Italia alla PMA eterologa atteso che questa sarebbe l'unica tecnica utile, e per ovvie ragioni, alle coppie *same-sex*. Ad oggi, tuttavia, tra i requisiti soggettivi di accesso alle tecniche in parola vi è ancora la diversità di sesso degli aspiranti genitori.

3.2 L'iter argomentativo della Corte: il diritto alla procreazione come espressione della generale libertà di autodeterminazione … ma solo per le coppie eterosessuali!

Nella motivazione della pronuncia in esame, la Corte apre ad affermazioni di principio, constatando non solo che il divieto assoluto di fecondazione eterologa, impedendo alla coppia destinataria della l. n. 40/2004 assolutamente sterile o infertile di procreare, è priva di fondamento

[6] v. Luberti, "*Fecondazione eterologa, norme della Convenzione europea dei diritti dell'uomo e Corte Costituzionale: i nuovi diritti presi sul serio*", in Giustizia civile, fasc. 11-12, 2013, 2327 ss.

costituzionale, ma soprattutto che la scelta dei componenti della coppia di diventare genitori e di formare una famiglia con figli costituisce espressione della fondamentale libertà di autodeterminarsi, riconducibile agli artt. 2, 3 e 31 Cost., e concernente la sfera privata e familiare. Ed invero, nonostante la Costituzione non abbracci una nozione di famiglia necessariamente caratterizzata dalla presenza di figli, il progetto di formazione di un nucleo genitoriale con prole, anche indipendentemente dal dato genetico, è favorevolmente considerato dall'ordinamento.

E' ovvio che, sottolinea la Consulta, la libertà di provare a realizzare l'esperienza genitoriale mediante la PMA non possa atteggiarsi a libertà illimitata, ma è pur vero che i suoi limiti, quand'anche ispirati da convincimenti di natura etica, non dovrebbero in nessun caso consistere in un divieto assoluto di accesso a una certa tecnica, salvo che ciò non sia indispensabile per tutelare interessi di pari rango, come le esigenze di tutela del nato[7].

Altro passaggio della motivazione illuminante, per ciò che qui rileva, è quello in cui il giudice delle leggi riconosce come la disciplina relativa alla PMA sia suscettibile di incidere in modo significativo sul diritto alla salute delle persone coinvolte, da intendersi nel suo significato più ampio, e quindi comprensivo della salute psichica.

E' infatti certo, secondo la ricostruzione della Consulta, che l'impossibilità di formare una famiglia con dei figli insieme al proprio *partner*, anche grazie alla PMA di tipo eterologo, possa incidere negativamente, in misura anche rilevante, sulla salute della coppia.

Atteso che il censurato divieto assoluto di fecondazione eterologa si riflette, pertanto, oltre che sul diritto a poter essere genitori, anche sul supremo bene della salute, non può che ritenersi costituzionalmente illegittimo, salvo che si dimostri che esso, nella sua assolutezza, sia l'unico mezzo per garantire altri valori costituzionali coinvolti.

All'esito dello scrutinio di ragionevolezza della disciplina, valutata l'eventualità di lesione di interessi di pari rango rispetto a quello di diventare genitori, nonché l'idoneità o meno del censurato divieto a scongiurarla, la Corte conclude affermando che quest'ultimo viola la libertà della coppia di formare una famiglia con figli senza che la sua assolutezza sia giustificata dalle esigenze di tutela del nato (da ritenersi congruamente garantite) né da altre esigenze di rilievo costituzionale. Per queste ragioni dichiara l'incostituzionalità della disciplina, anche considerando che la regolamentazione degli effetti della PMA eterologa praticata fuori dall'Italia realizza un'ingiustificata disparità di trattamento delle coppie sterili o infertili sulla base della loro capacità economica, discriminando le coppie che non abbiano i mezzi per recarsi in Stati che aprono alla tecnica, rispetto a quelle che possano permetterselo.

Con riguardo all'iter argomentativo fatto proprio dalla Corte, pare opportuno osservare quanto segue circa la necessità di spingere in avanti il suo *modus operandi* al fine di offrire tutela giuridica, in futuro, alle coppie "*altre*" che desiderano accedere alla genitorialità grazie alla PMA.

Preliminarmente è doveroso evidenziare come molte coppie LGBT (si pensi alle coppie *same-sex* o divenute tali post rettificazione sesso di un *partner*), si trovino esattamente nella condizione

[7] v. Tigano, *"La dichiarazione di illegittimità costituzionale del divieto di fecondazione eterologa: i nuovi confini del diritto a procreare in un contesto di perdurante garantismo per i futuri interessi del nascituro",* http://www.giurcost.org/decisioni/2014/0162s-14.html

di "*coppie assolutamente sterili o infertili"* descritta dalla Corte Cost. e dalla l. n. 40/2004, non potendo dare la vita a un nuovo individuo se non facendo ricorso, appunto, alla PMA eterologa.

In seconda battuta, non si vede come l'affermazione di un diritto costituzionale fondamentale, quale è riconosciuto essere il diritto di una coppia di (provare a) formare una famiglia con figli (in quanto espressione della generale libertà di autodeterminarsi, riconducibile agli artt. 2, 3 e 31 Cost., e concernente la sfera privata e familiare) possa accompagnarsi alla selezione di alcuni soltanto, tra i consociati, quali destinatari del diritto stesso: un diritto costituzionale fondamentale, infatti, o è tale per tutti gli individui o non lo è per nessuno di essi, salvo a voler svuotare di significato l'art. 3 della Costituzione.

E tanto vale a maggior ragione se si sostiene, come la C. Cost. espressamente fa in questa sentenza, che il mancato riconoscimento del diritto in parola si traduce in un *vulnus* ulteriore rispetto a quello legato al mancato riconoscimento del diritto, ovverosia al diverso e supremo bene della salute dei soggetti interessati (art. 32 Cost.).

Inoltre, non sembra in questa sede peregrino ricordare come la giurisprudenza italiana abbia recentemente affermato che: a) l'unione omosessuale, quale stabile convivenza tra persone dello stesso sesso, rientri tra le formazioni sociali di cui all'art. 2 Cost., cui spetta il fondamentale diritto di "*vivere liberamente una condizione di coppia, ottenendone, nei tempi, nei modi e nei limiti stabiliti dalla legge, il riconoscimento giuridico con i connessi diritti e doveri"*[8] ; b) che i componenti della coppia omosessuale, conviventi in stabile relazione di fatto, pur se in Italia non possono ancora contrarre matrimonio, possono, quali titolari del diritto alla "*vita familiare*" e nell'esercizio del diritto inviolabile alla tutela giurisdizionale di specifiche situazioni, e segnatamente alla tutela di altri diritti fondamentali, adire la magistratura per far valere, in presenza di "*specifiche situazioni*", il diritto ad un trattamento omogeneo a quello assicurato dalla legge alla coppia coniugata e, in tal sede, eventualmente sollevare le eccezioni di illegittimità delle disposizioni di legge applicabili, in quanto - o nella parte in cui - non assicurino detto trattamento, per assunta violazione delle pertinenti norme costituzionali e/o del principio di ragionevolezza[9].

Ciò premesso, viene allora naturale domandarsi: come è possibile affermare, al contempo, da parte dei nostri organi giurisdizionali: 1) che la stabile unione omosessuale integri una comunità di tipo familiare alla quale spetta il diritto al rispetto della vita familiare e il godimento (quantomeno) dei diritti fondamentali riconosciuti alle altre coppie; 2) che la libertà di formare una famiglia con figli, anche indipendentemente dal dato genetico, sia espressione del fondamentale diritto all'autodeterminazione riconducibile agli artt. 2, 3 e 31 Cost, poiché concernente la sfera privata e familiare, con la conseguenza che le limitazioni di tale libertà, ed in particolare un divieto assoluto imposto al suo esercizio, debbano essere ragionevolmente giustificate dall'impossibilità di tutelare altrimenti interessi di pari rango; 3) che l'impossibilità di formare una famiglia con figli insieme al proprio *partner*, anche mediante PMA eterologa, possa incidere negativamente, in misura anche rilevante, sulla salute dei componenti della coppia; 4) che, tuttavia, la PMA resti accessibile, ai sensi dell'art. 5 l. cit., solo alle coppie eterosessuali?

[8] C. Cost. n. 138/2010.

[9] Cass. n. 4184/2012.

Forse facendo ricorso al principio del superiore interesse del minore? Forse sostenendo l'inidoneità assoluta, e a prescindere da ogni valutazione in concreto, delle coppie non eterosessuali ad allevare dei bambini?

Se così fosse, su questo punto si dovrebbe ben riflettere, atteso che, come ricordato anche da recente giurisprudenza di merito e di legittimità[10], alla base della apodittica affermazione dell'inidoneità delle coppie *same-sex* ad essere delle buone coppie genitoriali non esistono, allo stato, certezze scientifiche o dati di esperienza, ma il mero pregiudizio che sia dannoso, per l'equilibrato sviluppo (specie sessuale) del minore, il fatto di vivere in una famiglia caratterizzata da un rapporto omosessuale tra i *partners* che assumono il ruolo genitoriale, così ponendo quale premessa del ragionamento ciò che, piuttosto, dovrebbe costituire l'esito del percorso dimostrativo: l'effettiva dannosità di un contesto familiare omogenitoriale.

Evidente appare dunque l'irrazionalità, allo stato, del requisito della diversità di sesso degli aspiranti genitori richiesta dalla legge italiana per l'accesso alle tecniche di PMA (e segnatamente alla fecondazione eterologa), nonché l'ingiustificata discriminazione perpetrata a danno delle coppie LGBT sotto questo aspetto, con violazione del principio di ragionevolezza e di eguaglianza sostanziale, nonché del diritto alla tutela della loro vita familiare e privata (art. 8 Cedu).

L'argomentazione svolta dalla C. Cost. nella pronuncia n. 162/2014, pertanto, per quanto corretta ed anzi meritevole di plauso per "*l'espansione della genitorialità*" ch'essa determina, sembra poter essere estesa, in futuro, anche alle famiglie "*altre*", riconoscendo loro il diritto ad accedere alla PMA alle stesse condizioni delle coppie eterosessuali.

Si conclude ricordando come, da un lato, il fenomeno del c.d. turismo procreativo renderebbe comunque vana la perdurante rigidità del legislatore italiano sul predetto requisito soggettivo e, dall'altro, l'apertura della PMA eterologa alle coppie LGBT non implicherebbe il necessario sgretolamento del pur anacronistico dogma dell'eterosessualità del matrimonio, atteso che, anche con riguardo alle coppie eterosessuali, la PMA è già oggi accessibile anche da parte dei *partners* (solo) conviventi e non coniugati.

3.3 C. Cost. n. 162/2014 e "S.H. e altri c. Austria" a confronto.

Come prospettato in introduzione, con la sent. n. 162/2014 la Consulta garantisce alle coppie aventi i requisiti di cui all'art. 5 della l. n. 40 del 2004 che vogliano provare ad avere un bambino tramite PMA, un livello di tutela più alto di quello che nei pronunciamenti della Corte Edu si richiede agli Stati membri di garantire loro. Meglio ancora, adotta un approccio diverso.

Il riferimento, in particolare, è alla sentenza della Corte Edu "*S.H. e altri c. Austria*" del 2011, relativa al divieto di fecondazione eterologa vigente in Austria. Con tale decisione, la Grande Camera, da un lato ha riconosciuto che il diritto di una coppia di concepire un figlio ricorrendo anche alla PMA rientra nelle garanzie previste dall'art. 8 Cedu, in quanto tale scelta è espressione della vita privata e familiare, ma dall'altro ha affermato che, poiché l'utilizzo della fecondazione in vitro ha sempre sollevato e continua a sollevare questioni di ordine etico e morale sulle quali non c'è

[10] Trib. min. Roma n. 299/2014 e Cass. n. 601/2012.

omogeneità tra gli Stati membri, ampio è il margine di discrezionalità di cui dispone ogni Stato in merito alla disciplina interna, sicché non può ritenersi contrastante con la Convenzione il divieto di fecondazione eterologa vigente in Austria.

Nessun obbligo in capo allo Stato italiano (e scaturente dal diritto sovranazionale) era pertanto ravvisabile, pur dopo il pronunciamento della Corte Edu sul caso austriaco, circa la necessità di aprire l'accesso (anche) alla PMA eterologa.

Nondimeno la Corte Cost. italiana, con la sent. n. 162/2014, ha ritenuto illegittimo, per le motivazioni esposte, il divieto di PMA eterologa vigente in Italia. I tempi, evidentemente, erano maturi per tale apertura e per fare, una volta tanto, più e meglio dell'Europa.

3.4 L'insegnamento di "E.B. c. Francia" e l'omogenitorialità in Italia

Uno dei temi più caldi tra quelli che ruotano attorno alla tutela dei diritti, delle libertà e del rispetto della vita familiare delle coppie LGBT è rappresentato dall'accesso all'esperienza genitoriale che, per tali coppie, può passare sia attraverso le tecniche di PMA di cui si è detto, sia realizzarsi, giuridicamente se non biologicamente, mediante l'istituto dell'adozione.

In Italia, l'adozione legittimante è attualmente riservata dalla legge alle coppie coniugate, sicché, per esempio, la questione dell'accesso della persona omosessuale all'adozione, come sottolineato dalla dottrina, "*può porsi de iure condito solo nei rari casi in cui il nostro ordinamento apre l'adozione al singolo, oltre che alla coppia coniugata*"[11]. Anche in questi casi, tuttavia, non è agevole superare i pregiudizi che aleggiano attorno all'omogenitorialità e aprire l'adozione in casi particolari ai single omosessuali.

Un recente arresto della Corte Edu, che peraltro ribalta un precedente orientamento[12], induce ancora una volta a riflettere sui diritti delle coppie LGBT e, in particolare, sul diritto a diventare genitori mediante accesso all'adozione, permettendo di trarre utili spunti per l'Italia[13].

Il caso è "*E.B. c.* Francia" del 22 gennaio 2008, nel quale da Corte stabilisce che è illegittimo e contrario alla Cedu il diniego dell'idoneità all'adozione, deciso dalle autorità di uno Stato membro che consente per legge al singolo di adottare, e motivato con la mancanza di un riferimento genitoriale del sesso opposto a quello dell'aspirante genitore adottivo non coniugato.

Più in particolare, la Francia viene condannata per aver violato l'art. 14 Cedu (divieto di discriminazione) in combinato disposto con l'art. 8 (diritto al rispetto della vita familiare e privata), per aver discriminato la single lesbica, richiedente l'adozione di un bambino, senza che fosse stata valutata in concreto la sua idoneità ad essere madre e per il solo fatto che, nel nucleo familiare d'accoglienza del bambino, non ci sarebbe stato un soggetto di sesso maschile. La discriminazione è ravvisabile nella circostanza che agli altri single eterosessuali tal requisito non viene richiesto.

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[11] Long, "*I giudici di Strasburgo socchiudono le porte dell'adozione agli omosessuali",* nota di commento a CorteEdu "E.B. c. Francia" del 22.01.2008, in *La Nuova Giurisprudenza Civile Commentata*, 6/2008, 672 ss.

[12] Caso "*Frettè c. Francia*" (2002), ric. n. 36515/97. Un uomo single, omosessuale, aspirante adottante lamentava di aver subito, nel procedimento di valutazione dell'idoneità all'adozione, un trattamento discriminatorio fondato sul suo orientamento sessuale, con conseguente violazione dell'art. 8 Cedu. La Corte la nega.

[13] Sul tema, Falletti, "*La Corte europea dei diritti dell'uomo e l'adozione da parte del single omosessuale"*, in *Famiglia e Diritto*, n. 3/2008, 224 ss.

L'influenza della pronuncia in Italia è limitata dal fatto che, come già detto, l'accesso dei single all'adozione può aversi solo nei casi particolari di cui all'art. 44 l. n. 184/1983 e, comunque, senza effetti legittimanti. In queste ipotesi, tuttavia, può e deve sicuramente trovare ingresso il principio espresso dalla Corte Edu, nel senso che l'Italia non può discriminare il single omosessuale che voglia adottare un bambino, ricorrendone gli altri presupposti previsti, solo in ragione del suo orientamento sessuale e del fatto che egli non possa garantire la presenza costante, nel nucleo di accoglienza, di un soggetto di sesso opposto al proprio. Un tale atteggiamento dell'organo giudicante, in assenza di valutazione in concreto sull'idoneità genitoriale, costituirebbe infatti violazione dell'art. 14, in comb. disp. con l'art. 8 Cedu, ed esporrebbe l'Italia a condanne.

Pur se in una prospettiva diversa, ossia dal punto di vista dell'interesse del minore e non dall'angolo visuale del diritto del single omosessuale a diventare genitore, molto interessante appare la recente pronuncia del Tribunale per i minorenni di Roma n. 299 del 30 luglio scorso, che consente a una donna lesbica di adottare, ex art. 44, lett. d. l. cit., la figlia minore della sua compagna e convivente, nata in Spagna mediante PMA eterologa. Come ricordato dal Trib., infatti, intanto la norma non discrimina, con riferimento agli adottanti, tra coppie conviventi eterosessuali e omosessuali e, dunque, una diversa lettura sarebbe contraria alla *ratio legis* della norma, al dato costituzionale e ai principi della Cedu di cui l'Italia è parte. Con specifico riguardo all'interesse della minore coinvolta, si aggiunge che, come affermato anche da recente giurisprudenza di legittimità[14], se è vero che la dannosità di un contesto familiare omosessuale non può presumersi, parimenti non può presumersi che l'interesse del minore non possa essere ivi soddisfatto.

Nell'iter argomentativo della pronuncia, inoltre, è interessante notare come il Trib. per i minorenni faccia riferimento alla giurisprudenza sovranazionale e, segnatamente, all'arresto "*X e altri c. Austria*" del 19 febbraio 2013, per risolvere il caso in senso favorevole all'adozione della minore da parte della donna omosessuale, compagna della madre.

La pronuncia della Grande Camera, infatti, riguardava un caso analogo: due donne, unite in una stabile relazione omosessuale, lamentavano il rigetto della richiesta avanzata da una di loro di adottare il figlio dell'altra, senza rottura del legame giuridico tra madre biologica e figlia (adozione c.d. co-genitoriale). La Corte Edu, osservando anzitutto che in Austria non è consentito il matrimonio *same-sex* e richiamando la Convenzione dei diritti del fanciullo di New York in base alla quale il canone da tenere in maggiore considerazione nel decidere è il migliore interesse del minore, ha ritenuto discriminatoria, per violazione dell'art. 14, in comb. disp. con l'art. 8 Cedu, la legge austriaca che non consente l'adozione in tali casi, concessa invece alle coppie di fatto eterosessuali. La motivazione di "X e altri c. Austria" si fondava, dunque, in parte sulla discriminazione operata dalla legge austriaca tra coppie eterosessuali e coppie omosessuali e, in parte, sulla necessità per il giudice di motivare, in concreto, sull'interesse superiore del minore.

[14] C. Cass. n. 601 del 2012

Anche con riferimento al tema dell'omogenitorialità e alla possibilità di accesso da partae delle coppie LGBT all'istituto dell'adozione in casi particolari, i principi sovranazionali impongono agli organi giurisdizionali italiani di rimuovere alcuni ostacoli frapposti a tali coppie[15].

4 L'"*Affaire Mennesson c. Francia*": il rispetto della vita privata dei bambini, *sub specie* di certezza giuridica del loro *status filiationis*, prevale sulle legislazioni nazionali in tema di PMA

4.1 Il caso e i profili di rilevanza per l'indagine

Con la sentenza del 25 giugno scorso, la Corte Edu, adita da due coniugi francesi, sig. Dominique Mennesson e sig.ra Sylvie Mennesson, nonché dalle gemelle minori Valentina e Fiorella Mennesson, nate in California mediante maternità in surrogazione, condanna all'unanimità lo Stato francese a risarcire le gemelle per il danno loro cagionato dalla violazione dell'art. 8 della Cedu, sotto il profilo del mancato rispetto della loro vita privata. La condanna trova ragione, in particolare, nel mancato riconoscimento da parte della Francia del legame di filiazione tra loro e il padre biologico da un lato, la madre sociale dall'altro, giustificato con il divieto di "*maternità per conto terzi*" vigente nello Stato e l'asserita contrarietà all'ordine pubblico interno della trascrizione degli atti di nascita californiani delle minori nei registri dello stato civile francesi.

L'importanza della pronuncia ai fini dell'indagine è rappresentata dai seguenti elementi: 1) l'affermazione di principio della rilevanza giuridica, specie in presenza di minori, dell'esistenza di una vita familiare di fatto, da riconoscere e tutelare negli Stati dell'UE indipendentemente dalla veste formale che quei rapporti familiari assumono o possono assumere secondo le legislazioni domestiche[16]; 2) l'affermazione secondo cui, sebbene gli Stati contraenti godano di un largo margine di valutazione discrezionale, importante per poter decidere, anche in materia di diritto di famiglia, ciò che sia "necessario in una società democratica", l'ampiezza di tale margine va sempre rapportata alle circostanze, agli ambiti, al contesto di riferimento e alla presenza o assenza di un denominatore comune ai sistemi giuridici degli Stati contraenti. In particolare, la Corte afferma che, quando viene in gioco il tema della filiazione, emerge uno degli aspetti essenziali dell'identità personale, sicché il margine di valutazione degli Stati nel dare tutela ai rapporti giuridici è ridotto, con la conseguenza che le scelte operate dagli stessi, pur se nei predetti limiti, non sfuggono al controllo della Corte Edu, cui compete l'attento esame degli argomenti utilizzati dallo Stato per pervenire alla soluzione del caso e la verifica dell'effettivo raggiungimento del giusto equilibrio tra gli interessi dello Stato medesimo e quelli delle persone coinvolte. In particolare, allorquando venga in rilievo lo status di un minore, il suo interesse deve avere rilievo preminente; 3) l'affermazione secondo cui il rispetto

[15] v. Falletti, *"LGBTI discrimination and parent-child relationships: cross-border mobility of rainbow families in the European Union*", in *Family Court Review*, vol. 52, n. 1, 2014, 28 ss.

[16] La Corte Edu si richiama ai suoi precedenti "*X,Y e Z c. Regno Unito*" del 22.04.1997 e "*Wagner e J.M.W.L. c. Lussemburgo*" del 28.06.2007. Nel secondo caso riconosce l'esistenza di una *"vita familiare*" tra un minore e la madre adottiva, ancorché l'adozione non fosse riconosciuta nell'ordinamento interno di riferimento.

della vita privata di una persona (art. 8 cedu) esige che "chacun puisse établir les détails de son identité d'être humain, ce qui inclut sa filiation; un aspetct essentiel de l'identité des individus est en jeu dès lors que l'on touche à la filiation" e, di conseguenza, pur essendo comprensibile, da un lato, che uno Stato Membro (qui la Francia) voglia dissuadere i suoi cittadini dal ricorrere all'estero ad un metodo di procreazione vietato sul territorio nazionale, tuttavia, allorché tale deterrente determini il disconoscimento di una filiazione altrove legittimamente stabilita e formalmente riconosciuta come tale, con conseguente incertezza giuridica del legame di filiazione nello Stato membro, ciò cagiona un serio nocumento all'identità personale dei minori e viola il diritto al rispetto della loro vita privata (art. 8 cedu); 4) da ultimo, nell'ottica delle possibilità di tutela delle famiglie arcobaleno in Italia, e in particolare sotto il profilo della genitorialità delle coppie LGBT, è interessante sottolineare come il ragionamento e i principi espressi della Corte Edu siano impiegabili nel senso che segue: nel caso in cui una coppia LGBT ottenga di realizzare il proprio desiderio di genitorialità mediante utilizzo di tecniche di procreazione vietate in Italia, ma consentite in altri Stati, e dia vita a una situazione familiare di fatto, lo Stato italiano non può disconoscere il rapporto di filiazione giuridica e la situazione familiare legalmente determinatasi all'estero, trincerandosi dietro il baluardo della "contrarietà all'ordine pubblico interno", giacché ciò si tradurrebbe in una lesione del diritto al rispetto della vita privata dei minori ed esporrebbe lo Stato a condanne della Corte Edu.

Un ragionamento analogo potrebbe farsi, mutatis mutandis, allorché il rapporto di filiazione giuridica venga costruito mediante forme di adozione non consentite in Italia. Il principio generale della circolazione dello status filiationis opererebbe, infatti, nello stesso senso di cui sopra.

5 Conclusioni

Se il caso del "bambino arcobaleno" nato in Spagna e figlio di due madri lesbiche fosse giunto all'attenzione dei magistrati torinesi oggi, l'epilogo sarebbe dovuto essere diverso. Così, in molti casi a carattere transnazionale ma anche interamente domestico che vedranno in futuro coinvolte coppie LGBT e famiglie arcobaleno, il contributo della recente giurisprudenza sovranazionale risulterà decisivo per soluzioni più garantiste degli organi giurisdizionali italiani.

I principi enunciati dalla Corte Edu negli arresti degli ultimi anni, infatti, hanno già consentito alla C. Cost. di pervenire ad aperture che probabilmente, in assenza di quei pronunciamenti, non si sarebbero avute, si sarebbero avute più avanti, o solo con interventi legislativi *ad hoc.*

Per esempio, applicando le coordinate ermeneutiche indicate dalla Corte Edu in "*H c. Finlandia"* e *"Shalk and Kopf c. Austria"*, la Consulta, con sent. n. 170/2014, ha affermato l'illegittimità costituzionale del «divorzio imposto» al transessuale, siccome non accompagnato, ove gli ex coniugi siano concordi nel voler mantenere la relazione, a forme alternative di tutela dell'equilibrio dei rapporti personali e patrimoniali instaurato durante il regime coniugale (es. *partnership* registrata). L'assoluta impossibilità di tutela di tale equilibrio mediante forme giuridiche diverse dal matrimonio, infatti, determina la violazione del diritto al rispetto della vita familiare della coppia (divenuta) LGBT e si pone in contrasto con l'art. 8 della Cedu.

Non sono mancate ipotesi in cui la C. Cost. è riuscita a tutelare più e meglio di quanto richiesto dalla Corte Edu importanti diritti quale quello di accesso alla PMA, che potrebbero in futuro essere resi accessibili anche a queste coppie. Tale diritto, in particolare, è stato al centro della pronuncia n. 162/2014, che ha dichiarato illegittimo il divieto di fecondazione eterologa, ritenendo, in senso opposto rispetto a "*S.H. e altri c. Austria*", che il bilanciamento tra gli interessi operato dal legislatore italiano fosse irragionevole, e affermando che esso violasse la libertà dei *partners* di formare una famiglia con figli, senza che la sua assolutezza fosse giustificata da esigenze di tutela del nato o da altre esigenze di rango costituzionale.

Importanti spunti di riflessione la Corte Edu ha offerto anche sul tema dell'adozione di minori da parte di persone omosessuali e sul dibattuto tema dell'omogenitorialità. In particolare: in "*X e altri c. Austria*", ha ritenuto discriminatoria la legge austriaca che non consentiva alle coppie same-sex la c.d. adozione co-genitoriale, aperta invece alle coppie eterosessuali; in "*E.B. c. Francia*" ha ritenuto discriminatorio, nei confronti delle persone omosessuali, il diniego dell'idoneità all'adozione, deciso dalle autorità di uno Stato che consente al single di adottare, motivato con la mancanza di un riferimento genitoriale del sesso opposto a quello dell'aspirante genitore adottivo.

Anche tali principi devono essere applicati in Italia, contribuendo ad abbattere le barriere e i pregiudizi che aleggiano attorno al tema dell'adozione da parte degli omosessuali e, più in generale, della genitorialità delle coppie LGBT. Devono trovare applicazione, in particolare, tutte le volte in cui si prospetti la possibilità che un aspirante adottante venga discriminato, rispetto ad altri, solo per il proprio orientamento sessuale e senza valutazione, in concreto, della dannosità di tale adozione per il minore adottando. Se tanto non avvenisse, infatti, sarebbe agevole prevedere una rimessione della questione alla C.Cost., perché decida in conformità con i richiamati orientamenti sovranazionali, eliminando trattamenti differenziati delle persone omosessuali o delle coppie LGBT, dove non motivati con la contrarietà dell'adozione all'interesse preminente dell'adottando (il riferimento, per l'Italia, attualmente è alle sole adozioni in casi particolari).

Uno degli insegnamenti più recenti ed importanti dalla Corte Edu, nell'ottica della tutela delle famiglie arcobaleno, è sicuramente quello offerto nell'"*affaire Mennesson c. Francia",* in cui afferma il fondamentale principio della circolazione degli stati familiari[17]. Alla luce di questa pronuncia, nessuno Stato membro può trincerarsi dietro il baluardo del proprio ordine pubblico interno per ignorare e negare ogni forma di tutela, anche meramente dichiarativa (es. trascrizione nei registri dello stato civile), a situazioni familiari regolarmente costituite all'estero: un simile atteggiamento si porrebbe in contrasto con il diritto al rispetto della vita privata delle persone, minori compresi, esponendo lo Stato stesso a condanne da parte della Corte Edu.

Applicare il principio all'Italia significa allora, per esempio, riconoscere che uno *status filiationis* venuto in essere per mezzo di tecniche di procreazione o forme di adozione non consentite

[17] Per un recente contributo, che raccoglie gli interventi ad un incontro di studio sul tema della circolazione degli status familiari, tenutosi a Milano il 26.10.2012, v. "*La famiglia si trasforma. Status familiari costituiti all'estero e loro riconoscimento in Italia, tra ordine pubblico ed interesse del minore*", (a cura di) Cesaro, Lovati, Mastrangelo, Ed. Francoangeli, Milano, 2014.

dalla legislazione italiana dev'essere regolarmente trascritto nei registri dello stato civile italiani tutte le volte in cui sia stato acquisito all'estero in conformità della *lex fori*.

Le ricadute pratiche di tale principio ai fini della tutela delle famiglie arcobaleno e delle coppie LGBT sono molteplici, evidenti e di grande rilievo. Ed invero, in attesa che il legislatore prenda atto dei mutamenti sociali e culturali maturati negli ultimi decenni e si faccia carico di dare tutela giuridica, secondo la sua discrezionalità, alle diverse realtà familiari esistenti, gli organi giurisdizionali possono e devono, alla luce di quel principio, accordare protezione quantomeno alle situazioni arcobaleno legittimamente costituite altrove.

Quest'immediata applicazione dei principi sovranazionali alle fattispecie a carattere transnazionale, se da una parte può apparire una magra consolazione a chi vorrebbe un riconoscimento formale ed immediato delle coppie LGBT e delle famiglie arcobaleno in Italia (e a chi, non a torto, ravvisa comunque in tale *modus operandi* una discriminazione nei confronti di quanti non abbiano i mezzi materiali per recarsi all'estero e costituire quegli *status* familiari e dei quali non si possa poi negare riconoscimento in patria), d'altra parte essa si pone come importante apripista culturale ai fini della costruzione di forme di tutela ad hoc per le fattispecie domestiche.

Il principio di circolazione degli *status* familiari diventa allora esso stesso fattore di armonizzazione dei diversi diritti familiari degli Stati membri, capace di avvicinare le categorie giuridiche a una mutata realtà sociale e di riplasmarle in funzione di quest'ultima.

Senza dimenticare che tale principio, d'altra parte, non può che essere funzionale alla reale e profonda implementazione della libertà di circolazione e stabilimento sul territorio dell'Ue.

162/2014 + 138/2010 = ?

Michele Ubertone

Abstract

Nella recente sent. 162/2014, la Corte Costituzionale italiana ha affermato che "La determinazione di avere o meno un figlio, anche per la coppia assolutamente sterile o infertile, concernendo la sfera più intima e intangibile della persona umana, non può che essere incoercibile, qualora non vulneri altri valori costituzionali". In altre parole, la Corte è arrivata a configurare l'aspirazione a diventare genitore, anche in modo non naturale ma con l'ausilio di tecniche mediche, come un vero e proprio diritto rispetto al quale il legislatore non avrebbe la facoltà di interferire, se non per proteggere altri valori costituzionali di pari rango. Tra questi, preminente è il diritto alla salute fisica e psichica dei figli.

Alla Corte è parso irragionevole pensare che il grado di lesione agli interessi costituzionali contrapposti al diritto a divenire genitori, e dunque il risultato del bilanciamento, potesse dipendere dal fatto che i gameti utilizzati fossero quelli degli aspiranti genitori o provenissero invece da terzi. Come è stato rilevato in dottrina, il combinato disposto di due norme della legge 40/2004 (il divieto di fecondazione cd. eterologa e la norma secondo cui l'unica finalità per cui è possibile il ricorso alla procreazione assistita è quella di rimuovere le cause di sterilità o infertilità") ha finora precluso l'accesso alle prestazioni di PMA da un lato le coppie senza alcun problema di fertilità, dall'altro le coppie totalmente sterili. Ciò configura una discriminazione tra due tipologie di infertilità: quella solo parziale, per cui la PMA era ammessa, e quella totale, per cui non lo era; discriminazione che si è ritenuto non fosse sostenuta da valide ragioni.

In questo articolo, ci si chiede se la *ratio decidendi* espressa dalla Corte non implichi anche la possibilità di un'ulteriore censura nei confronti della legge 40, in particolare rispetto alla norma che limita l'accesso alle tecniche di fecondazione assistita alle sole coppie eterosessuali. La coppia omosessuale rappresenta anch'essa infatti una tipologia di coppia (in sé) totalmente sterile il cui diritto alla genitorialità, secondo il principio enunciato dalla Corte, potrebbe venir meno solo in relazione a valori costituzionali contrapposti di pari grado. L'aspettativa di diritto alla salute del nascituro implica forse l'aspettativa di vivere in un contesto familiare eterosessuale? E tale aspettativa costituisce un valore costituzionale di grado tale da giustificare l'intromissione del legislatore nell'autodeterminazione biologica della coppia? Questa questione andrà affrontata anche alla luce di quanto la Corte stessa ebbe a dire sullo status delle coppie omosessuali nella sent. 138/2010.

Keywords

Fecondazione eterologa, potenziamento umano, legge 40/2004, famiglia come società naturale, paradigma eterosessuale della famiglia

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1 Introduzione

Il dibattito sui diritti LGBT normalmente procede in modo graduale: parte dal superamento della discriminazione matrimoniale, per pervenire solo in un secondo momento al tema dell'omogenitorialità. Dapprima si ammette il principio secondo il quale chiunque può decidere liberamente chi sposare, senza dovere obbedire all'imposizione di limitazioni soggettive da parte dello Stato. Restano ovviamente ammesse le limitazioni legate all'età del coniuge, alla sua capacità naturale e legale di agire, necessarie per assicurare che il matrimonio sia l'espressione della volontà pienamente formata delle persone coinvolte, e non dei genitori o altri soggetti terzi, ma cessano di essere ammesse, e si riconoscono come irragionevoli, quelle legate al sesso. In una seconda fase, si prende in considerazione il tema dell'adozione che è più complesso perché coinvolge anche gli interessi di un soggetto terzo, il figlio adottato, e si ammette (quantomeno sulla base di una valutazione comparativa rispetto a situazioni drammatiche) che la condizione dell'orfano può, almeno in alcuni casi, essere migliorata con la sua assegnazione anche ad una coppia omosessuale. Solo in una terza fase, si ammette la possibilità di procreare per mezzo di tecniche di fecondazione assistita, nel caso delle coppie di donne lesbiche, con la donazione di gameti maschili da parte di un terzo, nel caso di coppie di uomini gay (ove sia ammessa) con la gestazione per altri.

La recente giurisprudenza costituzionale ha però affermato alcuni principi che sembrano prefigurare per l'Italia la possibilità di un percorso inverso. Mentre si è statuita, con la sentenza che ha cancellato il divieto di fecondazione eterologa, la pienezza del diritto alla autodeterminazione procreativa (suscettibile di essere limitata solo in presenza di un diritto costituzionalmente garantito di pari grado), si è ribadito, con una sentenza di poco successiva, che non vi è invece un diritto pieno alla autodeterminazione matrimoniale. Mentre in ambito procreativo, cioè, l'autodeterminazione segue le regole del bilanciamento costituzionale, in ambito matrimoniale si ritiene esista un modello, basato sui principi base fissati dal codice civile, da rispettare indipendentemente dal fatto che lo scostamento da esso comporti o meno la lesione di diritti altrui. L'autonomia negoziale di chi voglia contrarre matrimonio troverebbe infatti quantomeno il limite, che si suppone prefissato dai Costituenti, relativo ad una qualità personale dell'altro coniuge, il sesso, che dovrebbe essere necessariamente diverso dal proprio. Si è parlato un paradigma eterosessuale, implicitamente ricavabile dal testo dalla Carta.

Attualmente la legge 40/2004, all'art. 4, impone come requisito d'accesso alle tecniche di fecondazione assistita l'eterosessualità della coppia richiedente (che può però essere anche non coniugata). Tuttavia sembra, seguendo il ragionamento con cui la Corte ha cancellato il divieto di fecondazione eterologa, che questo limite possa essere rimosso semplicemente dimostrando che ciò non lederebbe un diritto di pari grado rispetto a quello all'autodeterminazione procreativa. Poiché l'altro interesse in gioco è chiaramente quello del bambino, basterebbe dimostrare che non esiste un interesse, tantomeno un interesse costituzionalmente garantito, del bambino a crescere

in un contesto familiare eterosessuale[1]: cosa peraltro oramai data per scontata dalla giurisprudenza della Corte di Strasburgo[2] che ha per effetto del rinvio contenuto all'art. 117 Cost. ha valore di parametro costituzionale nell'ordinamento interno.

Molto più irta di ostacoli sembra invece la via per il riconoscimento del diritto al matrimonio, che, a quanto pare, non potrà essere riconosciuto senza un intervento di revisione costituzionale da parte del legislatore, volto a rimodellare l'art. 29 in modo che la Corte cessi di scorgervi un paradigma di coniugio eterosessuale. Tale paradigma tuttavia si lega, ad avviso della Corte, all'esigenza che il matrimonio disciplini una relazione con "finalità (potenzialmente) procreativa". Il che provoca uno strano cortocircuito. Si può infatti pensare che un'eventuale declaratoria di illegittimità che riconosca l'accesso alle tecniche di p.m.a. alle persone dello stesso sesso possa, attribuendo anche alle coppie gay una "finalità potenzialmente procreativa", provocare il venir meno della *ratio* alla base della conservazione del modello eterosessuale di matrimonio che si ritiene tacitamente espresso dall'art. 29.

La giurisprudenza costituzionale ci consegna dunque un art. 29 schizofrenico, in cui la naturalità della società familiare significa autonomia e libertà nel caso dei diritti procreativi, ma significa aderenza necessaria a paradigmi precostituiti nel caso del diritto di sposarsi. Da un lato, l'atto procreativo è riconosciuto come un'espressione dell'autonomia della famiglia, che resta "società naturale", indipendentemente dal fatto che scelga di organizzarsi in modi inediti (si pensi al caso dell'ovodonazione che implica addirittura il coinvolgimento di tre soggetti invece di due nell'atto procreativo). Dall'altro, si considera il matrimonio estraneo a una simile autonomia e legato invece ad un paradigma fisso.

C'è da chiedersi dunque quali saranno gli scenari futuri, in che direzione si muoverà la Corte per ricondurre a ragionevolezza la propria stessa giurisprudenza.

2 Le sentt. 138/2010 e 170/2014

Con la sent. 170/2014, la Corte Costituzionale ha enunciato, indirettamente ma comunque in termini abbastanza chiari, l'incompatibilità del matrimonio omosessuale con la nostra Costituzione.

Si tratta della sentenza intervenuta in un peculiare caso in cui un matrimonio eterosessuale era divenuto omosessuale, a causa della rettificazione di sesso di uno dei coniugi[3]. I due componenti della coppia desideravano restare sposati, ma la Corte di Cassazione aveva ritenuto che le vigenti norme del codice civile non consentissero la permanenza del vicolo matrimoniale alla luce della mutata identità di genere di uno dei due e imponessero implicitamente, per un caso di questo tipo, una sorta di divorzio automatico. Ravvisando però un'incompatibilità di questa conclusione con

[1] Per la precisione, basterebbe dimostrare che non esiste un diritto adespota, costituzionalmente garantito, a non nascere se non in una famiglia eterosessuale (anzi a non essere concepito se non con l'aspettativa di poter essere cresciuti in un contesto familiare eterosessuale).

[22] Cfr. la sent. della Gran Camera resa nel caso X e altri c. Austria (2013).

[3] Per un approfondimento della vicenda trattata nel giudizio a quo, il cd. caso Bernaroli, segnalo le preziose riflessioni contenute nel primo numero della rivista GenIus ad esso completamente dedicata, e disponibile su Internet all'indirizzo: www.articolo29.it/genius/ (ultima consultazione: 29.09.2014).

molteplici articoli della Carta fondamentale, tra i quali l'art. 29, la Cassazione sollevava questione legittimità costituzionale. La Corte Costituzionale ha accolto la questione in modo solo parziale servendosi di un tipo di sentenza manipolativa tra i meno frequentemente utilizzati: una sentenza additiva di principio[4], una pronuncia, cioè, con la quale l'illegittimità è dichiarata ma non è eliminata direttamente dalla Corte, che si limita a invitare il legislatore a emendare le norme impugnate ispirandosi ad un principio che viene enunciato in termini astratti. Nella specie, la Corte ha dichiarato l'illegittimità costituzionale delle norme che determinano, in caso di sopravvenuta uguaglianza del sesso dei due coniugi, il divorzio automatico nella parte in cui non consentono alla coppia di restare unita in un rapporto giuridicamente regolato, diverso dal matrimonio, che spetterà al legislatore introdurre nell'ordinamento. I giudici ritengono infatti di non poter intervenire con una decisione che sostituisca il divorzio automatico con un divorzio a domanda, in quanto ciò equivarrebbe ad ammettere un matrimonio omosessuale nel nostro ordinamento, cosa che, a giudizio della Corte, contrasterebbe con l'art. 29 Cost..

Con questa sentenza, dunque, la Corte si spinge molto oltre (anzi, verrebbe da dire, molto più indietro) rispetto a quanto non si fosse spinta con la sent.138/2010, nella quale - come è noto - aveva affermato che l'art. 29, dando protezione a una concezione di matrimonio con "paradigma eterosessuale", non *richiedeva* che il medesimo diritto fosse esteso alle coppie omosessuali. Era difficile, però, immaginare che la copertura costituzionale del diritto di sposarsi delle coppie eterosessuali, esprimesse contemporaneamente un divieto di estendere il medesimo diritto alle coppie omosessuali, in quanto nella tradizione delle Costituzioni i diritti previsti vengono normalmente intesi come previsioni minime di tutela necessaria, non come previsioni massime di tutela consentita. L'idea del paradigma eterosessuale da negazione di una garanzia, con la sent. 170/2014, diventa addirittura divieto di una garanzia.

3 La lettura originalista dell'art.29 e la "(potenziale) finalità procreativa del matrimonio"

La Corte era pervenuta all'idea di un paradigma predefinito del rapporto coniugale servendosi di un'interpretazione originalista[5] dell'espressione "fondata sul matrimonio", che aveva ritenuto ancorata al significato che la parola poteva avere negli anni '40. Capovolgendo la gerarchia delle

[4] Francesca Biondi, 'La sentenza additiva di principio sul c.d. divorzio "imposto": un caso di accertamento, ma non di tutela, della violazione di un diritto', consultabile all'indirizzo: www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/giurisprudenza/2014/0026_nota_170_2014_biondi.pdf (ultima consultazione: 29.09.2014).

[5] Un criterio spesso adottato nell'ermeneutica giuridica è quello secondo il quale *ratio legislatoris* è irrilevante e ciò che davvero importa è soltanto la *ratio legis,* cioè l'intenzione della legge in se stessa, non l'intenzione che ad essa potremmo ascrivere solo con riferimento a ulteriori informazioni relative al suo autore empirico. Non sono tuttavia mancati nel pensiero giuridico, pur essendo in generale fortemente minoritari, orientamenti interpretativi tesi a valorizzare l'*intentio auctoris*: tra questi appunto i cosiddetti interpreti originalisti delle Costituzioni, specie di quella statunitense. Costoro, tra i quali spicca il nome del famoso giudice Scalia, per anni membro della Corte Suprema, ritengono che le parole del costituente americano vadano interpretate come parole di uomini del Settecento: i valori e i principi che esse enunciano perciò - secondo Scalia e gli originalisti - non tollererebbero letture attualizzate.

fonti, cioè, si era data della Costituzione un'interpretazione codicisticamente orientata. Recita la motivazione della sent. 138/2010:

> I costituenti, elaborando l'art. 29 Cost., discussero di un istituto che aveva una precisa conformazione ed un'articolata disciplina nell'ordinamento civile. Pertanto, in assenza di diversi riferimenti, è inevitabile concludere che essi tennero presente la nozione di matrimonio definita dal codice civile entrato in vigore nel 1942, che, come sopra si è visto, stabiliva (e tuttora stabilisce) che i coniugi dovessero essere persone di sesso diverso. Si deve ribadire, dunque, che la norma non prese in considerazione le unioni omosessuali, bensì intese riferirsi al matrimonio nel significato tradizionale di detto istituto. Non è casuale, del resto, che la Carta costituzionale, dopo aver trattato del matrimonio, abbia ritenuto necessario occuparsi della tutela dei figli (art. 30) […]. [L]a (potenziale) finalità procreativa del matrimonio […] vale a differenziarlo dall'unione omosessuale.

Questa impostazione è criticabile per molte ragioni che sono già state spiegate dalla dottrina costituzionalistica molto meglio di quanto non si possa fare in questo articolo[6]. Limitandosi alla più evidente, si può evidenziare che così non si dà protezione alla famiglia come società naturale, ma piuttosto come società giuridicamente definita e regolata dal codice civile. L'espressione società naturale, come emerge dagli atti dell'Assemblea costituente, invece, doveva alludere ad un ordine giuridico pre-legislativo, simile a quello cui implicitamente si riferisce l'art. 2, quando dichiara che la Repubblica non *costituisce* ma semplicemente "*riconosce* e garantisce" i diritti inviolabili. Alla base di questa retorica giusnaturalistica dei Costituenti, c'era il rifiuto delle pretese totalitarie espresse dall'ordinamento fascista che si era spinto a disciplinare le relazioni interpersonali anche nei loro aspetti più intimi: si pensi alla l. 1728/1938 che, all'art.1, proibiva il matrimonio "del cittadino italiano di razza ariana con persona appartenente ad altra razza" e, all'art. 2, subordinava il matrimonio dell'italiano con persona straniera al "preventivo consenso del Ministero dell'Interno". Il riconoscimento della famiglia come società naturale non può equivalere dunque all'imposizione di un paradigma vincolante relativo alle condizioni personali dei coniugi, ma al contrario come il riconoscimento di una fondamentale autonomia di scelta. Questa autonomia non è smentita ma confermata dall'espressione "fondata sul matrimonio", che significa fondata sul consenso: un principio questo che per esempio renderebbe contraria al disegno costituzionale attuale l'articolo di legge appena citato che fondava invece la famiglia, non sul consenso dei coniugi, ma sull'assenso del Ministero dell'interno.

Se proprio si volesse dare una lettura storica dell'art. 29, occorrerebbe poi tenere a mente che, a causa della dialettica tra le varie forze politiche rappresentate in Assemblea Costituente, uno dei caratteri più originali della Carta sta nel riconoscimento del principio di sussidiarietà, come criterio per il riparto dei poteri tra vari livelli di governo. Questo carattere originale deriva dalla tradizione cattolica ma anche da un compromesso tra le concezioni liberali che ponevano alla base

[6] Segnalo a mero titolo esemplificativo: Barbara Pezzini e Anna Lorenzetti (cura di), *Unioni e matrimoni same-sex dopo la sentenza 138 del 2010: quali prospettive ?* (Jovene, 2011); Gabriele Strazio e Matteo Winkler, *L'abominevole diritto* (Saggiatore, 2011).

del disegno costituzionale l'individuo e quelle socialiste che ponevano alla base lo Stato come garante del principio di solidarietà: la Repubblica sceglie una terza via che non è né individualista né statalista, ma valorizza, oltre all'individuo e allo Stato, l'autonomia di tutti i corpi intermedi ossia quelle varie "formazioni sociali" ove l'individuo realizza la sua personalità che trovano protezione nell'art. 2.

Al discutibile argomento originalista, la Corte ne associa un altro: il paradigma prefigurato nell'art. 29 giustificherebbe perché la coppia etero e quella omosessuale non rappresentano situazioni "omogee", in quanto la prima può procreare e la seconda no. Il matrimonio dovrebbe infatti assumere un'almeno potenziale finalità procreativa. Questo secondo argomento certo non spiega perché non sia incostituzionale il matrimonio di coppie sterili (tra le quali anche quelle che sono eterosessuali solo in ragione di un intervento di rettificazione di sesso di uno dei loro due componenti), e tuttavia appare molto più razionale del primo. Il fatto che da una relazione possa nascere un nuovo essere vivente appare come un significativo elemento di differenziazione tra un tipo di formazione sociale e l'altra. Si noti che la Corte Costituzionale ha affermato nella sent. 138/2010 e continua ad affermare nella 170/2014 che il riconoscimento alla famiglia omosessuale è obbligatorio nelle forme che il legislatore avrà il compito di definire, anche queste forme non dovranno (oggi precisa: non potranno) essere le medesime previste per il matrimonio, ma non ha specificato quale sia la differenziazione costituzionalmente imposta tra il matrimonio e l'istituto che dovrà regolare l'unione omosessuale. Presumibilmente dunque i caratteri del matrimonio che non potranno essere riconosciuti alle unioni omosessuali sono quelli che il legislatore considererà funzionalmente legati alla filiazione se non effettiva quantomeno potenziale.

Ebbene, già oggi le coppie omosessuali in realtà possono avere figli, per esempio servendosi degli strumenti giuridici presenti in altri stati o perché divenuti genitori in precedenti relazioni eterosessuali. Ma che cosa accadrà se il anche legislatore o la Corte stessa introdurrà la possibilità di accedere alle tecniche di p.m.a. alle coppie omosessuali o anche semplicemente alle donne single? Quale base razionale potrà restare per un regime differenziato tra famiglie etero e gay?

4 La sent. 162/2014. La legge 40/2004 come legge costituzionalmente necessaria. Divieti costituzionalmente necessari?

Se da un lato, con la sent. 170, la Corte fortifica una concezione originalista e antilibertaria dei diritti matrimoniali, dall'altro, con la sent. 162, pronunciata a distanza di un paio di mesi, afferma invece una concezione evolutiva e libertaria dei diritti procreativi.

La sent. 162/2014 è solo l'ultimo di una serie di interventi giurisdizionali (della stessa Corte Costituzionale, della Corte di Strasburgo e di giudici comuni, sia ordinari che amministrativi) che, dall'entrata in vigore della legge 40/2004, l'hanno progressivamente svuotata dei suoi contenuti originari. La storia di questa progressiva erosione[7] costituisce un importante lezione sul ruolo che il

[7] Per una recente ricostruzione delle tappe di questa storia, v. Paola Sanfilippo, *Dal 2004 al 2014: lo sgretolamento* necessario *della legge sulla procreazione medicalmente assistita*, consultabile all'indirizzo: www.penalecontemporaneo.it/upload/1404988561SANFILIPPO_2014.pdf , (ultima consultazione: 29.09.2014).

legislatore può assumere in relazione ai temi che attengono alla sfera più intima della persona umana, quei temi che il linguaggio giornalistico spesso chiama "questioni etiche"[8]. L'epopea giudiziaria della legge 40 insegna che, nella regolazione di simili argomenti più che altrove, il legislatore deve essere particolarmente cauto e non può fondare il suo intervento su scelte arbitrarie, ma solo su un ponderato calcolo degli interessi in gioco.

La fecondazione assistita è un tema rispetto al quale esisteva, fino al 2004, un vuoto di disciplina, nonostante in esso si contrappongano, come ha più volte sottolineato il giudice delle leggi, "plurime esigenze di tutela", che hanno imposto al legislatore l'obbligo costituzionale di intervenire. La necessità costituzionale della legge era già stata affermata con la sent. 45/2005, con la quale la Corte dichiarò inammissibile il *referendum* diretto ad abrogarla totalmente. La legge 40/2004, disse la Corte in quell'occasione, è:

> [l]a prima legislazione organica relativa ad un delicato settore, che negli anni più recenti ha conosciuto uno sviluppo correlato a quello della ricerca e delle tecniche mediche, e che indubbiamente coinvolge una pluralità di rilevanti interessi costituzionali, i quali, nel loro complesso, postulano quanto meno un bilanciamento tra di essi che assicuri un livello minimo di tutela legislativa. […] [L]a richiesta di sottoporre a *referendum* abrogativo l'intera legge […] coinvolge quindi una normativa […] costituzionalmente necessaria.

Su quale sia la precisa natura di queste esigenze e di questo obbligo, la Corte Costituzionale continua in parte, con questa pronuncia, a serbare il silenzio, ponendo il legislatore in una condizione di incertezza circa l'estensione del proprio potere discrezionale nella regolazione (e deregolazione) della materia. In altre parole, la Corte ribadisce che la legge 40 è costituzionalmente necessaria, ma non spiega chiaramente il perché.

Poiché è stata creata con lo scopo di disciplinare una tecnica prima totalmente libera (si parlava di "*far west* procreativo"), si potrebbe essere indotti a pensare che la sua natura necessaria derivi dalla necessità costituzionale che l'ordinamento esprima alcuni divieti. Essa disciplina la p.m.a. principalmente nel senso di vietarla (in alcuni casi e in mancanza di alcune condizioni) e si potrebbe perciò ritenere che la tutela minima cui allude la Corte coincida necessariamente con uno o più divieti (o obblighi o oneri) minimi.

Già in un commento a quella pronuncia[9], tuttavia, Antonio Ruggeri notava che si trattava di una legge costituzionalmente necessaria nel suo complesso, ma non nelle sue singole parti. La Corte qualificava la legge come necessaria ma non spiegava che cosa all'interno di essa fosse necessario e che cosa accessorio. Il suo carattere necessario aveva determinato il rigetto del quesito volto

[8] Tali non perché abbiano una maggiore attinenza con l'etica rispetto ad altre questioni (come la distribuzione della ricchezza, la lotta alla criminalità o l'amministrazione della giustizia), ma perché sembrano riguardare l'etica privata delle relazioni interpersonali (rimessa in una società pluralistica all'autodeterminazione delle formazioni sociali interessate) più dell'etica pubblica..

[9] Antonio Ruggeri, Tutela minima" di beni costituzionalmente protetti e referendum ammissibili (e... sananti) in tema di procreazione medicalmente assistita (nota "a prima lettura" di Corte cost. nn. 45-49 del 2005), in Marcella Fortino (cura), La procreazione medicalmente assistita (Giappichelli 2005), p. 317.

all'abrogazione totale mentre non aveva ostacolato l'ammissibilità dei quattro quesiti relativi ad alcune norme specifiche. Da questo qualcosa si poteva desumere: l'esigenza di disciplina della p.m.a. non derivava dalla permanenza nel sistema giuridico italiano delle singole norme incise dai quattro quesiti proposti, ma evidentemente da qualcos'altro.

Tra i punti della legge incisi da uno dei quesiti referendari vi era il divieto di fecondazione eterologa. Si poteva dunque già immaginare, che nel giudizio di legittimità costituzionale relativo a tale norma, l'eccezione di inammissibilità, proposta dall'Avvocatura dello Stato, secondo la quale l'eventuale accoglimento della questione avrebbe creato un vuoto normativo costituzionalmente inaccettabile, sarebbe stata respinta. La Corte, in effetti, respinge tale eccezione. Oltre a richiamare i menzionati precedenti relativi all'ammissione dei quesiti referendari del 2005, elenca alcuni "profili di più pregnante rilievo", che nonostante dichiarazione di illegittimità della norma impugnata, restano adeguatamente disciplinati. Il legislatore anzitutto - osserva la Corte - pur avendo vietato l'eterologa, ne ha regolato le eventuali conseguenze civilistiche, consapevole del fatto che vietare un fenomeno non equivale a cancellarlo dalla realtà e che comunque si tratta di una tecnica ammessa in altri ordinamenti:

> [S]ono […] identificabili più norme che già disciplinano molti dei profili di più pregnante rilievo, anche perché il legislatore, avendo consapevolezza della legittimità della PMA di tipo eterologo in molti paesi d'Europa, li ha opportunamente regolamentati, dato che i cittadini italiani potevano (e possono) recarsi in questi ultimi per fare ad essa ricorso, come in effetti è accaduto in un non irrilevante numero di casi.

Inoltre, le norme residue della legge forniscono elementi sufficienti per rispondere a tutti i più rilevanti interrogativi giuridici che l'introduzione dell'eterologa anche in Italia potrebbe suscitare:

> La ritenuta fondatezza delle censure *non determina incertezze* in ordine all'identificazione dei casi nei quali è legittimo il ricorso alla tecnica in oggetto. […] *Nessuna lacuna* sussiste in ordine ai requisiti soggettivi […]. Ad analoga conclusione deve pervenirsi quanto alla disciplina del consenso […]. È, inoltre, parimenti chiaro che l'art. 7 della legge n. 40 del 2004, il quale offre base giuridica alle Linee guida emanate dal Ministro della salute, […] concernendo il genus PMA, di cui quella di tipo eterologo costituisce una species, è, all'evidenza, riferibile anche a questa, come lo sono altresì gli artt. 10 ed 11, in tema di individuazione delle strutture autorizzate a praticare la procreazione medicalmente assistita e di documentazione dei relativi interventi.

Come si vede bene in questo passaggio, la più esplicita preoccupazione della Corte è che il fenomeno della procreazione assistita nel suo complesso resti disciplinato da norme certe: la sentenza insiste sull'esigenza costituzionale di una *presa di posizione* da parte del legislatore in materia, senza però dire che questa sia limitata nei suoi contenuti da vincoli, se non da quello della ragionevolezza. D'altronde, non appena nel *Considerato in diritto* la Corte ricorda la natura costituzionalmente necessaria della legge 40, subito precisa che "[n]ondimeno, in parte qua, non ha

contenuto costituzionalmente vincolato". L'inciso "in parte qua", che significa in questo caso "in materia di eterologa", limita la portata dell'affermazione, lasciando aperta la possibilità che la Corte possa un giorno dirci che alcune altre disposizioni della legge sono dopotutto immodificabili; ma resta l'importanza della distinzione. Che una legge sia costituzionalmente necessaria ovviamente non significa di per sé che tutte, o anche solo parte, delle sue disposizioni abbiano un contenuto costituzionalmente vincolato[10]. La necessità costituzionale di una legge ordinaria, anzi, tipicamente dipende dal presupposto che coesistano più modelli di possibile attuazione del dettato della Carta, tutti disponibili al legislatore. Al legislatore, dunque, in tali casi non è vietato, ma al contrario è imposto, di esercitare la propria discrezionalità[11].

Nel caso di specie, come si desume dal passo citato, la necessità di una legge in materia di p.m.a non equivale alla certezza che alcuna delle disposizioni in essa attualmente contenute siano immodificabili. Per quanto qui può interessare, certo, non equivale a dire che è necessario che essa sia concessa per le sole coppie eterosessuali. Equivale piuttosto all'esigenza che, di fronte a una scoperta tecnologica suscettibile di incidere in modo molto significativo sulla possibile estensione di diritti fondamentali, il legislatore si esprima. Questo presumibilmente perché l'espansione, sul piano di fatto, della possibilità pratica di realizzazione di un interesse, protetto dalla Costituzione, può implicare l'espansione del diritto individuale a realizzare quell'interesse, sempre che questa espansione non comprima i diritti di altri individui, o comunque sempre che non li comprima in misura irragionevole.

La necessità costituzionale della legge non deve quindi per forza essere interpretata come l'obbligatorietà costituzionale di porre un freno alla *hybris* dell'uomo tecnologico, ma anche in modo quasi contrario. L'evoluzione scientifica genera, sì, "plurime esigenze di tutela", ma non solo nei confronti dei titolari di diritti che potrebbero risultare materialmente lesi dall'introduzione di una nuova tecnologia; anche, e soprattutto, nei confronti di persone che, con l'accesso a nuovi mezzi, potrebbero vedere espansa la propria sfera giuridica.

5 Il diritto di procreare della "coppia assolutamente sterile o infertile"

In un passo cruciale della motivazione si legge:

[10] Le leggi a contenuto costituzionalmente vincolato sono leggi costituzionalmente necessarie, ma non viceversa. Cfr. Simone Penasa, *L'ondivaga categoria delle leggi "a contenuto costituzionalmente vincolato",* consultabile all'indirizzo: www.forumcostituzionale.it/site/index3.php?option=content&task=view&id=550 (ultima consultazione: 29.09.2014).

[11] La Corte nella sent. 45/2005 ha rammentato che "il vincolo costituzionale può anche riferirsi solo a parti della normativa oggetto del quesito referendario o anche al fatto che *una disciplina legislativa comunque sussista*" In un certo senso, dunque, l'esistenza di fenomeni che è costituzionalmente necessario regolamentare con legge ordinaria pone il legislatore in una situazione analoga a quella in cui l'esercizio del diritto di azione pone il giudice: il dovere di fornire una risposta strutturalmente conforme al diritto ad una domanda di tutela e il divieto di *non liquet.*

La determinazione di avere o meno un figlio, anche per la coppia assolutamente sterile o infertile, concernendo la sfera più intima e intangibile della persona umana, non può che essere incoercibile, qualora non vulneri altri valori costituzionali.

Il presupposto implicito di questa affermazione è che la tecnologia abbia la capacità di espandere i diritti della persona. Se accedere alle tecniche di aiuto alla procreazione quando non si è in grado di procreare, fa parte del diritto alla procreazione, ciò che significa che la mera invenzione di tali tecniche, estendendo la possibilità pratica di procreare, ha anche esteso il contenuto del diritto alla procreazione.

Si noti che nel ragionamento della Corte non solo il diritto alla procreazione include quello alla procreazione artificiale, ma è bandita ogni discriminazione tra le diverse tecniche di procreazione artificiale che si fondi sulla mera circostanza che la tecnica rassomigli strutturalmente alla procreazione naturale oppure no. Si pensi in particolare al caso della procreazione assistita con ovodonazione, che la sentenza in esame, rende possibile anche in Italia. Essa consente, scindendo il concetto di madre in due (una madre genetica, e una gestante) un modalità di procreazione, per la quale un bambino può nascere da tre persone; cosa che ovviamente non potrebbe accadere in natura con un rapporto sessuale. Ebbene anche l'uso di questo metodo, al fine di procreare, rientra nel novero dei diritti attribuiti alla famiglia-"società naturale".

La sentenza sembra esprimere un'indicazione di metodo, che può considerarsi di rilevanza generale nel settore del biodiritto, in quanto sembra implicitamente prendere posizione in un dibattito aperto in ambito bioetico e biogiuridico: quello del cosiddetto potenziamento umano. Il fatto di considerare irragionevole il diverso trattamento riservato dal legislatore alla fecondazione artificiale omologa che, coinvolgendo due sole persone di sesso diverso, imita strutturalmente la procreazione naturale e quella eterologa che può, nel caso della donazione di ovocita, coinvolgerne tre, implica il superamento di un pregiudizio naturalistico. Il fatto che una tecnica medica vada, per così dire, contronatura, attribuendo artificialmente al corpo umano funzioni inedite non è *di per sé* un motivo ragionevole per vietarla[12], specie ove quella tecnica sia per il paziente il mezzo per godere di un diritto costituzionalmente garantito, qual è quello alla procreazione.

Il potenziamento umano è un argomento molto dibattuto oggi, non solo in ambito filosofico[13], ma anche in ambito giuridico[14] e spesso se ne parla con riferimento a temi molto diversi da quello di cui stiamo trattando ora[15]. Sicuramente, tuttavia, anche la questione dell'aiuto alla fecondazione si presta ad essere esaminata da questo punto di vista: le tecniche di p.m.a. devono essere vincolate a riprodurre gli effetti della filiazione naturale o possono legittimamente mirare a produrre effetti,

[12] Per una difesa di un punto di vista simile sul piano, però, prettamente etico-filosofico, v. Allen Buchanan, 'Human Nature and Enhancement' (2009) 23 Bioethics 141

[13] Per una panoramica sul dibattito filosofico sul tema, v. Julian Savulescu e Nick Bostrom, *Human Enhancement* (Oxford University Press 2009).

[14] Per una bellissima discussione delle tematiche giuridiche lambite dal fenomeno segnalo Stefano Rodotà, *Il diritto di avere diritti,* (Laterza, 2012), in part. il cap. 13 delicato al "Post-umano":

[15] Per esempio, il Comitato Nazionale di Bioetica ha di recente adottato due pareri in materia di potenziamento umano intitolati rispettivamente *Neuroscienze e potenziamento cognitivo farmacologico* e *Diritti umani, etica medica e tecnologie di* potenziamento *(enhancement) in ambito militare*.

desiderati, ma non praticamente realizzabili senza tecnologia? Nel caso citato dell'ovodonazione, la riproduzione umana viene alterata non solo nei suoi suoi presupposti ma anche nei suoi effetti, nel senso che crea un assetto di relazioni inesistente in natura. Il diritto di procreare va difeso, anche se per esercitarlo si modifica il risultato del processo procreativo: un figlio non di soli due soggetti, ma di tre[16].

L'impostazione è dunque lontanissima rispetto a quella delle sentt. 138/2010 e 170/2014. In questo caso, si esclude l'idea che la Costituzione imponga dei paradigmi di relazioni familiari rigidi ma al contrario si ritiene che le stesse garanzie costituzionali possano estendersi laddove la tecnologia e l'evoluzione sociale, senza ledere diritti di altri, espandano le possibilità di azione e organizzazione familiare dell'uomo.

6 Potenziamento umano e potenziamento dei diritti. Società naturale come società libera

Con riferimento al movimento di opinione che dato origine alla legge 40, Stefano Rodotà ha scritto:

> Sembra quasi che l'umanità, vissuta fino a ieri al riparo delle leggi di natura, scopra luoghi dove l'irrompere improvviso della libertà si rivela insopportabile. Si rivelano così aree dell'esistenza che dovrebbero essere "normate", perché la libertà di scegliere, dove prima era solo caso o destino, spaventa, appare come un pericolo o un insostenibile peso. Se cadono le leggi della natura, l'orrore del vuoto che esse lasciano deve essere colmato dalle leggi degli uomini[17].

Ebbene, la Corte Costituzionale non solo rigetta questa impostazione, ma la capovolge. L'esigenza di disciplina che rende una legge in materia di procreazione assistita necessaria non è quella di ripristinare un pretese leggi di natura violate dalla scienza, ma quella di regolare l'espansione di diritti costituzionalmente garantiti, percepita come una conseguenza necessaria del progresso scientifico. Poiché la tecnologia consente di superare limitazioni naturali, si apre la possibilità che l'intero catalogo dei diritti umani sia suscettibile di essere riletto in chiave di diritti transumani.

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[16] Certo ciò viene concesso per risolvere, o meglio aggirare, un problema di salute, la sterilità, ma nel momento in cui si accetta che la naturalità di per sé non è un valore, questo presupposto appare poco rilevante, nel ragionamento dei giudici. Se davvero esiste un diritto all'autodeterminazione procreativa che trova come unico limite, non un paradigma naturale di filiazione, ma la tutela di diritti fondamentali di pari rango, perché obbligare alla fecondazione naturale persone non malate? Non a caso, la Corte nell'interpretare l'art. 32, fa riferimento al concetto di salute accolto dall'Organizzazione Mondiale della Sanità, che notoriamente respinge la dicotomia netta tra salute-malattia. Si legge infatti nella sentenza che: "La disciplina in esame incide [...] sul diritto alla salute, che, secondo la costante giurisprudenza di questa Corte, va inteso 'nel significato, proprio dell'art. 32 Cost., comprensivo anche della salute psichica oltre che fisica' [...]. [Q]uesta nozione corrisponde a quella sancita dall'Organizzazione Mondiale della Sanità, secondo la quale 'Il possesso del migliore stato di sanità possibile costituisce un diritto fondamentale di ogni essere umano' (Atto di costituzione dell'OMS, firmato a New York il 22 luglio 1946)".

[17] Stefano Rodotà, *Perché laico* (Laterza, 2009) 69.

Quest'impostazione secondo la quale il potenziamento umano può determinare il potenziamento dei diritti previsti dalla Costituzione è stato aspramente criticato da Andrea Morrone il quale, nel commentare la sentenza, ha coniato un nuovo brocardo, che in modo molto icastico sintetizza l'idea di fondo del ragionamento: *ubi scientia, ibi iura*. Scrive Morrone:

> Si potrebbe pensare che la concezione sottesa alla pronuncia sia quella della al servizio della persona e dei suoi diritti. A me pare, invece, che i diritti e la persona finiscono per dipendere sempre di più dalla scienza e dalla tecnica […]. Il diritto alla genitorialità e il diritto alla famiglia con prole derivano dalla libera del soggetto (ammesso che quest'ultimo sia un diritto secondo la nostra oppure sono il frutto della scienza e della tecnica? Il diritto ad essere genitore è un della persona o una possibilità consentita alla persona dalla medicina?[18]

La risposta a queste domande (che l'autore pone polemicamente come domande retoriche) sembra essere che il diritto alla genitorialità deriva sì dalla libera autodeterminazione, ma il progresso scientifico ne ha esteso la portata; il diritto ad essere genitore è un aspetto della persona, ma non per questo non può estrinsecarsi anche attraverso nuove tecniche consentite dalla medicina; è un aspetto della persona, ma non è vincolato ad una nozione pre-tecnologica di persona.

Se il diritto costituzionale proteggesse i diritti solo nella misura in cui essi potevano essere goduti in un ideale stato di natura, privo di tecnologia, ben poca tutela potrebbe offrire la Costituzione all'uomo contemporaneo. Il ragionamento appare in tutta la sua semplicità se invece di riferirlo al diritto alla procreazione lo riferiamo per esempio alla libertà di espressione. Quando affermiamo che accedere a Internet per comunicare costituisce una forma di esercizio del diritto alla libertà di espressione, diamo per scontato che il contenuto di questo diritto sia stato arricchito dall'invenzione di Internet. Lo stesso potrebbe dirsi dell'invenzione della stampa, o della scrittura. Man mano che il progresso ci consegna nuovi strumenti per comunicare, il diritto si espande nelle sue potenziali manifestazioni. E non ci stupiamo che esso possa contemporaneamente derivare dalla "libera autodeterminazione del soggetto" e, in molti, forse nella maggior parte dei casi, essere anche "il frutto della scienza e della tecnica".

Quando, dunque, la scienza è in grado di potenziare l'uomo nelle sue facoltà tecniche, è possibile che anche i diritti dell'uomo ne risultino conseguentemente potenziati. È possibile, ma non è scontato: è necessario, come si è già detto, che questa, per così dire, espansione tecnologica del diritto individuale non vada a ledere altri diritti o valori costituzionali. Ma nel bilanciamento tra i vari interessi in gioco, nell'ambito del giudizio di ragionevolezza, non rileverà di per sé che un diritto sia esercitato in modo "naturale" o con la mediazione di uno strumento tecnologico.

Morrone prosegue tuttavia la sua critica sottolineando che:

> L'autodeterminazione soggettiva è solo una faccia della libertà dell'individuo, la quale, come ogni libertà, deve trovare fondamento, concretizzazione ed effettività

[18]Andrea Morrone, 'Ubi scientia, ibi iura. A prima lettura sull'eterologa', consultabile in www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/giurisprudenza/2014/0022_nota_162_2014_morrone.pdf (ultima consultazione: 05.09.2014).

> nell'ambito di una comunità politica organizzata. Quella che pare emergere nella pronuncia in commento è, in sostanza, una concezione delle libertà meramente individualistica, egoistica, sradicata da relazioni intersoggettive, lontana dall'idea repubblicana della 'libertà sociale'. L'idea che i diritti fondamentali siano attributi della della persona come animale sociale e politico, sembra essere scalzata da un'innovativa un'innovativa teoria delle libertà come facoltà consentite all'uomo dalla scienza e dalla tecnica.[19]

Eppure, la prospettiva di diritti fondamentali post- o trans-umani, che si intravede in questa pronuncia, non collide affatto con un'idea sociale dell'esercizio della libertà, e anzi la presuppone. Viene alla mente, in proposito, il secondo comma dell'art. 3, che forse tra le varie norme costituzionali è quella che in modo più diretto definisce la dimensione sociale delle libertà previste dalla Carta. È infatti l'art. 3 che dopo avere enunciato la pari dignità sociale dei cittadini al primo comma, nel secondo attribuisce alla Repubblica il compito di rimuovere gli ostacoli sociali che limitando *di fatto* la libertà e l'eguaglianza impediscono il pieno *sviluppo* della persona umana. Gli ostacoli sociali cui allude l'art. 3 non sono solo quelli di censo, ma anche quelli legati alla corporeità, alla salute eccetera. Per la Costituzione, la realtà *di fatto*, ossia la natura, non dovrebbe costituire dunque un limite all'autodeterminazione personale dei cittadini. È inoltre rilevante il riferimento alla persona umana, che la Repubblica, secondo l'art. 3, ha l'obbligo non semplicemente di proteggere, ma di far *sviluppare*.

La Costituzione dunque non parte dall'idea rousseauiana secondo cui l'uguaglianza coincide con la condizione di un ideale "stato di natura", ma dall'idea opposta: l'idea che l'uguaglianza sia un costrutto tipicamente artificiale che non si realizza naturalmente ma solo grazie l'impegno degli uomini e delle istituzioni giuridiche.

La sent. 162 coglie dunque il profilo più libertario dell'art. 29, per il quale la qualificazione della famiglia come "società naturale" non implica una diminuzione, ma un aumento della sua libertà: non l'obbligo che essa si conformi a paradigmi codicistici o comunque legislativamente precostituiti, ma il suo diritto di strutturarsi in modo autonomo e senza interferenze da parte dello Stato (salve ovviamente le interferenze necessarie per proteggere diritti costituzionalmente garantiti).

7 Conclusioni

Abbandonato in ambito procreativo il *favor* per strutture familiari tradizionali, molti altri limiti contenuti della legge 40 cominciano a vacillare, compreso il divieto di accesso alle tecniche da parte di coppie omosessuali. Quale diritto infatti potrebbe entrare in bilanciamento con il diritto procreativo della coppia omosessuale fino ad arrivare ad estinguerlo? Può esistere un diritto di pari grado del minore a non nascere se non nell'ambito di un contesto familiare eterosessuale?

Le ragioni che fanno propendere per il no sono molte e di vario genere. Anzitutto, ragioni legate al diritto vivente, che non può non essere preso in considerazione anche dalla Corte

[19] Ibidem.

Costituzionale per valutare la reale regolazione di situazioni analoghe da parte della legge ordinaria, situazioni suscettibili di essere assunte come *tertium comparationis* nell'ambito del giudizio di ragionevolezza. La giurisprudenza italiana recente ammette, ad esempio, l'affido di minori a coppie di fatto dello stesso sesso o la cd. step-child adoption da parte del partner omosessuale del genitore di un bambino. La stessa Cassazione ha poi qualificato come "mero pregiudizio" quello secondo cui sarebbe "dannoso per l'equilibrato sviluppo del bambino il fatto di vivere in una famiglia incentrata su una coppia omosessuale" (Cass., I sez. civ. n. 601/2013). La legge italiana assume dunque come presupposto implicito in molte circostanze che il contesto familiare omosessuale sia pienamente adeguato alla crescita sana del minore. È ragionevole che una *ratio* contraddittoria rispetto questa possa informare le norme che fissano i requisiti d'accesso alla procreazione assistita, se è vero che, come ha stabilito la Corte, il diritto ad accedervi da parte di coppie sterili è un diritto incoercibile?

In secondo luogo, la nota sentenza della Gran Camera della Corte di Strasburgo resa nel caso X e altri c. Austria spinge nel senso della piena equiparazione tra coppie non sposate etero e gay sul piano della loro idoneità a svolgere il ruolo di genitori. Si tratta di una sentenza relativa ad una vicenda giudiziaria scaturita dal rifiuto delle autorità austriache di consentire l'adozione cd. "coparentale", del figlio minore di una donna, da parte della sua compagna. In quel caso, la Corte ha ritenuto che la legge austriaca fosse discriminatoria perché concedeva l'adozione alle coppie non sposate etero, ma non alle coppie gay (che non sposate, anche in Austria, ancora lo sono per forza). La Corte ha precisato che non vi sarebbe discriminazione se l'Austria ammettesse l'adozione da parte delle sole coppie sposate, in quanto da un lato il matrimonio è un requisito che non può essere considerato discriminatorio e dall'altro il fatto di non concedere il diritto a sposarsi alle coppie omosessuali è una scelta che rientra nel margine di apprezzamento di ciascuno Stato aderente alla Convenzione. Poiché però il legislatore austriaco ha discriminato le coppie, non sulla base del fatto fossero sposate o no, ma solo sulla base del sesso dei loro membri la normativa impugnata è stata giudicata illegittima. È evidente che se la medesima *ratio* venisse applicata alla legislazione italiana in materia di fecondazione assistita, sulla base dello stesso ragionamento, il divieto di accesso alle tecniche alle coppie omosessuali potrebbe venire meno, in quanto anche in questo caso vi sarebbe una discriminazione tra coppie non sposate etero e gay. Poiché la Corte Costituzionale ha rimosso il divieto di fecondazione di tipo eterologo, la situazione risulta totalmente assimilabile a quella dell'adozione coparentale su cui si è pronunciata la Corte di Strasbugo, con la sentenza appena menzionata. In entrambi i casi, vi è una legislazione che non assume come criterio di idoneità di una coppia ad allevare congiuntamente il figlio di uno dei suoi membri, il fatto che sia una coppia sposata, ma piuttosto il fatto che sia una coppia eterosessuale. Ciò viola il combinato disposto degli artt. 8 e 14 della Convenzione e per il loro tramite l'art.117 della Costituzione italiana.

In terzo luogo, ammettendo per assurdo che il contesto familiare eterosessuale sia preferibile per lo sviluppo sano del minore, resta tuttavia difficile ipotizzare pensare che, ammessa in generale la fecondazione eterologa, l'ordinamento italiano possa esprimere divieti specifici per ragioni eugenetiche. Se per esempio evidenze statistiche mostrassero che i figli di coppie ricche crescono con un aspettativa di vita maggiore rispetto a figli di coppie povere, sarebbe questo un legittimo motivo per impedire l'accesso alle tecniche di fecondazione assistita alle prime e non alle seconde?

Peraltro, non si può non segnalare come il diritto del minore a nascere in un contesto familiare adeguato abbia finora avuto un'importanza molto relativa nel diritto vivente: si pensi che, da tempo, la Corte di Cassazione ha stabilito che il diritto alla procreazione per mezzo di fecondazione assistita costituisce un diritto inviolabile anche per l'ergastolano in regime di 41bis!

Se la Costituzione dunque non incorpora, come ci insegna la sent. 162, il vincolo a uno schema procreativo naturale, in breve, non restano ragioni obiettive per non ammettere un diritto alla procreazione alle coppie omosessuali, o quantomeno alle coppie di donne lesbiche. Il tema della procreazione da parte degli uomini gay è più complesso perché implica la necessità di rimuovere un ulteriore divieto presente nella legge 40, il divieto di gestazione per altri (art. 12, comma 6), che è comunque un altro dei divieti che la *ratio* espressa nella sentenza sembra mettere in discussione.

Appare evidente dunque come la Corte si trovi a un bivio. Sentenze come la 138/2010 e la 162/2014 non possono coerentemente coesistere. In un caso, infatti, la famiglia protetta è quella naturale nel senso di tradizionale, nell'altro è naturale nel senso di libera. È quest'ultima, a giudizio di chi scrive, l'interpretazione che dovrà prevalere. La Costituzione alludendo a diritti naturali preesistenti o società naturali, non protegge la natura dell'uomo, se non proteggendo la sua libertà, la sua capacità di autodeterminazione, che secondo il pensiero umanistico, ne è la più autentica essenza. Ci sarebbe una profonda contraddizione infatti nella pretesa di preservare dall'artificio una nozione originaria, pura, pre-tecnologica e pre-sociale, di uomo. La natura dell'uomo *è* l'artificio. A differenza di altri animali, infatti, gli uomini soddisfano i propri interessi, non semplicemente attraverso l'istinto, ma soprattutto attraverso il ragionamento, la cultura e anche attraverso i mezzi tecnici che le acquisizioni culturali e scientifiche hanno consegnato alla specie. Il primo tra questi artifici è l'artificio giuridico, che con le sue istanze di eguaglianza e giustizia, mira a disciplinare le relazioni tra individui.

Si sente parlare spesso di leggi contronatura e dell'esigenza di proteggere la natura umana dalle degenerazioni contemporanee. Ma che cos'è la natura umana? Nell'*Oratio de hominis dignitate*, Pico della Mirandola immagina che Dio dopo avere creato l'uomo lo ponga al centro del mondo e, con queste parole, gli spieghi che cosa distingue da tutti gli altri animali:

> Non ti ho assegnato, o Adamo, né una sede determinata né un proprio volto né alcun privilegio che fosse esclusivamente tuo, affinché quella sede, quel volto, quei privilegi che tu desidererai, tutto tu possa avere e conservare secondo il tuo desiderio e il tuo consiglio. La natura determinata per gli altri è chiusa entro leggi da me prescritte. Tu, invece, te le fisserai senza essere impedito da nessun limite, secondo il tuo arbitrio al quale ti ho consegnato. Ti ho posto nel mezzo del mondo perché di là tu possa più agevolmente abbracciare con lo sguardo tutto ciò che c'è nel mondo. Non ti ho fatto né celeste né terreno né mortale né immortale affinché, quasi di te stesso arbitro e sommo artefice, tu possa scolpirti nella forma che avrai preferito. [20]

[20] Pico della Mirandola, *Oratio de hominis* dignitate (tr. di E. Garin) (Edizioni Studio Tesi 1994) 7.

Detenzione e nuclei stabili LGBTI
I diritti di una fragile libertà•

*Marco Bracoloni**

Abstract

Obiettivo del presente studio è indagare il complesso quadro delle tutele dei diritti di coloro che sono sottoposti a restrizione della libertà personale in caso di detenzione di uno dei componenti dei nuclei stabili LGBTI (definiti anche famiglie omogenitoriali). Tutele rivolte all'aspetto dell'affettività e dei diritti legati al more uxorio, ai diritti legati alla cura del bambino che vive all'interno del nucleo stabile LGBTI ed alla dimensione dei diritti riproduttivi dei soggetti detenuti. Il quadro, già complesso, del detenuto LGBTI si complica ulteriormente in tutti i casi in cui sia presente anche lo status genitoriale, ovvero nel caso in cui il soggetto detenuto sia il genitore biologico o adottivo, oppure nel caso in cui il soggetto detenuto esercitasse di fatto, all'interno del nucleo stabile LGBTI, la funzione genitoriale. Tali aspetti si intrecciano anche con i congedi di maternità, paternità e parentali in senso ampio. È necessario che l'approccio non sia più solo fondato sulle discipline tese ad eliminare le discriminazioni di genere ma che guardi al "genitore" come colui che accoglie nel proprio nucleo stabile un nuovo componente, il bambino, a cui vuole trasmettere affetto, benessere e cure, contribuendo così, insieme alla sua crescita, anche allo sviluppo produttivo della società; come colui che necessita di rapporti con il mondo esterno familiare in quanto ristretto. La discussione va ricondotta alla garanzia preminente dell'interesse del fanciullo, individuando le disposizioni che permettono la cura dei figli, o rimuovendo gli ostacoli se presenti ed individuati, per consentire anche al genitore non biologico dei nuclei stabili LGBTI, di fruire dei diritti legati alla loro cura, quali, ad esempio il miglioramento delle modalità attraverso le quali permettere ai detenuti di mantenere e sviluppare relazioni familiari il più possibile naturali e normali, ivi compresi i permessi in ambito lavorativo retribuiti e non, anche attraverso un maggior ricorso allo *stepchild adoption*. In conclusione, occorre riconoscere al bambino il diritto ad avere un regime di cura adeguato, indipendentemente dal genere dei propri genitori. Il figlio deve essere considerato quale soggetto di diritto e non solo oggetto del diritto del genitore.

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• Le considerazioni contenute nel presente scritto sono frutto esclusivo dell'Autore e non hanno carattere in alcun modo impegnativo per l'Amministrazione di appartenenza.

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1 Il detenuto componente del nucleo stabile LGBTI[1] e i legami meritevoli di tutela: l'affettività

1.1 Il panorama normativo: la politica comunitaria e la specificità dei singoli Stati in caso di detenzione di un componente del nucleo stabile LGBTI

La politica comunitaria ha inserito tra i suoi obiettivi principali la riduzione e l'eliminazione delle discriminazioni, lo ha fatto attraverso l'introduzione del principio di parità[2], perseguito tramite l'adozione di azioni mirate al suo raggiungimento. In tema di esecuzione della pena le politiche sociali di ogni singolo Stato dell'Ue presentano diverse posizioni.

Se da un lato, partendo dalla Convenzione per la salvaguardia dei diritti dell'uomo, sino alle Raccomandazioni del Comitato dei Ministri n. 1340/97 e da ultimo dell'11 gennaio 2006 – definite più genericamente "Regole 2006" - , sono presenti norme tendenti ad una riduzione in materia penitenziaria della tendenza discriminatoria di natura omofobica, dall'altro le specificità di ogni singolo Stato in tema di affettività in corso di esecuzione della pena, determinano le caratteristiche del regime carcerario che possono ripercuotersi anche nel mercato del lavoro e della cura dei figli.

L'interrogativo del senso della pena, soprattutto in tema di inviolabilità del diritto alla affettività, alla sessualità ed alla genitorialità del detenuto, mostra sempre più l'aspetto dirompente della così detta umanizzazione della pena.

La sentenza Torrigiani, anche se non riguarda nello specifico i temi legati al detenuto LGBTI, pone l'accento sul necessario e primario obiettivo di migliorare le condizioni detentive eliminando tutte le condizioni negative presenti nei carceri, soprattutto sovraffollati, che incidono sullo stato psicofisico dei detenuti. Ne sono testimonianza gli alti tassi di decessi e suicidi.

I dati[3] che rilevano la popolazione carceraria in Europa mettono in risalto un crescente incremento della popolazione, anche se il rapporto italiano è oggi in controtendenza[4], con una popolazione maschile che si avvicina al 95%. Il Paese con la maggiore incidenza di stranieri è l'Italia con oltre il 35% di stranieri.

Di difficile e complicato reperimento è un dato che rilevi la tendenza omofobica in carcere, la quale si ritiene comunque molto sviluppata e discriminante rispetto a chi ha già manifestato il

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[1] Per una definizione del Nucleo Stabile LGBTI, mi permetto di rinviare alla definizione contenuta in M. Bracoloni, *The rights of the care of the child as well as maternity, paternity and parental leave in stable LGBTI family units*, saggio contenuto nel volume *Equality and Justice – Sexual Orientatiion and Gender Identity in the XXI Century*, a cura di Alexander SCHUSTER, FORUM EDITRICE, Udine, 2011.

[2] La ricostruzione delle politiche di diritto diseguale, a partire dall'analisi dei presupposti di legittimità dei trattamenti differenziali, sono contenuti in S. Scarponi, E. Stenico, *Le azioni positive: le disposizioni comunitarie, le luci e le ombre della legislazione italiana,* in *Il nuovo diritto antidiscriminatorio, il quadro nazionale e comunitario,* a cura di M. Barbera, Milano, 2007.

[3] I dati relativi al 31 marzo 2014 per Italia, Francia, Spagna, Inghilterra forniti dall'International Centre for Prison Studies, mostrano un rapporto detenuti/popolazione del Paese che vede primeggiare l'Inghilterra con un valore pari a 148 detenuti per 100k ab (i detenuti sono 84.697).

[4] L'Italia presenta un valore pari a 100k ab, oggi in diminuzione, i detenuti al 31 marzo erano 60.197. A pochi mesi di distanza, al 30 settembre 2014, i detenuti sono scesi al numero di 54.195 [fonte e dati ufficiali situazione italiana su http://www.giustizia.it/giustizia/it/mg_1_14_1.wp;jsessionid=D1ADE249A5DD39BF17E36566E6944650.-ajpAL03?previsiousPage=mg_1_14&contentId=SST1064602presenti].

proprio orientamento sessuale, in modo particolare per le persone trans. Inoltre, pur se con scarsa visibilità, esiste una omosessualità ricercata o coatta, sia a seguito di minacce o violenze.

Una presenza riscontrabile di tali dati potrebbe condurre il presente studio verso analisi più aderenti alla reale situazione nelle quali oggi i familiari componenti i nuclei stabili LGBTI si trovano. Se da un lato ciò evidenzia un serio problema culturale, dall'altro il consenso rassegnato alla situazione intensifica i rapporti a rischio con una contestuale riduzione delle difese anche sul piano della salute, la quale deve essere tutelata come diritto inviolabile.

Se rispetto a questa problematica, e soprattutto in tema di prevenzione, numerosi sono stati gli interventi, molto meno incisivi sino ad oggi sono risultati gli interventi in tema di tutela dei diritti inviolabili e costituzionalmente garantiti rispetto alle tematiche dell'affettività in generale, compresa la filiazione biologica o non.

Il quadro normativo italiano, oltre alle garanzie costituzionali[5], presenta una norma fondamentale di disciplina: la legge n. 354 del 1975 - Ordinamento Penitenziario.

In particolare gli artt. 18[6] e 28 disciplinano i colloqui dei detenuti con i congiunti e le altre persone e i rapporti con la famiglia. Su tale tematica è intervenuto il Dipartimento dell'Amministrazione Penitenziaria con la circolare 3478/1998, attraverso la quale invita le Direzioni degli Istituti di pena ad usare criteri di favore nei confronti delle relazioni affettive caratterizzate da rapporti costruttivi e strutturati, ed attenersi, nell'atto autorizzatorio del colloquio, al concetto giuridico di conviventi, intendendovi la sola natura di stretta convivenza o meglio come coloro che coabitano nello stesso alloggio.

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[5] Si rimanda alle considerazioni sulla dottrina legata allo studio dei principi contenuti negli articoli 2, 29, 30 e 31 della Costituzione.

[6] L'Art. 18, O.P. è rubricato "Colloqui, corrispondenza e informazione", e recita: " I detenuti e gli internati sono ammessi ad avere colloqui e corrispondenza con i congiunti e con altre persone, anche al fine di compiere atti giuridici.

I colloqui si svolgono in appositi locali sotto il controllo a vista e non auditivo del personale di custodia.

Particolare favore viene accordato ai colloqui con i familiari.

L'amministrazione penitenziaria pone a disposizione dei detenuti e degli internati, che ne sono sprovvisti, gli oggetti di cancelleria necessari per la corrispondenza.

Può essere autorizzata nei rapporti con i familiari e, in casi particolari, con terzi, corrispondenza telefonica con le modalità e le cautele previste dal regolamento.

I detenuti e gli internati sono autorizzati a tenere presso di sé i quotidiani, i periodici e i libri in libera vendita all'esterno e ad avvalersi di altri mezzi di informazione.

La corrispondenza dei singoli condannati o internati può essere sottoposta, con provvedimento motivato del magistrato di sorveglianza, a visto di controllo del direttore o di un rappresentante all'amministrazione penitenziaria designato dallo stesso direttore.

Salvo quanto disposto dall'articolo 18-bis, per gli imputati i permessi di colloquio fino alla pronuncia della sentenza di primo grado, la sottoposizione al visto di controllo sulla corrispondenza e le autorizzazioni alla corrispondenza telefonica sono di competenza dell'autorità giudiziaria, ai sensi di quanto stabilito nel secondo comma dell'articolo 11. Dopo la pronuncia della sentenza di primo grado i permessi di colloquio sono di competenza del direttore dell'istituto.

Le dette autorità giudiziarie, nel disporre la sottoposizione della corrispondenza a visto di controllo, se non ritengono di provvedervi direttamente, possono delegare il controllo al direttore o a un appartenente alla amministrazione penitenziaria designato dallo stesso direttore. Le medesime autorità possono anche disporre limitazioni nella corrispondenza e nella ricezione della stampa."

In tale circolare viene altresì fatto invito espresso a non attribuire rilevanza all'identità del sesso o alla tipologia del rapporto affettivo. Ciò rappresenta di sicuro una posizione che prescinde dal rapporto giuridico che lega i familiari e attribuisce un forte valore all'affettività che lega i componenti di un nucleo stabile, non solo LGBTI, o comunque legato da un semplice rapporto di convivenza. Per accedere al diritto del colloquio, non è necessaria la residenza nella stessa abitazione o un legame di composizione dello stesso nucleo familiare, ma è necessaria la dimostrazione della coabitazione.

La disciplina di accesso ai colloqui risulta così, anche se non dichiaratamente, scritta in ossequio dell'art. 13 del Trattato Istitutivo della Comunità europea, e successive modificazioni, il quale attribuisce al Consiglio dei Ministri europei, su proposta della Commissione e previa consultazione del Parlamento europeo, la facoltà di prendere provvedimenti opportuni per combattere tutte le discriminazioni, tra le quali quelle fondate sul sesso e sulle tendenze sessuali.

Il contenuto della Circolare soprarichiamata risulta aderente al contenuto della Carta di Nizza del 2000, che introduce il divieto di discriminazione sulla base delle tendenze sessuali, successivamente ripreso dall'art. 21 della Carta europea dei diritti fondamentali del 2003, e che prevede il diritto per le coppie dello stesso sesso al riconoscimento ed all'equiparazione a quelle tradizionali. Tale previsione sembra indirizzata a voler istituire una regolamentazione unitaria nei rapporti di filiazione.

La necessità di tutelare la piena uguaglianza per i componenti dei nuclei stabili LGBTI rispetto ai componenti delle famiglie tradizionali è stata più volte ribadita dal Parlamento europeo attraverso l'adozione di numerose Risoluzioni[7], volte a riconoscere ed istituire contratti di unione civile sopprimendo le discriminazioni di cui sono vittime gli omosessuali in materia di diritto tributario, diritti civili, diritto del lavoro, diritto previdenziale, regimi patrimoniali. L'invito al trattamento paritario è contenuto anche nelle Raccomandazioni del Parlamento europeo, tra queste si segnalano quella del 16 marzo 2000 che chiede ai Paesi europei di garantire alle coppie dello stesso sesso parità di diritti rispetto alle coppie e alle famiglie tradizionali e quella del gennaio 2006 che ha chiesto di assicurare che le persone LGBTI siano protette da violenze e dichiarazioni di odio omofobico.

Per quanto concerne la disciplina contenuta nell'art. 28, questa va combinata al disposto dell'art. 61 del regolamento di esecuzione dell'O.P., il D.P.R. n. 230 del 2000, che contiene il precetto relativo alla cura dei rapporti con la famiglia e progressione nel trattamento [rieducativo]: particolare attenzione è rivolta al mantenimento del rapporto con i figli specie in età minore. A tale fine il gruppo di osservazione[8] indica al Direttore dell'Istituto la possibilità di prevedere colloqui aggiuntivi con il permesso di trascorrere parte della giornata in appositi locali o spazi all'aperto dedicati.

A questo punto risulta utile richiamare le specificità di ogni singolo Stato dell'Ue, in termini di politiche sociali ed in tema di affettività in corso di esecuzione della pena, che determinano le

[7] Si ricordano le Risoluzioni: dell'8 febbraio 1994 "Sulla parità di diritti per gli omosessuali nella Comunità"; del 17 settembre 1996 "Sul rispetto dei diritti dell'uomo nella Comunità europea".

[8] Il Gruppo di osservazione è composto da--

caratteristiche del regime carcerario e che si ripercuotono nel mercato del lavoro e nella cura dei figli:

- Paesi favorevoli a mantenere e sviluppare le relazioni familiari, anche per i nuclei stabili LGBTI;
- Paesi di dichiarato stampo omofobico e proibizionisti ove i rapporti tra le persone dello stesso sesso sono reati penali puniti con la detenzione.

Le norme sovranazionali, in particolare la Convenzione per la salvaguardia dei diritti dell'uomo e la Raccomandazione del Parlamento europeo n. 2003/2188 del 2004, includono tra i diritti da riconoscere ai detenuti quello di avere una vita affettiva e sessuale prevedendo misure e luoghi appositi[9]. L'esperienza di Spagna, Norvegia, Danimarca e Svezia sono il migliore esempio di come tale politica vada perseguita ed attuata.

La posizione italiana, all'art. 18 O.P. co.2, prevede il controllo visivo dei colloqui e di fatto impedisce la piena esplicazione del diritto all'affettività. Tale condizione assume la qualifica di conseguenza accessoria alla pena. Purtroppo la Corte EDU, esclude l'esistenza di un obbligo positivo per gli Stati di riconoscere un diritto alla sessualità per i detenuti.[10]

La posizione che si rileva rimane comunque favorevole agli interventi nazionali che riconoscono l'equiparazione del convivente stabile al coniuge.

Infatti, gli artt. 8 e 14 CEDU prescrivono il divieto di discriminazione tra coppie sposate, coppie di fatto e altre convivenze, tra figli naturali e legittimi.

Su tale aspetto si richiama l'art. 28 della Costituzione italiana il quale contiene il precetto: *"Particolare cura è dedicata a mantenere, migliorare o ristabilire relazione dei detenuti e degli internati con le famiglie."*

Da rilevare, sul tema della tutela dell'espressione fisica dell'affettività, è il silenzio legislativo: non vi è una norma posta a tutela dell'espressione fisica dell'affettività. Ciò conduce ad una reale astinenza sessuale coatta, produttiva dei c.d. "matrimoni bianchi"[11], per tutti i detenuti che non possono accedere ai permessi *ex* art. 30 ter. O.P., che riconducono l'affettività a condizioni di «normalità», posto il permesso di sposarsi ma non di "consumare" il matrimonio.

In Italia non vi è una diversità normativa in base all'orientamento sessuale, ma in realtà non vi è una tutela specifica, mentre nei Paesi del Nord Europa l'incontro con il partner dello stesso sesso è previsto e possibile.

Per questo si può affermare che il silenzio delle norme impedisce al dato di emergere.

[9] Tra i Paesi dell'Ue che hanno curato maggiormente tale aspetto si segnala l'esperienza di Spagna, Norvegia, Danimarca e Svezia.

[10] Si rinvia agli artt. 8 e 12 CEDU che disciplinano il Diritto al rispetto della vita privata e familiare e il Diritto al matrimonio.

[11] L'art. 44 O.P. prevede la possibilità di contrarre matrimonio.

2 La tutela della genitorialità in caso di detenzione di un componente il nucleo stabile LGBTI.

2.1 Il necessario bilanciamento di valori tra esigenze punitive e la tutela dei diritti inviolabili dell'affettività

Un aspetto non marginale è insito all'esercizio del potere decisionale dello Stato dettato dall'esigenza di prevenzione. Infatti, tutte le limitazioni di contatto tra detenuto e familiare sono poste per evitare il passaggio degli oggetti dai familiari ai detenuti.

A tal fine i colloqui sono svolti e soggetti ad audio e video pur constatando che le persone vengono perquisite prima del colloquio. Tale potere decisionale, oggi, risulta calmierato visto che risulta preminente la vicinanza fisica del colloquio senza divisorio in quanto facilita il consolidarsi del legame affettivo. Quest'ultimo aspetto è ritenuto necessario soprattutto in presenza di un minore ed a garanzia del suo equilibrato sviluppo. Su questo aspetto si è espressa la Giurisprudenza di merito del Magistrato di Sorveglianza accogliendo il reclamo estensivo della durata del colloquio senza divisorio.

Inoltre il contatto fisico dei colloqui risponde alla necessità di valorizzazione gli elementi della personalità del detenuto ed il complesso quadro giuridico idoneo al mantenimento del legame con la dimensione familiare.

Solo tramite la possibilità di attuare incontri prolungati e senza controlli visivi del personale di vigilanza si realizza l'attuazione di un rapporto familiare.

Un breve cenno va fatto alla legge Gozzini del 1986 ed i permessi premio: l'art. 30 – ter, O.P. consente ai detenuti di coltivare interessi affettivi, culturali e di lavoro. Rimane comunque la compressione della genitorialità, maternità e paternità, anche se la Corte Costituzionale nella sua Giurisprudenza ha precisato che "non esiste un divieto assoluto di tutela di tale esigenza affettiva ed umana" in quanto i detenuti debbono trovarsi nelle condizioni di poter fruire dei permessi.

Altro aspetto legato alla genitorialità degno di essere oggetto di ampia discussione è legato alla applicabilità della disciplina prevista in materia di procreazione medicalmente assistita.

È consentita la procreazione assistita nei casi di sterilità o infertilità a garanzia del diritto alla paternità o alla maternità.

In particolare, la Corte di Cassazione con decisione n.11259/2009 ha previsto che "il detenuto in regime di 41 bis possa essere autorizzato al prelievo del liquido seminale al fine di consentire la procreazione medicalmente assistita." Tale aspetto risulta di difficile collocazione in caso di nucleo stabile LGBTI e di omogenitorialità.

3 Conclusioni

In questa prima indagine, pur non avendo la pretesa di essere esaustiva[12], risulta comunque interessante soffermarsi su alcune questioni che già delineano la necessità di una soluzione normativa che deve garantire l'affettività introducendo soluzioni che rendano meno difficile la fragile libertà della tendenza sessuale in un ambiente caratterizzato da un alto tasso di pregiudizio che si ripercuote inevitabilmente sul luogo di lavoro e nella cura dei propri figli.

Il trattamento penitenziario deve essere conforme a umanità e deve assicurare il rispetto della dignità della persona, per questo il problema va affrontato individuando una soluzione possibile per la comunità LGBTI.

È utile anche interrogarsi sulla possibile costruzione di Carceri ad hoc – come proposto dalla Turchia nell'aprile 2014 o limitarsi a individuare sezioni dedicate in alcuni Istituti o continuare a fare finta di nulla.

Posto che pochissimi detenuti hanno dichiarato il proprio orientamento sessuale, se non palesemente visibile, come il caso della transessualità, il tema presenta difficile soluzione. A proposito del tema legato alla transessualità nei carceri in Italia, risulta che, in alcuni istituti, sono state dedicate sezioni ad hoc che di fatto hanno tramutato la detenzione del soggetto transessuale in un semi-isolamento. In tali casi, prendendo spunto da quanto attuato in Paesi del Nord Europa, è necessario un supporto psicologico adeguato e nello stesso tempo garantire l'accesso a cure e farmaci necessari. Il tutto andrebbe bilanciato da una integrazione con i detenuti eterosessuali in una ottica di maggiore coinvolgimento in tutte le attività tratta mentali che possono essere svolte in comune.

Infine, bisogna comunque concentrare l'attenzione sul preminente interesse del fanciullo in ottemperanza al dettato normativo della Convenzione dell'Organizzazione delle Nazioni Unite sui diritti dell'infanzia, passando così dal tentativo di eliminazione della discriminazione di genere all'individuazione del soggetto di diritto che è appunto il bambino.

[12] Numerose sono le problematiche da esaminare su tali aspetti, per questo si rimanda ad un più approfondito e successivo studio che sarà dedicato alle tematiche legate alla genitorialità e detenzione di un componente del Nucleo Stabile LGBTI, visto che ogni possibile situazione necessita di uno studio maggiormente approfondito.

Personal Strategies For Overcoming Legal Obstacles. ‘Families Of Choice In Poland’ (2013-2015)

Joanna Mizielińska, Agata Stasińska

Abstract

There is still a lack of social recognition and legal regulations concerning non-heterosexual relationships in Poland, despite of a growing acceptance of same-sex partnerships and parenting in most of EU member states. Also studies on non-heterosexual relationships have a long tradition in the West but there is a scarcity of research conducted outside the Western framework. The urgent need to situate non-heterosexual families in specific cultural and social policy context of Central and Eastern Europe is reflected in the pioneering multi-method project called "Families of choice in Poland" (2013-2015; PI: dr hab. Joanna Mizielinska) which generates extensive data that sheds light on the actual life, needs and self-descriptions of ‘families of choice’ in Poland.

1. In our paper we will draw on diverse findings from the research. The following data sources will be investigated more closely:
2. Quantitate study concerning the family life of 3385 LGBT individuals living in non-heterosexual families Poland.

The most significant legal and media cases about LGBT families in the last decade (2003-2014), e.g. Polish cases in the European Court of Human Rights in Strasbourg (i.e. Piotr Kozak’s case) and state court.

Through discourse analysis, we will outline public/political strategies of silencing and excluding/including certain types of intimacies. Then, drawing on selected case studies and results of quantitative part of our research, we will show how members of families of choice struggle for a recognition of their relationships in daily life.

We will argue that the image of “families of choice” in the mainstream discourse slowly changes due to the emancipatory strategies of the LGBT communities in Poland. The dominant, conservative and mainstream media discourse still (re)presents and (re)produces the traditional vision of the family at the heart of a society. But LGBT families are not solely victims of the marginalization and lack of recognition. They fight back and develop their own strategies to cope with their discrimination. We propose to read them as wilful, subversive and emancipatory legitimization of ‘queer kinship’ in the public sphere.

Keywords

families of choice, LGBT/non-heterosexual communities, strategies of emancipation, sociology of gender and sexuality, sociology of family, sociology of everyday life, discourse analysis.

* * * * *

1 Introduction: Framework of 'Families of Choice in Poland research project

There are over two million LGBT people (lesbians, gays, transgender persons, and bisexuals) in Poland. It is estimated that around half of them live in intimate relationships. Many of them raise children. Their families are called "families of choice". Why such a term? It reflects the reality whereby these families are often created and sustained without any kind of social and legal support and/or recognition. Additionally, such families are not always of blood kinship, and thus it is their choice to form, live, and self-label themselves as a family.

Little is known about these families in Poland due to the lack of in-depth research on this subject. Our project is the first complex attempt to understand the phenomenon of LGBT families in Poland. It is a broad study which aims at showing the diversity of intimate and familial configurations lived by non-heterosexual people in Poland. It aims at understanding the multiplicity of challenges facing such families in their daily lives, and strategies of coping with such duress. In our project we investigate the manifold complexity of everyday life of non-heterosexual families in Poland in their social, economic, political, cultural, personal, and other dimensions.

The research consists of a number of stages and techniques which have been selected in such a way as to most fully present the multidimensionality of intimate and family life of non-heterosexual people. They include both quantitative and qualitative methods.

- Analysis of academic and public discourse concerning "families of choice". A special attention has been paid to the reconstruction of the voices of the most important actors influencing the shaping of these discourses (state institutions, Roman Catholic church, academy, NGOs) and the kinds of the arguments applied;
- Detailed analysis of selected case studies: including key public debates concerning the situation of non-heterosexual persons in Poland, such as the debate concerning proposed same-sex partnership bills. Furthermore, legal proceedings (e.g. in the European Court of Human Rights in Strasbourg and the Supreme Court of Justice in Poland) have been analysed;
- Quantitative research which was the basis of the present report, carried out throughout Poland with the use of questionnaire consisting of questions concerning needs and expectations of people living in "families of choice";
- 53 individual in-depth interviews with people living in families of choice, intended to provide in-depth data concerning motives connected with the most crucial decisions made in a relationship, as well as the issue of social support, love and intimacy, strategies of handling social invisibility, and attitudes towards basic institutional circumstances;
- Ethnographic research: researchers accompanied selected families in their daily lives for 30 days from September to November 2014. The researchers spent time in the families' homes, watch their behaviour, and talk about life, its joys and sorrows;

- 20 focus group interviews: the interviews in groups of 6 to 10 people will allow us to collect data concerning attitudes and opinions in the situation of social interactions, the interviews also aim at recognizing similarities and differences between the experiences and narrations of various members of "families of choice" and present an advanced view of their individual and common experience1.

One of the main goals of our research is presentation of the complexity and diversity of the functioning of families and other intimate configurations made by non-heterosexual people in Poland as well as understanding the challenges that they wrestle with in their daily life.

Consequently, in our project we enquire into issues connected with everyday life, problems, needs, and expectations of members of non-heterosexual families in contemporary Poland. It is particularly important to present the family life of non-heterosexual people from their own perspective. Instead of assuming a priori how non-heterosexual people live and that they do not form families – which is a dominant tendency in majority of Polish opinion polls and in numerous studies of the Polish sociology of the family[2], we ask members of such families how they define their families, how they create them and how they make them meaningful through their everyday activities, what they need, and how they would like to be recognized by society and law. We assume thus that the people who have the best understanding of the specific conditions of such families are the people who live in them. It is of crucial importance in the situation when such relationships are publically considered as dysfunctional, worthless, and unnatural without any attempt at an actual research. Such opinions only get in the way of recognizing the phenomenon, pushing it further away into social margins.

In the quantitative research which included 3038 people living in non-heterosexual families, the results of which are presented in our report, we tried to approach families living throughout Poland, of various age and level of education, living in big cities and small towns, in order to reflect most completely on the variety of such families as well as on particular aspects of their everyday lives. The respondents were able to comment upon various aspects of their own family life. We were interested for example in:

- How do the non-heterosexual people create their relationships? What models of relationships are prevalent among them? In which way does gender influence the actual model?

[1] It is worth mentioning that 4 parts have already been completed. Analysis of the interview is under way and from September to November 2014 the ethnographic part of the project shall take (took?) place.

[2] Franciszek Adamski, *Rodzina. Wymiar społeczno-kulturowy*, (Wydawnictwo Uniwersytetu Jagiellońskiego 2002); Zbigniew Tyszka *Rodzina we współczesnym świecie* in Anna Kwak. *Rodzina w dobie przemian. Małżeństwo i kohabitacja*, (Wydawnictwo Akademickie Żak 2005); CBOS, *Potrzeby prokreacyjne oraz preferowany i realizowany model rodziny. Komunikat z badań* (Fundacja Centrum Badania Opinii Społecznej Raport BS/52/2006)*;* CBOS *Nie ma to jak rodzina. Komunikat z badań* (Fundacja Centrum Badania Opinii Społecznej, Raport BS/40/2008), CBOS, *Rodzina - jej współczesne znaczenie i rozumienie. Komunikat z badań* (Fundacja Centrum Badania Opinii Społecznej, Raport BS/33/2013)

- How do the non-heterosexual people conceptualize and justify their relationship in their social surrounding? What is the discourse concerning the issue of families of choice in Poland?
- What are the needs and expectations of the people living in the families of choice towards the issue of their recognition and legal status in Poland?
- How do the non-heterosexuals cope with their parenthood within a society that is against queer parenthood? How does the parenthood change the dynamics of relationships between partners? Does it influence the way biological families treat them and their partners?

The aim of this paper is to present some of the findings of the first two stages of our project. In the first part of our paper we concentrate on the presentation of the findings of quantitative analysis, more specifically, on its part concerning the needs and expectations of the people living in the "families of choice" towards the issue of their legal recognition and social status in Poland (e.g. childcare, education, health care, and social services). In the second part of the paper we present case studies of legal proceedings, the applied methodology was analysis of public discourse. We selected for analysis two most interesting cases of people who had demanded legal proceedings in order to obtain legal recognition of the status of their relationships.

2 Quantitative research

In the first part of our text we would like to present some of the findings of our quantitative study concerning the family life of 3038 LGBT individuals living in non-heterosexual families in Poland. This stage was carried out throughout Poland, among people of diversified social groups (incl. age, education, place of living, gender, economic statues, etc.). The respondents had the opportunity to share their opinions on different aspects of life in families of choice. The presented results concern the matters of needs and expectations of people living in 'families of choice' towards the issue of their legal recognition and social status in Poland (e.g. childcare, education, health care, social services).

As there is no possibility of obtaining legal recognition of partnership in Poland, it is hardly surprising that majority of the relationships under scrutiny have not been formalized in any way (82,6%). Minority of respondents, however, declared some form of formalizing their relationship anyway, 17,4% of couples opted for some form of symbolic celebration of their partnership, in most case these were female couples.

Although there are no legal regulations on the matter the respondents have undertaken various attempts to solve their problems with the use of the existing legal instruments or less formal agreements. A little more than 1% of our respondents enter legally binding agreements with their partners e.g. by signing agreements concerning the issue of inheritance or undertake joint financial liabilities such as joint mortgage loans. However, one in four respondents (25%) indicated their partners in their life insurances, one in six authorized their partners to have access to medical documents or prepared last will in which they designated their partners as beneficiaries.

Vast majority (75%) of respondents would like to register their partnership if there is such a legal possibility in Poland. For most of them everyday issues are of the highest importance such as the possibility of receiving registered letters addressed to their partners, joint taxation, including the partner in social security benefits, possibility of securing the partner's future after one's own death). The reasons connected with the willingness to give the partner a proof of lasting love and emotional involvement (79%), as well as demonstrating the importance of the relationship to family and friends (76%) were also considered as important by the respondents, especially women. However, the difference between the relative importance of practical and symbolic motivations seems telling and indicates that the lack of the institution of registered partnerships in Poland makes everyday life much more difficult for many people in families of choice.

The respondents quoted a number of problems stemming from the fact that they lived in a non-formalized relationships. Especially numerous issues were connected with health care – as many as 38% of respondents reported problems with accessing information about the health of their partners, visiting them in hospitals, making decisions concerning their partners' health, or simply obtaining test results. Many of the described situations were very dramatic and difficult. Regulations concerning common property were also considered as important (24%). Respondents mentioned problems connected with joint purchase of apartments, their transfer by deed of gift, or bequeathing them to a partner without the necessity of paying high inheritance tax. A number of respondents mentioned the lack of possibility of joint taxation. Many respondents indicate problems with receiving mail and arranging financial matters (e.g. the impossibility of taking a mortgage loan together, opening a joint bank account). Many official matters also prove troublesome e.g. because of the necessity of providing notarial power of attorney (which is both costly and often insufficient), as well as lack of possibility of providing health and/or life insurance for the partner.

The respondents encounter problems at work and in contacts with various services. The fact that their relationship is not formally recognised by their employers results in problems with getting time off for holidays or limits their ability of going abroad for professional training, or moving to another branch of the company which does not happen in case of recognised relationships. This situation influences also those self-employed e.g. there are different regulations for married couples and people who formally speaking strangers. There are formal problems in contacts with various companies such as electricity, gas, or telecommunication companies (e.g. agreements, bills, etc.).

One in five respondents commented upon issues connected with the functioning of their relationships in the society. They mention problems with describing their status and that of their partners (e.g. should they say 'wife/husband' when there is no possibility of marriage in Poland, or rather opt for 'partner' which is often misunderstood?), aversion of the environment after revealing the fact that they are in a non-heterosexual relationship, or being perceived as single when one does not reveal their actual relationship status. Almost half of the parents raising children mentioned also problems in contacts with health care or schools.

Many respondents stress how much effort and thought they put into solving problems resulting from all these problems. They face difficulties in contacts with almost every public

institution they have to deal with. Many of the difficulties could be avoided within the existing legal regulations; however, many of them can be solved only by the introduction of registered partnerships or some other form of registration. A little more empathy on the part of representatives of state institutions could also make the everyday life of families of choice much easier. The remarks of the respondents concerning their difficulties can serve as guidelines in the sphere of lack of knowledge of the needs of non-heterosexuals in same-sex relationships exhibited by the most often mentioned institutions. The institutions seem to them extremely prejudiced and completely unprepared for their specific needs.

As far as their needs connected with registration of partnership are concerned practical considerations seem by far more important that the symbolic ones. The respondents would prefer to register their partnerships in the register office (87%). And yet the symbolic considerations are quite important. 70% of respondents would opt for marriage in the register office while 44% would be satisfied with an agreement signed in the notary public office. 13% of respondents chose religious marriage as the most preferable option.

Also for the non-heterosexual parents raising children in Poland legal issues may be quite challenging. Social parent raising a child is formally a stranger and cannot make any decisions concerning the child. Many respondents not only face serious problems connected with the fact and, consequently, attempt to employ various strategies connected with the issue of contacts of the child with its social parent in case of the death of the biological parent or separation of the parents. One in five respondents spoke to us about their experiences. Over a half of the parents try to resort to some form of agreement between the partners (notarial deed or last will) although they are aware of the fact that such documents are not legally binding. Others either try to arrange the matters with other family members, counting on their understanding, or they do not think that formal documents are necessary as they trust their families on the matter.

3 Case studies of legal proceedings[3]

3.1 Characteristic of cases

3.1.1 Piotr Kozak's case

The case of Piotr Kozak was a legal case lodged with the European Court of Human Rights. The court deliberated whether Poland discriminated against the plaintiff Piotr Kozak on the grounds of his homosexual orientation. Piotr Kozak lived with his partner in a council flat in Szczecin, after the partner's death in 1998 he was refused tenancy even though partners in common law marriages do have such right. The key issue in the argument consisted in the interpretation of par. 691 of the Civil

[3] Quantitative analysis computer programme MAXQDA 11 was employed in the analytic work on the collected data. It was employed in coding the data and the search for relations between categories. The material consisted of press articles, blogs such as salon24.pl, lewica.pl, and natemat.pl, legal documents, and in one case also private correspondence, narrative interview as well as personal blog of the heroine of one of the cases (Joanna).

Code and the concept of "de facto marital cohabitation"[4] which, according to Polish courts of justice, is possible only between a man and a woman. On March 2, 2010 the European Court of Human Rights after the fight for the tenancy lasting over ten years decided that Poland had violated Article 14 (against discrimination) in conjunction with Article 8 (right to respect for private and family life).

Cases on local level similar to that of Kozak have also been analysed. In the cases of Adam K. and Jacek K./Damian[5] who also battled in courts of justice to obtain succession to tenancy from their deceased partners District Court in Warsaw disregarded the verdict of the European Court of Human Rights and stated that a person in an informal relationship with a partner of the same sex did not fulfil the conditions of the Article 691c. It was only the Regional Court after the appeal of Adam K. that sought the decision of the Supreme Court whether the de facto marital cohabitation may be applied to persons of the same sex. As a result on the 28th of November, 2012, the Supreme Court granted the right to succeed to tenancy from the deceased partner to person of the same sex and issued a resolution concerning the interpretation of art. 691 of the Civil Code in which the court stated that: "A person in de facto cohabitation with the tenant – (...) is a person sharing the emotional, physical and economic bonds, also a person of the same sex"[6]. The resolution was not included in the rules of law registers, consequently, it is not binding, and it serves only as a lodestar in other legal proceedings.

3.1.2 Joanna's Case[7]

The case of Joanna includes a number of legal proceedings in Polish courts of justice concerning the recognition and equal treatment of same-sex relationships. Even though the cases are not commented upon in the media and the successes so far are from overwhelming, the case is extremely interesting due to Joanna's consistent everyday fight against the discriminating legal system.

Joanna has been in a same-sex relationship for 9 years. In 2006, she changed her name by poll deed to that of her partner. The couple has formalised their relationship thrice, although none of the forms is recognised by the Polish legal system. In August 2009, they got married under the patronage of the Polish Association of Rationalists. It was the first same-sex marriage in Poland. On the same day the two women celebrated their religious wedding officiated by presbyter of the Reformed Catholic Church. A year later the couple registered their partnership in Scotland. Joanna either led or leads with her partner Marta the following legal cases concerning:

- The right to joint taxation (Personal Income Tax)
- Zero tax on deeds of gifts (and inheritance)
- Social security benefit for the period of doctor's leave taken in order to look after a sick family member
- Registration of marriage contracted abroad in register office

[4] The Civil Code, Kodeks Cywilny. (Wydawnictwo C.H. Beck 2012, translation Ewa Kucharska)
[5] The plaintiff was referred to in the press in this way, either by first name and initial or a changed name.
[6] Uchwała Sądu Najwyższego w sprawie wspólnego pożycia, 28.11.2012
[7] The name was changed to that which had been used in the press after consultation with the person in question.

- Social security and healthcare for one of the partners paid from the other partner's health insurance contribution.

The first three cases have been dealt with on all the levels of the Polish judicial system. The verdicts were appealed against in the end of August 2012 to the European Court of Human Rights in Strasbourg.

3.2 Strategies

In the situation of lack of recognition of one's own family, as there is no possibility or registering the relationship, or facing social aversion towards same-sex relationships the heroes of the presented cases employ various strategies and ways of presenting their families. They differ depending on what social actors they encounter and to what degree they want the specific circumstances of their families and their needs to be properly recognized. We shall look both at their discursive strategies and practical actions they undertake.

3.2.1 The threat of homophobia and life under cover vs. full disclosure

The families of choice in their own discourse are very often presented as functioning under the constant threat of homophobia. The issue of the threat of homophobia and the applied strategy of concealing a relationship as the only available strategy in the given time and place appears in the case of Piotr Kozak[8]. Originally, he claimed that he had only sublet a room in the apartment of a friend, denying any intimate relations.

> I felt embarrassed back then in 1998, it was not something one could just talk about in our country. People in Poland are still against different relationships. [...] I didn't say that we had lived together. If I did, no one would have helped me. Oh, they'd say, two fags, two aunties. They would have kicked me out even sooner[9]

For Joanna, however, the basic rule is to speak/write openly about her relationship, regardless of possible consequences. The strategy of full disclosure, however, costs dearly e.g. it gets in the way of Joanna's dream of raising a child when she applies for adoption not as a single but as a person in a same-sex relationship.

3.2.2 Comparing to the heteronorm: the same or different?

Families of choice are very often compared and they compare themselves to heteronormative families. References to the heteronormative model are present in almost every text concerning non-heterosexual people and their life. In the discussed cases those involved and sympathetic journalists

[8] The relationships of Adam K. and Jacek K. also functioned in concealment as most non-heterosexual relationships in Poland as it can be seen from the report of the Campaign Against Homophobia (Makuchowska, Pawlęga 2012).

[9] Monika Adamowska, *Gej dziedziczy po geju*, interview with Piotr Kozak. (Gazeta Wyborcza: Duży Format nr 59. 11.03.2010)

often stress the fact that same-sex couples are the same as heterosexual couples (topos of similarity), they perform similar function, providing each other love and support.

Discrimination consists in the fact that homosexuals, when they form similar relationships to those of heterosexual couples - common household, material and emotional support, mutual assistance and responsibility, do not stand any chance of legalising their relationship as heterosexual couples. Consequently, they can't resort to the protection of the state on equal terms.[10]

Piotr Kozak referred in his appeal to the similarity to common-law marriage and cohabitation which is independent of sexual orientation, demanding the same kind of treatment as heterosexual common-law marriages. This similarity is recognized even by these institutions which guard the heteronormative vision of family such as the High Administrative Court which can be seen in the following (negative, by the way) verdict in Joanna's case: "the court has no doubt that the plaintiff lives with K. F. in an actual partnership which may be compared to actual marriage"[11] It seems that those involved in the discussed cases often live in a state of certain "autopresentation schizophrenia" which is also present in the discourse of the press and the Internet portals of the non-heterosexual communities[12]. The "schizophrenia" consists in difficulty in making the decision whether it is better to indicate one's own difference from the heteronormative family or rather concentrate on the similarities and ordinariness[13]? In the discussed cases both solutions have been employed.

The concept of ordinariness has been developed by Brian Heaphy, Carol Smart, and Anna Einarsdottir[14]in their commentaries on their research on same-sex marriages in Great Britain. They subvert in their book the paradigm inspired by the studies of Anthony Giddens who assumes that same-sex relationships are "unique" and "totally different" from heterosexual relationships and fully based on pure relationship. They oppose also the radical queer voices of the activists and academics who protest against the idea of same-sex marriage as inherently assimilative and heteronormative. The authors claim that perceiving and projecting oneself as "ordinary", an attitude often encountered among the respondents, may be quite radical in practice.

3.2.3 The strategy of employing the authority of the West

Inasmuch as the right wing believes that by "listening" to Europe we lose our national sovereignty, the left-liberal discourse much closer to those involved in the discussed case and the sympathizing community are apparently fascinated by the tolerance and fight against discrimination

[10] Ewa Siedlecka, Polska nie widzi homorodzin (http://m.wyborcza.pl/wyborcza/1,105226,12431624, Polska_nie_widzi_homorodzin.html, date of access 26.09.2013)

[11] Verdict NSA II FSK 2082/10 in the case concerning joined taxation

[12] The issue has been discussed in detail by Agata Stasińska in her discourse analysis „Portale i czasopisma oraz inne publikacje związane ze społecznością LGBT w Polsce" ("Portals and Press and Other Publications Connected with the LGBT Community in Poland") (see: Stasińska 2013), in press.

[13] It is worth noting that this "schizophrenia" is present also in scientific studies in non-heterosexual families. The scientists either concentrate on the similarity and conformity of same-sex families as compared to heterosexual families (e.g. Patterson 1994, Dunne 1999, Stacey and Biblarz 2001, Kurdek 2001, Strah 2003, Sullivan 2004) or stress their transgressive and subversive character (Warner 1991, Bell & Binnie 2000, Butler 2002).

[14] Brian Heaphy, Carol Smart and Anna Einarsdottir, *Same Sex Marriages: New Generations. New Relationships* (Palgrave Macmillan 2013)

in these Western European countries where the institution of registered same-sex partnerships has been introduced (topos of external authority, especially the authority of Europe). In their opinion the verdict of the Strasbourg tribunal in the case of Piotr Kozak was yet another lesson taught by the tolerant Europe to the homophobic Poland.

> Marcin Szczygielski: It is a signal that something is wrong. We are a part of the Europe, in most European country homosexual relationships are legalized, and we signal from abroad that we should introduce some changes in the matter as well.[15]

The authority of Europe is also used in attempts at forecasting how the regulations concerning same-sex couples will be dealt with in Poland in the future. The progressive (in this respect) Europe seems to show us the way while we are a little backward in the matter.

The Western European experience shows that the right wing must undergo certain gradual emancipation – from open hostility towards the homosexuals, through lenient acceptance to taking over and supporting the postulates of the LGBT movement.[16]

3.2.4 Strategy of marrying/formalizing the relationship

Even though in Poland there is absolutely no legal possibility of entering into a registered partnership/marriage same-sex couples opt for various forms of symbolic ceremonies intended to emphasize the importance of their relationships. In the case of Joanna an institution which helped make her plans come true was Polskie Stowarzyszenie Racjonalistów (the Polish Association of Rationalists) which has been organizing humanist weddings (also of same-sex couples) since 2007. Joanna and Marta were the first same-sex couple to get married this way. In 2009 the first humanist wedding of a gay couple in Poland took place in Szczecin. The religious wedding of Joanna and Marta was celebrated in the Reformed Catholic Church. Their third marriage (registered partnership) took place in Scotland.

It seems that getting married abroad, even though such marriages have no legal standing in Poland, becomes more and more popular among same-sex couples. Articles in the bimonthly *Replika* confirm their growing popularity. Tomasz Basiuk, academic lecturer from the American Studies Center in Warsaw, gave an interview in a recent issue of the magazine about his wedding in New York to his partner of 20 years[17]. In the same issue a female couple bearing the same family name spoke among other things about their informal wedding. Introductory findings of our quantitative research carried out within the project "Families of Choice in Poland" indicate that 17,4% of our respondents formally or symbolically confirmed their relationship with their partners.[18] As we have already mentioned vast majority of such attempts at formalizing relationships does not entail any legal consequences, they are not recognized by the Polish state and they offer no

[15] *Pytanie na śniadanie* (TVP 2. wydanie z dnia 20.10.2012)
[16] Robert Biedroń, *Prawo gejów do szczęścia*. (Rzeczpospolita. 10.06.2011)
[17] Bartosz Żurawiecki, 2013. *Jako mąż i niemąż* (Replika 46/2013: 26-27)
[18] Joanna Mizielińska, Marta Abramowicz, Agata Stasińska *Families of Choice in Poland. Family life of noheterosexual persons* (Institute of Psychology, Polish Academy of Sciences 2014)

improvements in everyday life. The question is thus why do people opt for such a seemingly "empty gesture"?

Joanna, who has formalized her relationship a number of times, speaks/writes often about her motives which allowed us to look at the results of the quantitative research from a different perspective and cast a new light on the existing practices in the matter. In her opinion, it is only marriage (even if not recognized by law) that creates a family as it allows to represent one's own relationship in such categories.

> It is important for us to convey to others that we want to be perceived as a family and not as two separate people as it was before. The humanist wedding, preceded by the church ceremony, gave us such an opportunity. We want to be treated as any other married couple. We want to stress it with all our might with this marriage[19]

Consequently, marriage stresses the bond between partners as without it other people perceive them still as two separate, single people. It may be, thus, a way to communicate it to the world and others that a couple forms a family, an element of seeking recognition in the eyes of the others. It is quite a well thought out strategy in a country where couples which did get married are considered as "somewhat more of" families (CBOS 2006, 2013). The answers to the questions in the CBOS polls of 2006 and 2013 "What kind of relationship between people you would consider a family and which kind you would not?" clearly demonstrate the social mental hierarchy of relationships in which formalization of a relationship and raising a child are the highest ranking and consequently guarantee legal recognition (CBOS 2006, 2013). Consequently, presenting one's own relationship as formalized is a means to obtain recognition of the relationship in the eyes of the closer and more distant others. Furthermore, the strategy often proves successful. As Joanna indicates, many people are not aware of the fact that in Poland a same-sex marriage contracted abroad has no legal standing and they react very positively to the information that she got married. Consequently, a same-sex marriage contracted abroad may have not merely symbolic value as a statement of the couple's "internal" involvement but strengthen their relationship in the eyes of the society.

An awareness of the growing popularity of "foreign" marriages among non-heterosexual people slowly reaches LGBT organisations and influences their strategies. Kampania Przeciw Homofobii (Campaign Against Homophobia, KPH) – the largest LGBT organisation in Poland – undertook the initiative of legal action connected to the issue of registration in Poland information concerning marriages contracted abroad (the case of Joanna). KPH intends to gather same-sex couples who got married abroad and help them to submit motion to the registry office to recognize the marriages and, if the motion is rejected, support them financially and with legal advice in the proceedings up to the European Court of Human Rights in Strasbourg. KPH also intends to provide assistance in the preparation of petitions in other cases wherever legal action is possible (e.g. in the cases filed by Joanna). KPH employs the mechanism of strategic litigation based on undertaking a specific kind of legal action in public interest with the aim of making the matter publically known and influencing the development of a socially important issue. The ultimate aim is a change in the

[19] Joanna, *Ślub humanistyczny* (racjonalista.pl. 3.08.2008. date of access: 20.10.2013)

law (through the verdict of the Strasbourg court) and "inspiring" Polish courts of justice how to decide in similar cases as well as bringing back to the public opinion the lack of legal regulations concerning same-sex relationships in Poland. On the other hand, should Poland introduce the institution of registered partnerships same-sex marriages contracted abroad will be automatically recognized here.

3.2.5 Strategy of presenting one's own relations as family relations and using marital terminology

As ties connecting same-sex couples are repeatedly questioned they must be continually "confirmed". A strategy employed by those involved in the analysed cases is defining themselves and their loved ones according to the place in their relations - (relationalisation). Joanna for example always calls her partner her wife both on her blog and in everyday life. It is as if with this term she attempted to bring to life in public awareness something that transcends this awareness as it is in the following quotation where she speaks about the meaning of her marriage.

> These are both symbolic and formal issues because they overlap. For example in contacts with healthcare we refer to each other as "wives". There is always SHOCK so we add "we got married abroad" and there are questions, at least twice, "how can it be?" but I'd say we have crossed a boundary from an informal to a formal relationship and we present ourselves as such. People haven't got the slightest idea that our marriage doesn't have any legal consequences in Poland from the formal point of view.[20]

On the one hand this strategy places Joanna within family but foremostly she stresses the "familiarity" of her relationship. Consequently, the use of marital terminology is an element through which she presents it, lends it credence, "displays" it.[21]

As the cases discussed above show the strategies of presenting oneself to the world as a family do not necessarily elicit the intended reactions. The message "this is my family", regardless of all efforts and repetitions, is often misunderstood or rejected when the recipients/external audience/public from which one seeks legitimisation stubbornly refuses to acknowledge the fact. Lack of social recognition results in lack of acceptance, discrimination, and homophobia. The latter may be expressed openly but most often takes form of weird smiles, or seeking other pretexts for different/worse treatment.

3.2.6 Strategy of demonstrating family ties / seeking support from the family of origin

The most important matter is not so much the fact that their family is recognized publically. For many non-heterosexual people it is much more important that their families should be recognized by their loved ones, their families of origin[22]. In most cases the practices of display

[20] Interview with Joanna done by Agata Stasińskaw 25.01.2013.

[21] Janet Finch, *Displaying Families* (*Sociology* 41 (1): 2007, 65–81); Esther Dermott and Julie Seymour, (eds) *Displaying Families: A New Concept for the Sociology of Family Life*, (Palgrave Macmillan 2011).

[22] Op. cit.

concentrate on the people in the immediate surroundings, with whom the couples are in direct contact[23]. The performative "this is my family" cannot work when people to whom it is directly addressed refuse to accept it as a fact. This is why the question of revealing one's relationship to the family of origin and finding their acceptance is such an important issue in the analysed cases. The fact of coming out to the relatives, regardless of the unpleasant repercussions, is often presented in the LGBT discourse as a way to achieve inner peace and happiness.

In case Joanna her family does not support her relationship. After her sister's initial homophobic reaction to the news that Joanna was in a relationship with another woman, the relations have gone back to normal, according to Joanna. However, the sister, who lives in the same city, has never visited the couple. When Joanna speaks about her family of origin in the interview one can trace her disappointment and sadness, for example when she comments on the absence of her relatives at her wedding.

> Well, it was very sad for us that Marta's [partner's] mother and brother arrived while there was no one from my family. At that time my sister simply couldn't accept it that her sister was with another woman while my mother stated that "no, no, she was not going to THIS kind of wedding"[24]

It is often so that the family of origin lives far away knowing absolutely nothing about the same-sex couple. They appear in critical moments such as the death of one of the partners and preparations for the funeral. Polish law does not recognize same-sex partners as family; consequently, decisions concerning the funeral must be made by a member of family, even the most distant and least known. It happens often that members of family of origin refuse to accept the character of the relations of their relative with a person of the same sex. The reaction of the sister of the deceased partner of Jacek K./Damian is quite typical in this respect:

> When Tadeusz was still in coma his sister arrived in Warsaw. First she thanked Damian for being such a wonderful friend and looking after Tadeusz. Like family. When she was left alone she searched the flat and understood. [...] You have never guessed it? –Damian asked. – There was never a woman in his life. He heard that THIS KIND of brother offended her and it must have been God that punished Tadeusz. Things got even worse when it turned out that the family will not inherit the flat while the money from the insurance went to Damian. The sister took from the flat everything she could [...] He asked her to leave at least the photographs but she answered that she had to burn them all to avoid the shame, [...] She did not let Damian dress Tadeusz's body in the cloths he had prepared, took the body from the hospital, and told everyone that did not want to see absolutely anyone from Warsaw at the funeral.[25]

[23] Kathryn Almack, Display Work: Lesbian Parent Couples and their Families of Origin Negotiating New Kin Relationships w: Dermott. Esther i Julie Seymour. Displaying Families: A New Concept for the Sociology of Family Life (Palgrave Macmillan 2011); Esther Dermott and Julie Seymour (op. cit.).

[24] Interview with Joanna (op.cit.)

[25] Joanna Podgórska, *Faktyczne wspólne pozycie*, (Polityka. 25.11.2011)

3.2.7 The use and subversion of the law

3.2.7.1 The use of courts of justice to assert one's rights

The use of the judicial system to assert one's rights may be treated as a separate strategy if we consider the above mentioned action of the KPH using strategic litigation as well as the analysed cases. However, inasmuch as Joanna "uses" the discriminatory law in a purposeful and well thought out manner in order to expose discrimination, in all other cases (Kozak, Adam K., Jacek K.) the fight in courts of justice is perceived as the ultimate and unpleasant necessity.

Joanna uses all existing legal loopholes not only to prove that same-sex couples are discriminated against in Poland but also to reveal spheres of uneven treatment and privileges which are granted exclusively on the basis of heterosexual orientation.

> The most important issue for us – as the first in Poland – is breaking through "the impossible" (due to lack of systemic legal solutions for same-sex couples in our country). The most important issue is a change of the law and the resulting change in the attitude towards our rights in Poland. [...] Our actions are systematic, planned, and carried out in a planned manner as our "legal interest" changes, when we can "approach" subsequent issues through legal proceedings[26]

By tracing legal loopholes and inconsequences of the Polish law, the internal contradictions of the constitution, Joanna demonstrates that without the institution of registered partnership the contradictions and problems of families of choice cannot be solved.

In case of Piotr Kozak, Adam K. or Damian K. suing Poland was the last resort. Piotr Kozak stated repeatedly that he hoped that his case would end on the local level. It was not the case, however. Even though all of them decided to claim the right to inherit tenancy from their deceased partners, they were motivated by absolute necessity and fear that they may lose the flats in which they had lived for many years. Their actions were not purposefully organised or even initiated as it is in the case of Joanna.

3.2.7.2 The change of one's name by deed poll

One of possible strategies of "displaying" one's own family is the decision to share the family name. Joanna decided to change her name by deed poll to that of her partner and she was not unique in this respect. She obtained specific instructions from a female couple from Warsaw which had done the same earlier. Joanna describes the whole procedure on her blog, providing valuable advice to all those who would like to follow her example. She also describes in gruesome detail problems resulting from the aversion of the officials at the register office and their incompetent handling of her case. Initially, they were friendly, accepting the fact that one might want to change the name without getting married. One might assume that if Joanna were in a heterosexual relationship her motion would have been dealt with immediately. However, when it turned out that she was in relationship with another woman things started to get complicated. Ultimately, Joanna's

[26] Private correspondence between Joanna and Joanna Mizielińska (2013-2014)

motion was rejected, she appealed to the governor of the province who overruled the decision. However, in the final decision the governor (purposefully?) ignored that fact that the two women were in a same-sex relationship and presented the change of name as "administrative" while he referred to Joanna's "partner" as "acquaintance".

The strategy of changing one's name by poll deed and displaying in this way the fact the two people are family gains popularity. A similar case has recently been presented in *Gazeta Wrocławska* in an article entitled "Wrocławski sposób na ślub" (The Wroclaw way to get married) about a gay couple who decided to share common family name after seven years together. In the article the change is presented as an alternative to the non-existing institution of registered partnership while the described case is called "probably the first in Poland" [27] . As we have shown above it was not the first and probably will not be the last. One of the recent issues of *Replika* included an interview with a female couple raising a daughter together entitled "Marcinkowskie" ("The Two Ms Marcinkowska").[28]

Sharing the family name seems thus a more and more popular strategy of showing the world the existence of family. It enables *quasi* "proper" perception of one's relationship by others. In a country where same-sex relationships are seldom considered families it enables recognition without the necessity of disclosure. It allows overcoming the dominating perception of a same-sex relationship as two mutual strangers of the same sex who merely cohabit as well satisfying the curiosity of others. Sharing a family name redirects this "morbid curiosity" to a socially recognised sphere and results in the recognition of the familiarity of a relation if not within the category of "being in a relationship" then certainly "being a family" (a couple may be perceived as siblings or, in case of a major age difference, as a parent and a child).

4 Conclusion

The experience of the heroes of the described cases is largely the experience of being "second rate" citizens. In these experiences we can see reflected problems that families of choice in Poland face almost daily. We can also see the "grey area" of lack of recognition and attempts to make it more visible. The attempts are very important as they show that LGBT people do not merely wait for the law to change but they try to alter it[29]. Their example allows us to describe various strategies of coping with difficulties in the everyday life of same-sex couples as we have tried to do honestly in the present paper.

[27] Agata Wojciechowska, *Wrocławski sposób na gejowski ślub*, (Gazeta Wrocławska 13.07.2013, http://www.gazetawroclawska.pl/drukuj/944033.wroclawski-sposob- date of access: 04.02.2014).

[28] Marta, Konarzewska, Marcinkowskie, (Replika 46/2013: 14-15).

[29] The petition concerning the lack of registered partnership law in Poland to the European Parliament prepared by Joanna is an example of such an activity. The couple complains foremostly about the fact that Poland refuses to register the partnership contracted abroad which contravenes the EU directive of the free movement of people and right to respect of private and family life. They argue that as a result of such decisions "a person who registered partnership or married a person of the same sex may get married to a person of the opposite sex in Poland and, consequently, commit bigamy. Not by Polish law but in fact. And by the law o 16 out 28 EU member states which recognize registered partnerships (Siedlecka 2013).

Such individual strategies are most often ignored in the discourse concerning registered partnerships in Poland. It is so also in the foreign press where far too often we encounter passivation/objectification of LGBT persons. As a result activities on the most basic level are erased once again. Our cases analysis shows that when one treats them seriously and analyses the carefully, they prove extremely important. Furthermore, they are adapted to local conditions, sensitive to institutional limitations, and, consequently, they may play an important role in the change of social attitudes.

The analysed cases show the impossibility of separating everyday life and activism. Mutual help provided by LGBT people who share their experience and knowledge with others, and create a supportive network often consisting of people who do not know each other and yet are willing to sacrifice their time and energy for others is extremely important. Private dimension is often combined with community dimension and individual determination and resolve brings about results of more general importance. They may be more or less spectacular but they share the potential of changing social mentality as well as the Polish law. It was as a result of Piotr Kozak's individual fight that Polish law concerning the inheritance of tenancy was changed. The change was made possible by the determination of a single man which proves the crucial role of grass-roots strategies, so often erroneously passed over in the mainstream discourse as well as in the few discourse analyses focused on the non-heterosexual community in Poland.

In ricchezza e povertà, in salute e malattia.
Famiglie omogenitoriali e diritti in Italia in una prospettiva psicosociale

Federica de Cordova, Chiara Sità

Abstract

Dal punto di vista della psicologia culturale un corpus giuridico non è solo un insieme di ordinamenti per la convivenza sociale, ma un substrato simbolico che contribuisce a fondare i confini dell'essere[1]. Più in generale, nell'ambito delle scienze umane e sociali, la relazione tra ordinamento normativo e identità in specifiche configurazioni culturali è stata da tempo approfondita[2].

All'interno del quadro normativo italiano le famiglie omogenitoriali sono categoria inesistente. Questo vuoto provoca un'assenza di diritti/doveri, che costringe le persone nella forma dell'imprevisto all'interno di passaggi cruciali per la definizione dei ruoli e delle appartenenze familiari (per esempio la nascita e la registrazione anagrafica, l'iscrizione del figlio/a al nido o a scuola). L'emergere di tali configurazioni familiari si basa così su un'autodefinizione, sulla decisione soggettiva di rendersi visibili al mondo sfidando gli spazi messi a disposizione dalla norma e dalla cultura. Assumendo una prospettiva psicosociale questo articolo affronta il vuoto giuridico che si riscontra in questi passaggi nei termini delle ricadute che provoca a livello di processi psicologici ed educativi.

Basandosi su una ricerca ancora in corso sulla transizione all'omogenitorialità il lavoro mette in luce il processo di "rendersi visibili" di tali famiglie nel percorso che si snoda attraverso le contraddittorie categorie amministrative e normative.

Keywords

Omogenitorialità in Italia, ricerca qualitativa multimetodo; identità e diritti LGBT; costruzione della visibilità; pratiche familiari

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[1] Massimini F., Calegari P. (1979) Il contesto normativo sociale. Teoria e metodo di analisi, Milano, Franco Angeli.

[2] Blandy S., Sibley D., (2010), "Law, Boundaries and the Production of Space", *Social & Legal Studies*, 19, pp. 275-284; Bourdieu, P. (1987) "The Force of Law: Towards a Sociology of the Juridical Field", *The Hastings Law Journal*, 38, pp. 814–53; Engel D.M., Munger F.W., (2003), *Rights of Inclusion: Law and Identity in the lifestory of Americans with Disabilities* , Chicago, University of Chicago Press. Fitzpatrick P., (2005), "The damned word': culture and its (in)compatibility with law", *Law, Culture & the Humanities*, 1 (1), pp. 2-13. Moghaddam, F.M., Slocum N.R., Finkel N., Mor Tzili, Harrè R. (2006) "Toward a Cultural Theory of Duties", Culture & Psychology, 6, pp. 275 – 302.

1 Il ruolo della norma nel pensare l'impossibile: una cornice teorica

Uno dei primi testi italiani di taglio psicopedagogico sull'omogenitorialità[3] prende spunto per il suo titolo dal racconto di un evento reale, accaduto all'interno di una scuola dell'infanzia.

> Durante un'attività di gruppo, una bambina si era rivolta alla maestra: "maestra, ho due mamme", aveva detto suscitando le reazioni dei compagni che a più voci replicato: "no, non è vero, nessuno può avere due mamme, la mamma è una sola, vero, maestra?"[4] (Contini in Gigli, 2011:25)

L'aneddoto mette in primo piano, attraverso le parole dei bambini, la "impossibilità" dell'omogenitorialità. Fa da sfondo al ragionamento l'incapacità di rappresentarsi simbolicamente la genitorialità tra due persone dello stesso sesso: di mamma o papà ce n'è uno, e il secondo suona ridondante. L'affermazione della genitorialità di una coppia dello stesso genere espone ad un disorientamento e spesso l'interrogativo di chi è chiamato a porsi come "orientatore" di un pubblico – nella veste di giurista, psicologo, pedagogista ecc. - riguarda il tenere insieme una tensione, risolvendone la contraddizione.

Nello sviluppo del nostro ragionamento partiamo dall'inversione di tale approccio: le coppie di genitori omosessuali "sono" e questo è un dato di fatto, precedente a qualsiasi presa di posizione da parte dell' "altro", cioè a prescindere dall'accettazione sociale e dalla possibilità culturalmente ammessa per tale configurazione[5]. Rifacendoci alla scena sopra descritta questo è il momento in cui la bambina, ignara dell'impossibilità di sé in ambienti diversi dal proprio, afferma la realtà della propria esperienza, dichiarando che ha due mamme. Dunque, un'esperienza soggettiva inopinabile.

Manca, tuttavia, qualcosa che riguarda il mondo "al di fuori": una morfologia, collettivamente condivisa, entro cui collocare tale esperienza così che possa evadere la pura dimensione idiosincratica per farsi elemento costitutivo di un gruppo. L'assenza di questa dimensione ha delle implicazioni ulteriori che vanno al di là dello scarso riconoscimento sociale o al mancato accesso a dei diritti, ma hanno che fare con una distonia rispetto all'esperienza psichica di sé nel mondo.

Il punto che vogliamo qui affrontare è dunque la mancanza di uno spazio simbolico all'interno del quale la famiglia omogenitoriale possa trasformarsi da imprevisto logico a soggetto, uno spazio per costruire un pieno là dove viene letto il vuoto (l'assenza del padre/madre); una differenza, dove il mondo descrive un'uguaglianza (donna/donna o uomo/uomo). In questa dinamica la questione

[3] Gigli A., (a cura di) (2011), Maestra, ma Sara ha due mamme? Le famiglie omogenitoriali nella scuola e nei servizi educativi, Milano, Guerini.

[4] Contini M., (2011), "I bambini stanno bene?", in Gigli A. op. cit.

[5] Non esistono dati ufficiali sulle famiglie omosessuali anche perché, dal punto di vista amministrativo, si tratta di una categoria inesistente. I dati disponibili si basano su un'autodefinizione. Dalla ricerca "Modi-di" condotta nel 2005 da Arcigay con il patrocinio dell'Istituto Superiore di Sanità, da un campione di oltre 6.600 soggetti omo/bisessuali intervistati emerge che il 5% di loro ha almeno un figlio, ma la quota sale al 20% per le persone con 40 anni e oltre. La forma più diffusa di genitorialità deriva da relazioni eterosessuali, mentre è al momento una minoranza il numero di figli nati all'interno della coppia omosessuale. Il numero approssimativo stimato di bambine/i e ragazze/i figli di omosessuali è di circa 100.000. Vedi anche Bottino M., Danna D., (2005), La gaia famiglia. Omogenitorialità: il dibattito e la ricerca, Asterios, Trieste. http://www.salutegay.it/modidi/risultati_della_ricerca/.

dei diritti ricopre un ruolo chiave perché è, di fatto, responsabile non solo nel dare o meno accesso a comportamenti e pratiche sociali, ma perché è elemento fondante di un nucleo psichico identitario[6].

1.1 La norma tra mondo sociale e mondo psichico

Assumendo un punto di vista psicologico, infatti, possiamo dire che l'esperienza soggettiva, per diventare reale e oggettiva, deve essere riconosciuta e legittimata a livello collettivo. L'identità stessa è dialogica, data in relazione ad una precisa configurazione del contesto, in un continuo movimento di co-costruzione della realtà[7]. Attraverso questo processo di *riconoscimento* – tra un dentro e un fuori - di un'esperienza unica e singolare si attribuisce una collocazione nel dominio collettivo, conferendo in questo modo alle biografie individuali costanza e coerenza. Proprio grazie all'ancoraggio ad un preciso ordine significante i soggetti sviluppano quel senso di appartenenza che rende capaci di orientarsi nel mondo, mettendo in atto e sviluppando competenze e abilità specifiche. In questo senso, il mondo sociale e culturale rappresenta quell'insieme di condizioni extrapsichiche in grado di intervenire sullo sviluppo di una soggettività e del suo funzionamento in senso armonico o disarmonico. Così, le categorie che mettono in ordine il mondo si trasformano da categorie sociali a categorie psicologiche[8].

> Il gruppo che ci precede (…) è un gruppo che ci sostiene e ci mantiene in una matrice di investimenti e di cure, predispone dei segni di riconoscimento e di richiamo, assegna dei posti, presenta degli oggetti, offre mezzi di protezione e di attacco, traccia delle vie di realizzazione, segnala dei limiti, enuncia degli interdetti. (Kaës, 2005:20).

A questo punto ci sembra di poter dire che un corpus normativo si caratterizza per la sua capacità di organizzare tanto il piano di realtà concreta quanto quello simbolico, andando a costruire orizzonti valoriali e di (im)possibilità di fare e di pensarsi. La norma e i costrutti che la compongono possono essere rappresentati come artefatti[9], cioè contenitori di informazione culturale organizzata che orienta pratiche sociali, così come l'esperienza soggettiva individuale. Se dico, per esempio, "padre di famiglia" o "matrimonio" evoco precisi istituti normativi e la loro articolazione nella società, ma al contempo si configurano come elementi attivi capaci di indurre nelle persone stati affettivi, comportamenti e azioni, favorire o inibire processi sociali.

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[6] Calegari P., Massimini F., (1978), *L'artefatto normativo sociale*, Milano, Franco Angeli.

[7] Cole M., (1996), *Cultural Psychology*. Cambridge (MA), Harvard University Press; Gergen K. J., (1994), *Realities and Relationships. Soundings in Social Construction*. Cambridge (MA), Harvard University Press; Harré R., Gillett, G., (1994), *The discursive mind*, Los Angeles, Sage.

[8] Tajfel H., (1999), Gruppi umani e categorie sociali, Bologna, Il Mulino.

[9] Massimini F., Calegari P. op. cit.; Inghilleri, P., (1999), *From Subjective Experience* to *Cultural Change*. New York, Cambridge University Press.

René Kaës[10] chiama garanti metasociali quegli elementi propri di un gruppo capaci di garantire e legittimare le formazioni sociali, consentendo la condivisione di sistemi interpretativi del mondo coerenti. Intende con ciò miti, ideologie, valori, istituzioni, religioni ecc., ovvero quell'insieme di macroelementi che costruiscono lo sfondo simbolico[11] di una società; essi costituiscono il substrato extrapsichico a cui la soggettività si ancora per collocare e dare senso a se stessa come appartenente ad uno specifico contesto. In questo ambiente simbolico altamente caratterizzato si sviluppano delle "vie di accesso" specifiche ai processi di soggettivazione: esse sono composte per mezzo di interdizioni fondamentali, modelli per identificarsi e costruire patti, alleanze e contratti psichici. Vengono assicurati così, ad un piano che trascende il singolo individuo, i principi organizzatori dello psichismo singolare e le relazioni intersoggettive su cui esso si fonda[12]: l'Autore li definisce quindi garanti metapsichici.

Possiamo affermare che il processo di soggettivazione necessita di precisi - sebbene molteplici e arbitrari - precedenti "sociopsichici" e rappresentare l'esperienza psichica soggettiva come processo complesso che si compone attraverso piani differenti[13]:

- *comune*: si basa sul contratto di fedeltà col gruppo e prelude all'esistenza del soggetto;
- *singolare*: spazio intrapsichico, privato;
- *condivisa*: porzione del singolare che si allea con altri e nuovi ordini significanti, variabili.

Ecco dunque che il "mondo interno" del soggetto è dato dalla sua capacità di scorrere fluidamente tra il dentro e il fuori e quanto viene descritto come elemento "comune" interpreta proprio l'ancoraggio del mondo intrapsichico ad una dimensione extrapsichica. Se questo fluire incontra degli ostacoli, delle non corrispondenze e dei vuoti, si sperimentano condizioni di malessere che rendono più difficile lo sviluppo di processi di empowerment.

1.2 L'omogenitorialità tra pieni e vuoti

Torniamo dunque alle famiglie omogenitoriali come nucleo di esperienze che naviga tra pieni e vuoti, in cui spicca prepotentemente quello normativo. Un co-genitore che si reca quotidianamente a prendere il figlio all'asilo, delegato dal genitore biologico, ma che non può firmare per la partecipazione del bambino ad una gita, rappresenta un'esperienza comune che ben esemplifica questo stato dei fatti.

[10] Kaës R., (2014), Il malessere, Roma, Borla; Kaës R., Faimberg H., Enriquez M., Baranes J.J., (2005), *Trasmissione della vita psichica tra generazioni*. Roma, Borla.

[11] I garanti metapsichici costituiscono per loro natura un insieme non univoco, ma plurale; tuttavia essi manifestano una relazione d'ordine significante al loro interno che fa si che le possibilità di "essere" siano molteplici ma non infinite.

[12] Kaës R., (2008) "La trasmissione delle alleanze inconsce, organizzatori metapsichici e metasociali", in Centro Psicoanalitico Italiano, *Generi e generazioni. Ordine e disordine nelle identificazioni*, Milano, Franco Angeli.

[13] Kaës R. (2007) *Un singolare plurale*. Roma, Borla.

Questa alternanza di spazi possiamo allora immaginarla come una bidimensionalità in cui scorre l'esperienza dei protagonisti. Da una parte la scala "uno a uno" dello spazio più prossimo in cui è comune la fluidità nello stare insieme (nella scuola, nella rete amicale, nella famiglia allargata). Le relazioni vicine sembrano cioè riconoscere l'omogenitorialità con naturalezza a volte imprevista[14]: non è uno spazio libero da difficoltà, ma c'è continuità di sé nell'esperienza dando la possibilità di agire come soggetti pieni. Dall'altra, si contrappone la dimensione formale della scala "uno al mondo" in cui la soggettività dell'individuo è cancellata a favore della (non) categoria con cui il mondo colloca quell'esperienza. In questi momenti di "vuoto" si viene esautorati della propria vita per diventare pezzo di una procedura di cui si incarna un imprevisto. Le due dimensioni non sono separate, ma si intrecciano costantemente e l'incongruenza che esplicitano è l'unico vero potenziale rischio dell'omogenitorialità, ascrivibile al contesto e non alla specificità degli individui[15].

Questa bidimensionalità implica dunque degli "accidenti" nel percorso di manifestazione di sé e di rappresentazione della propria esperienza per i bambini e i loro genitori omosessuali, che sono chiamati costantemente a dimostrare il proprio (buon) funzionamento e a marcare i territori, per ribadire e spiegare la propria esistenza. Eppure, questo obbligo a occupare visibilmente uno spazio per prendersi il proprio posto nel mondo contiene anche margini di creatività e invenzione sociale.

Così, tra dicibile e indicibile, la quotidiana invenzione di sé nel mondo dell'omogenitorialità apre spazi di possibilità impensati negli ordinamenti già definiti. La ricerca presentata di seguito si focalizza sui processi attraverso cui le famiglie omogenitoriali si presentano e dicono di sé al mondo, identificando in essi i punti di osservazione per le pratiche di negoziazione e invenzione della propria esistenza.

2 La ricerca

La ricerca coinvolge coppie "same-sex" con figli e si propone di esplorare il lavoro di costruzione del ruolo genitoriale entro un orizzonte - quello italiano nello specifico - segnato dal vuoto normativo e simbolico. Nella prospettiva teorica in cui prende forma la nostra ricerca, la famiglia non è pensata semplicemente come istituzione pre-esistente all'agire individuale, ma come nucleo emergente dalle pratiche quotidiane[16]. Secondo questa visione, ogni famiglia è costruita e negoziata con il mondo circostante, fatta oggetto di pensiero e investimento sul piano emozionale e sul piano del significato da parte dei soggetti che la costituiscono. Il posizionamento di sé come

[14] Lalli C., (2009), *Buoni genitori. Storie di mamme e di papà gay*, Milano, Il Saggiatore.

[15] Bos H.M., van Balen F., van den Boom D.C., (2004), "Experience of Parenthood, Couple Relationship, Social Support and Child-Rearing Goals in Planned Lesbian Families", *Journal of Child Psychology and Psychiatry, 45*(4), pp. 755-764; Gershon T.D., Tschanne J.M., Jemerin J.M. (1999) "Stigmatization, Self-Esteem and Coping among the Adolescent Children of Lesbian Mothers", *Journal of Adolescent Health*, 24, pp. 437-445; Golombok S., Tasker F., Murray C. (1997), "Children Raised in Fatherless Families from Infancy: Family Relationships and Socioemotional of Children of Lesbian and Single Heterosexual Mothers", *Journal of Children Psychology and Psychiatry*, 38, pp. 783-792; Tasker F., Golombok S., (2007) *Growing Up in Lesbian Family: Effects on Child Development*, New York, Guilford Press.

[16] Smart C., (2004), "Retheorizing Families", *Sociology 38*(5), pp. 1043-1048; Gabb J., (2008), *Researching Intimacy in Families*, London, Palgrave MacMillan; Finch J., (2007), "Displaying families", in *Sociology,* 41*,* pp. 65-81.

genitori è agito nella vita quotidiana attraverso pratiche ("family practices")[17], che riguardano ogni tipologia familiare ma che ipotizziamo assumano una curvatura particolare nei nuclei omogenitoriali che si costituiscono entro uno spazio privo di forme consolidate, di riconoscimento e di definizioni condivise.

La ricerca prende in considerazione coppie dello stesso sesso che vivono in Italia e che hanno uno o più figli, concepiti all'interno della relazione con differenti modalità (per esempio, il ricorso a tecniche di procreazione medicalmente assistita all'estero o a donatore informale). Abbiamo utilizzato un approccio multi-metodo che integra un'indagine mediante questionario (effettuata in Italia e in California con la finalità di comparare contesti profondamente differenti sul piano del riconoscimento giuridico)[18] con tecniche qualitative per la conoscenza in profondità dell'esperienza vissuta con un numero limitato di soggetti: interviste, mappa emotiva dei luoghi della quotidianità, diario sull'esperienza genitoriale nell'arco di una settimana. Con questi strumenti sono state sinora esplorate le esperienze di 4 coppie di donne. Il paper si focalizza sui risultati dell'indagine qualitativa italiana. La scelta dei metodi fa riferimento all'approccio della ricerca sull'*intimacy* nello studio delle realtà familiari[19] e si propone di acquisire dati sull'essere famiglia nel quotidiano e sui microprocessi che caratterizzano la vita familiare, attraverso la combinazione di strumenti più tradizionali come l'intervista individuale e di coppia, preceduta da un colloquio preliminare di presentazione della ricerca e formalizzazione del consenso, tecniche basate sull'autonarrazione nel quotidiano (un diario sull'esperienza genitoriale nell'arco di una settimana) e metodi visuali (una mappa emotiva sugli spazi della quotidianità). La combinazione di questi strumenti richiede un forte ingaggio a ricercatore e partecipanti ma presenta il fondamentale vantaggio di consentire ai partecipanti di diversificare e personalizzare l'esplicitazione del proprio punto di vista e del proprio sapere senza essere diretti da categorie di significato decise apriori dal ricercatore.

L'analisi del materiale è stata effettuata utilizzando la procedura di codifica propria della Grounded Theory[20] e ha progressivamente consentito di mettere in luce le caratteristiche del lavoro di costruzione di sé come genitore, nell'intreccio con il mondo normativo e simbolico in cui i singoli, le famiglie e i loro interlocutori si muovono nel quotidiano.

I risultati emersi mettono in luce come categoria focale un processo che abbiamo definito "modulazione della visibilità". Tale processo appare incardinato su alcune categorie di pratiche fondamentali, che riguardano la nominazione dei legami, la creazione di spazi simbolici di riconoscimento, la produzione di aggiustamenti di corto respiro in collaborazione con i professionisti (soprattutto professionisti della salute e dell'educazione) con cui i genitori entrano in relazione rispetto al loro ruolo.

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[17] D.H. Morgan (1996), *Family connections. An Introduction to Family Studies*, Cambridge, Polity Press; ID. (2011), *Re-thinking family practices,* London, Palgrave MacMillan.

[18] Questa fase della ricerca internazionale è in corso al momento della stesura del paper, in partnership con S.D. Holloway e I. Dominguez Pareto della Faculty of Education, UC Berkeley, USA.

[19] Gabb J. *op. cit*.

[20] Charmaz K., (2002), "Qualitative interviewing and grounded theory analysis", in J. F. Gubrium & J. A. Holstein (Eds.), *Handbook of interview research: Context and method*, Thousand Oaks, CA, Sage, pp. 675-694.

2.1 Nominare (e non nominare) i legami

La costruzione del ruolo genitoriale e il suo posizionamento nello spazio sociale passa attraverso la nominazione del legami familiari, pratica che sembra essere molto presente, sia nel pensiero individuale, sia nella discussione all'interno della coppia. Il vuoto simbolico, che si rende visibile a livello giuridico, è anche, forse soprattutto, un vuoto di parola. Nell'esperienza delle coppie intervistate non sono disponibili dei modi per "dire" i legami familiari privi di una sponda di ancoraggio istituzionale, di automatismi di riconoscimento, o di forme di circolazione entro la cultura diffusa. Questo comporta un lavoro sulle parole che è già stato rilevato in precedenti ricerche sulle forme familiari atipiche[21]. L'analisi delle interviste e dei diari mette in evidenza che, nella narrazione di sé come genitore, numerosi episodi critici relativi alla nominazione del legame diventano momenti chiave nella storia familiare e sono utilizzati come veri e propri dispositivi per raccontare, da un punto di vista interno, la famiglia nella sua relazione con gli interlocutori nella quotidianità. Spesso questi accadimenti ruotano intorno al vedersi negare o al timore di sentire descritta come "impossibile" la propria condizione di genitore e attivano nella famiglia la necessità di fornire risposte, o di individuare strategie – di parola, come nel primo esempio, di silenzio (secondo esempio) o di attesa (terzo) - che consentano di non vedere disconfermata, soprattutto nei confronti dei figli, la propria identità di famiglia.

> Un amico di mio figlio [4 anni] gli ha detto: "ma tu non hai un papà". Io gli ho detto che deve rispondere che però ha due mamme.
>
> Abbiamo conosciuto questa famiglia ed è nata un'amicizia…non abbiamo detto niente ma è una cosa ovvia. Ad esempio, venerdì vengono a cena qui. Però non hanno mai chiesto…si, ogni tanto ci sono delle battute…sai, quando sei tra amici.
>
> La mia teoria, il mio modo di vivere è se tu domandi io ti rispondo. Quindi stai attento a quello che domandi, perché io ti rispondo la verità.

I legami familiari, il modo con cui sono nominati dai protagonisti e accolti dal mondo che li circonda (famiglia allargata, relazioni informali, istituzioni) sembrano costituire un fondamentale oggetto di pensiero per le coppie. I racconti delle protagoniste rimandano a un mondo di pratiche familiari e di costruzione di senso che continuamente disegnano, e trasformano, questi stessi legami, i quali diventano materia non solo privata ma pubblica e sociale: per essere pienamente genitore, o figlio, sembra essere necessario non soltanto attribuirsi questa posizione ma anche essere riconosciuti come tale da un mondo esterno, che con le sue norme, automatismi e discorsi è interlocutore attivo nella definizione (o nella mancata definizione) di ruoli e appartenenze.

[21] Iori V., Rampazi M., (a cura di) (1998), *Storie di famiglie. Bisogni e risorse nei racconti di vita familiare a Reggio Emilia*, Milano, Guerini; Carsten J., (2004), *After Kinship*, New York, Cambridge University Press; Nordqvist P., Smart C., (2013), *Relative Strangers. Family Life, Genes and Donor Conception*, London, Palgrave, 2013; Mason J., Tipper B., (2008), "Being Related. How Children define and create Kinship"*, Childhood, 15,* pp. 441 – 460.

2.2 Disegnare un proprio spazio di riconoscimento

L'assenza di luoghi di visibilità per i genitori e i figli si ripercuote sull'essere ripetutamente costretti a fornire spiegazioni sulla propria situazione familiare entro gli spazi sociali frequentati. Questa condizione è riportata come un aspetto particolarmente problematico nell'impatto con i professionisti e con le istituzioni in genere. Nella relazione con il mondo esterno, i genitori elaborano strategie, nel qui ed ora e nel lungo periodo, che consentano di preservare o di costruire un possibile spazio in cui sentire di poter essere genitore e di essere visto e riconosciuto come tale.

Il lavoro di invenzione che le coppie omogenitoriali fanno, oscillando tra adesione e distanza rispetto ai modelli di famiglia tradizionali, non si nutre della sola intenzionalità dei/delle partner ma richiede luoghi sociali e istituzionali dove potersi dire e manifestare come genitore con una certa libertà che consenta di affrontare, con altri, tematiche e interrogativi comuni a tutti i genitori: in questo senso possiamo parlare di una dimensione di attivazione obbligata. Questa attivazione è visibile nella ricerca dei professionisti "giusti" (come il ginecologo, o il pediatra) o delle scuole che si manifestano come accoglienti della loro diversità e verso cui si esercita il proprio potere di scelta (in assenza di diritti, l'unico potere di cui le coppie possono disporre); ma essa si traduce anche nel piegare le situazioni e gli spazi disponibili, per esempio riscrivendo o sovrascrivendo i moduli di anagrafica familiare in modo da massimizzarne l'inclusività.

> Gli ho detto, alla pediatra, "io glielo dico subito, Luca ha due mamme, siamo io e lei, se però crea un problema questa cosa tranquillamente cerco a chi non rappresenta un problema"
>
> (all'ospedale) Lei [la partner] aveva firmato insieme a me i documenti perché se succedeva qualcosa a me c'era il nome suo, neanche mia mamma o mia sorella ma lei.

2.3 Creare aggiustamenti nel qui ed ora

Le coppie coinvolte nella ricerca descrivono processi, più o meno faticosi, di ingaggio delle istituzioni di prossimità (mondo della salute, della scuola) nella negoziazione dei loro possibili spazi di riconoscimento. Questo ingaggio si traduce in forme di aggiustamento di breve respiro, che non intacca il sistema nel suo complesso e che coinvolge i soggetti come individui e non come garanti delle istituzioni in cui operano.

Nella tensione tra interno ed esterno, tra intenzionalità personale e confini normativi e sociali, le pratiche di esposizione di sé come famiglia sono strettamente connesse con il tentativo di occupare gli spazi socialmente disponibili minimizzando le differenze (in cui il messaggio è "siamo una famiglia come le altre") o di disegnare spazi nuovi, sfidando gli impliciti sull'idea di famiglia e sulle forme di genitorialità diffusamente accettate. In questa prospettiva, non è un caso che la modulistica (per esempio ospedaliera, o scolastica) sia terreno di aspre battaglie o di silenziose riscritture per fare spazio alle diversità familiari. I "moduli" costituiscono l'artefatto per eccellenza che rende manifesto il "dato per scontato" che esclude in partenza una possibilità di essere visti in quanto famiglia, e l'azione di modificare e adattare alla realtà dell'esperienza familiare le righe con

il prestampato “madre” e “padre” entra a pieno titolo nelle pratiche di costruzione di uno spazio in cui negoziare con le istituzioni e i loro rappresentanti uno spazio di esistenza. Nella citazione che segue, l’atteggiamento del corpo docente è di silenzio/assenso a fronte della compilazione dei campi riservati ai genitori, e questo silenzio è letto come un atto di accettazione e fiducia (“si sono fidati di quello che ho scritto”).

> (a scuola) ho compilato i moduli, messo il suo nome [della compagna], basta, loro si sono fidati di quello che ho scritto

Un ulteriore esempio di aggiustamento è costituito dall’utilizzo allargato delle prassi disponibili per garantire diritti che non ci sono. Nel racconto sotto riportato, il datore di lavoro accorda alla madre non biologica lo stesso congedo per la nascita del figlio che è per legge riservato al padre.

> Quando mi hanno detto che il cesareo era dopo domani io ho parlato al mio capo e ho avuto subito 4 giorni a casa…come se fossi comunque un papà. Perché comunque a un papà danno 3 giorni.

2.4 Tra visibilità e invisibilità

All’interno del percorso che si snoda attraverso le contraddittorie categorie amministrative e normative, individui e coppie negoziano quotidianamente livelli di visibilità e invisibilità, presenza o trasparenza, che ne mappano geografie identitarie in divenire.

La categoria della *disclosure*, intesa come il momento in cui ci si rende visibili al mondo esterno[22], assume un significato particolare per le coppie dello stesso sesso con figli, e non è semplicemente sovrapponibile alla scelta di dichiarare o di non dichiarare ad altri il proprio orientamento sessuale e la storia della filiazione. Lo status di genitore, in generale e a maggior ragione nella famiglie omogenitoriali, è una condizione di esposizione continua all’esterno, che stimola le interlocuzioni quotidiane, formali e informali, nella forma dell’attenzione, della curiosità, della richiesta di spiegazioni, dell’esplicitazione di una dissonanza rispetto al dato per scontato (*come posso spiegarlo agli altri bambini, a scuola?*), o della chiusura (*nessuno ha due mamme!*). Questa condizione si traduce, anche nelle situazioni di più favorevoli di accoglienza, in un continuo essere messi in gioco, dover fornire delle spiegazioni, doversi dotare di un’etichetta, o di un confine di esistenza, comprensibile al mondo esterno.

3 La modulazione della visibilità: un fatto sociale

Ogni famiglia si costituisce oltre le tradizionali funzioni di “naturale” riproduzione e di socializzazione, come sfera di intimità e di interazione che genera ulteriori significati

[22] Sullivan M., (2004), *The family of woman. Lesbian mothers, their children and the undoing of gender*, Berkeley, University of California Press.

nell'interscambio con un contesto storico e culturale. Ciò è particolarmente evidente nei nuclei omogenitoriali, che per la loro caratteristica di "imprevisto" rispetto a una *normalità* familiare data per scontata, sia nel discorso quotidiano, sia nel dettato normativo, sono protagonisti di un costante lavorio di costruzione, nominazione e affermazione all'esterno di legami familiari che sono pressoché assenti nell'immaginario sociale.

Queste situazioni non ci parlano di casi specifici, ma della quotidianità di molte famiglie contemporanee. Come altri nuclei atipici (per esempio, le famiglie ricostituite, quelle affidatarie) ci costringono a mettere a fuoco alcuni nodi che riguardano da vicino i processi del "fare" famiglia tout court e che interpellano il mondo della ricerca, la società, la giurisprudenza su che cosa significa, per esempio, essere figli, o genitori; su quale rilevanza attribuiamo, nella nostra esperienza quotidiana, ai legami biologici e alle forme di genitorialità non biologica; sui modi in cui le appartenenze familiari di ciascuno vengono esposte e raccontate al mondo esterno e, con questo mondo, negoziate.

Dai primi dati emergenti dalla ricerca possiamo identificare alcune transizioni di vita come la nascita in ospedale, l'iscrizione all'anagrafe, la prima relazione con il pediatra o con gli insegnanti, quali momenti istituenti condizioni di soggettività. Tutto ciò ha consistenti implicazioni nella pratica professionale degli operatori che lavorano nelle istituzioni. Infatti, nonostante l'elevata capacità di inclusione e la competenza dei singoli operatori istituzionali, quelli scolastici in primis, si manifesta una difficoltà, proprio *in quanto istituzione*, ad interagire con le famiglie. Un esempio eloquente riguarda la scuola, in cui il riconoscimento del genitore non biologico come genitore a pieno titolo non è generalmente praticato dalle direzioni scolastiche, proprio a causa della mancanza di un appoggio normativo che lo renda possibile. Oltre alle immaginabili implicazioni emotive, questa esclusione ha conseguenze di non poco conto sul piano identitario, sull'esperienza di sé come genitore, vincolato ad essere delegato dal partner per ogni azione riguardante il figlio a scuola, e impossibilitato a partecipare come genitore agli organi collegiali e al corpo elettorale dell'istituzione scolastica.

Dunque, di fronte ad un vuoto normativo e simbolico di una società "in astratto" che attende di decidere, se e come, riconoscere questi nuclei di esperienza umana appartenenti a sé, ci sono dei luoghi che, volenti o nolenti e al di là di qualsiasi posizionamento valoriale e ideologico, non possono prescindere dal dare forma - massima o minima - a una nuova società "in concreto"; si trasferisce così a livello del funzionamento sociale quella frattura dell'esperienza che sperimentano le famiglie omogenitoriali sul piano individuale. Questi luoghi di negoziazione sono delle "terre di nessuno" dal punto di vista della collettività, in cui gli individui agiscono fortemente svincolati dal contesto istituzionale di appartenenza e da precisi ordini sociali. Sono cioè quei punti in cui il tessuto dei garanti metasociali diventa estremamente labile e la dimensione personale, soggettiva, deve assumere su di sé l'onere di farsi istituente di un livello collettivo, obbligando la famiglia omogenitoriale (e chi la sostiene) a fare del suo privato un fatto politico e a rendersi garante di se stessa.

La modulazione di una visibilità omogenitoriale diventa in questa arena una costruzione molto delicata che procede per aggiustamenti contingenti che non informano necessariamente il sistema nel suo complesso. Il continuo dover affermare e spiegare se stessi, per gli adulti e ancora di più per

i minori, diventa un gioco di forza all'interno del quale guadagnarsi, volta per volta, alleanze e pesi specifici.

Da qui la necessità di dotarsi di etichette, di produrre semplificazioni di sé per farsi riconoscibili attraverso categorie già note. E' in questa istanza "ad essere", in tensione tra l'affermare una specificità e il riconoscersi in un già dato, che va inquadrata a nostro avviso la questione dei diritti. Il riconoscimento istituzionale e politico può alleggerire il piano personale dei singoli nuclei familiari dall'onere di farsi garanti di sé in quanto categoria sociale, evitando al tempo stesso il rischio di normalizzare e reificare l'istituzione familiare. In questo senso, i diritti rappresentano un imprescindibile punto di partenza e non di arrivo.

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